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## REFINING THE LAWMAKING FUNCTION OF THE SUPREME COURT

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Frederick Schauer\*

### I.

In some contexts it is considered completely unthinkable to suggest that the Supreme Court of the United States makes law, as opposed merely to interpreting or applying the law made by others.<sup>1</sup> In other contexts, including most especially the legal academy, denial of the Court's lawmaking activity is considered conclusive evidence of professional incompetence.<sup>2</sup> But however obvious it may be that the Supreme Court makes law all the time, we have ignored an important ambiguity about the notion of "making law," and as a result have paid far too little attention to an important aspect of the task before the Supreme Court.

In the sense in which the "making law" notion is most commonly used with reference to Supreme Court adjudication, the lawmaking function is primarily backward looking. The talk of "making law" occurs in the context of the sources of the norms for making the decisions in cases currently before the Court. The very fact that a case is indeed before the Court means in most instances that the relevant controversy has already ripened, and the task of the Court is to make a decision between the parties in the existing controversy. To the extent that its decision is based on norms not already embodied in authoritative legal materials,<sup>3</sup> the Court is accused of, or praised for, making law.

But in another sense, the notion of making law is forward looking.

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1. The best example of a context in which the Supreme Court is viewed as properly only applying law made by others is the Court's direct interaction with the political branches of government, particularly the Senate on the occasion of consideration of a Supreme Court nominee. See Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781-82 (1983).

2. *Id.* at 781; see also J. ELY, *DEMOCRACY AND DISTRUST* 11-41 (1980). Ronald Dworkin denies that judges normally do or should make law, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), but I feel quite confident in assuming that Dworkin's model of adjudication would garner little admiration from Senator Hatch, see Tushnet, *supra* note 1, at 781 n.1.

3. The domain of "authoritative legal materials" is, of course, highly contested, and the characterization in the text is intended to be neutral about the extent to which the text, original intent, and other sources are permissible or mandatory sources of "law." This is the full field of constitutional theory, and I do not wish to deal with those issues here. See generally J. ELY,

For the Court makes law not only when it applies new norms to decide actual controversies, but also when it sets forth a standard, or principle, or rule that is to be followed and applied by those to whom it is addressed. To the extent that we expect others to follow the Supreme Court's lead, and to obey its directives, then those others<sup>4</sup> occupy a position with respect to the Court that is not dissimilar to that occupied by the citizen with respect to a legislature. These others expect to be able to follow the guidance of the Supreme Court, and it is not unreasonable to suggest that the demands made by the citizenry on its legislatures in terms of the process of setting forth directives are or should be paralleled by the demands made on the Supreme Court by those who must heed it.

In this Article, I will address this second type of lawmaking. I want to explore the ways in which the Supreme Court, in its opinions,<sup>5</sup> does and can guide the conduct of lower courts, legislatures, government agencies, government employees, and the public at large. Each of these groups, and others, is likely at times to have some direct need to know what the law is. And to the extent that part of our law is set forth in the opinions of the Supreme Court, this aspect of the craft of law-making should not be ignored. Although it is common in academic discourse and classroom discussions in law schools to emphasize the weaknesses in Supreme Court opinions, this is a luxury not available to the conscientious lower court judge, legislator, head of an executive department, or cop on the beat. The people occupying these roles may not be totally unconcerned with whether the law is right or wrong, but they have a much more direct concern with simply knowing what

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*supra* note 2; *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

4. The text is deliberately vague about who those "others" are, because much of this article deals with the various groups — lower courts, legislative bodies, public agencies and officials, the general public — that might constitute the class of "others."

5. A related issue is the extent to which the Court exercises its influence by means other than its opinions. In many respects it is not what the Court says that is important, but what the newspapers and television news stories say the Court said. The dynamics of this process are beyond the scope of what I can plausibly do in this Article, but it seems clear that the factor of popular interpretation of Court opinions is not an irrelevant factor in the guidance process. For example, the necessity of the corrective decision of *Jenkins v. Georgia*, 418 U.S. 153 (1974), is accountable far more to the misreporting of the notion of local community standards in obscenity prosecutions in *Miller v. California*, 413 U.S. 15 (1973), than to anything that can be found in *Miller* itself.

Similar considerations relate to the Court's "nondecisions." It is technically true that denials of certiorari are not decisions on the merits and have no precedential value. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-20 (1950) (Frankfurter, J., respecting the denial of certiorari); Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979). But that is not the same thing as saying that they may not serve to channel behavior; on the contrary, denials of certiorari may influence behavior, either because lawyers perceive the Court as unwilling to review an issue, or because denials of certiorari are publicly reported in the press as "upholding" the decision below.

the law *is*.<sup>6</sup> When the law that governs them emanates from the Supreme Court, the effectiveness of Supreme Court lawmaking depends on the ability of the Court to perform its role in the process. Consequently, the guidance function of the Court deserves close scrutiny.

The process I want to explore is not isolated. It exists in every Supreme Court opinion that might have to be interpreted and followed by some other actor or entity. But this does not mean that the importance of the lawmaking function cannot vary considerably from case to case. The decision of a contested boundary dispute between two states is unlikely seriously to implicate the full range of potential problems associated with the Supreme Court's promulgation of norms to govern future conduct. But consider, by contrast, *Miranda v. Arizona*.<sup>7</sup> The most striking facet of a *Miranda* warning is that a police officer, one of hundreds of thousands similarly situated, is in effect reading directly from a decision of the Supreme Court of the United States. In some sense there is a "chain of command," or at least a chain of review, between the police officer and the Justices of the Supreme Court. There are police supervisors and commissioners, who in turn are under the direction of various state and local political subdivisions, which in turn are subject to the decisions of state and federal trial courts, and these courts are subject to the control of appellate courts, which are, finally, under the direct supervision of the Supreme Court of the United States. The fascinating thing about a *Miranda* warning is that the decision in *Miranda* leapfrogs every single one of these intermediate points in the chain of review and the chain of direction and control. In *Miranda*, the Justices are speaking directly to the cop on the beat.

A somewhat different example of the same process exists with respect to the relevant constitutional standards sufficient to convict on obscenity charges.<sup>8</sup> *Miller v. California*<sup>9</sup> is not only the decision in the litigation between Marvin Miller and the People of the State of California, and it not only contains general statements by the Supreme Court about the ways in which the definition of obscenity is constrained by first amendment considerations, but it also announces virtually exact instructions to be given to juries in obscenity cases. *Miller* is not only Supreme Court opinion, but formbook as well, speaking directly and unequivocally to every trial judge in the country.<sup>10</sup>

In other instances the Court is talking to smaller or different

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6. See generally H. HART, THE CONCEPT OF LAW 79-88, 132-44 (1961).

7. 384 U.S. 436 (1966).

8. *Miller v. California*, 413 U.S. 15 (1973).

9. 413 U.S. at 24-25.

10. There is, of course, no necessity that jury instructions, or statutes, be direct quotations from *Miller* or any other Supreme Court opinion. But such a use of a Court opinion is undoubtedly the safest course, and it is thus inevitable that it will be followed.

audiences. In *Immigration and Naturalization Service v. Chadha*<sup>11</sup> and *Powell v. McCormack*,<sup>12</sup> for example, the Court is speaking directly to Congress, telling it how it must legislate or conduct its internal affairs in the future. In *Reynolds v. Sims*<sup>13</sup> and *Avery v. Midland County*,<sup>14</sup> the Court is talking directly to state and local legislative bodies, telling them how they must apportion their representation to stay within the mandates of the equal protection clause. And, most commonly of all, the Court is talking to other courts, providing not only direction but mandate as well, as lower trial and appellate courts apply the rulings of the Supreme Court to the cases before them.<sup>15</sup>

In each of these instances someone is following the directions of the Supreme Court. But how good a director is the Court? How can it best perform the function of directing? What are the costs to the Court's other functions if it emphasizes or overemphasizes the directing function? Addressing this group of questions is my task here, but merely pointing out that they exist may be sufficient to justify this endeavor.

## II.

The lawmaking or directing function that I am discussing is in no way peculiar to the Supreme Court of the United States. The task of guidance is performed by all appellate courts and by any other decision-making entity that writes opinions when it makes a decision.<sup>16</sup> Nevertheless, I want to focus on the Supreme Court here for several reasons, only one of which is that Supreme Court adjudication of constitutional issues happens to be my primary area of interest.

Apart from my desire to write about what I know best, concentration on the Supreme Court, at least in this initial exploration of the topic, seems to make sense. By virtue of being at the apex of the judicial pyramid, the Supreme Court's directives bind the greatest number of other entities. Thus, the impact of Supreme Court deficiency in issuing these directives is likely to be the greatest. Moreover, the issues decid-

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11. 103 S. Ct. 2764 (1983).

12. 395 U.S. 486 (1969).

13. 377 U.S. 533 (1964) (holding existing Alabama apportionment scheme and proposed plans constitutionally invalid because neither legislative house is or would be apportioned on a population basis).

14. 390 U.S. 474 (1968) (holding that local units with general governmental power over an entire geographic area may not, consistently with the equal protection clause, be apportioned among single-member districts of substantially unequal population).

15. I reject any form of extreme Legal Realism that would deny that lower court judges can be and are in fact influenced and usually controlled by the collection of symbols that we call binding precedent. For my reasons for reaching this conclusion, see Schauer, *Easy Cases*, 58 So. CAL. L. REV. (forthcoming).

16. We should not ignore the extent to which labor arbitrators, hearing officers, administrative tribunals, and many other bodies write opinions that serve as a basis for guidance by others.

ed by the Supreme Court are almost exclusively issues of public law. Although private parties undoubtedly have an interest in knowing what the law is in order that they may best order their private transactions, the nature of the common law process is such that we have made the decision that judicial guidance to future private parties, albeit useful, is in the long run less important than the advantages of case-by-case adjudication with a slow and often sputtering development of general principles.<sup>17</sup> These assumptions of the common law method are not immune from reconsideration, but such a task is well beyond the more modest goals I set for myself here.

In the area of public law, however, it is likely that the considerations are different. Because a judicial decision with respect to the activities of a governmental agency can affect every person within the potential control of that agency, the consequences of a failure to guide that agency are considerably more widespread. Moreover, with respect to constitutional constraints on governmental action, there is a sense in which it is especially troubling that government might not know what is constitutionally required of it. Thus, the kinds of issues decided by the Supreme Court may be different in kind as well as in general importance from those decided by other courts, and focusing this inquiry on the Supreme Court may offer special insights.

Finally, the Supreme Court is a peculiarly public institution. Its opinions are a matter of public as well as professional legal scrutiny, and it is quite often speaking to the nation as a whole as much as it is speaking particularly to those who might have to follow its decisions. As a result, its audience is always, albeit indirectly, the entire population, and its ability to direct is of great political as well as more narrowly legal importance.

### III.

The case or controversy requirement<sup>18</sup> has the effect of ensuring that judicial lawmaking will not occur except as it is at least prompted by an act of adjudication. But the fact that adjudication of the rights of specific parties and lawmaking in the instant sense inevitably occur in tandem should not cause us to forget that they are two quite different functions.

In the strictest sense an act of adjudication can take place even though no opinion at all is offered. The adjudicator listens to the parties, decides who wins, and announces the result. This is what happens all the time

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17. See generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

18. U.S. CONST. art. III, § 2.

in lower courts and is in fact becoming increasingly prevalent in appellate courts.<sup>19</sup> Although providing reasons for a decision is often considered a central part of the notion of due process of law,<sup>20</sup> reasons that are provided in compliance with this requirement are still being provided solely for the benefit of the parties before the court. As a result, an opinion issued solely from an adjudicatory perspective can be exclusively related to the particular circumstances and issues before the court.

In contrast, there is no reason that lawmaking need take place in the context of a ripe dispute between opposing parties. Legislative promulgation of norms, although inevitably inspired by particular factual assumptions and specific events thought to require legislative reaction, still takes place in a setting divorced from the necessity of deciding a specific controversy between designated parties. The process by which a particular institution announces a directive to be followed by others is a process that can and frequently (indeed, most commonly) does occur in settings in which there are no specific winners or losers. Lawmaking, qua lawmaking, is therefore distinct from the process of adjudication.

All of this is so commonplace as to approach the trivial. Yet it is necessary to restate the obvious in order to set the stage for the problem. For the difficulty we confront is that the Supreme Court is inevitably charged with the task, in each case, of both adjudicating and lawmaking. To the extent that it promulgates norms for the guidance of lower courts, legislatures, executive departments, public employees, and the public, the Court is exercising the lawmaking function, yet it is forced to do so in the setting and under conditions primarily designed for the distinct function of adjudication. Because of its primary design for adjudication — the Supreme Court is, after all, a court — commentary on the performance of the Court has tended to focus on the adjudicatory function, and perhaps the reasoning process as well, but not on the ability of the product of the Court's work to establish effectively norms that can be followed by others.<sup>21</sup>

The primary source of the analytical difficulty, however, is not that adjudication and lawmaking are two distinct functions. Rather, it is that those two functions are in inevitable tension with each other, tension

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19. See generally Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

20. See, e.g., *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).

21. I have noted the issue previously. Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 217-18. The issue is dealt with in some more detail in Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-11 (1982); see also Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974); LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

that verges on inconsistency. The process of lawmaking is a process of establishing a *rule*.<sup>22</sup> And in establishing a rule, the rule maker uses the rule to exclude certain factors from consideration in the future while at the same elevating certain other factors to special importance.<sup>23</sup> The lawyers' "facts of the case," after all, are not *all* of the facts that are related to the transaction before a court. They are only those facts that a legal rule, established prior to the event, has deemed will be legally relevant in determining the rights and duties arising out of the transaction.<sup>24</sup> But a legal rule, excluding all but certain designated facts from consideration, precedes in time the events that it governs. Thus, the formulation of the rule is at best a prediction. It is an assessment, in advance, of what facts are likely to exist, of which of those facts we wish to control, and of which of those facts we wish to exclude from consideration by the decision maker. But because the formulation of the rule is in this sense only a prediction, and because our predictions, lacking omniscience,<sup>25</sup> may be incorrect, the process of lawmaking, or rule formulation, is inevitably coarse. It excludes from future consideration facts that might be important in the future but that we cannot foresee today. To deal with future conduct by rule, therefore, entails the risk of being precluded from considering certain facts that we would, ideally, wish to take into account in reaching a decision in the case at hand.

To the extent that we can stylize and idealize the adjudicative function,<sup>26</sup> however, the idea of excluding certain facts from consideration may disable us from reaching the ideal solution in the individual case before the adjudicator. If we seek to be most just in the particular case, to achieve the optimal result in each case, we should not, in advance and with imperfect knowledge of the future, exclude certain potentially important factors from our consideration. To constrict the relevant context of adjudication entails a substantial risk of deflection of results from the optimal. Because the process of laying down relatively clear strictures for the future involves doing just that, the consequence is that exercising the lawmaking function inevitably detracts from optimal exercise of the adjudicative function. This does not mean

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22. I use "rule" here in a quite loose sense, and I do not mean to distinguish rules from principles or other sorts of standards.

23. It is by his choice of the material facts that the judge creates the law . . . . To ignore his choice is to miss the whole point of the case. Our system of precedent becomes meaningless if we say that we will accept his conclusion but not his view of the facts. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930); see also G. GOTTlieb, *THE LOGIC OF CHOICE* 46 (1968).

24. G. GOTTlieb, *supra* note 23.

25. See H. HART, *supra* note 6, at 125-26.

26. Adjudication serves many purposes, and the relationship among them is complex. Here I am artificially narrowing the adjudicative function to ignore a wide range of interests other than those of achieving the best resolution of a dispute involving only two parties.



that some accommodation between these competing goals is not possible. It means only that we must realize that they are competing, and that any increase in one must come at the expense of the other.

#### IV.

In addition to the tension between the adjudicative and lawmaking functions, there is the tension between the desire to achieve the correct, or at least optimal, result, and the desire to provide guidance to lower courts and others. To the extent that the Court resolves quickly and clearly an issue of concern, it heeds its lawmaking function, but possibly at the cost of a less than perfect resolution of that issue. Ideally, in terms of achieving the best result, the Court ought to delay decision until a number of different factual circumstances have presented themselves in the lower courts. In formulating a rule, the rule-making body attempts to imagine at least a fairly extensive sample of the types of situations that are likely to arise under the rule. To the extent the decision maker's imagination or foresight diverges from the reality that in fact occurs, the rule represents an imperfect fit between the desires of the rule maker and the results obtained by application of the rule. Thus, if the rule maker can in fact substitute observation for guesswork by examining a fair sample of factual situations before formulating a rule, the risk of imperfect fit is reduced, and the rule is more likely to achieve the results desired by the decision maker.

Similar considerations provide at least part of the foundation for the case or controversy requirement of Article III.<sup>27</sup> The requirements of standing, ripeness, and mootness, in addition to providing an adversary presentation of issues, also ensure that the Court is considering the formulation of a rule in the context of real facts. Although the factual situation then before the Court cannot necessarily be taken to be representative of the types of cases that will arise in application of the rule, one is still better than none, and the presence of a ripe controversy seems better than issuance of a merely advisory opinion without any concrete facts at all.<sup>28</sup>

Whatever the justifications for the Article III requirements,<sup>29</sup> they serve as a barrier to the exercise of the lawmaking function even when exercise of that function seems necessary. Yet apart from the Article III constraints, the various other decision-avoiding devices — pruden-

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27. See generally Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

28. *United States v. Fruehauf*, 365 U.S. 146 (1961). See generally Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

29. See generally Brilmayer, *supra* note 27; Monaghan, *supra* note 28.

tial considerations,<sup>30</sup> the "passive virtues,"<sup>31</sup> the *Ashwander* rules<sup>32</sup> — all spring from a desire to achieve a "correct" result rather than a desire to provide guidance. For whenever the Court avoids deciding a case, or avoids deciding the central issue in a case, the law in that area remains uncertain. And when the law remains uncertain, there is no guidance from an authoritative source for those who genuinely wish to do what the law requires. It is certainly not always true that it is less important that issues be decided correctly than that they be decided at all,<sup>33</sup> but it is an admonition that should not be ignored completely. Some issues, even some of those decided by the Supreme Court of the United States, are less momentous than others. Some areas of Supreme Court adjudication do not involve fundamental decisions regarding the course of the law or the course of life. In these areas, therefore, it is less vital that every effort be made to ensure that no decision is issued unless and until the "correct" result can be achieved. Consequently, the relative importance of certainty and predictability in many areas may be values that have recently been undervalued.

In a way, the issue of decision-avoidance is peripheral to my primary theme of Supreme Court guidance in those cases it does decide. But decision-avoidance in part implicates many of the same themes. For when the Court fails to decide an issue at all, it may, in many cases, be failing to perform adequately or may simply be abdicating its guidance function. This is not, of course, always the case. When the Court fails to decide the "good faith" exception issue in *Illinois v. Gates*,<sup>34</sup> for example, it does nothing more than leave in place an existing body of Supreme Court precedent.<sup>35</sup> Failure to decide a particular case is not a failure of guidance if guidance already exists.

In other situations, such as *Princeton University v. Schmid*,<sup>36</sup> the issues may arise sufficiently rarely that a failure to address the merits of the controversy entails few costs. But where the amount of lower court litigation indicates a recurring problem of considerable uncertainty, as with the "nativity scene" issue finally before the Court,<sup>37</sup> failure to decide the issue perpetuates a state of uncertainty. This is

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30. E.g., *United States v. Richardson*, 418 U.S. 166 (1974). See generally LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework For Analysis*, 1982 DUKE L.J. 1013.

31. Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

32. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

33. See W. MUEHL, *THE ROAD TO PERSUASION* 241 (1956).

34. 103 S. Ct. 2317 (1983).

35. E.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

36. 455 U.S. 100 (1982) (dismissing appeal for want of jurisdiction because university regulation, allegedly violative of first, fifth, and fourteenth amendment rights, changed during pendency of appeal).

37. *Lynch v. Donnelly*, 691 F.2d 1029 (1st Cir. 1982), cert. granted, 103 S. Ct. 1766 (1983) (No. 82-1256).

not to say that the extent of a rule's uncertainty ought to be dispositive. It is, after all, desirable for the Court to reach the optimal result, and many of the techniques of decision-avoidance are designed to achieve this goal. Moreover, broader issues of Court legitimacy, power, and effectiveness may militate in favor of avoiding hearing a case or avoiding deciding it on the merits.<sup>38</sup> But achieving these goals, however laudable they may be, imposes a price when a failure to decide constitutes a failure to issue directives to those who are then in need of direction.

Recognition of the inherent tension between the values served by decision-avoidance and the Court's guidance function implies nothing about the resolution of competing goals in any particular case. But we must recognize that there *are* competing goals, and that decision-avoidance may often exact a high price that is not immediately apparent if we focus only on the Supreme Court in isolation.<sup>39</sup>

## V.

Putting aside the question of decision-avoidance, my central concern is the process of issuing directives, of lawmaking, in those cases that the Court does decide. And at this point not only do I wish to put aside the question of decision-avoidance, but I also want to avoid the question of which way a case should be decided. Although strategic as well as substantive considerations may at times influence or even dictate the outcome of a case,<sup>40</sup> that is not my concern here. I shall take the broad contours of any particular decision as given and assume that the Court has determined what the outcome of the case is to be, and what, in very broad terms, justifies that outcome. The question, then, is, How should the Court formulate the result, the rule, and the opinion in light of recognition of its duty to provide leadership to those who must follow that opinion? There is no clear answer to this question, and the considerations will vary from case to case. So what I want to do here is to identify some of those considerations and the ways in which they will be a function of particular features of the case before the Court.

The Court's methodology in exercising its lawmaking function can be characterized in terms of three models of lawmaking: lawmaking

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38. See Bickel, *supra* note 31; cf. Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

39. It is, of course, tempting to focus only on the Supreme Court because there are a limited number of Supreme Court cases. Looking at the effect of Court doctrine is, quite simply, hard work. See Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. 745 (1983).

40. See Blasi, *The Pathological Perspective on the First Amendment*, 84 COLUM. L. REV. (forthcoming).

by example, lawmaking by general principles, and lawmaking by specific rules. The lines between these models are, of course, fuzzy, and no opinion will have all of the characteristics of one model and none of either of the others. Rather, every opinion will have at least some parts of all three models, with varying emphasis among the three. But the three styles, or approaches, are sufficiently different in focus that teasing out the distinction seems useful, even though the result is a loose categorization rather than a rigidly demarcated division.

Lawmaking by example is lawmaking in the adjudicative mode. In this sense it is lawmaking in common law fashion. Cases are decided on a more or less ad hoc basis,<sup>41</sup> and only after a number of cases have been decided can we piece together broad principles to guide future adjudication. Now, when the Supreme Court decides a case in this manner, it does not say that it is deciding by an ad hoc method. Nor does it simply announce its result, without any reasons attached. Rather, what characterizes a case that is decided in this mode is the particular effort to limit the ruling to the facts of the case or to a quite narrow class of cases with decidedly similar facts. When, in *New York v. Ferber*,<sup>42</sup> Justice Stevens expressed a desire to decide the case on the basis of the particular material and litigant before the Court, rather than to articulate a broad rule, he was expressing a desire, at least for the time being, to operate in this mode. The same desire is expressed in Justice White's concurrence in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,<sup>43</sup> in Justice Stewart's opinion in *Craig v. Boren*,<sup>44</sup> in Justice Powell's plurality opinion in *Kassel v. Consolidated Freightways Corp.*,<sup>45</sup> and in many other cases. In all of these the general perspective is the same. The Court, or some individual Justice, perceives that the case can be decided on narrow grounds, and thus uses those narrow grounds for reaching a particular result in the particular case. At times the narrow grounds may be a function of the factual peculiarities of the case at hand, as in *Kassel* and *Min-*

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41. By "ad hoc" I mean that the agenda of adjudication is determined by the existence of particular controversies at a quite low level, and the emergence of the controversy before the courts is partly determined by factors over which the courts have no control, such as the absence of settlement, the willingness of the parties to pursue the matter, the ability of the parties to afford counsel, and so on.

42. 102 S. Ct. 3348, 3365 (1982) (Stevens, J., concurring) (rejecting first amendment attack on a New York law designed to deal with child pornography by prohibiting the distribution of material depicting children engaged in sexual conduct without requiring the material to be legally obscene).

43. 103 S. Ct. 1365, 1376 (1983) (White, J., concurring) (holding invalid a Minnesota user tax that applied only to large newspapers).

44. 429 U.S. 190, 214 (1976) (Stewart, J., concurring in the judgment) (invalidating statute that allowed access to "near beer" to males of ages 18-20, but denies access to females of the same ages).

45. 450 U.S. 662, 665-68 (1981) (invalidating Iowa statute that prohibited 65-foot double truck units as an impermissible burden on interstate commerce).

*neapolis Star*, and at times the narrow grounds may be a function of the usability of an existing standard to decide the case at hand and a reluctance to erect a new standard, as in Justice Stewart's opinion in *Craig v. Boren*. Most often these two factors — factual peculiarities and existing usable standards — will be intertwined, and thus presented in the same case, or the same argument.

When the Court adjudicates in this style, it rejects a number of possibilities for a broader decision. It rejects the possibility of creating a new rule if this case can be decided under an old one. It rejects the possibility of dealing with yet to be presented hypothetical cases (usually presented in "slippery slope"<sup>46</sup> fashion) if this case can be decided without considering those cases, and it consequently rejects the possibility of laying down broad general guidelines, choosing instead to decide the case in the narrowest way possible. This approach is signaled by the catch-phrase "but we need not reach that issue here,"<sup>47</sup> or its synonym "but we need not decide that question here."<sup>48</sup> These and similar phrases announce to the reader of the opinion that the Court is going to decide as little as possible on this occasion.

An opinion that is issued in this fashion, complete with all the caveats, qualifications, and disclaimers that festoon a narrowly decided case, is, by virtue of its adjudicative bias, the least effective as a directive. The greater the number of qualifications, the less the Court is saying. And the more an opinion is limited to a relatively specific factual pattern, the less someone faced with a slightly different factual situation can rely on what the Court has already said. To the extent that the Court is cognizant of the fact that it hears only a limited number of cases and must guide with respect even to those cases that it cannot hear,<sup>49</sup> it will hesitate to rely too heavily on the adjudicative mode, of making law by example only, and will be reluctant to refrain from giving broad directives that govern and direct in a range of cases substantially broader than the one that, perhaps fortuitously, happens to be before the Court.

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46. There is an important distinction that should be noted here. At times hypotheticals are presented to show the application of a putative rule to cases within the linguistic contours of that rule. And at other times hypotheticals are presented that lie outside the putative rule, but which, it is argued, represent realistic fears in terms of "the next step," or in terms of lower court misapplication of the rule. A court that is attentive to its guidance function will consider both possibilities. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 370-71 (G. Gunther & F. Schauer Supp. 1983).

47. *E.g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 116 n.33 (1979); *United Jewish Orgs., Inc. v. Carey*, 430 U.S. 144, 153 n.13 (1977).

48. *E.g.*, *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2870 n.15 (1983); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 377 n.10 (1976).

49. See Easterbrook, *supra* note 21, at 808. The specific characterization of the "guidance" function is Professor Easterbrook's. *Id.* at 807.

Implicit in the adjudicative mode is the assumption, suggested by the name itself, that the range of problems is coextensive with the problems actually presented to the courts. But this assumption, when carefully considered, is strikingly at odds with the reality of human and judicial behavior.<sup>50</sup> In many cases the existence of a judicial precedent will forestall any litigation whatsoever; but it would be a mistake to assume that the absence of litigation is, in this context, a sign that an underlying factual controversy did not or could not have existed.

Even the perspective that recognizes the effect of prior directives on the present scope of legal controversies is focused far too narrowly, because it ignores the enormous range of "legal events" that never reach the lawyer's office.<sup>51</sup> To the extent that the law speaks with moderate clarity over a wide range of events in which people normally engage, the very clarity of the law, by preventing a controversy from arising in the first instance, is as much a legal event as controversy resulting from doubtful or unclear law. It is strange but true that many are quite willing to take breaking the law but not following the law as an example of what law is "all about." But it is, of course, not true that there would be no law if there were no disobedience of law,<sup>52</sup> and thus the law serves an important function every time it channels behavior from where it would have gone in the absence of legal constraint.

The discontinuity between problems presented by discrete cases and the range of potential problems is even greater in constitutional law, because the selective process by which the Supreme Court decides which cases to decide means that many cases will never reach the Court at all.<sup>53</sup> Yet there is a great deal of law involved in those cases that do not reach the Court, in those cases that never reach any court, and in those cases that never go to the lawyers' offices at all. Every time a police officer reads a *Miranda* warning exactly as it is on the card, every time that officer goes off to get a warrant even though he is absolutely sure that the search will yield the desired results,<sup>54</sup> every time a prosecutor does not prosecute a Communist for the simple act of being a Communist,<sup>55</sup> and every time a certain class of school

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50. See Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 LAW & SOC. REV. 91, 99-100 (1978).

51. For an expanded version of this point, see Schauer, *supra* note 15.

52. Indeed, to Bentham the ideal sanction was one that would never have to be imposed, and thus the ideal legal system would contain numerous but never-used sanctions. J. BENTHAM, *OF LAWS IN GENERAL* (H. Hart ed. 1970).

53. But see *supra* note 5.

54. See *Aguilar v. Texas*, 378 U.S. 108 (1964).

55. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Noto v. United States*, 367 U.S. 290 (1961).

districts does not create a separate school for blacks,<sup>56</sup> the Supreme Court's lawmaking function has operated as it should. Yet it is silly to suppose that the urges to engage in constitutionally relevant behavior can neatly coincide with the desire of the Supreme Court, or any court, to hear and decide the case. Thus, there will be instances in which guidance from the Court on the basis of previous cases will be desirable. But if the previous case says nothing except what is narrowly relevant to that case, the case will be ineffective lawmaking in the sense I am using the term. When no law is made, but when the factual situation arises, there is a void, with its consequent uncertainty. To the extent that the Court anticipates this problem, and is thus willing to write more than needed for a minimal rational explanation of the result,<sup>57</sup> it prevents problems from arising; and in that sense it makes law effectively.

Despite this, an argument in favor of a narrow and extensively qualified opinion relates to the Court's raw political power and theoretical legitimacy. The same reasons that might lead the Court to decline to decide a case could also lead it to decide the case as narrowly as possible.<sup>58</sup> To the extent that the Court decides too much, it may weaken its ability to decide when it really matters.<sup>59</sup> And if there are questions of legitimacy with respect to every exercise of judicial review,<sup>60</sup> then each case before the Court presents, *pro tanto*, a good reason for deciding the case as narrowly as possible.

Not only is this not the place to present counterarguments to these pervasive concerns, but I have no inclination to do so. That there are concerns that cut in the opposite direction does not indicate that these concerns are not legitimate. But there is a difference between what is a good argument, or reason, and what is, all things considered, the course of action to follow. Every argument for not deciding a case, or for deciding it as narrowly as possible, is not diminished by the presence of arguments that would militate in the opposite direction when deciding what, all things considered, to do. The values motivating arguments against the adjudicative mode and in favor of greater acknowledgment of the lawmaking function are often ignored as important factors that should be considered in this ultimate inquiry. But in arguing that these factors ought to be taken into account more often,

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56. See *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

57. What counts as a "minimal rational explanation" is an extremely difficult and complex issue, but in this context such a discussion would be superfluous. All I am saying is that it is possible, and often desirable, for the Court to be quite detailed about its reasoning. See Easterbrook, *supra* note 21, at 808.

58. See Gunther, *supra* note 38.

59. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

60. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

I am not arguing that they can or should be often or even sometimes dispositive.

Alternatively, it might be argued that decisions rendered more broadly than is required by the facts of the case are decisions that are rendered against the background of an insufficient record. In refusing to qualify an opinion narrowly, the Court is in effect deciding cases not then before it and might be only guessing about the factual setting of such cases. The concern over the Court's elaboration of broad directives applicable to an undetermined range of future cases, which is not the same as a general desire for case-by-case adjudication,<sup>61</sup> is premised on the assumption that it is easier to decide cases in a concrete setting than it is to decide them based on speculation about what kind of factual setting might be presented.<sup>62</sup> But this assumption is only as valid as the gap between the factual speculation and factual reality. To the extent that the Court is deciding in advance controversies that have not and will not occur, and failing to decide actual controversies, there are indeed special dangers involved in deciding in advance of the controversy itself. But to the extent that anticipatory adjudication accurately reflects and predicts a future but real state of affairs, the disadvantages of anticipatory adjudication decrease. Thus, if lower court litigation and extensive familiarity with certain fact patterns enable the Court to know the types of cases that are likely to arise, this particular objection to broadly sweeping opinions is blunted. But if the novelty of the issues is such that there is truly grave doubt about the future, then there are substantial problems with deciding cases that might never have to be decided.

Finally, it is possible that opinions that are too unqualified will reduce the Court's own flexibility in deciding those cases in the future that cannot currently even be anticipated. Unlike the problem discussed just previously, here we are not concerned with the type of case that can be anticipated as a problem. A thorough search of both the lower court cases and the imaginations of the Justices might still omit some case that will arise despite a total inability to predict that that will happen. Indeed, it is not just a matter of "might," for the phenomenon of open texture<sup>63</sup> is an inevitable and irremovable feature of the legal

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61. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 297 n.65.

62. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

63. I use "open texture" in its strict philosophical sense, not as a synonym for "vagueness." Thus, "open texture" refers to the possibility that any term, or rule, no matter how specific, might under some currently unimaginable state of affairs present a difficult question of application. See Waismann, *Verifiability*, in *LOGIC AND LANGUAGE (FIRST SERIES)* 120-21 (A. Flew ed. 1952); see also H. HART, *supra* note 6, at 121-32.



condition.<sup>64</sup> For example, it was virtually impossible for the Court, at the time it decided *Brown v. Board of Education*,<sup>65</sup> to have predicted the entire range of issues subsequently presented by affirmative action and racial line-drawing for noninvidious<sup>66</sup> purposes. At the time the Court decided *Brandenburg v. Ohio*,<sup>67</sup> it certainly did not and probably could not have imagined the range of issues, arguably in tension with *Brandenburg*, raised by the litigation involving *The Progressive*.<sup>68</sup> And it seems unlikely that the decision and language in *Ex parte McCardle*<sup>69</sup> were informed by a knowledge of the issues now being raised in connection with the use of the "exceptions and regulations" power in Article III to withdraw Supreme Court jurisdiction for reasons based on objections to specific rulings by the Court.<sup>70</sup>

The problem in these and many other cases is not that the Court did not think hard enough. A crafty law professor with a host of bizarre hypotheticals would not have enabled the Court to anticipate what evaded it.<sup>71</sup> Regardless of how much care is devoted to thinking of possible ramifications of a decision, something new can and usually will occur that goes well beyond the range of plausible contemplation at the time the first decision was rendered.

In the face of this problem, it is possible that a lack of a safety valve or escape route in the first opinion will, when the new situation arises, increase the probability of tension between the opinions. If we expect the Court's decisions to be principled, following the rules set forth in earlier cases to the extent that those rules, on their face, govern the next case,<sup>72</sup> then is it not wise for the Court to refuse to fetter itself in the first case? Should it not decide the first case as narrowly as possible in order to maintain maximum flexibility to deal with the unforeseen?

To the extent that we are dealing here with the truly unforeseen and unforeseeable, such a strategy seems partly unattainable and partly un-

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64. See H. HART, *supra* note 6, at 125-26.

65. 347 U.S. 483 (1954).

66. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

67. 395 U.S. 444 (1969) (per curiam).

68. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), *mandamus denied sub nom. Morland v. Sprecher*, 443 U.S. 709 (1979), *dismissed*, 610 F.2d 819 (7th Cir. 1979). See Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 297-99 (1981).

69. 74 U.S. (7 Wall.) 506 (1868) (holding appellate jurisdiction of Supreme Court derives from the Constitution and not from Congress).

70. See generally Sager, *The Supreme Court, 1980 Term—Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

71. See *supra* note 46.

72. See generally Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978). Both of the foregoing refine the notions in Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

necessary. The goal is unattainable because the unforeseeable is just that — unforeseeable. If we are to plan for the unforeseeable, we are, in effect, destining ourselves to paralysis. Any decision, however narrow, is potentially in tension with what might be necessary under some as yet unimaginable set of facts. To plan for such a consequence would involve decisions that totally abdicated any pretense at a lawmaking function and dealt with everything on a case-by-case basis. Moreover, such an approach is unnecessary, because it cannot plausibly be contended that the goals of precedent, stare decisis, and principled adjudication are absolute mandates.<sup>73</sup> Should the truly unforeseen arise, then the Court can simply acknowledge the force of precedent while at the same time holding that the facts now presented are sufficiently novel and compelling that the mandate of the rule articulated in the earlier case will not be followed. Indeed, it is commonly acknowledged that stare decisis means less in the context of constitutional adjudication than it does in other contexts.<sup>74</sup> But that does not mean that it has no function whatsoever. Principles, including the principle of stare decisis, can still be effective even though they are not absolute or may vary in strength.<sup>75</sup> But once we recognize that the Court has the power, ex post facto, to engraft exceptions onto previously unqualified language, then there is no reason to suppose that allowing for the possibility of the unforeseen means that every decision of the Court must be narrowly constrained by exceptions, qualifications, caveats, and escape clauses. And if this is the case, then the argument from unforeseen facts and issues is ineffective in blunting the force of the argument for greater attention to the Court as lawmaker.

## VI.

Lawmaking by general principles, the second model of opinion writing, is in sharp contrast to lawmaking by example, the adjudicative model just discussed. The adjudicative model starts with extremely narrow decisions and generates broad principles only over time, as certain regularities can be identified running through the narrow decisions. But lawmaking by general principles operates in exactly the opposite way. Here the Court starts with very broad and majestic statements, seemingly all-encompassing, and then narrows these principles as it proceeds to decide further cases arising under the principle.

This model, at least in terms of authoritative statutory texts, is an established feature of American legal life. Lawmaking by general prin-

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73. See Greenawalt, *supra* note 72, at 992-94.

74. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983). See generally Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979).

75. See R. DWORKIN, *supra* note 2, at 22-28.

ciples is a reasonably accurate characterization of constitutional adjudication under quite broad and abstract constitutional clauses, and it is also characteristic of adjudication under such general nonconstitutional instruments as the Sherman Antitrust Act<sup>76</sup> and Section 10(b) (and Rule 10b-5) of the Securities Exchange Act of 1934.<sup>77</sup>

In the examples just mentioned, the abstract statement has its origin in a statutory (or constitutional) text. But it is possible for the Court to operate in the same way in rendering its opinions. The Court's excessively expansive statements in *Shelley v. Kraemer*,<sup>78</sup> *Harper v. Virginia Board of Elections*,<sup>79</sup> and *Givhan v. Western Line Consolidated School District*,<sup>80</sup> for example, can be taken as instances of a strategy of whittling rather than building. For rather than constructing a precise principle out of small parts, the Court here is starting with a very large block and then whittling it down to size, just as it does under most constitutional provisions and a number of statutes.

As with lawmaking by specific examples in the adjudicative model, this approach is not without its distinctive advantages. It allows the Court to perform an important function as the expositor of broad values,<sup>81</sup> and it also provides at the same time most of the advantages of open-endedness that were discussed with reference to the adjudicative model. But just as this model shares many of the advantages of the adjudicative model, it also shares most of its weaknesses. For an opinion that is excessively expansive provides little, if any, more guidance than does an opinion that is excessively narrow. A lower court or other party that must apply a Supreme Court opinion to new facts is not likely to receive much guidance if the law that it must apply is presented in terms of little more specificity than "privacy,"<sup>82</sup> "fundamental fairness,"<sup>83</sup> "minimum contacts,"<sup>84</sup> or "implicit in the concept of ordered liberty."<sup>85</sup> I am not saying that such emotive generalities serve

76. 15 U.S.C. § 1 (1982).

77. 17 C.F.R. § 240.10b-5(a) (1983).

78. 334 U.S. 1 (1948) (stating that state enforcement of private discriminatory choices is state action).

79. 383 U.S. 663, 668 (1966) (stating that wealth is a suspect classification under the equal protection clause).

80. 439 U.S. 410, 413-16 (1979) (stating that the text of the first amendment precludes distinguishing between public and private speech).

81. Whether the Court does or can serve as a significant educational force in American life is an important question that deserves careful consideration. As a hypothesis, it seems likely that decisions such as *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), serve to create public values as much as if not more than they reflect such values. This theme is dominant in the thinking of the Scandinavian Realists, particularly W. LUNDSTEDT, *LEGAL THINKING REVISED* (1956).

82. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

83. *E.g.*, *Chandler v. Florida*, 449 U.S. 560, 575 (1981).

84. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

85. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

no purpose in constitutional adjudication. The broad ideas suggested by such vague phrases can and do serve over time as significant touchstones to remind us of the importance of certain values, and are implicit statements of the priority of certain values. But such phrases, however powerful they are for some purposes, provide little comfort for the conscientious judge, legislator, or public employee who is uncertain about how to decide a concrete case before him.

When Congress enacts legislation in the broad and vague style of the Sherman Act, it can be interpreted as having delegated to the courts the task of developing a body of concrete rules and principles to govern actual cases. And it has at the same time declined to perform that very task itself. Similarly, when the Supreme Court decides a case by reference only to such general standards, it can be taken to have delegated to some other body<sup>86</sup> the task of working out the specifics. This delegation, which might under some circumstances amount to abdication, is not necessarily wrong, but it is a denial of the guidance and lawmaking function. Under some circumstances this may be the appropriate course, but it seems likely that this model is often used without a full appreciation of its implications in terms of the Court's lawmaking function.

## VII.

The final model I wish to discuss is lawmaking by specific rules. This is the model that most closely resembles lawmaking by a legislative body in the "normal" manner, where quite specific guidance is given on how certain transactions should be dealt with. This is the model of *Miranda*, of *Miller*, and of any opinion that promulgates a specific test, usually one with three parts.<sup>87</sup> Some of these tests are of course more specific than others. The tests that the Court has set forth with respect to gender discrimination,<sup>88</sup> commercial speech,<sup>89</sup> tenth amendment limitations on congressional action,<sup>90</sup> and incidental restrictions on speech,<sup>91</sup> for example, are all directed primarily to lower court judges making legal determinations, and they are all, as a result, not enormously specific. Other tests, such as the obscenity test in *Miller*, and the defamation standards in *New York Times Co. v. Sullivan*<sup>92</sup> and

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86. Most commonly, but not necessarily, that body will be a lower court. But it could be an administrative agency, the executive, or a legislature.

87. Because all of the present Justices have at one time been law students, it is not surprising that they have retained the law student's love for three-part tests.

88. *Craig v. Boren*, 429 U.S. 190 (1976).

89. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

90. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

91. *United States v. O'Brien*, 391 U.S. 367 (1968).

92. 376 U.S. 254 (1964).

*Gertz v. Robert Welch, Inc.*,<sup>93</sup> seem directed primarily towards juries,<sup>94</sup> and are consequently more specific. And tests that are directed immediately towards the citizen or the public official may be still more specific.

But relative specificity is in some ways a side issue. For although the Court may at times be more or less successful in promulgating specific rules, its attempt to promulgate such rules is evidence of the Court's cognizance of its lawmaking function. It is certainly fashionable in academic circles to mock specific tests, suggesting that perhaps there is more of the Realist in most of us than we would wish to admit,<sup>95</sup> but exactly the same criticism could be leveled against a legislature. Once we realize that any court, and most especially the Supreme Court, is in the business of making law to be applied by others, the same standards that apply to legislative lawmaking can and should be applied to Supreme Court lawmaking. And if it is therefore appropriate to urge that legislatures act with some specificity, then so, too, it is appropriate to suggest that the Supreme Court should also act with some specificity, writing opinions that contain the kinds of specific rules, standards, and tests that can be most helpful in applying the opinion to a wide range of specific instances not before the Supreme Court when it set forth the standard.

When the Court is acting in this manner, one frequently sees the complaint that this is an example of judicial legislation, which is then taken as persuasive evidence that the Court is acting illegitimately.<sup>96</sup> That is, if the Court produces a result that contains a test so specific that it looks legislative, then the charge is made that a legislature is the more appropriate body to make decisions of that type and that therefore the Court is exceeding its authority. But this argument is simply a non sequitur. That a court, aware of its responsibility to guide other courts and other actors and entities, attempts to guide in a meaningful way implies nothing about the circumstances that justified its entry into the enterprise in the first place. What makes *Roe v. Wade*<sup>97</sup> to many<sup>98</sup> an illegitimate exercise of judicial power is not that the Court attempted to provide quite specific guidance to legislatures on what types of restrictions are permissible.<sup>99</sup> For its critics, *Roe* would have

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93. 418 U.S. 323 (1974).

94. In both obscenity and defamation cases the standard to be applied is a constitutionally based one and thus requires judicial determination as well.

95. See, e.g., Tushnet, *supra* note 1.

96. See, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972).

97. 410 U.S. 113 (1973).

98. E.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

99. See 410 U.S. at 164-65.

been equally illegitimate had it concluded its decision with an amorphous mandate prohibiting unreasonable restriction on a woman's right to have an abortion.<sup>100</sup> The standards that emerged from *New York Times Co. v. Sullivan*<sup>101</sup> are every bit as specific as those that emerged from *Roe*, yet to call *New York Times* an illegitimate exercise of judicial power or an unauthorized encroachment on the judicial function seems quite simply bizarre.<sup>102</sup> Conversely, *Lochner v. New York*,<sup>103</sup> the standard example of judicial encroachment on the legislative sphere, is no less illegitimate because the Court there did not specify with precision the exact contours of the freedom to contract, nor promulgate a three-part test to determine what future legislative actions would be struck down as violative of the freedom.

### VIII.

I have thus far argued that there are three models of judicial lawmaking, lawmaking by example, lawmaking by general principles, and lawmaking by specific rules, and that the third of these is vastly superior to the first two in terms of the Court's responsibility to guide others. I have also suggested that the advantages of the other two models, however legitimate they may be, are insufficient to justify total abdication of the lawmaking function by the Supreme Court. But if there are strong reasons that cut against an excessive concern with the Court's lawmaking and guidance function, then we should try to identify those factors that might be of importance in deciding how crucial the lawmaking function is in a given instance.

The most important factor to be considered is the nature of those who are to be guided. At times, as in most first amendment and equal protection cases, the Court will primarily be guiding lower courts. The same can be said for much of its work in the procedural area.<sup>104</sup> And when the nature of the subject matter is such that the Court's directives are aimed at other courts, the mandates can arguably be tailored to the presumed expertise of the courts that are to follow those mandates. Thus, in these instances a moderately general standard, or test,

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100. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2504 (1983) (O'Connor, J., dissenting).

101. 376 U.S. 254 (1964).

102. I am not saying that *New York Times* is clearly correct, although I think it is. Rather, I am saying that decisions relating to interpreting the mandates of the first amendment in light of political speech are plainly legitimate.

103. 198 U.S. 45 (1905).

104. I am referring here primarily to constitutional restraints on *civil* procedure, including restraints on the exercise of personal jurisdiction, see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and limitations on prejudgment remedies, see *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

may be sufficient, requiring the exercise of some judgment as that standard or test is applied to particular facts. This is what courts do all the time, and there may be no need, or at least less need, to provide a very specific and mechanical formula that removes all judgment from the lower court.<sup>105</sup>

This is not to say that the Court could not still be unsuccessful in guiding lower courts. When the Supreme Court's standards are simply confusing, or inconsistent, or so abstract as to be useless, then the Court has not succeeded in guiding even other courts, and it is properly criticized on these grounds.<sup>106</sup> But if the Court's standards are internally consistent, comprehensible, and sufficiently specific to channel decisions in a particular direction, then the lack of precision ought not by itself to be taken as an occasion for criticism. To say that the Supreme Court should guide lower courts is not to say that it should totally preempt their function.

At other times the Court is speaking directly to legislatures. In *Immigration and Naturalization Service v. Chadha*,<sup>107</sup> for example, the Court is quite simply telling Congress how, in a procedural sense, to legislate. In some respects *Chadha* is an excellent illustration of the theme of this Article, because the Court decided the two-house veto situation in the context of a one-house veto case. Thus, the decision was broader than necessary, but for that very reason it will be quite effective as a guide to Congress.<sup>108</sup> Although Congress and the legislatures of the states undoubtedly have legions of lawyers to interpret Supreme Court opinions for them, much of the guidance can be conceived of as direct. We do not wish the legislatures to have to wonder constantly about whether their legislation is going to be struck down by the courts, and there are thus important advantages to bypassing the lower courts and talking directly to the concerned party, the legislature. This may at times require greater specificity, but there is the clear advantage of reducing the incidence of judicial-legislative confrontations, an advantage that parallels many of the reasons for deciding a case narrowly. Thus, it is not so clear that arguments about the limitations on the judicial function always militate in favor of the narrow and highly qualified opinion. To the extent that a broad but clear opinion reduces future exercises of judicial power, it may in the long run be more attentive to limitations on the judicial function than a nar-

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105. It is, after all, impossible to come up with a "perfect code" that could "govern all possible combinations of circumstances." G. GOTTlieb, *supra* note 23, at 16.

106. This is the nature of the criticism in Corr, *supra* note 39.

107. 103 S. Ct. 2764 (1983).

108. I am not saying that *Chadha* has foreclosed every possible issue relating to the matters it decided, but only that it did foreclose a range of issues very likely to be raised.

lower decision that virtually guarantees continuing litigation and continuing confrontations between courts and legislatures.

Finally, there are some decisions that speak directly to the individuals concerned. As I have emphasized, *Miranda* exemplifies this type of decision, but the same phenomenon appears in *Connick v. Myers*,<sup>109</sup> in which the Court is speaking directly to governmental supervisors.<sup>110</sup> Where it is likely that the Court's mandates will have this kind of pervasive impact on a day-to-day basis, speaking directly to the parties concerned has distinct advantages, and it is in this situation where the advantages of greatest specificity are most apparent.

Another important factor that should be considered in deciding what type of decision to issue is the frequency of the likely occurrence of the situation. To the extent that the frequency of the occurrence of the situation before the Court is rare, the advantages of lawmaking by specific rule are minimal. For the very rareness of the situation makes it much more likely that every or at least most future instances can be reviewed by the Supreme Court, or at least some other appellate court. In these circumstances the guidance function can properly be subordinated to other concerns. But to the extent that the situation is extremely common, as is the case with arrests, searches and seizures, and so on, then the possibility of continuing judicial supervision, refinement and reevaluation is nonexistent. Here the Supreme Court, or any appellate court, can hear only a tiny percentage of the number of instances of application. As a result, the guidance function becomes of great importance, almost to the point of becoming the most significant factor in formulating an opinion.

Related to the frequency with which the situation arises is the question of the costs of a lack of or delay of Supreme Court review. If the issue is one that has significant consequences to many people or to large programs, and is one that is being frequently litigated in lower courts, clear guidance seems imperative. In issues related to school financing,<sup>111</sup> for example, there seems to be little excuse to let major decisions about large expenditures affecting millions of people remain in a state of continuing uncertainty. But where the underlying circumstances are less momentous, and where delay is less troublesome, some uncertainty pending frequent Supreme Court review may be a more acceptable price to pay for the advantages of delaying decisions.

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109. 103 S. Ct. 1684 (1983) (holding that discharge of an assistant district attorney for circulating a questionnaire that only minimally addressed issues of public interest did not violate claimant's first amendment rights).

110. Whether the Court's "matter of public concern" standard will be workable is a separate question.

111. What, for example, are the states to do in the wake of *Mueller v. Allen*, 103 S. Ct. 3062 (1983)?



## IX.

The ideas presented in this Article have been tentative, exploratory, and intentionally vague. I did not intend to offer much concrete guidance, a luxury I have because no one has entrusted me with the power of making law. But whether we wish to admit it explicitly or not, we have granted the Supreme Court that power, and thus we have a right to expect of it more guidance and more attention to the needs of those who must follow its lead. The Court's decisions should be evaluated not only in terms of whether they are correct or incorrect, legitimate or illegitimate, but also in terms of whether they are usable by others. Performing this evaluation is perhaps less flashy than broadside criticism of results, but it may have much greater importance. It may be too much to expect that the Court will always reach the "correct" result, but it is not too much to expect that the Court will at least always perform its functions with care. One of those functions is that of guiding others, and it is a function that deserves much closer attention.