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Signatures of Ideology: The Case of the Supreme Court's Criminal Docket

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SIGNATURES OF IDEOLOGY: THE CASE OF THE SUPREME COURT'S CRIMINAL DOCKET

*Ward Farnsworth**

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION..... | 67 |
| II. RESULTS..... | 69 |
| III. SOME MECHANISMS OF IDEOLOGICAL DECISION..... | 74 |
| IV. IMPLICATIONS..... | 88 |
| V. THE PUZZLE OF SUBSTANTIVE CRIMINAL LAW..... | 96 |
| VI. CONCLUSION..... | 99 |

I. INTRODUCTION

Everyone suspects that Supreme Court justices' own views of policy play a part in their decisions, but the size and nature of the part is a matter of vague impression and frequent dispute. Do their preferences exert some pressure at the margin or are they better viewed as the mainsprings of decision? The latter claim, identified with legal realism, has been lent some support by political scientists¹ who point out that some justices regularly vote for or against certain kinds of claims (for example, under the Fourth Amendment),² or that votes in some areas are broadly predictable according to a single "ideal point" that tries to sum up each justice's preferences,³ or that justices who dissent from a decision often will not acquiesce to it in future cases.⁴ The reason these studies haven't made much of an impression in the legal academy probably is that lawyers and scholars sense many reasons why judges' behavior may follow predictable patterns, not all of them related to their own preferences. Some justices may have ideas about interpretation

* Professor of Law, Boston University.—Ed. Thanks to Jack Beermann, Robert Bone, Ronald Cass, Oona Hathaway, Andrew Kull, Gary Lawson, Saul Levmore, Eric Posner, Richard Posner, and workshop participants at the University of Chicago Law School and Boston University School of Law for helpful comments; and special thanks to James Lindgren at Northwestern University School of Law for advice and assistance with the quantitative side of the project, and especially with Chart 2. I also am grateful to Alon Cohen, Miller Brownstein, Veronica Ebbuoma, Eric Labato, Justin Smith, and Yingchun Zhou for marvelous research assistance.

1. The political scientists who press these claims call themselves not realists but attitudinalists. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

2. E.g., Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984).

3. E.g., Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

4. E.g., HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL* (1999).

that happen to produce outcomes friendly to one side or another as byproducts; and a judge's public reputation as a "conservative" or "liberal," to which some of the political science work gives weight in explaining votes,⁵ likewise might arise because the judge's interpretive approach happens to yield results that conservatives or liberals like.

A closer look is needed at judicial behavior in cases where the policy stakes are similar but the sources of interpretive dispute are different, the better to reveal which dominates which. The best set of such cases is found on the Supreme Court's criminal docket. Cases involving accused or convicted criminals raise all sorts of legal issues but can be seen to involve a common set of policy stakes: the courts have to referee disputes, often of a zero-sum character, over the advantages to be enjoyed by the government and the accused or convicted defendant. Of course one also can divide up criminal cases into narrower categories that may involve different policies; we will try it later.⁶ But the hypothesis that all such cases involve similar rough trade-offs as a matter of policy is a useful starting point. It gives us many decisions to study; cases about criminals usually take up around a third of the Court's docket every term, which is enough to support interesting statistical inquiries and generalizations.

I compiled a database of all the Court's criminal cases over the past fifty years, defining them broadly to include appeals from criminal convictions, questions of search and seizure, disputes over the rules of evidence or of criminal procedure, civil rights claims brought by prisoners against their keepers, and many others: any cases where the government has been on one side with an accused or convicted defendant on the other.⁷ The next step was to separate cases involving different types of interpretive issues, which I did as an initial matter by splitting them into two categories: the constitutional and the nonconstitutional. The constitutional cases typically involve defendants' claims that their rights were violated under the Fourth, Fifth, Sixth, Eighth, or Fourteenth Amendments. The nonconstitutional kind involve disputes over the federal rules of evidence and procedure, the meaning of federal criminal statutes, the availability of habeas corpus, and so forth.

5. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

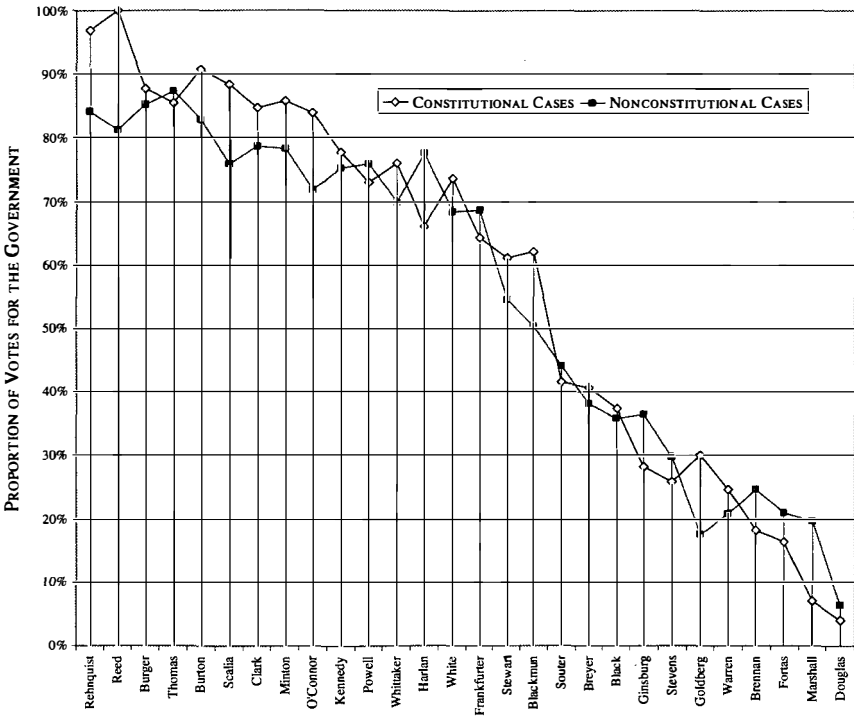
6. See discussion *infra* Part V.

7. The data for the study were derived from the United States Supreme Court Judicial Database at Michigan State University. Using that database creates some possible problems because it is not written to accommodate these inquiries; cases are not coded "criminal" or "non-criminal," and some of the codings used by its creator, Harold Spaeth, seem idiosyncratic and difficult to understand in application. I therefore compiled an independent database for all of the Court's criminal cases since the arrival of William Rehnquist in 1972. The correlations found in that data were greater than the correlations found using the Spaeth database. Political scientists understandably prefer to rely on findings based on standardized sources rather than on data collected independently, see Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 807-09 (2003), and since it makes little difference to the outcome here (if anything, it understates the effect I claim to find), all the graphs that follow are based on the Spaeth database.

II. RESULTS

The basic results can be seen in two ways. Chart 1 consists of a pair of lines, each based on career data for all of the justices since 1953. One shows how often each justice voted for the government in nonunanimous criminal cases involving constitutional claims. The other shows the same for cases depending on some other source of law—usually a statute or rule. The justices are ordered here according to the data (that is, by the mean of the two lines) to show the alignment between the two trends.

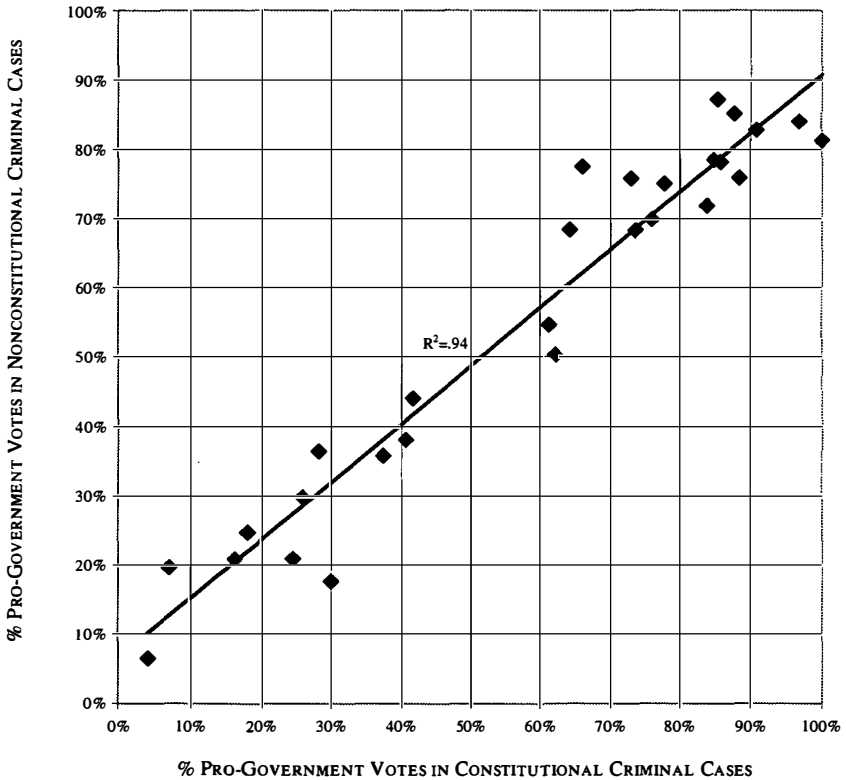
CHART 1: HOW OFTEN U.S. SUPREME COURT JUSTICES HAVE VOTED FOR THE GOVERNMENT IN NONUNANIMOUS CRIMINAL CASES SINCE 1953



The lines are notable for both their slopes (the tremendous difference between the justices to the right and to the left) and their similarities (the closeness of the two points with respect to any given justice). A different way to express the result is by removing the justices' names from the graph and instead putting their votes in constitutional cases along the bottom and their votes in nonconstitutional cases along the side. We then have Chart 2, a scatterplot of the twenty-eight justices since 1953 correlating the proportion of their votes for the government in nonunanimous criminal cases of the two

types.⁸ An increase in the share of votes for the government along one of the dimensions is very likely to mean an increase along the other; a fitted line shows a strong linear relationship between ruling in favor of the government in either situation. The Pearson correlation coefficient (R) is an extremely high .97, accounting for 94% of the variance (R^2) (signif. = 0.0000000000000002).

CHART 2: U.S. SUPREME COURT JUSTICES' VOTES FOR
THE GOVERNMENT IN CONSTITUTIONAL CASES
BY NONCONSTITUTIONAL CASES
(NONUNANIMOUS), 1953–2002



For lawyers to whom the graphs are gibberish, we can say it this way: knowing how often a justice votes for the government in the constitutional cases gives us a very strong sense of how often he votes that way in the cases not involving the Constitution.

Interpretive byproducts. The interesting question is why some justices vote for the government so much more often than others—and why this ten-

8. Robert Jackson is excluded because his time on the Court after 1953 was so short (one year).

gency tends to be so similar in different types of criminal cases. The results seem generally consistent with the realist hypothesis: the graphs reveal for each judge a signature of ideology, perhaps invisible on a reading of the judge's opinions but evident enough when the results are viewed as a set. But the point isn't that the decisions are "all politics," or that the justices always vote their policy preferences. We must remember that the cases we are studying are the nonunanimous ones, and that there are others where the left-most and right-most justices agree.⁹ The better interpretation is that every case provokes competition between a justice's preferences on the one hand and the legal materials on the other. When the legal materials are very strong, they can produce unanimity despite conflicting preferences. But when the legal materials aren't so strong—when they don't point to a clear answer and leave room for discretionary judgment—the competition is won by the justice's underlying preferences and views of the world. Those views of the world are the same regardless of what provision is at stake in a case; that is why there is so much convergence between the results in cases involving different sources of law. Whether a statute or rule or the Constitution is involved, the important question is simply how clearly the justices think the source of law speaks to the case. That clarity is a function of norms about what sorts of arguments the materials plausibly will accommodate.

These are natural conclusions from the data, but before settling on them we should consider some alternatives. First, might the results be explained by pointing to interpretive theory? It is well known that some justices tend more often than others to vote against the claims of criminal defendants, but some of those same justices also are the ones who endorse originalism as an approach to constitutional interpretation. Justice Scalia in particular subscribes to the view that the words of the Constitution should be given their original meanings;¹⁰ perhaps some others, such as Justice Thomas, think this as well. One byproduct of originalism might be consistent rulings for the government in criminal cases. The parts of the Bill of Rights concerning criminal procedure limit what the government can do; defendants often argue for updated and expanded readings of those limits, which an originalist might reject on grounds of interpretive principle. Maybe that is too cursory a reading of defendants' claims or of the originalist reaction to them,¹¹ but this notion of interpretive byproducts at least has surface plausibility; it suggests how judges' tendencies to vote for the government or for defendants *could* be traced to differences in how they approach the task of interpretation—a

9. In the period covered by the first pair of graphs, the Court decided criminal cases unanimously 31% of the time: in 27% of the constitutional cases and in 37% of the nonconstitutional cases.

10. See Antonin Scalia, *Originalism: The Lesser Evil*, Address at University of Cincinnati (Sept. 16, 1988), in 57 U. CIN. L. REV. 849 (1989).

11. For examples of originalist arguments put in the service of defendants, see, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

legalistic explanation for the large variation in the justices' inclination to vote for the government in constitutional cases.

But then what about the nonconstitutional results? Of course there are theories of statutory interpretation just as there are theories about how to read the Constitution, and sometimes they are analogous: those who like originalism as a constitutional theory often like textualism as an approach to interpreting statutes, and the two approaches resemble one another; indeed, in Scalia's view they are the same.¹² But I do not know of a story about the consequences of textualism in reading statutes that quite matches the story about the consequences of originalism in reading the Constitution—a story that explains why textualism should be expected to help the government so much more often than defendants. Most of the rules in the criminal cases the Court decides are not written to help one side or the other in the same way that the Bill of Rights was written for the benefit of defendants; and most of the rules and statutes the Court interprets are no more than ten or twenty years old, so there is no reason to expect their original understandings to systematically help one side more than the other. Nor do most other approaches to reading rules and statutes—for example, giving effect to their purposes or studying their legislative histories—seem likely to favor one side consistently. And if we could find theories of statutory interpretation that did tend to favor one side, we still would have the problem of explaining why the byproducts they produce are so similar to those found in constitutional cases; in other words, we would need to account not only for the slope of the statutory line but also for its correlation with the constitutional line.

The picture just sketched was a little too quick, for there is one prominent doctrine of statutory interpretation that does favor the accused in a criminal case: the rule of lenity, a canon of construction which generally provides that ambiguities in criminal statutes should be resolved in favor of defendants.¹³ But the rule does not do much to explain the data. From 1994 through 2001, the rule of lenity was raised by at least one of the justices in nineteen cases, and its applicability was rejected in sixteen of them. Everyone occasionally signs onto opinions invoking the rule of lenity, usually as the third or fourth argument for a result; it tends not to distinguish the justices from one another because the cases where they endorse the rule often are unanimous. Thus Justice Breyer endorsed the application of the rule of lenity three times, but in all three cases everyone agreed. Justice Stevens has joined opinions endorsing the application of the rule of lenity twenty-two times; in the same period Justice Rehnquist did so twenty-one times. The only justice to use the rule of lenity often and distinctively is Justice Scalia,

12. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

13. See, e.g., *United States v. Granderson*, 511 U.S. 39 (1994). For more discussion, see *infra* text accompanying note 87.

who applied it in ten of the last eleven cases where it was made an issue. This helps explain why Scalia's votes in statutory cases tend to favor the government less often than his votes in constitutional cases, for there is no rule of lenity in constitutional law. But the rule has no application to most of the Court's nonconstitutional cases, either, since it only applies to statutes defining the elements of crimes and the sentences for them. If a large share of the Court's criminal docket involved statutes of that sort, or if the criminal law were full of doctrines like the rule of lenity, we might have the start of a legalist's story about why some justices vote for the government so much more often than others. Neither is so.

Noninterpretive values. There may be other ways to explain the numbers that don't involve interpretation but also are not matters of raw policy preference. A judge may think that doubts about the meaning of both statutes and the Constitution should be resolved in favor of various values: the right to a jury trial, a right to careful review before a death sentence is carried out, or broader notions of a right to fair treatment. On the other side, a judge may be reluctant to meddle too much with death sentences or be anxious to avoid gratuitous interference with a state's machinery of criminal justice. Those sorts of positions can be relevant to a wide variety of criminal cases, so a judge's views about them might leave a consistent signature of the kind shown in the graphs. And a judge might say that those views are not his own preferences but are the preferences he thinks inform the Constitution and therefore should guide his decisions when guidance from more specific legal materials gives out. The values friendly to defendants, for example, may be taken as echoes from many provisions of the Bill of Rights taken together with the Due Process Clause of the Fourteenth Amendment; the batch more helpful to the government might be derived from notions of federalism found in the structure of the Constitution and from its textual acknowledgment that the government has the power take a defendant's life.¹⁴ This account may be plausible on its face but it raises many questions. The task of deriving such general guidance from the Constitution is amorphous; the document is full of values which, as just shown, often will conflict. How likely is a judge to be able to choose between them without giving effect to his own priors about which are most important? (How else is he supposed to arbitrate between them?) And then how often are those values perceptibly at stake in the cases?

14. U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

III. SOME MECHANISMS OF IDEOLOGICAL DECISION

Those last questions are empirical matters that can't be resolved through abstract speculation or by taking a bird's eye view of the enterprise. It will make things more concrete to look at some cases and ask what happens in them that could generate such striking patterns in the large. The justices routinely engage in heated disputes that may look for all the world like they depend on law; if the true springs of decision are their own priors, what mechanisms translate them into the debates that we read in their accounts of their disagreements? The value of seeing some examples will be especially great in the wake of the arguments made a moment ago: I said that interpretive theory doesn't explain the justices' votes in nonconstitutional cases, but I didn't show it; I only asserted that I know of no theory with such power. I also suggested that there may be no baseline of neutrality in some of these cases—that votes follow from priors inevitably. And finally there were questions about whether the cases might involve competition between values in the Constitution even where its provisions are not directly at stake. All of these ideas may cause the reader to wonder what the justices say they are disagreeing about in the cases that produce the patterns seen in the graphs.

I want to shed light on those questions by looking briefly at some recent examples of types of disagreements that arise in both sorts of cases, constitutional and nonconstitutional. The initial idea behind this study was that the Court's constitutional and nonconstitutional cases involve different interpretive issues. On inspection this turns out to be only partly true. Certain types of issues often come to the fore in both sorts of cases. The discussion that follows catalogues some of them using criminal cases that the Court has decided in recent years. We will examine how the following types of arguments can determine the outcomes of constitutional and statutory cases alike: disputes about interest balancing, about the content of "common sense," about how much to trust juries, and about how to interpret ambiguous prior cases—by reference to their holdings or to their rationales. We also will look at a few common types of textual argument that work in a similar way but tend to arise more often in statutory than in constitutional cases. Each of these mechanisms will be illustrated with brief descriptions of recent cases. After a while the mortal reader will have trouble keeping all the cases straight, but that doesn't matter. The important thing is to remember the large point that all of the examples mean to illustrate—namely, that each of these types of argument is a way that a judge's priors can be turned into a legal argument, and that most of them cut across constitutional and statutory settings. Still more examples could be developed, but these are among the most common and will be enough to provide a solid sense of why the graphs at the start of this paper look the way they do.

For the sake of concision I will refer to the current justices in two groups: hawks, who consist of Rehnquist, Thomas, Scalia, Kennedy, and O'Connor; and doves, who consist of Souter, Breyer, Ginsburg, and Stevens. These groupings will make it easier to describe the lineups that the decisions

produced; and a glance back at Chart 1 will show a large drop-off between the last of the current hawks (Kennedy) and the first of the current doves (Souter). The court makes many 5-4 decisions that follow this division, as the discussion that follows will illustrate.

To the cases and mechanisms:

1. *Interest balancing.* The disputes in criminal cases, as in cases of other types, often involve trade-offs between costs and benefits of different sorts—"interest balancing" of one kind or another.

a. *Constitutional example.* In *Pennsylvania Board of Probation & Parole v. Scott*,¹⁵ the question was whether illegally seized evidence could be considered at parole revocation hearings. Both sides balanced the costs and benefits of excluding the evidence. The hawks said that applying the exclusionary rule would hinder the functioning of the parole system and only minimally deter police misconduct. The doves said that the majority exaggerated the trouble the exclusionary rule would cause in parole hearings and underestimated the benefits it would create in inducing the police to behave better. The decision was five to four in favor of the state.

b. *Statutory example.* In *Calderon v. Thompson*,¹⁶ Thompson was convicted of murder and sought habeas corpus. After various proceedings in federal court, the Ninth Circuit denied all relief. Two days before Thompson's execution date, the en banc court of appeals recalled its mandate and granted relief after all. The court said that internal procedural errors (for example, a law clerk's mishandling of the papers in the case) had prevented it from acting earlier. The warden appealed. The question was whether the Ninth Circuit had abused its discretion by recalling its mandate at the last minute. The majority—the hawks—held that it had, and thus found for the warden: the state's interests in finality were compelling, especially once the federal courts had said they were finished with the case. "It would be the rarest of cases where the negligence of two judges in expressing their views is sufficient grounds to frustrate the interests of a State of some 32 million persons in enforcing a final judgment in its favor."¹⁷ A recall of the mandate in these circumstances could only be justified to avoid a "miscarriage of justice"—a standard that "accommodates the need to allow courts to remedy actual injustice while recognizing that, at some point, the State must be allowed to exercise its sovereign power to punish offenders."¹⁸ The doves dissented:

[H]owever true it is that the en banc rehearing process cannot effectively function to review every three-judge panel that arguably goes astray in a particular case, surely it is nonetheless reasonable to resort to en banc cor-

15. 524 U.S. 357 (1998).

16. 523 U.S. 538 (1998).

17. *Id.* at 552.

18. *Id.* at 558 (internal quotation marks omitted).

rection that may be necessary to avoid a constitutional error standing between a life sentence and an execution.¹⁹

c. *Analysis*. It is easy to understand why arguments about costs and benefits would lead to predictable splits that cut across constitutional and statutory cases. To say that judges balance costs and benefits is close to saying directly that they are giving effect to their preferences. The arguable difference is that judges do not say their own preferences are the ones they are enforcing; they say they are balancing the values found in the law. Thus in *Scott*, the instruction to balance deterrence and administrative costs had been given in prior cases discussing where to apply the exclusionary rule. Yet it still fell to the judges to decide how much weight goes into each of the pans; in *Scott* this meant making estimates of how much trouble the exclusionary rule would cause in the parole system and how much it would deter bad behavior by the police. Here, as elsewhere, the case law is better at calling for balancing than at explaining how it should be done, a task left to the justices to carry out as they see fit.

Any of several things might be occurring when judges disagree about the outcome of such an exercise. They might differ over the probable consequences of various rulings they could make, or they might agree about the likely results but disagree in their evaluation of them. In *Scott* the disagreement seemed empirical. One can imagine the research of academics being used to resolve such uncertainties, but the Court rarely repairs to that source of guidance, whether because the justices lack confidence in their ability to evaluate it competently, because the data are thought inconclusive, or because professional norms call for a decision explained in the language of law rather than policy. Perhaps arguing about social science research makes the Court's work look too much for comfort like the work of a legislature.²⁰ Instead, other methods evidently are used to fill the gaps, the most ready of them being recourse to the judge's own imagination. The fund of impressions from which these thoughts are drawn is internal, so the results end up

19. *Id.* at 569 (Souter, J., dissenting).

20. See Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000). The authors argue that while more consideration and discussion of social research by judges may not constrain them, "it will improve the quality of the Court's decision-making in constitutional criminal procedure and render more transparent and open to criticism the Court's opinions." *Id.* at 794. For more discussion of the judicial resistance to such research, see William Twining et al., *The Role of Academics in the Legal System*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 920, 934 (Peter Cane & Mark Tushnet eds., 2003):

[J]udges who do attempt to take academic work into account may find it hard to distinguish the good from the bad, or to apply the good work competently once it is found. A judge who admits that academic scholarship influenced his decision invites ridicule from judicial colleagues, who will cite this as evidence that his position is flimsy; or from the academy, which may be quick to complain if a court relies on work that turns out to be flawed, or inapposite, or that the judge fumbled in trying to apply. . . . Most courts would still be more comfortable citing an obscure judicial opinion from another jurisdiction than a hundred-page law review article as support for a holding.

colored by the judges' priors about the world—which players in a criminal drama should be trusted a little more or a little less, how slowly or quickly to assume that a defendant probably is guilty, how much trouble it would be to exclude evidence from a parole hearing, how bad it would be if the parolee got away because of it, and so on. Maybe the judges try to put themselves in the position of each of the players and find some of the efforts easier than others, or maybe they fall back on mental pictures acquired from anecdotes, novels, or movies. The point in any event is that many of the Court's decisions involve empirical guesswork that draws mostly on the justices' own views of the world, which are constant across different types of cases.

Calderon v. Thompson seemed to involve less empirical disagreement and more dispute about how to weigh various consequences that everyone could see. A decision either way had obvious costs. Allowing the mandate to be recalled delayed Thompson's execution. Not allowing it deprived Thompson of some small chance that a flaw would be found in his conviction. The hawks were preoccupied with the first worry:

Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike.²¹

The doves worried more about the other part of the case, the thought that there always is time for another look at someone's conviction before executing him. Here, as in *Scott*, there were authorities saying that both considerations matter but nothing to tell judges how to balance them. They decide for themselves, though the judgment may take the form of a decision about which authorities to treat as crucial. Thus the hawks said they weren't making up their preferences but were finding them in the AEDPA;²² though the statute hadn't been violated, they said it was important for the values behind it to inform their thinking about what the Ninth Circuit had done. The doves thought the AEDPA had nothing to do with the case.

2. *Common sense*. Appeals to common sense (or, even more regrettably, "commonsense") rarely are edifying but occur from time to time in cases of all types.

a. *Constitutional example*. In *Illinois v. Wardlow*,²³ Wardlow ran away when he saw police cars approaching his neighborhood. The police thought this suspicious; they gave chase, caught him, conducted a search, and found drugs. The question was whether there was reasonable suspicion to support the search. The justices all agreed that no bright line rule could determine whether a person's flight gave the police good ground to search him. It

21. *Calderon v. Thompson*, 523 U.S. at 556 (internal quotation marks and citations omitted).

22. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.), discussed more fully *infra* Section III.5.

23. 528 U.S. 119 (2000).

depended on all the circumstances. But they disagreed about whether the particular search of Wardlow was lawful. The majority—the hawks—said the determination had to be based “on commonsense judgments and inferences about human behavior,”²⁴ and concluded that here the suspicions of the police were reasonable (in addition to Wardlow’s flight, he was in a bad neighborhood). The doves dissented, arguing that there weren’t enough other facts in the picture to make Wardlow’s flight suspicious.

b. *Statutory example.* In *Ohler v. United States*,²⁵ Ohler was tried on drug charges. She already had a prior conviction for a drug offense, and the government sought to use it to impeach her at trial. Over Ohler’s objections the court said at the start of the trial that it would allow the evidence. Ohler’s lawyer then brought up the prior conviction during her direct testimony; he wanted to put it before the jury voluntarily rather than let the government draw it out on cross-examination. Ohler was convicted. She appealed the trial judge’s decision to admit the evidence of the prior conviction. The question was whether she waived the right to complain about it by voluntarily admitting the conviction in her own testimony. Ohler tried to base her argument on the logic of Federal Rule of Evidence 609, but the precise question in the case—whether she had forfeited her right to complain—was a matter of judge-made federal law. The hawks held for the government, five to four, finding the issue waived; they adhered to the “commonsense principle” that “a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.”²⁶ The doves dissented, saying that “the common sense that approves the rule also limits its reach to a point well short of this case.”²⁷

c. *Analysis.* An appeal to common sense seems to mean the judge is reporting what seems obvious. It may be empirical: *obviously* someone who runs away from the police in a bad neighborhood is behaving suspiciously. Or it may involve notions of fairness, perhaps with some underlying notion of costs and benefits behind it: *obviously* someone who voluntarily puts evidence in front of a jury can’t complain later about the court’s decision to admit it. In either event, appeals to common sense only are compelling when the sense of the situation really is common. Otherwise they are likely just to express each side’s vague priors about what sort of behavior or inferences make sense to them personally, which again will be bound up with their private understandings of the world; thus Einstein’s suggestion that common sense consists of the prejudices one has developed before the age of eighteen. It is circular, and ought to be considered an embarrassment, to invoke common sense as a source of authority in a case where the sense of

24. *Id.* at 125.

25. 529 U.S. 753 (2000).

26. *Id.* at 755.

27. *Id.* at 762 (Souter, J., dissenting).

the situation is precisely what is contested.²⁸ But the important point for us is that whatever common sense may be, it comes from the judge and cuts across cases involving different underlying legal issues.

3. *Estimates of juries.* Sometimes a case will call for guesses about how a jury should be expected to react to an instruction or piece of evidence. The resulting disagreements may reflect empirical judgments or disagreements about the substance of the standard being applied—that is, how much risk of various sorts of error ought to be tolerated.

a. *Constitutional example.* In *Kyles v. Whitley*,²⁹ Kyles was convicted of murder. It later came out that the state failed to disclose some evidence that was favorable to him. The issue was whether the evidence was material under *United States v. Bagley*;³⁰ in concrete form the question was whether there was a reasonable probability that the evidence would have led to a different outcome if it had been turned over. The majority—the doves, along with O'Connor—held the standard satisfied and found for Kyles. The hawks dissented, concluding that the evidence the prosecution withheld would not have mattered because the evidence against Kyles already was overwhelming. (*Kyles* may be thought an atypically factbound example of the sort of case that usually occupies the Court; for another illustration, perhaps more typical, see the discussion of *Gray v. Maryland* below.³¹)

b. *Statutory example.* In *Old Chief v. United States*,³² the defendant was convicted of being a felon in possession of a firearm. At trial he offered to stipulate that he previously had committed a felony, but the government declined the stipulation because it wanted to tell the jury about his earlier crime in detail; the question was whether the government had the right to so insist on making its case. The law on point was Federal Rule of Evidence 403, which calls for the exclusion of evidence “if its probative value is substantially outweighed by the danger of unfair prejudice”³³ The justices disagreed about whether a jury would likely be prejudiced by hearing the details of the prior crime. The majority—the doves and Justice Kennedy—thought so, and held that the defendant’s stipulation had to be accepted. The remaining hawks thought otherwise, saying that “[a]ny incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions.”³⁴ (The dissenters also added, naturally enough, that the majority’s view “defies common sense.”³⁵)

28. For more discussion, see Meares & Harcourt, *supra* note 20, at 783–84.

29. 514 U.S. 419 (1995).

30. 473 U.S. 667 (1985).

31. See *infra* Section III.4.a.

32. 519 U.S. 172 (1997).

33. FED. R. EVID. 403.

34. *Id.* at 196 (O'Connor, J., dissenting).

35. *Id.* (O'Connor, J., dissenting).

c. *Analysis.* Some judges tend to look at evidence wrongfully shown to a jury and conclude that it probably didn't make any difference (or they conclude that evidence wrongfully kept from a jury probably wouldn't have mattered). The good evidence, or the evidence the jury did see, was too conclusive for the disputed evidence to have affected the outcome. Other judges are more inclined to think the evidence could have mattered. Again there are two ways to look at this. One is that the judges imagine being jurors and ask whether the evidence would have mattered to them. This may not be quite what any judge wants to do; he wants to know whether a jury would have cared, not whether *he* would have cared. But it's hard to separate the issues, especially when most of the justices rarely if ever have participated in criminal trials in any capacity. To the extent a judge can't perform the separation, he will give effect to his own sense of the world. Every lawyer knows that some jurors are more likely than others to find defendants guilty; the same goes for judges when they imagine being jurors in order to decide whether an error made a difference. The reasons for the variation may involve priors about the likelihood that a defendant is guilty, or about whether a bad childhood mitigates crimes a defendant committed later, or about whether the credibility of a witness against the defendant is damaged by the revelation that he was a paid informant, given that he already was known to have a criminal record.³⁶ These lowly sorts of judgments work their way into the Court's larger legal decisions with some regularity. They owe nothing to interpretative philosophy.

Another possibility is that the justices roughly agree about the likelihood that the evidence would have mattered but disagree about the resulting legal significance. As *Kyles* illustrates, the standards in these cases tend to be drawn in terms such as whether there is a "reasonable probability" that some piece of evidence would have affected the trial or did affect it. There is room for variation within the standard; even if two judges agree that the likelihood that something mattered was one in three, they may disagree on whether the standard was satisfied; we know it requires an error that "undermines confidence in the outcome of the trial,"³⁷ but thresholds of confidence may be distributed quite unevenly between judges. Judges more worried about finality naturally will tend to interpret such standards to create a high bar, just as judges intolerant of inaccuracy will read vague legal standards to be intolerant of it, too. As suggested earlier, the extent of the intolerance might be part of a judge's private sense of the world, or it might be a general inference he draws from the Constitution or from other legal materials. In either event the answers don't come from interpretation of the materials at stake in the cases themselves.

Much the same general analysis applies to disagreements about whether jurors can be trusted to follow instructions. It isn't a distinctively legal in-

36. See, e.g., *Banks v. Dretke*, 540 U.S. 668 (2004).

37. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

quiry. Everyone agrees that the law usually has to assume jurors obey their instructions (the system couldn't function otherwise), and everyone knows there are times when the assumption isn't safe. When judges have to decide whether a case fits the rule or the exception they again may be tempted to imagine whether they themselves would have trouble following the instruction. This might seem an odd explanation, however, since the judges who seem least friendly to defendants are the ones most likely to be sure that jurors will obey their instructions and not penalize the defendant unfairly. So maybe the views judges take of the question really depend on how cheerful a picture they carry of the typical juror: as obedient, careful, and fair-minded, or as lazy, fearful of criminals, and casual in following instructions. Or perhaps the explanation is the other type we have been developing: judges aren't so much thinking differently about jurors as tolerating different levels of risk. Thus *Old Chief* involved the risk that some jurors, in spite of their instructions, will take a worse view of a defendant after hearing about terrible crimes he committed in the past. Judges who agree about the chance that this will happen might disagree about how much to care about it. If one jury in ten is turned against a defendant when it hears of his record, is it too many? The sources of legal guidance never say. They speak blandly of balancing and delegate the details to judges to make by their own lights.

4. *Interpreting case law.* Both constitutional and statutory cases, of course, sometimes involve disputes over how to read precedents.

a. *Constitutional example.* In *Gray v. Maryland*,³⁸ Gray and a codefendant were tried for murder. The codefendant didn't testify, but he had given a confession earlier and a detective read it to the jury. The confession implicated Gray, so whenever the detective reached Gray's name he said "deleted." The question was whether this violated Gray's rights under the confrontation clause of the Sixth Amendment. In *Bruton v. United States*,³⁹ the Court had held for a defendant on facts similar to Gray's but where the one defendant had been named explicitly in the confession of the other. In *Richardson v. Marsh*,⁴⁰ the Court had held for the state on slightly different facts: the defendant wasn't mentioned in his codefendant's confession, but when the confession was combined with other evidence the jury still might have figured out that the first defendant had been involved in the crime. The Court said the confession was admissible if accompanied by limiting instructions, since the inference harmful to the defendant only arose when put together with other evidence. The question in Gray's case was how his trial compared with those in *Bruton* and *Richardson*.

The majority—the doves along with Justice O'Connor—held for Gray:

Richardson must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson's* inferences involved statements that did

38. 523 U.S. 185 (1998).

39. 391 U.S. 123 (1968).

40. 481 U.S. 200 (1987).

not refer directly to the defendant himself and which became incriminating “only when linked with evidence introduced later at trial.” The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. . . .

Nor are the policy reasons that *Richardson* provided in support of its conclusion applicable here. *Richardson* expressed concern lest application of *Bruton*’s rule apply where “redaction” of confessions, particularly “confessions incriminating by connection,” would often “not [be] possible,” thereby forcing prosecutors too often to abandon use either of the confession or of a joint trial. Additional redaction of a confession that uses a blank space, the word “delete,” or a symbol, however, normally is possible.⁴¹

The remaining hawks dissented:

We declined in *Richardson* . . . to extend *Bruton* to confessions that incriminate only by inference from other evidence. When incrimination is inferential, “it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.” Today the Court struggles to decide whether a confession redacted to omit the defendant’s name is incriminating on its face or by inference. . . . The Court’s analogizing of “deleted” to a physical description that clearly identifies the defendant (which we have assumed *Bruton* covers, see *Harrington v. California*, 395 U.S. 250, 253 (1969)) does not survive scrutiny. By “facially incriminating,” we have meant incriminating independent of other evidence introduced at trial.⁴²

Gray also shows how the themes we are cataloguing often may be combined. Here we see a dispute about how to read prior cases and also a familiar disagreement about when jurors are likely to obey instructions.

b. *Statutory example.* In *Lee v. Kemna*,⁴³ Lee’s alibi witnesses disappeared without explanation on the day he was supposed to put on his defense at trial. The Missouri trial court refused to grant a continuance; Lee was convicted of murder. The state court of appeals said the trial court was right to deny the continuance because Lee hadn’t complied with procedural rules requiring the motion to be in writing. Then Lee sought federal habeas corpus. The district and appellate courts held it unavailable because he had lost in state court on state law grounds: the technical blunders that the state court of appeals cited. The Supreme Court had interpreted the habeas corpus statute⁴⁴ as forbidding relief for prisoners held under judgments that rest on

41. *Gray*, 523 U.S. at 196 (alteration in original) (citations omitted).

42. *Id.* at 201 (Scalia, J., dissenting) (citation omitted).

43. 534 U.S. 362 (2002).

44. 28 U.S.C. § 2254 (2005).

“adequate and independent state grounds”;⁴⁵ the question was whether Missouri’s judgment fit that description.

The Court had addressed this sort of question before, so the more precise issue for decision was how Lee’s facts compared to those in another case, *Osborne v. Ohio*.⁴⁶ Osborne was convicted of possessing child pornography. He had objected to the jury instructions in the trial court but then failed to renew the objections when he should have. The Supreme Court held that this was not an independent state ground that prevented him from complaining about the instructions on habeas corpus, because the state trial court had known the substance of Osborne’s complaint even if he hadn’t complied with all of its rules. That was enough to satisfy the policies behind the federal rule against letting prisoners raise claims that the state courts rejected for their own internal reasons. Was Lee’s case essentially the same? The majority thought so, and found for Lee; Thomas, Scalia and Kennedy disagreed. There was a long debate over the meaning of the *Osborne* case. Said the dissenters:

Though isolated statements in *Osborne* might appear to support the majority’s approach . . . *Osborne*’s holding does not.

. . . .

. . . The majority’s [decision] exaggerates the importance of certain language employed by the *Osborne* Court. We did take note of the “sequence of events,” but only because in all overbreadth cases, Ohio procedure mandated a sequence whereby defendants were required to predict unforeseeable limiting constructions before they were adopted or to lodge objections foreclosed by previous rulings. We also mentioned the trial’s brevity, but that fleeting reference was not only unnecessary but also in tension with the *Osborne* Court’s analysis. The adequacy doctrine would have dictated the same result, brief trial or no.⁴⁷

The majority read *Osborne* differently:

As attentive reading of the relevant pages of *Osborne* will confirm, we here rely not on “isolated statements” from the opinion, but solidly on its analysis and holding on “the adequacy of state procedural bars to the assertion of federal questions.”

. . . [T]he dissent views as central to *Osborne* the “unforeseeab[ility]” of the Ohio Supreme Court’s limiting construction of the child pornography statute at issue there, *i.e.*, that court’s addition of the “lewdness” element on which Osborne failed to request a jury charge. The dissent here is characteristically inventive. *Osborne* spoke not of the predictability *vel non* of the Ohio Supreme Court’s construction; instead, this Court asked whether anything “would be gained by requiring Osborne’s lawyer to object a

45. *Coleman v. Thompson*, 501 U.S. 722, 768 (1991).

46. 495 U.S. 103 (1990).

47. *Lee*, 534 U.S. at 396, 399 (Kennedy, J., dissenting) (quoting *Osborne*, 495 U.S. at 123–24) (citations omitted).

second time” on the question of lewdness, and answered that question with a firm “no.”⁴⁸

c. *Analysis.* Judges often have to choose between two general approaches when called on to apply a prior decision: adhering as closely as possible to the verbal formulation of its holding in the prior case or giving effect to its rationale. Or they may have to choose between multiple rationales the earlier opinion offered. These possibilities can lead to different results, and nothing in law guides the choice between them; either is within the bounds of custom, and no decision a judge makes about which approach to use in one case binds him to do the same in the next. Sometimes everyone can agree on the right choice because the considerations are lopsided. But in cases where it’s close—where maybe the rationale is present or maybe it isn’t, or where the formal statement of the rule from the first case leaves a little room to question its fit in the second one—where should a judge look for guidance? There really is nothing to consider but his own immediate perception of which makes more sense, and this will trade heavily on intuitions about the underlying policies at stake. (Another possibility is that judges give grudging readings to earlier cases they think were wrongly decided on interpretive grounds, and generous readings to decisions they like; this then pushes the question back to the earlier case and why *it* was decided as it was.)

5. *Statutory arguments.* Our catalogue of ways in which judges’ priors can be given effect should include an important family of mechanisms limited to nonconstitutional cases: arguments about how to read statutory texts. Here the best case studies are the Court’s readings of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),⁴⁹ the principal point of which was to change the rules governing federal habeas corpus. The Court’s decisions interpreting the statute are remarkable for the regularity of the justices’ votes in them despite the different legal issues involved. Occasionally the Court votes unanimously,⁵⁰ but its nonunanimous cases often have been decided five to four with little change in the composition of the majority or the dissenters: the hawks vote for the government while the doves, perhaps with Kennedy or O’Connor, vote for the prisoner.⁵¹ Sometimes there

48. *Id.* at 378–79 (quoting *Osborne*, 495 U.S. at 123–25) (citations omitted).

49. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.).

50. *See, e.g.*, *Castro v. United States*, 540 U.S. 375 (2003); *Artuz v. Bennett*, 531 U.S. 4 (2000); *Williams v. Taylor*, 529 U.S. 420 (2000); *Calderon v. Ashmus*, 523 U.S. 740 (1998).

51. Of the first eleven nonunanimous cases the Court decided under the AEDPA (which were the ones examined for this Part of the Article), four were decided five to four: *Carey v. Saffold*, 536 U.S. 214 (2002) (five to four for the prisoner); *Tyler v. Cain*, 533 U.S. 656 (2001) (five to four for the warden); *Hohn v. United States*, 524 U.S. 236 (1998) (five to four for the prisoner); *Lindh v. Murphy*, 521 U.S. 320 (1997) (five to four in favor of the prisoner). Also decided five to four, though a bit later in time, were *Lockyer v. Andrade*, 538 U.S. 62 (2003) (five to four for the warden), and *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (five to four for the warden; while this case arose under the AEDPA, it did not principally involve the interpretation of it).

are departures from this pattern, as where fewer than all of the hawks vote for the government⁵² or where fewer than all of the doves vote for the prisoner.⁵³ But there has not yet been an AEDPA case where a hawk voted for a state prisoner while a dove voted for the government.⁵⁴

What makes this result even more remarkable is that the AEDPA cases tend not to follow any of the patterns discussed above. On their face, at least, they usually don't involve disputes about how to weigh costs and benefits or guesses at how a jury would react to evidence. They involve statutory interpretation in a simpler and more classic sense: the justices are confronted with a chunk of text and questions about its meaning. They engage in heated arguments about *Webster's Third*, about the importance of giving effect to all the words in the statute, about the best view of the statute's purpose, and so forth—and then, as we shall now see, they vote with striking predictability. (In principle, of course, these same sorts of argumentative moves can arise in constitutional cases, but as a practical matter they come up far more often in cases involving statutes.)

a. *Textual arguments.* In *Hohn v. United States*⁵⁵ the district court held against the prisoner; he sought permission to appeal from a circuit judge, which was denied. The question was whether the request for permission amounted to a case in the court of appeals that the Supreme Court could review. The doves invoked the definition of “case” from one of the Court's prior opinions⁵⁶ while the dissenters said that an application for a certificate of appealability “does not have the requisite qualities of a legal ‘case’ under any known definition.”⁵⁷ In *Carey v. Saffold* the majority—the doves—relied on *Webster's Third* to conclude that the state's reading of the word “pending” was “not consistent with that word's ordinary meaning.”⁵⁸ The hawks argued that this view found no real support from *Webster's*, properly understood, and that the really important word in the case was “application”—

52. See, e.g., *Slack v. McDaniel*, 529 U.S. 473 (2000) (seven to two for the prisoner, with Scalia and Thomas dissenting); *Williams v. Taylor*, 529 U.S. 362 (2000) (six to three for the prisoner, with Rehnquist, Scalia, and Thomas dissenting); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (seven to two for the prisoner, with Scalia and Thomas dissenting).

53. See, e.g., *Woodford v. Garceau*, 538 U.S. 202 (2003) (six to three for the warden, with Breyer, Ginsburg, and Souter dissenting); *Duncan v. Walker*, 533 U.S. 167 (2001) (seven to two for the warden, with Breyer and Ginsburg dissenting); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (six to three for the warden, with Breyer, Ginsburg, and Stevens dissenting).

54. For almost the whole first decade under the AEDPA, no hawk voted for a prisoner of any sort—state or federal—in any case where a dove voted for the government; but just as this article was going to press, a single outflanking at last occurred: in *Johnson v. United States*, 125 S. Ct. 1571 (2005), Justice Souter was in a five to four majority in favor of the federal government, while Justice Scalia was among the dissenters.

55. 524 U.S. 236 (1998).

56. *Id.* at 241 (“[T]he words ‘case’ and ‘cause’ are constantly used as synonyms in statutes . . . , each meaning a proceeding in court, a suit, or action.” (quoting *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1872))).

57. *Id.* at 256 (Scalia, J., dissenting).

58. 536 U.S. 214, 219 (2002).

which they thought should be defined by prior case law and by looking at its usage elsewhere in the statute. In *Stewart v. Martinez-Villareal* the majority defined “second or successive” by looking at case law,⁵⁹ while Scalia and Thomas relied on *Webster’s* and on *Black’s Law Dictionary* to conclude that the warden should win.⁶⁰ In *Duncan v. Walker*, where the issue concerned grammar rather than definitions, the majority said that its reading was preferable because it avoided treating any of the statute’s words as surplusage.⁶¹ The dissent objected that the majority’s reading required “either an unusual intonation . . . or a slight rewrite of the language.”⁶²

b. *The purpose of the statute.* It is standard for each side to claim its reading better effects the purpose of the statute. Thus in *Hohn v. United States* the hawks (without Kennedy) complained that the majority had “achieve[d] a result that is fundamentally at odds with the purpose of the statute”;⁶³ that purpose, generally speaking, “was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal justice system, produced by various aspects of this Court’s habeas corpus jurisprudence.”⁶⁴ *Carey v. Saffold* and *Duncan v. Walker* both involved the interpretation of § 2244(d)(2); different majorities in the two cases explained that the purpose of the provision was to advance the causes of “comity, finality, and federalism” by promoting “the exhaustion of state remedies while respecting the interest in the finality of state court judgments.”⁶⁵ In *Duncan* the majority said that its reading was necessary to achieve those goals, but the dissenters—Breyer and Ginsburg—said the majority’s holding undercut another purpose of the statute: “to grant state prisoners a fair and reasonable time to bring a first federal habeas corpus petition.”⁶⁶ In *O’Sullivan v. Boerckel* everyone agreed that interests of “comity” were meant to be served by § 2254(d)(2),⁶⁷ but they couldn’t agree about whether this meant that prisoners should be required to bring every one of their claims to a state’s supreme court before trying for relief in federal court.⁶⁸

c. *Consequences.* Each side often says the other side’s reading is implausible because it leads to bad consequences; each denies that its own reading would create similar problems. Thus in *Carey v. Saffold* the question

59. 523 U.S. 637, 644 (1998).

60. *Id.* at 649 (Thomas, J., dissenting).

61. 533 U.S. 167, 174–75 (2001).

62. *Id.* at 187 (Breyer, J., dissenting).

63. 524 U.S. 236, 257 (1998) (Scalia, J., dissenting).

64. *Id.* at 264–65 (Scalia, J., dissenting).

65. *Carey v. Saffold*, 536 U.S. 214, 222 (2002) (quoting *Duncan v. Walker*, 533 U.S. at 178, and *Williams v. Taylor*, 529 U.S. 420, 436 (2000)); *Duncan v. Walker*, 533 U.S. at 178 (quoting *Williams v. Taylor*, 529 U.S. at 436).

66. *Duncan v. Walker*, 533 U.S. at 191 (Breyer, J., dissenting).

67. 28 U.S.C. § 2254(d)(2) (2005).

68. 526 U.S. 838 (1999).

was whether the time for filing a federal petition was tolled while the prisoner applied for an original writ in the state supreme court. The hawks said this would lead to a “strange anomaly” in cases where a prisoner’s federal petition appeared to be too late—unless he went back to the state supreme court and filed a new original petition there, in which case all the time that passed since his last appearance in state court might then be treated as tolled. The doves were untroubled: the state was free to change its rules if those consequences were unwelcome. The same style of argument also was prominent in *Stewart v. Martinez-Villareal*. A prisoner’s claim that he was incompetent to be executed was dismissed as premature because he had no execution date; once he got one, the question was whether he could return to federal court to have the claim heard. The doves (and three hawks) said that a negative answer would lead to perverse consequences since it would mean that a petitioner whose claim was dismissed for any trivial reason would never be able to have the claim heard. Scalia and Thomas were unmoved: on their view, since the right to have one’s claim heard is not given by nature—since, indeed, the right to challenge anything more than the jurisdiction of the convicting court was a judicial invention—the deprivation of such rights, even if on trivial grounds, should not be considered perverse.

d. *Analysis*. It sometimes is thought that the Supreme Court is riven by disputes between textualists and those who prefer a freer reading of a statutory text to give effect to its purposes. The cases concerning the AEDPA, at least, do not follow this pattern or any other consistent line of dispute over method. In none of them does anyone say the literal meaning of the statute should be sacrificed to advance its purpose. Instead, both sides generally say that theirs is the better reading of the text itself. The problem is that there are no legal metrics available for giving priority to one such argument over another—for saying which definition trumps which when one is from a dictionary, another from case law, and another from “ordinary meaning”; for saying what to do when two views of a statute’s purposes conflict; or for deciding whether a consequence of a reading is perverse or absurd. These all are qualitative or even aesthetic judgments left to the judges. They are supposed to call them like they see them, but how they see them evidently is colored by their background view of what outcome of the case makes best sense; as between two readings of a sentence or word, both plausible on their surface, the one that gives defendants another try at judicial review will tend to seem counterintuitive and unlikely to someone convinced that defendants get more than enough tries already—either as a matter of personal opinion or (if it is any different) because he thinks the mood of the Constitution has something general to say about the question. This is only a conjecture about how the justices do their work; but while it can’t be proven, it fits the facts.

IV. IMPLICATIONS

It might seem that the justices simply grab onto whatever arguments help the side they prefer on grounds they brought to the case from outside its four corners, whether they are styled as policy preferences or something fancier. In effect they may do something like that, but the examples just reviewed suggest a bit more to say about how the process works. The striking feature of the disputes just surveyed is how little most of them have to do with law, at least as conventionally understood (for example, collisions of interpretive theory)—and yet how rarely they involve confessed policymaking, either. Instead they routinely seem to involve disagreements that I will call quasi-factual. They are framed as disputes over the meaning or application of law, but legal materials turn out to provide little guidance for their resolution and they easily end up expressing the judge's own controversial opinion about what result in the case makes most sense.

It will be easier to understand this process if we step back and examine how disagreements arise in the first place. In every case the justices are presented with an array of arguments. Their job is to pick the best ones. The range of choices is bounded by law and custom. As a matter of customary understanding there is such a thing as a good textual argument and a bad one, and sometimes it is clear to everyone which is which. Or sometimes the customs and norms of the business make it clear to all that a particular textual argument offered by one side is too strong to be overcome by a particular appeal to consequences made by the other, or vice versa. Many of these customs are cultural and owe little to law; others are the sorts of norms into which lawyers are immersed through education and professional life. In any event, sometimes those sources of guidance are clear enough to create unanimity—to enable judges to agree about questions of interpretation despite conflicting priors. Other times they aren't, because some combination of lack of clarity in the law's directions on the one hand and the force of the judges' priors on the other makes it impossible for the former to constrain the latter. The judges end up confronted with arguments for each side that seem plausible; and while the customs of language and law are helpful in defining arguments as plausible or implausible, they are far less help in picking between them after that threshold is cleared. There are a few legal ideas to help referee such contests, such as the argument that the plain meaning of a provision should be held more important than its purpose even where both are plausible sources of argument, but those rules of thumb are controversial, small in number, and turn out to be less useful than advertised. Even if adopted they are incomplete; they can't gain traction until their users supply some inputs—judgments about the clarity of the text or its purpose, for example, that trigger the theory's operation. When those judgments are disputed, the guidance offered by law again runs out.

The choice between plausible arguments confronts judges with uncertainties that legal materials and customs are too weak to resolve. The uncertainties may be empirical, such as whether the police usefully would

be deterred by a ruling for the defendant or whether a person who runs from the police probably is guilty of something. They may be uncertainties about costs and benefits and how to weigh them—for example the cost of another reprieve for a prisoner on death row and the size of the benefit produced by giving his claims another round of review. They may be uncertainties best described as methodological (though since they tend to involve perception, rather than appeals to any general principles, I have suggested that they might as well be labeled aesthetic): whether to focus on the verbal statement of the holding of a prior case or on its rationale; whether to define words by using a dictionary or by consulting prior cases; or whether to regard some possible consequence of a decision as ridiculous. Where the legal materials bearing on these types of questions are inconclusive, there is little to do but pick the way out that sounds best, line up the arguments that support it, and denounce the other side for being obtuse. Since those judgments about what sounds best are not much disciplined by the legal materials, their makers try for congruence with some other template, and indeed with the only one at hand—their own sense of whether the result seems reasonable, which cuts across cases involving different legal questions.

On this view it helps to think of judging as less like philosophizing and more as a workaday task marked by familiar cognitive hazards. Psychologists have spent a lot of time studying how people carry out tasks where they are supposed to evaluate one variable of a situation while another exerts pressure in the background. In the most charming of the experiments a group of American students is shown film of an interview with a professor from Europe.⁶⁹ The students are told to judge his accent. Those who watch him speaking in a “warm” guise tend to judge his accent favorably; those who see him saying rude, disagreeable things like his accent much less. The payoff of the study and others like it is twofold. Qualitative judgments often are affected by how well they serve other preferences held by their makers; and their makers often will be unaware of this. Judges are in a similar situation when they pronounce on the quality of competing arguments in a case and then write opinions to explain why they voted as they did. Often they can agree that an argument—the equivalent of an accent—is excellent or is no good at all, but in a close case their legal training doesn’t enable them to avoid the tendencies that beset ordinary mortals. It just makes them proficient at ridiculing the professor’s accent.

I have suggested that most of these disputes can be described as quasi-factual. In some cases their factual character is plain enough. Will the jury obey its instructions? Will the police be deterred? Is a person who runs away when the police arrive probably a crook? When appellate judges decide these questions they make findings about the world openly or tacitly. It’s a

69. Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 *J. PERSONALITY & SOC. PSYCHOL.* 250 (1977). For more in the same vein, see RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980), and Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231 (1977).

funny sort of factfinding because it usually involves generalizations in the service of legal rules rather than specific conclusions about any one case (though we have seen some examples of the latter). On general questions of the sort just mentioned there typically are no witnesses, and there is no deference given to lower courts; nor are judges often supplied with empirical information helpful enough to displace their default tendency to rely on what they think they know about the world. The lawyers give them stories, claims, and fragments of data, but all usually weak enough to allow the agreeable parts to be accepted and the rest dismissed. Again, the cognitive psychologists have done helpful work. Anyone's default response when presented with new evidence is to interpret it to conform with what they already thought, and more determined efforts to make sense out of the data do not necessarily steer them elsewhere;⁷⁰ and it is natural as well for people trying to imagine what other people think to project their own knowledge and beliefs onto them.⁷¹ The application of these tendencies to appellate judging becomes clearer once the judges are seen to be taking evidence rather than doing interpretation—because the interpretive task has deteriorated into a quasi-factual dispute.

We can go a little farther still. Even the more apparently legalistic debates the Court engages in have strong overtones of factfinding.⁷² Whether the purpose of a statute should trump its plain meaning is a question of law, but deciding whether it *has* a plain meaning, or what that meaning might be, has more in common with factfinding than with legal interpretation as those two activities usually are imagined. Of course, the rightful classification of such questions as fact or law will depend on why we ask. They may seem legal from an ontological standpoint or in other ways;⁷³ statements about whether a plain meaning exists may not be provably true or false, may be general rather than specific, and may be suited for a judge rather than a jury, all of which are features normally associated with matters of law. But if we are concerned only with how judges resolve close questions and with what attendant hazards, those distinctions between law and fact lose practical force. Deciding whether the meaning of a bunch of words is plain, or whether the *expressio unius* inference is strong enough to overcome contrary indications from the purpose of the statute or elsewhere, generally will not involve the application of settled rules or standards or be amenable to

70. See John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983); Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411 (1992); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991).

71. See Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One's Own Knowledge to Others*, 125 PSYCHOL. BULL. 737 (1999).

72. See Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003). Cf. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

73. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 198 (1990).

solution through any number of hours of research or theorizing.⁷⁴ It involves staring at a text and making declarations about its properties based on the reader's perceptions of the thing. Sometimes everyone sees these questions the same way, whether they would like to or not, just as all the witnesses to a crime sometimes identify the same culprit even if they wish it weren't so. That is what law sometimes can achieve, even at the Supreme Court; it is the drama of adjudication, and the attitudinalists' dismissal of it—their failure to give a plausible account of the phenomenon of unanimity—is another part of the reason why their views have not caught on with lawyers. But of course it frequently is true, especially at the Supreme Court, that the evidence turns out to be too weak to constrain its users; the fellow who did the crime looks a little like two of the people in the lineup, or the text is open to two readings. In these cases it is common for gaps in certainty to be filled in by what the witness expects or wants to be true⁷⁵—or, in the judicial setting, for the decision to be nonunanimous and for the votes to follow the form we have seen here.

On this understanding of judicial disagreement the quality of the lawyering in a case remains important, though perhaps not quite in the way usually imagined. In the close cases it may not be true that the side with the better legal argument wins (in many of them it is questionable whether such a side exists in any useful sense); but the more plausible a lawyer's argument seems, the better the toehold it provides for a judge to give effect to his priors. Some of those five to four cases we reviewed might have been nine to zero the other way if no lawyer had come up with an appeal to precedent, to perverse consequences, or to the *expressio unius* canon plausible enough to turn the case into a quasi-factual dispute that gave the priors of the judges space to operate. Academics often fill a similar role. Their theories serve an enabling function, making desired results legally plausible. Theories gain traction because they lead to results their holders want. This helps explain why it is so hard to find a judge or academic who holds a really counterpreferential theory—a theory that consistently produces results they dislike as a matter of policy.

Kinds of priors. It is obvious that judges bring priors to their decisions; no one thinks a judge is a blank slate. But the traditional story is that the priors are methodological: they are ideas about how to decide cases—theories of interpretation, beliefs about the right occasions for deference, and other tools not meant or likely to favor any party or policy systematically. My claim is different. It is that the judicial priors used to resolve close cases are substantive: they are notions precisely about which party or policy should prevail. At this point we should revisit the possibility that the substantive priors come from the Constitution—not directly, but through

74. For an effort to start fashioning standards that might speak to some of these problems, see Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

75. See, e.g., David F. Ross et al., *Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 J. APPLIED PSYCHOL. 918 (1994).

impressions the justices have about the values in the document and their implications for statutory cases that may seem far removed from it. Or that the priors consist not quite of their preferences but rather of large principles of political morality that are attractive to them, that cut across different areas of law, and that have a more respectable pedigree than ordinary opinions about policy. Either of these stories might seem on its face to explain why the justices' decisionmaking patterns look so similar in statutory and constitutional cases: the constitutional views *inform* the statutory views, or both are informed by a common philosophy.

Suppose, for example, that we have a judge who constantly votes against prisoners on death row regardless of the details of the legal issue involved. Maybe it's because he has a preference for capital punishment: he thinks it just and approves its use. Or maybe he is ambivalent about capital punishment but feels strongly that federal courts shouldn't meddle with the states' attempts to impose it. This last view in turn may arise because he thinks the meddling offends the constitutional order in some large way, or it may just be that he thinks meddling is a waste of time. In either of these scenarios the judge has a prior that works its way out through his decisions. The conceptual problem lies in deciding whether the prior should be called a policy preference or something else. An enthusiasm for capital punishment is a pure matter of policy; affection for the prerogatives of the states also can be considered a matter of policy, but it occurs at a different level than a taste for capital punishment. It may reflect preferences about the law distinct from preferences about the world. Conceivably in some cases the preference for leaving the states alone is part of a large theory thought to be the right understanding of the thrust of the Constitution or of national traditions. Some might call this latter result a judicial philosophy.

Finding the right label for judges' priors is less interesting than the empirical question of how much the priors reflect the various types of preferences just sketched. The question finally is an impossible one since judges, like anyone, have messy interiors comprising lots of different preferences and values—clear and obscure, high and low, conscious and not. But the data and cases we have seen permit a few speculations about where on the spectrum the priors tend to lie. They suggest that the important ones do not take the form of anything so grand as clear philosophical principles of political morality; nor are they likely to be drawn from other legal materials in any comforting sense.

First, if the priors take either of the forms just described, where are they? A judge holding a general theory of law that bears on a case need not be shy about saying so, but we rarely hear any such thing in the opinions the Court produces, whether of the majority or individual variety. Nor do we see judges claiming to decide statutory cases by invoking ideas they say they are importing from the Constitution. Instead they usually talk at a fairly low level of abstraction about the consequences of deciding each way, about what jurors probably would think about some piece of evidence, about what the dictionary says, and so forth. Conceivably they are using theories but

don't want to say so for some reason, perhaps because they fear it would sound pompous. But a simpler account of why judges usually don't mention large theories or portable constitutional notions is that they aren't using them. Mostly they are just trying to answer the questions the cases present, empirical or conceptual or in whatever other form they take. To this one might reply that the large philosophies still could be doing unconscious work; but it's not clear that an unconscious philosophy *is* a philosophy, at least in any sense distinct from other sorts of priors a judge might hold. The point of calling a prior philosophical is precisely that it is worked out in careful and reflective fashion. If this were the nature of the priors that produce the patterns we have observed, we should expect to see clearer evidence than we do in the accounts the judges give of their own reasoning. And if judges' views about philosophy or the Constitution are unconscious, they presumably have to compete for influence with other unconscious beliefs or desires that seem likely to be deeper and to have the advantage in any competition for influence.

Second, it is very hard to come up with either philosophical notions or portable constitutional ideas that explain the totality of the graphs and cases. Recall Chart 1, which saw twenty-eight justices arrayed in smooth fashion from those enormously likely to vote for the government to those very unlikely to do so—with various of them occupying all points in between. It seems doubtful that well-formed philosophies or values found in the Constitution come in enough varieties to explain this wide spread of behavioral patterns. Humdrum preferences seem more likely to have that property: it would be easy enough for a judge to care a little more than one colleague and a little less than another about helping defendants and for these differences to leave signatures over a long run of cases that look like the ones we see in the data.

The impression is reinforced when we look at the cases themselves. A curse of much theorizing about interpretation is that it often is based on two or three leading cases that lend themselves well to the theorist's enterprise—cases where the interpretive issue is nicely presented and the judges say things that can be assimilated easily enough into some elegant model. A different sense is gained by looking at the broad run of the Court's criminal docket: the dull little cases as well as the grand ones, and the whole variety of them rather than a few picked for their suitability as a theorist's illustrations. Think of the range of questions in the cases considered earlier. They involved whether the police can search someone just because he ran away from them; whether a defendant can complain about a trial court's admission of evidence if she then decides to put it in front of the jury herself; whether and when a jury can be expected to follow limiting instructions; whether a limitations period in federal court is tolled while a convict seeks original review in a state supreme court; and whether the habeas corpus statute applies to petitions filed before it was enacted. It is difficult to come up with philosophies that cut across these situations and would naturally produce nearly identical five to four votes in every one of them. And of

course those are just five examples out of hundreds that make up the patterns found in the charts. Each case can be the subject of its own principled argument, but then the question is why each judge's principles tend to work in favor of the government to a similar extent in such a variety of settings. The patterns may be thought to reflect different ideas about what fairness entails, which in turn can be called a difference of principle if one is attached to the label. But any principle capacious enough to explain the patterns in all those cases would likely be too large to have rigorous philosophical or other theoretical content.

Finally, to whatever extent judges do make use of interpretive philosophies and argue about them, they have to pick out those philosophies for themselves; and the process of picking a philosophy is similar to the other unguided judicial choices discussed earlier and is subject to the same influences. The result is that judges, like academics or any others who take an interest in law, are most unlikely to subscribe to interpretive theories that consistently produce outcomes they dislike in live cases. We can imagine some gaps between a judge's choice of a theory and the same judge's less articulate preferences about the world, but the gaps are likely to be modest. Anyone who claims allegiance to a theory can point with pride to one or two results it produces that are felt to be unwelcome, but if the list gets much longer than that—if the whole balance of results tips toward the unwelcome—the theory tends to become unwelcome, too. To make the gaps between theory and preference large we would need philosophical methods robust enough to compel adherence to theories they support even when they lead to disagreeable results. We lack methods so strong; the choice of an interpretive theory is similar to the decision of a case where the constraining power of the legal materials has given out because there are too many good arguments on both sides. Of course most judges have no particular training or aptitude for philosophy, so even if it were potentially robust it would be surprising if it were so in the hands of those users. But it seems doubtful that it is even potentially robust. A nonjudicial example of someone who does have training and aptitude for philosophy is Ronald Dworkin, a well-known champion of the idea that judges should use theories of political morality to answer hard questions; but it has been observed that the results of his inquiries constantly align with the preferences of modern liberals who are not philosophically reflective at all.⁷⁶

The choice of which general values to find in the Constitution, if separate from the quest for a philosophy to guide the decisions in criminal cases, also seems liable to be dominated by private beliefs about which of the values are attractive. Earlier I offered the image of a judge who has mixed feelings about capital punishment but doesn't like seeing federal courts interfere with it. That is a plausible example of the small gap between a policy

76. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 127–28 (1997); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638, 1685–86 & n.98 (1998).

preference and a legal one. It is more difficult, though, to imagine a judge saying to himself, "I think the death penalty is monstrous, but since the Constitution mentions it as a possibility I am going to err on the side of making it *easier* for the states to impose when I interpret the habeas corpus statute." Or: "I myself think criminal defendants get far too many chances for review in federal court, but I'm going to read the habeas corpus statute generously to defendants because the Constitution tells me to—not in any place specifically, but just the whole thing generally." Neither inquiries into philosophy nor the search for portable constitutional values are likely to stray that much from the sense of things the judge had before the inquiries got started (again, where are the examples?)—which means that even where the priors a judge brings to a case do seem to be derived from other legal sources, we have to consider what preferences lie prior to *them*. Recall *Calderon v. Thompson*. Everyone agreed that the AEDPA did not control the case, but the warden argued that the statute's values nevertheless should inform the Court's thinking. While the warden was not pointing to the Constitution, he was making a claim that the justices should import values into the case from a source of law not directly on point. The result illustrates the likely result of such invitations. Five justices agreed with the warden that the values of the AEDPA were relevant and required judgment for him. Those were, of course, the same five who most often vote for the government in all sorts of other criminal cases. The other four justices, more accustomed to voting for defendants, did not think the spirit of the AEDPA mattered to the case and voted for the prisoner. Why do some justices so regularly find values helpful to the government (or unhelpful to it) when they look at materials bearing only indirectly on their cases? The obvious answer, which has no evident competition, is that they tend to find what they are disposed to find.

None of this allows us to say anything conclusive about where judges get the priors they use to decide close cases. But we can say that in those cases priors from somewhere seem to do the hard work, and there are good grounds to doubt that the priors have rigorous philosophical content or are otherwise very distinct from the wells of preferences from which judges draw their views on any other questions about the world. The actual basis of the priors seems likely to be of two possible sorts, the epistemic and the moral. A judge might be inclined for or against the government because of beliefs about deterrence, the social costs of crime, the risk of convicting the innocent, and other questions on which people differ because they lack good information about them. Or the inclinations might arise from moral views about how hateful or sympathetic the judge finds criminal defendants. These two types of priors might in turn influence each other, with the empirical guesses driving the moral conclusions or the moral views causing some empirical guesses to seem more appealing than others. In sorting through these speculations we may take notice that the same cleavage found between the current justices on criminal cases also separates the ones more and less

likely to vote to allow affirmative action,⁷⁷ to support federal power at the expense of the states,⁷⁸ to take expansive views of the establishment clause,⁷⁹ and to take various other positions that often divide the Court five to four⁸⁰—issues that may involve empirical uncertainties of their own, but none that line up in any evident way with the empirical uncertainties in the criminal cases. The most plausible inference from these patterns is that decisions in the close cases are, at bottom, driven by clusters of untheorized moral sentiments that tend to go together within a personality. But one should not be too confident when speculating about mental processes that cannot be directly tested or observed.

V. THE PUZZLE OF SUBSTANTIVE CRIMINAL LAW

The greatest puzzle in the data is the behavior of the justices in substantive criminal cases—in other words, the lineups in cases where the dispute involves whether the defendant's original acts in the world broke the law. A classic fount of such difficulties is 18 U.S.C. § 924(c)(1)(A), which provides stiff punishments for anyone who, “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.”⁸¹ If a drug dealer barter a gun for a batch of cocaine, has he “used” a firearm in relation to a drug offense? If he has a gun in the glove compartment of his truck and a load of marijuana in the back, has he “carried” a firearm in relation to a drug offense? Questions of this sort produce different voting lineups than the rest of the Court's criminal cases; hawks and doves sometimes outflank each other to the right and left. Thus the Court held for the government on both the questions just asked;⁸² Scalia, Souter, and Stevens dissented in the bartering case, and Rehnquist, Scalia, Souter, and Ginsburg dissented in the case concerning the defendant's glove compartment. The overall point is seen in the following graph, which compares recent justices' voting patterns in these kinds of cases with their votes in several other types.⁸³

77. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

78. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

79. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997).

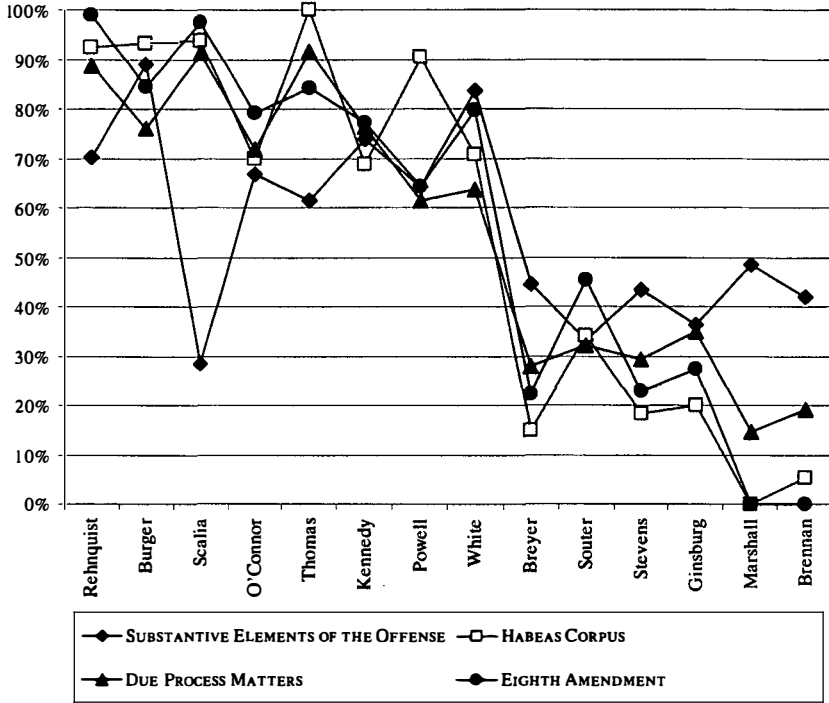
80. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion rights); *Abrams v. Johnson*, 521 U.S. 74 (1997) (interpretation of the Voting Rights Act of 1965 §§ 2, 5, 42 U.S.C. §§ 1973, 1973c (2000)); *Bush v. Vera*, 517 U.S. 952 (1996) (same); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same).

81. 18 U.S.C. § 924(c)(1)(A) (2005).

82. *Smith v. United States*, 508 U.S. 223 (1993) (barter); *Muscarello v. United States*, 524 U.S. 125 (1998) (glove compartment).

83. To prevent the graph from becoming so busy as to be illegible, I omitted a couple of recent justices rather arbitrarily: Blackmun and Powell. For the curious reader, however, I will state the numbers for those justices here. Blackmun voted for the government 67% of the time in cases involving the substantive elements of an offense, 32% of the time in cases involving the Eighth Amendment, 38% of the time in habeas corpus cases, and 53% of the time in cases involving the Due Process Clause. Powell voted for the government 64% of the time in substantive cases, 64% of

CHART 3: HOW OFTEN SELECTED U.S. SUPREME COURT JUSTICES HAVE VOTED FOR THE GOVERNMENT IN NONUNANIMOUS CASES INVOLVING PARTICULAR AREAS OF CRIMINAL LAW



The line tracing the justices' votes in substantive cases shows some striking departures from the others; it is the line that starts lower than all of the others and then ends higher than the rest. Some justices vote for the government about as often in all of these sorts of cases, but for others there are large and striking differences. Why? The best explanation probably is that substantive cases, unlike almost all the others, don't involve an underlying trade-off between accuracy and its costs. It's just a question of whether the defendant's conduct was allowed. The justices vary in their answers to that type of question, but not in the same way they vary in replying to the others—or at least some of them display this variance. Others exhibit similar tendencies in all types of criminal disputes, including these, perhaps suggesting that some sort of overall preference for giving one side a hand dominates their reasoning across the board.

Another possibility is that some of the differences found in substantive cases are a result of legal method. The obvious candidate for this explanation, as mentioned earlier, is Justice Scalia, whose sixty-point departure

the time in cases involving the Eighth Amendment, 80% of the time in cases involving interpretations of habeas corpus, and 61% of the time in cases involving the Due Process Clause.

from form in substantive cases might be explained by his adherence to the rule of lenity. Maybe this only shows that his preferences are different in the substantive setting than elsewhere, but it might also be viewed as a small but intriguing study in the power of doctrine to constrain a judge—or more precisely in the ability of a judge to constrain himself by adhering to a doctrine. There is good reason to think that Scalia has the priors we associate with a friend of the government. We can infer this fairly directly from what he says in his own opinions when called on to reckon the costs and benefits of a rule,⁸⁴ and we can infer it indirectly from the consistency of his votes for the government in statutory and constitutional settings—except, however, for the substantive cases where he applies the rule of lenity and suddenly favors the defendant more often than any of his colleagues.

The role of rules in deciding cases is an interesting frontier of interpretive work.⁸⁵ The recent discussions tend to emphasize the value rules can have in making interpretation more economical or more accurate by one metric or another, or in improving the legislative climate in which laws are written in the first place. Perhaps the results produced by the rule of lenity suggest afresh another value served by simple rules: they may cut down the role of discretion that is likely to be guided by a judge's priors. The details of this possibility are more complex than they first appear. If judges are thrown onto their priors by the inability of law to arbitrate between competing plausible arguments, it might seem that the law helpfully could do more by ruling out certain lines of argument entirely: never make appeals to the *expressio unius* canon, or ignore arguments about the consequences of ruling one way or the other. But this is not so clear. Sometimes subtracting a source of argument makes a case easier by taking inconclusive claims off the table; sometimes the subtraction makes a case harder by leaving behind only weak arguments and lots of room for discretion in selecting among them.⁸⁶ A strong appeal to *expressio unius* sometimes can create unanimity, as can a powerful argument made from consequences. It's hard to get rid of

84. For discussion, see Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992, 2011–15 (2002) (book review).

85. For recent examples, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999); and Vermeule, *supra* note 74.

86. Thus Justice Stevens's recent defense of the use of legislative history:

In refusing to examine the legislative history that provides a clear answer to the question whether Congress intended the scope of the mineral reservations in these two statutes to be identical, the plurality abandons one of the most valuable tools of judicial decisionmaking. As Justice Aharon Barak of the Israel Supreme Court perceptively has explained, the “minimalist” judge “who holds that the purpose of the statute may be learned only from its language” retains greater discretion than the judge who “will seek guidance from every reliable source.” JUDICIAL DISCRETION 62 (Y. Kaufmann transl. 1989). A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process. *Bedroc Ltd. v. United States*, 541 U.S. 176, 192 (2004) (Stevens, J. dissenting).

the weak forms of these arguments that spoil unanimity without also keeping out the strong ones that can create it.

But there are other things that rules of interpretation might do. Instead of favoring one argument over another or taking some claims off the table, they can amount to “if-then” instructions; and then much depends on the practical clarity of the “if” clause—the triggering device—and the interest of the judges in taking it seriously. The rule of lenity doesn’t apply until a text is held ambiguous, which most of the justices seem reluctant to conclude. Thus in *Smith v. United States*, the case asking whether a drug dealer “used” a gun when he traded it for cocaine, Scalia said the statute was ambiguous, invoked the rule of lenity, and would have held for the defendant. The majority denied that the statute was ambiguous and so rejected the argument. We are confronted with a familiar gap—an incompleteness—that law can’t close: it can give instructions about what to do with ambiguity, but judges are on their own in deciding whether ambiguity is present in the first place.

And then there is the related problem, also familiar from our look at some of the Court’s other cases, that judges may agree about the amount of ambiguity present but not about how much is needed to invoke the rule. One version of the rule of lenity is that “where text, structure, and history fail to establish that the Government’s position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”⁸⁷ Another is that the rule applies “only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.”⁸⁸ Some members of the current Court have signed on to both of those definitions. Most have joined opinions offering other versions of the rule that also are not quite consistent. There may be a process of degradation inevitable in a common law environment by which any such rule will be restated often and differently enough to thus drain away much of its utility as a constraint. Whether strategies like the rule of lenity might be devised for wider application, whether their benefits would outweigh their costs, and whether there is any feasible way to interest more of the justices in using them consistently all are questions for further research.

VI. CONCLUSION

At one level this article is an inquiry into criminal cases and how the Supreme Court decides them. But it also might be considered an inquiry into how courts decide cases of any kind; the mechanics by which judges’ values and preferences get translated into votes and opinions might be similar everywhere. In all areas of law the justices often are confronted with cases where the arguments are finely balanced and can be lined up to support either side, with uncertainties that require them to imagine the world and make guesses about it that will express their own views, with choices

87. *United States v. Granderson*, 511 U.S. 39, 54 (1994).

88. *United States v. Wells*, 519 U.S. 482, 499 (1997) (citations omitted).

about which of two sets of risks to prefer over the other, and with unguided choices to make between plausible readings of legal texts. These mechanisms cause them to reach predictable results in criminal cases of all kinds wherever the law isn't clear enough to produce unanimity; and the result may be especially visible in the criminal area just because there are so many more cases of the criminal variety than there are of any other single type. Their numbers make it possible to line them all up and see the striking patterns emerge. Other legal subjects might yield equally striking patterns if there were enough of them. It may be conjectured that the justices care more about criminal cases than some other kinds and that their own values thus play a larger role here than elsewhere;⁸⁹ but then it might as well be conjectured that the justices care *less* about criminal cases than they do about cases involving race or religion or federalism or many other controversial areas of law—areas where the justices' votes have followed patterns closely resembling those seen in our charts, and for similar reasons. But that is a tale for another day.

89. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (discussing consensus in dull cases).