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Court-Gazing

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COURT-GAZING

*Stephen F. Williams**

TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT. By *David G. Savage*. New York: John Wiley & Sons, Inc. 1992. Pp. 473. \$22.95.

DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT. By *H.W. Perry, Jr.* Cambridge: Harvard University Press. 1991. Pp. ix, 316. \$39.95.

I

A blurb on the cover of David Savage's *Turning Right* declares that the book

is a remarkably comprehensive and comprehensible history of one of the most crucial moments in American constitutional history — when the Reagan-Bush Supreme Court began the process of repudiating the Warren and Burger Courts' efforts to make the Constitution a bulwark for individual rights and an enzyme for social justice. . . . Basic reading for anyone who wants to understand the process by which the Supreme Court became the liberals' nightmare.¹

Those who believe that this comment aptly summarizes the relation between the present Court and its predecessors will enjoy a shiver of excitement from *Turning Right's* portrayal of the black-robed barbarians at the gate. Those who take a more nuanced view of the Court's evolution will not find much enlightenment.

As the blurb suggests, the book's leitmotif is that the Court's post-1980 appointees have set out with bulldozers to dismantle the rights found in the Constitution by their recent predecessors. Rather than systematically appraising the evolution of any particular right or rights, however, Savage proceeds obliquely. Having covered the Supreme Court scene for the *Los Angeles Times*, he builds the book mainly around nomination battles, both the administration fights over who will be nominated and the Senate fights over whether to confirm, together with background about Justices appointed earlier and occasional discussion of cases.

The book is weakest in its efforts at legal analysis. My favorite is the contrast Savage draws between Justices Scalia and O'Connor: "He sought decisions that were intellectually consistent; she tried to be

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1. Comments of Herman Schwartz.

fair" (p. 204). The phrase suits Savage's apparent purpose of depicting Scalia as a heartless slicer of metaphysical abstractions, but the price paid — in injury to minimum rationality — is high. Can Savage really think that "fairness" and "consistency" naturally conflict?² Isn't treating like cases alike a criterion of fairness?

Generally, Savage's viewpoint is that of the tendentious editorialist. Deriding Robert Bork's view that the First Amendment protects only political speech, he declares flatly that it would allow the White House "simply [to] order a ban on the publication of scientific papers that dispute the Administration's view" on global warming or the relation between electromagnetic fields and cancer (p. 144). The reach of Bork's theory is obviously a fair question, but if any Borkian phrase resolves these hypotheticals, Savage does not reveal it.³

Savage's whole theme, indeed, rests on a highly elastic treatment of the English language. "Under the edicts of the Rehnquist Court, the Bill of Rights is shrinking in significance" (p. 454). (Why "edicts"? The term is not traditional for judicial decisions, and I do not believe Savage uses it, or any similar term evoking a despot's arbitrary ukase, for any ruling of the Court that reflects Justice Brennan's jurisprudence.) One would expect this to be followed by examples of rights terminated or shrunk. Instead, we find cursory references to five cases in which an individual lost a claim against the government, without the slightest effort to suggest that these losses defeated rights established in either the language of the Constitution or prior cases. One case, *Harmelin v. Michigan*,⁴ modestly supports Savage's thesis, as Justices Scalia and Rehnquist explicitly favored abandonment of proportionality analysis as a component of review under the Cruel and Unusual Punishment Clause;⁵ but the swing opinion by Justice Kennedy can fairly be characterized as sorting out a mixed bag of prior decisions before coming down on the side of the less interventionist reading.

The other four cases seem completely unhelpful to Savage's theory of shrinking rights. Before *Cruzan*,⁶ there was no constitutionally protected "right to die."⁷ The Court's refusal to intervene on behalf of

2. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 586-90 (1990) (attacking Emerson's dictum that "A foolish consistency is the hobgoblin of little minds.").

3. I put aside the question of how the *White House* would acquire power to ban *any* speech without congressional authorization.

4. 111 S. Ct. 2680 (1991).

5. U.S. CONST. amend. VIII.

6. *Cruzan v. Director, Mo. Dept. of Health*, 110 S. Ct. 2841 (1990).

7. In fact, the Court assumed the existence of a constitutionally protected right to refuse lifesaving hydration and nutrition. 110 S. Ct. at 2852. The Court then concluded that any such right was not violated by Missouri's requiring "clear and convincing" proof of the comatose patient's preference as a predicate to the withdrawal of life support. 110 S. Ct. at 2853.

In a serious analysis of individual rights, how would one classify *Cruzan*? One might see it as

Nancy Cruzan could therefore not have shrunk such a right. Before *McCleskey v. Kemp*,⁸ there was no right not to be subject to the death penalty solely because of evidence that there was discrimination in applying the death penalty to one's race, evidence in no way linked to the particular defendant's sentence. Nor was there, pre-*Rust*,⁹ an established right entitling one who takes government funds for a project to use those funds to finance speech conflicting with the purposes of the project defined by the funding agency. And even the dissent in *United States v. Stanley*¹⁰ did not claim that American servicemen had previously enjoyed a right to recover damages against officials who deliberately deprived them of constitutional rights; rather, it argued only that certain prior cases, not involving the military, called for a narrow reading of a decision allowing the military a broad immunity to constitutional damage claims.

Savage's language makes sense only if one assumes that courts must continuously expand individual rights at the expense of laws made by a politically responsible authority, removing ever more issues from effective political discourse. By this standard, justices who fail to propel the expansion forward are hopeless right-shrinkers.

The strength of *Turning Right* lies in its occasional vignettes of the lives of the Justices. Indeed, the book's great claim to "balance" lies in its depiction of Justice Rehnquist. Off duty, it appears, he is by no means an ogre. We learn that he passed up one of Reagan's State of the Union addresses because it conflicted with his evening art class at the Arlington County adult education center (p. 16). He even engineered a practical joke on Chief Justice Burger, arranging for a street photographer — with a life-size photo of Burger and a sign reading "Have your picture taken with the chief justice. \$1" — to appear at the Court entrance as Burger's car swept in one morning (p. 16). A man who does that can't be all bad.

Unfortunately, the personal vignettes do not, as ideal journalism might, supply insight into the effect of personality on the Court's evolution. Savage might have spotted the features of the Reagan and Bush appointees that prefigured their *actual* role in the new Court. How is it that these Justices preserved *Roe*,¹¹ introduced a "coercion" test for Establishment Clause cases¹² that may end up restricting state use of religious ceremonial functions more than *Lemon*,¹³ and ex-

upholding Missouri's decision to afford patients a right not to have their lives lightly terminated. Aren't we really addressing conflicts among individual rights?

8. 481 U.S. 279 (1987).

9. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

10. 483 U.S. 669, 686 (1987) (Brennan, J., concurring and dissenting).

11. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2803 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

12. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

13. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

tended (yes, Virginia, extended) the existing rights against the discriminatory use of peremptory challenges?¹⁴

Far from identifying these developments in individual rights, Savage just endorses the received wisdom. In an unusual glimpse into the Chief Justice's mind, he tells us that, when Rehnquist posed with Justice Kennedy on the steps of the Court immediately after swearing him in, "he had good reason to smile broadly, for Rehnquist *knew* that he was standing next to his fifth vote" (p. 182) (emphasis added). Apparently he knew a lot that wasn't so, as Kennedy has given critical support to the interventionist side on all the above issues. Might not a practitioner of personal journalistic analysis have spotted the intellectual or personal attributes that spelled a different story? One cannot ask for clairvoyance, of course, but if journalism is to add, surely it should venture beyond the collection of charming anecdotes into some sort of informed study of character and intellect. Yet one searches *Turning Right* in vain for even a premonition of the new appointees' failure to follow the script.

II

In *Deciding to Decide: Agenda Setting in the United States Supreme Court*, H.W. Perry takes a totally different approach. He exudes the curiosity of an anthropologist as he explores the rituals and beliefs of the judicial tribe, especially its most illustrious subset, the Justices of the Supreme Court. The area he has chosen yields quite naturally to anthropological inquiry. Because grants and denials of certiorari are not accompanied by justification (though occasionally dissenters from a denial will justify their views), standard legal analysis is inapplicable. And, because denials so completely overwhelm grants, the quantitative methods evidently preferred by the political scientists who have previously tackled the cert process have produced a modest, even misleading, supply of findings (p. 119). For example, although political scientists of the 1950s and early 1960s recognized that intercourt conflict was a factor in granting cert,¹⁵ later studies appeared to undermine its significance (pp. 116-18), which was not restored among political scientists until publication of an article by Sidney Ulmer in 1984.¹⁶ All the article's quantitative methods accom-

14. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992) (restricting racially discriminatory use of peremptory challenges by criminal defendant); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2080 (1991) (same holding as to civil litigant).

15. See Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in *JUDICIAL DECISION MAKING* 111, 113-16, 123-24 (Glendon Schubert ed., 1963).

16. S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984); see also pp. 119, 251-52 (indicating role of Ulmer article). Ironically, the article that vindicated the role of intercourt conflict starts with a denunciation of "traditional legal methods" for their small data bases and "literary approaches." Ulmer, *supra*, at 901.

plished, however, was to remove a cloud created by those very methods, which had concealed what lawyers would have supposed obvious.

Perry, instead, has relied mainly on interviews — with five Justices, sixty-four clerks, four Solicitors General and four high-level lawyers in that office, a “knowledgeable” Court employee, and seven judges of the D.C. Circuit (p. 9). In something of a teaser, Perry writes that one of the most remarkable things learned from this last group of interviewees was “how little most of them know about the actual cert. process” (p. 286), but he does not reveal the gaps or errors in their information.

Perry’s interviews yield intriguing nuggets. Central to the cert process is a “discuss list” — drawn up by the Chief Justice but to which any Justice may add cases at will (p. 43). Listing a case assures an actual vote on it, but rarely any real discussion (pp. 43-49, 161). Death penalty cases automatically make the discuss list (pp. 92-96); just like a lower court contemplating a request for preliminary injunctive relief, the Court sees the extremity of the consequences as affecting its analysis, though in these cases only in the limited sense of requiring the Justices to invest more time on the substantive issues.

Perry offers his readers a variety of insights into preferences and patterns in the certiorari process. At least for a time, four Justices were ready in principle to reexamine obscenity law; but, because they lacked a fifth to come out their way, they held off from granting cert, not wishing to elicit a decision that set their position back even further. This produced what Perry calls a “Rule of Five” (p. 98), which in practice required five votes for a grant of cert on that issue. Another special rule has developed in practice — the Rule of Six, an agreed minimum for granting cert and summarily reversing the judgment below (pp. 99-101). In one of his relatively rare ventures into quantitative methods, Perry finds that the Solicitor General has a success for securing cert ranging from about 75% to about 90% (pp. 128-29). One finding will be welcome news to circuit judges whose decisions have drawn cert: several Justices told Perry that the chances for cert are better if a well-respected judge wrote the decision below, as it will start the Court off from a more informed point and reduce the risk of unpleasant surprises (p. 125).

If political scientists may benefit from Perry’s openness to non-quantitative methods, lawyers may profit from his freedom from legal presuppositions. He reports that horse trading on cert petitions is anathema to the Justices (pp. 165-66) and then goes on to examine whether this norm makes sense. If Justices properly pass over cases they think wrongly decided because they see the Court’s primary function as to unify or clarify the law — as Justices often assured him — why should they not agree to hear cases that seem unimportant in order to win the chance to correct some pervasive error or eliminate a

muddle? Perry thinks this would be quite all right, but he acknowledges that even on his premises Justices might fear a "slippery slope" once horse trading became accepted. He adds, rhetorically, "But surely if anyone can deal with slippery slopes, it is justices of the U.S. Supreme Court" (p. 166). Some, less confident than Perry of the Court's maneuvering on slippery slopes, may feel happier thinking that here the Court has wisely resisted temptation.

Perry also questions the underpinnings of the reasons he received for the very limited character of discussion among the Justices on grants of certiorari. They cite time pressure, but that explanation begs the question of why they allocate their time as they do. While there appears to be some sense that face-to-face persuasion is uncollegial, he wonders why (pp. 161-62). Senators, he points out, do it all the time, while Senate lobbyists do not; does it make sense that in this respect Justices should act more like lobbyists than senators?

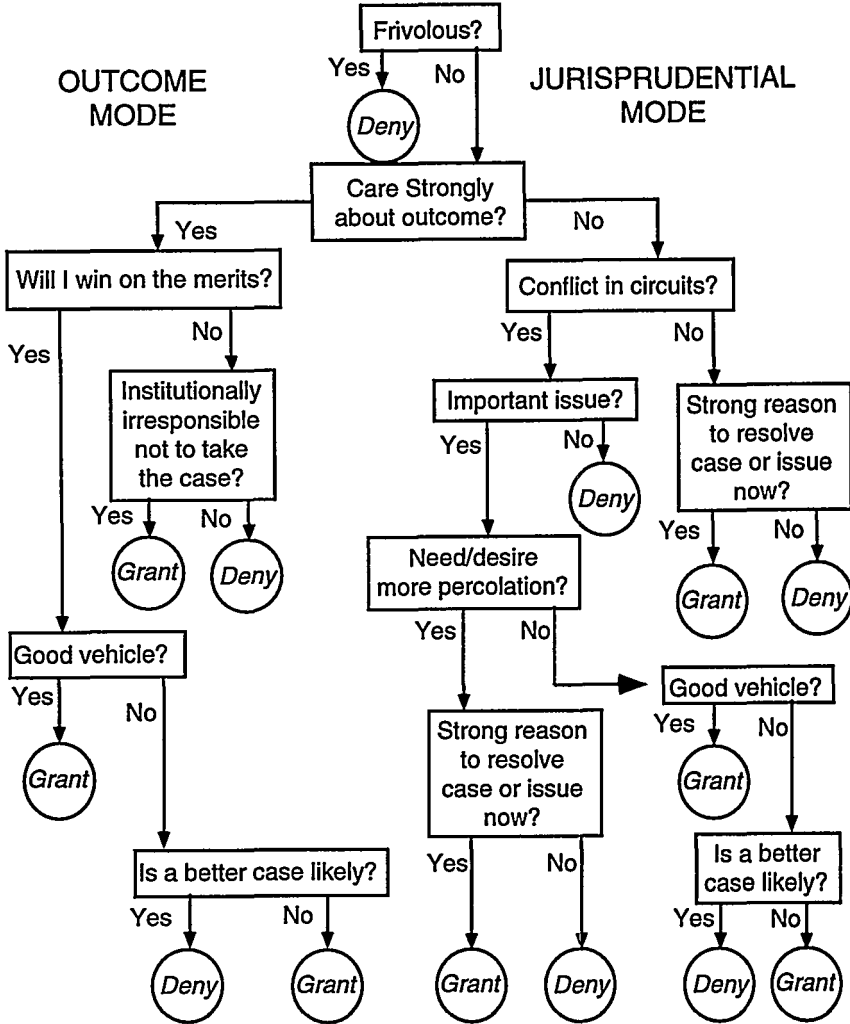
Perry's report on the Justices' thinking reveals one striking gap. Although he devotes several pages to the issue of intercircuit conflict (pp. 246-52), I can find no mention of variations as to the impact of protracted disagreement among the circuits. One Justice is quoted as saying that it is intolerable to have one law in the Eighth Circuit and another in the Second (p. 247). Doesn't it somewhat depend on the nature of the law? Suppose two circuits split on a reading of Sentencing Guidelines,¹⁷ so that a particular type of defendant will be sentenced somewhat more leniently in one region than in another. To the extent that this confuses criminals in their planning, need we worry? Apart from such planning, the split does not seem of great moment — except as a clue that one of the courts may have egregiously erred, as where on the same facts defendants get five years in one circuit and twenty in another.¹⁸ But egregious error has its own weight in the cert process, quite independent of another court's getting it right. For an interstate firm trying to adjust its business to federal law, and being driven to follow one circuit's more restrictive interpretation, however, the split nearly nullifies the other circuit's ruling and largely stifles any "percolation" of the issue (but not completely, for one-circuit firms can continue to press competing views). One hopes that the Court takes such variations into account, despite Perry's omission.

At the end, Perry seeks to infer a "decision model" that he characterizes as "a modified lexicographic decision process, that is, a hierar-

17. See 18 U.S.C. § 994(a) (1988) (authorizing promulgation of Sentencing Guidelines).

18. Compare, e.g., *United States v. Deal*, 954 F.2d 262 (5th Cir.), cert. granted, 61 U.S.L.W. 3256 (U.S. Oct. 6, 1992) (No. 91-8199) (holding that a defendant convicted of multiple crimes of violence on a single multicount indictment is subject to statutory 20-year sentence enhancements for "second or subsequent" convictions on all but the first count of the indictment) with *United States v. Abreu*, 962 F.2d 1447 (10th Cir.), petition for cert. filed, (U.S. July 9, 1992) (No. 92-67) (holding that the sentence enhancement only applies to convictions for offenses committed after a judgment of conviction has been entered for a previous crime of violence).

chical process of decisional steps or gates through which a case must successfully pass before it will be accepted" (pp. 272-73). As the accompanying chart indicates, Perry hypothesizes a division of each Justice's thinking into an "outcome mode" and a "jurisprudential mode."¹⁹



I find both features — lexicographic and two-mode thinking — fairly implausible, although perhaps with enough stress on the adjective “modified,” the lexicographic characteristic may be acceptable. The two-mode notion seems to suggest that within each Justice lurk

19. Pp. 274-82. In Perry’s “outcome” mode the Justice views a cert issue largely in strategic terms, aiming to bring about a substantive result, while in the “jurisprudential” mode the Justice addresses such “legalistic” issues as the problem of circuit splits. P. 274.

two judicial personae, either of which may take over disposition of the certiorari issue. The first of the lexicographic steps allocates the case to one of these two; thereafter, that persona controls, and the loser is out of the loop.

Even Perry's own conception suggests that this is far too stratified an image. In the "outcome" mode, the Justice comes to the question, "[Is it] institutionally irresponsible not to take the case?", a question that surely must call on the talents of the jurist. Similarly, the "outcome" Justice asks such questions as "Good vehicle?" and "Is a better case likely?", both of which also appear in the "jurisprudential" column. Thus, even if a Justice follows the intellectual course Perry outlines, the persona that won the case at the first decision point ends up addressing many of the same variables that his ousted counterpart would have considered. Thus, the process engages a genuinely single mind, in which various concerns compete for attention and weight until the Justice decides his or her vote.

Of course, there may be cases where one factor dominates. For example, the importance of an issue may be overwhelming, and the inferiority of all imaginable alternative vehicles may be self-evident (for example, later cases may be hopelessly ill suited because delay will generate intolerable confusion). Some cases are easy, in other words, because a strong factor pulls in one direction and no strong factor or combination pulls in the other. But these cases are completely consistent with the model of a single mind trying to maximize some general, all-embracing goal, continuously trading off competing values. They are quite inconsistent with any lexicographic mode of thought, which assigns factors ranks that never involve tradeoffs. Thus, a consumer who engaged in lexicographic ranking of goods and put food first would buy food with all of his income up to some ceiling, and devote all income beyond that sum to other goods. If his income fell below the food ceiling, he would cut out all other items, spending not a penny on shelter.²⁰ He never trades off values at the margin. Perry has not established that the Justices' thinking falls into such a strange mode.

Nonetheless, Perry's book is a valuable contribution. He gives a solid account of the cert process that will be useful both for speculative Court watchers and for lawyers trying to assess and maximize the chances of having their cases heard. More importantly, as a political scientist making systematic use of interviews — a technique that his colleagues have evidently neglected — he has bridged a gap between them and lawyers and opened the way for similarly integrated inquiry in the future.

20. See DONALD N. McCLOSKEY, *THE APPLIED THEORY OF PRICE* 77-78 (1982).