

# A MATTER OF JUDGMENT, NOT A MATTER OF OPINION

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*In this Article, Professor Hartnett enters the longstanding debate over whether elected officials are obliged to follow the Supreme Court's interpretation of the Constitution. Responding to a call by Professors Larry Alexander and Frederick Schauer for complete deference to judicial opinions—a stance echoed by a broad range of scholars, now including former antideference advocate Edwin Meese—Professor Hartnett attempts to identify serious flaws in this position. He maintains that because the scope of the judicial role is narrowly limited to deciding cases and controversies, and not “pronouncing the law,” there is a profound distinction between judgments and opinions. Therefore, we should not confuse deference with obedience and grant the Supreme Court a monopoly on constitutional interpretation.*

More than one hundred and ninety-five years after *Marbury v. Madison*,<sup>1</sup> one hundred and forty years after the Lincoln/Douglas debates,<sup>2</sup> forty years after *Cooper v. Aaron*,<sup>3</sup> and a dozen years after Attorney General Edwin Meese was criticized for agreeing with President Lincoln,<sup>4</sup> we continue to debate whether elected officials

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<sup>1</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

<sup>2</sup> See 3 The Collected Works of Abraham Lincoln 1-37, 38-76, 102-44, 145-86, 207-44, 245-325 (Roy P. Basler ed., 1953). Judge Douglas described the *Dred Scott* decision as “the law of the land, binding on you, on me, and on every other good citizen whether we like it or not.” 3 id. at 112. Lincoln ridiculed Judge Douglas for treating the Court as if it were God. See 3 id. at 28 (“Thus saith the Lord.”).

<sup>3</sup> 358 U.S. 1, 18 (1958):

[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States, “‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, “‘to support this Constitution.’”

<sup>4</sup> See Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979, 984-85 (1987) (published version of speech delivered in 1986) (agreeing that “other branches of government, and through them, the American people,” can “respond to . . . previous constitutional decisions and change them”); see also, e.g., Sanford Levinson, Could Meese Be Right This Time?, 61 Tul. L. Rev. 1071, 1078 (1987) (suggesting that Meese might be correct in invoking “ability of all citizens to share in the debates about the meaning of our

are obliged to follow the Supreme Court's interpretation of the Constitution. For a time it appeared that the Supreme Court's critics had gained the upper hand; indeed, one vocal advocate of the legitimacy of defying the Supreme Court, Professor Michael Paulsen, asked in 1994, "Will nobody defend judicial supremacy anymore?"<sup>5</sup> Professors Larry Alexander and Frederick Schauer recently rose to the challenge, defending the Court's assertion in *Cooper* of judicial primacy without qualification,<sup>6</sup> and calling on all officials to "obey" even what they believe to be "an erroneous interpretation of the Constitution" by the Supreme Court.<sup>7</sup> Perhaps persuaded by Alexander

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tenuously shared life"); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 Tul. L. Rev. 991, 993 (1987) (arguing executive branch's duty to comply with judicially declared law is matter of formal legal obligation).

<sup>5</sup> Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 Geo. L.J. 385, 385 (1994); cf. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1270 (1996) (writing that "[s]ome version of departmentalism"—which views "the federal legislative, executive, and judicial departments [as] each having an obligation, in the exercise of its granted powers, to interpret and apply the Constitution"—"may even reflect the consensus view among serious scholars of the Constitution").

Paulsen goes so far as to endorse what he calls the "*Merryman* power," named after "the most famous case illustrating the proposition, *Ex parte Merryman*, in which President Abraham Lincoln refused to obey Chief Justice Taney's order in issuing a writ of habeas corpus." Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 223 n.16 (1994) (citation omitted) [hereinafter Paulsen, *The Most Dangerous Branch*]. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487); see also Paulsen, *The Most Dangerous Branch*, supra, at 222 ("[The President] may refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law."); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81, 109-11 (1993) (concluding executive branch interpretive autonomy and judicial branch supremacy over interpretation are incompatible).

<sup>6</sup> See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1362 (1997) (claiming arguments against deference to judicial interpretation are not defensible).

<sup>7</sup> *Id.* at 1369. Others today seem to simply accept judicial supremacy as a given. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 352 n.63 (1998) ("Although the supremacy of Supreme Court pronouncements often is taken as a given today, the issue is still hotly debated at times.") (citing Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 Tul. L. Rev. 977 (1989)); see also Paulsen, *The Most Dangerous Branch*, supra note 5; Alexander & Schauer, supra note 6; and Lawson & Moore, supra note 5, as examples.

Not surprisingly, the Court itself continues to proclaim its supremacy. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)):

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents

and Schauer—or perhaps motivated by his happiness with Supreme Court decisions hostile to affirmative action<sup>8</sup>—even Meese appears to have changed his mind and has now “undertaken to monitor the efforts of law-enforcement officials to implement, vigorously and with all deliberate speed, the Constitution’s nondiscrimination mandate and U.S. Supreme Court decisions construing it.”<sup>9</sup>

Professors Alexander and Schauer ground their argument in neither empiricism nor history<sup>10</sup> but instead rely on the “nature of law and . . . the functions it serves.”<sup>11</sup> In their view, “an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done.”<sup>12</sup> This “settlement function,” they argue, can only be achieved by “establishing one interpreter’s interpretation as authoritative.”<sup>13</sup> Noting that lower court judges are expected to conform their decisions to Supreme Court decisions, they further argue that there is nothing wrong with expecting the same of *nonjudicial* officials, because “good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree.”<sup>14</sup> They acknowledge that some would call their view

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with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

For a critique of *Boerne*, see Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 163 (1997) (describing *Boerne* as adopting “startlingly strong view of judicial supremacy”). Only someone already committed to judicial supremacy, of course, could take these pronouncements themselves as authoritative. See Lawson & Moore, *supra* note 5, at 1293-94 (“The pronouncements of the courts can no more settle this question than can the pronouncements of presidents—at least, not unless the judicial supremacist position has already been established by other means.”).

<sup>8</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (subjecting affirmative action to strict judicial scrutiny).

<sup>9</sup> Letter from Attorney General Edwin Meese III and others to State Attorneys General (no date) (on file with the *New York University Law Review*); cf. Levinson, *supra* note 4, at 1078 (“Just as a stopped clock is right twice a day, so Attorney General Meese can be a source of insight.”). But see Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 Ga. St. U. L. Rev. 781, 789 (1998) (“It is important to recognize that the legislative and executive branches have co-equal power with the judicial branch in regard to the Constitution.”).

<sup>10</sup> See Alexander & Schauer, *supra* note 6, at 1369.

<sup>11</sup> *Id.* at 1370.

<sup>12</sup> *Id.* at 1377. Here, they echo Stephen Douglas, who contended:

It is [one of] the fundamental principles of the judiciary that its decisions are final. It is created for that purpose so that when you cannot agree among yourselves on a disputed point you appeal to the judicial tribunal which steps in and decides for you, and that decision is then binding on every good citizen. It is the law of the land . . . .

<sup>3</sup> The *Collected Works of Abraham Lincoln*, *supra* note 2, at 142-43.

<sup>13</sup> Alexander & Schauer, *supra* note 6, at 1377.

<sup>14</sup> *Id.* at 1387.

positivism and some would call it formalism, but conclude, "[w]e call it law."<sup>15</sup>

Despite their eloquence,<sup>16</sup> Professors Alexander and Schauer overlook a fundamental feature of our legal system: Courts (or at least federal courts) do not sit to pronounce the law, but rather to decide cases and controversies.<sup>17</sup> By failing to consider this fundamental feature, Alexander and Schauer miss the crucial distinction between judgments and opinions. As a result, they confuse deference with obedience.

## I

### THE PRIMACY OF JUDGMENTS

The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment.<sup>18</sup> As valuable as opinions may be to legitimize judgments,

<sup>15</sup> Id.

<sup>16</sup> See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83, 84 (1998) ("Alexander and Schauer's argument is important, provocative, and unconvincing."); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 Wm. & Mary L. Rev. 865, 903-04 (1998) ("Whether one agrees in the end that Alexander's and Schauer's theory actually supports the Supreme Court's most self-aggrandizing statements in *Cooper*, they have offered the most powerful justification of *Cooper* we have yet seen. If their argument fails, then *Cooper* may well be unsupportable."); Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 Wm. & Mary L. Rev. 945, 959-60 (1998) ("If, as I have claimed, scholars as accomplished as Alexander and Schauer do not provide [a] real argument for . . . judicial supremacy [then] there may well be none."). But see Emily Sherwin, *Ducking Dred Scott: A Response to Alexander and Schauer*, 15 Const. Commentary 65, 66 (1998) (finding Alexander and Schauer "at least potentially persuasive").

<sup>17</sup> See U.S. Const. art. III, § 2 (stating that judicial power of United States "shall extend to . . . cases [and] controversies"). For interpretations of this clause, see, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Geo. L.J. 347, 349 (1994) ("The business of the federal judiciary is deciding cases, not saying what the law is."); Lawson & Moore, *supra* note 5, at 1273 ("The power to interpret the laws is an incident to this case-or-controversy-deciding function; courts must interpret because they must decide."); Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965):

Federal Courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.

<sup>18</sup> See Daniel J. Meador & Jordana S. Bernstein, *Appellate Courts in the United States* 75-76 (1994) ("The opinion of an appellate court is the explanation of what the court is deciding; it is not a legally operative instrument. The court's formal action is embodied in its 'judgment,' a separate document directing the disposition of the case."); see also Lawson & Moore, *supra* note 5, at 1328 (stating that "the issuance of opinions is not an essential aspect of the judicial power"); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they ren-

to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that "settle[s] authoritatively what is to be done"<sup>19</sup>—and the only thing that the judgment settles authoritatively is what is to be done about the particular case or controversy for which the judgment was made.<sup>20</sup>

For example, a typical trial level judgment for a plaintiff will look like this:

This action came on for hearing before the Court, Honorable John Marshall, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff Ann Baxter recover of the defendant Charles Denver the sum of \$300,000, with interest thereon at the rate of 3 per cent as provided by law, and his costs of action.<sup>21</sup>

This short and simple document makes clear what is to be done regarding the controversy between Ann Baxter and Charles Denver. Nothing more is needed to settle that dispute authoritatively.

It may seem odd in the pages of a law review to emphasize the distinction between judgments and opinions, especially since law professors and law students<sup>22</sup> spend much of their time reading opinions and virtually no time at all reading judgments, but the primacy of judgments to the judicial function is evident in many ways. At the most basic level, there can be no doubt that a court can decide a case by entering a judgment but not issuing an opinion. Trial courts and

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dered the judgment they did."). Professor Merrill relies on what he calls "coherentist" and "consequentialist" arguments for this conclusion, *id.* at 44, rather than "provisions of the Constitution, . . . specific judicial precedents, or . . . assumptions about the nature of the judicial hierarchy." *Id.* at 43. He contends that "the allocation of power to decide cases and controversies . . . could mean that both judgments and precedents are binding on other branches." *Id.* at 57-58. Although this essay reaches the same ultimate conclusion as Merrill, it seeks to root that conclusion in the primacy, under Article III, of judgments rather than opinions.

<sup>19</sup> Alexander & Schauer, *supra* note 6, at 1377.

<sup>20</sup> See Devins & Fisher, *supra* note 16, at 91 ("Rather than settle transcendent values, Court decisions, at best, momentarily resolve the dispute immediately before the Court."). Professors Devins and Fisher, however, occasionally blur the distinction between judgments and opinions as well: They characterize the "invocations of judicial supremacy" in *City of Boerne v. Flores* as animated by the "threat of resistance to [the Court's] orders," *id.* at 93, while what was at issue in *Boerne* was congressional disagreement with the Supreme Court's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), not congressional resistance to the judgment rendered against Mr. Smith in that case.

<sup>21</sup> See Fed. R. Civ. P. Form 32.

<sup>22</sup> Practicing lawyers whose clients' lives are immediately affected by judgments are more likely than law professors or law students to read actual judgments.

appellate courts do it every day.<sup>23</sup> Even the Supreme Court of the United States does it regularly.<sup>24</sup> Indeed, Lord Mansfield went so far as to advise “new judges to state their judgments and withhold their reasons, since their judgments were probably right and their reasons probably wrong.”<sup>25</sup>

History confirms the primacy of judgments. While the Judiciary Act of 1789<sup>26</sup> required the clerks of federal courts, including the Supreme Court, to maintain accurate records of the orders, decrees, judgments, and proceedings of the courts, it said not a word about judicial opinions.<sup>27</sup> As John Harrison has noted, “[n]either the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions, let alone their public distribution.”<sup>28</sup>

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<sup>23</sup> See Meador & Bernstein, *supra* note 18, at 86 (“Many courts use still shorter forms of disposition like the Fifth Circuit’s ‘Affirmed. See Local Rule 21.’ A one-line affirmance without explanation is known in some courts as a ‘judgment order’ or a ‘PCA’ (so called because it says simply, ‘Per Curiam. Affirmed.’).”). Indeed, the Federal Rules of Appellate Procedure specifically provide for cases in which “a judgment is rendered without an opinion.” Fed. R. App. P. 36. The published reports, however, do not distinguish between judgments entered without any opinion and judgments entered with an unpublished opinion, listing in tabular form judgments of courts of appeals entered in hundreds of cases, some without opinion and some with unpublished opinion. See, e.g., 129 F.3d 1252-68 (1997). Professor Schauer himself has written about the practice of rendering judgment without opinion. See Frederick Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 634 (1995) (stating that “when federal courts of appeals dispose of cases from the bench or without opinion, when trial judges rule on objections and frequently when they rule on motions . . . the conclusion stands alone, unsupported by reasons, justifications, or explanation”). But see Michael C. Dorf, *Dicta and Article III*, 142 *U. Pa. L. Rev.* 1997, 2029 (1994) (asserting that legal culture requires that “any judicial decision must be justified by the giving of reasons”); Eisgruber, *supra* note 17, at 354 (describing federal judiciary as “required to justify decisions by written opinion”).

<sup>24</sup> See, e.g., *King v. Ill. Bd. of Elections*, 118 S. Ct. 877 (1998), *aff’d* without opinion, 979 F. Supp. 619 (N.D. Ill. 1997); *State Athletic Comm’n v. Dorsey*, 359 U.S. 533 (1959), *aff’d* without opinion, 168 F. Supp. 149 (E.D. La. 1958). In its past three terms, the Court summarily decided 248 cases, compared to 274 cases decided after argument with a signed or per curiam opinion. See *Statistical Recap of Supreme Court’s Workload During Last Three Terms*, 67 *U.S.L.W.* 3153, 3168 (1998). Although an opinion was issued in connection with some of the 248 cases decided summarily, most were decided without opinion. See *id.*

<sup>25</sup> Philip B. Kurland, *Politics, the Constitution, and the Warren Court* 94 (1970); see also Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 *Tex. L. Rev.* 51, 100 (1996) (“[It] should always be kept in mind in reading judicial opinions [that] judges are often better at deciding well than at explaining well.”).

<sup>26</sup> Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76.

<sup>27</sup> See *id.* The Judiciary Act of 1789 also required circuit courts, when sitting without a jury, to be sure that the facts appeared in the record, see *id.* at § 19 (requiring circuit courts “in causes in equity and of admiralty . . . jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record”), but did not require courts to make any legal explanation a part of the record.

<sup>28</sup> John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 *U. Chi. L. Rev.* 203, 230 (1997); see also Wilfred J. Ritz,

Congress did not provide for an official reporter for the Supreme Court until 1817.<sup>29</sup> Before then, the publishers of unofficial reporters, influenced by marketing decisions, exercised their discretion in deciding what Court opinions or portions thereof to publish.<sup>30</sup> The opinions that did appear in the unofficial reporters were often inaccurate due to delay and expense in reporting.<sup>31</sup> Such failings may have been “inherent in a system dedicated to the preservation of opinions . . . often extemporaneously delivered from only the most rudimentary notes.”<sup>32</sup>

The reliability of the reporting of Supreme Court opinions began to change with the appointment of Henry Wheaton as the official reporter.<sup>33</sup> As part of an effort to improve speed and accuracy, the Justices promised Wheaton “any written opinions they might prepare, or notes they might make in connection with their oral opinions.”<sup>34</sup> While the previous reporters had been up to eight years late, Wheaton managed to publish the opinions from the 1816 Term prior to the commencement of the 1817 Term.<sup>35</sup>

But even with Wheaton’s improvements, the Court’s opinions were hardly readily available. First, Wheaton himself used editorial

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Rewriting the History of the Judiciary Act of 1789, at 27-52 (1990) (explaining that in 1789 state courts were not hierarchical and that state judges neither wrote nor published opinions). The current statute providing for an official reporter is codified at 28 U.S.C. § 673 (1994).

<sup>29</sup> See Act of March 3, 1817, ch. 63, § 1, 3 Stat. 376 (providing for reports of decisions of Supreme Court) (current version at 28 U.S.C. § 676 (1994)). To this day, Congress has not provided for an official reporter for the district courts and regional courts of appeals.

<sup>30</sup> See Harrison, *supra* note 28, at 230 (noting that reliance on unofficial reporters undercuts argument that system was “set up with a focus on judicial exposition of law”).

<sup>31</sup> See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1304-05, 1312 (1985) (discussing work of Alexander Dallas, entrepreneur who reported many Supreme Court decisions when Court sat in Philadelphia, and William Cranch, court reporter for Supreme Court after Court moved to Washington, D.C.).

<sup>32</sup> *Id.* at 1328.

<sup>33</sup> Wheaton was informally appointed in 1816; within weeks, a bill was introduced in Congress providing for an official reporter for Supreme Court cases and, when it was enacted in 1817, Wheaton became the first official reporter. See *id.* at 1343. As Joyce notes, Charles Warren’s reference to an 1816 Act of Congress providing for a Supreme Court reporter appears to be an error. See *id.* at 1347 n.339 (citing 1 Charles Warren, *The Supreme Court in United States History* 455 n.1 (rev. ed. 1937)). Joyce was “unable to confirm the existence” of such an 1816 Act, see *id.*, and a diligent search by Xinh Luu, a reference librarian at the University of Virginia School of Law, has also failed to unearth it. See also Laurence F. Schmeckebier & Roy B. Eastin, *Government Publications and Their Use* 279 (2d rev. ed. 1969) (stating that “first legislative provision for the decisions of the Supreme Court was the act of March 3, 1817”).

<sup>34</sup> Joyce, *supra* note 31, at 1321.

<sup>35</sup> See *id.* at 1327 (stating that reports by Dallas had been up to eight years late and those by Cranch up to six years late).

discretion in deciding which opinions to publish and which to omit.<sup>36</sup> Second, Wheaton's volumes did not enjoy wide circulation. His successor, Richard Peters, Jr., wrote in 1828 that there were "but few copies of the reports of the cases decided in the Supreme Court of the United States in many large districts of our country" and that in "some of those districts . . . not a single complete copy of all the reports is in the possession of any one . . . ."<sup>37</sup>

Nor, for many years, was an opinion considered part of the record. In the famous case of *Martin v. Hunter's Lessee*,<sup>38</sup> the Supreme Court reviewed a judgment of the Court of Appeals of Virginia but refused to consider that court's opinion because opinions were not thought to be part of the record.<sup>39</sup> Only after Congress in 1867 lifted the Court's limitation of review to the record did the Court consider state court opinions when reviewing state court judgments.<sup>40</sup> Indeed, it was not until 1834 that the Court provided for the filing of its *own* written opinions with its own clerk, "and even then oral opinions were not invariably reduced to writing."<sup>41</sup>

A host of practices, some so firmly rooted that we scarcely notice them, also confirm the primacy of judgments.<sup>42</sup> Consider first the trial

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<sup>36</sup> See *id.* at 1329 (quoting 14 U.S. (1 Wheat.) iii (1816) (providing explanation by Wheaton that "discretion" had been exercised in omitting cases)).

<sup>37</sup> See *id.* at 1364-65 (quoting Proposals for Publishing, by Subscription, the Cases Decided in the Supreme Court of the United States, from Its Organization to the Close of January Term, 1827 (1828)).

<sup>38</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>39</sup> See *id.* at 359-60. *Martin* appeared in the first volume of decisions produced by an official reporter.

<sup>40</sup> See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874) (interpreting Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-87, to permit Court to consider state court opinions); see also Edward A. Hartnett, Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?, 75 Tex. L. Rev. 907, 922-25 (1997) (explaining that while *Murdock* found that jurisdiction did not extend to all questions, it did allow examination of state court opinions when considering judgments denying federal rights). The Judiciary Act of 1789 did not have any such explicit limitation to the record in federal cases.

<sup>41</sup> Joyce, *supra* note 31, at 1298 n.46; see also Sup. Ct. R. 41, 42 U.S. (1 How.) xxxv (1834) (ordering that "the original opinions of the Court, delivered to the reporter, be filed in the office of the Clerk of the Court for preservation as soon as the Volume of Reports for the term, at which they are delivered, shall be published"). Perhaps not coincidentally, the Court promulgated this rule the same week that counsel for the Court's first official reporter asserted at oral argument in a copyright case he brought against its second official reporter that "there is no law or custom to put opinions upon record." Joyce, *supra* note 31, at 1377 (quoting *Wheaton v. Peters*, 33 U.S. (8 Pet.) 595, 615 (1834)); see also 10 Op. Att'y Gen. 382, 412 (1862) (concluding that after 20 pages of legal analysis reaching as far back as Greek and Roman law, blacks could be citizens of the United States, noting that the opinion in *Dred Scott*, as opposed to the judgment, was "dehors the record").

<sup>42</sup> Even the tangled doctrine surrounding the Eleventh Amendment reflects the primacy of judgments. If process to enforce a *judgment* would run against the state, the Eleventh Amendment bars the action. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261,



court level. A litigant may seek a summary judgment or a default judgment but never a summary opinion or default opinion.<sup>43</sup> The clerk of the court must index judgments, not opinions.<sup>44</sup> Indeed, we have a special rule designed to guard against the confusion of judgments with opinions that requires that “[e]very judgment shall be set forth on a separate document.”<sup>45</sup> Judgments, not opinions, are given preclusive effect in later litigation, as even the title of the relevant Restatement attests.<sup>46</sup> Most importantly, process is available to “enforce a judgment,” not to enforce an opinion.<sup>47</sup>

While the primacy of judgments may be most obvious at the trial court level, it is evident at the appellate level as well. An appellate court reviews judgments, not opinions. Thus, when an appellate court disagrees with a lower court’s opinion, but agrees with its judgment, it *affirms* rather than reverses.<sup>48</sup> A judgment must be entered to decide

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281-82 (1997) (noting that quiet title action against state would be barred and holding that action that was “close to the functional equivalent of quiet title” was likewise barred); *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that action seeking retroactive payment of money from state treasury for wrongfully withheld disability benefits is barred); *Ex parte New York*, 256 U.S. 503, 511 (1921) (holding, without explicitly citing Eleventh Amendment, that state property used for “public and governmental purpose” exempt from in rem seizure by federal admiralty court). However, if process to enforce the judgment would not run against the state, but instead simply against an individual state officer (whether by contempt or execution), there is no Eleventh Amendment bar. See, e.g., *California v. Deep Sea Research*, 118 S. Ct. 1464, 1473 (1998) (holding that federal admiralty court may exercise in rem admiralty jurisdiction over res claimed by state but not within state’s possession, noting that in such cases state’s possession would not be “disturb[ed] by virtue of judicial process”) (citing *The Davis*, 77 U.S. 15, 21 (1869)); *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) (holding that damage claims against individual state officers not barred by Eleventh Amendment); *Ex parte New York*, 256 U.S. at 500 (distinguishing between actions where state is “the real party against which the judgment will so operate,” which are barred by Eleventh Amendment, and actions against individual state officers who “commit acts of wrong and injury,” which are not barred); *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (stating that Eleventh Amendment does not bar injunction against state officer who violated federal law).

<sup>43</sup> See Fed. R. Civ. P. 56 (governing rule for summary judgment); Fed. R. Civ. P. 55(b) (governing rule for default judgment).

<sup>44</sup> See Fed. R. Civ. P. 79(c) (“Suitable indices . . . of every civil judgment . . . shall be kept by the clerk under the direction of the court.”).

<sup>45</sup> Fed. R. Civ. P. 58.

<sup>46</sup> See Restatement (Second) of Judgments (1982); see also Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945 (1998) (exploring preclusive effect of judgments of one sovereign’s courts in courts of another sovereign); Lawson & Moore, *supra* note 5, at 1327-28 (describing origins of law of judgments and its importance for distinction between judgments and opinions).

<sup>47</sup> Fed. R. Civ. P. 69.

<sup>48</sup> See, e.g., *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (“In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”); see also *Turner v. AFT Local 1565*, 138 F.3d 878, 880 n.1 (11th Cir. 1998) (“We must affirm the judgment of the district court if the result is correct even if the district court relied upon a

the appeal; no opinion need ever be rendered.<sup>49</sup> The mandate of an appellate court—its order to a lower court—generally consists of a “certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs . . . .”<sup>50</sup>

These principles also hold true for the Supreme Court.<sup>51</sup> In every case coming from a state court, and virtually every case coming from a lower federal court, the Court acts on a judgment, either affirming, reversing, or vacating that judgment.<sup>52</sup> As to state courts, the jurisdiction statute authorizes the Court to review “[f]inal judgments or de-

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wrong ground or gave a wrong reason.”); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1485 (10th Cir. 1996) (stating that appellate court need not rely on same grounds as district court when affirming district court's decision).

<sup>49</sup> See Fed. R. App. P. 36 (“The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court . . . . If a judgment is entered without opinion, the clerk shall prepare, sign, and enter the judgment following instruction from the court.”).

<sup>50</sup> Fed. R. App. P. 41(a). Although questions surrounding the duty of courts to adhere to precedent is beyond the scope of this article, it is worth noting that the power of an appellate court to “issue . . . decrees to courts below, and to supervise them to make sure they are properly executed[.]” Charles Fried, *Impudence*, 1992 Sup. Ct. Rev. 155, 193 (1993), goes a long way toward explaining vertical stare decisis. See also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 818 (1994) (evaluating duty to obey precedents); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va. L. Rev. 333, 386 n.146 (1998) (“It is entirely possible that the rules of precedent actually followed by courts are a result of continuity of personnel and appellate hierarchies.”); John M. Rogers, *Lower Court Application of the “Overruling Law” of Higher Courts*, 1 Legal Theory 179, 179-85 (1995) (arguing that duty to obey precedent, including precedent regarding when precedent is to be overruled, is based on hierarchical structure of judicial system).

<sup>51</sup> As Alexander Bickel put it, speaking of the Court's opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954):

The Court is an organ of government. It is a court of law, which wields the power of government in disposing of concrete controversies. Therefore, although the pronouncement of the principle of May 17, 1954, was in itself not an ineffectual act, it did not alone discharge the function of the Court. Jurisdiction having been assumed, that function required the issuance of a legal decree.

Alexander M. Bickel, *The Least Dangerous Branch* 247 (1962); see also Kurland, *supra* note 25, at 184 (“In form, the Court's judgments do not purport to control the behavior of any except those who were brought under its jurisdiction.”).

<sup>52</sup> See Sup. Ct. R. 43.1 (“If the Court affirms a judgment, the petitioner or appellant shall pay costs . . . .”); Sup. Ct. R. 43.2 (“If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs . . . .”). The Supreme Court is also authorized to “give binding instructions” to a court of appeals that certifies “any question of law in any civil or criminal case as to which instructions are desired . . . .” 28 U.S.C. § 1254(2) (1994). Three things are significant about this provision. First, it is almost never used. Since 1946, “only three certificates have been accepted by the Court.” Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1675 (4th ed. 1996). Second, the “binding instructions” are issued to the court of appeals that sought “instruction”; the statute does not purport to bind anyone else. Finally, and most importantly, although the Supreme Court is not itself issuing a judgment, it is directing a lower federal court regarding the entry of a judgment.

crees rendered by the highest court of a State in which a decision could be had"<sup>53</sup> but does not grant the Court authority to review state court opinions. Moreover, it cannot review a state court judgment that rests on adequate and independent state grounds because nothing that the Supreme Court might say in an opinion would affect the judgment in the case.<sup>54</sup>

Furthermore, each member of a multimember court such as the Supreme Court must ultimately vote on the judgment. The tally of votes as to the judgment produces a judgment of the court. Should a tally ever produce a tie, the court's judgment is determined by a default principle: The lower court's judgment is affirmed.<sup>55</sup>

In contrast, there is no need to produce an opinion of the court even if the members of the court are issuing opinions. Indeed, during the first decade of its existence, the Supreme Court did not attempt to produce an opinion of the Court. Instead, opinions were delivered *seriatim*, that is, individual Justices made statements explaining their votes on the judgment.<sup>56</sup> Even today the Court frequently does not produce an opinion of the Court. And we simply have no need, in light of the primacy of judgments, for a default principle to handle

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<sup>53</sup> 28 U.S.C. § 1257 (1994).

<sup>54</sup> See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (stating that bar against reviewing state court judgments that rest on adequate and independent state grounds is based, in part, on avoiding issuance of opinion that has no effect on judgment); *Eustis v. Bolles*, 150 U.S. 361, 362 (1893) (stating that when a state court judgment rests on adequate and independent state grounds, Supreme Court should not exercise jurisdiction).

<sup>55</sup> See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233, 233 (1996) (affirming judgment of lower court by equally divided court); *Tompkins v. Texas*, 490 U.S. 754, 754 (1989) (same); see also 28 U.S.C. § 2109 (1994) (providing that if Supreme Court lacks quorum to decide case for two successive terms, it shall "enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court"). A recent book by a former Supreme Court clerk describes Justice Stevens as changing his vote in *Tompkins* "to assure that the Court [did] not issue his own opinion." Edward Lazarus, *Closed Chambers* 69 (1998). According to Lazarus's own account, however, Justice Stevens's vote on the judgment in that case was always to reverse. See *id.* at 61. What changed was that Justice Kennedy changed his vote on the judgment from reversal to affirmance, see *id.* at 68, and Justice Scalia changed from undecided on the judgment to affirmance, see *id.* at 65, leaving the Court evenly divided as to the judgment, see *id.* at 69. At that point, the Supreme Court followed the appropriate practice of issuing no opinion at all but simply entering a judgment of affirmance by an equally divided court. See *id.* at 50.

<sup>56</sup> See Scott Douglas Gerber, Introduction: The Supreme Court Before John Marshall, in *Seriatim: The Supreme Court Before John Marshall* 1, 20 (Scott Douglas Gerber ed., 1998) (explaining reason for title of book about Supreme Court Justices before Marshall and noting that "[w]hen John Marshall was appointed chief justice in 1801, he put an end to the practice of seriatim opinion writing"); James Bradley Thayer, *John Marshall* 54-56 (Da Capo Press ed. 1974) (explaining that before Marshall became Chief Justice, opinions were delivered *seriatim*); G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 Va. L. Rev. 1, 42 & n.153 (1984) (noting that Marshall was responsible for change from seriatim opinions to "opinion of the Court").

cases when the members of a multimember court are equally divided regarding an opinion.<sup>57</sup>

Still more strikingly, the outcome of a case in a multimember court depends on the tally of votes concerning the judgment even if the tally of votes concerning each issue resolved by opinion would logically produce a different conclusion.<sup>58</sup> For example, in *Apodaca v. Oregon*,<sup>59</sup> five Justices stated in opinions that the Sixth Amendment requires unanimous juries in criminal cases.<sup>60</sup> In that same case, eight Justices stated in opinions that state courts are obliged by the Fourteenth Amendment to meet the same standards for criminal juries that the Sixth Amendment imposes on federal juries.<sup>61</sup> The logical result from these pronouncements of law is that state court juries in criminal cases must be unanimous. Yet *Apodaca*, whose jury had convicted by a nonunanimous vote, did not get a new trial. Instead, the judgment of the state court was affirmed by the Supreme Court.<sup>62</sup>

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<sup>57</sup> The closest thing to such a default rule does not affect the initial case at all but rather its precedential effect. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (citation omitted)).

<sup>58</sup> See Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 20 (1993) (observing that "case-by-case" rather than "issue-by-issue" has historically been "encompassing norm of the Court"). Although Professors Kornhauser and Sager agree that such voting has been the norm, see *id.* at 40 (noting "acceptance of case-by-case voting among the American judiciary generally"), they call for reexamination of the practice and for a "metavote" on how "the court as a collective entity [ought to] decide the case," *id.* at 30-33. In particular, they note that the "hierarchical management" function of appellate courts is powerful reason "to favor issue-by-issue" adjudication. *Id.* at 42; see also David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Geo. L.J. 743, 745 (1992) (arguing for issue-by-issue voting because case-by-case voting "is fundamentally inconsistent with an appellate court's role of providing guidance to lower courts and the community as a whole"). Issue-by-issue voting, then, is consonant with Professors Alexander and Schauer's emphasis on courts as the managers of the law; it is in considerable tension with the traditional emphasis, rooted in Article III, on courts as case deciders. One would expect that an institution constituted to decide "cases" would adopt the "case-by-case" method as its "encompassing norm" and "longstanding tradition."

<sup>59</sup> 406 U.S. 404 (1972). *Apodaca* was decided in conjunction with *Johnson v. Louisiana*, 406 U.S. 366 (1972). A number of justices filed opinions covering both *Apodaca* and *Johnson* instead of separate opinions for each. Rather than printing such opinions twice, the reporter published them under the *Johnson* caption and provided a cross-reference under *Apodaca*. Accordingly, a number of the following citations are to *Johnson*.

<sup>60</sup> See *Johnson*, 406 U.S. at 366, 369-71 (Powell, J.); *id.* at 380-84 (Douglas, J., joined by Brennan and Marshall, JJ.); *id.* at 414-15 (Stewart, J., joined by Brennan and Marshall, JJ.); see also Kornhauser & Sager, *supra* note 58, at 28 (providing table of votes).

<sup>61</sup> See Kornhauser & Sager, *supra* note 58, at 28. Only Justice Powell disagreed with this proposition. See *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment).

<sup>62</sup> See *Apodaca*, 406 U.S. at 414 (White, J., announcing judgment of the Court).

Why? Because the relevant vote was the vote on the judgment, and five Justices—the minority of four who announced their opinion that the Sixth Amendment permits non-unanimous juries, plus the minority of one Justice who announced his opinion that the Fourteenth Amendment does not impose upon the states the same requirements that the Sixth Amendment does on the federal courts—voted that the judgment of the Supreme Court should be to affirm the state court judgment.<sup>63</sup>

A similar, though perhaps even more paradoxical, result occurred in *National Mutual Insurance Co. v. Tidewater Transfer Co.*<sup>64</sup> In *Tidewater*, the Court considered the constitutionality of diversity jurisdiction between a citizen of a state and a citizen of the District of Columbia.<sup>65</sup> The district court dismissed the action for lack of jurisdiction,<sup>66</sup> and the Fourth Circuit affirmed.<sup>67</sup> Seven Justices stated their opinion that a citizen of the District was not a citizen of a state within the meaning of Article III.<sup>68</sup> Six Justices stated their opinion that Congress could not extend the jurisdiction of Article III courts beyond the scope of Article III.<sup>69</sup> The logical conclusion is that Article III courts cannot exercise jurisdiction over cases in which the litigants assert diversity jurisdiction based on the fact that one litigant is a citizen of the District of Columbia. But that was not the Supreme Court's judgment. Instead, the two Justices who opined that the District of Columbia was a "state" and the three Justices who opined that Congress could give Article III courts jurisdiction over cases outside Article III combined to produce a judgment reversing the judgment of the court of appeals.<sup>70</sup>

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<sup>63</sup> See *id.* at 411 (concluding that Sixth Amendment permits nonunanimous juries) (White, J., announcing judgment of Court); *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment) (stating that all elements of Sixth Amendment are not incorporated).

<sup>64</sup> 337 U.S. 582 (1949).

<sup>65</sup> See *id.* at 583 (Jackson, J., announcing judgment of the Court).

<sup>66</sup> See *id.* at 583 n.2 (noting that district court did not file an opinion).

<sup>67</sup> See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 165 F.2d 531, 532 (4th Cir. 1947), *rev'd*, 337 U.S. 582 (1949).

<sup>68</sup> See *Tidewater*, 337 U.S. at 588 (Jackson, J., joined by Black and Burton, JJ.); *id.* at 626 (Vinson, C.J., joined by Douglas, J.); *id.* at 653-54 (Frankfurter, J., joined by Reed, J.).

<sup>69</sup> See *id.* at 616 (Rutledge, J., joined by Murphy, J.); *id.* at 627-28 (Vinson, C.J., joined by Douglas, J.); *id.* at 647-48 (Frankfurter, J., joined by Reed, J.).

<sup>70</sup> See *id.* at 655 (Frankfurter, J., dissenting):

A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.

A similar case was decided this past term. In *Miller v. Albright*,<sup>71</sup> seven Justices concluded in three opinions that an illegitimate child has standing to pursue an equal protection challenge to a statute that made it more difficult for the illegitimate children of American citizen fathers to become American citizens than for the illegitimate children of American citizen mothers.<sup>72</sup> Five Justices concluded in opinions that the statute violated Equal Protection principles.<sup>73</sup> The illegitimate child nevertheless lost because two of the five who opined that there was an equal protection violation also concluded that the child lacked standing.<sup>74</sup> Those two, combined with the four that rejected the child's claim despite finding standing, controlled the judgment. As a result, even though the child won seven to two on the standing issue and had five votes on the equal protection issue, she lost six to three.

## II

### THE TEMPTATION TO ELEVATE OPINIONS

Occasionally, a judge may be sufficiently troubled by the possibility that the judgment would be inconsistent with the logic of the votes on the issues discussed in opinions that he or she is tempted to change his or her vote on the judgment. This seems to be what happened in *Pennsylvania v. Union Gas*.<sup>75</sup> In that case, the Court of Appeals concluded that Congress had constitutionally abrogated Pennsylvania's Eleventh Amendment immunity in its passage of the Superfund Amendments and Reauthorization Act of 1986.<sup>76</sup> In the Supreme Court, five Justices opined that Congress had attempted to abrogate the states' Eleventh Amendment immunity,<sup>77</sup> and five Justices opined that Congress had the power to do so.<sup>78</sup> They were not, however, the same Justices. If each Justice had voted on the judgment in accord-

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Id.; see also Fallon et al., *supra* note 52, at 443 ("Justice Frankfurter is clearly correct about the last point, at least.").

<sup>71</sup> 118 S. Ct. 1428 (1998).

<sup>72</sup> See *id.* at 1436 (Stevens, J., joined by Rehnquist, C.J., announcing judgment of Court); *id.* at 1447 n.1 (Scalia, J., joined by Thomas, J., concurring in the judgment); *id.* at 1457 (Breyer, J., joined by Ginsburg and Souter, JJ., dissenting).

<sup>73</sup> See *id.* at 1460-61 (Breyer, J., joined by Ginsburg and Souter, JJ., dissenting); *id.* at 1445 (O'Connor, J., joined by Kennedy, J., concurring in the judgment) (stating "I do not share Justice Stevens's assessment that the provision withstands heightened scrutiny").

<sup>74</sup> See *id.* at 1443 (O'Connor, J., joined by Kennedy, J., concurring in the judgment).

<sup>75</sup> 491 U.S. 1 (1989).

<sup>76</sup> Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 10, 15, 26, 42 U.S.C.).

<sup>77</sup> See *Union Gas*, 491 U.S. at 13 (Brennan, J., joined by Marshall, and Blackmun, JJ.); *id.* at 23 (Stevens, J., concurring); *id.* at 29 (Scalia, J., concurring in part and dissenting in part).

<sup>78</sup> See *id.* at 19 (Brennan, J., joined by Marshall and Blackmun, JJ.); *id.* at 24 (Stevens, J.); *id.* at 56-57 (White, J.).

ance with his or her view of the case, Pennsylvania would have won: The minority of four Justices who opined that Congress had not abrogated state immunity (Justices White, O'Connor, and Kennedy, and Chief Justice Rehnquist<sup>79</sup>), combined with the one Justice who opined that Congress had attempted to abrogate but lacked the constitutional power to do so,<sup>80</sup> would have controlled the judgment and reversed the judgment of the court of appeals.<sup>81</sup>

But Justice White did something highly unusual.<sup>82</sup> Even though he believed that Congress had not attempted to abrogate states' immunity, he voted in favor of Union Gas and against Pennsylvania. Apparently uncomfortable with another case like *Apodaca* or *Tidewater*, he decided to "accept" the majority's view as to the statutory issue and voted to affirm the judgment.<sup>83</sup> In essence, he decided to give primacy to the views expressed in opinions by casting his vote on the judgment—his legally operative act—in accordance with the majority views expressed in the opinions.<sup>84</sup> Significantly, if the other Justices had given primacy to the issues resolved by opinions, the ultimate judgment in favor of Union Gas would have been unanimous.<sup>85</sup>

Justice Kennedy did essentially the same thing in *Arizona v. Fulminante*<sup>86</sup> that Justice White had done in *Union Gas*. In *Fulminante*, five Justices stated, in an opinion authored by Justice White, that Fulminante's confession had been coerced.<sup>87</sup> A different set of five Justices stated, in an opinion authored by Chief Justice Rehnquist, that the harmless error doctrine applies to coerced confessions.<sup>88</sup> Finally, five Justices stated, through Justice White's opinion, that the admission of Fulminante's confession was not harmless.<sup>89</sup> As

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<sup>79</sup> See *id.* at 45 (White, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in the judgment in part and dissenting in part).

<sup>80</sup> See *id.* (Scalia, J.).

<sup>81</sup> See Kornhauser & Sager, *supra* note 58, at 15 (providing table of votes).

<sup>82</sup> See *id.* at 14 (describing as "aberrant" both Justice White's vote in *Union Gas* and Justice Kennedy's vote in *Arizona v. Fulminante*, 499 U.S. 279 (1991)). For a discussion of Justice Kennedy's vote in *Fulminante*, see *infra* notes 86-91 and accompanying text.

<sup>83</sup> See *Union Gas*, 491 U.S. at 56-57 (White, J.).

<sup>84</sup> See Kornhauser & Sager, *supra* note 58, at 15 (stating that Justice White "chose to adopt the issue-by-issue voting protocol").

<sup>85</sup> See *id.* at 23 (providing table of hypothetical votes if White's approach had been followed by others); see also Fallon et al., *supra* note 52, at 1102 n.8 (noting that majority "held that Congress could abrogate under the commerce power" and asking if "the four Justices who disagreed on that point also [should] have concurred in the judgment").

<sup>86</sup> 499 U.S. 279, 313-14 (1991) (Kennedy, J., concurring in the judgment).

<sup>87</sup> See *id.* at 287 (White, J., joined by Marshall, Blackmun, Stevens, and Scalia, JJ.).

<sup>88</sup> See *id.* at 310 (Rehnquist, C.J., joined by O'Connor, Kennedy, Souter, and Scalia, JJ.).

<sup>89</sup> See *id.* at 302 (White, J., joined by Marshall, Blackmun, Stevens, and Kennedy, JJ.); see also Kornhauser & Sager, *supra* note 58, at 19 (providing table of votes).

in *Union Gas*, the five Justices who stated each of these opinions were not the same five. If each Justice had voted on the judgment in accordance with his or her own view of the case, *Fulminante* would have lost: The four Justices who thought that the confession was not coerced (Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter) plus the one Justice who thought it was coerced but harmless (Justice Scalia) would have controlled the judgment.

Justice Kennedy, however, "deem[ed] it proper to accept . . . the holding of five Justices that the confession was coerced and inadmissible."<sup>90</sup> Accepting—contrary to his own view—that the confession was coerced, he concluded that the "error" was not harmless and therefore voted with the four who viewed the confession as coerced (and always harmful) to affirm the judgment that a new trial was necessary.<sup>91</sup>

It is worth pausing to see just how unusual Justice White's and Justice Kennedy's actions were. Professor John M. Rogers has identified over one hundred and fifty Supreme Court cases prior to *Union Gas* in which a Justice "faced the possibility of deferring to the majority vote of others on an issue that would have caused a different result in the case" and found that in only six did a Justice do so.<sup>92</sup> He explained that in five of the six, the Court was divided three ways and would have been unable to produce a judgment any other way.<sup>93</sup> Rogers treated the remaining case, *U.S. v. Vuitch*,<sup>94</sup> as an "unwise anomaly,"<sup>95</sup> but it too was a case in which the Court was split three ways and could not have produced a judgment any other way. There, five Justices concluded that the Court had appellate jurisdiction, but could not agree whether to affirm or reverse.<sup>96</sup> The four other Justices

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<sup>90</sup> *Fulminante*, 499 U.S. at 313-14 (Kennedy, J., concurring in the judgment).

<sup>91</sup> See *id.*; see also *infra* note 121 and accompanying text (explaining that four Justices found that coerced confessions were never harmless).

<sup>92</sup> John M. Rogers, "I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides, 79 Ky. L.J. 439, 442, 459 (1990-91).

<sup>93</sup> See *id.* at 459-60. He has since identified another case. See John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 Vand. L. Rev. 997, 1032 n.118 (1996) (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 674 (1994) (Stevens, J., voting to remand rather than to affirm because "an accommodation is necessary" to produce majority)); see also *Bragdon v. Abbott*, 118 S. Ct. 2196, 2213 (1998) (Stevens and Breyer, JJ., concurring) ("[I]n order to provide a judgment supported by a majority, I join [Justice Kennedy's] opinion even though I would prefer an outright affirmation.").

<sup>94</sup> 402 U.S. 62 (1971).

<sup>95</sup> Rogers, *supra* note 92, at 459, 461.

<sup>96</sup> See *Vuitch*, 402 U.S. at 64-67 (Black, J., joined by Burger, C.J., and Douglas, Stewart, and White, JJ.) (concluding that Court has jurisdiction); *id.* at 72-73 (Black, J., joined by, *inter alia*, Burger, C.J., and White, J.) (writing that judgment should be reversed); *id.* at 80 (Douglas, J.) (stating that judgment should be affirmed); *id.* at 96-97 (Stewart, J.) (same).



concluded that the Court lacked appellate jurisdiction.<sup>97</sup> In this posture, no judgment could be entered, because four Justices would vote to dismiss the appeal, two would vote to affirm, and three would vote to reverse.<sup>98</sup> Justices Harlan and Blackmun, who believed that the Court lacked jurisdiction, nevertheless voted to reverse.<sup>99</sup>

Professor Suzanna Sherry has recently pointed to two other cases, *United States v. Jorn*<sup>100</sup> and *Kesler v. Department of Public Safety*,<sup>101</sup> in which Justices acted the way Justice White did in *Union Gas* and Justice Kennedy did in *Fulminante*.<sup>102</sup> Both *Jorn* and *Kesler*, however, are like *Vuitch* in that the Court was split three ways and could not otherwise enter a judgment. In *Jorn*, seven Justices concluded that the Court had jurisdiction, but those seven split four to three on the merits.<sup>103</sup> In that posture, no judgment could be entered because two would vote to dismiss the appeal, four would vote to affirm, and three would vote to reverse. Justices Black and Brennan, who believed that the Court lacked jurisdiction, nevertheless voted to affirm.<sup>104</sup> Similarly, in *Kesler*, six Justices concluded that the Court had jurisdiction but split four to two on the merits.<sup>105</sup> In that posture, no judgment could be entered because two would vote to dismiss the appeal, four would vote to affirm, and two would vote to reverse. Justice Stewart, who believed that the Court lacked jurisdiction, nevertheless voted to affirm.<sup>106</sup>

Professor Sherry seems to think that a Court that has four votes to dismiss an appeal, three votes to affirm, and two votes to reverse

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<sup>97</sup> See *id.* at 83-87 (Harlan, J., joined by Brennan, Marshall, and Blackmun, JJ.).

<sup>98</sup> But see Aimee Imundo, *Paradoxical Voting in the Supreme Court*, 3 *Geo. J. Legal Ethics*, 867, 871-72 (1990) (misinterpreting practice of permitting action by majority of quorum—which can be as small as four out of six—to mean that four Justices can issue judgment even where eight or nine are participating).

<sup>99</sup> See *Vuitch*, 403 U.S. at 96 (Harlan, J.); *id.* at 97-98 (Blackmun, J.).

<sup>100</sup> 400 U.S. 470 (1971).

<sup>101</sup> 369 U.S. 153 (1962).

<sup>102</sup> See Sherry, *supra* note 16, at 888-89 (observing that in *Jorn*, Justices Black and Brennan dissented from the Court's decision that it had jurisdiction but nevertheless joined four other Justices to form majority for affirming lower court's dismissal on merits, and, in *Kessler*, Chief Justice Warren and Justice Stewart both reached merits despite finding lack of jurisdiction).

<sup>103</sup> See *Jorn*, 400 U.S. at 475, 487 (Harlan, J., joined by Burger, C.J., Douglas, and Marshall, JJ.) (finding jurisdiction and affirming); *id.* at 489 n.2, 493 (Stewart, J., joined by White and Blackmun, JJ.) (finding jurisdiction and voting to reverse).

<sup>104</sup> See *id.* at 488.

<sup>105</sup> Justices Frankfurter, Clark, Harlan, and Brennan found jurisdiction and would affirm. See *Kesler*, 369 U.S. at 157, 174. Justices Black and Douglas found jurisdiction and would reverse. See *id.* at 182.

<sup>106</sup> See *id.* at 174. Chief Justice Warren, who also thought that the Court lacked jurisdiction, stated that because the Court reached the merits, it was his duty to do so as well. See *id.* at 179 (Warren, C.J., dissenting).

can enter a judgment of “lower court’s decision stands.”<sup>107</sup> There is, however, no such judgment. Rogers’s position is similar: One should be realistic and focus on the effect on the parties (treating dismissals and affirmances identically) rather than be formalistic and focus on judgments.<sup>108</sup>

But a judgment is not simply some formality that can be ignored. A court must enter *some* judgment in order to dispose of the case. Without majority agreement on the judgment to be entered (or a default rule for handling situations such as ties), the case cannot be decided at all. While a splintered legislature may simply be inactive, a court must make some decision.<sup>109</sup> It would hardly do to hold the case indefinitely awaiting a death or resignation.

Judgment-driven appellate courts are well designed to avoid the indecisiveness, strategic voting, and vote cycling problems of legislatures because they generally face a binary choice: affirm or reverse. When a third option is included (e.g., dismiss the appeal for lack of

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<sup>107</sup> See Sherry, *supra* note 16, at 889 (stating that votes by Justices Black and Brennan in *Jorn* “did not alter the ultimate outcome of the case: a refusal to join the majority in reaching the merits would still have left the lower court decision standing, with four Justices voting to affirm the appeal and two to dismiss it,” and that Justice Stewart’s “vote to affirm on the merits [in *Kessler*] had the same ultimate effect as a vote to dismiss the appeal for lack of jurisdiction”).

<sup>108</sup> Electronic mail from John Rogers to author (June 25, 1998) (on file with the *New York University Law Review*). Rogers’s decision to focus on the practical effects on the parties rather than the judgment entered leads him to overlook *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, as in *Vuitch*, *Jorn*, and *Kesler*, the majority of the Court believed that the Court had jurisdiction, but this majority was split as to the proper disposition on the merits. Three of the five finding jurisdiction (Chief Justice Hughes, Justices Stone and Reed) favored affirmance, see *Coleman*, 307 U.S. at 456, while two (Justices Butler and McReynolds) favored reversal, see *id.* at 474 (Butler, J., dissenting). Four others (Justices Frankfurter, Roberts, Black, and Douglas) thought that the petitioners lacked standing to invoke the Court’s jurisdiction. See *id.* at 460 (opinion of Frankfurter, J.). The four justices who preferred dismissal nevertheless voted to affirm, thereby providing the case with a disposition. See *id.* at 456 (Black, J., concurring). In explaining this decision, Justice Black noted that they were acting “under the compulsion” of the majority’s decision as to standing, citing (with a “cf.” signal) *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937). See *Coleman*, 307 U.S. at 456 & n.1. In *Davis*, four Justices (Justices Cardozo, Brandeis, Stone, and Roberts) favored reversal for lack of equitable standing, see *Davis*, 301 U.S. at 639, three Justices (Chief Justice Hughes, Justice Van Deventer, and Justice Sutherland) favored reversal on the ground that challenged Act of Congress was constitutional, see *id.* at 640-46, and two (Justices McReynolds and Butler) favored affirmance, see *id.* at 646. The four joined the three in an opinion holding the Act constitutional, asserting that “under the compulsion” of the majority’s ruling regarding equitable standing, “the merits are now here.” *Id.* at 640. *Davis*, however, does not appear to present either a true three-way split or a true instance of issue-by-issue voting because the decision by the four to address the merits did not affect the seven to two vote on the judgment.

<sup>109</sup> See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 *Yale L.J.* 1219, 1260 (1994) (noting that critical distinction in decisional processes between Congress and Supreme Court is that Congress can “do nothing”).

appellate jurisdiction), these risks emerge. Issue-by-issue voting invites these problems on a wide scale by making nearly all cases nonbinary.<sup>110</sup> So far, the Supreme Court has largely avoided these problems by avoiding issue-by-issue voting. To be sure, Justices frequently indicate their views on particular issues by joining only parts of opinions or by writing separate opinions, and sometimes choose to express their views on an issue merely because a majority opinion is addressing that issue. However, I am aware of no case (prior to *Union Gas*) in which a Justice's ultimate vote depended on a decision to accept the majority's resolution of an issue in that case—except when at least one Justice needed to do so to enable the Court to perform its function of deciding the case and issuing a judgment.<sup>111</sup> Thus the exception, far from legitimizing opinion-focused issue-by-issue voting, instead underscores the primacy of judgments and the correctness of the traditional voting protocol.<sup>112</sup>

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<sup>110</sup> See *id.* at 1270-71 (observing that issue-by-issue voting does “not guarantee an outcome in all cases” but “case-by-case resolution guarantees results in all cases”); see also Lewis J. Liman, *Fulminate: Vote Cycling and the Court*, N.Y.L.J., April 3, 1991, at 2 (noting that Supreme Court's decision to frame *Fulminante* case “as requiring the resolution of two separate questions” created “an environment in which vote cycling was possible” leading to “perverse results” for litigant).

<sup>111</sup> Note that this is different from a Justice deciding to accept a majority resolution of an issue in a *prior* case. See Sherry, *supra* note 16, at 869 n.10 (explaining that she is addressing different question than issue voting versus outcome voting in that her analysis “is applicable not only to single cases with multiple issues, but also to situations that arise as a result of a series of cases”).

<sup>112</sup> Some might view certiorari practice as embodying a limited form of issue-by-issue voting in that Justices who vote to deny certiorari usually accept that the case is before the Court for decision and do not ultimately vote to dismiss the writ as improvidently granted. Indeed, some Justices have viewed the “rule of four” as “requir[ing] that once certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted.” *Ferguson v. Moore McCormick Lines*, 352 U.S. 521, 559 (1957) (Harlan, J.). Others have disagreed. See *id.* at 527-29 (Frankfurter, J.) (relying on additional information gained after grant of certiorari as well as right to dissent to reach conclusion that “rule of four” does not require Justice to reach merits); see also, e.g., *New York v. Uplinger*, 467 U.S. 246, 250 (1984) (Stevens, J., concurring) (“I am now persuaded, however, that there is *always* an important intervening development that may be decisive. The Members of the Court have always considered a case more carefully after full briefing and argument on the merits . . . .”); *Connecticut v. Johnson*, 460 U.S. 73, 89-90 (1983) (opinion of Stevens, J.) (preferring to dismiss certiorari, but voting to affirm judgment where others are divided four to four on merits “[b]ecause a fifth vote is necessary to authorize the entry of a Court judgment”). But see *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 141 (1959) (opinion of Frankfurter, J.), in which Justice Frankfurter, seeking to avoid producing unexplained affirmance by an equally divided Court, joined the four favoring affirmance rather than voting to dismiss the writ as improvidently granted, concluding that this was not an “undue compromise with principle.” The nonmajoritarian nature of the “rule of four” leads to other complications as well. See generally Joan Maisel Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975 (1957) (discussing Justice Frankfurter's refusal to adhere to majority's interpretation of “rule of four”); Richard L. Revesz &

Professors Kornhauser and Sager point to Justice White's vote in *Union Gas* and Justice Kennedy's vote in *Fulminante* with a considerable measure of approval.<sup>113</sup> As I see it, however, these two cases illustrate the error of giving priority to opinions. In each, not only did the judgment ultimately entered fail to reflect how a majority of Justices believed the case should have been decided, but worse, unnecessary statements in opinions altered the judgment in the case.

Consider, first, *Union Gas*. In that case, five Justices believed that Congress had attempted to abrogate states' Eleventh Amendment immunity. These five, of course, were obligated before rendering a judgment against Pennsylvania to determine the constitutionality of that congressional act. Four of those Justices concluded that the statute was constitutional, and therefore voted to affirm the judgment of the Court of Appeals for the Third Circuit in favor of *Union Gas*.<sup>114</sup> One of the five, Justice Scalia, determined that it was not constitutional and therefore voted to reverse.<sup>115</sup> So far, *Union Gas* is winning 4-1. The remaining four Justices concluded that Congress had not attempted to abrogate states' immunity.<sup>116</sup> They should have voted to reverse the judgment without considering any constitutional question. If they had done so, the vote on the judgment would have been 5-4 in favor of Pennsylvania, and the vote on the constitutional issue would have been 4-1 in favor of congressional abrogation power, with 4 not voting.

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Pamela S. Karlan, *Nonmajoritarian Rules and the Supreme Court*, 136 U. Penn. L. Rev. 1067 (1988) (discussing "rule of four" and "rule of three" and their interaction with majority's power to control ultimate disposition). Certiorari practice, under what amounts to a congressional delegation of its power to regulate the Supreme Court's appellate jurisdiction, see James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 Vand. L. Rev. 895, 907 (1973) ("The kinds of jurisdictional decisions that Congress normally makes for the federal judiciary as a whole it delegated to the Justices . . ."), resembles administration or management more than adjudication. See generally Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 717 (1984) (arguing that in making certiorari decisions, Court should view itself as "manager of a system of courts"). Even assuming the propriety of current certiorari practice, such managerial decisions should not serve as a model for adjudicative decisions.

<sup>113</sup> See Kornhauser & Sager, *supra* note 58, at 27 (praising Kennedy's vote in *Fulminante* for producing outcome offering guidance for future court decisions); *id.* at 57 ("[I]ssue-by-issue voting is clearly the better option in many cases.").

<sup>114</sup> See *Pennsylvania v. Union Gas*, 491 U.S. 1, 13 (1989) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

<sup>115</sup> See *id.* at 44-45 (Scalia, J.).

<sup>116</sup> See *id.* at 45 (White, J., joined by Rehnquist, C.J., O'Connor, and Kennedy, JJ.).

Justices Rehnquist, O'Connor, and Kennedy, however, could not keep their pens still on the constitutional issue.<sup>117</sup> They insisted on addressing the constitutional question, even though it was completely unnecessary to their vote on the judgment. It was only their willingness to opine unnecessarily that revealed that, without Justice White's vote, the Court was evenly divided on the issue of constitutionality. Faced with this knowledge, and viewing the constitutional issue differently than Justices Scalia, Rehnquist, O'Connor, and Kennedy, Justice White opined—unnecessarily and without explanation—on the constitutional issue as well.<sup>118</sup> In short, if Rehnquist, O'Connor, and Kennedy had restrained themselves from addressing issues that they had no need to address, *Pennsylvania*—not *Union Gas*—would have won. It is not unusual for clients or lawyers to lose a case because they failed to hold their tongues; in *Union Gas*, *Pennsylvania* lost the case because Justices failed to hold theirs.

That is not a result we should welcome, even though I must confess a certain satisfaction that so-called judicial conservatives lost their majority on the judgment because they spoke unnecessarily about a constitutional issue. Nor should we be the least surprised that those who had the judgment slip through their grasp in *Union Gas* quickly overruled that decision.<sup>119</sup>

In *Fulminante*, too, unnecessary comments in opinions changed the judgment. Five Justices found the confession coerced and therefore had to address whether the admission of the coerced confession was harmless.<sup>120</sup> Four of those Justices concluded that such an error could never be harmless and therefore voted to affirm the judgment that a new trial was necessary.<sup>121</sup> One of the five, Justice Scalia, concluded that the admission of the coerced confession was harmless and therefore voted to reverse.<sup>122</sup> So far, *Fulminante* is winning 4-1. The remaining four Justices concluded that the confession was not coerced

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<sup>117</sup> Indeed, Justice O'Connor went so far as to justify her decision to address the statutory issue on the grounds that her view of the constitutional issue had not prevailed. See *id.* at 57 (O'Connor, J., dissenting).

<sup>118</sup> See *id.* at 56-57. I do not have direct evidence of precisely when Justice White changed his vote. Considering that he wrote an eleven page opinion on the statutory issue, see *id.* at 45-56, but on the constitutional issue said only that he agreed with Justice Brennan's conclusion (but not his reasoning), see *id.* at 57, it seems highly likely that he changed his vote quite late in the process.

<sup>119</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (overruling *Union Gas* and holding that Congress does not have power to abrogate state immunity when legislating pursuant to its commerce power).

<sup>120</sup> See *Arizona v. Fulminante*, 499 U.S. 279, 287 (1990) (White, J., joined by Marshall, Blackmun, Stevens, and Scalia, JJ.).

<sup>121</sup> See *id.* at 288 (White, J., joined by Marshall, Blackmun, and Stevens, JJ.).

<sup>122</sup> See *id.* at 306-12 (Rehnquist, C.J., joined, in relevant part, by Scalia, J.).

and should have voted to reverse without discussing whether the "error" that they did not find was harmless.<sup>123</sup> If they had done so, the vote to reverse the judgment would have been 5-4, with a 4-1 vote on the issue of whether the admission of a coerced confession could be harmless, with 4 not voting.

But once again, Justices Rehnquist, O'Connor, and Kennedy (this time joined by Justice Souter) could not restrain themselves from speaking on an issue that was unnecessary to their vote on the judgment. They opined that the "error" that they did not find *could* be harmless,<sup>124</sup> and two of them (Rehnquist and O'Connor) opined that it *was* harmless.<sup>125</sup> Faced with five Justices (not including himself) who opined that there was an error and five Justices (including himself) who opined that such an error *could* be harmless, and thinking however, that the "error" he did not find was *not* harmless, Justice Kennedy decided to accept the majority view of error, and vote to reverse.<sup>126</sup> If, however, Justices Rehnquist, O'Connor, Kennedy, and Souter had not reached out to opine about issues unnecessary to their vote on the judgment, Justice Kennedy would never have been tempted to change his vote.

In discussing *Fulminante*, Professors Kornhauser and Sager criticize Justice Souter for "curiously, cast[ing] an incomplete roster of votes."<sup>127</sup> That is, having

supported the view that the confession was voluntary, and joined in the conclusion that the harmless error doctrine applied to the admission of coerced confessions . . . he did not take a position on the question of whether the error in *Fulminante* would have been harmless and did not vote on the outcome of the case.<sup>128</sup>

This criticism, however, is exactly backward. Justice Souter did not opine on too few issues; he (along with Justices Rehnquist, O'Connor, and Kennedy) opined on too many issues.<sup>129</sup> Nor is it fair, in my view, to assert that while he managed to vote on a number of issues in the

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<sup>123</sup> See *id.* at 303-06 (Rehnquist, C.J., joined by O'Connor, Kennedy, and Souter, JJ.).

<sup>124</sup> See *id.* at 306-12 (Rehnquist, C.J., joined by O'Connor, Kennedy, and Souter, JJ.). Justice Scalia, as noted *supra* note 122, also joined this portion of the opinion.

<sup>125</sup> See *id.* at 312 (Rehnquist, C.J., joined by O'Connor, J.). Again, as already noted, Justice Scalia joined this portion of the opinion as well.

<sup>126</sup> See *id.* at 313-14 (Kennedy, J.).

<sup>127</sup> Kornhauser & Sager, *supra* note 58, at 15 n.36. See generally David G. Post & Steven C. Salop, Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others, 49 Vand. L. Rev. 1069, 1072 (1996) (criticizing outcome voting because it allows judges to "ignore issues that are unnecessary to their individual reasoning about the case," providing less guidance for future cases).

<sup>128</sup> Kornhauser & Sager, *supra* note 58, at 15 n.36.

<sup>129</sup> See Liman, *supra* note 110, at 2 (noting that Justice Souter's error was not failure to vote on whether error was harmless, but voting on whether harmless error analysis ap-

case, he neglected to perform his only legally operative act and forgot to vote on the judgment. Instead, under our longstanding tradition, his vote on the judgment is obvious: Having concluded that the confession was voluntary, his vote was to reverse the judgment.

Again, judicial conservatives lost their majority because they reached out to opine about issues unnecessarily.<sup>130</sup> And it was dictum by Justice Rehnquist—generally rather eager to move executions along—that led to the delay (and perhaps the ultimate avoidance) of Oreste Fulminante's execution.<sup>131</sup> Even so, while Justice Rehnquist's dicta may have lost him the battle, it won him the war. By reaching out to opine unnecessarily about whether the admission of a coerced confession could ever be harmless, he obtained a majority opinion stating that it could be, even though the contrary had been treated as an "axiom" for decades.<sup>132</sup> Despite the benefit to Oreste Fulminante, this is not a result we should welcome.

More generally, we should resist the temptation to elevate the opinion over the judgment. While a federal court may, and regularly does, enter a judgment without delivering an opinion, it may not deliver an opinion without entering a judgment.<sup>133</sup> This is the key to the firmly-rooted principle that a federal court cannot issue an advisory opinion.<sup>134</sup> The central feature that constitutes a "case" or "controversy" is that it results in a judgment.<sup>135</sup> And once the federal judi-

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plied). Once Justice Souter decided that the confession was not coerced, there was no need for him to address any other issue.

<sup>130</sup> For an argument that state officials such as the prosecutor in *Fulminante* should not be permitted to seek review of judgments of their own state courts in the Supreme Court of the United States, see Hartnett, *supra* note 40, at 957-71, 985-87.

<sup>131</sup> Oreste Fulminante was retried, convicted, and again sentenced to death. An appeal was argued before the Arizona Supreme Court in March of 1998, but has not yet been decided. Telephone interview with Vince Imbordino, prosecuting attorney, Maricopa County Attorney's Office (Nov. 3, 1998).

<sup>132</sup> See *Fulminante*, 499 U.S. at 288 (White, J.) (citing cases).

<sup>133</sup> See *supra* notes 23-25 and accompanying text.

<sup>134</sup> "The prohibition against advisory opinions has been termed 'the oldest and most consistent thread in the federal law of justiciability.'" Fallon et al., *supra* note 52, at 93-94 (quoting Charles Alan Wright, *Law of Federal Courts* 65 (5th ed. 1994)); see also Geoffrey R. Stone et al., *Constitutional Law* 90 (3d ed. 1996) ("One justiciability doctrine is unquestionably traceable to the early period.").

<sup>135</sup> See *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 408 (1792) (reporting that circuit court refused to make recommendations to Secretary of War regarding eligibility for pensions); Edward A. Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 *Fordham L. Rev.* 1099, 1153 n.303 (1995) (describing "judicially cognizable dispute" as "one that properly results in a judgment"); see also Harrison, *supra* note 50, at 372-73 ("Judicial practice reflects, not the principle that courts cannot be bound, but the principle that they can bind."). See generally Neal Kumar Katyal, *Judges as Advicegivers*, 50 *Stan. L. Rev.* 1709, 1746 (1998) (advocating judicial "advicegiving in a case or controversy" as way in which opinions can be written and distinguishing "advisory opinions" not linked to case or controversy); *id.* at

ary has produced its judgment, Congress may not compel it to reconsider or change that judgment.<sup>136</sup>

### III

#### JUDGMENTS CALL FOR OBEDIENCE; OPINIONS DO NOT

Professors Alexander and Schauer's failure to distinguish between judgments and opinions leads them to insist that there must be a single authoritative legal interpreter, the Supreme Court of the United States.<sup>137</sup> If the operative legal act of the judiciary is the opinion, and the function of the judiciary is to clarify the law and thereby "settle authoritatively what is to be done" generally, then there is a need for a single interpreter to have authority to review the opinions of others and create a single authoritative interpretation. But if the operative legal act of a court is the judgment, and a court's function is to "settle authoritatively what is to be done" in a particular case, there need only be a single authoritative judicial decisionmaker for any particular case, not an authoritative judicial interpreter on the law generally.<sup>138</sup>

The latter view is far more consistent not only with longstanding understanding of Article III, but with the history and current practice of Supreme Court jurisdiction. Under Professors Alexander and Schauer's view, one would expect the Supreme Court to be legally obliged to issue opinions on all unsettled legal issues, or at least the most important unsettled legal issues. But the Supreme Court has no legal obligation to issue opinions and has no authority to issue opinions except in explanation of judgments.<sup>139</sup> It has no authority to is-

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1804 (supporting doctrine that bars judges from "giv[ing] advice outside the context of an Article III case").

<sup>136</sup> See *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) (holding that Congress may not compel judiciary to reopen final judgments).

<sup>137</sup> See Alexander & Schauer, *supra* note 6, at 1377 ("To the extent that law is interpreted differently by different interpreters . . . it has failed to perform its settlement function."); *id.* at 1377-78 n.80 (responding to argument that legislature's interpretation could be taken as supreme, by noting that "[i]f this argument succeeds at all, it does so only for a single national legislature, because multiple legislatures could not serve the coordination function").

<sup>138</sup> Cf. *Post & Salop*, *supra* note 127, at 1078 (advocating issue-by-issue voting "precisely because our goal is to maximize the amount of future guidance that courts can provide in any given case"); *id.* at 1084 (preferring issue-by-issue voting because "providing guidance and usable precedent is [the] primary responsibility" of appellate courts).

<sup>139</sup> Elsewhere, Professor Schauer has questioned the aversion to advisory opinions, contending that all reasoned opinions are advisory because they entail *prima facie* commitments to decide other cases in accordance with the announced reason. See Schauer, *supra* note 23, at 655-56; see also *id.* at 655 ("[E]very time a court gives a reason it is, in effect, giving an advisory opinion."). As Schauer sees it, the ban on advisory opinions may be a good "strategic way" to "cabin the courts" and "prevent[ ] overreaching." *Id.* Professor



sue opinions on its own initiative. It has no authority to issue opinions reviewing state court decisions where the state court judgment rests on adequate and independent state grounds, no matter how wrong-headed the state court's opinion—even as to the Federal Constitution—appears to the Supreme Court.<sup>140</sup>

A quick look at the history of Supreme Court jurisdiction makes Professors Alexander and Schauer's view even more implausible. For most of our history, the Supreme Court lacked the authority to review state court judgments upholding federal claims and defenses.<sup>141</sup> For many decades, it lacked the authority to review not only the judgments of lower federal courts in civil cases involving little money, but also the judgments of lower federal courts in any criminal case.<sup>142</sup>

All of these limitations on the Supreme Court's jurisdiction are inconsistent with treating the judicial function as issuing opinions in order authoritatively to settle the law. By contrast, they are perfectly consistent with treating the judicial function as authoritatively resolving particular cases between particular parties. So long as some court—be it a state court or a lower federal court—has the last word regarding “what is to be done” about a particular case between particular parties, the judicial settlement function is fulfilled.

Perversely, Professors Alexander and Schauer's failure to distinguish between judgments and opinions undercuts *Marbury v. Madison*<sup>143</sup> while trying to exalt it. Under *Marbury*, it is the court's obligation to decide a case by issuing a judgment that gives rise to the power of judicial review.<sup>144</sup> That is, because the court must issue a judgment—e.g., issue the writ sought by *Marbury* or not—it must

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Schauer, however, has it exactly backward. We do not create courts to announce the law and then decide to constrain that function with the “case or controversy” limitation; instead, we create courts to decide cases and controversies, and, because those courts want their controversial decisions accepted, they tend to explain those decisions with generalized reasons. See, e.g., Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 241 (stating that judicial power to interpret law “exists as a consequence of case-deciding; it is not a power in its own right”). See generally *supra* note 52 (discussing statute authorizing courts of appeals to certify questions to Supreme Court).

<sup>140</sup> See *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (“[O]ur power is to correct wrong judgments, not to revise opinions.”); *supra* note 54 and accompanying text (discussing *Michigan v. Long*).

<sup>141</sup> See Hartnett, *supra* note 40, at 915-22 (noting absence of appellate jurisdiction over state court judgments upholding federal claims and defenses under Judiciary Act of 1789).

<sup>142</sup> See Fallon et al., *supra* note 52, at 32 (noting absence of appellate jurisdiction over lower federal court civil cases involving \$2,000 or less and over federal criminal cases under Judiciary Act of 1789).

<sup>143</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>144</sup> See *id.* at 177 (“Those who apply the law to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

choose between a law that tells it to do so (the Judiciary Act of 1789) and a law that tells it not to do so (Article III).<sup>145</sup> The power of judicial review is simply the byproduct of the judicial obligation to issue a judgment. As Professor Harrison put it,

The Constitution allocates to the courts the case deciding power, the power to issue judgments, that is where the duty to obey judgments comes from. The power to interpret the Constitution, however, comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect.<sup>146</sup>

By ignoring the distinction between a judgment and an opinion in an effort to support judicial supremacy, Professors Alexander and Schauer threaten the very basis for the practice of judicial review.

The distinction between judgments and opinions has important ramifications for the duty of obedience. Parties to a case can legitimately be expected to "obey" judgments. So, too, the executive can legitimately be expected to "obey" a court order (such as a writ of execution) calling on the executive to enforce that judgment against the parties.<sup>147</sup> But what does it mean to "obey" an opinion? An opinion, as an explanation of reasons for a judgment, does not direct that anything be done or not be done. There is nothing in it that calls for obedience.<sup>148</sup>

A simple example makes the point. Suppose that I (as I often do) tell my seven-year-old daughter to go to bed. Suppose further (good

<sup>145</sup> See *id.* at 177 ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

<sup>146</sup> John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 *Cornell L. Rev.* 371, 373 (1988).

<sup>147</sup> A typical writ of execution looks something like this:

The President of the United States to the Marshall for the District of New Jersey,

Greetings:

Whereas on the 11th day of October, 1998, in the United States District Court for the District of New Jersey, in a suit number 95-1332, wherein Anne Baxter recovered a judgment against Charles Denver for the sum of \$300,000

. . .

Therefore, you are hereby commanded, that of the property of Charles Denver be caused to be paid the sum of \$300,000 . . .

Herein fail not and have you the said monies together with this writ, showing how you executed the same, before said Court . . . within thirty days.

See Moore's Federal Practice Manual, Form No. 26-50 (1998) (providing verbatim text without names).

<sup>148</sup> Cf. Schauer, *supra* note 23, at 636 (noting that "the voice of a statute, regulation, or constitution" is "not one of persuasion or argument, but one of authority, of command"). The voice of a judgment is command; the voice of an opinion is persuasion.

progressive parent that I (sometimes) am<sup>149</sup>) I explain the reason that she must go to bed: Because it is late, she needs rest in order to be healthy and less cranky, and she has to get up in time for school in the morning. I expect her to obey the "judgment" that she go to bed, but I cannot expect her to "obey" the "opinion" explaining my reasons.

It is true that my wife and I might formulate a bedtime rule requiring her to go to bed by 8:30 on school nights and expect obedience of that rule. In our legal system, however, courts (again, at least federal courts) do not promulgate such rules; that is a task for legislative bodies. Indeed, the "stock example" of law's settlement function used by Professors Alexander and Schauer—"whether people should drive on the left side or the right side of the road"<sup>150</sup>—is precisely the kind of rule that a court would have little business decreeing.<sup>151</sup> While courts are called upon in particular disputes to "settle authoritatively what is to be done," it is for other institutions to do so when what is at issue are laws of general prospective application. Professors Alexander and Schauer err in their wildly expansive view of a what a judicial decision settles.<sup>152</sup>

The significance of this error becomes clear when Professors Alexander and Schauer try to reassure us that their approach would

<sup>149</sup> See generally *id.* at 636-37:

Typically, drafters of statutes, like sergeants and parents, simply do not see the need to give reasons, and often see a strong need not to: The act of giving a reason is the antithesis of authority. When the voice of authority fails, the voice of reason emerges. Or vice versa.

But see *id.* at 658 ("[G]iving reasons may be a sign of respect.").

<sup>150</sup> Alexander & Schauer, *supra* note 6, at 1371. Professors Alexander and Schauer explain:

The stock example concerns the case in which there are no substantive arguments to be made one way or another but where it is important that there be some decision, such as the decision whether people should drive on the left side or the right side of the road. Neither is better than the other, but either is better than leaving the decision to individual drivers.

*Id.*

<sup>151</sup> A court might *recognize* community custom, but the existence of any such custom vastly reduces the need for anyone to promulgate the rule.

<sup>152</sup> Their error also precisely replicates the error of Judge Douglas in the Lincoln/Douglas debate. Judge Douglas argued that Lincoln was "stimulating the passions of men to resort to violence and to mobs instead of to the law. Hence, I tell you that I take the decisions of the Supreme Court as the law of the land, and I intend to obey them as such."

3 The Collected Works of Abraham Lincoln, *supra* note 2, at 267.

Alexander and Schauer also exaggerate both the stability of judicial opinions and the importance of clear rules themselves. See Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 Wm. & Mary L. Rev. 849, 857 (1998) ("How anyone who has lived through a significant part of the modern period of tumultuous judicial creativity could treat the relative stability of judicial interpretations as self-evident is baffling."); *id.* at 864 ("As anyone who has successfully navigated a busy city sidewalk knows, social coordination is not only a matter of rules but also of unspoken assumptions and inarticulate experience.").

not lead to stagnation in the law. They first argue that most of the time a government official would not have to "disobey" the Supreme Court in order to give the Court an opportunity to correct itself because in "the vast majority of cases, it takes only an individual dissatisfied with the existing law to set in action the process that will give the Supreme Court the opportunity to change its mind if it is so inclined."<sup>153</sup> One problem with this analysis is that Professors Alexander and Schauer do not explain why, under their approach, a private individual—to say nothing of a lawyer as an officer of the court—is free to "disobey" the Supreme Court by bringing such a case.<sup>154</sup> That is, if it is "disobedience" for a member of Congress to vote for a law that is inconsistent with a Supreme Court opinion, why is it not equally "disobedient" to file a complaint that is inconsistent with a Supreme Court opinion?

A more significant problem is that in many cases, particularly those dealing with the scope of congressional power, no private individual could bring an action seeking reconsideration of restrictive Supreme Court opinions. As the Court itself has noted, Congress must sometimes pass legislation premised on disagreement with the Court's opinions in order for the Court to "extricate itself from error."<sup>155</sup> While Alexander and Schauer acknowledge that sometimes this will be the case,<sup>156</sup> they greatly underestimate its significance. For example, if presidents and members of Congress had acted in the conscientious and obedient way envisioned by Alexander and Schauer, it would be difficult to see how they could have supported legislation,

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<sup>153</sup> Alexander & Schauer, *supra* note 6, at 1386.

<sup>154</sup> Indeed, where would it leave legal academics, the vast majority of whom are court officers? Would Alexander and Schauer's view render most academic commentary on the Supreme Court illegitimate? Or would academics have a monopoly on such criticism, to the exclusion (at least) of elected officials? Or would academics who are not members of the bar have the monopoly? Alexander and Schauer do state that "[t]he existence of an obligation to follow judicial interpretations of the Constitution" does not "entail the impossibility of criticizing those interpretations on the grounds of inconsistency with the Constitution itself." *Id.* at 1381. Perhaps the point is that one can criticize so long as one does not act on that criticism, a position that might be rather comforting to many academics. See also *id.* at 1386 (stating that "main point" of taking their position is to make it more difficult for politicians to disregard Supreme Court opinions as to which there is "an overwhelming professional consensus that the same result would be reached again by the Supreme Court" (emphasis added)); Nagel, *supra* note 152, at 860 (noting that Alexander and Schauer hint at "more radical position" that "all popular, nonprofessional disagreement with the Court's constitutional interpretations" is illegitimate); cf. Sanford Levinson, *Constitutional Protestantism in Theory and Practice*, 83 *Geo. L.J.* 373, 384 (1994) ("Paulsen's critics must argue that all others, whether Presidents or citizens, are reduced to automatons who put to one side any question about the Court's ability to engage in genuinely reasoned elaboration of its opinions." (internal quotation omitted)).

<sup>155</sup> *Helvering v. Griffiths*, 318 U.S. 371, 401 (1943).

<sup>156</sup> See Alexander & Schauer, *supra* note 6, at 1386.

for example, establishing a national minimum wage or banning child labor.<sup>157</sup>

Indeed, under their approach, child labor might still be legal in this country. The story of the battle between the judiciary and Congress over child labor is a familiar one, but if it is forgotten (or ignored) by scholars as prominent as Professors Alexander and Schauer, it bears repeating. In 1916, Congress banned from interstate commerce any product made in factories that employed children under fourteen,<sup>158</sup> leading a father and his children employed at a cotton mill in North Carolina to sue the United States Attorney for the Western District of North Carolina seeking an injunction against the statute's enforcement.<sup>159</sup> The district court granted the injunction and the Supreme Court affirmed,<sup>160</sup> opining that the regulation of "hours of labor of children in factories and mines within the States" is a matter of "purely state authority," and therefore that the statute, the effect of which would be to regulate such child labor, was "repugnant to the Constitution."<sup>161</sup>

Although Congress did not attempt to disturb or disobey this judgment, it did not "obey" the opinion that it lacked power to effectively eliminate child labor. Instead, Congress imposed a ten percent tax on the net income of any manufacturer employing children under fourteen.<sup>162</sup> The Drexel Furniture Company paid the tax under protest and successfully sued for a refund, with the Court opining that "the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter [child labor] completely the business of the state government under the Federal Constitution."<sup>163</sup>

Again, while Congress did not disobey the judgment by refusing to authorize the payment of the refund, it did not "obey" this opinion. Instead, it continued to assert its constitutional power to ban child labor and enacted the Fair Labor Standards Act of 1938<sup>164</sup> which not only banned child labor, but more generally regulated minimum

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<sup>157</sup> See Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 *Suff. L. Rev.* 85, 103-09 (1991) (discussing success of congressional "fortitude in challenging the Court on the question of regulating child labor").

<sup>158</sup> See Child Labor Act, ch. 432, §§ 1-7, 39 Stat. 675 (1916).

<sup>159</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 268 (1918).

<sup>160</sup> See *id.* at 268, 277.

<sup>161</sup> *Id.* at 276.

<sup>162</sup> See Revenue Act of 1919, ch. 18, §§ 1200-1201, 40 Stat. 1138.

<sup>163</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 39 (1922).

<sup>164</sup> See Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 212-213 (1994)).

wages and maximum hours.<sup>165</sup> A Georgia lumber manufacturer was criminally prosecuted for violating the Act, and, after a district court quashed the indictment, the Supreme Court reversed.<sup>166</sup> Thus, after two decades of "disobeying" Supreme Court opinions and persisting in its view of its constitutional power, Congress finally prevailed.

The set of terrible judicial decisions is far larger than the only one Alexander and Schauer acknowledge: *Dred Scott*.<sup>167</sup> In short, Lincoln was right, and his reasoning extends to cases beyond *Dred Scott*:

We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free. We do not propose that when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.<sup>168</sup>

Alexander and Schauer have a response to Lincoln's argument, but it is one that undermines their most basic goals. They argue that sometimes there is sufficient ambiguity in the Court's opinions to permit a "good faith claim of uncertainty," and, if not, "a change in composition of the Court" can "permit a good faith claim that a different result might now be reached."<sup>169</sup> But is the rule of law—and its settlement function—really furthered by encouraging reliance on "good faith" claims of uncertainty and explicit appeals to the changed composition of the Court?

Worse, Professors Alexander and Schauer observe that in "some cases, an official may feel strongly enough about the issue that she will be willing to engage in an act of disobedience, and defend it as such."<sup>170</sup> I agree that it is better to permit—indeed invite—honest

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<sup>165</sup> See *id.*

<sup>166</sup> See *United States v. Darby*, 312 U.S. 100, 117 (1941) (overruling *Hammer v. Dagenhart*).

<sup>167</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856); see Alexander & Schauer, *supra* note 6, at 1383 (arguing that it is "better to treat *Dred Scott* as aberrational" and not design system of authority around it). In the same passage, Alexander and Schauer hint at their political goal: To "design a system of authority around . . . the view of contemporary politicians about abortion and school prayer." *Id.* For an argument that constitutional interpretation is better performed by Congress, see generally Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. Rev. 707, 725 (1985) ("If we count the times that Congress has been 'wrong' about the Constitution and compare those lapses with the occasions on which the Supreme Court has been 'wrong' by its own later admissions, the results make a compelling case for legislative confidence and judicial modesty.").

<sup>168</sup> 3 *The Collected Works of Abraham Lincoln*, *supra* note 2, at 255.

<sup>169</sup> Alexander & Schauer, *supra* note 6, at 1386.

<sup>170</sup> *Id.*

and forthright disagreement than to suggest "good faith" distinctions and emphasis on the Court's membership. I doubt, however, that the rule of law is furthered by labeling as "disobedient" those representatives, senators, and presidents who disagree with the Court's opinions.

To accuse someone of "disobedience" is to level a very serious charge. An official who refuses to comply with a judgment directing his actions can be called "disobedient," and the question of whether such disobedience can be defended as lawful is a difficult one. Unlike opinions, judgments *call* for obedience: They command action by government officials either directly (e.g., when the official is the defendant in an equitable action) or almost immediately thereafter (e.g., when a writ of execution is entered to enforce a money judgment). While I am a Catholic by religious faith, and distinctly "Protestant" in rejecting the Supreme Court's assertion of "papal" authority regarding its opinions,<sup>171</sup> I remain agnostic regarding Paulsen's claim that executive disobedience of judgments is legal.<sup>172</sup> Perhaps disobedience of judgments can only be justified as extralegal but moral;<sup>173</sup> or perhaps it is only proper if the court's constitutional error is "so clear

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<sup>171</sup> See Sanford Levinson, *Constitutional Faith* 27-53 (1988) (elaborating parallels between Protestant and Catholic approaches to Christian doctrine and "Protestant" and "Catholic" modes of approaching Constitution).

<sup>172</sup> See Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 344 (justifying "the *Merryman* power as a lawful exercise of executive branch interpretive power" (emphasis omitted)); *id.* at 282 (endorsing Lincoln's justification of *Merryman* power to disobey judgment as lawful in accordance with "the usual rules," not merely as necessary in special circumstances of Civil War).

<sup>173</sup> See Alexander & Schauer, *supra* note 6, at 1382:

That there are occasions for disobedience to the law does not mean that there are not good, albeit overridable, reasons for obedience. *If* it was important for winning the Civil War that Lincoln suspend habeas corpus and infringe on other civil liberties, then the moral importance of winning the war was sufficient to justify his actions.

See also Lincoln's Message to Congress (July 4, 1861), in 4 *The Collected Works of Abraham Lincoln*, *supra* note 2, at 430 ("[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"); Max Weber, *Politics as a Vocation*, in *From Max Weber: Essays in Sociology* 95 (H.H. Gerth & C. Wright Mills eds., 1946):

The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities . . . even if the order appears wrong to him . . . . The honor of the political leader, of the leading statesman, however, lies precisely in an exclusive *personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer.

Weber also reminds us that "he who lets himself in for politics, that is, for power and force as means, contracts with diabolical powers and for his action it is *not* true that good can follow only from good and evil only from evil, but that often the opposite is true," and that "[w]hoever wants to engage in politics . . . has to realize these ethical paradoxes [and] know that he is responsible for what may become of himself under [their] impact." *Id.* at 123, 125.

that it is not open to rational question’”;<sup>174</sup> or perhaps the legality of such disobedience should be left undecided.<sup>175</sup> Whether or not executive disobedience of judgments is legal, surely it is significant that only once in our history has the executive disobeyed a judgment,<sup>176</sup> while legislative and executive actions premised on disagreement with Supreme Court opinions are too numerous to count.<sup>177</sup> Disagreement with opinions is not the same as disobedience of judgments. Since actions premised on disagreement with judicial opinions is commonplace, classifying such ordinary, routine legislative and executive behavior as disobedient runs the serious risk of regularizing and legitimizing all disobedience.<sup>178</sup>

While a judicial opinion is not entitled to obedience, it is entitled to deference. Those outside the judicial branch—in particular, the President and members of Congress—should, as President Lincoln counseled, give judicial opinions “very high respect and consideration, in all paralel[l] cases.”<sup>179</sup> As Professor Eisgruber explained, “no institution enjoys unqualified supremacy with respect to all controversies, but, nevertheless, each institution will sometimes owe a constitutional

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<sup>174</sup> Lawson & Moore, *supra* note 5, at 1325 (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893) (arguing that *judicial* review is only warranted “when those who have the right to make laws have not merely made a mistake, but have made a very clear one, so clear that it is not open to rational question”)).

<sup>175</sup> See Eisgruber, *supra* note 17, at 363 (“The constitutional system requires us to recognize the possibility of such a power, but not to endorse its exercise in the abstract.”).

<sup>176</sup> See Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 276 n.216 (noting Lincoln’s defiance of judicial decree in *Ex parte Merryman*); see also *id.* at 344 (“No President other than Lincoln, who did it during the Civil War, has defended such a power . . . [and it] is probably fair to conclude that, in the real world, the Merryman power is an extraordinary power reserved for extraordinary occasions.”); see also Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1989-90) (“President Lincoln once did this . . . but no other President has followed suit.”).

<sup>177</sup> See Devins & Fisher, *supra* note 16, at 88-89 (recounting how Presidents Washington, Jefferson, Lincoln, Jackson, Roosevelt, Nixon, Reagan, and Clinton all acted on disagreements with Supreme Court opinions and asserting that Jackson’s view of coordinate constitutional construction “has been followed by every other President”); see also *id.* at 89 (recounting Acts of Congress premised on disagreement with Supreme Court opinions).

<sup>178</sup> See *id.* at 100:

[I]f policymakers treat Supreme Court rulings as final [and] cannot engage in constitutional dialogues which challenge the underlying correctness of Court decisionmaking, policymakers may well engage in civil disobedience, especially when the voting public disapproves of the Court. Rather than “aberrations,” such challenges may become an important part of public life.

Professor Paulsen’s insistence on the *Merryman* power runs the same risk.

<sup>179</sup> Lincoln’s First Inaugural Address, in 4 *The Collected Works of Abraham Lincoln*, *supra* note 2, at 268.



duty of deference to the decisions (including *erroneous* decisions) of another branch.”<sup>180</sup>

Professor Paulsen, however, insists on a distinction between “deference” and “accommodation.”<sup>181</sup> For him, deference is “nothing much more than down-to-earth humility—the recognition that any one interpreter (or branch) can err.”<sup>182</sup> Accommodation, by contrast, is “a willingness to tolerate, where necessary, an ultimate result produced by the interaction of multiple interpreters that is contrary to the result that one would reach in the exercise of his own independent judgment . . . .”<sup>183</sup> He “emphatically reject[s] the view, which sometimes travels under the name of deference, that an interpreter . . . should reach a conclusion different from the one produced by her best legal analysis, or should refrain from reaching any conclusion at all, because of the views of another.”<sup>184</sup>

Part of the difficulty with Paulsen’s view is a matter of terminology. He wants to label as “accommodation” much of what in fact travels under the name of deference, including the deference judges pay to juries, legislatures, and administrative agencies, and the deference appellate courts pay to trial courts.

But more is at work than a somewhat idiosyncratic terminology. Paulsen’s “accommodation” seems to require that each participant reach his or her own decision (informed by respectful consideration of others’ views) and then decide whether to give in, compromise, or

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<sup>180</sup> Eisgruber, *supra* note 17, at 348; see also Walter F. Murphy, *Who Shall Interpret?: The Quest for the Ultimate Constitutional Interpreter*, 48 *Rev. Pol.* 401, 417 (1986) (contending that search for ultimate interpreter is misguided and that right questions involve “degrees of deference one institution owes another under varying circumstances”).

<sup>181</sup> See Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 332.

<sup>182</sup> *Id.* at 333. Professor Paulsen’s view of deference is quite similar to Professors Lawson and Moore’s notion of “epistemological deference,” by which they mean deference that depends on a contingent determination that the view of another is “likely to reflect the answer that a thorough, fully-informed independent examination of the issue would yield.” Lawson & Moore, *supra* note 5, at 1278. Lawson and Moore approve of “epistemological deference” but generally disapprove of what they call “legal deference,” by which they mean the obligation to defer to the view of another simply by virtue of the others’ legal status. See *id.*; see also *id.* at 1279 (rejecting “legal” deference by judiciary to other branches); *id.* at 1330 (generally rejecting “legal” deference by President to judiciary); *id.* at 1325 (recognizing exception and accepting “legal” deference by President to judgments).

<sup>183</sup> Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 337. Although they do not directly address the issue in these terms, Lawson and Moore apparently do not even view accommodation as legitimate. See Lawson & Moore, *supra* note 5, at 1302 (“If the Constitution is truly supreme law, the only justification for deference (where the Constitution does not directly command it) is that some actor or institution is more likely to have reached the right answer.”); *id.* at 1311-12 (arguing that presidents and judges cannot shirk duty of independent interpretation, even at risk of impeachment).

<sup>184</sup> Paulsen, *The Most Dangerous Branch*, *supra* note 5, at 336 n.413.

fight. The term “deference,” as it is usually understood, however, permits some participants to “defer” to another—to say “it’s your call”—*without* ever deciding (and certainly without giving voice to) their own views. In this respect, Paulsen is wrong to deny the legitimacy of the broader view of deference. In all kinds of social institutions—friendships, marriages, families, workplaces, as well as government—individuals do not always (or even typically) voice their own views and simply “tolerate” an “ultimate result” produced by their interaction. Instead, individuals regularly listen to those who want to speak to an issue (typically the ones who feel most strongly about it or whose interests are most directly involved) and defer, thereby reaching conclusions different from the ones that would be produced by their own best analysis. This broader view of deference is common in the law. To take but one example, in a case in which reasonable factfinders could reach different conclusions, a judge need never decide which conclusion she thinks is correct, but instead can simply “defer” to the jury’s decision.

Without this broader kind of deference, social interaction would be much more abrasive, if not impossible.<sup>185</sup> Consider the relationship between spouses: Each spouse frequently “defers” to the other’s view, keeping quiet about doubts and never reaching an independent conclusion. Of course, some things are important enough to note disagreement about while giving in, and some things are important enough to argue about and then compromise, but many things are not worth disagreeing about, or even worth the time, energy, and emotional cost of discovering whether a disagreement exists. While avoiding conflict—avoiding starting down the path to where push may come to shove—is not the highest good, it is a good. In other words, avoiding conflict is itself a legitimate—indeed important—interest. Many things are simply not worth the fight.

But deference is not a one way street. Not only does the judiciary properly defer to the other branches in the vast majority of cases,<sup>186</sup> but a central question (perhaps *the* central question) in constitutional adjudication is the scope of this deference, and whether it should vary

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<sup>185</sup> See Harrison, *supra* note 50, at 357 (“[L]etting someone have the last word on a disputed question, . . . is basic to cooperation.”). As my grandmother used to say, “The less said, the easiest mended.”

<sup>186</sup> See, e.g., Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 56, 58 (1997) (“[T]he Court frequently treats reasonable disagreement as a ground for judicial deference to the political branches of the government.”); David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113, 126 (1993) (noting that “one of the settled aspects of judicial review that is favorable to the executive branch (and to Congress)” is that “courts will defer to those branches’ interpretations of the Constitution”).

depending on the constitutional provision at issue or the political power of the persons harmed.<sup>187</sup> Deference ranges from the complete,<sup>188</sup> to the nearly complete,<sup>189</sup> to the nearly nonexistent.<sup>190</sup> In-

<sup>187</sup> See *United States v. Carolene Prods.*, 304 U.S. 144, 152 & n.4 (1938) (holding that legislation at issue was rational, and hence, constitutional, but suggesting that such deference might not be warranted when legislation "appears on its face to be within a specific prohibition of the constitution," or "restricts . . . political processes," or is "directed at particular religious, or national, or racial minorities" (internal citations omitted)). Professor David Cole has argued that the Court should defer "to Congress's reasonable interpretations of the Constitution where Congress and the Court have concurrent enforcement authority." David Cole, *The Value of Seeing Things Differently: Boerne v. Flores* and Congressional Enforcement of the Bill of Rights, 1997 Sup. Ct. Rev. 31, 71. Professor Cole believes that the Fourteenth Amendment is unusual in "empowering two branches with concurrent authority to enforce its guarantees." *Id.* at 34. He overlooks the fact that the Court held over 150 years ago that Congress has the power to enforce the Constitution, explaining that if "the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it." *Prigg v. Pennsylvania*, 41 U.S. 539, 615 (1842); see also Edward A. Hartnett, *A "Uniform and Entire" Constitution; or, What if Madison Had Won?*, 15 Const. Comm. 251, 268-69, 275-76 (1998) (arguing that if Madison's approach to amending Constitution had prevailed, Section 5 of Fourteenth Amendment would have been unnecessary because, when Thirteenth Amendment was adopted, Necessary and Proper Clause would have been amended to state explicitly what *Prigg* had found implicit: that Congress has power to "enforce the limitations and obligations imposed by this Constitution").

<sup>188</sup> See, e.g., *Nixon v. United States*, 506 U.S. 224, 237-38 (1993) (judiciary must defer completely to Senate's decision as to what it means to "try" impeachment). Professor McGinnis has argued that one can conceive of an executive obligation to obey judgments as a "judicial question" doctrine parallel to the "political question" doctrine represented by *Nixon*; that is, the resolution of particular cases and controversies is textually committed to final determination by the judiciary. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 Cardozo L. Rev. 375, 392 (1993).

<sup>189</sup> See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 594 (1979) (holding that it is rational, and hence constitutional, for transit authority to refuse to hire people who use methadone); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (holding that it is rational, and hence constitutional, to prevent opticians from fitting or duplicating lenses without prescription); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (explaining that "necessary" in Necessary and Proper Clause means "convenient, or useful"); see also Thayer, *supra* note 174, at 144 (opining that judicial review is only warranted "when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question"); cf. Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745, 763 (1997) ("[T]he crucial question is how much deference do the courts owe to the legislatures."). But see Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 Nw. U. L. Rev. 193, 211 (1993) ("[G]iven enough cultural separation between jurists and political leadership, Thayer's ideas in operation can be expected to—and did—produce a great deal of disrespectful, intolerant, and expansive judicial decisionmaking.").

<sup>190</sup> See, e.g., *Adarand v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

deed, the very practice of writing opinions is an act of judicial deference and invitation to dialogue, as Professor Schauer's general description of giving reasons illustrates—even as it undermines his assertion of judicial supremacy:

When the source of a decision rather than the reason behind it compels obedience, there is less warrant for explaining the basis for the decision to those who are subject to it. But when decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons becomes a way to bring the subject of the decision into the enterprise. Even if compliance is not the issue, giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one.<sup>191</sup>

Moreover, it is not simply the courts and the political branches that owe each other deference regarding constitutional interpretation; the Congress and the President owe each other deference as well. Professor Christopher May has pointed out that for the vast majority of our history, presidents effectively deferred to the constitutional interpretations made by Congress, by enforcing laws enacted over constitutionally-based vetoes.<sup>192</sup> The same, of course, is true of *judicial* deference to the constitutional interpretations made by Congress.<sup>193</sup>

### CONCLUSION

Despite the allure of stability and certainty held out by the advocates of judicial supremacy, the republic is not well-served by *any* branch that thinks it has a monopoly on constitutional wisdom.<sup>194</sup> In-

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<sup>191</sup> Schauer, *supra* note 23, at 658; see also Murphy, *supra* note 180, at 417 (noting that "decreasing the scope of judicial authority to bind other branches of the federal government . . . underlines the value, even necessity, of reason in persuading other branches to accept any particular constitutional interpretation"); Wechsler, *supra* note 17, at 1003 (stating that Supreme Court "necessarily initiates a dialogue when it pronounces an opinion").

<sup>192</sup> See Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 *Hast. Const. L.Q.* 865, 977 (1994) (noting that from 1789-1981, executive branch questioned validity of laws hundreds of times, but only 20 times failed to comply with law and half of the 20 were since 1974); see also Strauss, *supra* note 186, at 118 (noting that it is "quite likely" that President is obligated to give "substantial degree of deference to the constitutional judgments implicit in Congress's decision to enact a law").

<sup>193</sup> See Kurland, *supra* note 25, at 23 ("[N]o federal statute was declared invalid by the Court between the famous *Marbury* case in 1803 and the infamous *Dred Scott* case in 1857. The Court became more temerarious after the Civil War. Even so, until the era of the Warren Court only sixty-eight such decisions were rendered." (internal citations omitted)).

<sup>194</sup> See Fallon, *supra* note 186, at 141-42 (stating that "implementing the Constitution . . . is a project that necessarily involves many people (not just courts) and often calls for accommodation and deference"); see also Murphy, *supra* note 180, at 417 ("There is a mag-

stead, all must remember that “[e]very political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed.”<sup>195</sup> If our political life in general, and the interaction of governmental institutions in particular, is marked by mutual respect and a willingness to defer to others, we stand a substantial chance of never again facing a case like *Merryman*—or a civil war. If we lose those characteristics—as Professor Paulsen’s position and Professors Alexander and Schauer’s position both threaten—these risks increase.

Supreme Court opinions rarely settle constitutional issues, nor should they.<sup>196</sup> Instead, they are parts of a conversation with others who are legitimately interested in the meaning of the Constitution.<sup>197</sup> As the father of the Constitution and the preserver of the Union both believed, “constitutional interpretation does not belong to the Supreme Court alone but must take place over a prolonged time involving many different institutional participants.”<sup>198</sup> Schauer is wrong to suggest that it is disrespect for the law that leads us to “hardly ever punish prosecutors for initiating [what the judiciary concludes are] unconstitutional prosecutions, and . . . never punish legislators for passing [what the judiciary concludes are] unconstitutional laws.”<sup>199</sup>

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netic attraction to the notion of an ultimate constitutional interpreter [but] finality . . . is not the language of politics.” (internal citations and quotations omitted)). Finality is, however, the language of judgments.

<sup>195</sup> Statement of Lord John Russell, quoted in Woodrow Wilson, *Congressional Government* 242 (reprint 1993) (1885); cf. Lawson & Moore, *supra* note 5, at 1311 (contending that Framers contemplated “ongoing constitutional brinkmanship” including impeachment of presidents and judges based on their constitutional determinations).

<sup>196</sup> See Devins & Fisher, *supra* note 16, at 96 (pointing out that “it is difficult to locate in the more than two centuries of rulings from the Supreme Court a single decision that ever finally settled a transcendent question of constitutional law”); see also Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 *Nw. L. Rev.* 145, 181-82 (1998) (arguing that it is “good news” that judicial interpretations of Constitution are not final).

<sup>197</sup> See Klarman, *supra* note 196, at 181-82. See generally Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577 (1993) (arguing that theory of countermajoritarian difficulty overstates role of Court while understating societal responsibility).

<sup>198</sup> Robert A. Burt, *The Constitution in Conflict* 99 (1992) (linking Madison’s and Lincoln’s views on constitutional interpretation); see also *id.* at 193 (observing that when Supreme Court attempted to shut off debate about slavery, it “drove the abolitionist lawyers out of the public institutions into the streets”).

<sup>199</sup> Frederick Schauer, *The Questions of Authority*, 81 *Geo. L.J.* 95, 110 (1992). Professor Levinson adds that “we do not in fact sanction political officials for many acts that are deemed by the judiciary to be ‘unconstitutional.’” Levinson, *supra* note 171, at 124. For examples of the unwillingness to sanction, see, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (granting absolute immunity from damages for President so long as within outer perimeter of official responsibilities); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (granting absolute immunity from damages for prosecuting); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (granting absolute immunity from damages for legislating). While

Instead, such absolute immunity doctrines serve, in part, to keep the constitutional dialogue open. But the conversation must extend beyond courts, legislators, and executive officials.<sup>200</sup> With a Constitution made in the name of "We the People," all of us are legitimately interested in the meaning of the Constitution—all of us must be welcome participants in the conversation.

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most executive officials lack immunity if they act contrary to clearly established precedent, see *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982), those who argue that judicial decisions have binding force on nonparties because damages can be obtained in later litigation, see, e.g., Daniel Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 Ill. L. Rev. 387, 405-07, fail to acknowledge not only the extent to which legislative, prosecutorial, and presidential immunity undermine their claims, but also the extent to which existing remedial law (with its limited immunity for other official functions) is under congressional control. At times, the commitment of such commentators to judicial supremacy apparently leads to blatant errors, such as describing Justice Powell's justification of the rule of *Ex parte Young* as "a means to the end of judicial supremacy," when he plainly and repeatedly wrote instead about *federal* supremacy. Compare Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 333 n.207 (1995) (characterizing Justice Powell's justification as "judicial supremacy"), with *Pennhurst v. Halderman*, 465 U.S. 89, 105-06 (1984) (Powell, J.) (explaining justification as "supremacy of federal law"). Moreover, to the extent that qualified immunity doctrine is a "specie of negligence," John J. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 55 (1998), legislative control of immunity law seems that much clearer.

<sup>200</sup> See Devins & Fisher, *supra* note 16, at 106 ("By participating in this process, the public has an opportunity to add legitimacy, vitality, and meaning to what might otherwise be an alien and short-lived document."); Eisgruber, *supra* note 17, at 371 ("A people who aspire to rule themselves cannot permit any institution, the Supreme Court included, 'to speak before all others for their constitutional ideals.'" (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.))); cf. Levinson, *supra* note 4, at 1078 (criticizing left for its "profound fear of the public in whose name the left pretends to speak"); Neuborne, *supra* note 4, at 1000 (former National Legal Director of American Civil Liberties Union arguing, with no apparent consciousness of irony, that "the advantages of a single, authoritative voice seem overwhelming").