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STYLE AND THE SUPREME COURT'S EDUCATIONAL ROLE IN GOVERNMENT

*Mark Tushnet**

The Supreme Court, we are told, is—or at least could be—a republican schoolmaster,¹ an educative institution.² Through its decisions and, even more, the written opinions that provide the rationales for its decisions, the Court leads the people of the United States to a deeper understanding of our constitutional commitments. As our understanding improves, the policies we pursue improve as well.

This picture of the Court's role is undeniably attractive.³ Its outlines need filling in, though. Claims for the Court as educator face an immediate difficulty. Surveys indicate rather low levels of public knowledge about the Court's work in general, and even lower levels of knowledge about particular decisions.⁴ How, then, could the Court educate the public about the true meaning of the Constitution?

One possibility is that it can do so by imposing its vision on the society, hoping that people will adjust their understandings to the reality they face. As Felix Cohen put it, the Court could edu-

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1. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 Sup. Ct. Rev. 127.

2. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961 (1992).

3. Of course the account finesses hard questions about how the Justices are to find out what our "deep" commitments are; what appear to be deep commitments from one perspective will often appear to be fundamental moral errors from another. This is, though, a criticism available against essentially everything that anyone has ever written about the Supreme Court, and it may be a positive virtue to finesse the questions that make such a criticism cogent.

4. See David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 378 (W.W. Norton, 3d ed. 1993) ("Most of the Court's decisions attract neither media nor widespread public attention"); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 125-27 (U. of Chi. Press, 1991) (citing studies showing, e.g., that "only about 40 percent of the American public, at best, follows Supreme Court actions," and that in 1966, "46 percent of a nationwide sampling could not recall *anything at all* that the Court had recently done").

cate by taking advantage of the normative power of the actual.⁵ To do so, however, the Court would first have to ensure that it could indeed create the reality to which people would adjust. Yet, lacking the power of the purse or the sword, possessing only judgment, the Court's ability directly to coerce as the preface to education is limited.

Here the reaction to the Supreme Court's flag-burning decisions deserves note. As the episode ran its course, it turned out that the Court's decisions, however apparently unpopular, were not inconsistent with the views of the national political elite; notably, slightly over forty percent of the members of the House of Representatives refused to vote for a constitutional amendment to overturn the Court's decisions.⁶

The flag-burning decisions show the Court successfully leading and, arguably, educating the public through its decisions alone, for, as Christopher Eisgruber has argued, Justice Brennan's opinion in *Texas v. Johnson* failed to achieve the rhetorical effect for which it strove. Eisgruber points out that in its concluding rhetoric the opinion distances the Court from the deeply held views of those who enacted the laws against flag-burning: Justice Brennan "begin[s] with the oddly coy, 'We are tempted to say,' and conclud[es] with 'Texas sees.'" This statement separates the Court and its defense of constitutional values from the people of Texas.⁷ As Eisgruber says, Brennan's closing paragraph, which ends by asking those who see a flag burned to salute the flag and give it a decent burial, is "well-intended, but ultimately ridiculous."⁸

Texas v. Johnson illustrates how an opinion whose rhetoric fails to capture the reader's imagination can nonetheless alter reality and in so doing educate the public about the Constitution. The Court can change reality through its decisions in several ways; none, however, seem to provide an adequate account of the Court's educative role.

Consider first how a political adviser might describe the Court's situation. The adviser would learn from the Justices that they hold views that are different from—as they would put it,

5. Quoted by Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 71 (1965).

6. The vote was 254 in favor, 177 against.

7. Eisgruber, 67 N.Y.U. L. Rev. at 982 (cited in note 2).

8. *Id.*

ahead of—the views prevalent in the society.⁹ An astute adviser might point out that if the Justices' views are only a bit ahead of society's, they might be able to educate society simply by enforcing their views. They would, on this account, pull the rest of society along, a task made easier by the relatively short distance society has to travel (or, in the educational metaphor, the relatively small amount of learning society has to do).¹⁰

If, in contrast, the Justices' views are well in advance of society's, a political adviser would probably suggest that they face a substantially more difficult task. If they attempt to enforce their views directly, they run a significant risk that what they do will be ignored.¹¹ A political adviser might suggest that the Justices move incrementally toward the goal they prefer. After one small step changes reality, society may adjust by coming to accept views closer to the Justices'. Succeeding steps might end where the Justices originally began.¹²

Robert Burt has recently offered an alternative account of how the Court's decisions may alter reality, by keeping contending visions of the constitutional good in constant dialogue.¹³ The Court's decisions matter, according to Burt, not because the decisions themselves coercively alter reality, but because they operate as signals to the public of the characteristics of acceptable resolutions of persistent conflict. A decision that awards a complete victory to one side is, on Burt's view, unlikely to lead to social peace. Like violent suppression of dissent, such decisions

9. Here "ahead of" does not mean, as it often might, "more liberal than." Conservatives seeking to change the views of a liberal public could properly describe themselves as ahead of the public.

10. The flag-burning decisions do not fit this account directly, though they do, I argue below, when the role of national political elites is taken into account.

11. The Court's aborted attempt to abolish the death penalty is probably the best recent example. And, it may be worth noting, the Court's 1972 decision was so highly fractured that the public could not know *why* the Court said the death penalty was unconstitutional, only *that* the Court said so. The decision, that is, could not possibly have educated the public. *Furman v. Georgia*, 408 U.S. 238 (1972). The example may be ambiguous, though, because at the time the Court acted it might not have seemed to the Justices that they were too far ahead of the public. Public support for the death penalty had recently reached historic lows, and was only beginning to rise again in the early 1970s. Abolitionist Justices might have thought that a Court decision would contribute to the long-term decline in support for capital punishment. For an elegant argument that political leadership is essential to abolition of capital punishment, see Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge U. Press, 1986).

12. This strategy, of course, runs the risk that it can be carried out only over a substantial period, during which the Court's membership might change. Some new members might not want to take further steps, or might even want to "retreat." If so, the Justices who sought larger changes would be thwarted from within the Court.

13. Robert A. Burt, *The Constitution in Conflict* (Belknap Press, 1992).

forcibly shove persistent conflict beneath the surface without alleviating it. In contrast, by structuring its results to concede some validity to all sides in conflict, the Court can assist the public in working out a resolution of the conflict. Sometimes Burt suggests that the Court provides a structure for dialogue about the conflict,¹⁴ but the force of his argument lies in the claim that the Court's contribution lies in keeping in dialogue people who otherwise would seek other methods of resolving their conflict.¹⁵

A third, and more common, explanation of the Court's educative role is that the Court educates through what it says to the public in its opinions. Joseph Goldstein provides a recent example.¹⁶ He seeks a constitutional law that would be more "intelligible" by being presented to the public in more readily understandable opinions. Intelligibility is essential, Goldstein argues, to maintain the Constitution as

something that We can understand if We are to remain sovereign. . . . If Ours is to be an 'intelligent democracy,' . . . We the People . . . must be able to learn, from Our reading of the Constitution and the Supreme Court's construction of it, what rights We have and do not have . . . [f]or then We can meet

14. Two difficulties with such a suggestion deserve note. Plainly dialogue about the positions in conflict already occurs, so the Court's decisions do no more than replace one structure for dialogue with another. Few if any normative conclusions can flow from such a substitution. And, if the Court's structure assists in resolving conflict because it has a normative tilt in favor of one side, the Court's contribution lies in its substantive position, a conclusion that Burt assiduously avoids.

15. Among those other methods is force, and, as others have noted, one of the weakest points in Burt's argument is his intellectually honest insistence that the conflict over slavery ought to have been addressed as he suggests, by acknowledging the validity of the claims of slaves and slaveholders. For discussion of Burt's argument on slavery, see Michael Stokes Paulsen, Book Review, 10 *Const. Comm.* 221, 224-25 (1993) (reviewing Burt, *The Constitution in Conflict* (cited in note 13)). The alternative there, of course, was war, and Abraham Lincoln offered the best answer to claims like Burt's:

If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war, as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—ferently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord, are true and righteous altogether.'"

2 *Abraham Lincoln: Speeches and Writings* 687 (Don E. Fehrenbacher, ed., Library of America, 1989) (Second Inaugural Address).

16. Joseph Goldstein, *The Intelligible Constitution* (Oxford U. Press, 1992).

Our responsibility as informed citizens to respond to what the Court did and why it did it.¹⁷

Goldstein argues that the Justices "have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest," an obligation that he believes they have failed to honor.¹⁸ Goldstein recommends that the Justices adopt certain "guidelines for maintaining the intelligibility of the Constitution," the first and presumably most important of which is, "Use simple and precise language 'level to the understanding of all.'" Or, quoting from Justice Hugo Black, "Write it so your Mamma can understand it."¹⁹

Yet, if public knowledge about particular *outcomes* in cases is low, surely public knowledge of the content of the Court's opinions, the precise ways in which it articulates the principles it finds in the Constitution, is lower.²⁰ Indeed, Goldstein's account seems to depend on the clearly mistaken view that the general public actually reads Supreme Court opinions; otherwise it seems nearly irrelevant whether its opinions are intelligible. Other than the *New York Times*, which sometimes reprints excerpts of major opinions, most newspapers provide at most a few sentences from opinions. The Justices can expect no more than that the public will know the outcomes of particularly salient cases, such as the flag-burning or abortion decisions, and perhaps one or two memorable lines in the opinions.

I believe that those memorable lines play an important part in the Court's educational effort. The memorable lines are expressions of the personalities of individual Justices in an otherwise bureaucratic institution, who use their distinctive phrasings to generate a sense among opinion leaders that the Justices are serious people who ought to have the public's trust.

My argument starts with the observation that the Court faces its most difficult educational task when it does something inconsistent with the judgments of the people it seeks to edu-

17. *Id.* at 5, 6.

18. *Id.* at 19.

19. *Id.* at 112.

20. Perhaps public knowledge is low because of the turgidity of the Court's opinions, and would improve if the Court changed the way in which its opinions were written. I find this suggestion quite implausible, if only because of the widely observed simplification of political discourse in recent years. See, e.g., Cass Sunstein, *The Partial Constitution* 215-16 (Harv. U. Press, 1993). No matter how hard the Justices try, they are unlikely to get their opinions stripped down to a ten-second sound bite (although of course, as I argue in the text, they may consciously attempt to insert such sound bites into their opinions).

cate—when, that is, it strikes down popular programs.²¹ We might contrast the Court with bureaucracies whose programs are validated by their outcomes. Because the Court's outcomes are unpalatable to the public when they are stated, the Court cannot rely on the outcomes themselves to educate the public.

Fortunately for the Justices, neither the general public nor opinion leaders can devote much time to assessing the particulars of the Court's performance. They must rely instead on a general sense of what the Court has done and is doing. If the Court seems to be trustworthy in general, opinion leaders may be willing to "cut it some slack" on decisions with which they initially disagree mildly. Editorials and op-ed articles may explain why the Court's decision actually makes sense. Conversely, if opinion leaders generally mistrust the Court, they may escalate their criticisms precisely to limit the success the Court might otherwise have in educating the public to its views.

How, then, can the Justices develop the trust which, on this account, is essential to their successful performance of the educative role? One method is suggested in *The Federalist Papers*. In discussing elections, Publius faced the problem of explaining how self-interested electors would select representatives of "the most attractive merit and the most diffusive and established characters" who would be more public-regarding than the voters themselves.²² With respect to the House of Representatives, where direct elections would occur, the Constitution offered the answer that electoral districts would be large enough to restrict the number of plausible candidates. To run for office, a person would already have to be well-known. To become well-known, in turn, the potential candidate would have to display his or her more diffusive character, generally through prior public service.

The particular problem that concerned Publius is irrelevant to the Supreme Court, but the general thought is not. People demonstrate their character through their public actions, which provide the basis for evaluating their fitness for higher public of-

21. The Court has a subsidiary educational role, emphasized by Charles Black, in ensuring that it communicate effectively the proposition that in refusing to strike down a statute as unconstitutional the Court is not affirmatively approving the statute. Cf. Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 48-53 (Macmillan, 1960) (describing "legitimizing" function of judicial review); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 29-31 (Bobbs-Merrill, 1962) (developing Black's argument). For a passage indicating the Court's understanding of this subsidiary role, see *San Antonio School District v. Rodriguez*, 411 U.S. 1, 58-59 (1973).

22. *The Federalist No. 10* 83 (James Madison) (New American Library, Clinton Rossiter ed., 1961).

fice. What potential Justices have done, that is, allows us to consider whether we ought to place our trust in them.²³

Performance after appointment can also generate trust.²⁴ At this point judicial style begins to matter. Recall that the question is how the Court can gain support for decisions that the public may initially find troublesome or even deeply wrong. Precisely because the decisions are unpopular, the Court cannot rely on the substance of the decisions themselves to generate support. Rather, it has to rely on either the manner in which the decisions are made—their style—or the more diffuse support the Court has generated from other decisions that the public has already come to support.

Here the flag-burning cases are again informative. I have argued that they educated by changing reality. Consider, though, the possibility that they educated by effectively communicating the Court's vision of the good constitutional order. That communication could have occurred only indirectly, because the opinions were flawed stylistically. The Court's opinions were translated for the public by the media. The flag-burning cases succeeded, on this view, because editorialists and op-ed page commentators were able to take the results and explain why the Court's action was profoundly correct, at least according to the editorialists' understanding of the Constitution's deepest commitments.

Whether or not this account of the flag-burning cases' effects is accurate, it suggests that often the Court educates the public indirectly. The general public knows some particular outcomes in controversial cases through the media and other opinion leaders.²⁵ Those leaders are likely to be somewhat more attentive to

23. This may account for what seems to me a widespread sense that Supreme Court nominees ordinarily should have a long career in public service, so that service on the Court is the culmination of, or at least an extension of, their careers. Thurgood Marshall and Lewis Powell provide relatively recent examples. In contrast, much of the apparent unease about the aborted nomination of Douglas Ginsburg, some of the unease about the nomination of Clarence Thomas, and some of the unease about David Souter's nomination may have occurred precisely because they had not served a national constituency long enough to generate the trust that nominees should. See *Marshall: Speaking Ill of the Dead*, Newsweek, Aug. 6, 1990, at 18 (when asked about Souter's nomination, Justice Marshall replied, "Never heard of him. And when his name came down, I was listening to television . . . I called my wife and said, 'Have I ever heard of this man?'").

24. Of course, life tenure means that we are unable to do anything about a Justice who, after appointment, fails to generate trust.

25. This argument tracks a familiar, albeit arguably outmoded, theme in the general political science literature about political knowledge and behavior. According to political scientists, political information occurs in a "two-step flow" . . . from the media to the attentive public . . . [and then] from the attentive public to the inattentive public." James David Barber, *Citizen Politics: An Introduction to Political Behavior* 59 (Markham Pub.

the Court's opinions as well as to its decisions. Knowing this, Justices seeking to educate the public might try to capture the attention of opinion leaders.

The Justices then must deal with the problem that, for better or worse, the Court has become one of the nation's governing bureaucracies. Opinion leaders know that what appears under the names of individual Justices are rarely the products of the Justice's own pen or word-processor. Surely, an opinion cannot carry the weight of Justice's prior public service when it is written by a recent law school graduate serving as the Justice's law clerk.²⁶

Here the memorable phrases matter. They are the eruptions of individual idiosyncrasy in the otherwise bureaucratic operations of the Supreme Court.²⁷ Whatever else media observers believe about the Court's opinions, they attribute these memorable phrases directly to the Justices. Sometimes the memorable phrases are used self-consciously, as in Chief Justice Warren's reported desire to have the opinion in *Brown v. Board of Education* written so that it would be "readable by the lay public."²⁸ His statement in *Reynolds v. Sims* that "[l]egislators represent people, not trees or acres," might be criticized for its content but

Co., 2d ed., 1972). Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* at 126-27 (cited in note 4), argues against this claim in the specific context of civil rights, but not with respect to the Court's actions overall, which is my concern.

26. This is true even though the Justice, as bureaucratic supervisor, is responsible for and stands behind the opinion. (A typical way to address this concern is to assert that, although the Justice did not draft the opinion, he or she read it with extreme care and made detailed editorial changes in the draft prepared by the law clerk. I believe that some time soon that myth will receive the same burial that the myth that Justices write their own opinions already has.)

27. Of course it is easier to include such lines in separate opinions joined by no other Justice. The Court has developed a norm that requires deference to the stylistic choices made by an opinion's author. See, e.g., Warren Burger to Harry Blackmun, March 5, 1985 ("I regularly join opinions whose style and adjectives I don't particularly fancy but I 'go along' because the style is for the author of an opinion"; Justice Blackmun objected to Burger's description of court of appeals' interpretation in *CIA v. Sims* as "crabbed," but Burger "consider[ed] 'crabbed' the mildest term I could use in the circumstances shown in this case"), Thurgood Marshall Papers, Library of Congress, Box 363, file 6. When a Justice objects to an idiosyncratic "tone" of an opinion, however, the author will often remove some of the objectionable phrases. See, e.g., Harry Blackmun to Antonin Scalia, June 9, 1988 ("I have withheld my vote . . . because the tone of the opinion has disturbed me somewhat. . . . [W]hat concerns me is the repeated criticism of the Ninth Circuit and its Judges"); Antonin Scalia to Harry Blackmun, June 9, 1988 (no one should be foreclosed from joining an opinion "solely because of its tone," and describing changes to be made in next version of opinion in *Immigration & Naturalization Service v. Pangilinan*), Thurgood Marshall Papers, Library of Congress, Box 446, file 13.

28. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 696 (Alfred A. Knopf, 1975).

not for its rhetorical power.²⁹ Or consider here the opening sentence of the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "Liberty finds no refuge in a jurisprudence of doubt."³⁰ This almost visibly strives for rhetorical effect, which is to say that its authors seem to have wanted to have the sentence quoted.³¹

By pointing out that Court opinions educate by combining outcomes with memorable phrases, I suggest that style is socially located, like everything else.³² As Gary Peller has noted, the newspapers' plain style, like Goldstein's guideline regarding simplicity and precision, are located in the "white, upper-middle class, eastern seaboard intelligentsia," and imply "that the reader and writer are both rational, civilized, right-thinking people, and that the world can be captured in common-sense, no-nonsense descriptions."³³ Without committing myself to the precise social analysis Peller offers, I believe his comments do point in the right direction. Because style is socially located, we ought to think about how the style of judicial opinions can contribute to their educational effect in society as it is presently constituted. What, that is, are the social circumstances under which judicial style educates?

The Court educates the public by acting through opinion leaders, and memorable phrases affect the way those leaders see the Court. Because opinion leaders fit at least roughly Peller's description, quotable phrases in Supreme Court opinions will seem to them eminently sensible expressions of what the Constitution must mean.

It follows that what counts as a memorable line changes. The rhythms of John Marshall's opinions in *Marbury v. Madison*³⁴ and *Gibbons v. Ogden*³⁵ are foreign to today's read-

29. 377 U.S. 533, 562 (1964).

30. 112 S. Ct. 2791, 2803 (1992).

31. Ironically, the evident desire to have a rhetorical effect weakens the sentence's actual rhetorical effect.

32. For an earlier discussion, see Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 Geo. L.J. 251 (1992).

33. Gary Peller, *The Discourse of Constitutional Degradation*, 81 Geo. L.J. 313, 322 (1992).

34. See, e.g., 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court").

35. See, e.g., 22 U.S. (9 Wheat.) 1, 197 (1824) ("[T]he power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it

ers, and would be at best quaintly archaic in a contemporary opinion. Edmund Wilson's famous argument about the chastening of the American prose style after the Civil War tries to explain why.³⁶ Today's newspapers' plain style communicates more effectively.

Even here, though, distinctions can be made. For example, consider the flatness of Justice Stewart's comment on hard-core pornography, "I know it when I see it, and the motion picture involved in this case is not that."³⁷ As Catherine MacKinnon has pointed out, at least in retrospect Justice Stewart's statement, with its explicit reliance on his own perspective ("when I see it"), not only fails to confront the alternative perspectives of those who would regulate the availability of pornography but brings the differences in perspective to the surface.³⁸ And, on a different level, the statement is memorably quotable only because readers elide the lumpiness of the full sentence.³⁹

The opening sentence in *Casey* provides another example of how quotable sentences help the Justices carry out their educational mission.⁴⁰ After reading no more than that "[l]iberty finds no refuge in a jurisprudence of doubt," readers know that the Court has definitively resolved the question about whether strict prohibitions of abortion are constitutionally permissible. The opinion sets itself as the defender of "liberty," providing it a "refuge" by eliminating "doubt." Consider as well the images evoked by *refuge*: a haven, a comfortable resting place, a home. The opinion attempts to soothe controversy by describing the

would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments").

36. Edmund Wilson, *Patriotic Gore* 635-69 (Oxford U. Press, 1966).

37. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

38. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 90 (Harv. U. Press, 1987).

39. On this, compare Justice Souter's dry, "We are honored," *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2471 n.7 (1992). The "we" here lifts the response above the personalized criticisms offered by Justice Scalia, evokes the royal "we" and thereby asserts for the Court a magisterial position, and more particularly evokes Queen Victoria's statement, "We are not amused," and thereby further elevates the Court above its internal critic.

40. My comments here are indebted to a presentation by Professor Marie Ashe of Suffolk University Law School at the Constitutional Law Workshop of the Association of American Law Schools, Ann Arbor, June 1993.

Court itself as a refuge, removed from the controversy that surrounds the abortion issue.⁴¹

Finally, it seems worth suggesting that today's Justices display judicial temperament by combining an overall bureaucratic operation with outcroppings of individualism, their quotable sentences. The quotable sentences show opinion leaders that a real person occupies a seat on the Court. The Court's more bureaucratic aspects, including the dull sentences and opinions that predominate in the U.S. Reports, show them that the Justices are sober, responsible, and trustworthy people. When such people do something that might trouble the public, opinion leaders stand ready to reassure us that, because the Justices are "serious people," we ought to dampen our discomfort with their decisions.⁴²

Of course, if we do not occupy the same social location that opinion leaders do, we might find their reassurances feeble.

41. I note, however, that the sentence's content is belied by virtually everything that follows in the joint opinion: a defense of *stare decisis* conjoined with overruling major cases, the articulation of a new test for determining when regulations of abortion are constitutionally permissible, accompanied inevitably by new doubts about the test's concrete meaning.

42. Perhaps this may explain what seems to me a discomfort expressed by some with Justice Scalia's opinions that goes beyond mere disagreement with his results. Their occasional acerbic tone, and what might be called their "mere" cleverness, may undermine the sense of seriousness necessary for a Justice to be an educator (beyond a relatively small circle of acolytes).