

Foreword

The Future of the Supreme Court: Institutional Reform and Beyond

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The Supreme Court of the United States is facing a potentially defining moment in its history. Samuel A. Alito, Jr. has replaced Justice Sandra Day O'Connor to become the 110th Justice of the Supreme Court. The Senate's confirmation of Judge Alito may shift the ideological balance of the Supreme Court to the right, potentially fulfilling President George W. Bush's campaign pledge to nominate Justices in the mold of Justices Antonin Scalia and Clarence Thomas.¹

Perhaps more importantly, Chief Justice William H. Rehnquist passed away on September 3, 2005, after battling thyroid cancer for several months. In his place, President Bush nominated District of Columbia Circuit Judge John G. Roberts to become the seventeenth Chief Justice of the United States. Following the first confirmation hearing in this country in over

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1. Prior to nominating Judge Alito, President Bush nominated his White House Counsel, Harriet Miers, to fill Justice O'Connor's seat, but Ms. Miers ultimately withdrew, in part because the popular press and blogosphere relentlessly attacked her ostensible lack of qualifications to sit on the Supreme Court. See Robin Toner, et al., *Steady Erosion in Support Undercut Nomination*, N.Y. TIMES, Oct. 28, 2005, at A16.

eleven years, Chief Justice Roberts was confirmed by the Senate by a vote of 78–22.

When we began planning this symposium in February 2005, we never could have envisioned the tumultuous months that followed. Regardless, the replacement of perhaps the two most significant legal figures of the past twenty years provides a unique opportunity to consider the future of the Supreme Court of the United States.

Our paramount goal in planning this symposium was to bring together a talented group of scholars to consider the institutional characteristics of the Supreme Court. The legal literature is replete with articles considering the legal and policy implications of Supreme Court decisions, but contains comparatively few analyzing the Court as an institution.² As time passed and the event loomed closer, it became increasingly clear that another goal of the symposium would be to offer suggestions to the new Roberts Court and Congress on the function and direction of the Supreme Court. With these goals in mind, thirteen leading scholars accepted our invitation to participate in this symposium.

We divided the participants into four panels, with Professor Adrian Vermeule presenting an introductory lecture on the feasibility of Supreme Court reform. The symposium's first panel, consisting of Professors Michael Gerhardt, Daniel Farber, and Randy Barnett, addressed the role of precedent at the Supreme Court. The panel discussed at length the controversial issue of whether "super precedent" exists. The timeliness of the exchange was revealed when it was made the subject of an article by law professor Jeffrey Rosen in the *New York Times* a week after the symposium.³ The second panel, including Professors Thomas Lee, Angela Onwuachi-Willig, and Mark Tushnet, examined the role of external influences on the decision making of the Justices, considering, among other issues,

2. Political scientists have done a far better job at analyzing the institutional characteristics of the Supreme Court, as demonstrated by some recent books on the subject. See, e.g., JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* (2005); *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999). However, much of this research is descriptive institutional analysis and accordingly fails to make normative suggestions about the Supreme Court as an institution.

3. See Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, § 4, at 1.

individual backgrounds, cultural norms, and foreign laws. The third group of panelists, consisting of Professors Stephen Smith, Martin Redish, and Neal Devins, addressed the apparent tension between the intensely political controversies the Supreme Court decides and its role as a neutral arbiter of legal disputes. Finally, the fourth panel, consisting of Professors David Stras and Steven Calabresi, and Dean Kenneth Starr, assessed the implications of the Supreme Court's shrinking docket and workload.

The following pages contain Essays resulting from the symposium. In his introductory Essay, Professor Vermeule discusses the difficulties inherent in achieving institutional reform of the Supreme Court. He posits that political factors frequently give rise to a reform versus counter-reform equilibrium, where strong movements in favor of reform create equally strong obstacles to reform, most often rendering substantive reform unlikely. The challenges to Supreme Court reform include the failure of traditional political alliances; the difficulty in achieving an optimal majority; the delicate balance necessary for leaders to advocate for reform yet not act merely in self-interest; and the need for political crises, which can serve as both the engine and the brakes for reform proposals. Professor Vermeule concludes that the interests of the Supreme Court are best served when those with expertise in a particular field put forth what are, in their best judgment, optimal proposals for reform, leaving the political wrangling to those actors involved in the political process.

Professor Gerhardt examines the concept of "super precedent" raised during the recent confirmation hearings of Chief Justice Roberts.⁴ He identifies three different areas where the term might be applied: fundamental institutional practices of the Court, foundational doctrines for approaching constitutional interpretation, and individual Supreme Court holdings that are repeatedly affirmed by the Court, accepted by other branches, and relied upon by the public. Professor Gerhardt concludes that the introduction of the term "super precedent" into the legal vocabulary may significantly impact the future of the Supreme Court, including the way in which confirmation

4. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. 109-158 Before the S. Comm. on the Judiciary*, 109th Cong. 2-4 (2005) (statement of Sen. Arlen Specter, Chairman, Senate Committee on the Judiciary).

hearings are conducted and the way judges and scholars analyze the Court's precedents.⁵

Professor Farber examines the tension between stare decisis and originalism. In response to originalism, he points out that a complete rejection of stare decisis is impracticable because of evolving views of history, methodological differences in judging, and the difficulty of assigning a static meaning to the broad terms in the Constitution. Professor Farber concludes that constitutional stare decisis, much like the Constitution itself, is worthwhile because it is adaptable and accommodating; constitutional precedent does not result in bright-line rules, but instead in functional guidelines that allow for the evolution of constitutional doctrine.

In addition to having the most colorful title in the symposium, "It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt," Professor Barnett takes issue with those who would argue that super precedents ought to be immune from reversal. He points out that, at the time they were decided, cases such as *Dred Scott* and *Plessy* would have been considered super precedents, but that this ultimately had no bearing on whether they were decided correctly under an originalist view of the Constitution. The benefit of hindsight tells us that reliance on the Constitution to support these decisions was misplaced and that, despite sociological motivations to the contrary, the Court ought to have reversed them sooner. He concludes that historical and sociological factors provide the true inertia behind super precedents and that constitutional stare decisis upholding "super precedents" might well be superfluous.

Professor Onwuachi-Willig proposes an increase in the number of Justices on the Supreme Court from nine to fifteen to facilitate greater diversity on the Supreme Court. Her view is premised on the argument that the background of Justices, including their race, sex, class, and religion, to name just a few, has a profound impact on their approaches to judicial decision-making. Professor Onwuachi-Willig argues that the goal of greater representation for minority voices can be effectively achieved through an increase in the number of seats available on the Supreme Court.

5. Judge J. Michael Luttig first raised the issue of "super stare decisis" with respect to abortion in *Richmond Medical Center for Women v. Gilmore*, 219 F.3d 376, 376 (4th Cir. 2000).

Professor Tushnet addresses some of the criticisms leveled against federal judges for citing foreign and international sources of law. He categorizes these criticisms into a few main concerns: that foreign law is given too much weight by American judges; that citations to foreign law are irrelevant to judges' holdings and thus superfluous; that foreign laws do not embody the same legal norms that American laws do; and that American judges are insufficiently informed about foreign laws to wield such a tool skillfully. Professor Tushnet concludes that all but a small number of these criticisms are unfair because many of the same criticisms can be directed towards other sources of law that judges examine and rely upon in order to decide the cases before them.

Professor Devins argues that today's Supreme Court should not worry about upsetting political actors with its decisions. Unlike the Warren Court era, for example, today's legislators are more focused on appeasing their constituents, parties, and special-interest groups than on pushing for true change of the Supreme Court. He argues that Court-curbing proposals are much less likely to succeed today than in the past because legislators lack genuine interest in real reform. Because the Court and Congress are often in lockstep with respect to their political views, the Court can be reasonably certain that few institution-altering proposals will actually be enacted into law.

Professor Redish and his coauthor, Uma Amuluru, address the constitutionality of the Rules Enabling Act of 1934, which established the Supreme Court's role in promulgating and amending the Federal Rules of Civil Procedure. Over time, they argue, experience has demonstrated that it is often impossible to separate substantive issues from the procedural ones in matters of civil adjudication, and that procedural rules can undermine the policy judgments of Congress. Consequently, Redish and Amuluru conclude that the Rules Enabling Act may well constitute an unconstitutional delegation of lawmaking authority to the Supreme Court.

Professor Stras examines the role of economic incentives in inducing the timely retirement of Supreme Court Justices. He constructs an economic model that includes the relevant variables, such as workload, income, and prestige, which have the most impact on the retirement decisions of Justices. Such a model, he argues, can help us better understand the decision making of Justices in purely personal areas. He concludes that,

based on the incentives approach to retirement, Congress should focus its attention on making incremental institutional modifications, such as to pensions and workload, rather than enacting command-and-control measures such as term limits or a mandatory retirement age for Justices.

Professor Calabresi and his coauthor, David Presser, propose that Congress reinstitute the practice of “circuit riding,” the long-abandoned requirement that Justices spend a certain amount of time each year in their assigned judicial circuits hearing lower court cases. Specifically, their proposal would require Justices to spend four weeks in July serving as district court judges and presiding over trials. Calabresi and Presser conclude that circuit riding would serve several important institutional interests, including reacquainting Justices with American culture outside of Washington; inducing earlier retirements; and preventing the undue influence of foreign law on Supreme Court decisions, which they contend is stimulated by Justices spending their summer recesses abroad.

Dean Starr examines the impact that William Howard Taft, the former President turned Chief Justice, had on the Supreme Court. Taft shepherded through Congress what became the Judiciary Act of 1925, which established discretionary certiorari jurisdiction for the Court. Starr believes that the Rehnquist Court’s reliance on certiorari jurisdiction to reduce the number of cases on the Court’s merits docket has been an unfortunate development. In failing to use the certiorari tool cautiously as Taft intended, the Court has often neglected important, unresolved questions of federal law and vexing circuit splits.

The transformational change the Court is undergoing is certain to accelerate over the next decade as additional Justices retire.⁶ This transformation provides an occasion to challenge some of our fundamental assumptions about the Supreme Court and to provide normative recommendations about its future. It is our belief that one of the most fertile and under-

6. Now that Judge Alito has been confirmed, six of the nine Justices are older than 65. By the time this symposium issue is printed, three Justices—John Paul Stevens, Antonin Scalia, and Ruth Bader Ginsburg—will be more than 70 years old. One other Justice—Anthony Kennedy—will turn 70 this summer. By historical standards, this is a very elderly Supreme Court, and we can anticipate more retirements over the next several years. *See* Oyez, U.S. Supreme Court Justices: A Listing of all Supreme Court Justices, <http://www.oyez.org/oyez/portlet/justices/> (last visited Apr. 8, 2006) (follow the Justices’ names hyperlinks to find brief biographies of each Justice).

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explored areas of legal scholarship is the analysis and evaluation of the institutional characteristics of the Supreme Court. It is our hope that this symposium is a significant step in advancing that discussion.