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“THE STEPFORD JUSTICES”: THE NEED FOR EXPERIENTIAL DIVERSITY ON THE ROBERTS COURT

TIMOTHY P. O’NEILL*

Is it finally over?

I mean the Roberts Court’s “Era of Good Feeling.”

Please, may we all stop singing *Kumbaya*¹ and go back to being our irascible selves?

Was it really less than two years ago when a sophisticated legal analyst such as Jeffrey Rosen could—with a straight face—provide this account of an interview with Chief Justice John Roberts: “[John] Marshall’s example had taught him, Roberts said, that personal trust in the chief justice’s lack of an ideological agenda was very important.”² Or how about, “Roberts said he had not thought about the sources of his own interest in unity and consensus and bringing people together or whether there was anything in his upbringing that might account for it.”³

The final score of the 2006 Term? Out of seventy-two cases, the U.S. Supreme Court decided twenty-four—fully one-third of its docket—by a vote of 5-4. This constitutes the highest percentage of 5-4 decisions in a Term in at least a decade.⁴ Moreover, the percentage of unanimous decisions was only 25%—the second lowest of the last decade.⁵

Roberts also told Rosen that “I think it’s bad, long-term, if people identify the rule of law with how individual justices vote.”⁶

The twenty-four decisions that were 5-4? Justice Anthony Kennedy was with the majority *in every single one*.⁷

* Professor, The John Marshall Law School. I wish to thank John Marshall for providing me with a research sabbatical that facilitated the writing of this article. I also wish to acknowledge the excellent research assistance of Danielle Vakoutis, Daniel Saeedi, and David Machemer. This Article is dedicated to my mother Virginia O’Neill, who throughout my life has helped me in ways too numerous to mention.

1. *Kumbaya* is a folk song popularly associated with the Civil Rights Movement, Scouting, the YMCA, and Catholic folk masses. See Eric Zorn, *Poor ‘Kumbaya’ Deserves Better Fate—Seriously*, CHI. TRIB., Aug. 31, 2006, at 1.

2. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 226 (2007).

3. *Id.* at 229.

4. SCOTUSblog.com, SCOTUSblog End-of-Term “Super StatPack”—OT06, at 1 (June 28, 2007), <http://www.scotusblog.com/movabletype/archives/SuperStatPack.pdf>.

5. *Id.* at 2.

6. ROSEN, *supra* note 2, at 226.

7. SCOTUSblog.com, *supra* note 4, at 3.

This article contends that in order to understand the Roberts Court, you must first appreciate the unique position it holds in American history. Although it is hopelessly split ideologically, in many ways it is the most homogeneous collection of justices ever to sit on the Supreme Court.

For the first time in history every justice had been a judge on the U.S. Court of Appeals at the time of appointment to the Supreme Court.⁸

For the first time in history eight out of nine justices graduated from the same three Ivy League law schools.⁹

For the first time in history no justice has had legislative experience *at any level—local, state, or federal*.¹⁰

For the first time in history no justice has ever held—or even run for—elective public office *of any kind*.¹¹

Ideologically, the Court is hopelessly split. But in terms of educational background and legal experience, they are truly “The Stepford Justices.”

This unprecedented narrowness of the justices’ governmental experience can be attributed to the transformation in both the nomination and confirmation of Supreme Court justices that occurred in reaction to the failure of Robert Bork’s

8. All the justices came directly from judgeships on the following circuits: District of Columbia (John Roberts, Antonin Scalia, Clarence Thomas, Ruth Bader Ginsburg); First (David Souter, Stephen Breyer); Third (Samuel Alito); Seventh (John Paul Stevens); and Ninth (Anthony Kennedy). See *A Divided Group: A Brief Look at the Nine Supreme Court Justices and How They Voted Saturday*, ATLANTA J. CONST., Dec. 10, 2000, at A26 [hereinafter *A Divided Group*] (listing the prior judicial positions and educational backgrounds of Justices Breyer, Ginsburg, Kennedy, Scalia, Souter, and Thomas); *Bush Chooses Roberts for Chief Justice*, SEATTLE TIMES, Sept. 6, 2005, at A1 [hereinafter *Bush Chooses Roberts*] (discussing the prior judicial positions and educational background of Chief Justice Roberts); David D. Kirkpatrick, *Advocacy Groups Prepare New Ad Campaigns on Alito*, N.Y. TIMES, Jan. 3, 2006, at A14 (discussing the prior judicial positions and educational background of Justice Alito); see also Oyez: Roberts Court (2006-), <http://www.oyez.org/courts/roberts/robt2/> (last visited Feb. 25, 2008) (listing biographical information of the 2006 Roberts Court). Since the founding of the U.S. Court of Appeals in 1891, there has never been a Supreme Court composed entirely of former court of appeals judges until now.

9. Eight of the justices graduated from either Harvard Law School (Roberts, Scalia, Kennedy, Souter, and Breyer), Yale Law School (Thomas and Alito), or Columbia Law School (Ginsburg). Stevens is the only graduate of a non-Ivy League law school: Northwestern. See *A Divided Group*, *supra* note 8; *Bush Chooses Roberts*, *supra* note 8; Kirkpatrick, *supra* note 8; Oyez: Roberts Court (2006-), *supra* note 8; see also Richard Cohen, Editorial, *Ivy-Covered Court*, WASH. POST, Nov. 15, 2005, at A21 (noting how the Court is dominated by Ivy League college graduates).

10. See *infra* notes 165-68; see also Oyez: Justices by Court, <http://www.oyez.org/courts/> (last visited Mar. 19, 2008) (revealing that in all previous Courts, at least one justice had previously served in some legislative capacity).

11. See Oyez: Justices by Court, *supra* note 10. All of the offices listed *infra* note 165 were elective offices.

nomination in 1987. On the one hand, politics as usual has dictated that presidents try to appoint justices who will carry out their particular ideological agendas. On the other hand, presidents must now sell each nominee both to the U.S. Senate and to the American public as a non-ideological, expert legal technician. Hence, since Bork all seven confirmed justices have been U.S. Court of Appeals judges who attended either Harvard or Yale Law School.¹² The one failed nominee—Harriet Miers—was a Southern Methodist University Law School graduate who had never been a judge. This mania for Ivy League judges may have reached its apotheosis when President Bush introduced his most recent nominee, Samuel Alito, by describing him as a graduate of both Princeton and Yale Law School and then noting that he had “more prior judicial experience than any Supreme Court nominee in more than [seventy] years.”¹³

This trend has had two pernicious effects. First, it has resulted in a Supreme Court with remarkably little experience in government outside the judicial branch. The lack of a justice who has ever sat in a legislature or even once campaigned for political office of any kind is quite disturbing for a court that does everything from reviewing the constitutionality of legislation to deciding campaign finance reform cases.

Second, telling the American public that legal expertise can somehow trump ideological concerns is unwise, if not downright dishonest. The public has every right to be confused when Ivy League-educated judges—who were sold to them for their legal prowess—continually split 5-4 on the crucial legal issues of the day. The confusion this engenders in the public can easily morph into cynicism.

This article is divided into four parts. Part I discusses two very different models of Supreme Court jurisprudence. In the earlier model, Henry Hart and Erwin Griswold described judging as the application of legal reasoning and analysis to the facts of the case, thus leading to the proper resolution. In the more recent model, Richard Posner and Stanley Fish contend that the reality of judging is exactly the opposite: A judge’s starting “premises” or “values” will immediately suggest an outcome to the judge. The judge then uses theory not to *reach* a decision, but rather to *justify* the decision she has already reached. Part I also discusses how the work of various Supreme Court justices has conformed to either the Hart-Griswold or Posner-Fish models. The article pays particular attention to the work method of the most overlooked member of the

12. Although Ruth Bader Ginsburg graduated from Columbia Law School, she attended Harvard Law School before transferring. See *A Divided Group*, *supra* note 8; Cohen, *supra* note 9.

13. See President George W. Bush, Remarks Announcing the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States, 41 WEEKLY COMP. PRES. DOC. 1625, 1626 (Oct. 31, 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd07no05_txt-7.pdf.

Warren Court—Charles Evans Whittaker. Whittaker's tenure on the Court reflects the problems—indeed, the tragedy—of a justice trying to follow the dictates of the Hart-Griswold theory.

Part II focuses on the work of mathematician Kurt Gödel. Gödel proved that a man-made, formal system such as mathematics could not be both complete and consistent. Gödel proved that in any such system there must be at least one axiom that is *true but unprovable*. A broad analogy is then drawn between Gödel's theorem and the docket of the U.S. Supreme Court: The very nature of the cases the Court selects for review will necessitate Court decisions that can be characterized as *true yet unprovable*. The decisions are *true* in the very limited sense that whatever five members of the Court agree on becomes *true*—at least for the time being. Nevertheless, they are also *unprovable* because the cases selected for review a fortiori are the ones that exist in the lacunae between varying interpretations of law. Thus, the traditional tools of legal analysis have already failed to resolve these cases. Even a unanimous Supreme Court decision cannot be considered a “proof” in any way comparable to the use of the term in mathematics. This creates a conundrum: While justices of the Supreme Court are appointed for their skill in conventional legal reasoning, they are asked to decide cases that defy resolution through the application of conventional legal reasoning. This raises the issue of what we should look for in a Supreme Court justice: What kind of person do we want to decide what is legally *true* but nonetheless *unprovable*?

Part III considers the phenomenon of the Roberts Court as “The Stepford Justices”.¹⁴ All of the justices have strikingly similar legal backgrounds. The article posits that this homogeneity is a reaction to the ideological firestorm created by Robert Bork's failed nomination in 1987. Post-Bork, both Republican and Democratic presidents have tried to soft-pedal questions of ideology by nominating candidates with “legal resumes on steroids.” And the result? The 2006 Term produced one of the highest percentage of 5-4 decisions—and one of the lowest percentages of unanimous opinions—in years. Mere technical competence does not trump political ideology—nor would any president want it to. Obviously, an ideologically split Supreme Court is nothing new. What is new is both the numbing similarity—and the alarming narrowness—of the professional backgrounds of the justices.

Part IV discusses why this homogeneity should disturb us. Pretending that a federal judge with an Ivy League degree is somehow above politics is obviously a charade. But this has resulted in a Supreme Court that, for the first

14. The reference, of course, is to the film *The Stepford Wives*, in which the married women in a Connecticut suburb grow strangely similar. See *THE STEPFORD WIVES* (Columbia Pictures 1975). It was re-made by Paramount Pictures in 2004. See John-Michael Maas, *Marketing Gets Wired*, PUBLISHER'S WKLY., Apr. 26, 2004, at 18, 20.

time in American history, lacks any member who has ever served in a legislature on any level. As for the executive branch, the Court lacks a single former cabinet member. Moreover, the Roberts Court—again, for the first time in American history—lacks even one justice who ever ran as a candidate for *any* public office. This paucity of well-rounded governmental experience would be worrisome on any collegial court, but it is especially so on the U.S. Supreme Court.

We must return to a tradition of choosing Supreme Court nominees with an eye towards creating a healthy mix of justices with broad experience in all three branches of government.

I. The Politics of Judging

It's in the papers
It's on your T.V. news
The application
It's just a point of view

Well you know you can't stop it
When they start to play
You gotta get out of the way

The politics of dancing
The politics of ooo feeling good
The politics of moving
*Is this message understood?*¹⁵

*The judge must be "perfectly and completely independent, with nothing to influence or contro[l] him but God and his conscience."*¹⁶

*It is important for us . . . to strip down, like a runner, to eliminate agendas [and] to eliminate ideologies . . .*¹⁷

15. RE-FLEX, *The Politics of Dancing*, on THE POLITICS OF DANCING (EMI Group 1983).

16. *United States v. Hatter*, 532 U.S. 557, 569 (2001) (quoting John Marshall, Speech on Dec. 11, 1829, in PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 616 (1830)).

17. *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States*, 102d Cong., pt. 1, at 203 (1991) (statement of then-Judge Clarence Thomas).

*I view the vote this morning as confirmation of what is for me a bedrock principle—that judging is different from politics.*¹⁸

So if we accept politics in dancing, why can't we accept it on the Supreme Court?

Some of this difficulty has to do with traditional notions of how justices work.

Richard Posner recently offered an iconoclastic take on this issue in his Harvard Law Review *Foreword* on the Supreme Court's 2004 Term.¹⁹ His article is titled simply *A Political Court*. His thesis is that to the extent the Supreme Court is a constitutional court, it acts as a political body.²⁰

Posner begins by discussing two famous Harvard Law Review *Forewords*, written by Henry Hart²¹ and Erwin N. Griswold²² respectively, on the work habits of the justices. Hart focused on the effect of caseload on the work of the individual justices. He stated that “[w]riting opinions [is] the most time-consuming of all judicial work, and the least susceptible of effective assistance from a law clerk.”²³ Hart posited that the justices’ heavy caseload militated against their taking the time necessary to make wise decisions.²⁴

Posner bluntly describes Hart’s views as “either naïve to the point of almost total cluelessness, or intellectually dishonest.”²⁵ Posner disputes Hart’s contention that writing consumes much of the justices’ time, noting that even at the time Hart wrote it was clear that law clerks carried the brunt of this work.²⁶ Posner ridicules Hart’s argument that more time per se would necessarily lead to wiser decisions, describing Hart’s model of the Court as “a politically neutral civil service guided by reason rather than by public opinion.”²⁷ Posner characterizes this as “the Progressive dream of policy emptied of politics.”²⁸

18. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 261 (2007) (quoting Chief Justice John Roberts after his Supreme Court swearing-in ceremony).

19. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005). Material from this article is incorporated in RICHARD A. POSNER, HOW JUDGES THINK 269-323 (2008).

20. *Id.* at 34.

21. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

22. Erwin N. Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

23. Hart, *supra* note 21, at 91.

24. *Id.* at 99-101.

25. Posner, *supra* note 19, at 60.

26. *Id.* at 60-61.

27. *Id.* at 60.

28. *Id.*

Hart's view was supported by Erwin Griswold, who served as both Solicitor General of the United States and the Dean of Harvard Law School.²⁹ Griswold agreed with Hart that "[t]he volume of the work of the Court is staggering," with the justices "reading long records" and "writing reflective opinions."³⁰ Posner concedes that this view "exemplifies an orthodoxy that Supreme Court Justices, other judges, and not a few law professors continue to proclaim."³¹ Posner also calls it "even more naïve than Hart's" views.³²

Why? Because there is no need for the justices to read much of the case record; most of the opinion writing is farmed out to clerks; and the opinions themselves are not "reflective" but rather "briefs in support of the decisions."³³

So how does Posner characterize the work of the Court? He describes the docket as "dominated by cases in which the conventional sources of legal authority, such as pellucid constitutional text or binding precedent . . . do not speak in a clear voice. If they did, the Court would rarely have to get involved in the matter; it could leave it to the lower courts."³⁴ Posner observes that "[t]he most striking characteristic of constitutional debate in the courts . . . is its interminability. Everything is always up for grabs intellectually, though not politically."³⁵ For this reason,

it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one uses terms like "correct" or "incorrect" in this context, all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it.³⁶

It is for this reason that Posner refers to the Supreme Court as "lawless." He explains: "I use 'lawless' in a nonjudgmental though unavoidably provocative sense. I mean the word simply to denote an absence of tight constraints, an ocean of discretion. . . . From a practical standpoint, constitutional adjudication by the Supreme Court is also the exercise of discretion—and that is about all it is."³⁷

29. Dennis Hevesi, *Erwin Griswold Is Dead at 90: Served as Solicitor General*, N.Y. TIMES, Nov. 21, 1994, at B10.

30. Griswold, *supra* note 22, at 84.

31. Posner, *supra* note 19, at 62.

32. *Id.*

33. *Id.*

34. *Id.* at 42-43.

35. *Id.* at 41.

36. *Id.* at 40.

37. *Id.* at 41.

So why can't the nine justices sit down and reason together to reach the correct result? Posner states: "[R]easoned argument is ineffectual when the arguers do not share common premises"³⁸ In fact, argument may actually "drive the antagonists further apart—or at least . . . cause them to dig in their heels and clutch their beliefs closer to their chests."³⁹

The conclusion a justice reaches may simply depend on the point where the justice begins. Posner provides some examples of these different starting "premises":

One disputant thinks the public safety more important than the rights of people accused of crime; the other thinks the opposite. . . . One worries about subtle forms of sexual harassment; the other (invariably male) worries about being falsely accused of harassment. One considers affirmative action naked discrimination; the other considers it social justice and political necessity. . . . One views abortion from the standpoint of the hapless fetus, the other from the standpoint of a woman forbidden to terminate an unwanted pregnancy. One values the states as laboratories for social experimentation; the other regards state government as provincial and local governments as little better than village tyrannies.⁴⁰

Judge Posner is hardly breaking new ground. Consider this observation on the nature of judging: "Judg[ment] begins . . . with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it."⁴¹ The renowned legal philosopher Judge Jerome Frank said this in 1930.⁴²

38. *Id.* at 73.

39. *Id.*

40. *Id.* In his new book, Posner appears to favor the use of the terms "preconceptions" or "Bayesian priors" rather than "premises." POSNER, *supra* note 19, at 67.

41. JEROME FRANK, *LAW AND THE MODERN MIND* 108 (Peter Smith Publ'g, Inc. 1963) (1930). Jerome Frank was a judge on the U.S. Court of Appeals for the Second Circuit, as well as a key figure in the legal realism movement. See David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 121 & n.92 (2003).

42. FRANK, *supra* note 41, at 108. Similarly, Justice Samuel Miller in 1875 had this to say about his colleagues on the Supreme Court:

It is vain to contend with judges who have been at the bar advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. . . . All their training, *all their feelings* are from the start in favor of those who need no such influence.

Letter from Justice Samuel Miller to William Pitt Ballinger (Dec. 5, 1875), in MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS* 224 (2003) (emphasis added).

The Hart-Griswold conception of judging visualizes a justice applying the rules and tools of his craft to the raw materials before him—the facts of the case—and then working inexorably to a conclusion devoid of political biases or personal preferences. It is a top-down process. The Posner-Frank conception, however, reverses the procedure. It sees the judge as starting with the conclusion and then using the rules and tools of his craft to convincingly support it. And personal preferences—or as Posner puts it, starting “premises”—are inextricably tied to the conclusion reached. The process cannot be divorced from politics.

Stanley Fish has described judging in a manner similar to the Posner-Frank position. In his germinal article *Dennis Martinez and the Uses of Theory*, he offers his view on how theory is used by judges.⁴³ He begins by specifically defining what he means by “theory”:

I reserve that word for an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice. A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term “correctly” here understood as meaning independently of his preconceptions, biases, or personal preferences.⁴⁴

That is, theory is a mechanism by which decisions are generated. It could very well describe the Hart-Griswold conception of judging.

According to Fish, everything is wrong with this premise. He contends that no one in any practice—whether it is playing sports, analyzing sports, inventing, or judging—“uses” theory in the sense of consciously following its rules in order to achieve a result. Fish is adamant on this point: “No activity is theoretical in the strong sense of unfolding according to the dictates of a theory”⁴⁵

This is not to say that theory is irrelevant. Fish distinguishes between “using” theory and “making use” of theory and cites Ronald Dworkin’s idea that law, in order to be recognized as legitimate, must strive for “articulate consistency.”⁴⁶ In other words, a judge must be able to convince the legal community that her ruling is not merely based on personal whim or caprice; instead, she must show that the ruling is “the inevitable production of a principled and consistent history.”⁴⁷ Thus, to convince the legal community of the legitimacy of her decision, a judge must be prepared to “make use” of theory. In doing so, the

43. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

44. *Id.* at 1779.

45. *Id.* at 1778.

46. *Id.* at 1778-79, 1786.

47. *Id.* at 1791.

judge is engaging in the practice of self-presentation, that is, “the practice of offering a persuasive account of *why* [she has] done what [she has] done.”⁴⁸

Again, Fish contends that use of theory never actually leads a judge to a conclusion. Rather, the role of theory is to remind the judge that once she makes her decision her work is only half-complete. In order to be persuasive, the judge must now use theory “to construct a certain kind of story in which [her] decision is more or less dictated by the inexorable laws of the judicial process.”⁴⁹ If she skillfully uses theory to justify the decision she previously made, her decision will be seen as one having “articulate consistency” that will then be accepted by the legal community.⁵⁰

The Posner-Fish view thus sees theory as a tool for justifying decisions that have already been made rather than a tool used to actually make decisions. But is this the way judges—especially those who are justices on the Supreme Court—really work?

Certainly some would agree. Years ago, Chief Justice Charles Evans Hughes described work on the Supreme Court in this way: “At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.”⁵¹ According to Justice William O. Douglas, Chief Justice Harlan Fiske Stone while writing opinions would leave blanks after asserting legal points, with instructions that his clerks should find precedents to support the contentions.⁵² In the same vein, Laura Kalman’s biography of Abe Fortas relates a story from a former Fortas clerk. Fortas once dropped a draft opinion on the clerk’s desk with this curt direction: “Decorate it.”⁵³ The clerk interpreted this to mean that he was to find case citations to support the legal conclusions Fortas had already reached.⁵⁴ (In discussing this story, Mark Tushnet observed that Fortas could treat legal citations as decorations because Fortas’s grounding in legal realism at Yale taught him “that—at least on the level at which he was working—cases were available to support whatever legal propositions one put forth.”⁵⁵)

Similarly, Justice Anthony Kennedy provided this description of how he works:

48. *Id.* at 1790 (emphasis added).

49. *Id.* at 1793.

50. *Id.* at 1791.

51. WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975*, at 8 (1980).

52. *Id.* at 171.

53. LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 271-72 (1990).

54. *Id.* at 272.

55. Mark Tushnet, *Members of the Warren Court in Judicial Biography: Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 756 (1995). Justice Souter recently made the same point when he wrote, “Of course, there is usually a case somewhere that provides comfort for just about any claim.” *Wilkie v. Robbins*, 127 S. Ct. 2588, 2606 (2007).

You know, all of us have an instinctive judgment that we make. You meet a person, you say, "I trust this person. I don't trust this person." . . . And judges do the same thing. . . . But after you make a judgment, you then must formulate the reason for your judgment into a verbal phrase, into a verbal formula. And then you have to see if that makes sense, if it's logical, if it's fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality.⁵⁶

Hughes, Stone, Fortas, and Kennedy all, to varying degrees, seem to reflect the Posner-Fish model of judging.

Has any justice ever worked in the Hart-Griswold mode? One possible example is Justice Charles Evans Whittaker.

Whittaker served on the Court from 1957 to 1962.⁵⁷ His prior legal experience was in private practice in Kansas City, followed by short stints as a judge on both the United States District Court and the U.S. Court of Appeals for the Eighth Circuit.⁵⁸

Here is how his biographer Richard Lawrence Miller described Whittaker's work habits on the Supreme Court:

Whittaker labored day and night

[H]e complained that justices had too much to do

. . . [But] *having no judicial philosophy increased his toil.* . . .

Whittaker's colleagues [who had a judicial philosophy] might be able to tell at a glance how a case should be decided, and assign their clerks the task of finding rules and precedents supporting the decision. . . . [But Whittaker] examined facts of each case and provisions of the Constitution mechanically, *almost attempting to use mathematical rules of formal logic to reach a decision.* . . .

. . . *He started from square one in every case* rather than building upon a foundation of knowledge. . . .

56. Interview by Academy of Achievement with Anthony Kennedy, Supreme Court Justice, in New York City, N.Y. (June 3, 2005), *transcript available at* <http://www.achievement.org/autodoc/page/ken0int-1>; *see also* Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16, 19 (quoting the Academy of Achievement interview).

57. THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 530 (Christopher Tomlins ed., 2005).

58. *Id.*

. . . [Whittaker] had good grasp of the law's mechanics. But he was in the position of an expert automobile mechanic being asked to design a road system.⁵⁹

It should come as no surprise that during his tenure "[h]is opinion output was annually the lowest on the Court."⁶⁰

Perhaps coincidentally, the Harvard Law Review *Forewords* written by Hart and Griswold both appeared during Whittaker's short stay on the Court. It is possible that Whittaker actually read these articles for guidance on how to perform his job. Is it just serendipity that both Whittaker and Hart complained about the time constraints on a Supreme Court justice? Could there be a connection between Whittaker's work habits and Hart's and Griswold's descriptions of the work of a justice?

We will never know. What we do know is that within a month of his appointment Whittaker decided that he had made a mistake in taking the job.⁶¹ Five years later, in the midst of trying to decide *Baker v Carr*,⁶² Whittaker suffered a physical and mental collapse.⁶³ A family member found him ready to commit suicide.⁶⁴ Chief Justice Warren arranged for a team of doctors to examine Whittaker at Walter Reed Hospital.⁶⁵ When the doctors declared that further service on the Court would be fatal, Whittaker tendered his resignation.⁶⁶

Consider Miller's characterization that Whittaker "started from square one in every case rather than building upon a foundation of knowledge."⁶⁷ In Posner's terms, Whittaker lacked starting "premises." Those justices who have starting premises have natural inclinations towards results in constitutional cases.

And a recent study suggests that a justice's starting premises affect more than just constitutional decisions.⁶⁸ Ward Farnsworth compared decisions by Supreme Court justices in two kinds of criminal cases: those raising

59. RICHARD LAWRENCE MILLER, WHITTAKER: STRUGGLES OF A SUPREME COURT JUSTICE 48-49 (2002) (emphasis added).

60. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 311 (1998). Hutchinson chronicles the last days of Whittaker's tenure before he was replaced by Byron White. *Id.* at 311-12.

61. MILLER, *supra* note 59, at 47.

62. 369 U.S. 186 (1962) (recognizing principle of "one man, one vote"). The *United States Reports* tersely noted that Justice Whittaker did not participate in the decision of the case. *Id.* at 237.

63. HUTCHINSON, *supra* note 60, at 311; MILLER, *supra* note 59, at 150-51.

64. MILLER, *supra* note 59, at 151.

65. HUTCHINSON, *supra* note 60, at 312; MILLER, *supra* note 59, at 151.

66. MILLER, *supra* note 59, at 151.

67. *Id.* at 48.

68. Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67 (2005).

constitutional issues and those with non-constitutional issues, such as statutory construction.⁶⁹ He posited that there should be no necessary connection between a judge's decisions in these two types of cases.⁷⁰ Instead, he found an amazing congruence: Justices tended to be either pro-prosecution or pro-defense regardless of the type of issue in the criminal case.⁷¹ He credited this result to what he called a judge's "priors."⁷²

Last Term provided a good illustration of the Farnsworth thesis. Eight of the Court's seventy-two opinions—11% of the entire Term's docket—involved death penalty cases from state courts.⁷³ The cases came to the Court both through direct appeal and through federal habeas corpus.⁷⁴ The issues ranged from jury instructions⁷⁵ to competence of the defendant to be executed,⁷⁶ from ineffective assistance of counsel⁷⁷ to improper removal of a juror,⁷⁸ one

69. *Id.* at 91-96. Farnsworth considered only nonunanimous—i.e., “close”—cases.

70. *Id.*

71. *Id.*

72. *Id.*

73. See *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (originating in Texas); *Uttecht v. Brown*, 127 S. Ct. 2218 (2007) (originating in Washington); *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007) (originating in Arizona); *Smith v. Texas*, 127 S. Ct. 1686 (2007) (originating in Texas); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) (originating in Texas); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (originating in Texas); *Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (originating in Florida); *Ayers v. Belmontes*, 127 S. Ct. 469 (2006) (originating in California).

74. See *Panetti*, 127 S. Ct. 2842 (seeking federal habeas corpus relief); *Brown*, 127 S. Ct. 2218 (seeking federal habeas corpus relief); *Landrigan*, 127 S. Ct. 1933 (seeking federal habeas corpus relief); *Smith*, 127 S. Ct. 1686 (direct appeal of denial of state habeas corpus relief); *Brewer*, 127 S. Ct. 1706 (seeking federal habeas corpus relief); *Abdul-Kabir*, 127 S. Ct. 1654 (seeking federal habeas corpus relief); *Lawrence*, 127 S. Ct. 1079 (seeking federal habeas corpus relief); *Belmontes*, 127 S. Ct. 469 (seeking federal habeas corpus relief).

75. *Smith*, 127 S. Ct. 1686 (holding state court used a constitutionally improper standard of review in denying relief to capital offender based on instruction error); *Brewer*, 127 S. Ct. 1706 (holding that Texas death penalty instructions at penalty phase violated the Eighth Amendment by not allowing proper jury consideration of evidence of Brewer's mental illness and substance abuse); *Abdul-Kabir*, 127 S. Ct. 1654 (holding that Texas death penalty instructions at penalty phase violated the Eighth Amendment by not allowing proper jury consideration of evidence of defendant's childhood deprivation and lack of self-control); *Belmontes*, 127 S. Ct. 469 (holding that California jury instruction at penalty phase was capacious enough to allow the jury to consider “forward-looking evidence”).

76. *Panetti*, 127 S. Ct. 2842 (holding that in considering whether defendant was competent to be executed, state court did not properly consider whether he had a rational understanding of the state's reasons for the execution).

77. *Landrigan*, 127 S. Ct. 1933 (holding that defendant received effective assistance of counsel at penalty phase).

78. *Brown*, 127 S. Ct. 2218 (holding that juror was properly removed under principles of *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

case even dealt with whether the habeas petition had been timely filed.⁷⁹

What did the cases have in common? Every single case was decided 5-4. Every single case had Scalia, Thomas, Roberts, and Alito holding for the prosecution. Every single case had Stevens, Souter, Breyer, and Ginsburg holding for the defense. Every single case was decided by Justice Kennedy's vote—four times with the prosecution and four times with the defense. Farnsworth's thesis certainly helps explain the votes of eight of the nine justices in all eight death penalty cases.⁸⁰

Farnsworth's "priors," Posner's "premises," Kennedy's "instinctive judgment," Hughes' "predilections"—are these all simply different ways of suggesting that successful justices have always included politics in their judicial judgments?

Return to the tragic figure of Justice Whittaker. He was by all accounts a competent federal judge on both the district court and court of appeals level. Did his refusal to recognize the acutely political dimension of the role of a Supreme Court justice contribute to his failure in Washington?

Look again at Miller's criticism that Whittaker was "almost attempting to use mathematical rules of formal logic to reach a decision."⁸¹ The next section will suggest an analogy to formal mathematics that may shed light on the true nature of the Supreme Court docket.

II. *The Limits of Legal Logic: Kurt Gödel and the Work of the Supreme Court*

*The basic problem with the plurality's technical "dicta"-based response lies in its overly theoretical approach to case law . . . Law is not an exercise in mathematical logic.*⁸²

*The life of the law has not been logic: it has been experience.*⁸³

*As a Supreme Court justice Charles Whittaker "exhausted himself trying to find rules governing situations that would never have reached the Supreme Court if existing rules had been adequate."*⁸⁴

79. *Lawrence*, 127 S. Ct. 1079 (holding that habeas corpus petition was untimely filed).

80. See *Panetti*, 127 S. Ct. 2842; *Brown*, 127 S. Ct. 2218; *Landrigan*, 127 S. Ct. 1933; *Smith*, 127 S. Ct. 1686; *Brewer*, 127 S. Ct. 1706; *Abdul-Kabir*, 127 S. Ct. 1654; *Lawrence*, 127 S. Ct. 1079; *Belmontes*, 127 S. Ct. 469. For a more in-depth discussion of these cases, see Timothy P. O'Neill, *A STARK New Cabal on the Supreme Court*, CHI. DAILY L. BULL., Aug. 10, 2007, at 5.

81. MILLER, *supra* note 59, at 48.

82. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2816 (2007) (Breyer, J., dissenting).

83. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

84. MILLER, *supra* note 59, at 51.

In the early twentieth century, a mathematician named David Hilbert took on an ambitious project.⁸⁵ His goal was to prove that all the axioms of arithmetic were both complete and consistent. By “complete” he meant that each axiom could be established through a formal proof. By “consistent” he meant that all the axioms taken together did not yield any logical contradictions.

There was a serious purpose behind Hilbert’s quest. He was his generation’s leading advocate of formalism in mathematics. According to Hilbert, mathematics was nothing more than “a game played according to certain simple rules with meaningless marks on paper.”⁸⁶ Formalists contended that mathematicians did not “discover” truths. Instead, in the words of Rebecca Goldstein, formalists saw mathematicians as “simply in the business of manipulating the mechanical rules of self-enclosed formal systems.”⁸⁷ Formalists believed that “man is the measure of all things. [Man creates] formal systems and all of mathematics follows.”⁸⁸

Hilbert’s work attracted the attention of Kurt Gödel, the man *Time* magazine would later recognize as the greatest mathematician of the century.⁸⁹ Contrary to Hilbert’s hope, Gödel proved that no formal system rich enough to contain arithmetic can be both “consistent” and “complete.” In any such formal system of axioms there must be at least one axiom that is *true but unprovable*.⁹⁰

85. REBECCA GOLDSTEIN, INCOMPLETENESS 121-45 (2005) (discussing David Hilbert).

86. *Id.* at 136.

87. *Id.*

88. *Id.* at 137.

89. *Id.* at 221 & n.4.

90. An in-depth discussion of how Gödel reached this conclusion is well beyond the scope of this article. But Rebecca Goldstein presents an excellent short description of Gödel’s proof. First, she says, assume a mathematical system; now assume the proposition “[t]his very statement is not provable within this system.” *Id.* at 166. Let’s call this statement “G”. Now we can say “G is unprovable in the system.” *Id.* at 167. The negation of G would be “G is provable in the system.” *Id.* Goldstein continues:

If G were provable then its negation—which, after all, says that G is provable—would be true. But if the negation of a proposition is true, then the proposition itself is false. So if G is provable then it is false. *But if G is provable, then it is also true.* After all, what else does a proof show [?] . . . So, . . . if G is provable then it is both true and false—a contradiction—which means that G is not provable. Thus if the system is consistent, then G is not provable in it. *But that is exactly what G says:* that it isn’t provable. So G is true. Therefore, G is both *unprovable and true*, which is precisely the famous conclusion of Gödel’s proof, that there is a true but unprovable proposition expressible in the system if the system is consistent. . . . The formal system is either inconsistent or incomplete. . . . A system rich enough to contain arithmetic cannot be both consistent and complete.

Id. at 166-68 (emphasis added).

Legal scholars have previously written about the challenges and problems involved in applying Gödel's theorem to the study of law.⁹¹ This article, however, only wishes to draw a very rough, broad analogy between Gödel's theorem and the work of the Supreme Court.

Drawing on the work of Mark R. Brown and Andrew C. Greenberg,⁹² I contend that the very nature of the cases the Court accepts for review a fortiori means that every decision of the Court could be characterized as "true but unprovable." The Court chooses to review those cases that fall into the lacunae between legal rules. That is why lower courts have disagreed with each other and that is why the Supreme Court is hearing the case.⁹³ I am using "true" not in any sophisticated philosophical sense, but rather in the pragmatic sense that whatever five justices agree on becomes "true"—at least for the time being. To paraphrase Justice Robert Jackson, because the Court is the final arbiter, the answer is not only "true" but "infallible."⁹⁴

But are we willing to call the Court's opinion supporting the decision a "proof" in a mathematical sense? Of course not—especially when the "true" or "correct" answer was reached by a 5-4 vote. Recall Posner's description of the Supreme Court's docket as being "dominated by cases in which the conventional sources of legal authority, such as pellucid constitutional text or binding precedent . . . do not speak in a clear voice. If they did, the Court would rarely have to get involved in the matter; it could leave it to the lower courts."⁹⁵ Or recall again Richard Lawrence Miller's account of Justice Whittaker futilely "attempting to use mathematical rules of formal logic"⁹⁶ to reach decisions in cases that quite simply "would never have reached the Supreme Court if existing rules had been adequate."⁹⁷

91. See, e.g., John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992 (1992); see also Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439, 1488 (1992). Applied to law, Gödel's theorem illustrates that "the judiciary is . . . a true body politic. 'Decisions' and 'interpretations' must rely on human choices and hunches—subjective determinations that cannot be quantified." *Id.*

92. Brown & Greenberg, *supra* note 91, at 1488.

93. The U.S. Supreme Court does not exist merely to correct errors but rather to decide issues that have created conflicts among lower courts. Supreme Court Rule 10 states that the Court will usually hear only those cases falling into three categories: 1) cases involving jurisdictional conflicts as to the proper law; 2) cases departing from established law; and 3) cases containing novel issues decided by lower courts. SUP. CT. R. 10.

94. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

95. Posner, *supra* note 19, at 42-43.

96. MILLER, *supra* note 59, at 48.

97. *Id.* at 51.

Justice Breyer's quotation that "[l]aw is not an exercise in mathematical logic"⁹⁸ may seem uncontroversial enough to be considered banal.⁹⁹ Yet consider this *New York Times* interview with Professor Jack Greenberg of Columbia Law School on his reaction to the *Seattle School District*¹⁰⁰ decision: "Professor Greenberg suggested that more than law was at play in [the] decision. 'You can't really say that five justices are so smart that they can read the law and precedents and four others can't,' he said. 'Something else is going on.'"¹⁰¹

Professor Greenberg does not explain what that "something else" is that constitutes something "more than law." But one does wonder if he felt the presence of the same ominous, extra-legal "something else" in, for example, the recent trio of 5-4 decisions that invalidated sentences of death in several capital cases from Texas.¹⁰²

Professor Greenberg's contention that "more than law" was at play would be correct if you just delete the "more than." It is simply law that is at play. The reason five justices can disagree with four justices is not because they are *flouting* law, but because they are deciding cases that fall between the cracks of established law. As Justice Breyer reminds us, law is not simply an arid exercise in mathematical logic. As Judge Posner reminds us, the Supreme Court, after all, is a "political court." And, as Gödel reminds us in a different context, not all truths are necessarily provable.

The very same *New York Times* article brings this point into focus. It notes that Chief Justice Roberts' plurality opinion in *Seattle School District* cited parts of the oral argument made on behalf of the black schoolchildren in *Brown v. Board of Education*¹⁰³ in order to support his argument that the use of race by the

98. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2816 (2007) (Breyer, J., dissenting).

99. See, e.g., *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 50 n.10 (1961) ("[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil." (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)) (alteration in original)).

100. 127 S. Ct. 2738.

101. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

102. *Smith v. Texas*, 127 S. Ct. 1686 (2007) (holding state court used a constitutionally improper standard of review in denying relief to capital offender based on instruction error); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) (holding Texas death penalty instructions at penalty phase violated the Eighth Amendment by not allowing proper jury consideration of evidence of Brewer's mental illness and substance abuse); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (holding Texas death penalty instructions at penalty phase violated the Eighth Amendment by not allowing proper jury consideration of evidence of defendant's childhood deprivation and lack of self-control).

103. 347 U.S. 483 (1954).

Seattle and Louisville school systems was unconstitutional.¹⁰⁴ Robert L. Carter, in his argument before the Court the first time *Brown* was heard in 1952, contended that “no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”¹⁰⁵ And, Roberts’ plurality opinion noted, “[t]here is no ambiguity in that statement.”¹⁰⁶ The Court went on to void the Seattle and Louisville integration schemes.

The *New York Times* then interviewed Robert Carter, now a ninety-year-old senior federal judge, who said that the plurality had completely misinterpreted his words. “All that race was used for [in 1952] was to deny equal opportunity to black people,” Judge Carter said.¹⁰⁷ “It’s to stand that argument on its head to use race the way [the justices in the *Seattle School District* plurality] use [it] now.”¹⁰⁸

So what is it—do we look at the words in isolation (the plurality’s view) or the words in context (the dissenters’ view)? This most basic of legal disagreements is the reason *Seattle School District* found its way to the Supreme Court.¹⁰⁹

Many, including this author, feel very strongly that one side in the *Seattle School District* case was right and the other side was wrong. Nevertheless, I cannot pretend that I can “prove” my view in the sense that one can prove the Pythagorean Theorem. Indeed, Justice Breyer in effect says “Don’t even try”; law is not a mathematical proof.¹¹⁰

I probably could not even “prove” my position in the weaker, legal sense of applying traditional legal methodology to the existing case law to convince all

104. Liptak, *supra* note 101, at A24.

105. *Seattle Sch. Dist.*, 127 S. Ct. at 2767-68 (quoting Transcript of Oral Argument at 7, *Brown*, 347 U.S. 483 (Nos. 1, 2, 4, 10)).

106. *Id.* at 2768.

107. Liptak, *supra* note 101, at A24.

108. *Id.*

109. This issue of how to interpret the Fourteenth Amendment goes back to the Amendment’s ratification in 1868. Early on, whites and corporations argued that they could claim protection under the “color-blind” reading of the language, while African-Americans countered that the Fourteenth Amendment must be read in the context of slavery and Reconstruction. The victory of the former reading has been characterized as a victory for “The Inverted Constitution.” For an excellent analysis of the U.S. Supreme Court’s interpretation of the Fourteenth Amendment in the decades following ratification, see JACK BEATTY, *AGE OF BETRAYAL* 109-91 (2007). See also Nicholas Lemann, *Reversals*, *NEW YORKER*, July 30, 2007, at 28 (“That more than a century of litigation on race has centered on the meaning of [the Equal Protection Clause] should be taken as a sign that the passage doesn’t, and wasn’t intended to, contain a clear and perpetually useful instruction on how the country should conduct its affairs on racial matters.”).

110. *Seattle Sch. Dist.*, 127 S. Ct. at 2816 (Breyer, J., dissenting).

readers that I had reached the correct result. Indeed, the plurality attempted such an approach through elaborate parsing of prior cases into holdings and dicta.¹¹¹ This effort was met by Justice Breyer's withering critique: "The basic problem with the plurality's technical 'dicta'-based response lies in its *overly theoretical approach to case law*, an approach that emphasizes rigid distinctions between holdings and dicta in a way that serves to mask the radical nature of today's decision."¹¹²

Neither logic nor legal technique explain why the plurality views the command of the Equal Protection Clause as a categorical bar to a state using racial considerations, while the dissenters contend that the language must be viewed in the context of what the state is trying to accomplish in the area of race relations.

After the dust settles following the 185-page shoot-out called the *Seattle School District* case, Judge Posner's article from three years ago still offers the simplest and most concise reason for the 5-4 divide: justices have different starting "premises." More specifically, in Posner's words: "One considers affirmative action naked discrimination; the other considers it social justice and political necessity."¹¹³ Where justices begin often dictates where they will end. In the final analysis, the rest is mostly noise.

Possibly the 2006 Term's best example of the role of starting premises in Supreme Court decision-making can be found in *Bowles v Russell*.¹¹⁴ The facts are simple. Bowles's request for relief under federal habeas corpus was denied.¹¹⁵ He then failed to file a timely notice of appeal.¹¹⁶ Consequently, Bowles proceeded to ask the District Judge to extend the period for filing the notice of appeal, relying on a federal rule that allows the judge under certain conditions to extend the filing period fourteen days.¹¹⁷ The judge granted the motion, but the judge's written order inexplicably gave Bowles seventeen days instead of fourteen; neither the judge nor the parties noticed the error.¹¹⁸ Bowles filed later than the rule's fourteen days, but within the seventeen days granted in the District Judge's order.¹¹⁹ Later, the Government filed a motion to dismiss the appeal, alleging that the filing was untimely.¹²⁰

111. *Id.* at 2746-68 (majority opinion).

112. *Id.* at 2816 (Breyer, J., dissenting) (emphasis added).

113. Posner, *supra* note 19, at 73.

114. 127 S. Ct. 2360 (2007).

115. *Id.* at 2362.

116. *Id.*

117. *Id.*; see also FED. R. APP. P. 4(a).

118. *Id.*

119. *Id.*

120. *Id.*

The issue before the Court was simple. Should Bowles have been able to rely on the seventeen day period written in black-and-white in the judge's order, or does the fourteen day rule—written in black-and-white in the rule book—trump the judge's mistake?

Bowles is more than merely a Supreme Court case. It could function as a personality quiz for the general public. *Bowles* divides the world into two groups—those who unfailingly enforce rules and those who are willing to listen to an excuse for a rule violation *after* the violation has occurred.

Bowles was easy to predict. Forget about law. The only issue was “What kind of high school teacher would each justice have been?” Weeks before the decision was released, I counted five justices who could have been teachers at my Roman Catholic high school: Roberts, Scalia, Thomas, Kennedy, and Alito.¹²¹ In fact, my school's Classics Department could have been comprised of these five.

What, miss a deadline on your *Aeneid* report and *then* expect Mr. Scalia to listen to your excuse? Or Mr. Alito? Or any of the five? No way. Rules are rules. “You have a problem, Mr. O'Neill? Did you even *read* the school rule? Forget what you *thought* I meant. Next time come to me *before* the due date in the school rule. Now sit down.”

Sure, crusty but kindly Mr. Stevens would understand. And Mr. Souter would also come through. (“I hear he lets you call him *Dave* in class!”) But even with Mr. Breyer and Ms. (“That's *Ms.*, not *Mrs.*”) Ginsburg on your side, that's only four.

It is not difficult to predict who won in *Bowles* and how the Court split. (Hint: It was 5-4).

Go back to Gödel's theorem holding that within any formal system there will always be truths that are unprovable. How, one may ask, did Gödel explain how a person could determine something was “true” without being able to “prove” it? For Gödel, this is where “intuitions” came into play. Intuitions “are given to us by the nature of things; . . . intuition is seen as the *a priori* analogue to sense perception, a direct form of apprehension.”¹²²

121. And, indeed, all five are Roman Catholics. See Robert F. Drinan, *Catholics on the Supreme Court: The Jury Is Out on Chief Justice John Roberts*, NAT'L CATHOLIC REP., Sept. 8, 2006, at 15.

122. GOLDSTEIN, *supra* note 85, at 134. A character in a Tom Stoppard play offered this distinction between reason and intuition: “[I]f the question is, how should we live? . . . then reason gives no answer or different answers. So something is wrong. The divine spark in man is not reason after all, but something else, some kind of intuition or vision, perhaps like the moment of inspiration experienced by the artist” TOM STOPPARD, *VOYAGE: THE COAST OF UTOPIA* 36 (2002) (omissions in original). For an extended analysis of the uses and misuses of intuition, see DAVID G. MYERS, *INTUITION* (2002).

There were those who looked at Gödel's theorem and despaired that man could not create a formal system that is both complete and consistent. Others, on the contrary, were *exhilarated* by the idea that no formal system could ever be devised to include everything man could intuit and know. Gödel's theorem meant that man was much more than merely a reasoning machine; it is intuition that differentiates the human mind from a calculator.

Again, let us be clear. Gödel and the Supreme Court are dealing with very different concepts of "truth." The truth that Gödel pursued was for him a Platonic reality, while the truth on the Supreme Court is pretty much whatever five justices will agree on in a given case.

Just as Gödel posited that any formal system will have truths that cannot be proven, analogously the Supreme Court docket is made up almost entirely of cases where the traditional tools of legal reasoning cannot produce a conclusive answer; that is the reason the Supreme Court agreed to decide them in the first place. And just as Gödel looked to intuition when traditional tools of logic failed in mathematics, so too must Supreme Court justices look to "premises" or "priors" or "predilections" to go where conventional legal reasoning alone will not take them.

Justices on the Supreme Court face a conundrum. It is assumed that they are very skilled in the use of traditional legal analysis to decide cases. The paradox is that the cases selected for the Supreme Court's docket a fortiori, in the words of Judge Posner, "occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call."¹²³ Posner refers to the kinds of decisions Supreme Court justices have to make as "political" because the cases are "not susceptible of confident evaluation on the basis of professional legal norms."¹²⁴ Supreme Court justices are often taken from the ranks of the nation's leading federal and state judges—experts in the use of conventional legal reasoning. They are then asked to decide cases which almost invariably exist in a "broad open area where the conventional legal materials of decision run out."¹²⁵ As earlier noted, Richard Lawrence Miller described Justice Whittaker's problem of moving from a federal trial and appellate judge to a Supreme Court justice as analogous to "an expert automobile mechanic being asked to design a road system."¹²⁶

The problem may not be Justice Whittaker's alone. Potential justices now must be legal technicians with rigorous academic backgrounds and prior judicial experience. Yet these qualities may not be the only characteristics required to decide what is legally *true* but nonetheless *unprovable*.

123. Posner, *supra* note 19, at 40.

124. *Id.*

125. *Id.*

126. MILLER, *supra* note 59, at 49.

III. The Roberts Court Is a "Judges' Court" . . . And Why We Should Be Concerned

The current system of nominating and confirming Supreme Court justices has resulted in a group of nine individuals with extraordinarily homogeneous legal backgrounds. For the first time in the nation's history, every single justice on the current Supreme Court had been a judge on the U.S. Court of Appeals at the time of appointment.¹²⁷

And the selection pool is even narrower than it sounds. Although there are thirteen circuit courts,¹²⁸ all nine members of the Roberts court have come from only five circuits: District of Columbia,¹²⁹ First,¹³⁰ Third,¹³¹ Seventh,¹³² and Ninth.¹³³ Indeed, six of the nine justices were drawn from only two of those circuits: the District of Columbia and the First.

This is unprecedented.

Additionally, seven of the nine members of the Roberts Court graduated from only two law schools:¹³⁴ Harvard¹³⁵ and Yale.¹³⁶

This is also unprecedented.

And this has not gone unnoticed.

Last February, Chief Justice Roberts spoke at Northwestern Law School. Roberts himself mentioned that all nine justices had come directly from judgeships on the U.S. Court of Appeals. A newspaper account of the speech said that:

127. See *supra* note 8 and accompanying text.

128. First through Eleventh Circuits, District of Columbia Circuit, and Federal Circuit. Prior judicial experience of the justices can be found on the Supreme Court's website. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 19, 2008).

129. Chief Justice Roberts and Justices Scalia, Thomas, and Ginsburg. See *A Divided Group*, *supra* note 8; *Bush Chooses Roberts*, *supra* note 8; Oyez, Roberts Court (2006-), *supra* note 8.

130. Justices Souter and Breyer. See *A Divided Group*, *supra* note 8.

131. Justice Alito. See Kirkpatrick, *supra* note 8.

132. Justice Stevens. See *A Divided Group*, *supra* note 8.

133. Justice Kennedy. *Id.*

134. Currently, the American Bar Association has approved 196 law schools in the United States. See ABA Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Mar. 19, 2008).

135. Chief Justice Roberts and Justices Scalia, Kennedy, Souter, and Breyer. See *A Divided Group*, *supra* note 8; *Bush Chooses Roberts*, *supra* note 8.

136. Justices Alito and Thomas. See *A Divided Group*, *supra* note 8; Kirkpatrick, *supra* note 8.

[T]he justices' common experience of serving on the federal appellate bench suggests that the Supreme Court is more of a "judges' court" now than in the past, Roberts said.

And he said he was pleased with that turn of events.

"To the extent that reflects the perception that what the court ought to be doing is acting like judges rather than acting like statesmen, I think that's a healthy development," Roberts said. "Because I think the court should be a court of law and not a place where policy is formed."¹³⁷

Putting aside whether the Roberts Court in the 2006 Term acted like judges, statesmen, or neither, one must examine how we have reached a point where every justice has come from exactly the same job and seven out of nine graduated from the same two Ivy League law schools.

Why do we have "The Stepford Justices"?

The origin of this homogeneous Court is the Robert Bork debacle in 1987. There is no question that the ideological firestorm ignited by his nomination to the Supreme Court and his rejection by the Senate had an impact on the nominations that followed. A successful Bork nomination may very well have opened the door for others like him—bright conservatives who had also been appointed to judgeships on the U.S. Court of Appeals by Ronald Reagan. Other than Bork on the D.C. Circuit, conservatives could have looked to Harvie Wilkinson on the Fourth Circuit, Richard Posner and Frank Easterbrook on the Seventh Circuit, and Alex Kozinski on the Ninth Circuit.

With Bork's defeat, however, caution became the watchword. Presidents Reagan and Bush turned to the bland Anthony Kennedy; David "The Stealth Candidate" Souter;¹³⁸ and Clarence ("Shed the Baggage of Ideology") Thomas.¹³⁹ The Kennedy and Souter nominations attracted little serious opposition.¹⁴⁰ And the rancor surrounding the Thomas nomination had a lot

137. Patricia Manson, *Roberts Says He Presides Over "Judges' Court"*, CHI. DAILY L. BULL., Feb. 2, 2007, at 1.

138. At the time of Souter's nomination, the press dubbed him "The Stealth Candidate" because of his lack of an ideological paper trail. See TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 94-146 (2005). (Chapter 3 is actually entitled "Stealth Candidate.") Of course, considering Souter's record since he has joined the Supreme Court, the most surprised person may have been President George H.W. Bush. Bush, concerned by Souter's lack of a written policy record, relied on New Hampshire Senator Warren Rudman's personal assurance that Souter was "one of the most extraordinary human beings [he'd] ever known." *Id.* at 100. In light of the more extensive paper trails of the five justices named to the Court after Souter, presidents appear to have learned a lesson.

139. See *supra* note 17 and accompanying text.

140. Kennedy was unanimously confirmed in 1988. Linda Greenhouse, *Senate, 97 to 0*,

more to do with Anita Hill's allegations than with serious discussions of ideology.¹⁴¹

Notably, these successful nominations had the following in common: The three men were all judges on the U.S. Court of Appeals and all three graduated from either Harvard or Yale Law School.¹⁴² Ideology was being soft-pedaled in favor of alleged technical competence.

President Clinton did not change the pattern. He nominated Stephen Breyer and Ruth Bader Ginsburg, two more Ivy League law school graduates who were judges on the U.S. Court of Appeals.¹⁴³ President Bush has followed with yet two more Ivy League judges from the same court, John Roberts and Samuel Alito.¹⁴⁴

The post-Bork strategy followed by both the Republicans and the Democrats is obvious: hype credentials, not ideology. Bring in nominees with legal resumes on steroids. Take only judges from the second-highest federal court. Pile on the Ivy League degrees. Have the nominee say—with a straight face—that he is willing to decide cases unburdened by ideology, and then hope that no one will pay any attention to the “man behind the curtain.”¹⁴⁵

So now for the first time in American history we have a Supreme Court in which every justice came directly from the U.S. Court of Appeals. In Chief Justice Roberts' words, we have a “judges' court,” a “court of law” rather than “a place where policy is formed.”¹⁴⁶

Confirms Kennedy to High Court, N.Y. TIMES, Feb. 4, 1988, at A18. Souter was confirmed 90-9. YARBROUGH, *supra* note 138, at 143-44.

141. See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE* (1994); KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT* (2007).

142. See *supra* notes 8-9 and accompanying text.

143. President Clinton tried to find a Supreme Court nominee from outside the federal judiciary. He told his aides he wanted a person with a “big heart” rather than the kind of professional jurist he pejoratively referred to as one of the “footnote people.” Yet for various reasons, his attempts to recruit people such as Mario Cuomo, George Mitchell, and Bruce Babbitt all failed. See JEFFREY TOOBIN, *THE NINE* 62-81 (2007).

144. Bush tried to nominate Harriet Miers, a person with very different credentials. See *infra* text accompanying notes 198-204 (discussing problems with the Miers nomination).

145. See *THE WIZARD OF OZ* (Metro Goldwyn Mayer 1939) (Professor Marvel a.k.a. The Wizard of Oz). In fact, the insistent demand for “More federal appellate judges!!!” and “More Ivy League degrees!!!” is reminiscent of Christopher Walken's classic portrayal of record producer Bruce Dickinson on *Saturday Night Live* in 2000. The skit, which parodied Blue Oyster Cult's recording session for “(Don't Fear) The Reaper,” has producer Walken/Dickinson offering exactly the same advice to the musicians after every take: “More cowbell!!!” *Saturday Night Live* (NBC television broadcast Apr. 8, 2000). The video of the skit can be found on numerous websites. See, e.g., SNL More Cowbell, <http://www.funnyhub.com/videos/pages/snl-more-cowbell.html> (last visited Mar. 19, 2008).

146. See Manson, *supra* note 137.

Opinions on whether this is accurate will vary from observer to observer. But, as Adam Cohen has pointed out, the Roberts Court during the 2006 Term was certainly not shy about telling other government branches and agencies how to do their jobs.¹⁴⁷ It told Congress that a key part of the McCain-Feingold campaign finance law was unconstitutional;¹⁴⁸ it told the Equal Employment Opportunity Commission that the way it judged the timeliness of complaints in pay discrimination cases was wrong;¹⁴⁹ it told Seattle and Louisville that they were improperly using race in their assignments to public schools.¹⁵⁰ The Court also overturned its own precedents, such as a ninety-six-year-old decision that forbade vertical price-fixing agreements,¹⁵¹ and all but overruled a case it decided in 2000 when it upheld the federal Partial-Birth Abortion Ban Act.¹⁵²

What Cohen found ironic was that President Bush had tirelessly campaigned against “activist judges,” and that he “promised to nominate [only those] judges who would ‘interpret the law, not try to make law.’”¹⁵³ Cohen concludes that by this definition, the Roberts Court’s 2006 Term was one of the most “activist” Courts in recent memory.¹⁵⁴

Where one observer sees judicial activism backed only by raw judicial power, others see a court enforcing law through reason and restraint.

One example of the difference between “power” and “reason” occurred in 1991. The Court in *Payne v. Tennessee*¹⁵⁵ held that “victim impact” testimony was admissible at the punishment stage of death penalty trials. *Payne* overruled two recent decisions that had held exactly the opposite.¹⁵⁶

Why the sudden change-of-heart?

Stripped of the legal mumbo-jumbo, the bottom-line was that Justices Souter and Kennedy had replaced Justices William Brennan and Lewis Powell, respectively. Justice Thurgood Marshall’s dissent in *Payne* did not miss this point. In his eloquent dissent—which would be the last opinion of his career—he equated the Court’s change of mind with its change in personnel and

147. Adam Cohen, Editorial, *Last Term’s Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, at A16.

148. Fed. Election Comm’n v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

149. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

150. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

151. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

152. Gonzales v. Carhart, 127 S. Ct. 1610 (2007). The 2000 case ruling Nebraska’s partial-birth abortion law unconstitutional was *Stenberg v. Carhart*, 530 U.S. 914 (2000).

153. Cohen, *supra* note 147, at A16.

154. *Id.*

155. 501 U.S. 808 (1991).

156. South Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808; Booth v. Maryland, 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. 808.

noted that “[p]ower, not reason, is the new currency of this Court’s decisionmaking.”¹⁵⁷

The Warren Court was also accused of putting power before reason. In another eloquent dissent, Justice John M. Harlan railed against the Warren Court for overruling a Vinson Court precedent that was only twelve years old. Harlan criticized the majority for speaking “only [with] a voice of power, not of reason.”¹⁵⁸ The case? *Mapp v. Ohio*, in which the Warren Court found the Fourth Amendment’s exclusionary rule binding on the states, thus overruling the Vinson Court’s recent holding in *Wolf v. Colorado*.¹⁵⁹

Clearly, what is “power” and what is “reason” lies very much in the eye of the beholder, making Adam Cohen’s conclusion in his *New York Times* article even more interesting. After scoring the Roberts Court for its “conservative judicial activism,” Cohen then states: “It is time to admit that *all judges are activists* for their vision of the law. Once that is done, the focus can shift to where it should be: on whose vision is more faithful to the Constitution, and better for the nation.”¹⁶⁰

What makes this view so refreshing is that it suggests we stop pretending that federal appellate judges with Ivy League degrees somehow comprise a Mandarin class of civil servants without “priors,”¹⁶¹ “predilections,”¹⁶² or “premises.”¹⁶³

Perhaps we can finally return to an American tradition that has all but disappeared: Supreme Court justices with wide-ranging governmental experience outside the judicial branch.

IV. Beyond a “Judges’ Court”: The Need for Experiential Diversity on the U.S. Supreme Court

So what has the “judges’ court” so prized by Chief Justice Roberts produced?

The 2006 Term had the highest number of 5-4 decisions and the second lowest number of unanimous decisions in a decade.¹⁶⁴ The problem is not *what* the justices are saying but rather *who the justices are*.

157. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

158. *Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting). The source of Justice Harlan’s rancor was his contention that the exclusionary rule issue had not been raised by *Mapp* and was not properly before the Court. See SAMUEL DASH, *THE INTRUDERS* 96-98 (2004); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983).

159. 338 U.S. 25 (1949), overruled in part by *Mapp*, 367 U.S. 643.

160. Cohen, *supra* note 147 (emphasis added).

161. Farnsworth, *supra* note 68, at 73.

162. DOUGLAS, *supra* note 51, at 8.

163. Posner, *supra* note 19, at 73.

164. See *supra* notes 4-5 and accompanying text.

Consider this fact: The 2006 Term is the first time in American history that no justice of the U.S. Supreme Court has ever previously served as a legislator at the federal, state, or local level.¹⁶⁵

And consider this: The 2006 Term is the first time in American history that no justice of the U.S. Supreme Court has ever run for public office *of any kind*.¹⁶⁶

As discussed in Part III, this post-Bork quest to create the illusion of competence without ideology—manifested by selecting only federal appellate judges with Ivy League backgrounds—has obviously done nothing to heal the ideological fissures on the Court.¹⁶⁷ What it has done, however, is create a U.S. Supreme Court possessing one of the narrowest ranges of governmental experience in the history of the Supreme Court.

In a nutshell, we now have eight justices who know the words to the Harvard or Yale fight songs, but not one who has ever introduced a bill in a legislature or has been a candidate for public office.¹⁶⁸ Again, this narrowness is unprecedented.

To get the full sense of the enormous change we have witnessed in the composition of the Court, it is helpful to take a “snapshot” of the members of the

165. Working backwards, we can see that—until today—there has always been at least one member of the Supreme Court with experience in the legislative branch: Sandra Day O'Connor (Arizona state senator) (Supreme Court service: 1981-2006); Potter Stewart (Cincinnati City Councilman) (1958-1981); Hugo Black (U.S. Senate) (1937-1971); George Sutherland (U.S. House of Representatives) (1922-1938); Joseph McKenna (U.S. House of Representatives) (1898-1925); Melville W. Fuller (Illinois House of Representatives) (1888-1910); Stephen J. Field (California Assembly) (1863-1897); James M. Wayne (U.S. House of Representatives) (1835-1867); John Marshall (U.S. House of Representatives) (1801-1835); William Paterson (New Jersey Senate) (1793-1806); John Jay (Continental Congress) (1789-1795). See Cornell Univ. Sch. of Law, Legal Information Institute: Biographies of the Supreme Court Justices, <http://www.law.cornell.edu/supct/justices/histBio.html> (last visited Mar. 19, 2008) [hereinafter *Biographies of the Justices*] (listing biographical information of all Supreme Court justices up to and including Justice Breyer). And the concept of “legislating” in the broad sense is not totally divorced from the work of a judge. Consider Oliver Wendell Holmes’ observation that “I recognize without hesitation that judges do and must legislate.” *S. Pac. Co. v Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). And Richard Posner has referred to appellate judges as “occasional legislators.” POSNER, *supra* note 19, at 81.

166. See Oyez: Justices by Court, *supra* note 10. It is true that Souter served as New Hampshire Attorney General from 1976-1978. But at that time the attorney general was appointed by the governor. See YARBROUGH, *supra* note 138, at 20.

167. See *supra* Part III.

168. Five justices are graduates of Harvard Law School: Roberts, Breyer, Souter, Kennedy, and Scalia. See *supra* note 135 and accompanying text. Two justices are graduates of Yale Law School: Alito and Thomas. See *supra* note 136 and accompanying text. And Ginsburg attended Harvard Law School before transferring to Columbia Law School. See *supra* note 12 and accompanying text. None of the current justices has ever served as a legislator or run for any other public office. See *supra* notes 10-11, 165-66.

Court over the last six decades, starting in 2006, using only one criterion to identify each justice: the job the justice held at the time of appointment to the Supreme Court. It is not a perfect measure. For example, even though Thurgood Marshall and John M. Harlan spent most of their careers as practicing lawyers, I count them as U.S. Court of Appeals judges because that was their job when they were appointed to the Supreme Court.

Here are the results.

In 2006, all nine justices had been judges on the U.S. Court of Appeals.¹⁶⁹

In 1996, seven had been judges on the U.S. Court of Appeals.¹⁷⁰ Justice O'Connor had been a state judge on the Arizona Court of Appeals.¹⁷¹ Chief Justice Rehnquist came from the Office of Legal Counsel and had never been a judge.¹⁷²

In 1986, only four of the justices came from the U.S. Court of Appeals.¹⁷³ Two had been state court judges (Justices O'Connor and Brennan).¹⁷⁴ Three had *never* been judges: one was Rehnquist; one was Lewis Powell, who came from private practice; the third was Byron White, who had been U.S. Deputy Attorney General.¹⁷⁵

In 1976, five of the justices came from the U.S. Court of Appeals.¹⁷⁶ One came from a state court (Brennan).¹⁷⁷ The same three had never been judges (Rehnquist, Powell, and White).¹⁷⁸

In 1966, only two justices had come from the U.S. Court of Appeals.¹⁷⁹ Brennan came from a state court.¹⁸⁰ But the *remaining six had not been judges*

169. See *supra* note 8 and accompanying text.

170. See Oyez: Rehnquist Court (1994-2005), <http://www.oyez.org/courts/rehnquist/rehn6/> (last visited Mar. 19, 2008) (listing biographical information of the justices on the Rehnquist Court in 1996).

171. *Id.*

172. *Id.*

173. See Oyez: Rehnquist Court (1986-1987), <http://www.oyez.org/courts/rehnquist/rehn1/> (last visited Mar. 19, 2008) (listing biographical information of the justices on the Rehnquist Court in 1986).

174. *Id.*

175. *Id.*

176. See Oyez: Burger Court (1975-1981), <http://www.oyez.org/courts/burger/bug4/> (last visited Mar. 19, 2008) (listing biographical information of the justices on the Burger Court in 1976).

177. *Id.*

178. *Id.*

179. See Oyez: Warren Court (1965-1967), <http://www.oyez.org/courts/warren/war8/> (last visited Mar. 19, 2008) (listing biographical information of the justices on the Warren Court in 1966).

180. *Id.*

at the time they were appointed to the Supreme Court.¹⁸¹ Two came directly from the U.S. Department of Justice (White and Tom Clark).¹⁸² One came from the Securities and Exchange Commission (William Douglas).¹⁸³ Two came from electoral politics: Earl Warren was Governor of California and Hugo Black was U.S. Senator from Alabama.¹⁸⁴ One came straight from private practice (Abe Fortas).¹⁸⁵

In 1956, only one justice had been appointed directly from the U.S. Court of Appeals: John M. Harlan.¹⁸⁶ The only state court judge was Brennan.¹⁸⁷ Seven of the justices *had not been judges* at the time they were appointed to the Supreme Court.¹⁸⁸ Three of them came from positions in the federal government: Douglas, Clark, and Stanley Reed, who had been Solicitor General.¹⁸⁹ Three came from electoral politics: Warren; Black; and Harold Burton, U.S. senator from Ohio.¹⁹⁰ One came directly from academics: Felix Frankfurter.¹⁹¹

In 1946, again only one justice came directly from the U.S. Court of Appeals: Wiley Rutledge.¹⁹² *Eight of the justices had not been judges* at the time they were appointed to the Supreme Court.¹⁹³ Five came from positions in the federal government: Douglas, Reed, Fred Vinson (Secretary of the Treasury),¹⁹⁴ and two

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. See Oyez: Warren Court (1956-1957), <http://www.oyez.org/courts/warren/war3/> (last visited Mar. 19, 2008) (listing biographical information of the justices on the Warren Court in 1956). It should be noted that Harlan had spent most of his career in private practice. He had only been a judge on the Second Circuit for less than one year when he was appointed to the Supreme Court. See Oyez: Biography of John M. Harlan, U.S. Supreme Court Justice, http://www.oyez.org/justices/john_m_harlan2/ (last visited Mar. 19, 2008).

187. See Oyez: Warren Court (1956-1957), *supra* note 186.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. See Oyez: Stone Court (1945-1946), <http://www.oyez.org/courts/stone/sto5/> (last visited Mar. 19, 2008) (listing biographical information of the justices on the Stone Court in 1946).

193. *Id.*

194. However, before he was Secretary of the Treasury, Vinson had served as a judge on the U.S. Court of Appeals for the D.C. Circuit. See Oyez: Biography of Fred M. Vinson, U.S. Supreme Court Chief Justice, http://www.oyez.org/justices/fred_m_vinson/ (last visited Mar. 19, 2008).

Attorney Generals (Frank Murphy and Robert Jackson).¹⁹⁵ Two came from electoral politics: Black and Burton. Frankfurter came from academics.¹⁹⁶

To summarize: in 1946, only one justice on the Court had been a judge of any kind at the time of appointment. Yet in 2006, not only all the justices had been judges at the time of appointment, but they were all from the same court: the U.S. Court of Appeals.

As previously discussed, the difference is the result of a tactic used by both Republican and Democratic presidents over the past twenty years: emphasizing a narrow concept of professional competence—federal appellate judicial experience and Ivy League degrees—as a way of downplaying ideology.¹⁹⁷

But a related phenomenon also contributes to the difference: the rise of “gavel-to-gavel” television coverage of Supreme Court confirmation hearings before the Senate Judiciary Committee. What used to be done informally behind closed doors has now become “must-see TV,” something along the lines of *Are You Smarter Than a Fifth-Term Senator?*

Jan Crawford Greenburg writes how the realities of the modern Senate confirmation hearing helped torpedo the Harriet Miers nomination:

Miers, though a smart and capable lawyer, had no experience in constitutional law. . . . [S]he had little understanding of the complex constitutional topics the senators would want to discuss in her upcoming hearings. And the confirmation process had changed The hearings were so contentious and the questions so focused that nominees without a background in constitutional law—either an experienced judge or a [regular member of the Supreme Court Bar]—would have a very tough time of it. Gone were the days when a president could nominate a practicing lawyer like Lewis Powell or Byron White and watch him sail through.¹⁹⁸

So, one may wonder, what was Byron White’s 1962 confirmation hearing like? According to White’s biographer, Dennis Hutchinson, “[t]he gravity of the hearings was evidenced by the fact that chairman [Senator] Eastland attended for only five minutes.”¹⁹⁹ Attorney General Robert Kennedy was so concerned that he sent his wife Ethel in his place.²⁰⁰ The hearing lasted a total of ninety minutes.²⁰¹ “After a five-minute executive session, the committee unanimously

195. See Oyez: Stone Court (1945-1946), *supra* note 192.

196. *Id.*

197. See *supra* notes 138-45 and accompanying text.

198. JAN CRAWFORD GREENBURG, SUPREME CONFLICT 279 (2007).

199. HUTCHINSON, *supra* note 60, at 330.

200. *Id.*

201. *Id.*

approved White's nomination."²⁰² The nomination then moved to the Senate floor *that same afternoon*, where White was confirmed by voice vote.²⁰³

In contrast, consider Greenburg's comments about the confirmation process as it exists today:

Senators expect a discussion of complex constitutional issues, and [consequently] a nominee who's spent his career thinking about constitutional law, either as a judge or a top appellate lawyer, starts with an enormous edge.

Lawyers like Miers . . . are expected to do the impossible. At one time, there was a place on the Supreme Court for lawyers like Miers, those with practical experience who handled witness interviews and managed law firms and ran bar associations. Lewis Powell was one before President Nixon nominated him. But those days are gone. *The job interview is designed for the appeals court judge or the elite appellate lawyer—someone like a Roberts or an Alito.*²⁰⁴

But isn't it important to separate intellectual heavyweights such as Samuel Alito from untested contenders such as Harriet Miers? The fear is that a nominee lacking the intellectual credentials of an Alito could not stand up to a strong personality such as Chief Justice Roberts. Do we really want a judicial novice such as Miers to simply agree by default with the Chief Justice 90% of the time?

Of course not. So instead, during the 2006 Term we had Samuel Alito agreeing with Roberts in 94% of the cases.²⁰⁵

I want to be clear. My proposal to increase the scope of prior governmental experience in our Supreme Court nominees has nothing to do with trying to change ideologies. Ideologically, the judicial decisions of a former SEC Chairman such as William Douglas can be just as predictable as the judicial decisions of a Samuel Alito. And Bill Clinton would no more appoint an Antonin Scalia than would Ronald Reagan appoint Ruth Bader Ginsburg.²⁰⁶

202. *Id.* at 331.

203. *Id.*

204. GREENBURG, *supra* note 198, at 302 (emphasis added).

205. SCOTUSblog.com, *supra* note 4, at 3. The 94% includes cases where Alito and Roberts agreed in part, as well as those in which they agreed in judgment only. *Id.*

206. A president's use of party ideology to choose a Supreme Court nominee is a tradition that goes back to the nation's founding. In fact, it was not until Republican Abraham Lincoln's nomination of Democrat Stephen Field in 1863 that a president openly crossed party lines to make a Supreme Court nomination—and at that time the deepest national ideological divide was Unionist/Secessionist rather than Republican/Democrat. (Although President John Tyler nominated members of both political parties to the Supreme Court in 1844–45, he did so at a time when he himself was unclear about his own party affiliation.) AKHIL REED AMAR,

Given the ideological proclivities of presidents and their nominees, I am looking for something far more modest: prior governmental experience outside of the judicial branch. And the reasons are two-fold. First, past work in a non-judicial branch of government may occasionally result in something other than an ideologically predictable result from a justice in a particular case. Second, extra-judicial experience often is accompanied by personality traits vital to the workings of a collegial Court.

First, an example of the former.

In 1987, the Court decided *Illinois v. Krull*.²⁰⁷ The issue was straightforward. Three years before, the Court had held that even if a search warrant lacked probable cause, the evidence would nonetheless be admissible at a criminal trial if the court could find that the police who obtained the warrant had reasonably relied on the magistrate's decision that the warrant was proper.²⁰⁸ This was the first time the Court had recognized a so-called "good faith" exception to the Fourth Amendment exclusionary rule.²⁰⁹

In *Krull*, police officers relied on an Illinois statute that authorized warrantless searches of the records of licensed motor vehicle and vehicular parts sellers.²¹⁰ The statute was later found to be unconstitutional.²¹¹ The issue was whether evidence seized pursuant to police searches that had been carried out *before* the statute was found unconstitutional would nevertheless be admissible at a criminal trial.²¹² In other words, would the Court recognize a police officer's good faith reliance on a *statute* in the same way that *Leon* recognized good faith reliance on a magistrate's decision?

Krull extended the good faith exception to such cases.²¹³ Unsurprisingly, the justices simply repeated either the pro-government or pro-defense votes they had cast in *Leon*²¹⁴—with one exception. Justice O'Connor, who had voted for the government in *Leon*, switched to the defense in *Krull*. Moreover, she wrote the dissent in *Krull*.²¹⁵

AMERICA'S CONSTITUTION 220 & 574 n.29 (2005).

207. 480 U.S. 340 (1987).

208. *United States v. Leon*, 468 U.S. 897, 926 (1984).

209. *Id.*

210. *Krull*, 480 U.S. at 343.

211. *Id.* at 344.

212. *Id.*

213. *Id.* at 355.

214. Between the decisions in *Leon* and *Krull*, Justice Rehnquist replaced Burger as Chief Justice, and Justice Scalia took over Rehnquist's seat. See Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Mar. 19, 2008). Rehnquist voted for the government in both cases, and Scalia in *Krull* duplicated Burger's pro-government vote in *Leon*.

215. *Krull*, 480 U.S. at 361 (O'Connor, J., dissenting).

O'Connor disagreed that reliance on a magistrate's decision was comparable to reliance on a statute passed by a legislature. In explaining why, the Court's only former legislator exhibited a hard-eyed realism that was missing in the majority opinion.

First, she notes that "the history of the [Fourth] Amendment suggests that legislative abuse was precisely the evil [it] was intended to eliminate."²¹⁶ She explains why citizens have far more to fear from the legislature rather than a single magistrate: "The legislative act . . . sweeps broadly . . . [A] legislature's unreasonable authorization of searches may affect thousands or millions and will almost always affect more than one. Certainly the [legislature] poses a greater threat to liberty."²¹⁷

Justice O'Connor then politely disputes the Pollyanna-like view the *Krull* majority has of legislators: "Legislators by virtue of their *political* role are more often subjected to the *political* pressures that may threaten Fourth Amendment values than are judicial officers."²¹⁸ Clearly, her experience as Republican Majority Leader of the Arizona Senate provided her with a view of state legislators very different from that of her fellow justices.

How many former Supreme Court justices with legislative experience would have smiled knowingly at this reference to the real world? Yet unfortunately, O'Connor was the only justice at the time to have had legislative experience. And now, for the first time in American history, there is no justice with such experience currently on the Supreme Court.²¹⁹

As to the second advantage of a justice bringing experience from other branches of government, we need only look at the backgrounds of some of the great Chief Justices. John Marshall, a former Congressman and Secretary of State, was a product of the rough-and-tumble world of Virginia politics. These political skills were vital to his success on the Court. Consider Jeffrey Rosen's comparison of Marshall with Thomas Jefferson:

Jefferson was consistently outfoxed by Marshall because [Jefferson's] romantic and visionary temperament, which insisted on carrying most disputes back to first principles, tended to stake out radical and extreme positions in the name of ideological purity. By contrast, Marshall, whose temperament was defined by modesty, conviviality, moderation, and incrementalism, had a unique talent for

216. *Id.* at 364.

217. *Id.* at 365.

218. *Id.* at 365-66 (emphasis added).

219. It is interesting to note that Illinois—a state that knows something about the pressures and realities of politics—later decided to reject the holding in *Krull* by largely adopting Justice O'Connor's dissent. See *People v. Krueger*, 675 N.E.2d 604 (Ill. 1996).

getting along with those who disagreed with him and for leading by gentle persuasion.²²⁰

You must read all the opinions of the 2006 Term to appreciate just how much the Jefferson-type personalities predominate over the Marshall-type personalities on the Roberts Court.

Among the Chief Justices of the twentieth-century, recall that three ran on national tickets for either President or Vice-President before becoming Chief. William Howard Taft, of course, was elected President and served one term.²²¹ Charles Evans Hughes narrowly lost to Woodrow Wilson in 1916 and also served as Governor of New York.²²² Earl Warren ran for Vice-President in 1948 and was a three-term Governor of California.²²³ These were men who possessed sophisticated political skills.

Jim Newton's biography of Warren states that his most important mentor on the court was Hugo Black.²²⁴ Not surprisingly, Warren, the product of decades of California politics, could find a friend in the former Senator from Alabama. Harry Blackmun affectionately described Black as "ever the politician, ever the U.S. Senator still."²²⁵ Black, in turn, admired the affable personality and backroom political skills of yet another justice—William Brennan. Although Brennan had never served in elective office, his private practice, which regularly took him into the union halls of New Jersey, provided him with street-smarts not found in books. Brennan's skills led Black to declare "Bill is my heir."²²⁶

As intellectually talented as many of our current justices are, it would be difficult to identify the Warren, the Black, or the Brennan on the current Court. In a misguided quest to pretend that mere legal competence can trump ideology, we have instead ended up with a set of justices with remarkably narrow world and governmental experience—and with a Supreme Court that is as ideologically split as any in recent memory.

220. ROSEN, *supra* note 2, at 32.

221. See Biographies of the Justices, *supra* note 165.

222. *Id.*

223. *Id.*

224. JIM NEWTON, JUSTICE FOR ALL 348 (2006).

225. HOWARD BALL & PHILIP J. COOPER, OF POWER AND RIGHT 78 (1992) (internal quotation marks omitted).

226. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 508 (2d ed. 1997). I explore the relationship between Warren, Black, and Brennan in my article Timothy P. O'Neill, *Scalia's Poker: Puzzles and Mysteries in Constitutional Interpretation*, 24 CONST. COMMENT. (forthcoming 2007).

Conclusion

A former clerk of Chief Justice Warren's had this to say about his boss:

[T]he Supreme Court could not function with nine Earl Warrens. It would be too conscious of delivering individual justice and perhaps too heedless of the need to construct an architecture of law. But [neither] . . . can the Court survive without one Warren. Someone needs [to guarantee] that it delivers not just abstract justice but actual fairness."²²⁷

Nine of any one justice—or any one type of justice—is not healthy for the Supreme Court.

The theme of this article is truly a modest one. Now and forever, conservative presidents will want to appoint conservative justices, while liberal presidents will want liberals on the Court. That will never change.

But we need to return to a tradition from a not-too-distant past that saw both liberal and conservative justices coming to the Court with rich backgrounds in the legislative and executive, as well as the judicial, branch. We need some justices with the “people skills” of politicians, as well as some justices coming straight from the legal academy. We need some justices with “street smarts” as much as we need some justices who are intellectuals.

We also need to remember that confirmation hearings are not merely televised dissertation defenses. The hearings should be something more than bloviating senators and clueless reporters waiting to pounce on some trivial legal gaffe.

What confirmation hearings should be seeking is suggested by Gerard Magliocca. He describes what he calls a “crucial point about constitutional doctrine, which is that *values* determine the status of judicial decisions more than reason. Although some opinions are more logical than others, that is not what usually distinguishes the landmarks from the losers.”²²⁸

It is time to once again assemble a Supreme Court comprised of justices with the varied backgrounds and breadth of governmental experience that are essential for work on the nation's highest collegial court.

It's time to leave Stepford, Connecticut far behind.

227. NEWTON, *supra* note 224, at 519.

228. GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION 100 (2007) (emphasis added).

