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# Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"

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# ARTICLES

## SEPARATE BUT EQUAL?: THE SUPREME COURT, THE LOWER FEDERAL COURTS, AND THE NATURE OF THE “JUDICIAL POWER”

ASHUTOSH BHAGWAT\*

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### INTRODUCTION

The past three or four decades have witnessed a fundamental change in attitudes within the federal judiciary regarding the proper function and role of the United States Supreme Court in the judicial hierarchy. Increasingly, instead of being first among equals, part of a joint enterprise, the Court sees itself, and is seen, as different in kind from other courts. Concomitantly, the judges of the lower, or “inferior,”<sup>1</sup> federal courts are viewed by the Court, and even view themselves, as subordinates who must defer to “judicial superiors.”<sup>2</sup> If Akhil Amar was correct to argue in favor of the “structural parity of all Article III judicial officers,”<sup>3</sup> it would seem that the members of the federal judiciary are not aware of this fact.

The purpose of this paper is to explore the causes of these developments,

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<sup>1</sup> See U.S. CONST., art. III, § 1.

<sup>2</sup> *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir.1996), *rev'd*, 522 U.S. 3 (1997).

<sup>3</sup> Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 (1985).

and through this process to develop insights regarding the nature and structure of the federal judiciary as it exists today. My ultimate thesis is that over the past half century the Supreme Court has evolved into an institution different in kind from all other federal courts, functioning as a rule maker and legislature for other courts rather than a resolver of disputes, to the point where the Court can barely be said to be exercising the “judicial power” as traditionally understood. Unfortunately, however, for reasons both institutional and structural, the Court is not particularly good at this role. Furthermore, the evolution of the Court into a quasi-legislature, while in some respects unavoidable, has had unfortunate consequences for the federal judiciary as a whole.

Part I of this paper examines one doctrinal area where the tension and changing relationships between the Supreme Court and lower courts has exhibited itself—the question of lower courts’ authority to “underrule” or refuse to follow outdated or undermined Supreme Court precedents. Part II considers the changing roles within the federal judicial system of the Supreme Court and inferior federal courts, and examines the institutional forces which have driven the evolution in the Supreme Court’s functions. Finally, Part III discusses some of the normative implications of the developments identified in this paper.

## I. THE ROYAL PREROGATIVE: OVERRULING OUTMODED SUPREME COURT PRECEDENTS

Barkat Khan, the owner/operator of a gas station in Du Page County, Illinois, brought a federal antitrust action against State Oil Company, his gasoline supplier, on the peculiar theory that State Oil had violated the antitrust laws by effectively preventing Khan from *raising* the prices he charged consumers for his gasoline.<sup>4</sup> Khan’s theory of liability seems to run contrary to economic common sense and to one of the basic purposes of the antitrust law—to protect consumers from higher prices;<sup>5</sup> and the district court judge before whom the case was brought granted summary judgment to State Oil on essentially those grounds. On appeal, the United States Court of Appeals for the Seventh Circuit reversed, relying on *Albrecht v. Herald Company*,<sup>6</sup> a 1968 decision of the United States Supreme Court holding that so-called “vertical maximum price fixing” constituted a *per se* violation of the antitrust laws.<sup>7</sup> The Appeals Court’s opinion by Chief Judge Richard A. Posner<sup>8</sup> extensively

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<sup>4</sup> See *State Oil. Co. v. Khan*, 522 U.S. 3, 8 (1997).

<sup>5</sup> See *id.* at 15 (“[W]e find it difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation.”).

<sup>6</sup> 390 U.S. 145 (1968).

<sup>7</sup> See *id.* at 153 (“[T]o force petitioner to maintain a specified price . . . constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.”).

<sup>8</sup> 93 F.3d at 1359. It should be remembered that Judge Posner was the leader of the

criticized the economic logic of Khan's claim, as well as the *per se* rule of *Albrecht*, noting that not only was *Albrecht*'s holding almost certainly wrong as a matter of economic theory, but it was also inconsistent with the language and reasoning of recent, more economically oriented Supreme Court antitrust opinions.<sup>9</sup> Nonetheless, the opinion noted that:

despite all its infirmities, its increasingly wobbly, moth-eaten foundations . . . , *Albrecht* has not been *expressly* overruled . . . . And the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself."<sup>10</sup>

Therefore, Judge Posner concluded that he was obliged to yield to his "judicial superiors"<sup>11</sup> and reverse the district court's grant of summary judgment.

State Oil sought review of Judge Posner's decision in the Supreme Court, and the Court granted certiorari.<sup>12</sup> Oral argument was heard in October of 1997, and less than one month after oral argument, in the first substantive opinion of that Term the Supreme Court unanimously overruled its *Albrecht* decision and reversed the Seventh Circuit.<sup>13</sup> Along the way the Court quoted extensively from Judge Posner's opinion criticizing the economic logic of *Albrecht*,<sup>14</sup> as well as from a broad range of scholarly criticism. Given all of this, including notably the fact that he was *reversed* by the Court, one might have thought that Judge Posner should have ruled for State Oil in the first instance. However, the Supreme Court informs us: "The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."<sup>15</sup> No reason was given beyond this bald statement for why "[t]he Court of Appeals was correct," and why burying dead precedent was the Court's own "prerogative;" but the validity of this approach was not questioned by any member of the Court. Thus, it was that Judge Posner was vindicated by being unanimously reversed by the Supreme Court.

The *Khan* litigation represents a relatively extreme version of an

Chicago School and a pioneer in the application of neoclassical economics to antitrust analysis. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

<sup>9</sup> 93 F.3d at 1361-63 (reciting possible explanations for and repercussions of maximum price fixing, and reviewing Supreme Court decisions subsequent to *Albrecht*).

<sup>10</sup> *Id.* at 1363.

<sup>11</sup> *Id.* at 1364.

<sup>12</sup> See *State Oil Co., v. Khan*, 519 U.S. 1107 (1997).

<sup>13</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 22 (establishing that virtual maximum price fixing is not a *per se* violation of the Sherman Act).

<sup>14</sup> See *id.* at 15-16 (quoting Judge Posner for the proposition that suppliers legitimately may desire maximum resale prices).

<sup>15</sup> *Id.* at 20.

increasingly common phenomenon: the Supreme Court's insistence that lower courts must apply and follow an extant, on-point precedent of the Court no matter how outdated that precedent, and no matter how much later decisions may have undermined the reasoning of that precedent. This rule, at least in its modern, implacable form, is of relatively recent vintage.<sup>16</sup> Though in various opinions the Court has hinted at such a principle for many years,<sup>17</sup> it was only in 1989 in *Rodriguez de Quijas v. Shearson/American Express, Inc.*<sup>18</sup> that the Court unequivocally stated: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."<sup>19</sup> *Rodriguez de Quijas* also involved application of a moribund and seemingly undermined Supreme Court precedent, but in that case, unlike *Khan*, the Court of Appeals chose to treat the precedent as not binding. For this impudence, the Supreme Court scolded the lower court (despite the majority's agreement with and affirmance of the Appeals Court on the merits of the case), with the dissent in the Court accusing the Court of Appeals of "engag[ing] in an indefensible brand of judicial activism."<sup>20</sup> As in *Khan*, however, the Court offered no justification for its adoption of this rule.

Since *Rodriguez de Quijas*, as Judge Posner notes, the Supreme Court has become "increasingly emphatic, even strident"<sup>21</sup> in its insistence that lower courts follow all extant Supreme Court precedent until and unless it has been expressly overruled. Another recent, prominent example of this trend is *Agostini v. Felton*, a case which because of its unusual procedural posture presented a particularly striking application of the Court's approach.<sup>22</sup> In this

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<sup>16</sup> For two early examples of cases where lower courts did "underrule" Supreme Court decisions without any negative comment by the Court on review, see *Barnette v. West Virginia Sch. Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942), *aff'd* 319 U.S. 624 (1943); *Committee for Industrial Organization v. Hague*, 25 F. Supp. 127, 150-51 (D.N.J. 1938), *aff'd* 101 F.2d 774 (3d Cir. 1939), *aff'd* 307 U.S. 496 (1939).

<sup>17</sup> See, e.g., *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents."); *Jaffree v. Board of Sch. Comm'rs of Mobile County*, 459 U.S. 1314, 1315-16 (1983) (Powell, J., in chambers) (granting a stay of judgment because the District Court did not follow controlling Supreme Court cases).

<sup>18</sup> 490 U.S. 477 (1989).

<sup>19</sup> *Id.* at 484. For a detailed history of the evolution of the *Rodriguez de Quijas* rule, see C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39, 43-52 (1990) (reviewing lower courts' decisions on anticipatory overruling and arguing the *Rodriguez de Quijas* rejection was surprising).

<sup>20</sup> *Rodriguez de Quijas*, 490 U.S. at 486 (Stevens, J., dissenting).

<sup>21</sup> *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996).

<sup>22</sup> 521 U.S. 203 (1997). *Agostini* represented a significant change in the Court's Establishment Clause jurisprudence, permitting greater state aid to religiously affiliated

paper, I do not mean to debate the merits and demerits of this approach in detail. Other scholars have discussed the evolution of the rule of *Rodriguez de Quijas*, and have ably (as well as almost unanimously) critiqued it.<sup>23</sup> Instead, I wish to look at this rule in a broader context, to seek out its institutional roots and purposes, and through this to try and cast light on the broader question of the role of the Supreme Court in the federal judiciary.

To understand the institutional bases for the *Rodriguez de Quijas* doctrine, however, one must first understand its contours and scope. There are three distinct ways in which a lower court might “underrule,” or refuse to follow a Supreme Court precedent. First, and most controversially, a lower court judge might choose to ignore a Supreme Court opinion that the Court itself has not questioned or undermined, simply because of the judge’s view that the precedent was mistaken—perhaps the best known example being Judge Brevard Hand of the Southern District of Alabama refusing to apply the Court’s school prayer decisions.<sup>24</sup> However, almost all commentators,<sup>25</sup> with

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schools. The case was also procedurally interesting, however, because the Court reached its result by permitting a litigant to bring a motion for relief from the judgment pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, and through that process overruling a previous decision of the Court, *Aguilar v. Felton*, 473 U.S. 402 (1985), in which the *same litigant* had been defeated, on the grounds that later decisions of the Court had undermined the reasoning of the earlier decision. As the Court acknowledged, however, under *Rodriguez de Quijas* the lower courts hearing the Rule 60(b)(5) motion were not permitted to ignore *Aguilar* and grant the motion, even though the Court itself ultimately concluded that not only should *Aguilar* be overruled, but that later cases had “so undermined *Aguilar* that it [was] no longer good law.” 521 U.S. at 217-18, 237. The Court never resolved the obvious tension between these positions, suggesting an infirmity in the Court’s approach towards its own precedent. For a thorough discussion of the Court’s decision in *Agostini*, including the application of the rule of *Rodriguez de Quijas* in that case, see Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 438-57 (1998).

<sup>23</sup> See, e.g., Baxter, *supra* note 22, at 443-57; Bradford, *supra* note 19, at 42 (criticizing the Supreme Court decision in *Rodriguez de Quijas*); Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 55-56 (1982) (evaluating the validity of anticipatory overruling); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J. L. & RELIGION 33, 82-87 (1989) (reviewing the arguments that a lower court may “underrule” the Supreme Court); David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87 (1984) (arguing in favor of lower court authority to disregard precedent in certain circumstances); cf. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 70-72 (1994) (finding a prohibition against anticipatory overruling justifiable).

<sup>24</sup> See *Jaffree v. Board of Sch. Comm’rs of Mobile County*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983), *aff’d in part and rev’d sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), cert. denied 446 U.S. 926 (1984), *aff’d* 472 U.S. 38 (1985). For a discussion of judicial attempts to circumvent the doctrine of hierarchical precedent, see Evan H.

the notable exception of Michael Stokes Paulsen,<sup>26</sup> reject such a power for the lower courts, and the few decisions are (not surprisingly) in accord.<sup>27</sup>

Second, a lower court might engage in purely predictive reasoning and refuse to follow a precedent that the court believes the Supreme Court would not follow today based on the court's assessment of the views of individual justices, even if the decision has not been undermined by what Michael Dorf describes as "impersonal sources of law"—*i.e.*, subsequent opinions.<sup>28</sup> Such an approach is defensible, and indeed has been ably advocated by Evan Caminker,<sup>29</sup> but Michael Dorf has presented a convincing, if not definitive argument for why such purely predictive reasoning undermines values associated with the rule of law.<sup>30</sup> It is therefore also not surprising or problematic that the Supreme Court should reject such purely predictive "underruling."<sup>31</sup>

The third form of "underruling" is much more limited and seemingly uncontroversial: the power of lower court judges to conclude that a Supreme Court precedent has been undermined by later decisions to the point that it has been *implicitly* overruled by the Court itself, and is therefore no longer binding. Such reasoning is *not* truly predictive because it analyzes and seeks to reconcile binding legal authority, rather than ignoring it—the question is simply which authority is more binding, the older, more "on point" precedent or the newer inconsistent decisions.<sup>32</sup> The propriety of this kind of action was

Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817, 819 & n.4 (1994).

<sup>25</sup> See generally Caminker, *supra* note 24 at 860-65.

<sup>26</sup> See Paulsen, *supra* note 23, at 82-85.

<sup>27</sup> See, e.g., *Jaffree v. Board of Sch. Comm'rs of Mobile County*, 459 U.S. 1314, 1316 (1983) (Powell, Circuit Justice).

<sup>28</sup> Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 654 (1995). For an example of such decision-making, see *Barnette v. West Virginia Sch. Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942), *aff'd* 319 U.S. 624 (1943) (refusing to follow a Supreme Court decision because the foundations of that decision had been weakened).

<sup>29</sup> See Caminker, *supra* note 23, at 74 ("In the end, I believe that prediction has a proper, albeit circumscribed, role to play in inferior court decision-making."); see also Bratz, *supra* note 23 at 89 (discussing the "limited circumstances" where a lower court can disregard Supreme Court precedent).

<sup>30</sup> Dorf, *supra* note 28 at 679-89 (arguing that predictive reasoning can undermine the rule of law because it makes law appear dependent on judge's personalities, rather than on objective, impersonal factors).

<sup>31</sup> It should be noted, though, that rejecting even predictive underruling imposes serious efficiency costs on litigants and the judicial system, as well as limiting the role of the lower courts in initiating and implementing legal change.

<sup>32</sup> See Caminker, *supra* note 23 at 20 n.73 (analyzing the behavior of courts when faced with the dilemma of newer binding precedent conflicting with older on-point precedent); Dorf, *supra* note 28 at 676-77 n.87 (disagreeing with the Supreme Court's reasoning in *Rodriguez de Quijas*).



at issue in *Rodriguez de Quijas*, *Agostini*, and *State Oil v. Khan*; and in those cases the Supreme Court definitively rejected any such power on the part of the lower courts. The net result of the Court's approach, therefore, is that in deciding if it is bound by a precedent of the Court, lower courts must ignore the reasoning of that decision and subsequent doctrinal developments which might bring the validity of that reasoning into question, focusing instead on the narrow holding of the case, and whether it has been *expressly* overruled.

Described as such, it is clear that the rule of *Rodriguez de Quijas* raises important questions of institutional legitimacy for the Court. What does it mean for a court of law to announce that the reasons it gives for its decisions do not matter; all that matters is the decision itself, the raw exercise of power? After all, one can argue that deciding in a reasoned manner and explaining the reasons for one's decision is the essence of judging, as distinguished from other forms of state power.<sup>33</sup> As Michael Dorf has put it, "[f]or the judiciary, giving reasons justifies the exercise of governmental authority, much as elections justify its exercise by the political branches."<sup>34</sup> Of course, courts do sometimes decide cases without explaining their reasoning, as with summary affirmances and other decisions without opinion, but it is presumably because the reasons for the decisions are so obvious as not to require belaboring. If that is *not* the case, if an unexplained decision is not obviously correct, such behavior also raises grave questions of judicial legitimacy.<sup>35</sup> When a court (or at least an Article III federal court) behaves in a way which suggests that what really matters is not the reasons for its actions but rather the simple fact of its authority, it is no longer behaving as a court should—it is no longer exercising the "judicial power of the United States"<sup>36</sup> as properly understood. Instead, at this point the Court is acting more as a legislature, in which the act of adopting a rule, the sheer exercise of power, provides a complete justification for the

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<sup>33</sup> See Dorf, *supra* note 28 at 686 (arguing that the custom of giving reasons justifies the exercise of judicial power); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[R]easoned response to reasoned argument is an essential aspect of the judicial process."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."); cf. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (exploring the potential drawbacks to giving reasons for legal decisions under all circumstances).

<sup>34</sup> Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2029 (1994).

<sup>35</sup> My argument does not apply to judicial actions, such as denials of certiorari by the Supreme Court, which are truly discretionary with the court and do not involve the substantive resolution of legal rights. Such actions do not constitute an exercise of state power in the same way as resolution of a case on the merits, and the issuing of a mandate or other judicial order.

<sup>36</sup> U.S. CONST., art. III, §1.

action and for the binding obligation it imposes on citizens.<sup>37</sup> Judges should give reasons for their decisions, but legislators clearly need not. In *Rodriguez de Quijas* the Supreme Court comes perilously close to suggesting that, like legislatures, it need not give reasons, or at least reasons that have any significance or limiting effect.<sup>38</sup>

The rule of *Rodriguez de Quijas* thus stretches the Supreme Court's institutional legitimacy to its limit. This stretching raises a secondary, institutional objection to the rule: the circularity of a decision of the Supreme Court defining the binding power of its own precedents.<sup>39</sup> The "doctrine" of *Rodriguez de Quijas* is quite different from, for example, the First-Amendment doctrine established by *New York Times v. Sullivan*.<sup>40</sup> The latter deals with the substantive rights and obligations of private citizens and other state actors, while the former deals with the powers and obligations of the Court itself. To concede that the Court's substantive decisions are binding on lower courts, and perhaps on all government officials,<sup>41</sup> does not necessitate a conclusion that decisions like *Rodriguez de Quijas* are binding on anyone. Indeed, there are obvious reasons why the Court should *not* be the final word on the scope of its own authority.<sup>42</sup> The conflict of interest is obvious—foxes should not guard henhouses. And, like other federal government entities, the authority of the Supreme Court is constrained by the Constitution, and does not extend beyond

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<sup>37</sup> I develop this argument regarding the quasi-legislative nature of the Court's current role further in Part III.A, *infra*.

<sup>38</sup> For a similar argument, see Michael C. Dorf, *Courts, Reasons, and Rules* in RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER 129, 135-37 (Linda Meyer ed. 1999) (discussing why courts need to explain their decisions); Dorf, *supra* note 34, at 2067 (same); contrast RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 82 (1990) ("Judicial decisions are authoritative because they emanate from a politically accredited source rather than because they are agreed to be correct."); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849 (1993) (arguing that the "political pedigree" is the source of the Court's authority).

<sup>39</sup> See Paulsen, *supra* note 23 at 83 n.132 (commenting on the "circularity" of the argument that Supreme Court cases are binding because the Supreme Court cases say they are).

<sup>40</sup> 376 U.S. 254, 283 (1964) (limiting a State's ability to award damages in libel suits brought by public officials to those instances where actual malice was intended).

<sup>41</sup> See Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360-61 (1997) (describing, but rejecting, arguments supporting "judicial non-exclusivity" in constitutional interpretation); see also *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress, in exercising its powers to enforce the Civil War Amendments, must accept and legislate on the basis of the Court's interpretations regarding the substantive scope of those Amendments).

<sup>42</sup> Of course, in practice the Court has claimed precisely such power, through judicially-created doctrines such as standing and the political question doctrine. The question is how other institutional actors should treat such claims.

the power delegated to it in Article III.<sup>43</sup> Thus, when the Court seeks to define its power beyond the constitutional limits, there is a powerful argument that others, including perhaps lower federal courts, should consider its actions ineffective,<sup>44</sup> just as a congressional statute or an executive order declaring an otherwise unconstitutional action to be consistent with the Constitution would be ineffective.

Beyond the institutional weaknesses of the rule of *Rodriguez de Quijas*, there are practical reasons to question the Court's fervent attachment to its own precedents. There is an inefficiency, as *State Oil v. Khan* illustrates, in requiring litigants to go all the way to the Supreme Court to overturn a precedent which is widely acknowledged to be moribund;<sup>45</sup> and in this era of weak *stare decisis* and constantly revised doctrine,<sup>46</sup> the incidence of specific precedents which are no longer consistent with the Court's current views and recent decisions has expanded dramatically. Furthermore, one consequence of the rule of *Rodriguez de Quijas* is that when the Court adopts a new approach in an area of law, especially constitutional law, it takes much longer for that approach to be fully adopted and implemented by the rest of the judiciary. The lower courts remain obliged to follow extant, narrow, and older precedents that are directly on point, even if their reasoning and result is clearly inconsistent with the Court's recent decisions.<sup>47</sup> Finally, if taken literally (as the Court

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<sup>43</sup> The Court has recognized this point, for example, in its "standing" cases. See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (limiting federal court power to Article III specifications).

<sup>44</sup> I say "perhaps" because the relationship of the lower federal courts to the Supreme Court is obviously different from Congress's and the Executive Branch's relationship to the Court. This point is explored further in Part II, *infra*.

<sup>45</sup> It is notable that in his opinion in *Khan v. State Oil Company*, Judge Posner specifically predicted the demise of *Albrecht*. *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) ("[*Albrecht*] should be overruled. Someday, we expect, it will be.").

<sup>46</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 209 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)); *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)); *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987)); but cf. Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 733-34 (1999) (arguing that *stare decisis* has not weakened substantially in the Rehnquist Court).

<sup>47</sup> For example, research suggests that an important and perverse consequence of the Court's approach is that despite the Court's recent decision in *Agostini*, see *supra* note 22, lower courts have continued to apply older, more squarely on point precedents to strike down government aid to religious schools. See, e.g., *Helms v. Picard*, 151 F.3d 347, 360 (5th Cir. 1998), *cert. granted* 119 S. Ct. 2336 (1999) (deciding that *Agostini* had not overruled prior precedent on a particular issue); *Columbia Union College v. Clarke*, 159 F.3d 151, 161 (4th Cir. 1998) (holding that *Agostini* does not upset the supposition that when religion permeates a secular college, the government cannot provide grants for secular subjects).

seems to indicate it should be), the rule of *Rodriguez de Quijas* can lead to extreme and absurd results. If the military chose to place an ethnic minority into concentration camps during a time of war, would the lower courts have to uphold the action? Presumably so, because *Korematsu v. United States*<sup>48</sup> has never been expressly overruled.<sup>49</sup> In the wake of *Brown v. Board of Education*,<sup>50</sup> were the lower federal courts obliged to uphold all segregated public facilities with respect to which the Court had previously upheld segregation other than the schools? Presumably so (though thankfully for this country, the Court of that era did not see it that way).<sup>51</sup> And, on a more mundane but perhaps more practically significant level, are the host of undermined-but-not-expressly-overruled antitrust decisions issued by the Warren Court, such as *United States v. Von's Grocery Co.*<sup>52</sup> and *Brown Shoe Co. v. United States*,<sup>53</sup> still binding on the lower courts? Again, presumably so.<sup>54</sup>

Given these numerous objections to the Court's approach, it is unclear why the Court insists on delivering the coup-de-grace to its own precedents. One possible explanation for the *Rodriguez de Quijas* rule is that it permits the Court to better control its own timing and agenda; a lower court "overruling" a precedent of the Supreme Court would tend to force the Court's hand in terms of taking and resolving the issue, to maintain inter-circuit uniformity.<sup>55</sup> However, *Rodriguez de Quijas* is relevant only with respect to Supreme Court precedents whose reasoning has been seriously undermined by other, later Supreme Court decisions. Thus, to a significant extent, the Court *does* retain control over its agenda, since the Court has created the circumstances that might justify a lower court declaring a precedent implicitly overruled.

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<sup>48</sup> 323 U.S. 214, 219 (1944) (upholding Japanese internment during World War II).

<sup>49</sup> *But cf.* *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (vacating the conviction of Fred Korematsu).

<sup>50</sup> 347 U.S. 483 (1954).

<sup>51</sup> *See* Baxter, *supra* note 22, at 451-57 (explaining the role lower courts played in implementing the Supreme Court's decision in *Brown*); Bradford, *supra* note 19, at 71-72 (same). For an attempt by a lower court to reconcile these contradictions, *see* *Planned Parenthood v. Casey*, 947 F.2d 682, 697-98 & n.13 (3rd Cir. 1991), *aff'd in part and rev'd in part* 505 U.S. 833 (1992) (concluding that when the Court has abandoned a particular legal standard, all cases decided under that standard are no longer binding).

<sup>52</sup> 384 U.S. 270 (1966).

<sup>53</sup> 370 U.S. 294 (1962).

<sup>54</sup> As noted in Part II, *infra*, it seems likely that the lower courts will rebel against such results. But not always. For a particularly absurd application of the *Rodriguez de Quijas* rule, *see* *Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) (upholding restrictive state regulation of legislative lobbying against First Amendment attack based on two Supreme Court precedents from 1906 and 1864, despite massive interim developments in First Amendment law).

<sup>55</sup> For a discussion of the value of uniformity, and the Court's role in maintaining it, *see infra* notes 176-177 and accompanying text.

Furthermore, in some ways the *Rodriguez de Quijas* approach reduces the Court's control over its (or more accurately, the judiciary's) agenda, because one consequence of the rule is to delay the implementation of new approaches adopted by the Court.

Further explanation for the Court's approach towards undermined precedents seems necessary, and the only one that comes to mind is distrust of the lower courts—and in particular, distrust of the lower federal courts since they are most likely to be in the position to “underrule” the Court's decisions. The Court seems willing to tolerate the inefficiency, delay, and occasional injustice generated by its approach because it does not wish to grant lower courts the authority to decide when a precedent of the Court has been so undermined as to be no longer binding. In light of the above criticisms, other justifications for the rule, such as minimizing conflict, or maintaining an orderly system of justice, vanish. A strict application of the doctrine of *Rodriguez de Quijas* seems more likely to breed confusion and conflict (albeit internal conflict within the judiciary as a whole, rather than inter-circuit conflict) than to reduce it. Therefore, whether justified as a form of respect or as a necessary consequence of stare decisis principles, the doctrine of *Rodriguez de Quijas* ultimately must be understood as a mode of control, of exercising power over the other courts in the federal judicial hierarchy. When the Court insists on retaining its “prerogative . . . to overrule one of its precedents”<sup>56</sup>—note the royal connotations<sup>57</sup>—it is attempting to exercise a strict form of supervision over lower courts, thereby denying them a substantial area of discretion.<sup>58</sup>

## II. HIERARCHY AND HUBRIS

In cases like *Rodriguez de Quijas*, *Agostini*, and *State Oil v. Kahn*, the Court indicates an unwillingness to share its power to make new law, which is an aspect of the judicial power, with other courts within the federal judiciary. Instead, the Court is seeking to concentrate the authority to make and change the law into its own hands.<sup>59</sup> This is not surprising; it is after all a basic assumption of our Constitution, as noted by Madison in Federalist No. 51, that

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<sup>56</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

<sup>57</sup> The Oxford English Dictionary reports as its first definition of the word prerogative “[t]hat special preeminence which the sovereign, by right of regal dignity, has over all other persons . . . .” OXFORD ENGLISH DICTIONARY 2283 (2d ed. 1989).

<sup>58</sup> On the relationship between supervision and discretion, see Edward Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1304-07 (1997).

<sup>59</sup> Of course in principle, even without a rule such as the *Rodriguez de Quijas* doctrine the highest court in a system always retains ultimate “control” over the law, through the power of review. In practice, however, the enormous volume of federal litigation, and the limited size of the Court's docket, makes rule-based approaches such as *Rodriguez de Quijas* the only effective way to maintain that control.

government officials will seek to expand their own power.<sup>60</sup> The accumulation of power in the hands of the Court, at the expense of the lower federal judiciary, is also not a new phenomenon. Edward Purcell recently explained that, as early as 1928, Felix Frankfurter predicted, described, and extolled this development, in part because of Frankfurter's explicit hostility (common among progressives at that time) to the lower federal judiciary.<sup>61</sup> In recent years, however, this process appears to have escalated and changed in nature. Instead of viewing the exercise of the judicial power as a cooperative venture in reasoned decision-making and precedent-building, where there is value to be gained from participation by all levels of the judiciary, the Court increasingly seems to see it as an exercise of raw power, so that any sharing of that power is necessarily at the expense of the Court's own authority.<sup>62</sup>

Whatever its causes, evidence of such a change in the Court's attitude abounds. In addition to the "underruling" rule of *Rodriguez de Quijas*, there are the recent, highly publicized disputes between the Supreme Court and the Ninth Circuit over implementation of the death penalty. On two separate occasions in recent years the Court has chastised the Ninth Circuit Court of Appeals for obstructing state efforts to carry out a death sentence.<sup>63</sup> In the first incident, involving the execution of Robert Alton Harris in 1992, the Court took the extraordinary step of issuing an order to the Ninth Circuit stating that "[n]o further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."<sup>64</sup> In the second case, involving Thomas Thompson, the Court severely criticized the Ninth Circuit's unusual procedural actions, accusing the lower court of negligence, coming close to

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<sup>60</sup> THE FEDERALIST No. 51, at 321-22 (James Madison) (Clinton Rossiter ed. 1961). Insofar as Judges were thought not to raise the same concerns regarding overreaching as other officials, it is not because they would lack the desire to expand their power, but because they would lack the ability. See THE FEDERALIST No.78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (describing the judiciary as "the weakest of the three departments of power").

<sup>61</sup> Edward A. Purcell, Jr., *Reconsidering the Frankfurtian Paradigm: Reflections on Histories of the Lower Federal Courts*, 24 L. & SOC. INQUIRY 679, 702, 705-06 (1999) (citing FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928) for the proposition that the lower courts' jurisdiction should be reduced).

<sup>62</sup> Why this shift in attitudes has occurred it is hard to say—perhaps it is an inevitable aspect of our postmodern world, where faith in the force or even the possibility of reasoned analysis has been undermined. For some support for this proposition, see William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (arguing that the job of the Court is not to find a "correct" solution, but only a "definitive" one).

<sup>63</sup> See *Vasquez v. Harris*, 503 U.S. 1000 (1992) (vacating the 9th Circuit's stay of execution); *Calderon v. Thompson*, 523 U.S. 538 (1998) (admonishing the 9th Circuit for stalling the inevitable execution of the defendant).

<sup>64</sup> *Vasquez v. Harris*, 503 U.S. 1000 (1992).

accusing it of bad faith, and concluding that the Ninth Circuit had committed a grave abuse of discretion.<sup>65</sup> The dispute between the Supreme Court and the Ninth Circuit might simply be attributed to politics; but that is not a complete explanation. In recent years, the Court has made it a priority to severely limit judicial, especially *federal* judicial, interference in the death penalty process, and thereby to speed up the execution process in this country. The Court's substantive Eighth Amendment jurisprudence, as well as its decisions limiting federal habeas corpus relief, reflect this policy.<sup>66</sup> In *Harris* and *Thompson* the Ninth Circuit demonstrated a willingness to ignore the Court's policy preferences. This was unacceptable to the Court, and in response in *Harris*, it took the extreme, and arguably illegitimate, step of stripping the Ninth Circuit of the judicial power conferred on it by Congress.

The concept of "percolation" provides another example of the Court's changing attitudes towards the rest of the judiciary. It has long been a predicate of Supreme Court decision-making that before the Court grants certiorari to finally resolve an issue, it will often choose to allow the issue to "percolate" in the courts of appeals, so that the Court has the benefit of multiple perspectives.<sup>67</sup> In recent years, however, no less a figure than Chief Justice Rehnquist has questioned the value of percolation,<sup>68</sup> and a number of academic commentators have agreed, suggesting implicitly (or explicitly) that the lower courts have little to contribute to the Supreme Court's decision-making.<sup>69</sup> Furthermore, Evan Caminker has made the argument, with which I agree, that Supreme Court Justices rarely even read lower court opinions anymore (if they ever did), thereby reducing the *value* of any percolation.<sup>70</sup>

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<sup>65</sup> See *Calderon v. Thompson*, 523 U.S. 538, 552 (1998). For a discussion (and defense) of the Ninth Circuit's actions in the *Thompson* proceedings, see Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 351-53 (1999).

<sup>66</sup> For a discussion of the recent habeas jurisprudence, see Reinhardt, *supra* note 65 at 315-19 (describing the Rehnquist Court's "assaults" on the writ of habeas corpus).

<sup>67</sup> See Caminker, *supra* note 23, at 1, 56 n. 196 (1994) (citing authorities); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65-67 (1998) (explaining the benefits of temporary disagreement between courts).

<sup>68</sup> See Rehnquist, *supra* note 62, at 11 (suggesting that those who find benefits in percolation are making a "virtue of necessity").

<sup>69</sup> See, e.g., Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 691 (1990) (arguing that the benefits of percolation are exaggerated while the costs are ignored); Caminker, *supra* note 23 at 56 (suggesting that independent judgments of lower courts will not necessarily bring forth new ideas); Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 690 & n.2 (finding that percolation gives a false justification for deferring decisions on difficult issues).

<sup>70</sup> Caminker, *supra* note 23 at 58-59 ("Justices frequently do not avail themselves of any potential inferior court contributions."). For an early and eminent exposition of this view, see Henry J. Friendly, *The "Law of the Circuit" and All That—Foreword to the Second Circuit, 1970 Term*, 46 ST. JOHN'S L. REV. 406, 407 (1971) ("I doubt whether many of the Justices even read our opinions, at least on constitutional issues . . ."). Of course, the

And even after the Court has resolved a problem, and adopted a doctrinal rule, the Justices also seem to completely lack the institutional capacity to observe the actual operation of various doctrinal formulations in the lower courts, and so to make practical assessments of their “workability and desirability.”<sup>71</sup> There are many complex reasons for these developments, including growing caseloads in the lower courts, which limit the Court’s ability to keep track of lower court decisions, and the explosion in the filing of *amicus* briefs that makes lower court opinions a less important source of data and legal arguments.<sup>72</sup> The results are nevertheless clear—a growing isolation of the Supreme Court from the rest of the judiciary.

Until now, this article has focused on the view from above: the Supreme Court’s attitudes towards the lower courts. But what about the judges of those “inferior” courts? How do they feel about the gradual loss of power and status vis a vis the Supreme Court? The answer is mixed. One can find some evidence of frustration and even resentment among prominent lower court judges. Not surprisingly, the strongest reactions have been from the Ninth Circuit. Judge Stephen Reinhardt—who admittedly is far from representative of the federal judiciary—has written two articles which are harshly critical of the Supreme Court’s recent jurisprudence, and its handling of the death penalty disputes with the Ninth Circuit.<sup>73</sup> He has argued that the Court acted improperly, even vindictively, and exceeded its authority.<sup>74</sup> The tone of both articles is angry, bitter and derisive.<sup>75</sup> Another prominent federal appellate judge, Patricia Wald of the District of Columbia Circuit, has written a more temperate but no less pointed criticism of the Supreme Court, focusing on the modern Court’s tendency to ignore lower court opinions and denigrate the

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Justices’ failure to read lower court opinions does not completely eliminate the value of percolation, since ideas developed in the lower courts can reach the Court via briefs written by lawyers who have read those opinions. But it seems likely that a Court which looked to lower courts for help and guidance would be more influenced by the ideas expounded by disinterested fellow judges, than by those ideas as filtered through the briefs of partisan lawyers.

<sup>71</sup> Caminker, *supra* note 23, at 58-59.

<sup>72</sup> See Joseph Kearney and Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PENN. L. REV. 743, 751 (2000) (documenting the rise in *amicus* brief filings in recent years).

<sup>73</sup> See Reinhardt, *supra* note 65, at 316 (1999) (criticizing the Supreme Court for reducing access to federal courts and “placing the interests of the state ahead of those of its citizens”); Judge Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L. J. 205, 215 (1992) (“[T]he responsibility . . . lies with the Supreme Court, not the lower courts.”).

<sup>74</sup> See *id.* at 214.

<sup>75</sup> See, e.g., Reinhardt, *supra* note 65 at 350 (“There was little doubt in their minds or in mine that, were we to rule in Thompson’s favor, the Supreme Court would swiftly reverse us once again—and perhaps this time the five-Justice majority would order us whipped or put in the stockade.”).



value of percolation.<sup>76</sup> She attributes this trend to the dominance of law clerks, as well as the Justices' desire to be seen as "original."<sup>77</sup> In the same article Judge Wald talks about a possible "parlor maid complex" among lower court judges, though she then goes on to note the extraordinary amount of power that lower court judges in the United States do possess, compared to most other constitutional democracies.<sup>78</sup> These reactions are undoubtedly due in part to transient political differences between the Supreme Court and lower courts,<sup>79</sup> especially with regards to the Ninth Circuit's tussles with the Supreme Court over the death penalty.<sup>80</sup> However, the content and tone of the criticism suggests that there may be more going on than political dissatisfaction.

On the whole, however, lower court judges are remarkably quiescent regarding, and even supportive of, the upward shift in rulemaking power within the federal judiciary. Explicit criticisms of the Supreme Court by lower court judges are relatively rare, even among prominent and otherwise self-confident judges,<sup>81</sup> probably because of the judges' perceptions of what propriety requires. For example, Judge Posner's opinion in *State Oil v. Kahn* might be read as criticizing the current Court's "strident" disapproval of lower court underruling,<sup>82</sup> but if so it is far from explicit. And aside from any concerns about propriety, lower court judges are far from unanimous in chafing at the Court's attitudes and accumulation of power. As Sanford Levinson has eloquently written, "the Supreme Court, and much scholarly and

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<sup>76</sup> Honorable Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CINN. L. REV. 771, 792-93 (1993) (observing that the Supreme Court "appeared not to rely heavily on the rationales of the lower courts"). Indeed, Judge Henry Friendly of the Second Circuit noted this reality, and also expressed frustration, as early as 1972. See Friendly, *supra* note 70 at 407.

<sup>77</sup> See Wald, *supra* note 76, at 792-93.

<sup>78</sup> See *id.* at 772.

<sup>79</sup> This was especially evident during the late Carter and early Reagan Administrations. At this time, the Supreme Court was more politically conservative than the lower courts, a situation that persisted until President Reagan's lower court appointments began to fill up the judiciary. As a result, lower court judges resented being forced to implement holdings and legal rules with which they disagreed. Even today, despite the general homogeneity and conservatism of the federal judiciary at all levels, that sort of political tension has not disappeared entirely.

<sup>80</sup> See *supra* notes 63-66 and accompanying text.

<sup>81</sup> For an empirical study of judicial prominence, see William M. Landes, ET AL., *Judicial Influence: A Citation Analysis of Federal Court of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998) (using "the number of citations to the published opinions of judges on the federal courts of appeals to measure the influence of individual judges").

<sup>82</sup> *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir.1996), *rev'd*, 522 U.S. 3 (1997) ("The Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself.").

ordinary understanding, views the 'inferior court' as the simple (and perhaps simple-minded) enforcer of the Supreme Court's dictates, however wise or unwise they may appear to the hapless judge below."<sup>83</sup> Even among lower court judges, this view appears to be fairly common. For example, Judge Alfred Goodwin of the Ninth Circuit has described the lower courts as "messengers who translate" for the Court.<sup>84</sup> And Judge Kenneth Ripple, concurring in *Kahn v. State Oil*, made the remarkable argument that he felt bound to apply the *per se* rule of *Albrecht* to the facts before the Seventh Circuit because he was "unable to rule out the possibility that the Justices might intend the *per se* rule to be broad enough to reach *State Oil*'s conduct."<sup>85</sup> For a particularly extreme example of such self-abnegation, consider the following comment by Judge Karen Henderson of the D.C. Circuit: "It is more than misguided [to question Supreme Court decisions]—it is wrong. We are not in the business of lamenting or celebrating decisions of the United States Supreme Court. We are to follow them. Period."<sup>86</sup> A more reasoned, but equally deferential, approach to Supreme Court precedent can be found in Judge Reinhardt's dissent from the panel opinion in *Watkins v. U.S. Army*.<sup>87</sup> In that case, Judge Reinhardt concluded, against his instincts and preferences, that the Supreme Court's decision in *Bowers v. Hardwick*<sup>88</sup> required him to reject an Equal Protection Challenge to the Army's policy of barring homosexuals from military service, because "[a]n important part of the function of circuit court judges is to interpret the Supreme Court's opinions."<sup>89</sup> These opinions indicate that, among "inferior" federal judges, there is a growing acceptance of the sharp division in the modern legal culture between the Supreme Court, with its role as legislator for the judicial system,<sup>90</sup> and all other courts.<sup>91</sup>

A strong sense of hierarchy is thus an established part of the current culture of the federal judicial system.<sup>92</sup> On first glance, moreover, this seems entirely

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<sup>83</sup> Levinson, *supra* note 38, at 845.

<sup>84</sup> Judge Alfred T. Goodwin, *How the Supreme Court Employs Inferior Courts as Messengers*, 75 OR. L. REV. 699, 700 (1996).

<sup>85</sup> Khan, 93 F.3d at 1368 (Ripple, J., concurring).

<sup>86</sup> *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1489 n.1 (D.C. Cir. 1997) (Henderson, J., dissenting).

<sup>87</sup> 847 F.2d 1329, 1353-1362 (9th Cir. 1988) (Reinhardt, J., dissenting) ("I am bound . . . to apply the Constitution as it has been interpreted by the Supreme Court . . . whether or not I agree with those interpretations."), *withdrawn*, 875 F.2d 699, 700 (9th Cir. 1989).

<sup>88</sup> 478 U.S. 186 (1986) (rejecting a due process challenge to a Georgia law forbidding sodomy).

<sup>89</sup> *Watkins*, 847 F.2d at 1354 (Reinhardt, J. dissenting).

<sup>90</sup> See *supra* notes 35-38 and accompanying text.

<sup>91</sup> Cf. *Dronenburg v. Zech*, 741 F.2d 1388, 1396-97 (D.C. Cir. 1984) (opinion by Judge Bork suggesting that whatever the propriety of the Supreme Court recognizing new, non-textual constitutional rights, the lower courts should not engage in such activism).

<sup>92</sup> Sanford Levinson has noted this tendency among lower federal courts, and has attributed it to a fundamentally positivistic approach towards legal authority. See Levinson,

appropriate and consistent with the constitutional design—after all, Article III explicitly refers to federal courts other than the Supreme Court as “inferior Courts,”<sup>93</sup> and Article I, § 8 clarifies that they are “inferior to the Supreme Court.”<sup>94</sup> The term “inferior,” however, turns out to be somewhat more ambiguous than first appears, a point famously debated by the Court in *Morrison v. Olson*, where the Court defined the term “inferior officers” in Article II.<sup>95</sup> One possible meaning of the word “inferior” is certainly hierarchical—an inferior is one who is subordinate to, and under the command of another, superior (or in the language of Article II, “principal”) officer or court. This is the definition that Justice Scalia advocated in his dissent in *Morrison*,<sup>96</sup> and a number of academic commentators have defended this definition.<sup>97</sup> However, the hierarchical/subordination definition of inferiority is not the only possible definition. “Inferior” can also mean less important, because less powerful or possessing less authority and (in the judicial context) jurisdiction. Indeed, this is the definition adopted by the majority in *Morrison*, who found that the independent counsel is an inferior officer in part because of her limited jurisdiction, *not* because she was clearly subordinate to the Attorney General or any other officer.<sup>98</sup> Whatever the strength of this holding in interpreting the Article II term “inferior officers,”<sup>99</sup> there are powerful reasons to think that this is the best understanding of the term “inferior court” in Article III. As William Dodge has argued convincingly, at the time the Constitution was written, with respect to *courts* at least the terms “inferior” and “supreme” appear to have been understood as referring to importance, and scope of jurisdiction, rather than exclusively (or even necessarily) to a

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*supra* note 38, at 851-52 (“[T]he meaning applied to that notion in regard to ‘inferior’ judges is . . . remarkably positivistic . . .”).

<sup>93</sup> U.S. CONST., art. III, § 1.

<sup>94</sup> U.S. CONST., art. I, § 8, cl. 9 (stating that Congress shall have the power “to constitute Tribunals inferior to the Supreme Court”).

<sup>95</sup> *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (stating that the Independent Counsel is an “inferior officer” because she is subject to removal, has limited duties, and is limited in her jurisdiction).

<sup>96</sup> *See id.* at 719 (Scalia, J., dissenting) (“[T]he independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch.”).

<sup>97</sup> *See, e.g.*, Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 668-69 & n.92 (1997) (observing that “[a]n ‘inferior officer . . . embodies a *relational* concept” that includes subordination); Caminker, *supra* note 24, at 831-33 (commenting that the term “inferior to” used in Article III “clearly suggests a direct relationship of subordination”).

<sup>98</sup> *Morrison*, 487 U.S. at 671-72 (explaining why the Independent Counsel is an inferior officer).

<sup>99</sup> Recent caselaw suggests that the Court itself may not have much faith in this definition any longer. *See Edmond v. United States*, 520 U.S. 651, 662 (1997) (“Whether one is an ‘inferior’ officer depends on whether he has a superior.”).

hierarchical relationship.<sup>100</sup> Other commentators support this position as well,<sup>101</sup> and in my opinion it is the better view.<sup>102</sup>

In addition to its historical pedigree, a definition of “inferior” in Article III that is tied to jurisdiction and importance seems to comport better with the reality of the day-to-day business of the courts than the subordination/supervision definition of “inferior.” As a practical matter, lower federal courts are not, and have never been, under the close supervision of the Supreme Court in carrying out their day-to-day duties and functions.<sup>103</sup> A typical district court judge, deciding a typical case, is just not greatly concerned about the possibility of review by the Court, in the way that even relatively low-level bureaucrats in the Executive Branch are likely to be influenced by the views of their superiors.<sup>104</sup> Moreover, the Court simply lacks the tools of discipline and control available in typical hierarchical organizations. The Justices of the Supreme Court cannot fire lower court judges, cannot demote them, and cannot even reduce or influence their compensation.<sup>105</sup> Indeed, even the Court’s ability to issue “commands” to lower court judges is limited to remands in individual cases, rather than broad directives. Of course, in addition to reviewing individual decisions the Court

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<sup>100</sup> William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an “Essential Role,”* 100 YALE L. J. 1013, 1020-21 (1991) (stating that the words “supreme” and “inferior” seem to indicate relative importance).

<sup>101</sup> See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1180 n.139 (1992) (suggesting that the word “inferior” was used to distinguish between courts that were subject to geographical and subject matter constraints and those that were not); David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 475 n.95 (1991) (“[I]t was then common to describe one tribunal as inferior ‘to’ another for a variety of reasons.”); Paulsen, *supra* note 23, at 84-85 (1989) (“While lower courts may be ‘inferior’ in the hierarchy . . . they are not constitutionally subordinate in terms of either their duties under the Constitution or their relationship to higher courts).

<sup>102</sup> In rejecting this reading of “inferior court,” Professors Amar and Caminker rely heavily on the language in Article I, § 8 describing lower courts as “inferior to the Supreme Court” to defend their subordination reading. See Amar, *supra* note 97, at 668; Caminker, *supra* note 24, at 828. However, that interpretation places a great deal of weight on one somewhat ambiguous word, probably too much absent some evidence that the word was chosen with care and forethought.

<sup>103</sup> See, e.g., Dodge, *supra* note 100, at 1017 n.19 (noting that the Judiciary Act of 1789 left significant gaps in the Supreme Court’s appellate jurisdiction over lower federal courts, including a lack of appellate jurisdiction, and thus supervisory control, in *any* criminal cases).

<sup>104</sup> Edward Purcell cites statistics suggesting that over 95% of decisions by the courts of appeals are final. Purcell, *supra* note 61, at 722. The percentage of district court cases never reviewed by the Supreme Court must, of course, be even higher.

<sup>105</sup> See Paulsen, *supra* note 23, at 84-85 (noting that only Congress, via its impeachment power, can control the lower federal courts).

also creates precedent which is “binding” on the lower courts. But, as Evan Caminker points out, precedent is truly *binding* only because of the power and threat of appellate review.<sup>106</sup> In the modern world, the threat of review by the Supreme Court is extremely limited, given practical and voluntarily adopted constraints on the Court’s docket, and the huge volume of federal litigation (to say nothing of state litigation raising federal issues).<sup>107</sup> Thus, in practice, for all of the abstract claims of subordination, inferiority, and superiority, the Supreme Court’s ability to actually supervise the regular business of the federal courts is almost nil. As Justice Scalia points out in his dissent in *Morrison* (with of course a quite different emphasis), this lack of control is quite inconsistent with the concept of inferiority as subordination.<sup>108</sup> Thus, the term “inferior,” as used in Article III, does not necessarily mean “subordinate,” nor is it necessarily a constitutional endorsement of a highly hierarchical organization for the judiciary.

This limitation on the Supreme Court’s practical authority illustrates the importance, the novelty, and the questionable nature of the order issued by the Court in the *Harris* case, which stripped the Ninth Circuit of jurisdiction over all *future* claims raised by Harris to attempt to block his execution.<sup>109</sup> Such an order does not constitute a normal exercise of the power of appellate review, and indeed comes perilously close to a judicial usurpation of *Congress’s* power to create and empower the lower federal courts.<sup>110</sup> Charles Fried has defended the Court’s actions in *Harris* by invoking the Court’s “supervisory power” over lower federal courts.<sup>111</sup> It is true that the Court has some sort of supervisory authority over the “inferior” federal courts, including powers of mandamus and the power to remand a case to a different judge.<sup>112</sup> It is doubtful, however, that the power extends as far as the Court took it in *Harris*,

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<sup>106</sup> Caminker, *supra* note 24, at 824-25 (“The duty to obey hierarchical precedent tracks the path of review followed by a particular case as it moves up the three federal judicial tiers.”); *see also* Dorf, *supra* note 28, at 672 (observing that appellate review adds effect to notions of inferiority and superiority).

<sup>107</sup> This inability is reflected in the Court’s renunciation of any “error-correction” role through the certiorari process. *See* ROBERT STERN, ET AL., *SUPREME COURT PRACTICE* 373 (6th ed. 1986).

<sup>108</sup> *Morrison v. Olson*, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting) (“If what was meant was merely ‘lower in station or rank’ one would use instead a term such as ‘lesser officers.’”).

<sup>109</sup> *See Vasquez v. Harris*, 503 U.S. 1000 (1992) (“No further stays of Robert Alton Harris’ execution shall be entered by the federal courts except upon order of this Court.”).

<sup>110</sup> *See Reinhardt, supra* note 73 at 214 (questioning whether the Supreme Court’s order was a valid exercise of power).

<sup>111</sup> *See* Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 193 (“Superior courts have always enjoyed the authority to issue not only propositions of law but executive decrees to courts below, and to supervise them to make sure they are properly executed.”).

<sup>112</sup> *See id.* at 193-94 (discussing the Supreme Court’s powers over the lower federal courts).

to prospectively strip a lower court of jurisdiction granted by Congress; even Fried concedes that any exercise of “supervisory power” by the Court is unusual and limited to the most extreme circumstances.<sup>113</sup> In any event, whatever the proper resolution of this debate, the events surrounding the Harris execution illustrate well the severe limitations on the Supreme Court’s power to control lower federal courts.

These limitations not only provide important insights into the abstract question of the relationship between the Supreme and lower federal courts, they also have practical consequences. The most important form of power the Court exercises over lower courts is of course the power of precedent, backed up by the distant but ever-present threat of review and reversal. Because the possibility of review is, however, extremely limited, the true force of the Court’s precedent must lie in the voluntary, good faith efforts of the lower courts to follow it. And in most cases, there seems no doubt that federal judges do in fact make every effort to apply the Court’s precedent, in part no doubt because that precedent is likely to comport with their own inclinations. But what about those admittedly few cases where the Court’s precedent is controversial, and not necessarily in agreement with the views of other judges? As Frederick Schauer points out, precedent has true significance only in that situation.<sup>114</sup> Even then, outright defiance of an explicit holding by the Court remains exceedingly rare.<sup>115</sup> But both evidence and observation suggest that more subtle, subterranean defiance, through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta,<sup>116</sup> is far from unusual. Edward Purcell cites an impressive array of recent scholarship indicating that the lower courts do not automatically implement “the rules of law laid down by the Supreme Court.”<sup>117</sup> Evan Caminker also cites several studies, as well as a

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<sup>113</sup> See *id.* at 193-94 (calling the exercise of supervisory authority “rare”).

<sup>114</sup> Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575-76 (1987).

<sup>115</sup> See Caminker, *supra* note 24, at 819-20 (discussing the rare example of a lower court judge refusing to follow precedent with which he disagreed); Levinson, *supra* note 38, at 847-48 (noting that “inferior judges know their place, as it were, which is the enforcement of the decisions of their superiors, whatever their own views”); Reinhardt, *supra* note 73, at 206 (discussing the execution of Robert Allen Harris and noting that “[w]hatever our sorrow over the systematic erosion of established rights, we must continue to apply whatever decisions the Court issues. And we will do that. That is our constitutional obligation.”).

<sup>116</sup> Of course, the distinction between dicta and holding is often far from clear. See generally Larry Alexander, *Constrained by Precedent*, 63 S. CAL L. REV. 1, 25 (1989) (discussing the distinction between dictum and holding, “the existence of which all lawyers are trained to acknowledge, but the determination of which proves in practice to be quite controversial”); Dorf, *supra* note 34, at 2005-26 (discussing the holding/dictum distinction and noting that lower courts are divided regarding their obligation to follow higher court dicta, though prudence counsels following dicta to avoid reversal). Schauer, *supra* note 114, at 579-80 (1987) (discussing the difference between dictum and holding).

<sup>117</sup> Purcell, *supra* note 61, at 724 & nn. 119-123 (discussing the ways in which trial

pointed remark by Justice O'Connor, suggesting that avoidance of precedent is far from uncommon.<sup>118</sup>

Recent experience tends to confirm this view. For example, in 1992 the Court decided *Lee v. Weisman*, a case holding unconstitutional, over a vigorous 4-justice dissent, a decision by a public school to permit religious invocation and benediction prayers at a graduation ceremony.<sup>119</sup> Yet in *Jones v. Clear Creek Independent School District*, the Fifth Circuit Court of Appeals, in a case remanded by the Court for reconsideration in light of *Lee*, upheld a school district's practice of permitting students to choose a student volunteer to deliver prayers at a graduation ceremony.<sup>120</sup> The facts of *Jones* may well have been distinguishable from *Lee*, but the Fifth Circuit's decision fails to adhere to the reasoning of *Lee*, since the *Lee* opinion emphasizes the coercive impact on dissenting students of religious prayers at a graduation ceremony.<sup>121</sup> And indeed, the Supreme Court subsequently confirmed, in *Santa Fe Independent School District v. Doe*,<sup>122</sup> that the Court's reasoning in *Lee* applies fully to student-initiated prayer. Thus, the Fifth Circuit's decision in *Jones* almost certainly reflects hostility to the Court's holding in *Lee*.

Similarly, in *Thomas v. Anchorage Equal Rights Commission*, a panel of the Ninth Circuit struck down an ordinance prohibiting landlords from discriminating against tenants on the basis of "marital status," finding that application of the rule violated the constitutional rights of the plaintiff landlords to the free exercise of religion.<sup>123</sup> In so holding, the Ninth Circuit panel opinion distinguished the Supreme Court's decision in *Employment*

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courts expand and shift Supreme Court precedent).

<sup>118</sup> Caminker, *supra* note 24, at 819 & n.8 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) and noting that judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences").

<sup>119</sup> 505 U.S. 577, 599 (1992) (holding that the Establishment Clause prohibits a religious exercise "at a graduation ceremony in circumstances where . . . young graduates who object are induced to conform").

<sup>120</sup> 977 F.2d 963, 972 (5th Cir. 1992); *but see* ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1482 (3rd Cir. 1996) (en banc) (rejecting holding of *Jones* and holding student-initiated prayers unconstitutional under *Lee*).

<sup>121</sup> This critique of the *Jones* decision is of course premised on the view that the reasoning of an opinion has precedential force. For a defense of this position, *see* Dorf, *supra* note 34, at 2008-09, 2029-40 (discussing whether dicta is binding precedent and noting the need for a holding/dictum distinction based on rationales rather than facts and outcomes).

<sup>122</sup> 120 S.Ct. 2266 (2000). That the *Santa Fe* case involved prayer at a football game rather than a graduation ceremony provides no basis for distinguishing it from *Jones*, and certainly the Court in *Santa Fe* did not appear to consider the distinction relevant.

<sup>123</sup> 165 F.3d 692, 702 (9th Cir. 1999), *opinion withdrawn, reh'g en banc granted* 192 F.3d 1208 (9th Cir. 1999), *rev'd* 2000 U.S. App. LEXIS 18696 (9th Cir. Aug. 4, 2000) (en banc).

*Division v. Smith*,<sup>124</sup> which held that the Free Exercise Clause does not prevent a state from applying generally applicable laws even if the laws create a substantial burden on the exercise of religion, by citing a “hybrid rights” exception allegedly created by dictum in the *Smith* opinion. The court then engaged in a highly sophistic analysis to determine that such “hybrid rights” were in fact implicated in the *Thomas* case.<sup>125</sup> The en banc 9th Circuit ultimately reversed the panel opinion, but on ripeness and standing grounds rather than substantive disagreement.

For yet another example of lower court avoidance of the logical implications of a Supreme court decision, consider the D.C. Circuit’s decision in *Lamprecht v. FCC*,<sup>126</sup> in which then-Judge (now Justice) Thomas authored an opinion striking down the Federal Communications Commission’s gender preference policy in granting broadcasting licenses as violative of the Equal Protection Clause, despite the fact that just two years earlier the Supreme Court had upheld the FCC’s minority preference policy in the same context.<sup>127</sup> As Judge Wald, a member of the D.C. Circuit has suggested, *Lamprecht* represented a relatively clear instance of a lower court evading binding Court precedent under the thinnest pretense of distinguishing it.<sup>128</sup>

In the area of affirmative action, the Court has expressed a great deal of hostility to all race conscious government policies, mandating the use of the highest, “strict” standard of scrutiny in all such situations, and suggesting broadly that such policies may be adopted *only* to remedy prior

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<sup>124</sup> 494 U.S. 872, 882 (1990).

<sup>125</sup> The *Thomas* case determined that a plaintiff invoking the “hybrid-rights” exception must “make out a ‘colorable claim’ that a companion right has been infringed.” 165 F.3d at 705. The court then held that a law forbidding a landlord from discriminating against tenants on the basis of marital status, or inquiring regarding the marital status of prospective tenants, raised “colorable” constitutional claims under both the Takings Clause of the Fifth Amendment and the Free Speech Clause of the First Amendment. *See id.* at 707-711. While a complete discussion of these areas of law is not possible here, suffice to say that both conclusions are extremely difficult to defend under existing doctrine, not least because if the Ninth Circuit is correct in *Thomas*, then essentially *all* regulation of rental housing raises colorable constitutional claims.

<sup>126</sup> 958 F.2d 382 (D.C. Cir. 1992).

<sup>127</sup> *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled in* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Of course, as it turns out the demise of *Metro Broadcasting* might suggest that Justice Thomas was prophetic in refusing to follow it; but as the Court’s own doctrine discussed in Part I, *supra*, indicates, that hardly justifies Justice Thomas’s non-acquiescence.

<sup>128</sup> *See* Wald, *supra* note 76 at 798-99 (discussing how the Supreme Court in *Metro Broadcasting* “had specifically said that it was not ruling on the gender-preference policy, though many thought its reasoning would be controlling,” and that then-Judge Thomas managed to distinguish the two cases by finding that Congress’ “authorization of the preference for women in contrast to the minority preference, was unconstitutional because it lacked sufficient empirical evidence of a nexus between female-owned stations and discrete women’s programming”).



discrimination.<sup>129</sup> At least one appellate court has read these decisions as holding that only remedial purposes may justify state affirmative action.<sup>130</sup> Yet in two recent decisions, *Wittmer v. Peters*<sup>131</sup> and *Hunter v. Regents of the University of California*,<sup>132</sup> the Seventh and Ninth Circuits respectively have upheld race conscious state programs, despite the lack of any claimed remedial purpose.

Another example of a lower court sidestepping the implications of a Supreme Court precedent is Judge Alex Kozinski's opinion on remand from the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>133</sup> In *Daubert*,<sup>134</sup> the Supreme Court substantially altered the law regarding the admission of scientific evidence in federal courts, displacing the previously widely-used *Frye* "general acceptance" test with a significantly more complex requirement of "scientific validity," and creating a rule which emphasized the trial court's discretionary power to admit or exclude expert testimony.<sup>135</sup> In the course of creating the new standard, the *Daubert* Court also reversed and remanded a decision of the Ninth Circuit excluding particular expert testimony. Yet on remand, the Ninth Circuit re-affirmed its decision to exclude the expert testimony *as a matter of law*, without seeing the need to remand to the trial court; and in the course of the opinion on remand, Judge Kozinski roundly criticized the rule adopted by the Court in *Daubert*, suggesting that it was

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<sup>129</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (noting that "[f]ederal racial classifications, like those of a State, must serve a compelling government interest, and must be narrowly tailored to further that interest"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (noting that classifications based on race are subject to strict scrutiny and that such classifications may lead to "stigmatic harm . . . unless they are strictly reserved for remedial settings"); see also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. at 611 (1990) (O'Connor, J., dissenting) (noting that "the Government possesses a compelling interest in remedying the effects of identified racial discrimination"); *Hunter v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999) (Beezer, J., dissenting) (discussing whether race-based classifications should only be used for remedial purposes).

<sup>130</sup> See *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir. 1996) (noting that non-remedial state interests, such as diversity, will never justify racial classifications).

<sup>131</sup> 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied* 117 S. Ct. 949 (1997) (upholding a race-conscious hiring program in a state youth penal program adopted in order to assure the presence of minority officers in light of the predominantly minority inmate population).

<sup>132</sup> 190 F.3d 1061, 1067 (9th Cir. 1999) (upholding a race-conscious admission program at a "laboratory" elementary school run by U.C.L.A., adopted in order to ensure an ethnically representative sample of students necessary to conduct educational research).

<sup>133</sup> 43 F.3d 1311 (9th Cir. 1995).

<sup>134</sup> 509 U.S. 579 (1993).

<sup>135</sup> See *id.* at 589-92; see generally DAVID L. FAIGMAN ET AL., 1 MODERN SCIENTIFIC EVIDENCE, THE LAW AND SCIENCE OF EXPERT TESTIMONY ch. 1 (1997). In *General Electric Company v. Joiner*, 522 U.S. 136, 138-39 (1997), the Court confirmed the discretionary nature of the trial court's admissibility determination.

unworkable, and placed a “daunting” burden on lower courts.<sup>136</sup> Again, it is difficult not to conclude that the Ninth Circuit’s decision not to remand the case to the district court was driven to a considerable extent by hostility to the Court’s new doctrine.

An even more stark example of lower court evasion of longstanding precedent can be found in the Fourth Circuit’s recent decision in *United States v. Dickerson*,<sup>137</sup> where the appeals court held that, contrary to thirty years of precedent, the Court’s decision in *Miranda v. Arizona*<sup>138</sup> was not binding in federal courts because of a statute enacted by Congress soon after that decision, purporting to overrule *Miranda*. The Supreme Court subsequently reversed this decision (by a 7-2 vote), indicating that there are limits to the degree of evasion a lower court can engage in before the Court takes notice, and acts.<sup>139</sup>

Finally, Alan Brownstein has collected extensive authority suggesting that the lower courts have been quite reluctant to follow the Supreme Court’s highly deferential approach to content-neutral regulations of speech, established in cases such as *Clark v. Community for Creative Non-Violence*<sup>140</sup> and *Ward v. Rock Against Racism*,<sup>141</sup> and have instead enforced the intermediate scrutiny standard quite vigorously, striking down a number of speech-restrictive regulations.<sup>142</sup>

The studies cited by Professors Purcell and Caminker suggest that the above decisions are not aberrational in the willingness they evince to evade and avoid Supreme Court precedent (though they probably do not reflect the norm either).<sup>143</sup> The Court does, however, have tools which might permit it to at least limit the ability of lower courts to engage in such avoidance. Because lower courts are rarely willing to explicitly flout binding precedent, or even to be perceived as doing so, if the Supreme Court were to establish and explicate clear, doctrinal rules with determinate consequences, such rules might be quite effective in actually binding lower court decision-making and limiting the avoidance of precedent. In fact, however, as many commentators have noted,

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<sup>136</sup> 43 F.3d at 1315-1316.

<sup>137</sup> 166 F.3d 667, 692 (4th Cir. 1999), *rev’d* 120 S.Ct. 2326 (2000).

<sup>138</sup> 384 U.S. 436 (1966).

<sup>139</sup> *Dickerson v. United States*, 120 S.Ct. 2326 (2000).

<sup>140</sup> 468 U.S. 288 (1984).

<sup>141</sup> 491 U.S. 781 (1989).

<sup>142</sup> See Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMM. 101, 115-16 n.45 (1999) (citing extensive caselaw).

<sup>143</sup> See Purcell, *supra* note 61, at 697 (describing conservative jurists’ challenge to the Warren Court’s authority); Caminker, *supra* note 23, at 3-4 (discussing cases where lower courts avoided Supreme Court precedent). For a related but broader argument that unpopular Supreme Court decisions can have limited impact because of public officials’ reluctance to enforce them, see Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 8-9 (1984) (citing the example of the school prayer decisions).

the current trend on the Court is a movement away from rules, and towards more open-textured and flexible “standards.”<sup>144</sup> The reasons for this development are complex, and I have elsewhere developed in detail at least one possible explanation,<sup>145</sup> but briefly, this Court, dominated as it is by political moderates, appears to be driven towards standards and balancing tests as a way to avoid often difficult and potentially unpopular decisions and to simultaneously avoid binding itself in the future or having to overrule its precedents with too great a frequency.<sup>146</sup> Of course, however, this greater freedom comes at a cost, which is a lessening of the Court’s control over lower court decision-making, an effect which is exaggerated by the Court’s inability to oversee, and seemingly complete lack of attention to, the application of its precedents by the lower courts.<sup>147</sup>

The above discussion paints a complex, if somewhat troubling picture of the Supreme Court and its relationship with the lower federal courts. On the one hand, the realities of docket growth as well as internal pressures on the Court towards doctrinal adoption of more open-textured standards, has systematically lessened the Court’s ability to control and supervise the lower federal courts. On the other hand, through such devices as the *Rodriguez de Quijas/Agostini* prohibition on “underruling,” the Court’s increasing rejection of “percolation” and shared responsibility within the judiciary for doctrinal development, and in extreme cases the sorts of chastisement on display in the Harris and Thompson executions, the Court has sought to reassert and even increase its hierarchical authority over lower courts, and to separate itself out from the rest of the judiciary as a way of concentrating power at the top. The result is a delicate balance. The questions that remain, of course, are the more normative ones of what *is* the appropriate relationship between the Supreme Court and the

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<sup>144</sup> See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004 (1987) (discussing the rise of balancing as a form of constitutional reasoning and noting that “[b]alancing has turned us away from the Constitution, supplying ‘reasonable’ policymaking in lieu of theoretical investigations of rights, principles, and structures.”); Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 963-65 (1998) (noting that balancing dominates constitutional law today and discussing the implications of balancing for individual rights); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978) (discussing the rise of balancing as a form of constitutional reasoning); see generally Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (describing how the split in the Supreme Court in the 1991 term can be explained by the split in methodologies).

<sup>145</sup> See Bhagwat, *supra* note 144 at 978-84 (offering the unique institutional nature of the Supreme Court and other aspects of the US legal culture).

<sup>146</sup> See *id.* at 981; Sullivan, *supra* note 144 at 100-02, 122.

<sup>147</sup> See Caminker, *supra* note 23 at 59 & nn. 210-11; Bhagwat, *supra* note 144 at 991-93 (noting that “the Supreme Court’s current doctrinal structure fits badly with the institutional role of the Court as a creator of rules for other courts (and non-judicial decision-makers) to follow”).

“inferior” federal courts, and what are the costs and benefits of the Court’s current attitude and approach.

### III. LEGITIMACY AND THE LIMITS OF THE “JUDICIAL POWER”

Almost half a century ago, Justice Jackson made the following comment regarding the role of the Supreme Court: “There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.”<sup>148</sup>

More recently, in *Hutto v. Davis*, the Court echoed this sentiment, but with a subtly different emphasis:

More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases “by virtue of their commissions, not their competence.” [B]ut unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.<sup>149</sup>

Both of these statements appear to reflect the same basic sentiments about the powers and limitations of the Court. But in fact, they are quite different in their tone. Underlying the oft-quoted passage from Justice Jackson, generally invoked to argue in favor of limited Supreme Court or federal jurisdiction, is a subtle assumption: that the Supreme Court when it engages in review is no different from any other court in its fundamental, institutional nature. It is supreme because it is final, but it is still a court. By the time of *Hutto v. Davis*, however, a shift in attitudes has occurred from a certain humility, rooted in a recognition of fundamental equality between courts, to a naked assertion of authority, and power, which emphasizes the *lack* of equality and congruence between the Court and all other courts. At a more fundamental, though closely related, level moreover, the excerpts from *Brown* and *Hutto* also reveal a shift in the Court’s perception of its own *role* in the judicial system. In *Brown*, Justice Jackson spoke of the Court’s power of review, and the need to exercise it with caution. In *Hutto*, the Court speaks instead of the Court’s power to establish precedents, and the absolute obligation of all federal courts, rooted in the hierarchical structure created by Article III, to follow those precedents without question. I have already discussed and criticized the Court’s view of hierarchy and Article III.<sup>150</sup> I now wish to turn to the more basic question of the Court’s view of its own fundamental role.

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<sup>148</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>149</sup> *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam).

<sup>150</sup> See *supra* notes 92-108 and accompanying text.

### A. *Legitimacy: The Court as Legislature*

The Supreme Court is different from all other federal courts, and from most state courts (though some state courts of last resort share some of the Supreme Court's special characteristics). The Court's day-to-day operations differ from those of other courts in many ways. For example, the Supreme Court's docket is today almost entirely discretionary.<sup>151</sup> In exercising that discretion, and choosing which cases to decide on the merits, the Court focuses almost exclusively on the legal issue posed by the case rather than on the details of the dispute between the litigants.<sup>152</sup> Furthermore, the Court will often delay resolving a legal issue until it has "percolated" in the lower courts, so that the Court has the benefit of multiple perspectives.<sup>153</sup>

Even after it has decided that it should resolve an issue, the Court may choose to pass up cases presenting the issue until a case with suitable facts is presented. When the Court finally grants certiorari in a case and then decides it, the Court's opinions on the merits tend to focus almost exclusively on abstract doctrinal and policy issues, with essentially no discussion of the facts and equities of the particular case in front of it. Indeed, even after it has crafted a new legal standard, the modern Court has displayed an increasing tendency to remand the case to a lower court to apply that standard, rather than to fully resolve the dispute before it as most courts would do as a matter of course.<sup>154</sup> Finally, Erwin Chemerinsky has noted a recent trend on the Court of reaching out to decide issues which were not presented in the petition for certiorari, and were not briefed or argued by the parties.<sup>155</sup> All of these are well-accepted and today largely uncontroversial aspects of the Court's decision-making process. But taken together, they emphasize just how far the functions of the modern Supreme Court have drifted from the traditional judicial role of adversarial dispute resolution, as well as the general acceptance of this fact.<sup>156</sup>

For all practical purposes, then, the modern Supreme Court does not resolve

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<sup>151</sup> See 28 U.S.C. §§1254, 1257 (1993) (providing for Supreme Court appellate review upon writ of certiorari); ROBERT STERN, ET AL., *SUPREME COURT PRACTICE* 40 (6th ed. 1996); GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 145 (3d ed. 1996) (describing the Supreme Court's discretionary jurisdiction).

<sup>152</sup> See *id.* at 145 (describing the Supreme Court's criteria for granting review).

<sup>153</sup> See *supra* note 67 and accompanying text.

<sup>154</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>155</sup> Erwin Chemerinsky, *The New Judicial Activism*, Cal. Law., Feb. 2000, at 25-26.

<sup>156</sup> Further indication of the extent to which the Court sees itself as a creator of binding rules can be found in the modern Court's attitude, discussed in Part I, towards its own precedents, and lower courts' obligations to follow them. See *supra*, Part I. As noted there, the Court's uncompromising attitude towards the binding effects of its precedents, even if their reasoning is outmoded and inconsistent with later decisions, reveals an underlying assumption that for the Court, reasons do not matter, all that matters is holdings—or put differently, all that matters is what rule the Court has adopted. See *supra*, Part I.

disputes between litigants, it does not decide cases, and it does not enforce legal rights or duties.<sup>157</sup> Instead, the Court makes rules.<sup>158</sup> That courts, and the Supreme Court in particular, make law is of course unsurprising.<sup>159</sup> What is surprising is that the Supreme Court seems to make law *in the same way* as Congress and other legislatures—by announcing abstract rules. We do not call the law made by the Court statutes, or regulations, we call them precedents and doctrine, but they are rules nonetheless. Moreover, given the scrivener's care with which the lower courts parse Supreme Court opinions in seeking to identify applicable doctrine,<sup>160</sup> there is, in truth, little meaningful difference between the effect of a congressional statute, and a new doctrinal rule adopted by the Court, from the point of view of the rest of the judicial system.<sup>161</sup> Put differently, the traditional judicial distinction between dictum and a holding seems to play an increasingly insignificant role in the Court's opinions formulating the "rule" that they create, and subsequently in lower courts' decisions analyzing and applying those rules.<sup>162</sup> This process unquestionably

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<sup>157</sup> I do not want to overstate this point. There are no doubt instances in which the Court simply chooses to decide a case, because of its importance. The Watergate tapes case, *United States v. Nixon*, 418 U.S. 683 (1974), was no doubt an example, and so probably was *Clinton v. Jones*, 520 U.S. 681 (1997). However, such cases are notable primarily for their rarity.

<sup>158</sup> In this respect, the Supreme Court more closely resembles a European-style Constitutional Court than a traditional Anglo-American court. However, the U.S. Supreme Court in fact does exist within a broader judicial system with which it shares its authority, and its decisions have the force of precedent, making abstract rulemaking much more problematic than in the European context.

<sup>159</sup> See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 69 (1921), (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)). For a detailed description, and defense, of the Court's role as a creator of doctrine, see Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 106-126, 149-152 (1997). I should add that I completely agree with the thrust of Professor Fallon's analysis in this regard; it is not that fact that the Court makes doctrine—or law—that I question, it is the way in which it does so. See *infra* notes 185-189 and accompanying text.

<sup>160</sup> See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 704-07 (9th Cir. 1999), *rev'd* 2000 U.S. App. LEXIS 18696 (9th Cir. Aug. 4, 2000) (en banc) (parsing dictum in *Employment Div. v. Smith*, 494 U.S. 872 (1990), to determine the proper scope of a "hybrid rights" exception to *Smith*).

<sup>161</sup> One difference that does exist, of course, is that the Court's decisions are not subject to presidential veto, or any other independent review, for example by the judiciary.

<sup>162</sup> For a general argument that what courts treat as "holdings" are often technically dicta, see Schauer, *supra* note 114, at 579-82 (1987) (arguing that the articulated characterization of a precedent can be considered mere dicta); cf. Dorf, *supra* note 34, at 2035-40 (arguing that Article III *requires* courts to treat the rationales offered by prior decisions as the "holding" of that decision, even if the rationale was broader than necessary). It should be noted that if the Court really did give the rationales underlying its decisions precedential force, as opposed to merely the "rules" enunciated therein, this would go a long way towards limiting the force of the rule of *Rodriguez de Quijas*, since in that situation later

began, and perhaps reached its apogee, during the Warren and early Burger Courts,<sup>163</sup> but it continues to dominate the Court's decision-making today.<sup>164</sup>

The Court's almost complete abandonment of its dispute resolution function in favor of abstract rulemaking appears to be a modern phenomenon. Of course, there have always been "great" cases best known for establishing rules rather than resolving disputes—*Marbury*<sup>165</sup> and *McCulloch*<sup>166</sup> come to mind—and no one would accuse, for example, Chief Justice Marshall of being shy about exercising the court's law- and policymaking powers.<sup>167</sup> Moreover, the evolution in the Court's role from a "court of 'law' [into] a forum for 'statesmanship'" was first observed, and lauded (because of his political hostility to the lower federal courts), by Felix Frankfurter in 1928.<sup>168</sup> However, until recently "great" cases were the exception rather than the rule. A perusal of the U.S. Reports during the first half of this century demonstrates the extent to which the Court of that time devoted its energies to resolving seemingly trivial, and certainly doctrinally insignificant disputes. The current Court will not deign to perform this task, even if it means leaving its docket half-empty.

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decisions *would* overrule previous ones with inconsistent rationales. However, as noted earlier, that is clearly not what the Court does. I am grateful to Michael Dorf for this insight.

<sup>163</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 165-65 (1973) (adopting a complex, trimester-based rule regarding regulation of abortions); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that the Fifth Amendment requires police to provide suspects in custody with specified warnings); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (establishing "actual malice" for libel actions brought by public officials).

<sup>164</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-37 (1995) (adopting "strict scrutiny" standard of review for federal affirmative action programs, with little analysis of the particular highway construction program at issue, or the consequences of the Court's new standard for that program); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (adopting "undue burden" standard for previability abortion regulations); *Employment Div. v. Smith*, 494 U.S. 872, 882-90 (1990) (reconceptualizing previous caselaw and adopting expansive new rule that *no* scrutiny is required under the Free Exercise Clause of generally applicable laws which burden religious exercise).

<sup>165</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>166</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>167</sup> See, e.g., *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (establishing that a corporate charter was a contract between the chartering state and the chartered corporation, thus implicating the Contracts Clause of the Constitution); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (adopting a broad interpretation of the "necessary and proper" clause of Article I of the Constitution); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (holding that legislative rescission of a previous land sale obtained through bribery violates the Contracts Clause of the Constitution); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (deciding that the Supreme Court has the power to void any legislative act that conflicts with the Constitution).

<sup>168</sup> Purcell, *supra* note 61, at 702 (quoting FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUSTICE SYSTEM* 290-91 (1928)).

Edward Purcell notes that well into the 20th century, litigation involving the federal government (including civil and criminal cases) constituted a very significant part of the docket of the federal judiciary, including the Supreme Court.<sup>169</sup> Moreover, the language and structure of Article III, and in particular the structure of the Supreme Court's original jurisdiction, suggest that at the time of the framing the Court's primary significance was viewed in terms of dispute resolution, albeit the resolution of *important* disputes. Thus, Article III grants the Court original jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."<sup>170</sup> These are not cases which are particularly likely to involve difficult *legal* issues. Rather, they are cases where the facts and a proper resolution of the dispute itself has potential national significance.<sup>171</sup>

To some extent, it is to be expected, and indeed perhaps inevitable that the modern Court's role has shifted so strongly towards rulemaking away from dispute resolution. The enormous growth during this century in the size of the federal judiciary, and of the docket of the lower federal courts,<sup>172</sup> has made it essentially impossible for the Court to engage in meaningful "error correction," which is to say taking and resolving cases merely because the lower court got it wrong.<sup>173</sup> Thus, the notion of the Supreme Court as a court of ultimate appeal, available to vindicate rights improperly denied below, is necessarily dead.<sup>174</sup> However, the growth of the federal docket does not necessarily preclude the Court from focusing on dispute resolution by devoting its resources to correction of gross errors, as well as resolving *important* cases or cases in areas which the Court feels are particularly sensitive (as the language

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<sup>169</sup> See *id.* at 691.

<sup>170</sup> U.S. CONST., art. III, § 2.

<sup>171</sup> For a similar argument, see William S. Dodge, *supra* note 100, at 1024-29 (proposing that Article III's original jurisdiction clause is explained by the sensitivity of the cases as well as the dignity of the parties involved); see also Purcell, *supra* note 61, at 692 n.42 (diversity and alienage jurisdiction of the lower federal courts were considered "critical 'national'" matters during early Republic).

<sup>172</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 391, Table A.2 (1996).

<sup>173</sup> See Purcell, *supra* note 61, at 722 (suggesting that over 95% of decisions by the court of appeals are final). For an argument that this is appropriate, and indeed that appellate courts generally should not seek to "do justice" as between individual litigants, see Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 250-56 (1991) (arguing that notions of efficiency, credibility, and deference counsel in favor of limited appellate review).

<sup>174</sup> Though perhaps not in the popular imagination—consider the still-common use of the phrase "all the way to the Supreme Court." See, e.g., United Press International, *Teacher's Free Services Opposed* (Williamstown, VT Nov. 22, 1999); Ray Tessler, *Businessman Warms to His War on Smoking Ban*, L.A. TIMES Nov. 24, 1998, at B1 (reporting that citizens were prepared to fight the city's anti-smoking laws "all the way to the Supreme Court").



of Article III suggests was originally envisioned). Indeed, in one area—enforcement of the death penalty—this is apparently exactly what the Court does.<sup>175</sup> Thus, the explosion of the federal docket alone cannot explain the Court's shift away from a dispute resolution function.

A better explanation for the evolution of the Court's role might be found in the twin concepts of guidance and uniformity. As the federal judiciary's size and docket have grown, so inevitably has the incidence of disagreement and doctrinal diversion among the courts of appeals. Furthermore, as the number of federal statutes, regulations, and agencies has exploded, so has the sheer number of different types of issues that federal courts must resolve. As a result, assuming that it is desirable for the Supreme Court to provide guidance to the lower courts on how to address these issues, and to try to maintain uniformity of federal law by minimizing the extent of disagreement among the courts of appeals, it seems inevitable that the Supreme Court today will end up spending much of its time setting forth rules, and resolving legal disputes between the lower courts, rather than deciding concrete cases. The values of uniformity, however, strike me as often being overstated. After all, on issues governed by *state* law we tolerate substantial disuniformity as a product of our federal system, with 50 different state supreme courts creating 50 often inconsistent and certainly unreconciled sets of rules (albeit this disuniformity is not over interpretation of the same statutory or constitutional language—though from the point of view of private citizens why that should matter is less clear). And yet the Republic has not fallen. In contrast, there are after all only twelve regional courts of appeals, and furthermore the extent of disagreement between them seems likely to be less serious than among 50 quite heterogeneous state court systems.<sup>176</sup> I do not want to overstate this point—the desire for guidance and uniformity certainly provides a partial justification for the Court's strong move towards a primarily rulemaking role. But it is hard to believe that it is a complete justification.<sup>177</sup>

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<sup>175</sup> See, e.g., *Strickler v. Greene*, 527 U.S. 263, 263-64 (1999) (affirming petitioner's capital sentence and rejecting his habeas corpus petition based on ineffective assistance of counsel); *Lilly v. Virginia*, 527 U.S. 116, 116-17 (1999) (reversing and remanding petitioner's capital punishment sentence based on a violation of the Sixth Amendment); *Calderon v. Thompson*, 523 U.S. 538, 566 (1998) (holding that the court of appeals committed a grave abuse of discretion in recalling its mandate denying all of petitioner's habeas relief); *O'Dell v. Netherland*, 521 U.S. 151, 151-52 (1997) (refusing to apply retroactively a new rule of law that would disturb petitioner's death penalty and entitle him to resentencing); *Sochor v. Florida*, 504 U.S. 527, 540-41 (1992) (vacating and remanding a death sentence).

<sup>176</sup> Though, of course, state courts also resolve federal issues, thereby increasing the opportunity for disuniformity. However, outside of the area of criminal procedure, most important federal issues do seem to make their way into federal court.

<sup>177</sup> For a similar argument, see *Dorf*, *supra* note 67, at 65-67 (discussing the role that the Supreme Court assumes in assuring the uniformity of federal law and noting the benefit of temporary disuniformity as a way for the Court to obtain knowledge).

At bottom, therefore, it is hard not to conclude that at least part of what has happened in the Supreme Court is a simple power grab. Dispute resolution is boring, compared to rulemaking, and it is certainly a far slower and less effective way of projecting power.<sup>178</sup> After all, resolving a dispute changes the lives only of the parties before a court, and announcing a narrow holding may affect relatively few people. In contrast, adopting a broad new rule can change the lives of thousands or millions. The question that arises, then, is whether we should consider this to be problematic. The answer, I think, is “yes,” though a qualified yes. After all, as noted above, the Court is a governmental institution and therefore can be expected to seek to maximize its own power, as rulemaking enables it to do.<sup>179</sup> The problem is, the power that the Court exercises today is not the *type* of power which was confided to it by the Constitution. Article III of the Constitution grants to the Supreme Court (and the inferior federal courts) the “judicial power of the United States.” As the Court itself has noted, the essence of the judicial power is that of resolving concrete disputes between individuals, or put differently, “[t]he province of the court is, solely, to decide on the rights of individuals.”<sup>180</sup> Many scholars have agreed, emphasizing that the fundamental role of courts, as understood traditionally and even today, is to resolve a particular dispute and to grant a judgment, not to pronounce law.<sup>181</sup>

Moreover, this distinction makes a lot of sense. Courts are not particularly good at formulating broad rules. Not only do they lack a democratic pedigree, but more importantly, they lack the institutional capacity to collect data regarding or otherwise assess the need for, and likely impact of, any particular

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<sup>178</sup> *But see* Lee, *supra* note 173, at 250-56 (defending a primarily law-developing function for appellate courts).

<sup>179</sup> *See supra* notes 59-60 and accompanying text.

<sup>180</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992), (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); *see also* Allen v. Wright, 468 U.S. 737, 750-52 (1984) (discussing how the judicial power extends only to cases and controversies); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (arguing that the judicial function is limited to deciding cases between individuals); *but see* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 277-79 (1990) (positing other primary judicial functions, such as checking the political branches); Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979) (defining function of judiciary as “to give concrete meaning and application to our constitutional values”).

<sup>181</sup> *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126-27 (1999) (advocating the role of the courts to decide cases and controversies rather than pronouncing the law); Michael Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 186-87 (Laurance Goldstein ed. 1987); *cf.* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44 (1993) (arguing that from the perspective of the Executive Branch, judicial opinions should be understood simply as explanations for judgments, not as sources of binding law).

rule.<sup>182</sup> The doctrine of *stare decisis* also makes judicial rulemaking more dangerous than legislative rulemaking since future courts will feel obliged to adhere to it even though they are in no worse, and probably a better position to choose a rule, thereby imparting to judicially-adopted rules a life of their own. Legislatures in contrast feel no such compunction.<sup>183</sup> These institutional weaknesses of the Court are very much on display in several arenas into which the modern Court has chosen to enter with broad pronouncements, including the abortion debate and the Court's recent attacks on affirmative action. I have no intention here of stepping into the endless, and ultimately fruitless debate over the propriety of the Court engaging in "policymaking" and entering into the great moral debates of our time. It seems to me that such entry is inevitable, especially given the repeated failure of the political branches to deal adequately with those issues. What the above discussion does suggest, however, is that, for institutional reasons, it matters *how* the Court enters into these debates—a point which mirrors recent arguments made by Cass Sunstein in favor of a "minimalist" judicial approach to decision-making.<sup>184</sup>

It should be emphasized that I am not advocating a retreat from judicial rulemaking, or the use of clear, doctrinal standards.<sup>185</sup> Indeed, I have argued extensively elsewhere that clear, doctrinal rules have a great deal of value, and that one of the unfortunate trends of the modern Court has been a retreat from clear rules in constitutional law, towards standards and balancing tests.<sup>186</sup> Mine is a narrower point, directed at the *process* through which courts formulate such doctrinal rules. Courts are generally better at formulating

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<sup>182</sup> See *infra* notes 206-209 and accompanying text. Judge Posner has put it thus: "it is a disservice to courts, as well as a common source of erroneous predictions concerning the scope and direction of the law, to treat a judicial opinion as if it were a statute, every clause of which was Law. It is difficult to write a judicial opinion without making some general statements by way of background and explanation. But in a system of case law such statements can be misleading if carelessly lifted from the case-specific contexts in which they were originally uttered." *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 866 (7th Cir. 1999).

<sup>183</sup> See Dorf, *supra* note 38 (arguing that statutes are the product of majoritarian compromises that can be altered at any time).

<sup>184</sup> See, e.g., CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259-60 (1999) (defining minimalism as "an effort to limit the width and depth of judicial decisions"); Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case*, Occasional Papers from The Law School, The University of Chicago No. 37 1996, at 3 (proposing that courts "decide cases rather than set down broad rules"); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 32-33 (1996) (advocating a minimalist approach, especially in highly contentious areas that have receive a lot of democratic attention).

<sup>185</sup> Cf. Fallon, *supra* note 159, at 106-126 (outlining the importance of doctrine in the Supreme Court).

<sup>186</sup> See Bhagwat, *supra* note 144, at 989-1005 (1998) (criticizing balancing methodologies for their lack of predictability).

doctrinal rules over time, through the device of resolving disputed cases, since such a process gives them access to more empirical data, as well as the insights of a greater number of decision-makers and perspectives, spread over a longer time period. In other words, it is not the fact of rulemaking itself by the Court which is problematic, it is the abrupt declaration of broad, forward-looking rules by a Court which has essentially no awareness of how those rules will play out in practice.

The process of decision-making I advocate here for the Court is one of *incremental* rulemaking, through case-by-case formulation of narrow rules necessary to resolve particular disputes rather than through broad legislation. This type of process has strong roots in the common law tradition, and best utilizes the institutional strengths of the judiciary.<sup>187</sup> The methodology through which the Court formulates those rules, whether through so-called “definitional balancing,” or through a more interpretational process, is less relevant to the concerns expressed here.<sup>188</sup> The common-law process of lawmaking, however, has costs, most obviously in terms of delay and legal uncertainty during the period in which clear rules are being formulated—though so long as the end result of the rulemaking process is a body of relatively clear rules, the uncertainty need not be permanent. However, the costs imposed by this temporary uncertainty in legal standards must be balanced against the error costs associated with the creation of broad, forward-looking rules as the modern Court is inclined to do. If the observations made in this paper are correct, there is reason to think that the latter costs are extremely significant. Furthermore, since the modern Court’s broad decisions tend to come in the guise of flexible “standards,”<sup>189</sup> the actual amount of certainty that these rulings provide is quite limited. Thus, on the whole, the error costs created by bad rules seem greater than the costs of delay and temporary uncertainty.

To reiterate, all courts make doctrine, and so all courts legitimately make rules, including federal courts in exercising their Article III authority. Furthermore, in so doing all courts also make policy choices. It is the way in which the modern Supreme Court has chosen to exercise its undisputed rulemaking function that raises issues of legitimacy. Traditionally, the Court’s exercise of its law-declaring and policymaking powers was closely tied to its dispute resolution function, in all but the most unusual cases. Today, that link has been largely dissolved, due to the Court’s abandonment of dispute resolution as a significant part of its activities.

One consequence of the above-described evolution in the Supreme Court’s decision-making is a sharp contrast, decreed by the Court itself, between the way in which it exercises the judicial power of the United States, and the way in which all other courts do it. For a stark example, consider again *Agostini v.*

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<sup>187</sup> See discussion *infra* Part III.B.

<sup>188</sup> See Bhagwat, *supra* note 144, at 972-75 & n.53 (discussing how the Supreme Court applies strict scrutiny review).

<sup>189</sup> See *supra* note 144-147 and accompanying text.

*Felton*,<sup>190</sup> in which the Court permitted a party to attack, and ultimately have overruled, one of the Court's own longstanding precedents through the device of a motion for relief from a prospective judgment pursuant to Federal Rule of Civil Procedure 60(b)(5). In order to grant such relief the Court was required to hold that by the time the motion had been brought, the substantive "Establishment Clause law [which had lead to the Court's original *Aguilar* decision had] 'significant[ly] change[d]' since we decided *Aguilar*."<sup>191</sup> Nonetheless, the Court also indicated, confirming its *Rodriguez de Quijas* doctrine,<sup>192</sup> that the lower courts should *not* have granted the Rule 60(b)(5) motion, because they are obliged to follow even an undermined decision of the Court such as *Aguilar*.<sup>193</sup> This leads to a very peculiar conclusion: that the "law" in effect at the time the motion was brought was *different* for the Supreme Court and for all other courts,<sup>194</sup> because the effect of precedent varied in the Supreme Court as opposed to other courts. If the reasoning and underpinnings of the precedent had been weakened, the precedent was no longer valid in the Court itself, but it retained its validity for the rest of the judiciary.<sup>195</sup> The effectiveness and constraining power of precedent, however, is closely tied up with the nature of the "judicial power" granted by Article III.<sup>196</sup> Thus, for precedent to operate differently in two different courts, it must

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<sup>190</sup> 521 U.S. 203, 209 (1997) (ordering relief under Rule 60(b)(5)).

<sup>191</sup> 521 U.S. at 237 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)).

<sup>192</sup> See *supra*, Part I.

<sup>193</sup> See *Agostini*, 521 U.S. at 237 ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

<sup>194</sup> See *Baxter*, *supra* note 22, at 438 ("Although from the point of view of the Supreme Court, the 'current law' announced in *Zobrest* was in place from June 1993 on, it was in place only for the Supreme Court's consideration.").

<sup>195</sup> The two definitions of precedential force adopted by the Court in *Agostini* parallel the modern debate over whether the effect of precedent is best understood as based on a "result" model or a "rule" model. See *Alexander*, *supra* note 116, at 5 (describing the models for reading precedents); *Caminker*, *supra* note 23, at 14 & n.52 (discussing the binding effect of precedent); *Schauer*, *supra* note 114, at 579-82 (commenting on the different ways to treat precedent). Oddly enough, however, in *Agostini* the Court appears to have split the baby, adopting the narrow result-based model for itself, but imposing a rule-based model for lower courts.

<sup>196</sup> See *Anastasoff v. U.S.*, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000) at \*18 ("We conclude therefore that, as the Framers intended, the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III."); THE FEDERALIST NO. 78 at 471 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."); *Dorf*, *supra* note 34, at 2068 (1994) (discussing the limits that Article III imposes on Congress' ability to pass statutes regulating the Court's use of precedent); *but see* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L. J. 1535, 1543-44 (2000) (arguing that

be that the judicial power differs in its nature in those courts. In particular, the Court's analysis in *Agostini* reveals that when it exercises the judicial power, the Court believes it is making rules which bind lower courts regardless of their underlying reasoning or other traditional judicial concerns. As noted above, this is a peculiarly legislative type of authority.<sup>197</sup> On the other hand, within the Court itself its precedents are treated in a more traditional manner, so that doctrinal coherence and consistency retain significance. And, presumably the Court continues to believe that the lower courts should treat the precedents established by all other federal courts in this way as well. *Vis-a-vis* lower courts, then, the precedents of the Supreme Court bind like statutes. *Vis-a-vis* itself, however, and among the lower courts themselves precedents retain their traditional, malleable form.

Thus, the modern Supreme Court has bifurcated the "judicial power" of the United States into two different powers: the traditional dispute-resolving, precedent-making power wielded by the "inferior" federal courts; and the power to establish abstract rules, disconnected from legal reasoning or the facts of individual cases, wielded by the Supreme Court. For reasons I have already touched upon,<sup>198</sup> this bifurcation raises serious concerns about the continued legitimacy of the Court as a governmental institution; the modern Court's functions have taken the Court far—perhaps too far—from the source of its authority, which is the dispute resolution power granted in Article III. Moreover, there seems to be no constitutional justification for the division created by the Court. The judicial power of the United States, as described in Article III, is unitary. There is no suggestion of two different types of power, one for the Supreme Court and one for everyone else.<sup>199</sup>

There are thus good reasons to be concerned about the role the modern Court has chosen for itself. I freely concede, however, that the legitimacy

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*stare decisis* is a rule of policy only, without constitutional statute, and therefore may be abrogated by Congress).

<sup>197</sup> See *supra* notes 33-38 accompanying text; see also Wechsler, *supra* note 33, at 15-16 ("No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action."). The Court's command to the lower courts to obey the holdings rather than the reasoning of the Court's opinions is analogous to the Court's own approach towards legislative history—that it is perhaps relevant to understanding the meaning of an ambiguous statutory command, but can in no way trump or affect the validity of a statute.

<sup>198</sup> See *supra* Part I.

<sup>199</sup> The only textual hint of such a division is the denomination of one court as "supreme" and all others as "inferior." But for reasons I note above, *supra* at note 102, the supreme/inferior terminology cannot carry that much weight. Professors Alexander and Schauer come close to defending such a position based on the "settlement function" of law, but their emphasis is on judicial supremacy *vis a vis* the other branches of government, not on relationships within the judiciary. See Alexander & Schauer, *supra* note 41, at 1387 & n.105 (suggesting that their argument is consistent with calls for lower court deference to the constitutional views of the Supreme Court).

argument I make here is controversial and far from decisive. Many would argue that rulemaking is an inevitable aspect of lawmaking, including judicial lawmaking, and indeed should be embraced rather than feared.<sup>200</sup> And perhaps the relatively greater rulemaking component of the Supreme Court's decision-making can be justified simply by its position at the apex of an increasingly large and diverse judicial structure.<sup>201</sup> I would like, therefore, to move beyond the broad, theoretical objections to the Court's current role, and for the rest of this paper consider instead some more practical consequences of the modern Court's role as an almost exclusively rulemaking institution.

### B. *Isolation: The Court and the Common Law Process*

In its cases discussing the Article III requirement of "standing" for litigants in federal court, the Supreme Court has set forth the various institutional purposes served by the standing doctrine. In addition to the broad goal of restricting the federal courts to their basic purpose of protecting "the rights of individuals,"<sup>202</sup> the doctrine also ensures that courts exercise their powers and establish rules of law in contexts in which they are best suited to do so, which is to say, "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. [In addition, because standing] assures an actual factual setting . . . , a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court."<sup>203</sup> In essence, in these cases the Court is equating the benefits of the standing requirement with the traditionally understood strengths of the common law process—the ability of courts to focus on the concrete rather than the abstract in resolving individual cases, and to treat the rules that emerge from such cases not "as final truths, but as working hypotheses, continually retested in those great laboratories of the law,"<sup>204</sup> and modified freely over time as new facts emerge or society changes. This contrasts with the legislative arena, where rules are formulated without the

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<sup>200</sup> See, e.g., Alexander, *supra* note 116, at 50 (1989) (calling for "binding rules that are 'legislated' by courts in the gaps left by legislatures"); Alexander & Schauer, *supra* note 41, at 1372-73; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1456 (1995) (suggesting that judicial opinions should play a role similar to statutes).

<sup>201</sup> But cf. *supra* notes 197-198 and accompanying text (arguing against such an understanding of Article III).

<sup>202</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); see also *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (describing how "[t]he irreplaceable value of [Article III power] . . . lies in the protection it has afforded to constitutional rights and liberties of individual citizens").

<sup>203</sup> *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982).

<sup>204</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921) (quoting MUNROE SMITH, *JURISPRUDENCE* 21 (1909)).

benefit of such concrete examples or experience over time, and where modification of rules is difficult, so that in evaluating the wisdom and impact of proposed rules decision-makers must rely on the relative institutional advantages of legislatures: their greater empirical fact-finding capacity, and their democratic pedigree permitting the exercise of political judgment.<sup>205</sup>

Seen in this light, the *practical* problems with the Supreme Court's current institutional role become clear. By focusing on rulemaking rather than dispute resolution, and requiring lower courts to treat its doctrinal formulations as inviolable rules, the equivalent of statutes, the Court has essentially given up the comparative advantages enjoyed by the judiciary. In particular, the fact-based focus of most judicial decision-making is largely absent in the Supreme Court, where for most justices in most cases the facts are simply irrelevant—the rule that emerges is the thing that matters. Moreover, because of the limited size of its docket and the huge number of difficult legal issues circulating in the federal courts at any time, the Court is able to visit particular legal areas extremely infrequently, or perhaps only once. As a result, the Court does not have the benefit of seeing an area of law evolve over time, and being able to evaluate the impact of its rules over a range of cases. Instead, like a legislature, the Court is forced to simply formulate a rule without any first-hand understanding of the rule's practical consequences, and then count on the implementers of the rule (*i.e.*, the lower courts) to work out the problems.

All of that might be fine, except of course that the Court also lacks the institutional advantages of legislative bodies. It completely lacks the vast administrative apparatus that Congress and the Executive Branch bring to the lawmaking process, and also lacks the ability to hold extended fact-finding hearings.<sup>206</sup> Thus, it is not able to substitute *ex ante* empiricism for the ongoing evaluative process that is the traditional strength of courts. Of course, severe questions might be, and have been, raised about the fact-finding competence of the legislative and executive branches as well.<sup>207</sup> More importantly, however, the Court also lacks the democratic legitimacy enjoyed by the political branches, which is essential to be able make the forthright

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<sup>205</sup> Rulemaking by administrative agencies probably falls somewhere between the archetypal “judicial” and “legislative” models—more flexible and grounded in the concrete than legislatures, but more abstract, empirical and political than the judiciary.

<sup>206</sup> For a discussion of the limits on the Court's ability to gather empirical data, see Dorf, *supra* note 67, at 53-60 (discussing the Court's lack of expert staff to assist its decision-making process). It is true that the explosion of *amicus* briefs filed in the Court in recent years somewhat mitigates the Court's institutional weaknesses. However, the biased, often sloppy submissions of lawyers writing such briefs are in no way a substitute for a careful fact-finding process controlled by the decision-making body itself. For a discussion of the impact of *amicus* briefs on Supreme Court decision-making, see Kearney and Merrill, *supra* note 72.

<sup>207</sup> See DAVID FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW chs. 5, 6 (1999) (discussing the use of scientific data in the legislative process).



political judgments that can often substitute for empirical knowledge.<sup>208</sup> Which is not to say, of course, that the Court does not make such judgments, but it makes them surreptitiously and without accountability. Ultimately, this combination of factors leaves the Court in a kind of institutional limbo, having cast off the traditional strengths of the judiciary, but unable to replace them with the strengths of the legislature. Instead, in recognition of its institutional weaknesses the modern Court has taken to substituting (or hiding behind) abstract theoretical approaches such as originalism, textualism, or political constructs such as the “accountability” rationale offered for the *Chevron* doctrine of deference to administrative interpretations of statutes.<sup>209</sup> Such approaches in no way correspond to the institutional strengths of the judiciary, but they provide a shield behind which to hide the problematic nature of the modern Court’s enterprise.

To some extent, the dilemma faced by the Court is unsolvable. Absent some institutional help—such as the much-mooted “National Court of Appeals”<sup>210</sup>—the Court’s ability to revisit legal areas with any frequency is inherently limited by realities. Furthermore, the needs for uniformity, coordination, and

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<sup>208</sup> Cf. Walter Dellinger and H. Jefferson Powell, *Marshall’s Questions*, 2 GREEN BAG 2d 367, 376 (1999) (setting forth Chief Justice Marshall’s views that certain kinds of constitutional issues should be left to the political branches because their resolution requires “the political capacity to make judgments of prudence and policy”).

<sup>209</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 864-66 (1984) (explaining judicial review of agency rulings as a two-question process: 1) whether Congress spoke directly to the precise question at issue; if so, the court must apply Congress’ intent; and 2) if the statute is ambiguous, is the agency’s answer based on a permissible construction of the statute); *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 645 (D.C. Cir. 1998) (explaining that “[i]t is precisely in answering questions of this sort that the expertise and political accountability of administrative agencies command judicial deference.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 628-29 (1996) (offering an accountability justification for *Chevron*); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308-12 (1986) (discussing how *Chevron* shifts policy-making responsibility from courts to “democratically accountable officials” in agencies); cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514-16 (1989) (rejecting “separation of powers” justification for *Chevron* doctrine).

<sup>210</sup> See, e.g., William H. Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313, 1314 (1974) (discussing the proposal for the creation of a National Court of Appeals); U.S. Comm’n on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* (1975), reprinted in 67 F.R.D. 195, 199-204 (1975) (summarizing the recommendations for a National Court of Appeals); James Duke Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal For a National Court of Appeals—a State Judge’s Solution to a Continuing Problem*, 1981 BYU L. REV. 545, 558-560 (discussing the relationship between state court decisions and federal review, and the proposal for a National Court of Appeals).

final resolutions of issues<sup>211</sup> make it inevitable that a large part of the Court's business will consist of resolving doctrinal conflicts and formulating rules for other courts to follow. In other words, the Court's role today is necessarily somewhat "legislative," and so necessarily stretches the limits of its institutional competence. Improved fact-finding would help some, but—Brandeis notwithstanding—there is simply no way for the Court or litigants to duplicate the fact-finding abilities of the executive and legislative branches. Moreover, the biggest barrier the Court faces here, its lack of democratic accountability, is inherent in its nature, and indeed is in some contexts its greatest strength.

So what is to be done? Perhaps nothing. No governmental institution is perfect, and the flaws in the Court's decision-making process, while important to identify and acknowledge, may be something we must live with, just as we live with the flaws of the legislative and executive branches (flaws which have been on spectacular display in recent years). However, identifying the sources of the problems the modern Court faces does suggest some incremental steps that might alleviate them.

Most notably, one of the gravest institutional problems the Court faces is its splendid isolation from facts, and from the practical experience gained by observing the legal system in action on a day to day basis. There is, however, an obvious place for the Court to look to reduce its isolation: the lower federal courts. Those courts, which share many of the institutional strengths of the Court, such as life tenure and a careful (albeit not as careful) selection process, are in the thick of the administration of justice, rather than situated in a temple on Capitol Hill. The Court could access a great deal of knowledge simply by paying more, and more systematic, attention to those courts' attempts to implement the doctrines promulgated by the Supreme Court. This, of course, would require the Court to take the theory of "percolation" seriously, not merely as an excuse for avoiding decision, but as a source of ideas and practical experience. Relatedly, the Court might take a more generous view of lower courts who in light of experience experiment with, or even deviate from, the Court's apparent preferences and doctrinal formulations. Of course, for this kind of interaction to succeed, the lower courts must themselves be willing to engage in independent and sometimes aggressive reasoning. Unfortunately, as recent, self-abnegating remarks made by lower court judges suggest,<sup>212</sup> such willingness is often lacking. Moreover, there is now a long tradition in the legal community, again dating back to Felix Frankfurter, of denigrating the significance and independence of lower federal courts, and instead portraying them as mere "intake" points for the Supreme Court.<sup>213</sup> The docility of the

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<sup>211</sup> See generally Alexander & Schauer, *supra* note 41, at 1373-1381 (discussing the need in our political and legal systems for uniformity, coordination, and finality of decisions).

<sup>212</sup> See *supra* notes 84-91 and accompanying text.

<sup>213</sup> See Purcell, *supra* note 61, at 688 (noting that "[a]lthough Frankfurter's work illuminated the history of the lower federal courts, it also constrained and warped that

lower courts should not, however, be overstated. Over the years, the lower courts have displayed their independence often, both in creative decision-making and occasionally in a willingness to flout the Supreme Court.<sup>214</sup> Moreover, there exists an enormous wealth of talent in the lower federal courts, particularly in the Courts of Appeals; the Supreme Court's decision making would benefit from taking advantage that talent. If a system of independent, and aggressive lower courts could be created, it would reintroduce some of the strengths of the common law process, including notably the *evolutionary* nature of the common law, into the Court's formulation of legal rules.

Two examples of the adventurous decision-making by the lower federal courts that I advocate are *Wittmer v. Peters*,<sup>215</sup> where the Seventh Circuit, in an opinion by Judge Posner, upheld a race-conscious hiring program in a state penal program even under the highest, "strict" standard of scrutiny mandated by the Court for all race-conscious government actions; and *Hunter v. Regents of the University of California*,<sup>216</sup> where a divided Ninth Circuit panel upheld under strict scrutiny a race-conscious admission program at a "laboratory" elementary school run by U.C.L.A. The *Wittmer* and *Hunter* decisions are in clear tension with the Supreme Court's recent hostility to affirmative action programs, and in particular with the strong hints offered by several justices that *only* remedial purposes can justify race-based government actions.<sup>217</sup> Nonetheless, neither decision explicitly defies the Court, or violates any clearly established precedent—whether precedent is defined narrowly as only a specific factual result, or more broadly to include the reasoning used to reach that result.<sup>218</sup> They merely reveal a willingness to explore and push the law in new directions, where the Court, though clearly not advocating those paths, has not yet cut them off.<sup>219</sup>

The majority and dissenting opinions in *Hunter* present an especially fascinating picture of the two extremes of possible lower court decision-

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history").

<sup>214</sup> See *id.* at 720-21 (explaining that "[r]ecent work . . . has exploded the idea that the lower federal courts are mechanical cogs in a hierarchical system, and it has broken the automatic linkage between the rulings of the lower courts and the formal authority of the Supreme Court").

<sup>215</sup> 87 F.3d 916 (7th Cir. 1996), *cert. denied* 519 U.S. 1111 (1997).

<sup>216</sup> 190 F.3d 1061 (9th Cir. 1999), *petition for cert. filed* (U.S. July 18, 2000) (No. 00-135).

<sup>217</sup> See *supra* notes 129-130 and accompanying text.

<sup>218</sup> See Dorf, *supra* note 34 at 2008-09, 2029-40 (1994) (discussing the difference in the breadth of holdings depending on the understanding and definition of "dictum").

<sup>219</sup> For an old example of such adventurousness, see *Committee for Industrial Organization v. Hague*, 25 F. Supp. 127, 146 (D.N.J. 1938), *aff'd* 101 F.2d 774 (3rd Cir. 1939), *aff'd* 307 U.S. 496 (1939) (holding, contrary to longstanding Supreme Court precedent, that the First Amendment constrained state power to regulate speech in public places).

making styles. The majority opinion, by Judge Pregerson, acknowledges the argument that *only* remedial interests can justify race-based official actions, but rejects that position by simply pointing out that “the Supreme Court has never held that only a state’s interest in remedial action can meet strict scrutiny.”<sup>220</sup> Judge Pregerson then proceeds to simply decide what sorts of interests *can* be compelling. The dissenting opinion by Judge Beezer, on the other hand, seeks to assess the propriety of non-remedial compelling interests by cobbling together quotes from various dissenting, plurality, and separate opinions from the Court, in an effort to divine the Court’s will on this question.<sup>221</sup> *Independent* judgment and reasoning is simply missing from the dissenting opinion, and apparently is viewed by the author as inappropriate. As a result, while the Supreme Court might learn something about the practicalities of equal protection jurisprudence from the majority opinions in *Wittmer* and *Hunter*, there is little it could learn from the *Hunter* dissent.

Of course, permitting experimentation by lower courts entails a cost in terms of loss of centralized control by the Court, especially given the Court’s limited ability to oversee lower court decisions for error. However, in the American political tradition centralization has never been seen as a strength for its own sake, and certainly in the *judicial* context its advantages are far from apparent. And, contrary to the Court in *Hutto v. Davis*, I doubt very much that granting the lower courts a greater modicum of authority would cause “anarchy to prevail within the federal judicial system.”<sup>222</sup> What would be lost is some uniformity, which as I have already discussed seems a rather modest cost. There is also a danger of enabling “rogue” judges to flout well-established rules; the example of Southern federal judges who abused the “all deliberate speed” standard of *Brown II*<sup>223</sup> to delay desegregation of public schools immediately comes to mind. Ultimately, however, the Court did decree an end to “all deliberate speed,” and Southern public schools were integrated;<sup>224</sup> and the delay that did occur is perhaps attributable as much to excess caution on the part of the Court (not to mention the political branches) as to the inherent effectiveness of the lower federal judiciary’s revolt against *Brown*. Furthermore, the saga of *Brown* and desegregation must be understood as the exceptional rather than the usual case. In almost all instances, it is reasonable

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<sup>220</sup> *Hunter*, 190 F.3d at 1064 n.6.

<sup>221</sup> *See id.* at 1070-76 (Beezer, J. dissenting).

<sup>222</sup> *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam).

<sup>223</sup> *Brown v. Board of Ed. of Topeka*, 349 U.S. 294 (1955).

<sup>224</sup> *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (authorizing forced busing to eliminate all vestiges of race-based segregation from public schools); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968) (banning a “freedom-of-choice” plan that was perpetuating segregation); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964) (striking down racially motivated public school closings); *Goss v. Board of Educ. of Knoxville*, 373 U.S. 683 (1963) (refusing to uphold a race-based transfer program because it would perpetuate segregation).

to expect that the appeals process and the multi-judge nature of appellate panels, as well as the possibilities of en banc and eventually Supreme Court review, are likely to provide effective checks against rogue behavior.

More significantly, greater lower court freedom would weaken the “settlement function” of Supreme Court decisions, recently extolled by Professors Alexander and Schauer.<sup>225</sup> More power to experiment with, and deviate from, the Court’s decisions would result in less settlement of legal issues.<sup>226</sup> The common law process does not, however, permit great leaps or repudiations of precedent, and certainly even a more generous approach to lower court independence would not permit lower courts to simply abandon the major principles established by the Court’s decisions. Just as a “common law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court,”<sup>227</sup> so a lower court could not refuse to follow the fundamental holdings of *Roe v. Wade*, *Hans v. Louisiana*, or the Court’s Establishment Clause decisions.<sup>228</sup> The values advanced by judicial creativity and independence must be balanced against the costs imposed by legal uncertainty and instability, and the common law system through its strong system of *stare decisis* draws this balance heavily in favor of stability. The costs of permitting greater lower court experimentation thus should not be overstated. But some costs are inevitable.

### C. Checks and Balances: Limiting the Judicial Power

There is another, more subtle benefit to the Court adopting a more collaborative strategy vis a vis the lower federal courts—a benefit which would accrue not to the Court itself, but to the polity more generally. This is because in addition to assisting the Supreme Court in its lawmaking function, a more

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<sup>225</sup> Alexander & Schauer, *supra* note 41, at 1371 (explaining that the Supreme Court performs an important coordination function by settling what the law dictates).

<sup>226</sup> An example of an adventurous lower court decision unsettling well-established precedent is the Fourth Circuit’s recent decisions in *United States v. Dickerson*, 166 F.3d 667, 692 (4th Cir. 1999), *rev’d* 120 S. Ct. 2326 (2000), where the court held, departing from 30 years of caselaw at all levels of the federal judiciary as well as the expressed wishes of the Department of Justice, that a federal statute, 18 U.S.C. §3501, overruled the Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the Supreme Court overruled the Fourth Circuit, demonstrating that the Court remains quite capable of responding to major deviations from settled law.

<sup>227</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 69 (1921) (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)).

<sup>228</sup> *Cf. Jaffree v. Board of Sch. Comm’rs of Mobile County*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983), *aff’d in part and rev’d sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *cert. denied* 446 U.S. 926 (1984), *aff’d* 472 U.S. 38 (1985) (asserting, contrary to well-established Supreme Court precedent, that “[b]ecause the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional”).

independent and assertive lower federal judiciary might also play another role: to check the power of the Court in its exercise of that function.

There is a substantial need under modern conditions for some sort of checking mechanism against the power of the Court. The Supreme Court is at the head of one of the three co-equal branches of the federal government. As such, the Court exercises one of the three powers of government, the judicial power, and in the twentieth century that power has become one of enormous practical importance—far more so than the framers of the Constitution could ever have envisioned. The Court is also able to wield that power with great effectiveness. Though it is a multimember body, the Court is nowhere near as unwieldy as Congress, with its 535 members; and this smaller size permits the Court a capacity for forthrightness that is missing in the legislative branch. The judicial power is thus more akin, under modern circumstances, to the executive power, both because it is exercised by a small group that is able to act with decisiveness when needed, and because it is wielded through commands issued to others—though the courts, unlike the President, are entirely dependent on others' willingness to obey to be effective.<sup>229</sup> As a consequence, the Court shares many of the institutional features which have permitted the Executive Branch to so enhance its power during the 20th century.

What is distinctive about the Court is the complete absence of any effective inter-branch checks and balances against its authority in the constitutional system as it is currently implemented.<sup>230</sup> The other branches are checked in obvious ways. The President is constantly subject to congressional oversight, spending restrictions, legislative interference, and ultimately the ballot. Congress is subject to even greater electoral oversight, and it is also subject to a presidential veto and to the President's unwillingness to enforce the laws it passes. And, of course, both branches are subject to judicial review by the Court, which in recent years has turned out to be of substantial practical importance.<sup>231</sup>

However, there are no such *effective* checks against the Court. The only direct influence the President has over the Court is in his appointment function, but the effect of that influence wanes quickly, as intended, because of the

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<sup>229</sup> In this respect the judicial power is in principle quite different from the Executive power, which the President exercises alone; but in practice it may not be very different since the President cannot act without substantial assistance from subordinates.

<sup>230</sup> The lack of checks on the Court with respect to constitutional law is in contrast to the Court's role in statutory interpretation, where it is subject to the obvious check of congressional action reversing judicial interpretation. The concerns raised in this section are, therefore, primarily of concern when the Court is interpreting the Constitution.

<sup>231</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down the Line Item Veto Act); *Printz v. United States*, 521 U.S. 898 (1997) (striking down Brady gun control legislation); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down the Communications Decency Act).

Constitution's assurance of life tenure. Congress does, in principle, have more direct ways of checking the Court—notably, its powers under the “exceptions and regulations” clause of Article III to control the Court's appellate jurisdiction,<sup>232</sup> as well as the more blunt power to control the size and organization of the Court.<sup>233</sup> While historically these powers have sometimes been exercised—notably in Congress's cancellation of the 1802 Term of the Court for political reasons<sup>234</sup> and its changes to the size of the Court in 1860s to ensure a pro-Civil War and pro-Reconstruction majority<sup>235</sup>—the power has been essentially defunct for political reasons since the defeat of President Roosevelt's “Court packing” plan in 1937.<sup>236</sup> Congress also, of course, has the power of impeachment over Supreme Court justices, but again, it is inconceivable in the modern political climate that the power would or could be employed simply because of disagreement over how the Court is exercising its authority, as opposed to gross moral turpitude. In fact, no Supreme Court justice has ever been removed from office through impeachment (indeed, no justice has been impeached since Samuel Chase in 1804).<sup>237</sup>

Finally, the most obvious limitation on the Court's power is of course the physical impotence of the judicial branch. The Court depends on the other branches to enforce its judgments, leaving them with the ultimate potential check on the Court: inaction. The other branches employed this check after the Court's decision in *Worcester v. Georgia*,<sup>238</sup> and arguably employed it again during the first decade after the Court's decision in *Brown v. Board of Education*.<sup>239</sup> In practice, however, for political reasons the willingness of the

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<sup>232</sup> See U.S. CONST. art. III, § 2, cl. 2. In *Ex Parte McCordle*, 74 U.S. 506 (1869) the Court suggested that that power is largely unlimited, but the extent of Congress's power remains hotly debated. For an excellent summary of that debate, see Dodge, *supra* note 100 at 1015-17 (outlining the “essential functions” and “distributive” theories of Congress' exceptions power).

<sup>233</sup> See U.S. CONST., art. III. Article III does not define the size or composition of the Court, or the details of when it shall meet, etc. As a consequence, such matters are set by statute, giving Congress the potential power to manipulate the composition or schedule of the Court for its own ends.

<sup>234</sup> See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 32 (3d ed. 1996).

<sup>235</sup> See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 478 (Kermit Hall, ed. 1992) (describing the changes in the number of Supreme Court justices).

<sup>236</sup> See generally BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 11-25 (1998); WILLIAM E. LEUCHTENBERG, *The Origins of Franklin D. Roosevelt's “Court-Packing” Plan*, 1966 SUP. CT. REV. 347.

<sup>237</sup> See OXFORD COMPANION, *supra* note 235, at 423-24.

<sup>238</sup> 31 U.S. 515 (1832); see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 725 (3d ed. 2000) (discussing President Andrew Jackson's failure to enforce the Court's decision in favor of the Cherokee Tribe).

<sup>239</sup> 347 U.S. 483 (1954). See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994) (citing figures demonstrating negligible desegregation in first decade after *Brown*); *id.* at 130-140 (demonstrating the lack of support

other branches to flout judicial orders has diminished substantially, to the point of nonexistence. This is in part because of the tremendous prestige enjoyed by the Supreme Court, and in part because of the rather low esteem into which the elected branches have fallen. The consequence is that to fight the Court would entail tremendous political costs, costs that neither the Congress nor the President are willing to accept today. As a result the modern Court's frontal assault on affirmative action,<sup>240</sup> its new-found limitations on congressional regulatory authority,<sup>241</sup> and its inroads into congressional authority over the states based on quite dubious readings of the Tenth and Eleventh Amendments,<sup>242</sup> have been accepted by the other branches without much resistance, or even vocal complaint. More fundamentally, the modern Court has claimed for itself the right to define the nature and scope of its own constitutional authority,<sup>243</sup> a power that it denies the other branches of government,<sup>244</sup> and yet the other branches have acquiesced to the Court's claim in recent years (in contrast to the views of Presidents Jefferson, Jackson, Lincoln, and Franklin Roosevelt).<sup>245</sup> Of course, in politics all things come to an end, and the current immunity of the Court from political interference may well pass. For now, however, there is little that the other branches seem

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for civil rights during Eisenhower and early Kennedy administrations).

<sup>240</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (requiring that federal racial classifications pass the strict scrutiny test).

<sup>241</sup> See, e.g., *United States v. Morrison*, 120 S.Ct. 1740 (2000) (striking down the Violence Against Women Act as exceeding Congress' powers under both the Interstate Commerce Clause and § 5 of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that §5 of the Fourteenth Amendment does not give Congress the power to define substantive violations of that amendment); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zone Act of 1990 as exceeding Congress' powers under the Interstate Commerce Clause).

<sup>242</sup> See *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress cannot subject abrogate State sovereign immunity by authorizing lawsuits in State courts); *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that Congress lacks the power to require local law enforcement officers to conduct background checks on potential gun buyers); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53 (1996) (deciding that Congress cannot abrogate State sovereign immunity using its Article I powers).

<sup>243</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (reciting that the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" to support the proposition that the Supreme Court's "interpretation of the Fourteenth Amendment . . . is the supreme law of the land").

<sup>244</sup> See, e.g., *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (holding that the Congress cannot impose criteria for membership in excess of what is provided in the Constitution); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (deciding that the Constitution does not give the President the power to issue an executive order to seize steel mills).

<sup>245</sup> *But see* Edwin Meese, *The Law of the Constitution*, 61 *TULANE L. REV.* 979, 985 (1987) ("[C]onstitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.").



willing to do to limit the Court's assertions and exercise of power.

What does this have to do with the lower federal courts? If Congress and the President, with their vastly greater power and influence, cannot effectively check the Supreme Court, how can a district court judge in Iowa? Perhaps she cannot, or at least not much. But, the judges of the lower federal courts do enjoy one great advantage over Congress and the President—they are not elected. As a result, they are insulated from popular reaction, and indeed share some of the luster enjoyed by the Supreme Court because of their nonpolitical status. As to how the lower courts can check the Court, it is probably not thorough full-scale civil disobedience. Ultimately, the lower courts largely are, and will remain, the “messengers” and implementers of the Court's will.<sup>246</sup> However, a greater independence on the part of “inferior” federal judges, a greater willingness to think for themselves, to deviate from doctrine which does not make sense, and to try and impose doctrinal coherence on the Court's work, would in practice limit the Court's power to some extent. At a minimum, it would force the Court to focus more on *reasons* and on traditional legal analysis than on the raw exercise of power in reaching decisions and formulating doctrine. It might even lead the Court to take notice of the effects of, and difficulties in, implementing its decisions.

Of course, none of these checks resemble the blunt limits on power available against the political branches. It should be noted in this regard that the changes that I propose here do not require any *tangible* modifications to existing procedures and doctrines (other than, perhaps, overruling the doctrine of *Rodriguez de Quijas* and *Agostini*).<sup>247</sup> They instead require some evolution in the institutional culture and attitudes of the federal judiciary, a far more subtle and difficult thing. At bottom, I suggest that the Court would do a better job, and would better serve its constitutional role, if it treated the lower federal courts as collaborators, rather than as employees. Of course, all collaborators are not created equal, and nothing I propose would deny the Court the power to have the final word on cases or issues; but it would change the extent to which the Court tries to micromanage the activities of the lower courts. Realistically, therefore, the possibility of such change is probably slight because the Court is composed of human beings, and human beings are notoriously unwilling to yield power for the sake of abstract benefits. It may also be in vain to hope for such limited resistance from the lower courts. Such a reaction against the leaders of their own branch of government would be difficult, especially because as noted the Supreme Court seems unlikely to cooperate in a project which would curtail its own power. Any assertion of independence on the part of the lower judiciary will necessarily be in the face of opposition, active resistance, and criticism by the Supreme Court, a force which in truth most federal judges are likely to find irresistible. And in fact, lower courts show only a limited willingness to express their dissatisfaction, or to try and nudge

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<sup>246</sup> See *supra*, Part II.

<sup>247</sup> See *supra*, Part I.

the Court towards a more collaborative approach.

External pressure thus seems essential if reform is to proceed, but there is no obvious source for such pressure. Congress might possess the power to alter the relationships within the federal judiciary, including the nature and force of *stare decisis* (and thus overrule, at a minimum, the rule of *Rodriguez de Quijas*);<sup>248</sup> but it seems unlikely that Congress, or the President, would wish to get involved. And in truth, they probably should not, given this country's long and healthy tradition of judicial independence.

Moreover, even if the Court is willing to contemplate a loss of power, such changes in the Court's culture and practices will take some time to become useful, because of the effects that the modern Court's approach of stripping independence and authority has had on the culture of the lower federal courts. Many if not most lower court judges no longer think of themselves as participants in the joint process of formulating legal rules, and the consequent loss of intellectual independence and curiosity makes those courts ill-suited to (and apparently uninterested in) the collaborative process which I espouse. None of this, however, is irreversible, and such resistance, if it were to emerge, would provide at least some check on the Court's power. That can only be an improvement on the current situation: a Court which faces essentially no external restraints on its power, and has largely abandoned any internal ones

### CONCLUSION

The Supreme Court, because of its institutional structure, has increasingly come to resemble the courts of Louis XVI or Czar Nicolas II—isolated and out of touch from the “inferior” federal courts that it supervises. The Court's isolation manifests itself in a number of ways. For example, the Court has come to adopt an increasingly autocratic view of the force and immutability of its own precedents, a trend which displays itself in the doctrine of *Rodriguez de Quijas v. Shearson/American Express, Inc.*<sup>249</sup> that lower courts must follow even doctrinally undermined Supreme Court decisions. In addition, the justices of the Supreme Court have largely come to disdain relying on or seeking guidance from the lower courts in the course of the Court's work. Most fundamentally, however, the Supreme Court has drifted away from the institutional role of the judiciary, a role still played by the lower courts: the resolution of disputes. Instead, the Court has increasingly evolved into a maker of rules, a quasi-legislature for the judiciary. As with legislative edicts, the Court's rules are made largely without consideration of the factual contexts in which they will be applied, and without awareness of the complexities of

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<sup>248</sup> See generally Paulsen, *supra* note 196, at 1582 (defending congressional power to alter *stare decisis*); Dorf, *supra* note 34, at 2068 (suggesting limits on Congress' power); but cf. *Anastanoff v. U.S.*, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000) (tying the doctrine of precedent to the “judicial power” of Article III, and thus raising question about Congress' power to alter the effect of precedent).

<sup>249</sup> 490 U.S. 477 (1989).

actual implementation. As a result, the Court's "rules," its doctrines, are often announced in a vacuum, without explanation or opportunity to evolve over time—in other words, without the traditional fortes of the common law decision-making process. None of this is to question the undoubted strengths of the Court, or the competence and good intentions of its members. The problem is institutional.

One might expect some resentment to emerge from within the rest of the judiciary in response to the increasingly imperialistic Court. And indeed, there is evidence of just such a reaction, especially among the more prominent members of the lower federal judiciary. It is possible that this reaction might rise someday to the level of resistance to, if not defiance of, the Court's hegemony, and the development of an increasingly assertive lawmaking stance by the lower courts. After all, revolutions come from below. One of the primary theses of this paper is that such a development would probably be extremely beneficial to the federal judiciary as an institution, and even to the Supreme Court itself. Candidly, however, a *sua sponte* change in the institutional culture of the lower judiciary is unlikely and probably unrealistic. That culture has largely become a culture of obedience. For every hint of grumbling at the Supreme Court, there are a myriad of voices in the lower courts vowing obeisance. Moreover, the makeup and nature of the federal judiciary, the very bastion of privilege and order, makes it an unlikely source for insurrection.

All of which leads to the conclusion that there is probably little to be done about the current situation. It is perhaps unfortunate but hardly surprising that as the power and importance of the Court has grown in recent decades, the institutional nature of the Court has evolved. Presumably, in time an institutional self-correction will occur. Nonetheless, there is always value in knowledge, in developing some understanding of the Court's unique position within the judicial system, and the strengths and weaknesses that are associated with it. Moreover, beyond such purely scholarly value, perhaps a wider awareness of the Court's peculiar institutional role might produce pressures for change, from within or without.

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