

Tulsa Law Review

Volume 45
Number 2 *Supreme Court Review*

Volume 45 | Number 2

Winter 2009

Foreword: The Most Confusing Branch

Michael C. Dorf

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Michael C. Dorf, *Foreword: The Most Confusing Branch*, 45 Tulsa L. Rev. 191 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol45/iss2/1>

This Supreme Court Review Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

SUPREME COURT REVIEW

FOREWARD: THE MOST CONFUSING BRANCH

Michael C. Dorf*

From time to time I have received a version of the following complaint from a student: “I understood the material when I read it, but I left class more confused than when I arrived.” I usually reply with a line like this: “Good. That means I have done my job.”

If I were to leave things at that, I would probably qualify for some sort of prize for pedagogical sadism, but there is a method to this particular madness. I like to distinguish between what I call “bad confusion” and “good confusion.” A student who is confused about an issue to which the law provides a clear answer suffers from bad confusion. She or he simply needs to spend more time with the materials to master the content of the doctrine.

Often, however, the law itself is in a state of confusion. One line of cases points in one direction; another line of cases points in another direction; and some new case falls either somewhere in between or, despite nominally falling within the scope of each doctrinal category, raises issues not raised or considered fully in either. Here the law is, if not completely contradictory, at least indeterminate. No student, indeed, no expert in the field, can make sense of the new situation simply by staring long enough at or thinking hard enough about the prior cases.¹ A student who suffers good confusion can locate the law’s gaps and ambiguities. He or she knows that an argument can be made for two or more different outcomes in some category of cases, and that nothing more

* Robert S. Stevens Professor of Law, Cornell University Law School. The author gratefully acknowledges the contributions to this symposium of each of the authors of the articles collected herein. Thanks also to the editors of the Tulsa Law Review for doing all of the hard work in putting together this issue, while giving me the honorific of guest editor.

1. Ronald Dworkin argues that even in hard cases, the law provides a unique right answer—the answer that puts the pre-existing law in its best light, where “best” takes its meaning from principles of political morality. See e.g. Ronald Dworkin, *Law’s Empire* 249 (Belknap Press 1986). By contrast, positivists argue that in such hard cases judges may write opinions purporting to derive their results from formal legal materials but that they really exercise discretion. See e.g. H.L.A. Hart, *The Concept of Law* 274 (2d ed., Oxford U. Press 1994) (Postscript). I can hardly referee jurisprudence’s longest-running debate in a footnote, so I shall limit myself here to the observation that students and lawyers must take what Hart calls the “external” point of view. See *id.* at 88–89. From that perspective, even a judge who is, in some metaphysical sense, really finding unique right answers, will appear to be exercising discretion to close gaps and resolve ambiguities in the law, because different people, including different judges, will hold different views about what the best principles of political morality require.

determinate can be said about such arguments than that he or she finds one more persuasive than another.

By contrast with students, lawyers, and scholars, judges rarely admit to experiencing confusion, either good or bad, even when the law plainly contains internal tensions. Consider the situation the Supreme Court faced in the 2007 case of *Parents Involved in Community Schools v. Seattle School Dist. No. 1*.² Seattle and, in a companion case, a school district in the Louisville area, had voluntarily undertaken race-conscious student assignment measures to reduce *de facto* racial segregation in public schools. Were these measures constitutional? The prior cases pointed in two directions. The Court's civil-rights era decisions held that race-conscious student assignments could be ordered as a remedy for past unconstitutional segregation and said in dicta that voluntary race-based integration was also permissible;³ yet those cases pre-dated a line of affirmative action cases requiring that all classifications based on race be justified by exacting standards.⁴ The Court split 5-4 on the outcome, with the Court's five most conservative Justices giving controlling effect to the affirmative action cases and the four more liberal Justices crediting the civil-rights-era dicta. Justice Kennedy split the difference. He would have permitted race-conscious measures that the plurality's reasoning would have forbidden.⁵ But even Justice Kennedy did not treat the prior case law as contradictory. He simply chose a reconciliation point somewhere in between the points chosen by the plurality and the dissent.

To be sure, judges occasionally do acknowledge contradictory strands in their prior cases,⁶ but such acknowledgments clearly represent the exception. Unless overruling precedents, judges much more commonly use the rhetoric of synthesis in explaining away or ignoring inconsistencies in prior doctrine. That judicial hesitation to acknowledge existing tensions in the law—the reluctance to express good confusion—can lead to decisions that are themselves confusing.

Consider the contributions to this issue. Each of the articles by Professors Bhagwat, Schwartz, and Stein mixes substantive criticism of the Supreme Court with a lament about the confusion the Court's doctrines engender.

Professor Bhagwat observes that “much of modern preemption law is confused”⁷ Indeed, he says “[t]he law of preemption generally, and the law of agency preemption in particular, is infamous for its vagueness and unpredictability.”⁸

2. 551 U.S. 701 (2007).

3. See e.g. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971).

4. See e.g. *Grutter v. Bollinger*, 509 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

5. See *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”)

6. See e.g. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in the judgment) (wondering whether case law governing agency adjudication should be likened to “landmarks on a judicial ‘darkling plain’ where ‘ignorant armies’ have clashed by night”).

7. Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?* 45 Tulsa L. Rev. 197, 198 (2009).

8. *Id.* at 197.

Bhagwat shows how the case on which he focuses—*Wyeth v. Levine*⁹—resolves one small puzzle about preemption¹⁰ even as it leaves unanswered basic questions about the scope of congressional power to confer on federal agencies the authority to preempt state laws.¹¹ In *Wyeth*, only Justice Thomas, Bhagwat says, adequately addressed the fundamental questions of federalism in play in agency preemption.¹² Yet given Justice Thomas's willingness to express idiosyncratic views on a range of issues—including federalism¹³—one cannot be very optimistic about the prospect of his inspiring a wholesale doctrinal reformulation in this area.

Professor Schwartz also mixes substantive critique with a comment on confusion. Although he presents the civil rights cases from the 2008 Supreme Court Term dispassionately, there is nonetheless a note of disappointment in his conclusion that “on the whole § 1983 defendants fared decisively better on the most important issues.”¹⁴ Schwartz is especially critical of the catch-22 in which the Court appears to have placed plaintiffs bringing due process complaints: “The Court will deny the claimed due process right when state legislatures are by and large recognizing the right, . . . and when by and large they are not”¹⁵ Schwartz does not simply disagree with the Court's treatment of civil rights plaintiffs, however. He also finds contradictions in the doctrine. For example, he states that the Supreme Court's 2007 ruling in *Bell Atlantic Corp. v. Twombly*¹⁶ “generated considerable uncertainty and confusion”¹⁷

Professor Stein goes further, expressing wry gratitude for the fact that *Twombly* is “so analytically incoherent as to limit its extension to other cases.”¹⁸ The case that principally occupies Stein's attention—*Ashcroft v. Iqbal*—is likewise most straightforwardly read, he argues, as endorsing a proposition at odds with well-established equal protection doctrine: It appears to say that a facially race-based government policy does not trigger strict scrutiny unless it was adopted for an invidious purpose.¹⁹ By showing how the defense of qualified immunity cast a shadow over the plaintiffs' *prima facie* case, Stein is able to make sense of the Court's conclusion in *Iqbal* that it is implausible to infer that the Attorney General and FBI Director ordered a discriminatory pattern of arrests.²⁰ My own view of the Court's opinion is somewhat less

9. 129 S. Ct. 1187 (2009).

10. Bhagwat, *supra* n. 7 at 220–221 (“*Wyeth* has resolved one doctrinal question, holding that the presumption against preemption applies in implied conflict preemption cases as well as in express preemption cases.”).

11. *See id.* at 222 (“*Wyeth v. Levine* decision thus provides some, but only limited clarity on issues relating to agency preemption.”)

12. *See id.* at 229.

13. *See U.S. v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) (urging a construction of congressional power to regulate commerce that would exclude “productive activities such as manufacturing and agriculture”)

14. Martin A. Schwartz, *Supreme Court § 1983 Decisions—October 2008 Term*, 45 Tulsa L. Rev. 231, 232 (2009).

15. *Id.* at 251–252 (discussing *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308 (2009) and *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

16. 550 U.S. 544 (2007).

17. Schwartz, *supra* n. 14, at 234.

18. Allan R. Stein, *Confining Iqbal*, 45 Tulsa L. Rev. 277, 284 (2010).

19. *See id.* at 289, 298.

20. *See id.* at 300.

sympathetic,²¹ but what is striking is that one *needs* a “take” on *Iqbal* to understand it. On its own, the Court’s opinion mostly produces head scratching.

Or at least that is where the Supreme Court’s cases lead until they are carefully explained and unpacked by skilled scholars. Mixed in with criticism, readers will find just such explanations and unpacking in the contributions to this issue by Professors Bhagwat, Schwartz, and Stein. In Professor Colburn’s contribution they will find something in the same spirit but simultaneously grander and bleaker. Whereas Bhagwat, Schwartz, and Stein reveal a Supreme Court whose rhetorical norms impede its ability to speak clearly, Colburn expressly levels that same complaint at the legal system as a whole—at least insofar as it is thought to produce something called “environmental law.”²²

Here we learn that all of the actors, not just the courts, are insincere. Congress enacts open-ended statutes that punt to administrative agencies the hard work of weighing any regulation’s costs and benefits; agencies in turn must balance not only costs and benefits, but also politics; public interest organizations litigating on behalf of tighter environmental regulation must identify demons to be held accountable, even though we the people—through the collective impacts of our individual choices—may be the real culprits;²³ and the courts then decide “pseudo-questions” bearing little resemblance to the real stakes.²⁴ Colburn provides a valuable service in demonstrating the distance between “environmental law” as practiced by the Supreme Court and actual protection of the natural environment, such as it is. But it is the sort of service—a literal disillusionment—for which thanks are unlikely to be forthcoming.²⁵

Gauged by the hearings to confirm recently appointed Supreme Court Justices—who, whether expected to be liberal or conservative, assured the Senators that they would simply follow the law without letting their personal views affect their decisions²⁶—the public expects formalism from the courts. Never mind that legal scholars debunked the mechanistic version of formalism well over a century ago.²⁷

One need not be a thoroughgoing legal realist or “crit” to see that the sorts of cases that reach the Supreme Court call for the filling in of the law’s gaps and the resolution of

21. See Michael C. Dorf, *Iqbal and Bad Apples*, 14 Lewis & Clark L. Rev. 217 (2010) (connecting the *Iqbal* opinion’s logic with the Bush and Obama Administrations’ narrative of detainee abuse as the work of a “few bad apples”).

22. See Jamison E. Colburn, *The Cynic at the Circus*, 45 Tulsa L. Rev. 307 (2010).

23. See *id.* at 319 (citing Ted Nordhaus & Michael Shellenberger, *Break Through: From the Death of Environmentalism to the Politics of Possibility* 201–204 (Houghton Mifflin Co. 2007)).

24. See *id.*

25. Cf. Plato, *Republic* 170 (G.M.A. Grube trans., Hackett Publ. Co. 1974) (“As for the man who had tried to free” the people chained in the cave, mistaking shadows for reality, “and lead them upward, if they could somehow lay their hands on him and kill him, they would do so.”)

26. See Sonia Sotomayor, Address, *Opening Statement of Judge Sonia Sotomayor Before the S. Judiciary Comm.*, (D.C. 2009) (available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=8102); John G. Roberts, Jr., Address, *Statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States* 56 (D.C. 2005) (available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>) (likening judging to umpiring a baseball game); but see Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049, 1051 (2006) (“No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.”).

27. See Oliver Wendell Holmes, Jr., *The Common Law* 1 (Dover 1991) (“The life of the law has not been logic: it has been experience.”).

its contradictions. Yet so long as the public demands that the Court downplay this role, it will produce confusing doctrine. That, in turn, will continue to make works like the four articles in this issue essential reading.

