

# Eavesdropping on the Justices

DEL DICKSON

THE SUPREME COURT IN CONFERENCE (1940-1985)

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I HAVE BEEN TEACHING and writing about constitutional law for a quarter century, but I have never done original research based upon the conference notes and papers of Supreme Court justices. I am not proud of this fact. Many of these papers are housed less than a mile from where I work, and it would not be all that difficult to walk over and take a look. Still, the prospect of poring over illegible, fragmentary, and poorly organized documents without quite knowing what I am looking for strikes me as daunting and, for better or worse, I have never done it.

Hence, my gratitude to Del Dickson for doing at least some of the dirty work for me. Dickson, a political science professor at the University of San Diego, has gathered conference notes written by Justices Frankfurter, Douglas, Murphy, Jackson, Burton, Clark, Warren, and Brennan on almost three hundred cases decided between 1940 and 1985.

Of course, the trouble with relying on someone else to do your dirty work is that you have to trust the person doing it. If one is really to rely on Dickson's presentation of this material, his care and accuracy as a scholar must be beyond reproach. I am unfamiliar with Professor Dickson's other scholarship, but there is evidence within this volume that raises some troubling doubts.

Consider, for example, the lengthy essay at the beginning of the volume on the history of the conference. Although Dickson's treatment of doctrinal matters is necessarily superficial, the essay is well written and full of interesting facts and anecdotes. Unfortunately, it is also laced with inexcusable errors, confusions, and contradictions. The partial compilation that follows is, I'm afraid, rather boring, but nonetheless necessary to demonstrate the point:

- Dickson says that *Swift v. Tyson* established the principle that "in commercial cases, at

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least, federal courts would not be bound by state laws.”<sup>1</sup> *Swift* held no such thing. Justice Story wrote that federal courts were not bound by state *judicial decisions*, precisely because “decisions of courts [do not] constitute laws.” He went on to make clear that federal courts would be bound by “positive statutes of the state.”<sup>2</sup>

- Dickson says that during the period when Melville Fuller was Chief Justice, “[t]he Court was in the midst of a great generational change, as the Civil War Justices began to give way to a core of dour, conservative Grover Cleveland and Benjamin Harrison Republicans.”<sup>3</sup> Is it possible that Dickson doesn’t know that Grover Cleveland was a Democrat? Perhaps they were dour (maybe that’s why Dickson thinks they were Republicans), but in fact, all of Cleveland’s appointees – Fuller, Lucius Lamar, Rufus Peckham, and Edward D. White – were loyal Democrats.
- According to Dickson, Oliver Wendell Holmes was the lone dissenter in *Lochner v. New York*.<sup>4</sup> Has he never bothered to read John Harlan’s famous dissenting opinion, which was joined by Justices White and Day?
- Dickson quotes Owen Roberts claiming that “never in eleven years did I see [Chief Justice Hughes] lose his temper.” Two pages later, without explaining or acknowledging the contradiction, Dickson asserts that “Hughes ... was prone to lose his temper” and cites as an example a conference held while Roberts was on the Court.<sup>5</sup>
- Similarly, he quotes Felix Frankfurter as praising Hughes for “the disinterestedness with which he made his assignments.” On the

same page, once again failing to explain or acknowledge the contradiction, Dickson says “Hughes’s behavior ... gave him an important tactical advantage; by voting with the majority he could control opinion assignments and influence the results in ways he could not have done in dissent.”<sup>6</sup>

- Dickson claims that “The Court’s declining tolerance for unpopular speech was confirmed in *Terminiello v. Chicago*.”<sup>7</sup> But *Terminiello* reversed the conviction of an unpopular speaker with a ringing opinion by Justice Douglas, which asserted that “[a] function of free speech under our system of government is to invite dispute” and that “[i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”<sup>8</sup>
- Dickson says that “[b]y the time Burger became Chief Justice, the practice of juniority voting [i.e. voting in the reverse order of seniority] had long since disappeared.” Almost 100 pages later, he quotes from Chief Justice Warren’s memoirs, which state that during his tenure (immediately preceding Burger’s) “[i]n voting, we ... first called upon the junior member, going up the ladder with the Chief Justice voting last.”<sup>9</sup>
- According to Dickson, the Warren Court “fought to end de jure school desegregation”<sup>10</sup> Did anyone bother to proofread this manuscript?
- According to Dickson, deliberations over *Clinton v. Jones*<sup>11</sup> are a “noteworthy exception[]” to the general rule that the modern conference “is in danger of becoming little

1 The Supreme Court in Conference (1940-1985) at 43 (D. Dickson ed., 2001) (hereinafter cited as “Dickson.”).

2 42 U.S. 1, 17, 18 (1842).

3 Dickson at 59.

4 198 U.S. 45 (1905). See Dickson at 66.

5 Dickson at 83, 85.

6 *Id.* at 86.

7 337 U.S. 1 (1949). See Dickson at 102.

8 337 U.S., at 26.

9 Dickson at 12, 108.

10 *Id.* at 111.

11 520 U.S. 681 (1997).

more than a vote-counting exercise.”<sup>12</sup> He cites no source for this interesting tidbit and gives us no hint of how he knows that it is true.

- Dickson cites *New York v. Harris*<sup>13</sup> for the proposition that “the Rehnquist Court significantly limited the scope of the *Miranda* rule.”<sup>14</sup> But the *Harris* he cites is not a *Miranda* case. (It involves the scope of the fourth amendment exclusionary rule, not the exclusionary rule relating to self-incrimination).<sup>15</sup>
- According to Dickson, the Rehnquist Court “refused to extend constitutional privacy rights to cover terminally ill patients who wanted to hasten their own deaths voluntarily.”<sup>16</sup> He cites *Cruzan v. Director, Missouri Dept of Health* for this proposition. In fact, Chief Justice Rehnquist, writing for the *Cruzan* Court, stated that “for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” The Court rejected *Cruzan*’s claim only because she was incompetent and therefore “not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment.”<sup>17</sup>
- Dickson says that “[i]n 1997, the Court struck down [the Religious Freedom Restoration Act] ... as a violation of the establishment clause.”<sup>18</sup> But only Justice Stevens endorsed the establishment clause argument. The majority invalidated the Act on the ground that it exceeded Congress’s power under § 5 of the fourteenth amendment.<sup>19</sup>

You get the idea. All this is really unfortunate, and, like the proverbial clock that strikes

thirteen times, these mistakes bring into question everything else in the book. Nor are matters helped by the editorial decisions Dickson has made regarding the conference notes themselves. For reasons that are left unexplained, Dickson includes none of Thurgood Marshall’s conference notes, although these are now available to scholars. Only a careful reader of the “Editor’s Note” at the beginning of the volume will realize that the notes that he does include are not in fact what they appear to be – verbatim transcriptions. Instead, Dickson informs us, the notes have been modified to give them “a more natural, conversational tone. Sentence fragments have been completed and abbreviations made whole, so that the notes read more as they were originally spoken in conference.” In other places, Dickson has “combine[d] different conference notes when multiple sets were available for a given case,” thereby giving the reader “a more complete picture of what transpired.”<sup>20</sup> If we could trust Dickson to do a careful and sensitive job of all this, perhaps none of it would be a problem. But for the reasons outlined above, we cannot.

Worse, yet, some of what Dickson reproduces turns out not to be conference notes at all. Interspersed with notes on what was actually said in conference are Justice Brennan’s “talking papers” prepared by his law clerks before the conference began. It is highly unlikely that Brennan actually said what is in

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<sup>12</sup> Dickson at 120.

<sup>13</sup> 495 U.S. 14 (1990).

<sup>14</sup> Dickson at 122-23 & n. 280.

<sup>15</sup> Dickson is probably confusing the case with *Harris v. New York*, 401 U.S. 222 (1971). This is not the end of the muddle, however. Dickson describes *Harris* as a case where “the Court permitted the use of *Harris*’ second confession even though his first confession had been illegally obtained and had to be excluded.” Dickson at 123 n. 280. Unfortunately, this is not an accurate description of either *Harris* decision. Instead, it describes *Oregon v. Elstad*, 470 U.S. 298 (1985).

<sup>16</sup> Dickson at 126.

<sup>17</sup> 497 U.S. 261, 280 (1990).

<sup>18</sup> Dickson at 124.

<sup>19</sup> See *Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring); see id. at 512.

<sup>20</sup> Dickson at xix.

these notes, at least in this form. Their inclusion creates an unfortunate and misleading impression: While the other justices are talking in fragmentary and disjointed fashion, Brennan seems to present fully formed, linear, and sophisticated arguments.

So I guess I will have to do my own dirty work after all. Still, if Dickson's book lacks the obsessive accuracy one would hope for from a scholar, it more than makes up for these deficiencies by providing many fascinating nuggets that will delight Supreme Court groupies and voyeurs. Dickson furnishes a very useful and quite comprehensive commentary on each of the cases discussed that places the case in context, indicates how it was ultimately decided, and allows the reader to follow most of what the justices are talking about. Although the talk itself is often quite desultory (more on this below) there are items of real interest scattered throughout the book.

For example, in recent days, Supreme Court justices have felt it necessary to protest (perhaps too much) that politics plays no role in their decisions. If this claim is indeed true, the Court's practices have changed dramatically from those documented in this book. Thus, during the deliberations over *Brown v. Board of Education*, Justice Jackson explicitly acknowledged that his vote in favor of ending legally enforced segregation was premised on political beliefs that he could not defend legally.<sup>21</sup> Similarly, consider Justice Douglas's version of Justice Frankfurter's statement to the conference on the eve of the unanimous *Brown* decision:

As a pure matter of history, in 1867, the Fourteenth Amendment *did not* have as its purpose to abolish segregation. The due process and equal protection clauses certainly did not abolish segregation when the Fourteenth Amendment was adopted. The most that the history shows is that the matter was inconclusive. A host of legislation passed by Congress presupposes that segregation is valid. A host of legislation and history in Congress and in this Court indicates that *Plessy* was right.<sup>22</sup>

None of this prevented Frankfurter from voting to strike down segregated education. Or consider Justice Goldberg's comments on cases concerning criminal convictions of defendants who engaged in sit-in demonstrations protesting segregated public accommodations. While the Court was considering these cases, Congress was debating a civil rights bill that would prohibit such segregation. Dickson quotes Goldberg as telling his colleagues that

If we decide these cases as we must, and if we allow public discrimination in public places, I am convinced that we will set back legislation indefinitely. Our society will then have an evil virus inside it that will keep it frozen on racial lines. ... There is legislation pending. The federal government's argument is not implausible. Rather than handing down a 5-4 decision Black's way [affirming the convictions], I think that it is better to put these cases off on the ground urged by the United States, reversing them narrowly and not reaching the broad ground.<sup>23</sup>

My own view is that political influences of this sort are not only legitimate; they are inescapable. Even if formal principles of law clearly dictate a particular outcome, anyone

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<sup>21</sup> Dickson quotes Jackson as follows:

This is a political question. To me personally, this is not a problem. But it is difficult to make this other than a political decision. ...

The problem is to make a judicial basis for a congenial political conclusion. ... As a political decision, I can go along with it – but with a protest that it is politics.

Id. at 658.

<sup>22</sup> Id. at 657.

<sup>23</sup> Id. at 722-23.

who is honest about the matter must admit that there is an irrepressible antecedent moral question concerning whether those formal principles should be obeyed. Law does not establish its own morality, and, although we would sometimes like to deny it, we always have the option to play the game by different rules. What else could Justice Jackson have meant when, in one of the most famous and revered Supreme Court opinions ever written, he stated that sometimes the result in a constitutional case should “depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law”?<sup>24</sup> Indeed, what else could Justice Scalia have meant when he confessed to being a “faint-hearted” originalist and admitted that he could not “imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging” even if there were no constitutional warrant for striking it down?<sup>25</sup>

Of course, it does not follow from the fact that politics inevitably affects Supreme Court decisions that the justices are good politicians. Indeed, sometimes, the justices are at their very

worst when they imagine themselves as sophisticated people of the world who know how to play the political game. Some of the Court’s behavior during the crisis produced by *Brown v. Board of Education* illustrates this problem. The story about the lawless fashion in which the Court disposed of *Naim v. Naim* so as not to inflame southern hostility in the wake of *Brown* is well known.<sup>26</sup> New to me, and vividly presented here, is the Court’s remarkable performance, apparently motivated by similar concerns, in *Williams v. Georgia*.<sup>27</sup>

*Williams* was convicted of murder and sentenced to death by an all-white jury chosen under a system whereby the names of white prospective jurors were typed on white tickets and the names of African American prospective jurors were typed on yellow tickets. Six months before *Williams’* trial, the Supreme Court had declared this system unconstitutional in *Avery v. Georgia*.<sup>28</sup> Despite this fact, the Georgia trial court continued to use the system, and *Williams’* lawyer admitted in a motion for a new trial that he had never heard of *Avery*.<sup>29</sup> Citing a Georgia rule that prohibited belated challenges to juries, the state court

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24 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 576, 637 (1952) (Jackson, J., concurring).

25 See Antonin Scalia, *Originalism, the Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989).

26 See *Naim v. Naim*, 350 U.S. 891 (1955); *Naim v. Naim*, 350 U.S. 985 (1955). Faced with a challenge to Virginia’s antimiscegenation statute in the immediate wake of *Brown*, the Court simply refused to hear the case, an action that Herbert Wechsler characterized as “wholly without basis in law.” Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv. L. Rev. 1, 34 (1959). Compare Alexander Bickel, *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* 174 (2d ed. 1962) (advancing a political/prudential argument in support of *Naim*) with Gerald Gunther, *The Subtle Vices of the “Passive Virtues” – a Comment on Principle and Expedience in Judicial Review*, 64 Colum. L. Rev. 1, 24 (1964) (attacking *Naim* as an abandonment of principle).

27 349 U.S. 375 (1955).

28 345 U.S. 559 (1953).

29 Less than two weeks before argument in the United States Supreme Court, the lawyer informed the Court that he was scheduled to appear in a local divorce case in the same week and that he would be unable to argue the case in the United States Supreme Court because doing so might cost him a paying client. Dickson at 241 n. 53. At the conference, Warren expressed his frustration with the quality of lawyering *Williams* had received:

He might as well have had no lawyer at all. Eugene Gressman [the new lawyer appointed by the Court to represent *Williams*] asked for the record from Georgia, and they denied letting the record go out of the state. I asked to have the record written up. [The trial lawyer] did nothing with the case and practically abandoned it, and when he made out his affidavit he

refused to reverse the conviction. When the case reached the Supreme Court, Justice Harlan asked his law clerk, E. Barrett Prettyman, Jr., to study the Georgia rule. Prettyman discovered that in fact the rule was discretionary, rather than mandatory. Based upon this discovery, Harlan drafted a memorandum urging the Court to remand the case to give the state court a second chance.<sup>30</sup>

Much of the discussion in conference concerned the adequacy of Harlan's proposed remedy. Chief Justice Warren worried that "[i]f we just send [the case] back, the court would *fix it up burglary proof*" and therefore favored an outright reversal. Justices Black and Douglas agreed, but Justice Frankfurter, as always obsessed with making an easy problem seem hard, refused to go along. In a long soliloquy, he agonized over the problem. "The implications of this case are highly important in the relation of federal power to the states," he opined. On the one hand, he had "*very strong views* of the duty of this Court to be alert against taking over the administration of criminal law from the states." On the other, "we must enforce standards in federal courts, which is our charge." Accordingly, Frankfurter would have "[gone] beyond Harlan's memo" because "[t]he situation here is special" and "[i]f there is discretion, this is a convincing case for it."<sup>31</sup>

Ultimately, Frankfurter proposed a compromise:

Here, there are compelling circumstances against the finality of the state order. I would remand in a nice way, in a considerate opinion not telling them what Georgia law is. I assume that Georgia will yield to its available remedy. I would imply that failure to grant the motion

would violate due process. ... I would not leave much room for Georgia to stand pat. If we remand and leave open a contingency that the Georgia Supreme Court might deny – if they did, I would reverse it when it came back.<sup>32</sup>

The Court seems to have followed Frankfurter's advice. It remanded the case with the suggestion that Georgia grant Williams a new trial.

If the justices supposed that Frankfurter's "Mr. Nice Guy" approach would produce the desired result, they were badly mistaken. On remand, Chief Justice Duckworth, speaking for a unanimous Georgia Supreme Court wrote the following:

This court bows to the Supreme Court on all Federal questions of law but we will not supinely surrender sovereign powers of this State. In this case the opinion of the majority of that court recognizes that this court decided the case according to established rules of law and that no Federal jurisdiction existed which would authorize that court to render a judgment either affirming or reversing the judgment of this court, which are the only judgments ...

Not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was first decided by us in 1953, and to avoid further delay, we state that our [first] opinion ... is supported by sound and unchallenged law, conforms with the State and Federal Constitutions, and stands as the judgment of all seven of the Justices of this Court.<sup>33</sup>

According to Dickson, Duckworth "fully expected to be dragged before the Supreme

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probably told the truth – he did not know about the *Avery* case and he did not care.

Id. at 241.

30 Id. at 241 n. 52.

31 Id. at 241-43.

32 Id.

33 *Williams v. State*, 211 Ga. 763, 763-64, 88 S.E.2d 376, 377 (1954).

Court in chains and held in contempt.”<sup>34</sup> Instead, by the time the case returned to the Court’s docket, the justices were enmeshed in the politics of defending its then recent *Brown* decision and determined not to provide more ammunition for southern nullifiers. So instead of summarily reversing the Georgia Court, as Frankfurter had promised, the Court voted 9-0 to deny certiorari.<sup>35</sup> A month later, Williams was dead. In the first conference, Chief Justice Warren had told his colleagues that he “could not have this man’s life on my conscience.”<sup>36</sup> Apparently, his conscience was harder than he first imagined.

Some might conclude from episodes such as this that the Court ought to follow a “mechanical” theory of judicial review that eschews nonlegal considerations. According to this theory, the Court’s legitimate power stems from the fact that its decisions can be read directly off the constitutional text. But not even rigid originalists believe in this theory any more, and there is scant evidence in this book to support it. Today, virtually everyone agrees that the Constitution’s text, not to mention the precedent, tradition, and moral and political theory that have glossed it, provides the justices with a great deal of discretion.

If judicial review is justified at all, then, its justification must rest on the kind of people the justices are, and the process they go through when making a decision. Since they will inevitably reason from open-ended premises to politically contestable conclusions, we must depend upon the fact that they are wise women and men engaged in a process calculated to

produce wise decisions. As Alexander Bickel observed long ago, “Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.”<sup>37</sup> Or as Frank Michelman has argued more recently,

Every norm [of justice], every time, requires explanation and justification in context. ... [T]he task calls for practical reason, and practical reason involves dialogue. ...

[T]he most universal and striking institutional characteristic of the appellate bench is its plurality. We ought to consider what that plurality is “for.” My suggestion is that it is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom.<sup>38</sup>

I must confess to a weakness for theories of judging that emphasize the special possibility judges have to deliberate.<sup>39</sup> But I must confess as well that if “our freedom” really does rest on “dialogue [that supports] judicial practical reason,” this book provides evidence that we are in serious trouble indeed.

Although somewhat obscured by Dickson’s topical arrangement of the cases, his book demonstrates a disturbing chronological trend. As time goes by, the justices seem increasingly uninterested in talking to each other. I do not mean to say that the quality of deliberation is uniformly high in the early years that he covers. During Chief Justice Hughes’ ponderous summary of the facts in *United States v. Darby Lumber Co.*,<sup>40</sup> a case argued in 1941, Justice Murphy mordantly notes “McReynolds is sound asleep, mouth

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34 Dickson at 244.

35 See *Williams v. State*, 350 U.S. 950 (1956) (denying certiorari).

36 Dickson at 241.

37 Alexander Bickel, *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* 25-26 (2d ed. 1962).

38 Frank I. Michelman, *Traces of Self-Government*, 100 Harv. L. Rev. 1, 76-77 (1986).

39 For my defense of this view, see Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (2001).

40 312 U.S. 100 (1941).

open – and Stone is dozing away.”<sup>41</sup> After the Court’s conference in *Dennis v. United States*,<sup>42</sup> a 1950 case where the Court affirmed the conviction of ten Communist party organizers, Justice Douglas wrote, “The amazing thing about this conference on this important case was the brief nature of the discussion. Those wanting to affirm had their minds closed to argument or persuasion. The conference discussion was largely pro forma.”<sup>43</sup>

Nor should lengthy conference monologues be confused with authentic deliberation. According to Dickson,

[Justice] Douglas complained that [Justice] Frankfurter constantly engaged in histrionics during conferences, bringing in piles of books, reading at length from them, and pounding on the table for emphasis. . . .

In 1960, Douglas threatened to quit attending conferences so long as Frankfurter remained on the Court. He wrote a memorandum to the Chief absurdly threatening to resign from the conference . . . .

Douglas occasionally left the conference table while Frankfurter was speaking, sat down in an easy chair in another part of the room and read or wrote personal letters. Douglas enjoyed antagonizing Frankfurter by saying something at the conclusion of Frankfurter’s remarks like, “When I came into this conference I agreed with the conclusion that Felix has just announced. But he’s just talked me out of it.” Potter Stewart reported that no matter how many times Douglas pulled the same stunt, it never failed to make Frankfurter angry.<sup>44</sup>

Although this behavior is inexcusably rude, I think that most readers of this book will get some flavor of Frankfurter’s didactic pomposity and moral obtuseness and come away with

some sympathy for Douglas. Still, personal animosity at this deep level is not conducive to a calm, reasoned, and open exchange of ideas.

There is no evidence that more recent conferences are marred by this sort of behavior. Unfortunately, however, the modern justices seem to have veered to the opposite extreme. Precisely so as to avoid authentic debate about real differences, and perhaps for fear that such debate would spin out of control, the conference has degenerated into a bland, orchestrated, and bureaucratic interchange that substitutes elaborate ritual and mutual expressions of respect for serious debate.

Consider, for example, Justice Brennan’s notes on the conference held in 1982 concerning *Michael M. v. Superior Court of Sonoma County*.<sup>45</sup> The case concerned a seventeen-year-old male’s conviction for the statutory rape of a sixteen-year-old female. The defendant argued that California’s statutory rape law violated the equal protection clause because it applied only to men. Thus, even if an older female had sex with a younger male, the male, but not the female, would be guilty of the offense. Here, in its entirety, is Dickson’s version of Brennan’s notes:

BURGER: None of our equal protection cases give much help. The state does not have to treat boys and girls alike for all purposes, at least in a sexual context. Protection against teen-aged pregnancy is a state interest, even if protection against teenage chastity is not. Rationality analysis suffices. The case really presents the question of what values the judicial system should support – and female chastity has always been regarded as a higher value than male chastity.

STEWART: Intellectually this is a very puzzling case. Males and females are not similarly situated, and therefore no equal

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41 Dickson at 219.

42 341 U.S. 494 (1951).

43 Dickson at 279.

44 *Id.* at 109-10.

45 450 U.S. 464 (1981).



protection violation is involved here. The statute is based on biological differences, contrary to all other equal protection cases.

WHITE: I agree with Bill Brennan that a gender-neutral statute can better achieve the state's interests. We ought to do this as applied. I could not reach the same result if the man were fifty and the girl eleven.

BLACKMUN: I come down to affirm even under *Craig v. Boren*, accepting the California Supreme Court's holding as to the purpose of the statute.

POWELL: I agree with Harry that even under *Craig v. Boren* we can come out to affirm.

REHNQUIST: This is not a sexual stereotype case at all. There is a difference between men and women that provides a perfectly acceptable basis for the difference in treatment.

STEVENS: If the pregnancy basis is accepted, why say no punishment for a woman but punishment for a man? That is irrational under whatever standard you use. I think that this law is bad on its face, and not only as applied.<sup>46</sup>

There are several noteworthy points about this exchange. First, the justices do not seem to be engaging with each other. Instead, the discussion has a disconnected quality. Each of the justices presents his own position, apparently oblivious to the position stated by his colleagues.

Second, no one seems to be making anything like a sustained argument. The justices record their votes, but provide little or no reasons for them. Why, one wants to ask, does Justice Blackmun "come down to affirm even under *Craig v. Boren*," and why does Justice Powell "agree with Harry"? Why does Justice White think that the case would be different if the parties were different ages, and why does Chief Justice Burger think that female chastity has a higher value than male chastity?

Third, the justices talk at cross-purposes and argue from different premises. Should the case be reviewed under heightened scrutiny or rational basis review? Should the decision address the facial discrimination contained in the statute, or its application to the particular facts? Should we assume that the statute is meant to protect female chastity, to guard against pregnancy, or to serve some other purpose? A logical discussion of the case would address each of these issues in turn, rather than jumbling them together.

Finally, the discussion is on a shockingly low level. I regularly teach *Michael M.* and most of my students, with minimal prompting, recognize that the case poses difficult and interesting questions. To start at the simplest level, it is obvious to the students (even if, apparently, not to all the justices) that the conduct of both a man and a woman is necessary to produce pregnancy. In what sense, then, does the punishment of only men promote the goal of pregnancy prevention? The gender discrimination might make some sense if one assumes that men as a group are more likely to be aggressive in sexual encounters than women, or that women are more likely than men to bear the financial and emotional burdens of childrearing if the encounter results in pregnancy. If we accept these generalizations as true, then it may be more necessary to deter men than women through statutory rape laws, especially if standard rape doctrine is ineffective because of sexist and outmoded assumptions about force and consent. But how do we know that the generalizations are true? And even if they are, might not the generalizations themselves be the products of pervasive gender discrimination? And if this is so, does accepting the truth of the generalizations reinforce this discrimination or help to break it down? Should we be concerned that even accurate gender generalizations deny the ability of

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46 Dickson at 779-80.

people to defy the stereotypes and thereby entrench rigid gender norms that are a barrier to human freedom? Are any of these concerns, even if legitimate, relevant to constitutional analysis?

Some of the Court's opinions (perhaps authored by law clerks) deal with these issues in reasonably interesting ways,<sup>47</sup> but there is barely a hint in the conference notes that the justices are even aware of them. Part of the problem, to be sure, is an artifact of the medium. The conference notes do not purport to be anything like a verbatim transcription of what occurred. They are instead a fragmentary record, presumably intended primarily to memorialize the justices' positions so that the ultimate opinion will conform to them. Thus, for all we know, the justices considering *Michael M.* had a rousing and enlightening discussion of the modern state of gender discrimination law – a discussion that Justice Brennan did not bother to write down.

But I doubt it. The dismaying evidence provided by the notes that Dickson produces is confirmed by what little we know about the impressions of law clerks and the justices themselves concerning what takes place at conference. Here is how Dickson summarizes these impressions:

The conference [is] highly factionalized and uncommunicative. Whether out of animosity or indifference, many of the Justices have all but given up talking to each other, let alone trying to persuade others in conference or attempting to forge a consensus. Gathering five votes is all most of the Justices are interested in at this point, and the conference is in danger of becoming little more than a vote-counting exercise.<sup>48</sup>

Things were not always this way. In the early days of the Republic, the justices lived

with each other during the Court's term. They left their families at home, and Washington, D.C. – a backwater if ever there was one – afforded few distractions from their job. Oral arguments were leisurely affairs with no fixed time limit and often extending over days. Moreover, beginning with John Marshall's tenure, there developed a strong norm against dissenting or concurring opinions. Thus, the justices had to come to a consensus about what they wanted to say. The result was lengthy – perhaps even interminable – deliberation. The justices talked about cases over meals, over drinks, when they got up in the morning, and when they went to sleep at night. They bargained, argued, exchanged ideas, and struggled for consensus.

Even when the justices stopped living together, the decisionmaking process was much less bureaucratized than it is today. As late as the early twentieth century, Louis Brandeis could boast that, "Here we do our own work." Because the justices were essentially solo operators, they had no one to consult but each other. Moreover, they had to write their own opinions and justify their conclusions. Today, in contrast, each associate justice is authorized to have four law clerks, two secretaries, and a messenger. As Chief Justice Rehnquist has remarked, the justices have become "a collection of nine autonomous opinion-writing bureaus." The head of each "bureau" can indulge her own whims, unconstrained by the need to justify or even talk in a serious way about the outcome. Then, she can foist on an underling the task of cleaning up the mess by writing something that, somehow, makes the outcome seem plausible.

Are there things that can be done to improve the situation? Here are four modest proposals that have about as much chance of

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47 See, e.g., the exchange between Justices Blackmun and O'Connor in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

48 Dickson at 120.

being adopted as Antonin Scalia has of endorsing *Roe v. Wade*:

### **1. The Supreme Court's conferences should be offered for live broadcast**

I know, I know. How are the justices supposed to be candid with each other if every word they speak is made public? But, for goodness sake, these folks have *life tenure*. What is this protection for, if not to allow the justices to say what they think without worrying about retribution? Members of Congress seem to do just fine with public mark-up sessions on bills even though they risk electoral defeat if they offend the wrong people. If the justices in fact feel a little pressure to think more carefully about what they say at conference, this would be a good, rather than a bad, result. And if they decide to avoid the public conference by holding more informal, behind the scenes meetings (the apparent result of many "open meetings" laws), this outcome too might improve the deliberative process.

### **2. Congress should zero out the budget line for Supreme Court law clerks**

Despite their effort to convince us otherwise, the fact is that the justices have a pretty cushy job. They sit for only nine months per year and produce a very modest written product. For example, during the 1999 Term, Chief Justice Rehnquist wrote a total of fourteen opinions. To be sure, the Chief Justice has administrative duties, but Justice O'Connor wrote fifteen and Justice Ginsburg, eighteen.<sup>49</sup> Although some of these were major efforts, many others were short concurrences or dissents. A professor at a major law school

with a similar output might have some difficulty getting tenure.

Moreover, the dirty little secret is that the number of cases actually decided by the Court has declined dramatically during the very period when its support staff has been growing.<sup>50</sup> True, the justices have a large number of petitions for certiorari to process, but for years, Justice Brennan managed to handle these without the assistance of law clerks. There is no reason why the other justices should be unable to do the same.

Stripped of protective staff, the justices might be compelled to interact directly with each other and to think in a serious way about the problems they are addressing. The dismantling of the Court's administrative apparatus might also produce a more subtle but nonetheless significant effect. A large and obsequious staff is part of what makes a Supreme Court justice an Important Person. Forcing the justices to do their own work is a useful corrective to the arrogance and self-importance that is an occupational hazard in a job where people refer to you as "your honor" and rise when you enter a room.

### **3. The Court should release draft opinions for public comment before they are finalized**

Why not? Administrative agencies have functioned this way for years. Congress does not usually keep important legislation secret until it becomes law, and when it tries to do so, it is subject to harsh criticism. It is terrifying that the Court produces major legal documents in final form without giving interested parties the opportunity to point out errors and suggest revisions.

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49 See *The Statistics*, 114 Harv. L. Rev. 390, 390 (Table I) (2000).

50 In 1999, the Court produced 77 full opinions disposing of cases and a total of 194 opinions. *Id.* The comparable numbers 20 years earlier were 138 and 338. See *The Supreme Court, 1978 Term - The Statistics*, 93 Harv. L. Rev. 1, 275 (Table I) (1979).

**4. After the draft is made public, the Court should conduct reverse oral argument, where lawyers for each side can question the justices about the opinion**

Why is it only the justices who get to ask the questions? A reverse oral argument, with the advocates posing the hypotheticals and testing limits, might uncover unintended consequences of an opinion or flabby argumentation. Moreover, forcing the justices to defend their opinions is bound to provide more incentive to think carefully about what they are doing.

If we were serious about having justices engaged in authentic deliberation about

questions that mattered, we would be serious about proposals like these as well. Of course, we are not serious. For the present, at least, we seem mostly satisfied to substitute pseudo-religious imagery and the secrecy that reinforces it for real deliberation.

There is some hope, however. The furor surrounding the Court's outrageous decision in *Bush v. Gore* has begun a public dialogue about whether the justices are really serving the nation. Viewed in this context, the publication of these conference notes might play a small role in fueling this discussion. And in the end, it is only this sort of dialogue about the Court that holds any hope of restoring real dialogue among the justices. *♣*