

Fall 8-31-2018

# Working Without a Net: Supreme Court Decision-Making as Performance

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## Recommended Citation

Frederick Mark Gedicks, *Working Without a Net: Supreme Court Decision-Making as Performance*, 2018 BYU L. Rev. 57 (2018).  
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## Working Without a Net: Supreme Court Decision-Making as Performance

Frederick Mark Gedicks\*

*Up on the high wire, I hear the crowd begin to call.  
Some want you to fly, some want to see you fall.  
Now and then I stumble, but I ain't fallen yet.  
Your love helps me forget, I'm workin' without a net.*

—Waylon Jennings\*\*

*Though judges often portray themselves as helpless to alter case outcomes dictated by law, this is mostly false humility. Judges are illusionists, and their opinions sleights of hand which obscure that they participate in creating what they purport merely to apply. This is especially the case in the Supreme Court, from which there is no appeal. The Justices perform the law, and their opinions are the records of these performances.*

*Performance theory supplies a better means of analyzing Supreme Court decisions than ubiquitous and wearisome attacks on judicial integrity. The Court has its precedents, but they have no connection to a pre-existing natural order, and often not even to a determinate text. The Court's readings of its precedents form a tradition that is rarely so fixed as to yield only one possible result in every case. This makes the Court's constitutional decision-making the purest of performances – holdings and citations are "iterated," shorn from their original contexts and dropped into new ones, creating new and surprising principles that masquerade as old and established.*

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\* Guy Anderson Chair & Professor of Law, Brigham Young University Law School. I received helpful criticisms and comments at an internal workshop at BYU Law School, and from Dr. Francesca Sborgi Lawson of the BYU College of Humanities, who introduced me to performance theory. James Egan, Ash McMurray, and Brianna Rosier provided excellent research assistance.

\*\* WAYLON JENNINGS, *Working Without a Net*, on WILL THE WOLF SURVIVE (MCA Records 1986).

*It is unhelpful to call this dishonest. The Justices cannot admit their performative role because it cannot be reconciled with still-powerful higher-law and rule-of-law myths. The necessity of performing constitutional law stems from the general absence of a single authoritative text that can constrain that performance; there are, instead, multiple interpretive possibilities, which makes performance inevitable. The Justices are always working without a net, performing constitutional law in opinions with nothing beneath them.*

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## INTRODUCTION: PERFORMING LEGAL DECISION-MAKING

In his celebrated history of American pragmatism, Louis Menand observed that a case coming to a court for decision “enters a kind of vortex of discursive imperatives” – the judge’s felt need to reach a result that is simultaneously faithful to precedent, beneficial to society, and just in itself.<sup>1</sup> Less explicit but equally powerful pressures are also in play: to secure a politically congenial outcome, to shape the law to adhere to social conditions, to “punish

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1. LOUIS MENAND, *THE METAPHYSICAL CLUB* 339 (2001).

the wicked and excuse the good,” and to reallocate costs from “parties who can’t afford them” to “parties who can.”<sup>2</sup> But hovering over all of these imperatives is a singular “meta-imperative”: “not to let it appear as though any one of these lesser imperatives has decided the case at the blatant expense of others.”<sup>3</sup> A result that seems intuitively just but violates precedent “is taboo.”<sup>4</sup> Justice cannot come at the expense of precedent, but precedent cannot eclipse justice; reckless behavior must be punished but not at the expense of socially desirable behavior; judgments must coincide with attractive political ends without appearing to distort the law to reach them.<sup>5</sup>

Menand’s account of judicial decision is familiar to anyone who has studied or practiced law but is at serious odds with how judges portray their craft. Justice Owen Roberts’s Depression-era description of judicial minimalism is typical:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.<sup>6</sup>

Almost seventy years later, soon-to-be Chief Justice John Roberts invoked the national pastime to say nearly the same thing:

Judges are like umpires. Umpires don’t make the rules, they apply them. . . .

. . . .

. . . If I am confirmed, . . . I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it’s my job to call balls and strikes, and not to pitch or bat.<sup>7</sup>

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2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 339–40.

6. *United States v. Butler*, 297 U.S. 1, 62–63 (1936).

7. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005).

Both Justices articulated the conventional view of judging that is both descriptive and normative: judges merely apply, and ought merely to apply, principles or texts to the facts of the cases before them. The conventional view implies that legal principles and texts both pre-exist the judicial decision in which they are applied and possess a determinate and stable meaning that judges can objectively retrieve, fully intact. Judges are and properly should be helpless to alter the outcomes dictated by law.

If Menand's realist account is accurate, then the conventional view is mostly false humility. Judges are nothing so much as illusionists, and their opinions sleights of hand which obscure that they are not bound by the law in the powerful sense they suggest but participate in creating what they purport merely to apply.<sup>8</sup> This is especially the case with Justices of the U.S. Supreme Court, from which there is no appeal. The Justices perform constitutional law, and their opinions are the records of these performances.

Legal and academic literature has periodically compared legal decision-making to performance, lately using the performance theory that emerged in the humanities in the 1990s. These comparisons often focus on J.L. Austin's argument about performativity in language,<sup>9</sup> or use artistic (usually musical) performance as a loose metaphor to illustrate the bounded creativity of judicial decision-making.<sup>10</sup> Others have analyzed the performative dimensions of

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8. My colleague Christine Hurt describes Justice Cardozo as a "magician" who was able to fashion brand-new common law rules as if they were the inevitable consequence of prior holdings.

9. See, e.g., Monica Eppinger, *Sages, Savages, and Other Speech Act Communities: Culture in Comparative Law*, 57 ST. LOUIS U. L.J. 407, 416 (2013); Trish Luker, *Performance Anxieties: Interpellation of the Refugee Subject in Law*, 30 CANADIAN J.L. & SOC'Y 91, 94 (2015). See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

10. See, e.g., Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994); Sanford Levinson & J.M. Balkin, Book Review, 53 NOTES 419 (1996) [hereinafter Levinson & Balkin, Book Review] (reviewing RICHARD TARUSKIN, *TEXT AND ACT: ESSAYS ON MUSIC AND PERFORMANCE* (1995)); Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) [hereinafter Levinson & Balkin, *Performing Arts*] (reviewing AUTHENTICITY AND EARLY MUSIC (Nicholas Kenyon ed., 1988)); Brett G. Scharffs, *Composing Law: The Lawyer as Composer, Part Two of Two*, CLARK MEMORANDUM, Fall 2002, at 31; Carol Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439 (1999).

legally relevant social behavior,<sup>11</sup> as well as courtroom trials.<sup>12</sup> No one, however, has used performance theory as a metric for evaluating constitutional decision-making by the Supreme Court and, in particular, its most daring quality: performance without a text.

Performance theory supplies a better measure of Supreme Court decisions than ubiquitous attacks on the Justices' integrity. Questioning the honesty of majority opinions is a pastime so common it hardly deserves mention, let alone a law review article.<sup>13</sup> Even the Justices indulge.<sup>14</sup> Charging dishonesty is a favored rhetorical tactic of those whose own views differ from the Court's or the other Justices'. It presupposes the existence of single correct ("honest") answers to even complex constitutional questions;<sup>15</sup> how else can one criticize the Justices for not telling the precedential truth? On the other hand, the Justices are often in a difficult spot.

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11. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (using Erving Goffman's performance theory to explore how gays and lesbians "cover" sexual orientation); see also Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 597 (2013) (showing how Goffman's work and performance studies generally have impacted doctrinal, policy, and theoretical debates about family); Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2124 (2003) (examining the performative structure of U.S. bankruptcy law); Kevin Noble Maillard & Janis L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 L. & INEQ. 305, 316-18 (2008) (examining the "performativity" of "passing"); Sherally Munshi, *You Will See My Family Became So American: Toward a Minor Comparativism*, 63 AM. J. COMP. L. 655, 693 (2015) (describing how new American citizens perform Americanism); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 25-41 (1996) (describing negotiation as a "ritual" in which participants play roles).

12. See, e.g., Jessie Allen, *Theater of International Justice*, 3 CREIGHTON INT'L & COMP. L.J. 131 (2012) (using Richard Schechner's work to assess the effectiveness of international human rights tribunals); Emiliano J. Buis, *How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals*, 16 FLA. J. INT'L L. 697 (2004) (comparing the performative elements of Greek theory and jury trials); see also Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 645-54 (2001) (analyzing slavery and race trials as performances); Caroline Wake, *Caveat Spectator: Juridical, Political and Ontological False Witnessing in CMI (A Certain Maritime Incident)*, 14 L. TEXT CULTURE 160, 162 (2010) (exploring how performance studies research might illuminate theories of witnessing).

13. See, e.g., A. Christopher Bryant, *Nigro v. United States: The Most Disingenuous Supreme Court Opinion, Ever*, 12 NEV. L.J. 650 (2012); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 265 (2004).

14. See, e.g., *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting) ("Those who are bound by our decisions usually believe they can take us at our word. Not so today.").

15. See RONALD DWORKIN, *LAW'S EMPIRE* ch. 5 (1986).

The continuing power of “higher-law” and “rule-of-law” myths forces them to conform their opinions to a natural-law world view whose conceptual underpinnings have dissolved: that judges must only “find” and never “make” the law they apply.

This Essay argues that decision-making in the Supreme Court is best understood as a *performance* of precedent that can be criticized on that ground. Part I sketches a working definition of “performance” drawn from the relatively new field of performance studies, illustrating its paradoxical combination of present and past, copy and original, creation and reenactment. Part II shows how two path-breaking decisions in the Supreme Court’s development of religious free-exercise doctrine, *Employment Division v. Smith* and *Burwell v. Hobby Lobby Stores, Inc.*,<sup>16</sup> succeeded and failed as judicial performances. Part III generalizes the point these cases exemplify: the shift of American jurisprudence from natural law to positivism forced judges into a performative role in which they surreptitiously create constitutional law while denying they do so. Criticism of the Court, therefore, should focus, not on whether it has been “honest” in choosing and reading its precedents, but on whether its performance of them is recognizable *as performance* – that is, as a recitation of precedent that is faithful *and* creative. The Essay concludes with an ironic sketch, illustrating how performance illuminates the absurdity and inevitability of the conventional view of judicial decision-making.

### I. THE PARADOX OF PERFORMING

Performance theory emerged as a distinct academic field in the 1990s. The pioneers were departments of “performance studies” established at New York University and Northwestern University in the early 1980s.<sup>17</sup> Both sought to enlarge the study of performance from the “performing arts” – music, dance, theatre –

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16. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). While formally *Hobby Lobby* was a statutory decision interpreting the Religious Freedom Restoration Act, the close relation of RFRA to the Free Exercise Clause and the Court’s free-exercise decisions makes it *de facto* constitutional. Cf. Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993).

17. See generally RICHARD SCHECHNER, *PERFORMANCE STUDIES: AN INTRODUCTION* ch. 1 (3d ed. 2013) [hereinafter SCHECHNER, *PERFORMANCE STUDIES*] (recounting the development of performance studies as a distinct academic discipline).

to a “broad spectrum” of activities also marked by performativity – “rituals, healing, sports, popular entertainments, and performance in everyday life.”<sup>18</sup>

Performance is a paradoxical combination of enactment and reenactment, presentation and representation. Richard Schechner, a major figure in performance studies, defines “performance” as “twice-behaved” or “restored” behavior.<sup>19</sup> (I will generally use the latter term.) As restored behavior, performance is the repetition of behavior first effectuated elsewhere according to “some pre-existing model, script, or pattern of action” that the performance follows.<sup>20</sup>

Restored behavior is an obvious characteristic of art forms that require rehearsal, training, or practice, like the performing arts, but it is also a quality of ordinary life, as Erving Goffman first claimed.<sup>21</sup> Activity in the workplace, for example, is a self-presentation crucial to both one’s own sense of self and the impressions formed by workplace peers.<sup>22</sup>

What is true of the workplace is true of every dimension of ordinary life. Like the performing arts, “everyday life also involves years of training and practice, of learning appropriate culturally specific bits of behavior, of adjusting and performing one’s life roles in relation to social and personal circumstances.”<sup>23</sup> Like the theatre, life consists of a “front” visible to others, and a “back” whose inaccessibility encourages the illusion that one’s visible behavior is unrehearsed and all there is.<sup>24</sup> Victor Turner elaborated: “[A]ll social interaction is staged—people prepare backstage, confront others while wearing masks and playing roles, use the main stage area for the performance of routines, and so on.”<sup>25</sup> Ordinary life is

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18. Richard Schechner, *Performance Studies: The Broad Spectrum Approach*, in THE PERFORMANCE STUDIES READER 7, 7–8 (Henry Bial ed., 2d ed. 2007) [hereinafter Schechner, *Broad Spectrum*] (“Performing arts curricula need to . . . add[] . . . how performance is used in politics, medicine, religion, popular entertainments, and ordinary face-to-face interactions.”).

19. SCHECHNER, PERFORMANCE STUDIES, *supra* note 17, at 28–29.

20. MARVIN CARLSON, PERFORMANCE: A CRITICAL INTRODUCTION 12 (2d ed. 2004); *see also* SCHECHNER, PERFORMANCE STUDIES, *supra* note 17, at 35 (“[A]ll behavior is restored behavior—all behavior consists of recombining bits of previously behaved behaviors.”).

21. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

22. *E.g., id.* at 47, 55–56, 64.

23. SCHECHNER, PERFORMANCE STUDIES, *supra* note 17, at 28–29.

24. GOFFMAN, *supra* note 21, at 107–19.

25. VICTOR TURNER, THE ANTHROPOLOGY OF PERFORMANCE 74 (1986).



rehearsed, like a play or a dance. As Goffman observed, “The world, in truth, is a wedding.”<sup>26</sup>

Even events that stand out from ordinary life can be understood as twice-behaved despite their apparent singularity. “[T]he ‘latest,’ ‘original,’ ‘shocking,’ or ‘avant-garde’ is mostly either a new combination of known behaviors or the displacement of a behavior” from a known to an unexpected context or occasion.<sup>27</sup> For example, many Americans saw the seemingly unprecedented terrorist attacks of 9/11 through the lens of Pearl Harbor, including even those too young to have had a personal memory of Pearl Harbor.<sup>28</sup>

As restored behavior, performance presupposes origins from which one is temporally distanced. Bits of previous behaviors are recombined in present performances, yet no single implementation or execution of such recombinations is the same as another.<sup>29</sup> Performative behavior is “‘twice-behaved,’ made up of new combinations of previously enacted doings.”<sup>30</sup> In its simplest form, performance is pretending to be someone else by self-consciously re-enacting the other’s previously enacted behavior.<sup>31</sup>

An early and important illustration of the paradoxical character of performance was Albert Lord’s *The Singer of Tales*.<sup>32</sup> Lord argued that the epic poems of Western literature were oral rather than literary.<sup>33</sup> He showed that the *Iliad*, the *Odyssey*, *Beowulf*, and other oral poems were not recitations of pre-existing written texts, but free-flowing oral presentations:

The poet who first sang these songs . . . never thought of his song as being at any time fixed either as to content or as to wording. He was the author of each singing. And those singers who learned from him the song of Achilles or that of Odysseus continued the changes of oral tradition in their performances; and each of them was author of each of his own singings. The songs

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26. GOFFMAN, *supra* note 21, at 36.

27. SCHECHNER, *PERFORMANCE STUDIES*, *supra* note 17, at 35.

28. See, e.g., Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002).

29. CARLSON, *supra* note 20, at 47; SCHECHNER, *PERFORMANCE STUDIES*, *supra* note 17, at 30, 35; see also *supra* text accompanying note 23.

30. SCHECHNER, *PERFORMANCE STUDIES*, *supra* note 17, at 220.

31. CARLSON, *supra* note 20, at 3.

32. ALBERT B. LORD, *THE SINGER OF TALES* (1960).

33. See, e.g., *id.* at 141–49.

were ever in flux and were crystallized by each singer only when he sat before an audience and told them the tale. It was an old tale that he had heard from others but that telling was his own.<sup>34</sup>

Lord's analysis of oral poems illustrates performance's paradoxical combination of iteration and singularity. The performance of these oral poems followed a narrative pattern, always telling a particular story but in a different way. The poem was realized only in its performance; there was no absent text brought into presence by its recitation.<sup>35</sup> The performance *was* the poem and *all* of it that could be said to exist. Such performances were never and could never be the same, though each one followed a narrative template that told the same story differently.

#### A. Iterability and Citability

A performance is paradoxically both copy and original.<sup>36</sup> It is composed of "iterations" or "citations" of previously behaved behavior, and yet re-presents this previous behavior through activity that is but fleetingly there, an ephemeral presentness that exists only in the moment. The thematization of performance is thus intellectually indebted to Jacques Derrida's analysis of iteration and citation in writing and language. Derrida argued that writing is constituted by the absence of both author and addressee, capable of functioning, of "meaning," in the absence of both.<sup>37</sup> The essential characteristic of written signs, in other words, is their "iterability" – their ability to constitute meaning even in the absence of the original context that first stabilized their meaning.<sup>38</sup>

Iterability characterizes all utterances. Every sign, oral or written, linguistic or nonlinguistic, simple or complex, can be "cited" – "cut off, at a certain point, from its 'original' desire-to-say-what-one-means . . . and from its participation in a saturable and constraining context."<sup>39</sup> By putting words in quotation marks, one

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34. *Id.* at 151–52.

35. *Id.* at 219.

36. See SCHECHNER, PERFORMANCE STUDIES, *supra* note 17, at 30.

37. See Jacques Derrida, *Signature Event Context* (Samuel Weber & Jeffrey Mehlman trans., 1977), in JACQUES DERRIDA, LIMITED INC 7–9 (Gerald Graff ed., 1988).

38. *Id.* at 7, 10.

39. *Id.* at 12.

can sever them from “every given context, engendering an infinity of new contexts in a manner which is absolutely illimitable.”<sup>40</sup>

Iterability and citation enable the repetition or representation of a behavior in a different context that accordingly produces a different meaning. The context for the original behavior may not be known; even if it is, the original context cannot control the meaning of its own citation. Over time, the original of restored behavior may recede into a barely remembered background as part of an imagined or mythic narrative of origin.

Successful performances cite a pre-existing set of words whose invocation achieves the intended performative effect.<sup>41</sup> But because a citation is necessarily shorn from its original authorial context and placed in another, the intention of the author or speaker who first wrote or spoke the cited text or utterance does not determine its performative meaning; in citation, intention cannot “govern the entire scene and system of utterance,” because “the intention animating the utterance will never be through and through present to itself and to its content.”<sup>42</sup>

It is ironic that citations are invoked as pre-existing authorities when their cited content and meaning are not determinate and stable. Judith Butler concludes that a citation does not possess authority because it points to particularized meaning, but acquires its authority rather through a repetition that actually obscures its indeterminacy:

If a performative provisionally succeeds . . . , then it is not because an intention successfully governs the action of speech, but only because that action echoes prior actions, and accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices. . . . [A] performative “works” to

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40. *Id.*

41. *See id.* at 18.

Could a performative utterance succeed if its formulation did not repeat a “coded” or iterable utterance, or in other words, if the formula I pronounce in order to open a meeting, launch a ship or a marriage were not identifiable as *conforming* with an iterable model, if it were not then identifiable in some way as a “citation”?

*Id.*

42. *Id.*

the extent that it draws on and covers over the constitutive conventions by which it is mobilized.<sup>43</sup>

Even the “improper” use of a performative – that is, the citation of a text or utterance in a way or for a meaning that seems to contradict its original meaning – “can succeed in producing the effect of authority where there is no recourse to a prior authorization.”<sup>44</sup> (E.g., “#FakeNews!”) Citations are performatives that do not simply re-cite prior meanings but produce their own meanings and effects in reciting the original.<sup>45</sup>

Schechner employed the evocative metaphor of the film director to capture the iterative character of performance.<sup>46</sup> The director cuts and splices filmed “strips” of scenes – recorded performances – into a unified narrative that did not previously exist.<sup>47</sup> In this view, life itself consists of “citation” – the endless composition and recomposition of “known bits of behavior rearranged and shaped in order to suit specific circumstances.”<sup>48</sup>

In sum, citations are pre-existing texts or previously enacted behaviors that can be repeated. Their iterative character permits their removal from prior contexts and their placement into new ones, while still continuing to have meaning. Because the prior contexts (including the intentions of the author or speaker) are not present to the new context, they cannot control the cited text’s or restored behavior’s meaning, which is instead determined by the new context.<sup>49</sup>

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43. JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 51 (1997) (emphasis deleted).

44. *Id.* at 158.

45. *Id.* at 158–59.

46. RICHARD SCHECHNER, *BETWEEN THEATRE AND ANTHROPOLOGY* 35–36 (1985).

47. *Id.* Schechner was apparently inspired by Erving Goffman’s notion of “strips of experience” – “sequences or happenings” set apart “from the ongoing stream of human behavior” that can be manipulated or managed, replicated and transformed to create different meanings. See CARLSON, *supra* note 20, at 45–47 (discussing ERVING GOFFMAN, *FRAME ANALYSIS* 10 (1974)).

48. SCHECHNER, *PERFORMANCE STUDIES*, *supra* note 17, at 29.

49. *Id.* at 34–35.

B. "Once-ness" and "This-ness"

Performance theory thematizes human activity in the moment, at a particular time and place.<sup>50</sup> It is accordingly focused on the body. Unlike a written text, which can be read repeatedly and without respect to its place of origin, the bodily activity that constitutes performance can take place only at a particular time and in a particular space.<sup>51</sup>

The term "thisness" captures this notion that performance embodies a unique encounter in time and space that did not exist before and will not exist again.<sup>52</sup> It challenges the assumption that the "aura" of a work is something attached to or embedded in the work that underwrites its authenticity.<sup>53</sup> The aura is instead performative, an experience of the work in time and space made possible by encountering it under particular, even unique, conditions:

[A] performance is not just any performance—it is *this* performance of *a* work that is *a* text . . . . Though *the* text may have *the same* words, appearing in *the same* order, and may even be spoken by *any* person—each time it is encountered in *a* performance it is *a* text, *this* text.<sup>54</sup>

"Once-ness" and "thisness" compose the awareness of the singular "be-here-now" that happens in performance, even when the performance is of a written or familiar text.<sup>55</sup>

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50. See Schechner, *Broad Spectrum*, *supra* note 18, at 8 (noting the "complex and various relationships among the players in the performance quadrilog—authors, performers, directors, and spectators").

51. See, e.g., W.B. Worthen, *Disciplines of the Text: Sites of Performance*, in THE PERFORMANCE STUDIES READER, *supra* note 18, at 10.

52. The term was coined by Gordon Coonfield & Heidi Rose, *What Is Called Presence*, 32 TEXT & PERFORMANCE Q. 192, 192 (2012).

53. *Id.* at 193 (discussing Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in WALTER BENJAMIN, ILLUMINATIONS 220–21 (Hannah Arendt ed., Harry Zohn trans., 1968)).

54. Coonfield & Rose, *supra* note 52, at 201.

55. *Id.* at 194.

## II. PERFORMING FREE EXERCISE

The Free Exercise Clause constrains federal and state governments from “prohibiting” the “free exercise” of religion.<sup>56</sup> When the Supreme Court first applied this clause to the states,<sup>57</sup> it construed the clause to protect absolutely a freedom to believe whatever one wishes, but to protect only conditionally the freedom to act out such beliefs. The First Amendment “embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”<sup>58</sup> Action, the Court reasoned, must be subject to government regulation for the good of society.<sup>59</sup>

This “belief/action” distinction initially yielded scant protection for religious exercise,<sup>60</sup> but the Court soon announced a more protective doctrine in *Sherbert v. Verner*.<sup>61</sup> Considering the appeal of a Seventh-Day Adventist who had lost her job and then been denied unemployment benefits because she refused to work on Saturday (her Sabbath), the Court held that a state may burden religious exercise only if doing so is necessary to a “compelling” or especially important government interest.<sup>62</sup>

The Court strengthened this “compelling-interest” test in *Wisconsin v. Yoder*, a 1972 decision in which the Court excused a group of Amish parents from sending their children to public school beyond the eighth grade despite a state law requiring attendance until age sixteen.<sup>63</sup> The parents claimed that the high school environment was so corrosive of Amish values that compulsory attendance would threaten their ability to pass their religion on to

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56. The full text reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

57. Although by its terms the Free Exercise Clause binds only the federal government, the Supreme Court “incorporated” it against the states in 1940 through the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

58. *Id.* at 303–04.

59. *Id.* at 304.

60. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961) (holding that the Sunday closing law did not burden the religious exercise of an orthodox Jewish merchant whose religion forbade working Friday night and Saturday, because the burden was only “indirect”).

61. *Sherbert v. Verner*, 374 U.S. 398 (1963).

62. *Id.* at 403, 406–07.

63. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

the next generation.<sup>64</sup> Though preparing children to become productive and informed citizens through compulsory school attendance is a quintessentially “compelling” government interest,<sup>65</sup> the Court held that the state lacked a compelling interest in enforcing the law *against the Amish*, because the practical training they provided their teenaged children constituted an adequate substitute for compulsory public education.<sup>66</sup>

The Court affirmed this “compelling-interest” test multiple times over the ensuing years, strengthening it in modest respects,<sup>67</sup> but also carving out notable exceptions.<sup>68</sup> Although the compelling-interest test was articulated in language almost identical to that of the “strict scrutiny” the Court uses in equal protection and fundamental rights cases,<sup>69</sup> the Court applied the compelling-interest test with much less rigor. Whereas government action rarely satisfies strict scrutiny of suspect classifications or interference with fundamental rights, the courts frequently upheld government

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64. *Id.* at 217–19.

65. *See id.* at 221–22.

66. *Id.* at 225–26, 228–29, 235–36.

67. *See, e.g.,* *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834–35 (1989) (holding a claimant need not belong to an organized religion or sect to receive protection from the compelling-interest test, so long as the burdened religious practice is sincerely held); *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715–16 (1981) (holding a claimant’s religious views need not conform to the normal understanding of others of his faith).

68. *See, e.g.,* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (holding the compelling-interest test does not apply to burdens on religious exercise caused by government’s management of its real property); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (same with respect to burdens on religious exercise of prison inmates); *Bowen v. Roy*, 476 U.S. 693 (1986) (same with respect to burdens caused by government’s management of its internal affairs); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (same with respect to burdens on religious exercise of members of military).

69. *Compare Thomas*, 450 U.S. at 708 (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”), *and* *United States v. Lee*, 455 U.S. 252, 257–58 (1982) (“The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”), *with* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[Racial and ethnic] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”), *and* *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

action that burdened religious exercise under the compelling-interest test.<sup>70</sup>

#### A. *Employment Division v. Smith* (1990)

Then suddenly, all this changed. Although the Court unambiguously affirmed the compelling-interest test in 1989,<sup>71</sup> one year later it reversed course. In *Employment Division v. Smith*, the Court held that the Free Exercise Clause offers no protection against incidental government burdens on religious exercise generated by general and neutral laws.<sup>72</sup> The claimants in *Smith* were members of the Native American Church who lost their jobs as drug rehabilitation counselors and were subsequently denied unemployment benefits because they participated in a Church ritual that included the ingestion of peyote, a state-prohibited hallucinogenic.<sup>73</sup> The lower court ruled that the criminality of the religious activity was not a justification for denying unemployment insurance benefits, and the state unemployment commission appealed to the Supreme Court.<sup>74</sup>

The Court reversed, holding that termination for criminal activity distinguished this case from its many prior precedents upholding one's right to unemployment benefits when terminated because of religious activity.<sup>75</sup> The Court might have stopped there, having merely clarified yet another exception to the compelling-interest test, for criminal violations. But it was intent on more. "We have never held," insisted the Court, "that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>76</sup> Then it doubled down: "On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."<sup>77</sup> Although *Yoder* had been understood to inform the compelling-

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70. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (government has historically satisfied strict scrutiny in 59% of religious exemption cases, but only 27% of racial and other suspect-class discrimination cases).

71. *Frazee*, 489 U.S. at 835.

72. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

73. *Id.* at 875.

74. *Id.* at 876.

75. *Id.* at 876, 882.

76. *Id.* at 878-79.

77. *Id.* at 879.



interest test, the Court refashioned it into a “hybrid-rights” exception: “The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .”<sup>78</sup> *Yoder*, in this telling, was never an important interpretation of the compelling-interest test, but only the exceptional coincidence of a free-exercise claim with a due-process parental-rights claim.

The Court similarly cabined *Sherbert* and its progeny by reading them as an exception triggered when bureaucrats exercise discretion in granting or denying government benefits: “[A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant’s unemployment.”<sup>79</sup> Accordingly, “[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”<sup>80</sup>

When the dust cleared in *Smith*, the Court had eliminated constitutional free-exercise claims when a law incidentally (as opposed to intentionally) burdens religious practice.<sup>81</sup> Although *Smith* remains controversial in some quarters, the Court has repeatedly affirmed it.<sup>82</sup>

### B. *Burwell v. Hobby Lobby Stores, Inc. (2014)*

*Smith* created a firestorm of controversy over the Court’s wholesale revision of free-exercise doctrine. In short order, Congress enacted and the President signed the Religious Freedom

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78. *Id.* at 881.

79. *Id.* at 884.

80. *Id.*

81. A subsequent decision clarified that the compelling-interest test continues to apply to laws that target religion as such. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

82. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–61 (2014); *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 694 n.24 (2010); *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997); *see also Hosanna-Tabor Evangel. Lutheran Ch. & Sch. v. EEOC*, 565 U.S. 171 (2012) (unanimous decision) (distinguishing *Smith*).

Restoration Act (RFRA), which provides that government may not burden the exercise of religion unless the burden is the “least-restrictive means” of pursuing a “compelling governmental interest.”<sup>83</sup> RFRA thus echoed the compelling-interest test of the Court’s pre-*Smith* free-exercise doctrine, and it was widely assumed that it had simply statutorily enacted the modestly heightened scrutiny of incidental burdens on religion that the Court had constitutionally abandoned in *Smith*.<sup>84</sup>

This understanding unraveled in *Burwell v. Hobby Lobby Stores, Inc.*<sup>85</sup> There, the conservative Christian owners of Hobby Lobby sought a RFRA exemption from the so-called “contraception mandate” of the Affordable Care Act, which requires employer and other health plans to cover all FDA-approved contraceptives without “cost-sharing” – that is, without additional out-of-pocket expense beyond the basic insurance premium.<sup>86</sup> Believing that life begins at conception, Hobby Lobby and its owners religiously objected to health plan coverage of IUDs and other emergency contraception that occasionally prevent pregnancy after conception, on the ground that these methods are tantamount to abortion.<sup>87</sup>

The mandate categorically exempted churches and other “houses of worship” and also included a complex accommodation of the religious objections of religious nonprofit businesses such as religiously sponsored hospitals, colleges, and social service agencies.<sup>88</sup> No comparable accommodation was provided to business corporations or their owners with religious scruples about contraception.<sup>89</sup>

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83. 42 U.S.C. § 2000bb-1 (2012). Four years after RFRA’s passage the Court held it inapplicable to state action. *Boerne*, 521 U.S. at 535–36.

84. See, e.g., *Gonzalez*, 546 U.S. at 424 (construing RFRA to have “adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*”).

85. *Hobby Lobby*, 134 S. Ct. 2751.

86. 45 C.F.R. § 147.130(a)(1)(i)–(a)(1)(iv); see *Hobby Lobby*, 134 S. Ct. at 2762. Hobby Lobby’s claim was consolidated with that of another business corporation also owned by conservative Christian shareholders, *Conestoga Wood Specialties Corporation*.

87. *Hobby Lobby*, 134 S. Ct. at 2764–65.

88. For details about the mandate and its various exemptions and accommodations, see Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 343, 350–56 (2014).

89. The government never sought to explain why it did not include business corporations within the religious nonprofit accommodation. It might have assumed that since the Court had never granted a religious exemption to a business corporation or its

The Court held in *Hobby Lobby* that the “least-restrictive means” component of RFRA’s compelling-interest test required the extension of the religious nonprofit accommodation to business corporations and their owners who religiously object to some or all of the mandated contraception coverage.<sup>90</sup> The Court reasoned that since the government already had in place the accommodation for religious nonprofits, which still accomplished its goal of contraception coverage without cost-sharing, RFRA’s least-restrictive means requirement obligated extension of that exemption to Hobby Lobby and other closely held business corporations and shareholders with the same objections.<sup>91</sup> Recognizing that the Court’s pre-*Smith* precedents had never found the compelling-interest test to entail such a strict alternatives analysis, the Court rendered those precedents irrelevant by ruling that RFRA’s statutory least-restrictive means test effected a “complete separation” from the pre-*Smith* cases.<sup>92</sup>

One precedent remained standing. In *United States v. Lee*, the Court had refused to exempt an Amish employer from paying Social Security taxes for his employees because of the complexity of the social security taxing scheme,<sup>93</sup> even though participation in social welfare programs seriously burdened his religion and Congress had exempted self-employed Amish from paying such

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shareholders, confining the accommodation to religious nonprofit businesses was a plausible and easily administered exemption boundary. *Cf. Hobby Lobby*, 134 S. Ct. at 2773 (“HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws.”). Because the accommodation is not costless when claimed by self-insured entities and their owners, the government might have feared that extending the accommodation to the vastly larger for-profit sector would exhaust available funds and undermine the mandate’s goal of universal no-cost contraception coverage, with little prospect of additional funding from a polarized and hostile Congress. *Cf. Andrew Koppelman & Frederick M. Gedicks, Is Hobby Lobby Worse for Religious Liberty than Smith?*, 9 U. ST. THOMAS J.L. & PUB. POL’Y 223 (2015) (explaining how extending the accommodation to business corporations could dramatically increase its cost to the government, and noting that elimination of federal contraception funding programs is a long term goal of the same political coalition that opposes the mandate).

90. *Hobby Lobby*, 134 S. Ct. at 2780–83.

91. *Id.*; see also *id.* at 2785 (Kennedy, J., concurring) (agreeing that extending the nonprofit accommodation to closely held business corporations and their owners was a less restrictive alternative to imposition of the mandate, but expressing doubt that enactment of an entirely new government program of contraception insurance or payment was such an alternative).

92. *Id.* at 2762; see also *id.* at 2761 n.3, 2767 n.18.

93. *United States v. Lee*, 455 U.S. 252, 261 (1982).

taxes on their own wages for precisely that reason.<sup>94</sup> The Court distinguished *Lee* from the contraception mandate on the ground that the courts owe special deference to congressional exemption decisions in complex revenue-raising programs.<sup>95</sup>

RFRA emerged from *Hobby Lobby* as a far more robust safeguard of religious exercise than the pre-*Smith* exemption cases it purported to restore. In particular, *Hobby Lobby* marked the Court's commitment to a stringent understanding of the least-restrictive means component of RFRA's compelling-interest test.

### C. Performance Reviews

Judicial opinions share some of the temporal, tactile, and other embodied characteristics that constitute the "thisness" of performance despite being in writing.<sup>96</sup> They are announced at predetermined times during open sessions of the Court, which the Justices attend in judicial robes. For each case, all or part of the majority opinion is often read from the bench by the Justice who wrote it, followed by readings of concurring and dissenting opinions by other Justices. News media frequently report the vigor and emotion with which the Justices read their opinions as well as the atmosphere in the courtroom. Though it persists as a writing, the judicial opinion nevertheless constitutes a sorting out of unique factors in time and space, history and culture, which will not occur again under identical conditions.

*Smith* and *Hobby Lobby* are thus instances of restored behavior despite their writtenness. Each opinion is a singular event; subsequent opinions follow and cite each of them, but no subsequent opinion will ever be "them" – that is, will ever capture in writing their distinct disassembly, reconstruction, and erasure of free-exercise precedents into entirely new doctrine. The Court's accounts of free-exercise doctrine in *Smith* and *Hobby Lobby* exhibited the paradoxical iteration and singularity of performances – restored behavior rearranged to create an original. But the opinions were not

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94. *Id.* at 255–56, 255 n.4.

95. *Id.* at 259.

96. See Coonfield & Rose, *supra* note 52, at 198. On the other hand, the vigor and emotion with which the Justices read their opinions from the bench, and the corresponding atmosphere in the courtroom, are often noted by media and others who report on the Court.

performative equals: *Smith's* performance is defensible, even brilliant, while *Hobby Lobby's* is neither.

### 1. *Performing Smith*

*Smith* was controversial, to be sure; creative performances often are. *Smith* is easy to criticize as doctrine. It eliminated a modest-yet-meaningful protection of religious exercise burdened by government action. The rate of constitutional invalidation under the pre-*Smith* compelling-interest test, while significantly lower than the corresponding rate in equal protection and fundamental rights cases, was still substantially higher than the rate in cases subject to minimal rational-basis scrutiny, which almost never results in invalidation of government action.<sup>97</sup> *Smith* eliminated this protection by decontextualizing the Court's free-exercise precedents and re-contextualizing them to signify the *opposite* of what they had long been understood to mean. *Smith* turned free-exercise doctrine inside-out: the compelling-interest test announced in *Sherbert* and strengthened in *Yoder* was recast as the exception, while previous exceptions became the rule.

And yet, *Smith* is defensible as performance. Its major doctrinal surgery was bracing, but also plausible, addressing a serious and growing problem: the implausibility of applying heightened judicial scrutiny to incidental as well as targeted burdens on religious practice. The United States is a religiously plural social welfare state with an impossibly diverse range of religious belief that is constantly ensnared in a vast web of regulations and entitlements. Application of the compelling-interest test to every religiously burdensome government action threatened a world in which believers might seek exemption from every law the government might enact. As the Court reasoned,

Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule

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97. See *supra* note 70 and accompanying text.

[claimants] favor would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind . . . .<sup>98</sup>

This conundrum has only increased in the years since, as diversity, regulation, and entitlements have grown apace.

There were answers to the Court's (somewhat exaggerated) specter of religious-exemption chaos, but their preservation of the compelling-interest test entailed unacceptable costs. One might have confined the compelling-interest test to burdens on "central" or "important" religious practices. This, however, would have violated the Establishment Clause prohibition on government entanglement in religious doctrine.<sup>99</sup> It is difficult to imagine a clearer establishment of religion than a doctrinal regime in which courts tell religions which of their practices are central to their faith and which are not. As the Court noted in *Smith*, "[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."<sup>100</sup>

Alternatively, one could have made explicit what had become clear by the time *Smith* was decided: that the compelling-interest test was, at best, a modest form of heightened scrutiny despite its linguistic resemblance to the classic strict scrutiny of equal protection and fundamental rights analysis.<sup>101</sup> Its pre-*Smith* application to incidental burdens, therefore, was not a major obstacle to social welfare regulations and other entitlements that licensed widespread violation of law. The Court, however, correctly (and presciently) noted that calling different tests by the same name was bound to end badly, confounding different doctrines of constitutional law,<sup>102</sup> and risking dilution of classic strict scrutiny in equal

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98. *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990) (internal quotation marks and citation omitted).

99. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183–84 (2012); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 131 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872).

100. *Smith*, 494 U.S. at 887.

101. E.g., Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1215 (1996); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 101–04 (1991).

102. *Smith*, 494 U.S. at 886.

protection and fundamental rights contexts in which exacting judicial review is crucial to the protection of important norms.<sup>103</sup>

In the end, the Court in *Smith* persuasively reread its free-exercise precedents to have already eliminated claims for relief from purely incidental government burdens on religion. Its performance was not without hiccups; the “hybrid-rights” exception for *Yoder* is a doctrinal line-drop if ever there was one, and it remains baffling that the Court would quote an overturned precedent as authority.<sup>104</sup> Nevertheless, the limitations of generality and neutrality and the dangers of standardless discretion that it read from the remaining pre-*Smith* decisions are plausible constructions that leave those decisions in recognizable (if altered) form. The success of the Court’s precedential performance in *Smith* is perhaps best evidenced by its wide (if sometimes grudging) acceptance across most of the church/state spectrum.<sup>105</sup>

## 2. *Performing* Hobby Lobby

*Hobby Lobby* should be so fortunate. To justify its decision there, the Court had to rewrite or ignore history (it did some of both). The Court there faced the reciprocal of the problem it resolved in *Smith*, the possibility that the social welfare state, if left unchecked, would leave no activity outside home and congregation unregulated, thus driving believers from public life or forcing them to abandon their faith as the price of participation.<sup>106</sup> But its solution to this problem had all the subtlety of a blunt-force instrument.

The Court attempted to demonstrate that RFRA had not, in fact, enacted the modest balancing test of the pre-*Smith* cases, but the classic and rigorous strict scrutiny applied to suspect classifications and violations of fundamental rights. The Court was aided by its

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103. *Id.* at 888.

104. Justice Scalia quoted *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586, 594–95 (1940), in support of his majority opinion without noting that the decision was overruled only three years later by *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). See *Smith*, 494 U.S. at 879.

105. E.g., Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815 (2011) (accommodationist defense of *Smith*); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (separationist defense of *Smith*).

106. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014).

own prior error. In *City of Boerne v. Flores*, relying on a dictum apparently drawn from the city's brief,<sup>107</sup> the Court called RFRA's compelling interest standard the "most demanding test known to constitutional law,"<sup>108</sup> and further found that the test "was not used in the pre-*Smith* jurisprudence."<sup>109</sup> Both of these statements were flatly wrong, directly contradicting both the pre-*Smith* exemption cases and RFRA's statutory text and legislative history.

The pre-*Smith* cases expressly recognized a least-restrictive means component of the compelling-interest test; they just did not apply it with the rigor used in classic strict scrutiny.<sup>110</sup> RFRA, moreover, expressly identified *Sherbert*, *Yoder*, and other pre-*Smith* decisions as the source of the standard of review that the statute meant to restore,<sup>111</sup> calling the compelling-interest standard they applied "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."<sup>112</sup> It is impossible to imagine, by contrast, a contemporary Congress's calling classic strict scrutiny in equal protection cases "a workable standard for striking sensible balances between the rights of racial minorities to equal treatment and competing government interests in racial discrimination"; strict scrutiny is applied in such cases precisely to invalidate racial discrimination by government in

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107. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 431 (2016). Lederman speculates that for tactical reasons neither the United States nor the opposing party wished to dispute this characterization. *Id.* at 431-32.

108. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

109. *Id.* at 535.

110. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Sherbert v. Verner*, 374 U.S. 398, 397-98 (1963) (Even assuming that the state's interests in preventing fraud were sufficiently weighty to justify denying claimant unemployment benefits, "it would plainly be incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."); *Braunfeld v. Braun*, 366 U.S. 599, 607 (1961) (A statute that incidentally burdens religious exercise does not violate the Free Exercise Clause "unless the State may accomplish its purpose by means which do not impose such a burden.").

111. 42 U.S.C. § 2000bb(b)(1) (2012) (declaring that a purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*") (citations omitted).

112. *Id.* § 2000bb(a)(5).



almost all circumstances.<sup>113</sup> And certainly it would have made little sense for Congress to speak of “restoring” classic strict scrutiny when the Court had never before applied such a rigorous standard in religious exercise cases.

RFRA’s legislative history is also replete with assurances by congressional committees and individual members that RFRA would merely enact the compelling-interest test that was in the Court’s pre-*Smith* jurisprudence.<sup>114</sup> When RFRA’s passage was threatened by a coalition of anti-abortion activists who feared RFRA would create a federal statutory right to abortion for those whose religious beliefs might compel abortion in particular circumstances, its co-sponsors clarified that RFRA would enact only the modest balancing text of the pre-*Smith* compelling-interest standard, not the strict scrutiny traditionally applied to suspect classifications or violations of fundamental rights like access to abortion.<sup>115</sup> Similarly, when RFRA was attacked by public school and prison administrators who feared it would subject their every move to classic strict scrutiny, its co-sponsors took to the Senate floor to clarify that the restored compelling-interest test would not require the invalidation of all or most religiously burdensome government actions.<sup>116</sup> Federal court decisions after RFRA’s enactment thus applied RFRA with the same modest scrutiny with which they had deployed the pre-*Smith* compelling-interest test, striking down some religiously burdensome government actions

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113. See, e.g., Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“Strict scrutiny” is “‘strict’ in theory and fatal in fact.”). The Court has applied what appears to be a somewhat relaxed version of strict scrutiny to affirmative action in higher education. See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003). This diluted version made its appearance a decade after RFRA and thus could not have been the standard of review RFRA meant to restore in religious exercise cases.

114. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2792 (Ginsburg, J., dissenting) (collecting quotations from RFRA’s legislative history).

115. See Lederman, *supra* note 107, at 428–31 (summarizing and quoting legislative history on this issue).

116. See Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 119–22 (2017) (summarizing floor debate and subsequent amendment of RFRA clarifying that it applies only to “substantial” burdens on religious exercise).

but upholding the majority, despite its semantic resemblance to classic strict scrutiny.<sup>117</sup>

Rather than performing a creative new arrangement of the relevant cases and history in *Hobby Lobby*, the Court chose the risky strategy of going off script. Quoting its mistaken *Boerne* dictum, the Court insisted in the face of the evidence that the pre-*Smith* cases did not use the least-restrictive means requirement enacted in RFRA, and on this authority concluded that “RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.”<sup>118</sup> Citing no authority other than its error in *Boerne*, and ignoring the many precedential and historical authorities in opposition, the Court found it “obvious” that RFRA and RLUIPA had effected – and had intended to effect – a “complete separation” from the pre-*Smith* case law.<sup>119</sup> The Court ridiculed the very suggestion that RFRA should be understood in terms of the pre-*Smith* cases: “[T]he results would be absurd if RFRA merely restored this Court’s pre-*Smith* decisions in ossified form . . . .”<sup>120</sup>

Finally, in a remarkable display of performative chutzpah, the Court in *Hobby Lobby* cited, for other purposes, numerous pre-*Smith* decisions that had also – and explicitly – included the least-restrictive means requirement in their statement and application of the compelling-interest test. The Court noted in *Hobby Lobby* that its decision in *Employment Division v. Smith* had abandoned the compelling-interest test of *Sherbert v. Verner*.<sup>121</sup> The Court cited and quoted *Braunfeld v. Brown* and *United States v. Lee* in support of its holding that business corporations have standing to raise free-

117. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 71–72 (2015).

118. *Hobby Lobby*, 134 S. Ct. at 2761 n.3; see *id.* at 2767 n.18 (“[I]n *City of Boerne* we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions.”).

119. *Id.* at 2761–62. RLUIPA is the Religious Land Use and Institutionalized Persons Act, enacted after *City of Boerne* invalidated the application of RFRA to the states. RLUIPA requires application of RFRA’s compelling-interest test to state land-use and prison laws and regulations which substantially burden religious exercise. 42 U.S.C. §§ 2000cc-2000cc-5 (2012).

120. *Hobby Lobby*, 134 S. Ct. at 2773.

121. *Id.* at 2760.

exercise claims,<sup>122</sup> and it distinguished *Lee* from its central holding because the former involved an exemption claim from tax rather than regulatory obligations.<sup>123</sup> Finally, the Court cited *Thomas v. Review Board* in support of its holding that courts reviewing RFRA claims must defer to the claimant's characterization of religious burden.<sup>124</sup> As I've just recited, *Sherbert*, *Braunfeld*, *Lee*, and *Thomas* all employed least-restrictive means analysis as part of their respective applications of the compelling-interest test.<sup>125</sup> The Court simply cherry-picked the citations and quotations it liked from each of these decisions without acknowledging that each of them also *expressly* invoked the very least-restrictive means requirement the Court claimed was "entirely new" with RFRA.<sup>126</sup>

### 3. Comparing Performances

One can perform a text without slavishly imitating it. Performance is both copy *and* original. It is now widely understood that even written plays and musical notation lack the fixed and determinate character that is habitually assigned them; directors and conductors have considerable discretion in deciding how to perform the underlying text.<sup>127</sup> And yet, a performance might depart so far from the text or notation that it is no longer recognizable as what it purports to be; the story is being told or the music played in such a way that it becomes, not the "twice-behaved" behavior of

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122. *Id.* at 2770, 2772.

123. *Id.* at 2783-84.

124. *Id.* at 2778.

125. See *supra* notes 110-13 and accompanying text.

126. See *United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an overriding governmental interest.") (emphasis added); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is *the least restrictive means* of achieving some compelling state interest.") (emphasis added); *Sherbert v. Verner*, 374 U.S. 398, 397-98 (1963) (Even assuming that the state's interest in preventing fraud was sufficiently weighty to justify denying claimant's unemployment benefits, "it would plainly be incumbent upon [the state] to demonstrate that *no alternative forms of regulation would combat such abuses* without infringing First Amendment rights." (emphasis added)); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (explaining that a religiously burdensome statute does not violate the Free Exercise Clause "unless the State may accomplish its purpose *by means which do not impose such a burden.*" (emphasis added)).

127. See Levinson & Balkin, *Performing Arts*, *supra* note 10, at 1610-14; Weisbrod, *supra* note 10, at 1442.

performance, but the “once-behaved” behavior of something entirely new.<sup>128</sup>

Like the dialogue and notes of a play or the musical notation of a symphony, so also the Constitution does not woodenly yield a single determinate meaning; it must be creatively interpreted before useful meaning can emerge.<sup>129</sup> Yet, however creatively one interprets the constitutional text, one must also be faithful to it. As Professor Scharffs has observed, the “first duty” of both musicians and lawyers is “fidelity to the text,” yet “interpretation is ubiquitous.”<sup>130</sup> Like the director of a play or musical, the author of a Supreme Court opinion might delete or add so much to the authorities it cites that they are no long recognizable as themselves. Daniel Kornstein has suggested, paraphrasing music critic Harold Schonberg, that judges “do” things to precedents, “sometimes elegantly and convincingly, sometimes outlandishly and stupidly.”<sup>131</sup>

The Court in *Smith* can be understood, like Schechner’s film editor, to have cut and spliced “strips of decisions” to assemble a standard of free exercise review that was both entirely new and yet latent in the Court’s free exercise tradition. But a performance can also leave out so much of what it purports to re-enact that it must be taken as an entirely new work. It is simply not accurate, for example, to say one has “performed” a particular play by leaving out most of the script and substituting entirely new material. The Court in *Hobby Lobby* edited out of RFRA every pre-*Smith* decision RFRA was intended to restore, because those decisions exposed the lie of its narrative—that RFRA enacted the rigorous alternative-means analysis of classic strict scrutiny. This was not a performance of the Court’s precedents, but a dismantling and replacing of them with a new legal structure.

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128. Cf. Levinson & Balkin, Book Review, *supra* note 10, at 422 (noting that theatrical performances sometimes may depart from the playwright’s text to such an extent “that audiences wonder whether to ask for their money back”).

129. Cf. Frank, *supra* note 10, at 1261 (describing the frustrations of composers with performances of their work that slavishly follow notations, calling such performances “unbearable caricature” and “nonsense”).

130. Scharffs, *supra* note 10, at 33.

131. DANIEL KORNSTEIN, *THE MUSIC OF THE LAWS* 108 (1st ed. 1982). Kornstein reports Schonberg as having recounted, “As a child, [I] realized that performers ‘did’ things to music—sometimes elegantly and convincingly, sometimes outlandishly and stupidly. It puzzled me that pianists could play the same work so differently.” *Id.*

*Smith's* new-performed-as-old doctrine has successfully displaced the pre-*Smith* compelling-interest test, not *despite* the originality of its precedential readings, but *because* of them. *Smith's* account of the precedents was both different and plausible in the sense that its readings were discernibly present in the precedents even though unconventional. It told a free-exercise story, one quite different from conventional pre-*Smith* decisions, but nevertheless recounted in a manner that preserved the integrity the precedents possessed in the older story. It is, I submit, "convincing," if not quite "elegant."<sup>132</sup>

Whether *Hobby Lobby's* implausible "restoration" of never-before-applied classic strict scrutiny in RFRA cases will similarly succeed remains very much in doubt. The Court's ignorance of RFRA's statutory text and legislative history and its own numerous precedents to the contrary, performed an entirely new work whose roots in that text, history, and precedent it not only failed to recognize, but forcefully disclaimed. *Hobby Lobby's* free exercise story is not simply different than the conventional one drawn from RFRA's text, history, and precedent—it is told by erasing some precedents and violating others. "Convincing and elegant" this was not.

### III. PERFORMING CONSTITUTIONAL LAW

Unlike film directors, the Justices have no interest in taking credit for their performances. They strive instead to show that the Court's decisions are copies of law, not the original. As Jerome Frank trenchantly observed, "Many a musical performer strives to make the music sound as if he were creating it in the act of playing it. But our courts . . . have tried to conceal their limited creativeness, have attempted to make their conduct appear as if there were no judicial 'law-making.'"<sup>133</sup>

*Smith* and *Hobby Lobby* typify judicial performance in high-stakes Supreme Court cases. The text and the precedents bearing on meaning are conceptualized as fixed and stable, so that all the Court appears to do—and all it will admit to doing—is bloodlessly

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132. *See id.*

133. Frank, *supra* note 10, at 1269.

“apply” the legal principles immanent in these purportedly determinate texts and precedents to the particular situation before it. To admit otherwise, as Menand observed, is “taboo.”<sup>134</sup> Where does this powerful pressure come from? Why do the Justices feel so strongly the need to deny that they exercise creativity or discretion in deciding constitutional cases, even (or especially) when it is clear that they do?

Political theory suggests one answer. Since the Constitution vests the legislative power in Congress, “the courts would seem to be acting beyond their powers were they frankly to legislate.”<sup>135</sup> Jurisprudential theory suggests something more subtle. The judicial imperative to disguise performances of constitutional law rests on the ruins of a long-abandoned metaphysical foundation. That foundation assumed the real existence of legal principles apart from and prior to the situations in which they were to be applied. Legal principles thus paralleled the legal reality of “text” that the judge simply “applied,” in the same way that actors perform a written play or musicians perform a written score.

Natural-law theory held that our world is imprinted with a moral order of right and wrong discoverable by the careful exercise of human reason.<sup>136</sup> This capacity was traditionally known by an oft-used shorthand, “right reason.”<sup>137</sup> True law conformed to this natural order, while sovereign decrees, orders, and statutes that violated it were thought to not really be law. “[A]s Augustine says, ‘a law that is not just seems to be no law at all.’”<sup>138</sup> This understanding gave rise to the idea of “higher” law – law existing independent of the sovereign and providing the ground for judging

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134. See *supra* text accompanying note 4.

135. Frank, *supra* note 10, at 1267.

136. E.g., 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* Q.94.ii.co, at 222 (Fr. Laurence Shapcoate trans., Daniel J. Sullivan rev. trans., 2d ed. 1952) (“Now a certain order is to be found in those things that are apprehended by man.”); see GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 49–54 (3d ed. 2007).

137. See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 *EMORY L.J.* 585, 608–11 (2009).

138. E.g., 2 AQUINAS, *supra* note 136, Q.95.ii.co, at 227–28; see also Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 *CAN. J.L. & JURIS.* 201, 205 (2007).

the rightness or wrongness of its acts.<sup>139</sup> Higher law, in turn, yielded the “rule of law,” which holds that a just legal order adheres to *rule by laws*, not by *caprice of men*.<sup>140</sup> Higher law and rule of law both presuppose that law can truly bind the sovereign.

Natural-law theories dominated the American nineteenth century but were abandoned in the early twentieth century under the pressure of legal realism and ethical pluralism. Demonstrating the metaphysical existence and content of the “natural” law had always been difficult and controversial, and it became impossible when people of good will held multiple competing conceptions of the good, none of which could be demonstrated to be the single true conception. Law thus was separated from morals, as the mere “positive” command of the sovereign.<sup>141</sup> Under legal positivism, the rightness or wrongness of such commands is irrelevant to whether they have the status and character of law. Realist judges especially derided these metaphysical pretensions, caricaturing natural law as a “brooding omnipresence in the sky,”<sup>142</sup> and rule by a “bevy of Platonic Guardians.”<sup>143</sup>

The positivist abandonment of natural law shifted judicial attention from metaphysics to texts. If law is merely the command of the sovereign, then judging must be largely textual. To decide a case, a judge cannot access the metaphysical natural law but must instead find a positively enacted written law, like the Constitution, to apply to the case. The Constitution stands in for the higher law, in place of now-abandoned natural law. Higher-law texts enable the Supreme Court to honor the myths of higher law and rule of law without elaborating their metaphysical foundations: the Court

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139. See Gedicks, *supra* note 137, at 608–11.

140. Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. LEGAL STUD. 232, 243–44 (2012); see also STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 2 (2d ed. 1995) (“By the most widely accepted accounts, the rule of law requires coercion to be used by officials only when and as authorized by the law.”).

141. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 86–103 (Robert Campbell ed., 5th ed. 1885); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957).

142. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), *superseded by statute*, Longshoremen’s and Harbor Worker’s Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424.

143. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

merely applies the Constitution.<sup>144</sup> Though it can no longer appeal to natural law, it can treat “the Constitution” as a higher law that compels and justifies the result in a particular case.<sup>145</sup>

Applying the metaphors of musical and theatrical performance to legal decision-making suggests that the underlying text constrains performance to some considerable extent, even if there is need for performative creativity.<sup>146</sup> The difficulty in applying this to constitutional decision-making is that many provisions of the Constitution are, as H.L.A. Hart described it, “open-textured,” consisting of vague standards rather than specific directives.<sup>147</sup> This is particularly true of individual rights provisions. “Congress shall pass no law . . . prohibiting the free exercise” of religion points in the direction of religious liberty but is far too abstract to decide most individual cases of government interference with religious practice. It is a bit like performing the skeletal narrative, “Boy meets girl, boy gets girl, girl dumps boy, girl takes boy back” — the formula for literally hundreds, if not thousands, of American plays and films. It is not meaningful to say these all perform the same story.

When the Court applies “open-textured” standards, therefore, it becomes hard to maintain the fiction that it is merely “interpreting” the text—elaborating meaning that is semantically obvious from the face of the text.<sup>148</sup> Rather, the Court is necessarily “construing” or “constructing” the law of free exercise of religion—

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144. See James J. Hamula, Comment, *Philosophical Hermeneutics: Toward an Alternative View of Adjudication*, 1984 BYU L. REV. 323, 338.

145. Cf. U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

146. See, e.g., Frank, *supra* note 10, at 1272 (“Just as, perforce, the musical composer delegates some subordinate creative activity to musical performers, so, perforce, the legislature delegates some subordinate judicial legislation—i.e., creative activity—to the courts.” (emphasis added)); Levinson & Balkin, *Performing Arts*, *supra* note 10, at 1613 (characterizing “both the text of the Constitution and the score of Beethoven’s *Pastorale* Symphony are commands inscribed in signs”); Weisbrod, *supra* note 10, at 1441 (“There is, in both [law and music], a script.”).

147. See H.L.A. HART, *THE CONCEPT OF LAW* 124–36 (3d ed. 2012).

148. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13–14 (1980).



in short, making law up.<sup>149</sup> As these constructions accumulate through the adjudication of individual cases, they constitute “doctrines” that often eclipse the constitutional text they purport merely to interpret.

This leaves constitutional performance dangling. Hans-Georg Gadamer explained how and why this is so.<sup>150</sup> Whereas in the conventional understanding judges merely “apply” abstract pre-existing principles to the case before them, this very understanding assumes that such principles can exist wholly apart from the judge who applies them. Gadamer attacks this assumption, arguing that legal principles do not exist in such an objective factual state.<sup>151</sup> Any text is always already embedded in an interpretive tradition that shapes and pre-determines its meaning; it does not and cannot exist in the pristine self-existence presupposed by the conventional understanding.<sup>152</sup> Any interpreter, moreover, comes to the text with problems and projects whose solution is a matter of importance, not as a wholly disinterested observer seeking the only and true

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149. “Statutory construction” has long been a part of legal interpretation, but its application to the Constitution was only recently theorized, primarily in the work of Keith Whittington. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999) [hereinafter WHITTINGTON, *INTERPRETATION*]; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) [hereinafter WHITTINGTON, *CONSTRUCTION*]. Whittington defines “construction” as a fundamentally subjective and normative process of creating constitutional meaning. WHITTINGTON, *INTERPRETATION*, *supra*, at 5. With construction, factors external to the text, such as contemporary policy considerations, social interests, and partisan politics, combine with the text to build out its meaning. WHITTINGTON, *CONSTRUCTION*, *supra*, at 6.

Because construction is a fundamentally political process that operates in the interstices of the Constitution by projecting meaning onto the text, Whittington considers it fundamentally inconsistent with the judicial role of merely interpreting the Constitution—deriving “relatively narrow rules” in the form of “doctrines, formulas, and tests” that resolve legal disputes. WHITTINGTON, *INTERPRETATION*, *supra*, at 5–6. He thus confines construction to the political branches. WHITTINGTON, *INTERPRETATION*, *supra*, at 7; WHITTINGTON, *CONSTRUCTION*, *supra*, at 6–7. Later theorists, however, have embraced construction as a necessary and legitimate part of judicial decision-making in constitutional disputes. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 300–12 (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 121–30 (rev. ed. 2014); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013).

150. See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall rev. trans., 2nd rev. ed. 2004).

151. *Id.* at 334–39.

152. *Id.* at 302–10.

meaning of the text.<sup>153</sup> There is an interpretive “arc” or “horizon” that connects the interpreter and the text; the history of the text moves forward in time along the arc, while the concerns of the interpreter work back; understanding occurs when they meet.<sup>154</sup>

If I review a book about Plato, for example, I cannot write only my own thoughts about Plato without considering the book’s discussion of him and his philosophy; that would not be a review of the book. On the other hand, it is implausible to demand that, in discussing the book, I ignore my own thoughts and commitments about Plato, as well as those of other Plato scholars. That’s not a review of the book either.<sup>155</sup>

The constitutional law of equal protection provides another instructive example. Imagine the absurdity of trying to decide an affirmative action case—say, *Grutter v. Bollinger*<sup>156</sup>—as if *Brown v. Board of Education* had never been decided.<sup>157</sup> *Brown* is part of the meaning of the Equal Protection Clause—though it wasn’t always. The decision in *Brown*—and each case that preceded it,<sup>158</sup> and

153. *Id.* at 316–18. Gadamer’s hermeneutics is founded upon Martin Heidegger’s rejection of Cartesian ontology, which assumes the separation of an interior subject from the exterior and objective world, in favor of “Being-in-the-world,” which assumes that there is not and can never be a moment when human beings are not already engaged in relations with persons and things in the world. *See, e.g.*, MARTIN HEIDEGGER, BEING AND TIME ¶¶ 12, 19–25 (John Macquarrie & Edward Robinson trans., 1962). For a succinct and accessible account of Heideggerian ontology, see Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253, 262–71 (1996).

154. GADAMER, *supra* note 150, at 301–05.

155. The example is from DONATELLA DI CESARE, GADAMER: A PHILOSOPHICAL PORTRAIT 88 (Niall Keane trans., 2013).

156. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding use of race among several factors as legitimate means of admitting a diverse class to state professional school under Equal Protection Clause).

157. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating *de jure* segregation of public schools under Equal Protection Clause).

158. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950) (finding that the exclusion of African Americans from the flagship state law school and their confinement to an alternative state African American law school violated Equal Protection Clause because facilities were not equal); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (holding the same regarding denial of admission to otherwise qualified African American to state law school, where state did not have alternative law school); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding Equal Protection Clause requires equal opportunities to study law for African Americans and whites, though not necessarily in the same school or location); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that racially segregated rail passenger cars does not violate the Equal Protection Clause), *overruled by Brown*, 347 U.S. 483.

followed it<sup>159</sup>—altered the meaning of the Clause. Attempting to apply the clause in the absence of these cases—and particularly the case that (now) most informs that meaning (*Brown*)—would make no sense. On the other hand, imagine the equivalent absurdity of trying to decide an affirmative action case as if one had no personal knowledge, sense, or conviction about the morality or legality of race-conscious decision-making in higher education and the controversies it has engendered. This is to ask a person to decide the case as if she were not herself, but instead some impossibly disembodied being wholly disengaged from the world. It is precisely one's own prior understanding of a constitutional text that connects her to the possible meanings of that text in the situation that calls for decision—that is, whether affirmative action in higher education is consistent with the meaning of the Equal Protection Clause.<sup>160</sup>

Gadamer's argument is a version of the ancient problem of universals and particulars.<sup>161</sup> As Aristotle showed, in scientific and theoretical thought universally valid rules (universals) govern specific situations that fall under them (particulars);<sup>162</sup> this is what it means to say that scientific knowledge can be *demonstrated* to another.<sup>163</sup> In case of practical knowledge, however, a universally valid rule cannot be formulated in advance of the situation in which it is applied, because the universal is *in* the particulars.<sup>164</sup> Determining the right thing to do in a particular situation depends instead on both the character of the decision maker and the characteristics of

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159. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that the Equal Protection Clause requires racially neutral federal decision-making); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding the same with respect to state decision-making).

160. See Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 VAND. L. REV. 613, 639 (1997) (“[T]he expectations of meaning that attached to the [Equal Protection C]lause after *Brown* unavoidably affect how the original understanding is understood in any contemporary post-*Brown* situation[,] . . . but contemporary cases like *Brown* have just as clearly affected the original understanding of equality.” (footnote omitted)).

161. GADAMER, *supra* note 150, at 310–11.

162. *Nicomachean Ethics* vi.3 1139b23–31, vi.6 1140b31 [hereinafter *NE*] (W.D. Ross & J.O. Urmsion rev. trans., 1894), in *THE COMPLETE WORKS OF ARISTOTLE* 1729, 1799, 1801 (Jonathan Barnes ed., 1984) [hereinafter *ARISTOTLE*].

163. *NE* vi.3 1139b31–32, vi.6 1140b32–33, in *ARISTOTLE*, *supra* note 162, at 1799, 1801.

164. *NE* vi.5 1140a30–1140b4, in *ARISTOTLE*, *supra* note 162, at 1800.

the situation that demands action.<sup>165</sup> The relation is dialogical: the judgment of the right action to take in a particular situation depends on who the agent is, but who the agent is depends on the actions she takes in such situations.<sup>166</sup>

Judging is a form of practical reasoning. This is why Aristotle insisted that general legal rules must always be supplemented by equitable interpretation: “[T]his is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law . . . .”<sup>167</sup> Certainly, lawyers know, in the way that only experience can teach, that general legal rules rarely suffice to resolve legal disputes. Resolution depends, rather, on the character of judge and jury, on the quality of legal representation, and on the specific facts of the situation that gives rise to dispute. The purportedly fixed and independent legal principles that judges and fact-finders apply are merely temporary or provisional, their meaning changing with each application. To assume otherwise is to commit the mistake of reification—to act as if an abstract principle or rule has an independent existence apart from the real-world situations that give it form and meaning.<sup>168</sup>

The interpreter of a legal text can understand that text only in terms of its applications. Every new application changes the content of the principle, just as *Brown* changed the meaning of “equal protection” since *Plessy*, *Adarand* and *City of Richmond* changed it since *Brown*, *Grutter* since *Adarand* and *City of Richmond*, and on to *Fisher* and other applications (and meanings) hardly yet imagined. As Gadamer encapsulated this point, to be understood at all, the legal text “must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application.”<sup>169</sup> There is no difference between the questions, “What

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165. NE i.3 1094b28, 1095b3 & -6-8, ii.2 1104a4-5, in ARISTOTLE, *supra* note 162, at 1730, 1744.

166. NE ii.5 1105b9-12, iii.5 1114a2015-23, in ARISTOTLE, *supra* note 162, at 1746, 1758.

167. NE v.10 1137b26-29, in ARISTOTLE, *supra* note 162, at 1796.

168. See, e.g., ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 136-37 (1975). See generally Georg Lukács, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 83 (Rodney Livingstone trans., 1971).

169. GADAMER, *supra* note 150, at 307-08.

does this text mean?" and "How should this text apply in this case?" Meaning always – and only – arises out of application.

Gadamer's critique exposes the quandary of judicial decision-making. Judges purport to apply pre-existent legal principles, in service to higher-law and rule-of-law norms. But the principles they apply are altered, created anew, in the very act of applying them. The embarrassment of constitutional decision-making is that it cannot help but contradict the fundamental norms by which it claims to be guided. Decision-making is not a bloodless and uncommitted application of prior precedents, but their performance.

#### CONCLUSION: WORKING WITHOUT A NET

Felix Cohen once facetiously related how a great jurist died and went to a special heaven reserved for legal theorists.<sup>170</sup> There he met, "face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life."<sup>171</sup> He met "the disembodied spirits of good faith and bad faith, property, possession, *laches*, and rights *in rem*."<sup>172</sup> Here also were many great machines of conceptual jurisprudence, including "a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute," and "a hair-splitting machine that could divide a single hair into 999,999 parts."<sup>173</sup>

The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished of jurists the Lethean draught was entirely superfluous. They had nothing to forget.<sup>174</sup>

As Cohen's formalist parody suggests, the idea that judges can uncover the law in some elevated isolated state, untainted by social need or other judicial taboos, rests on a metaphysics that no one – least of all Supreme Court Justices – any longer takes seriously. The Court has its precedents, but its readings are traditional rather than

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170. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–10 (1935).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

formalist, rarely so fixed and determinate as to yield only one possible result. This makes the Court's constitutional decision-making the purest of performances – iterated citations, shorn from their original contexts and dropped into new ones, creating new and surprising principles that masquerade as old and established.

It is pointless to call this dishonest. The Justices cannot admit their performative role because it cannot be reconciled with still-powerful higher-law and rule-of-law myths. If law does not exist outside the case in which the judge applies it, if it is not a stable premise of judicial decision-making but a function of the judge and the situation, how are we governed by “law rather than men” (and women)?

The necessity of performing constitutional law stems from the absence of a definitive underlying text that can constrain the substance of that performance; there are, instead, innumerable indeterminate texts, which makes judicial performance unavoidable. The Justices are always working without a net, performing constitutional law in opinions with nothing beneath them. Sometimes they pull off a convincing performance, but sometimes they don't – and we need to recognize the difference.

