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COLLEGE OF LAW

*Legal Studies  
Research Paper Series*

**Research Paper #311  
December 2016**

## **Looking Ahead: October Term 2016**

**Glenn Harlan Reynolds**

**CATO SUPREME COURT REVIEW 313 (2016)**

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## Looking Ahead: October Term 2016

Glenn Harlan Reynolds\*

At the end of the Supreme Court's term in June 2015, the Court had granted 82 petitions for certiorari. At the end of the term in 2016, the number was 29. And, of those granted, the cases were mostly relatively technical and unimportant, at least compared to the high profile cases of 2016. So, "few and boring" is the in-a-nutshell description of the Supreme Court's current caseload for the coming year. (By contrast, the last time I wrote this "Looking Ahead" feature, the Court was setting up to hear *District of Columbia v. Heller*, *Boumediene v. Bush*, and *Medellin v. Texas*, among many others).<sup>1</sup>

Nor are things likely to improve. The chief reason for the Court's stinginess in granting certiorari would appear to be the death of Justice Antonin Scalia, suggesting that things won't change until a successor is installed. If, as seems likely, the slot won't be filled until after a new president takes office in January 2017, that means that the soonest a new associate justice could be installed and up to speed would probably be sometime in March—and it's quite possible that it could be much later. So October Term 2016 seems likely to live up to the "few and boring" description unless something surprising takes place.

One might expect an author in my position, then, to simply fold his tents and steal away. But if legal scholars were so easily discouraged, half the law reviews in America would collapse. So after offering some highlights from among the paucity of cases that the Supreme Court has agreed to hear, I will spend a bit of time talking about cases they aren't hearing, and about what the Supreme Court's increasingly light caseload—even in years when Justice Scalia was

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<sup>1</sup> Glenn Harlan Reynolds, Looking Ahead: October Term 2007, 2006–2007 Cato Sup. Ct. Rev. 335 (2007).

alive—means for the institution, and for the American system of law. But first, the cases.

### Intellectual Disability and Execution

In *Moore v. Texas*,<sup>2</sup> the Supreme Court is faced with the question of whether the Eighth Amendment and prior decisions in *Hall v. Florida*<sup>3</sup> and *Atkins v. Virginia*<sup>4</sup> require that current tests and diagnostic standards for intellectual disability be used in determining whether an individual may be executed. (An additional question presented—on whether an extensive, more-than-three-decade delay in execution after the imposition of the death sentence constituted cruel and unusual punishment under the Eighth Amendment was initially also granted—but then the Court realized that this would make things too interesting, so removed it.)

Bobby James Moore and two accomplices attempted to rob a grocery store in April of 1980. The robbery went badly, and one of the store's employees was shot and killed. Moore, as the shooter, was convicted of capital murder and sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction.<sup>5</sup>

After habeas proceedings in state and federal courts, the U.S. Court of Appeals for the Fifth Circuit eventually found that Moore had been deprived of effective assistance of counsel during the trial and punishment phase, and that his attorney's failure to develop or present mitigating or exculpatory evidence was constitutionally deficient and prejudiced the outcome of the punishment phase.<sup>6</sup>

In a new state-court sentencing hearing in February 2001, Moore was again sentenced to death. After a complex series of additional motions and appeals, the Texas Court of Criminal Appeals wound up disagreeing with a lower court regarding which standard should be applied. The lower court applied definitions, guidelines, and standards from the American Association on Intellectual and Developmental Disabilities, the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) of Mental Disorders versions IV

<sup>2</sup> No. 15-797, opinion below at 470 S.W.3d 481 (Tex. Crim. App. 2015).

<sup>3</sup> 134 S. Ct. 1986 (2014).

<sup>4</sup> 536 U.S. 304 (2002).

<sup>5</sup> *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 1113 (1986).

<sup>6</sup> *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

and V, and the legal standards outlined in *Atkins*. The Texas Court of Criminal Appeals said this was error, and that the appropriate standard was the legal definition of intellectual disability, and standards for proving same, set forth in *Ex Parte Brizeno*.<sup>7</sup> Applying the *Brizeno* standards, the Texas Court of Criminal Appeals held that the record did not support a finding of intellectual disability.

This case boils down to the question of whether medical definitions govern judicial assessments, or whether courts are free to develop legal standards of their own. Unsurprisingly, Moore argues that “current medical definitions” must be used, while Texas’s argument is that the Supreme Court has never held that states must use clinical definitions of intellectual disability, much less those promulgated by particular professional organizations. The Court’s earlier pronouncements in *Hall* and *Atkins* invoked such standards but did not mandate them. Instead, Texas argues that the Court in *Atkins* expressly left the development of standards to the states, while *Hall* specifically addressed strict IQ cutoffs and did not hold that the legal definition of intellectual disability must be strictly tied to professional clinical definitions.

The conclusion in this case is likely to turn on whether the guidelines and definitions developed by professional societies for use in a clinical, treatment-oriented setting are appropriate for use in a legal setting where the questions do not involve treatment, but rather capacity and culpability—a subject on which the DSM offers its own warning.<sup>8</sup> On the one hand, the prestige and research that stand behind the professional guidelines are likely to appeal to many on the Court, which has traditionally deferred to medical expertise. On the other hand, these guidelines change frequently—the DSM, for example, has gone through multiple significant revisions since the 1980 murder—and adopting them might raise questions about which set of guidelines applies when. It also raises some questions about the

<sup>7</sup> 135 S.W.3d 1 (Tex. Crim. App. 2004).

<sup>8</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 25 (5th ed. 2013) (“Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals.”).

independence of courts vis-à-vis the medical establishment. Should the justices conclude that each new edition of the DSM might set off a flood of fresh habeas petitions, Texas is likely to win.

As a side note, though the question regarding delay in execution was dismissed, on reading through the procedural history of the case, the long-running nature of the proceedings is truly striking. I was a teenager when Mr. Moore committed his crime; I'm now a senior professor whose 401k balance seems disturbingly important. Hearing this question would have been difficult for the Court, given that Moore's own ceaseless legal efforts no doubt account for much of the delay and the State of Texas would surely have been happy to execute him sooner.<sup>9</sup> But I defy anyone to read this procedural history and come to the conclusion that our legal system is dealing with capital cases well.

### **The Fourth Amendment, Malicious Prosecution, and 42 U.S.C. § 1983**

*Manuel v. City of Joliet, Illinois* deals with the scope of 42 U.S.C. § 1983 and "whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based on the Fourth Amendment."<sup>10</sup> This is a question that the Supreme Court raised, but did not answer, in *Albright v. Oliver*.<sup>11</sup> Since then, the circuits have split on the question.

Elijah Manuel was arrested for possession with intent to distribute ecstasy. A bottle of pills found in his possession when he was arrested was tested by the police who falsified the results to show that

<sup>9</sup> These factors probably account for the Court's dismissal of the question presented regarding delay of execution, despite Justice Stephen Breyer's having expressed strong interest in that subject over the years. See *Lackey v. Texas*, 514 U.S. 1421 (1995) (joining Justice John Paul Stevens's dissent); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari); *Foster v. Florida* 537 U.S. 990, 991 (2002) (Breyer, J., dissenting from denial of certiorari) (arguing that "the combination of uncertainty of execution and long delay is arguably 'cruel'"). In addition, just a week before the Court granted certiorari in *Moore*, Breyer dissented from denial of certiorari in *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (denying cert.), stressing the possibility that since fewer than two percent of U.S. counties accounted for all death sentences nationwide, the death penalty might itself constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments.

<sup>10</sup> No. 14-9496, opinion below at 590 Fed. App'x 641 (7th Cir. 2015).

<sup>11</sup> 510 U.S. 266 (1994).

the pills contained ecstasy. Lab reports confirmed that the pills were not ecstasy on April 1, 2011, but Manuel was arraigned on April 8, and the government did not dismiss the charges until May 4, with Manuel being incarcerated the entire time.

Manuel sued the city on April 10, 2013, just after the two-year statute of limitations for many of his claims. But the statute on malicious prosecution had not run because his imprisonment extended until May 4, so that claim was not time-barred. His claim was dismissed by the district court under *Newsome v. McCabe*,<sup>12</sup> however, on grounds that Illinois law provided an adequate remedy.<sup>13</sup> On appeal, Manuel challenged the dismissal of his malicious prosecution claim on the grounds that it did not fall under *Newsome*, arguing that the U.S. Court of Appeals for the Seventh Circuit had left open the possibility of a Fourth Amendment claim against officers who misrepresent evidence to prosecutors.

The Seventh Circuit, in an unpublished opinion, dismissed his claim, both on the grounds that the claim arose, if at all, when he was arrested and would thus be time-barred along with his other claims, and because the Seventh Circuit does not recognize a federal claim for malicious prosecution under the Fourth Amendment.

Given that 10 other circuits have accepted such a claim,<sup>14</sup> it seems likely that the Court granted certiorari in order to bring the Seventh Circuit in line with the others. That's certainly the way to bet, though bets on Supreme Court outcomes are notoriously shaky. I might also note that given the glacial pace of the criminal law in general, a two-year statute of limitations on such claims seems rather brief.

### **Mens Rea and Bank Fraud**

*United States v. Shaw* involves the federal bank-fraud statute, 18 U.S.C. § 1344(1).<sup>15</sup> The question is whether a conviction for a "scheme to defraud a financial institution" requires proof of a specific intent

<sup>12</sup> 256 F.3d 747 (7th Cir. 2001).

<sup>13</sup> See *Manuel v. City of Joliet*, No. 13 C 3022, 2014 WL 551626, at \*1 (N.D. Ill. Feb. 12, 2014).

<sup>14</sup> See *Julian v. Hanna*, 732 F.3d 842, 846 (7th Cir. 2013) (collecting cases); *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 98–99 (1st Cir. 2013) ("[T]here is now broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period.").

<sup>15</sup> No. 15-5991, opinion below at 781 F.3d 1130 (9th Cir. 2015).

not only to deceive, but also to cheat, a bank. Defendant Lawrence Shaw devised a scheme to extract money from the Bank of America savings account of Stanley Hsu, obtaining the account information, creating a PayPal account, and ultimately withdrawing \$300,000 out of the savings account and depositing it into two accounts he had created at another bank, Washington Mutual. At trial, Shaw argued that § 1344(1) requires the government to establish that he not only meant to deceive the bank, but also that he intended to cheat or harm the bank. (Victim Hsu was known to Shaw and was selected because he didn't review his statements regularly as would be required for Bank of America to be liable, ensuring that PayPal, a non-bank entity, would bear the loss. Shaw argued that he had no intent to cheat Bank of America—and in fact the government never argued at trial that he did.) Shaw requested a jury instruction to this effect, which was denied, and he was subsequently found guilty of 17 counts of bank fraud.

Shaw appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the conviction, holding that there is no need to show intent to harm the bank. Shaw's petition to the Supreme Court argues that there is a circuit split on this issue, with nine circuits agreeing on the need to prove intent to cheat the bank, while the Ninth Circuit is one of three that hold no such requirement.

This case is interesting mostly because of the increased interest in *mens rea* generally. Though defendant Shaw does not seem like an ideal poster candidate for the "honest mistake" that winds up being prosecuted as a crime,<sup>16</sup> there is a growing interest among reformers in limiting the reach of criminal statutes and regulations by requiring a degree of scienter on the part of the accused.<sup>17</sup> The Supreme Court's treatment of this case may offer something of a clue as to whether those reformers have reached the ears of the justices.

<sup>16</sup> See Jacob Sullum, Clinton May Get a Pass on Her Intentions, So Why Do the Democrats Want to Imprison Those Who Make Honest Mistakes, Reason.com, July 6, 2016, <http://reason.com/archives/2016/07/06/no-more-accidental-criminals>.

<sup>17</sup> See John Villasenor, Over-Criminalization and Mens Rea Reform: A Primer, Brookings FixGov blog, Dec. 22, 2015, <http://www.brookings.edu/blogs/fixgov/posts/2015/12/22-mens-rea-reform-villasenor> (Describing issue and reform efforts).



## Double Jeopardy and Collateral Estoppel

In *Bravo-Fernandez v. United States*, the question is whether the government can retry individuals who have had their convictions vacated due to constitutional violations or whether such retrials are barred by the Constitution's Double Jeopardy Clause.<sup>18</sup>

At trial in 2011, petitioners were acquitted of conspiracy and traveling to commit bribery, but were convicted of committing bribery under 18 U.S.C. § 666. The U.S. Court of Appeals for the First Circuit then vacated the bribery conviction. The government then sought to retry them on that charge, leading the petitioners to move to bar retrial under the Double Jeopardy Clause. This motion was denied by the district court.

The First Circuit affirmed, following the Supreme Court's holding in *United States v. Powell*,<sup>19</sup> which provided that when the same jury reaches inconsistent results, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful."<sup>20</sup> Given that the jury here had convicted the petitioners under Section 666 but acquitted them of any underlying conspiracy and travel, the First Circuit held that the jury reached inconsistent results and the Double Jeopardy Clause would not bar a retrial.

Petitioners, however, invoke *Yeager v. United States*,<sup>21</sup> which they argue bars re-prosecution. That case dealt with hung counts that were inconsistent with an acquittal; petitioners argue that it is thus more favorable to them in their case, which involves a vacated unconstitutional conviction. Further, they cite *North Carolina v. Pearce* for the proposition that when a conviction is vacated for constitutional violations it has "been wholly nullified and the slate wiped clean."<sup>22</sup> This seems to me to be a rather expansive reading of *Pearce*; whether the Court agrees will likely determine the outcome.

<sup>18</sup> No. 15-537, opinion below at 790 F.3d 41 (1st Cir. 2015).

<sup>19</sup> 469 U.S. 57 (1984).

<sup>20</sup> *Id.* at 68.

<sup>21</sup> 557 U.S. 110 (2009).

<sup>22</sup> 395 U.S. 711, 721 (1969).

## Free Exercise, Equal Protection, and the Exclusion of Churches from Government Programs

*Trinity Lutheran Church of Columbia v. Pauley* deals with the denial of a state grant on the basis that the grant applicant is a church.<sup>23</sup> The question presented is: “Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.”

Trinity Lutheran operates a licensed daycare center and preschool called the Learning Center on its premises. The center is a ministry of Trinity Church that presents daily religious teachings as part of its program. In 2012, Trinity applied for a state grant to resurface the playground of the Learning Center. The application was denied based on Article I, Section 7 of the Missouri Constitution, which states that “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”

Trinity Lutheran sued in federal district court, where it lost, and appealed to the U.S. Court of Appeals for the Eighth Circuit where it lost again. Both courts held that Missouri was free under the U.S. Constitution to impose a stricter separation of church and state than the Establishment Clause of the First Amendment requires. Petitioners argue that by excluding all religious organizations from this government program, Missouri is discriminating on the basis of religious status in violation of the Free Exercise Clause. This is not a neutral law of general application, they argue, because it is targeted solely at religious organizations. They also argue that Missouri’s exclusion “violates the Equal Protection Clause because it employs a suspect classification that cannot satisfy strict scrutiny.”<sup>24</sup> And, citing *Plyler v. Doe*,<sup>25</sup> they argue that religious classifications are “presumptively invidious,” requiring a strict scrutiny that Missouri cannot satisfy because the state has no compelling interest in excluding religious organizations from grants of this type, and because this exclusion is not the least restrictive means of accomplishing the state’s goal.

<sup>23</sup> No. 15-577, opinion below at 788 F.3d 779 (8th Cir. 2015).

<sup>24</sup> Pet. Brief on Merits at 22, *Trinity Lutheran Church of Columbia v. Pauley*, No. 15-577, 2016 WL 1496879 at 22 (Apr. 14, 2016).

<sup>25</sup> 457 U.S. 202, 216 (1982).

In response, Missouri argues that its restriction does not prohibit the free exercise of religion, nor does the Free Exercise Clause require states to subsidize religious institutions. The state analogizes this to *Locke v. Davey*, in which state scholarships were not available for students who pursued degrees in devotional theology, something the Supreme Court held permissible as part of the play in the joints between the Free Exercise and the Establishment Clauses.<sup>26</sup>

This case may be somewhat more problematic because of the history behind the constitutional provision in question. Missouri's provision is one of several state "Baby Blaine" amendments that were adopted in the late-19th Century with the explicit intention of targeting religious schools, in particular Catholic schools.<sup>27</sup> The Supreme Court was able to duck this issue in *Locke v. Davey*, but it is presented more squarely here. Anti-gay animus was enough to invalidate a state law limiting municipalities' power to promote gay rights in *Romer v. Evans*;<sup>28</sup> will the anti-Catholic animus that inspired this Missouri provision be enough to invalidate it now? Or will the very fact that it is Lutherans, not Catholics, who are feeling the pinch undermine that argument?

### The Cases Not Heard

If the cases heard are few and boring, the cases that the Supreme Court has decided not to hear are worth at least a mention.

#### *Gun Control*

*Shew v. Malloy* deals with gun control legislation passed by the New York and Connecticut state legislatures.<sup>29</sup> The questions presented were:

1. Whether a flat ban on possession of a class of constitutionally protected firearms that includes the most popular rifles in the Nation should be subject merely to intermediate scrutiny, as the Second Circuit concluded below, rather than being deemed flatly unconstitutional under this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or subject to strict scrutiny, as the Fourth Circuit has recently held.

<sup>26</sup> 540 U.S. 712 (2004).

<sup>27</sup> See Noah Feldman, *The Case Against Separating Church and State*, Bloomberg View, Jan. 19, 2016, <https://www.bloomberg.com/view/articles/2016-01-19/the-case-against-separating-church-and-state>.

<sup>28</sup> 517 U.S. 620 (1996).

<sup>29</sup> 804 F.3d 242 (2d Cir. 2015), cert denied, 2016 U.S. LEXIS 3959 (2016).

2. Whether Connecticut's flat ban on a class of constitutionally protected firearms that includes the most popular rifles in the Nation is an unconstitutional infringement of the fundamental right to keep and bear arms.

A variety of plaintiffs challenged restrictive bans passed after the Sandy Hook Elementary school shooting, only to have those upheld by lower courts applying intermediate scrutiny. The U.S. Court of Appeals for the Second Circuit affirmed in all important particulars, and petitioners argue that the decision is inconsistent with *Heller*, which should require strict scrutiny.

The Court's decision to punt on this case, despite a split in the circuits, means that resolution of such issues will be left to future cases in front of a future Court. Perhaps this is simply the result of a desire to let the issue percolate in the circuits for a bit longer, but this seems like a case where the presence of Justice Scalia might have made the difference.

#### *The EPA and the Rule of Law*

*Michigan v. EPA* dealt with the lower courts' alleged lack of response to the Supreme Court's previous remand in this case.<sup>30</sup> The question presented was "When an agency promulgates a rule without any statutory authority, may a reviewing court leave the unlawful rule in place?"

Under the Clean Air Act, the Environmental Protection Agency must regulate emissions of hazardous pollutants from certain sources, but only if the EPA concludes that "regulation is appropriate and necessary" after studying hazards to public health posed by those sources.<sup>31</sup> The EPA completed the required study in 1998, and in 2000 issued a finding that regulation of coal and oil-fired power plants was "appropriate and necessary."<sup>32</sup> In 2012, the EPA reaffirmed the finding and imposed emission standards without considering the costs involved. When the case reached the Supreme Court in 2015, the Court held that the EPA interpreted the statute unreasonably when it chose to ignore costs, and reversed and

<sup>30</sup> *White Stallion Energy Ctr. LLC v. EPA*, No. 12-1100 (D.C. Cir. Dec. 15, 2015) (order to remand without vacatur) appeal sub nom. *Michigan et. al v. EPA*, cert. denied, 2016 U.S. LEXIS 3828 (2016) (No. 15-1152).

<sup>31</sup> 42 U.S.C. § 7412(n)(1)(A).

<sup>32</sup> 65 Fed. Reg. 79826, 79830 (2000).

remanded to the U.S. Court of Appeals for the D.C. Circuit for further proceedings consistent with the opinion.<sup>33</sup> Upon remand, the D.C. Circuit allowed the regulation to remain in force while the EPA reworked it.

Petitioners argued that allowing a regulation based on an unreasonable interpretation of a statute to stand is itself unreasonable. My own belief—and this is probably why I will never serve on the Court—is that such an action raises obvious nondelegation problems. Perhaps that is why the Court chose not to hear it.

### *First Amendment*

Blogging at Concurring Opinions, Ronald K. L. Collins could be talking about the Court's certiorari decisions in general when he writes, "The big First Amendment news of the 2015 Term was the cases the Court *declined* to hear."<sup>34</sup> Among the big-but-declined cases he mentions is *Electronic Arts v. Davis*,<sup>35</sup> where the question presented was "Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic portrayal of a person in an expressive work." *Davis* drew considerable interest from law professors and the games industry, but to no avail.

Also denied was a petition in *Bell v. Itawamba County School Board*,<sup>36</sup> where the question was "Whether and to what extent public schools, consistent with the First Amendment, may discipline students for their off-campus speech."

Another denial involved a case that seems quite relevant in light of current events, *Town of Mocksville v. Hunter*.<sup>37</sup> The questions presented were "(1) Whether the First Amendment protects police officers who report misconduct in their ranks to a law enforcement agency for investigation; and (2) whether petitioners are entitled to qualified immunity."

<sup>33</sup> See *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

<sup>34</sup> Ronald K. L. Collins, FAN 114 (First Amendment News) 2015 Term: What Happened to the Big Cases?—Equally Divided or Cert. Denied, Concurring Opinions, June 29, 2016, <http://concurringopinions.com/archives/2016/06/fan-114-first-amendment-news-2015-term-what-happened-to-the-big-cases-equally-divided-or-cert-denied.html>.

<sup>35</sup> No. 15-424, opinion below at 775 F.3d 1172 (9th Cir. 2015).

<sup>36</sup> No. 15-666, opinion below at 799 F.3d 379 (5th Cir. 2015).

<sup>37</sup> No. 15-480, opinion below at 789 F.3d 389 (4th Cir. 2015).

And, in *Center for Competitive Politics v. Harris*,<sup>38</sup> the Supreme Court denied certiorari on the questions of “(1) Whether a state official’s demand for all significant donors to a nonprofit organization, as a precondition to engaging in constitutionally-protected speech, constitutes a First Amendment injury; and (2) whether the ‘exacting scrutiny’ standard applied in compelled disclosure cases permits state officials to demand donor information based upon generalized ‘law enforcement’ interests, without making any specific showing of need.”

While it is always a mistake to make too much of denials of certiorari, these cases illustrate that if the 2016 caseload is short and boring, it will not be because there were no interesting cases to take. Although one can never say in any particular case, overall it seems highly likely that the absence of Justice Scalia, together with the unsettled political situation elsewhere, is a major factor in the Court’s light caseload.

### The Notorious RBG

Aside from cases on which certiorari has been granted or denied, one potential issue for the coming term involves Justice Ruth Bader Ginsburg’s comments about the apparently horrifying prospect of a Donald Trump presidency, made in not one, but two separate interviews. Ginsburg essentially said that she found the prospect of a Trump presidency unthinkable and joked about moving to New Zealand. As the *Washington Post* noted, this has led many experts to draw parallels to an earlier case, when Second Circuit Judge Guido Calabresi compared President George W. Bush’s election to the elevation of Mussolini.<sup>39</sup> Calabresi was formally admonished for that, and while Supreme Court justices are not subject to such admonishment,

<sup>38</sup> No. 15-152, opinion below at 784 F.3d 1307 (9th Cir. 2015).

<sup>39</sup> Aaron Blake, In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line, *Wash. Post*, July 11, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line>. See also Daniel Drezner, Justice Ruth Bader Ginsburg Has Crossed Way, Way over the Line, *Wash. Post*, July 12, 2016, <https://www.washingtonpost.com/posteverything/wp/2016/07/12/justice-ruth-bader-ginsburg-has-crossed-way-way-over-the-line/>. Excerpt:

But because Ginsburg believes in speaking plainly, then let us return the favor: This was a remarkably stupid and egregious comment for a sitting

experts cited by the *Post* said that she would certainly have to recuse herself in any litigation over Trump's election.<sup>40</sup>

The comments were injudicious, and though they are unlikely to become relevant in the coming term, should they in fact matter—because of a contested election, with the nation closely divided—her recusal, or worse, her refusal to recuse, would undoubtedly have explosive results, both for the nation and for the Court itself, an institution that depends on public regard and that has already been growing less popular in recent years.<sup>41</sup> Her comments are an iceberg

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Supreme Court justice to make on the record. Say what you will about Justices Antonin Scalia, who died in February, or Clarence Thomas, but they never weighed in on presidential politics quite like this. The closest example I can find is that in January 2004, during an election year, Scalia went on a hunting trip with Vice President Dick Cheney. That action alone got legal ethicists into a lather.

What Ginsburg did was way worse, though. Indeed, I can find no modern instance of a Supreme Court justice being so explicit about an election—and for good reason. . . . As I noted earlier this year, trust in the Supreme Court was bound to take a hit after the death of Scalia and the partisan deadlock over filling his seat. But if eroding trust was a slow-burning political fire, Ginsburg just poured gasoline on it. There are certain privileges that one sacrifices to be a sitting member of the federal judiciary and making explicitly partisan comments about presidential elections is one of those privileges.

Drezner cites other pundits and legal experts, none of them Trump supporters, who agree. See Mark Joseph Stern, *Ruth Bader Ginsburg Just Risked Her Judicial Independence, Her Ethical Standing, And Her Legacy To Insult Trump*, *Slate*, July 12, 2016, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/07/ruth\\_bader\\_ginsburg\\_risks\\_her\\_legacy\\_to\\_insult\\_donald\\_trump.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/ruth_bader_ginsburg_risks_her_legacy_to_insult_donald_trump.html) (“To be clear, what Ginsburg is doing right now—pushing her case against Trump through on-the-record interviews—is not just unethical; it’s dangerous. As a general rule, justices should refrain from commenting on politics, period. That dictate applies to 83-year-old internet folk heroes as strictly as it applies to anybody else who dons judicial robes. The independence of our judiciary—and just as critically, its appearance of impartiality—hinges on a consistent separation between itself and the other branches of government. That means no proclamations of loyalty to any candidate, or admissions of distaste of any other.”) Ginsburg subsequently apologized, but the damage was done. David Savage, *Justice Ruth Bader Ginsburg Apologizes for ‘Ill-Advised’ Criticism of Donald Trump*, *L.A. Times*, July 14, 2016, <http://www.latimes.com/nation/la-na-ginsburg-trump-apology-20160714-snap-story.html>.

<sup>40</sup> But hey, how likely is it that a presidential election will wind up in front of the Supreme Court? I mean, when has that ever happened?

<sup>41</sup> See, e.g., Associated Press-NORC Center for Public Affairs Research, *Confidence in Institutions*, <http://www.apnorc.org/projects/Pages/HTML%20Reports/confidence-in-institutions-trends-in-americans-attitudes-toward-government-media-and-business0310-2333.aspx>.

that most likely will never meet its *Titanic*, but are worth noting here because, should that meeting come to pass, the results would surely be the most significant event of the coming term.

### Is There a United States Supreme Court?

Some time ago, on the occasion of the 200th anniversary of the Supreme Court's decision in *Marbury v. Madison*, I noted that perhaps the Supreme Court isn't as important as we might think:

The Supreme Court's caseload continues to fall, with the Court producing 76 signed opinions last year, down from 129 thirty years before. And this drop has occurred despite a dramatic growth in the number of opinions issued by lower federal courts and state supreme courts. In the twelve months ending September 30, 2002, the regional Courts of Appeals decided 27,758 cases on the merits, compared to a mere 777 for the year ending March 31, 1973. The result is that, as a percentage of the whole, virtually no lower-court opinions are reviewed by the Supreme Court. A given opinion in a trial court, in fact, is probably less likely to see Supreme Court review than the trial judge issuing it is to be struck by lightning.<sup>42</sup>

We can't know with certainty how many decisions the Supreme Court will render in the coming term, but it appears likely that the trend described above will continue, and there is no chance whatsoever of the Court's reviewing anything like the percentage of cases that it reviewed in 1973. That raises the question: Do we have a United States Supreme Court?

In popular imagining, and for that matter in general legal thought, the Supreme Court sits at the top of a judicial pyramid, where decisions of federal courts and decisions of state courts applying federal law (including the U.S. Constitution) come for final resolution. It's true, of course, that the Supreme Court is, as its discretionary jurisdiction implies, an institution that provides general supervision, not one that guarantees correction of errors in individual cases.

<sup>42</sup> Glenn Harlan Reynolds, *Marbury's Mixed Messages*, 71 *Tenn. L. Rev.* 303, 305–06 (2004). I also raised this issue in my 2007 "Looking Ahead" piece for this journal. But Mike Graetz once told me that you have to say something in print three times before anyone pays attention. This is number three!



Nonetheless, even that less-demanding task would seem to be beyond the capacity of an entity that produces so little output in relation to its input.

In addition, there is considerable reason to believe that lower courts are less than faithful in following the Supreme Court's guidance when it points them in a direction that they, for various reasons, don't want to go. That, at least, is what Brannon Denning and I have found in a multiyear survey of lower-court opinions responding to the Supreme Court's pro-federalism holdings in *United States v. Lopez* and *United States v. Morrison*.<sup>43</sup> Our research, in fact, suggests that lower courts are acting like the imaginary judge described by Judge Gilbert S. Merritt in a prophetic *Yale Law Journal* article written over three decades ago:

I am a manager of events, appointed to get a job done, and . . . what is important is not so much the process and the creative act but the result, the practical consequences, the effect on society. Like senators, university administrators, newspaper publishers, and major executives, I must concentrate on the big picture and delegate responsibility to others to carry out my orders. Nobody reads district court opinions these days except the parties. Gone are the days of the poets and philosophers of the law like Marshall, Shaw, Holmes, Hand, Cardozo, and Traynor.<sup>44</sup>

In short, all too often a sort of desk-clearing mentality is in the driver's seat. The following is a short description of what we found, followed by some further thoughts on what this means for the importance (or lack thereof) of the Supreme Court.

In our research, we thought that the Supreme Court's decision in *Lopez* offered an interesting opportunity to watch a major doctrinal shift percolate through the lower courts. Prior to *Lopez*, the conventional wisdom was that Congress could do essentially anything it wanted under the Commerce Clause, something that, as Deborah Merritt noted, had become a law-school joke by the 1980s.<sup>45</sup> Indeed,

<sup>43</sup> *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>44</sup> Gilbert S. Merritt, Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State, 92 *Yale L.J.* 1469, 1471 (1983).

<sup>45</sup> Deborah Jones Merritt, *Commerce!*, 94 *Mich. L. Rev.* 674, 691 (1995).

as Lynn Baker and Ernest Young have pointed out, federalism had by that time become part of a “Constitution in exile.”<sup>46</sup> Observing the lower courts’ response to this change seemed likely to provide some insight into how lower courts respond to Supreme Court doctrine generally.

And it did, though at first things were a bit unclear. The initial installment of our project, published in the *Wisconsin Law Review* in 2000, was subtitled “What If the Supreme Court Held a Constitutional Revolution and Nobody Came?”<sup>47</sup> There, we concluded that lower courts seemed strangely slow to respond to the *Lopez* decision, but suggested that Supreme Court clarification might improve matters. We wrote:

[Decisions based on *Lopez*] provide a background for two very different, though not necessarily entirely inconsistent, stories. One story—not very flattering to court of appeals judges—is that of an ossified intermediate bench in the throes of “judicial sclerosis,” unable or unwilling to apply Supreme Court decisions that depart too sharply from business as usual. This story seems particularly compelling in the context of the drug and firearms cases, where the courts’ impatience with constitutional arguments that might keep unpopular offenders out of jail is palpable, and where *Lopez* issues are dismissed in terse paragraphs containing little or no analysis.

But there is another story, too; this one is not very flattering to the Supreme Court. The view of appellate judging provided in most law school classes is a fairly simple one: Higher courts select principles, which lower courts then apply faithfully. As any lawyer with even a modicum of practice experience can attest, the situation in the real world is more complex. For example, that the lower courts are supposed to apply principles articulated by higher courts presumes that the principles of the upper courts are easily identifiable and readily available for application by the

<sup>46</sup> Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *Duke L.J.* 75, 75 (2001).

<sup>47</sup> Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 *Wis. L. Rev.* 369.

lower courts. But as the multiplicity of readings to which *Lopez* has been subject suggests, higher courts (in this case, the United States Supreme Court) do not always fulfill this responsibility. . . .

In *Lopez*, the Supreme Court struck a bold and telling blow for limited government and a return to the first principles of the Constitution. Or it didn't. Or maybe it did, but it just did not say it very well. After all, it does not matter how loudly you speak if you mumble when you do so.

How will we know which? The cynical—and, perhaps sadly, correct—answer in this case is, we will know when the Supreme Court tells us. Given the Court's decision this Term to resolve the split in the circuits over the Violence Against Women Act occasioned by the *Brzonkala* decision, as well as the scope of the federal arson statute, perhaps Supreme Court resolution is not too far away.<sup>48</sup>

Though the Supreme Court was almost certainly unmoved by our pleas, it did grant certiorari in those very cases, and in both it seemed to underscore the importance of the *Lopez* decision in terms that seemed to remove most excuses for lower-court foot-dragging. A couple of years later, we authored the next installment of our survey.<sup>49</sup> Unfortunately, we found that lower courts were, in fact, doing little to put *Lopez's* reasoning into effect. Examining the large number of lower-court cases addressing Commerce Clause issues, we found ample evidence of a desk-clearing mentality at work. We concluded:

But if ideology is not the source of lower court resistance—or, if any sustained inquiry is likely to result in the old Scots verdict, “not proven”—is there an explanation for lower courts' behavior? Research by other scholars suggests that the problem here, to paraphrase former presidential candidate Michael Dukakis, is not ideology, but rather competence. What we are seeing in lower courts' Commerce Clause

<sup>48</sup> *Id.* at 397, 399–400 (citations omitted).

<sup>49</sup> Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 *Ark. L. Rev.* 1253 (2003).

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decisions may be only symptomatic of a larger problem in the federal judiciary: that of courts responding to an increasingly unmanageable caseload by resorting to corner-cutting, resulting in an overall reduction in the quality of courts' work product. . . .

The Supreme Court is the highest court in the land. Lower courts follow its precedents. The makeup of the Supreme Court is thus the most important influence on American constitutional law. These are statements so taken for granted that they are seldom even examined. But in fact, reality seems to be more complex than that.

That complexity holds a number of lessons. One is that the way we teach constitutional law is simplistic: the way that Supreme Court opinions affect the system is far more complex and indeterminate than the casebooks suggest. That complexity exists in a variety of forms, but the way in which Supreme Court precedents do (or do not) percolate down through the lower courts is surely more important than the standard tale would make it seem. Another is that the lower courts simply are not living up to the general expectations we have had for them, in terms of thoughtfulness, fairness, and a willingness to give a hearing to litigants regardless of their stature or of the crimes of which they are accused. This failure is a serious one, not only for justice but for the very legitimacy of the system.<sup>50</sup>

Indeed, in examining the Supreme Court's behavior, one might almost compare its role to that of the Turkish or Argentinean armies over much of the 20th century—as an independent check on the political system that overturns things whenever the politicians seem to have gone too far, without a whole lot of positive law basis for deciding when that is.<sup>51</sup>

Whether such a role for the Court is constructive or unhealthy is a matter of opinion. I have written in the past that even an inconsistent or unpredictable Supreme Court—a chaotic one, in fact—might nonetheless play a positive role by breaking up special-interest

<sup>50</sup> *Id.* at 1303, 1310 (citations omitted).

<sup>51</sup> See Glenn Harlan Reynolds, *Of Coups and the Constitution*, unpublished work in progress, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2802308](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802308).

dominance that is unreachable by ordinary political means.<sup>52</sup> I confess that I find myself turning to that analysis for comfort these days, when the Court, like the Turkish Army, appears past its prime in its constitution-preserving role.

It remains unclear what is to be done about this problem. The Supreme Court could, and probably should, hear more cases, but the gap between the activity of lower courts and the Supreme Court's capacity to decide cases is still enormous. American society could return to 1973 levels of litigiousness, but that seems highly unlikely. We could, as some have proposed, interpose a National Court of Appeals between the circuits and the Supreme Court, but that solution in a sense only compounds the problem by giving the Supreme Court more lower courts to supervise. And we should certainly pay closer attention to the work of the courts of appeals, since they are, for all practical purposes, courts of last resort for almost every litigant.

A solution to this problem, at any rate, is beyond the scope of this short article. But despite the fascination with what the Court did last year, and will do next year, it is worth keeping in mind that in a very real sense, we don't have a Supreme Court at all. This may be an undiplomatic point to make in a journal that is, after all, dedicated to the Supreme Court's doings, but that doesn't make it any less true.

<sup>52</sup> Glenn Harlan Reynolds, *Chaos and the Court*, 91 *Colum. L. Rev.* 110 (1991).

