

# THE REHNQUIST COURT AT TWILIGHT: THE LURES AND PERILS OF SPLIT-THE- DIFFERENCE JURISPRUDENCE

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## INTRODUCTION

The departures of Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor from the Supreme Court constitute an event of singular importance for that institution. Rehnquist and O'Connor were by any reckoning highly consequential Justices. Although differing in important respects, each Justice was a public servant of the highest integrity and dedication; each was a patriot to the core; and each at the end reflected credit on the Court, the profession, and, it should be acknowledged, on Stanford Law School. Some of the criticism in this Article is pointed. But it is written in a spirit of respect for all that these two fine people contributed to America and for the Court they so proudly and ably served.

The Rehnquist Court left multiple legacies. One was certainly a commitment to our federal system and to the doctrine of dual sovereignty. Another was the renewal of emphasis on the structural features of the Constitution, after a long period of relative neglect. Yet a third legacy was that of judicial supremacy, in which the Court asserted its own role at the expense of the executive, the Congress, and the states. A final legacy was probably that

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of pragmatic centrism, in which the Court sought to shape constitutional doctrine to the temper of the times. These legacies are in some tension with each other. Which of them will prove most durable will remain a subject of debate. It is beyond dispute, however, that the course of the Rehnquist Court was not constant. It shifted significantly over time.

By the end of the twentieth century, many observers would have marked *United States v. Lopez*<sup>1</sup> as the Rehnquist Court's most significant case. In ruling the Gun-Free School Zones Act unconstitutional, the Court reaffirmed that the national government was indeed one of enumerated powers and that there were, in fact, enforceable limits upon the Commerce Clause. The Court likewise imposed limits on the ability of Congress to abrogate the states' immunity from suit<sup>2</sup> and to implement its view of the Fourteenth Amendment through the enforcement power of Section 5.<sup>3</sup>

There were, to be sure, real dangers in this course. The Court risked being perceived as aggrandizing its own power at the expense of the people's representatives. Whether a law had a "substantial effect" on interstate commerce or whether a statute represented a congruent and proportional use of the Section 5 enforcement power could be seen to be largely in the eye of the judicial beholder. On a practical level, an aggressive application of the *Lopez* restrictions threatened much civil rights and environmental legislation, and ultimately the concept of the United States as a single national economic unit.

Notwithstanding such dangers, the Court's new assertiveness had a healthy aspect. It did not seek to shut down democracy, as the *Lochner* and New Deal Courts had done.<sup>4</sup> Instead, it sought a restoration of democratic balance and a reinvigoration of the authority of individual states to exercise their residual police powers. In sum, the Court seemed intent on recognizing the American Constitution as a document with enforceable structural features that would bolster this country's enjoyment of democratic liberties and, ultimately, of personal rights.

Thus, prior to the Court's last five years, its dominant jurisprudence was one of revivalism, not compromise. To be sure, cases during the 1980s and 1990s did occasionally adopt a middle ground,<sup>5</sup> but the emphasis remained plainly on resurrection—in this case, resurrection of the doctrines of dual sovereignty and enumerated powers.

At the beginning of the twenty-first century, almost as if on cue, something happened. The Rehnquist Court shifted course. The shift may have begun with

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1. 514 U.S. 549 (1995).

2. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

3. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

4. See *infra* notes 96-97 and accompanying text.

5. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (adopting an "undue burden" standard for determining the constitutionality of restrictions on abortion).

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*Bush v. Gore*, where the Court found the imperative of resolving a national election to override the tortuous state process involved in tallying the Florida vote.<sup>6</sup> After that decision, the Court's interest in federalism slowly foundered. Challenges to congressional authority began to meet more frequent rejection. In *Nevada Department of Human Resources v. Hibbs*, the Court allowed plaintiffs seeking benefits under the Family and Medical Leave Act to subject the states to suit.<sup>7</sup> In *Tennessee v. Lane*, sovereign immunity likewise proved no bar to plaintiffs seeking access to court under the Americans with Disabilities Act.<sup>8</sup> And in *Gonzales v. Raich*, the Court upheld the authority of Congress to regulate the production of homegrown marijuana under the commerce power.<sup>9</sup> The same five-Justice majority that rejected assertions of congressional authority in the name of state sovereignty throughout the 1990s had frayed.

The Court's new mood involved more than declining to check the assertion of congressional power in the name of dual sovereignty and federalism. The Court took the affirmative step of overriding state prerogatives on a variety of fronts. It issued a series of finely spun opinions that increasingly constitutionalized some of the country's most volatile political debates. The opinions were not markedly liberal. Many were not significantly out of line with public opinion. Rather, the Court sought to tackle the most controversial issues before it by splitting the difference. Few courts have ever raised this form of jurisprudence to such an art form. It is this persistent tendency of the late Rehnquist Court to split the legal difference that I address.

How did the Court come to embrace this approach? There exist many possible explanations. The Court's drift into fine-shaven outcomes may have owed something to the Chief Justice's ebbing influence and stamina. It may have been that the long tenures of the Court's members produced a growing faith in the powers of judicial wisdom. The Court may have been so shaken by the criticism over *Bush v. Gore* that it sought to reassure the country with a display of centrist evenhandedness. Whatever the explanation, the Rehnquist Court, without any change in membership, became in its final years a decidedly different institution.

I plan in Part I to discuss examples of the Court's split-the-difference approach. In Part II, I will then attempt to set forth the case for addressing the country's most volatile issues in this fashion. Finally in Part III, I will ask whether this is the way Americans should wish their Supreme Court to proceed in the future. This is not an easy question. There are hard choices over the path that constitutional interpretation should take in this century, and the final years of the Rehnquist Court present the debate with stunning clarity.

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6. 531 U.S. 98 (2000).

7. 538 U.S. 721 (2003).

8. 541 U.S. 509 (2004).

9. 125 S. Ct. 2195 (2005).

## I. SPLITTING THE DIFFERENCE

Split-the-difference jurisprudence can manifest itself in several ways. Sometimes, the result of a case, or set of cases, transparently bespeaks a split-the-difference approach. In other cases, an opinion scrupulously balances statements appealing to one side with statements attractive to the other and adopts an in-between approach to resolve the issue before it. A third manifestation of split-the-difference jurisprudence occurs when a court steers a course that obviously threads the needle between two polar positions in a broader political debate. These three categories will, of course, overlap at times, and a given case may appropriately belong in more than one. Nevertheless, as I explain below, each category represents a distinct species of split-the-difference jurisprudence, and I therefore find it useful to consider them separately.

As time went on, the Rehnquist Court increasingly engaged in all three types of splitting the difference. The lineup of Justices naturally varied from case to case. In fact, sometimes only one Justice—often, but not always, Justice O'Connor—actually split the difference. But the reasoning and result would nevertheless hinge on those votes, and the Court's institutional statement remained one of navigating between competing alternatives without appearing to choose sides.

In this Part, I describe recent Rehnquist Court decisions that exhibit each of the three split-the-difference paradigms. These are hardly the only cases I could have selected. The fact that they are illustrative rather than exhaustive is precisely my point. The descriptions will focus not so much on the factual and legal nuances of each case, but instead on how each is an exemplar of the late Rehnquist Court's overarching split-the-difference philosophy. Interspersed throughout is a discussion of the Court's reliance on certain doctrinal tools that are conducive to a split-the-difference approach, a subject I explore more fully at the end of this Part.

*A. Splitting the Difference in Result*

Recent decisions have often had results that themselves split the difference. In these cases, the Court's actual holdings straddle both sides of a difficult issue, and the outcomes, while perhaps unsatisfying to the adversaries in a polarized debate, nevertheless attempt to settle upon a constitutional middle ground. There are various recent examples that fall into this category, but I have selected four—last Term's Ten Commandments cases,<sup>10</sup> *Elk Grove Unified School District v. Newdow*,<sup>11</sup> the Michigan affirmative action cases,<sup>12</sup>

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10. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (plurality opinion); *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

11. 542 U.S. 1 (2004).

12. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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and *United States v. Booker*.<sup>13</sup>

In June 2005, the Court decided a pair of Establishment Clause challenges to the public display of the Ten Commandments on government property. *Van Orden v. Perry* concerned a six-foot-tall stone monument featuring the Ten Commandments.<sup>14</sup> Given to the state in 1961 by a civic fraternal organization, this monument was placed on the grounds of the Texas State Capitol among other commemorative markers, such as war memorials and tributes to state history.<sup>15</sup> At issue in *McCreary County v. ACLU* was the posting of the Ten Commandments in the hallways of two Kentucky county courthouses.<sup>16</sup> Originally installed in 1999 as stand-alone displays, the Ten Commandments were eventually supplemented with framed copies of other historical documents, such as the Declaration of Independence and the Mayflower Compact.<sup>17</sup>

Despite the evident similarities between the two cases, the Court split the difference in result, upholding the display in *Van Orden* but striking down the exhibit in *McCreary County*.<sup>18</sup> In *Van Orden*, the Chief Justice explained that “[o]ur cases, Januslike, point in two directions in applying the Establishment Clause”: one that acknowledges the historical role of religion in our public life and another that reflects the potential for government to imperil religious liberty.<sup>19</sup> His broad characterization only too aptly describes the outcomes in last Term’s cases. The Chief Justice’s plurality opinion in *Van Orden* draws on the former, the majority opinion in *McCreary County* on the latter. The difference in result was the product of Justice Breyer, who alone found a distinction between the two cases based upon the apparent divisiveness or lack thereof of the display at issue in each case.<sup>20</sup> His difference-splitting was made possible doctrinally by emphasizing that “no single mechanical formula” could be used,<sup>21</sup> eschewing reliance on “a literal application of any particular test”<sup>22</sup> and finding instead “no test-related substitute for the exercise of legal judgment.”<sup>23</sup>

The Religion Clauses provide fertile ground for split-the-difference results, as the Court’s opinion in *Elk Grove Unified School District v. Newdow* further makes evident.<sup>24</sup> In that case, Michael Newdow contended that a school

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13. 543 U.S. 220 (2005).

14. 125 S. Ct. at 2858 (plurality opinion).

15. *Id.*

16. 125 S. Ct. at 2728.

17. *Id.* at 2728-31.

18. *Van Orden*, 125 S. Ct. at 2858-59 (plurality opinion); *McCreary County*, 125 S. Ct. at 2745.

19. 125 S. Ct. at 2859 (plurality opinion).

20. *Id.* at 2871 (Breyer, J., concurring in the judgment).

21. *Id.* at 2868.

22. *Id.* at 2871.

23. *Id.* at 2869.

24. 542 U.S. 1 (2004).

district's policy of classroom recitation of the Pledge of Allegiance, including the words "under God," violated the Establishment and Free Exercise Clauses.<sup>25</sup> Whereas the Ten Commandments cases split the difference with two divergent holdings, *Newdow* did so by not issuing a holding at all on the underlying constitutional question. The Court instead concluded that Newdow lacked prudential standing to bring the suit on behalf of his daughter, because the child's mother had sole legal custody and the suit would likely have had an "adverse effect" on the child.<sup>26</sup> The decision split the difference because the Court declined either to condone expressly or to remove the Pledge's reference to God.

The Court's penchant for splitting the difference in result is also illustrated by its 2003 affirmative action decisions. Like the challenges to the displays of the Ten Commandments, the Court considered simultaneously two cases on affirmative action, framing the issue from the outset as one amenable to dissimilar outcomes. In *Gratz v. Bollinger*, the Court took up the constitutionality of the University of Michigan's undergraduate affirmative action program, which automatically assigned candidates from underrepresented minority groups an additional twenty points on a hundred-point admissions index.<sup>27</sup> The companion case, *Grutter v. Bollinger*, considered the affirmative action policy at the University of Michigan Law School.<sup>28</sup> That policy attempted to promote racial and ethnic diversity so as to achieve "a 'critical mass' of underrepresented minorities."<sup>29</sup>

The results of this affirmative action double feature fall within the general pattern I have identified. The *Grutter* majority held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>30</sup> The Court's results then split as to whether the two policies at issue were narrowly tailored to achieve this objective. The *Gratz* Court held that the twenty-point allocation for minority candidates lacked the indicia of an individualized inquiry.<sup>31</sup> The *Grutter* Court, by contrast, held that the law school's more inclusive definition of diversity treated race as a "'plus' factor" for attaining a "critical mass" of minority students rather than a determinate factor designed to attain any specified number of racial or ethnic minorities.<sup>32</sup> Taken together, the cases establish the middle position that while quota-type systems will not survive strict scrutiny, more holistic inquiries may. The Court also split the difference temporally, indicating that in twenty-five years, race-conscious admissions policies may no longer be narrowly tailored to a

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25. *Id.* at 7-8.

26. *Id.* at 14, 17.

27. 539 U.S. 244, 253, 255 (2003).

28. 539 U.S. 306, 311 (2003).

29. *Id.* at 316, 333.

30. *Id.* at 325.

31. *Gratz*, 539 U.S. at 270-71.

32. *Grutter*, 539 U.S. at 334-37.

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compelling state interest.<sup>33</sup>

Finally, in *United States v. Booker*,<sup>34</sup> the Court achieved a dichotomous result in a slightly different fashion, but it split the difference all the same. In a majority opinion by Justice Stevens, the Court first determined that “the Sixth Amendment is violated by the imposition of an enhanced sentence under the Federal Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.”<sup>35</sup> But in a separate majority opinion by Justice Breyer, the Court held that the proper remedy was not to invalidate certain applications of the Guidelines, but instead to retain them in all cases as advisory rather than mandatory.<sup>36</sup> Taken together, the Court’s two majority opinions did not leave the Sentencing Guidelines framework entirely intact, but, as a practical matter, the Guidelines will continue to be followed in a substantial majority of cases. Relying on its perception of Congress’s desire for a workable sentencing system, the Breyer opinion reigned in the formalism of the *Apprendi* line of cases<sup>37</sup> and with it the more formal doctrinal tools that are less amenable to a split-the-difference approach.

#### B. *Splitting the Difference in Reasoning*

The Court splits the difference in a second way when it borrows reasoning from competing polar positions and uses it to establish a middle-of-the-road method for resolving disputes. While the set of cases adopting this technique may overlap with the set I have just discussed, the cases in this Part possess the additional quality of utilizing a legal and rhetorical framework of express compromise. Such a framework will not always lead to a compromise result—particular cases may lie clearly on one side of the line—but a case’s reasoning and dominant language nonetheless give something to everyone. I shall focus in this Part on two recent examples of the trend: *Hamdi v. Rumsfeld*<sup>38</sup> and *Vieth v. Jubelirer*.<sup>39</sup>

*Hamdi* involved the questions of whether the government could detain a U.S. citizen as an “enemy combatant” and what process, if any, is constitutionally required when the detainee seeks to challenge his enemy combatant designation.<sup>40</sup> The two endpoints of the debate were exemplified by

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33. *Id.* at 343.

34. 543 U.S. 220 (2005).

35. *Id.* at 229 n.1; *see also id.* at 227.

36. *Id.* at 245-46.

37. *See, e.g.,* *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999).

38. 542 U.S. 507 (2004).

39. 541 U.S. 267 (2004).

40. 542 U.S. at 509 (plurality opinion of O’Connor, J.).

the opinions of Justice Scalia and Justice Thomas. In Justice Scalia's view, Hamdi's detention was unconstitutional unless either he was charged with a crime such as treason or Congress suspended the writ of habeas corpus.<sup>41</sup> Justice Thomas, by contrast, believed that Hamdi's detention fell "squarely within the Federal Government's war powers" and that the Due Process Clause did not allow for judicial "second-guessing" of the executive's classification of an individual as an enemy combatant.<sup>42</sup> The four-Justice plurality opinion, authored by Justice O'Connor and joined by Chief Justice Rehnquist, charted a course between these two opposing views. Hamdi's detention was authorized by Congress's post-9/11 approval of military force and was constitutional so long as he "receive[d] notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>43</sup>

The plurality arrived at this middle position through an express balancing of opposing concerns. Recognizing that the interests on both sides of the issue were compelling,<sup>44</sup> the Court invoked "[t]he ordinary mechanism" it uses for comparing such interests in the due process context: the *Mathews* balancing test.<sup>45</sup> This test is the very embodiment of split-the-difference reasoning: it requires a "weighing" of private and public interests and a "judicious balancing" to determine whether additional procedures might be necessary.<sup>46</sup> The plurality here balanced "the [liberty] interest in being free from physical detention by one's own government"<sup>47</sup> against "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."<sup>48</sup> The outcome affirmed in both reason and rhetoric that "a state of war is not a blank check for the President,"<sup>49</sup> while simultaneously acknowledging "that [the] due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action."<sup>50</sup> The Court furthermore instructed lower courts to continue its split-the-difference approach, expressing confidence that they would "pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns."<sup>51</sup>

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41. *Id.* at 554 (Scalia, J., dissenting).

42. *Id.* at 579, 592 (Thomas, J., dissenting).

43. *Id.* at 519, 533 (plurality opinion of O'Connor, J.).

44. *Id.* at 529.

45. *Id.* at 528-29; see *Mathews v. Eldridge*, 424 U.S. 319 (1976).

46. *Hamdi*, 542 U.S. at 529 (citing *Mathews*, 424 U.S. at 335).

47. *Id.* at 529.

48. *Id.* at 531.

49. *Id.* at 536.

50. *Id.*

51. *Id.* at 539.



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The Court split the difference in a similar fashion in *Vieth*.<sup>52</sup> At issue in that case was the extent to which the Constitution restricted state legislatures from undertaking a so-called “political gerrymander,” in which one party draws voting districts so as to dilute the impact of voters likely to favor the opposition.<sup>53</sup> A four-Justice plurality, in an opinion authored by Justice Scalia, would have held all political gerrymandering claims nonjusticiable because of the absence of judicially manageable criteria for adjudicating them.<sup>54</sup> The four Justices in dissent suggested various legal theories as to how a court could in fact adjudicate the plaintiffs’ political gerrymandering claim.<sup>55</sup> The institutional statement thus came to rest in the hands of Justice Kennedy, whose controlling vote split the difference in both reasoning and result.

Justice Kennedy concurred in the plurality’s judgment that the claims in *Vieth* itself should be dismissed, but refused to “foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”<sup>56</sup> His reasoning sought expressly to balance the competing concerns underlying each side of the fractious debate. On the one hand, he saw “two obstacles” to adjudicating a claim of political gerrymandering: the lack of neutral principles to guide adjudication of such disputes and the concomitant difficulties of constraining judicial discretion in this context.<sup>57</sup> But on the other hand, “[a]llegations of unconstitutional bias in apportionment are most serious claims” because “the ‘right to vote’ is one of ‘those political processes ordinarily to be relied upon to protect minorities.’”<sup>58</sup> It would be difficult to prove the absence of a workable standard, and “[w]here important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.”<sup>59</sup> He thus encouraged future courts to continue their efforts to find an administrable test for these claims, suggesting that they look beyond the Equal Protection Clause to the First Amendment.<sup>60</sup>

This split-the-difference analysis is quite similar to what the plurality did in *Hamdi*. Both opinions offer up statements that should comfort both sides, but decline to take a definitive position. They chart a narrow, middling course to avoid potentially treacherous extremes, while leaving lower courts to make the initial voyages into largely uncharted waters.

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52. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

53. *Id.* at 272 & n.1.

54. *Id.* at 281.

55. *See id.* at 317-41 (Stevens, J., dissenting); *id.* at 343-55 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 355-68 (Breyer, J., dissenting).

56. *Id.* at 306 (Kennedy, J., concurring in the judgment).

57. *Id.* at 306-07.

58. *Id.* at 311-12 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

59. *Id.* at 310-11.

60. *Id.* at 315.

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*C. Splitting the Difference in a National Debate*

The last type of split-the-difference approach that I will discuss concerns not compromises in individual cases or between cases, but centrist solutions within whole areas of constitutional law. Individual decisions that appear to exhibit strong commitments on the single issue before the Court are sometimes decidedly middle-of-the-road in the context of the larger political debate. This type of jurisprudential threading the needle is most apparent in controversial areas such as the death penalty and gay rights.

The Eighth Amendment restricts the infliction of “cruel and unusual punishments.”<sup>61</sup> This necessarily requires a determination of what limits, if any, the Constitution places on the death penalty. The Court might have chosen either of two polar ideological positions. On the one hand, it could have decided that the death penalty is always cruel and unusual, and thus always unconstitutional.<sup>62</sup> On the other, it could have determined that the Eighth Amendment places no restrictions on capital punishment, leaving the states solely responsible for imposing whatever limits they might deem prudent.

The Court ventured down neither of these avenues. It refused to strike down capital punishment in its entirety, but it also declined to give states a free hand. Two recent cases are illustrative. In *Atkins v. Virginia*, the Court held that the Eighth Amendment eliminates the state’s ability to execute the mentally retarded.<sup>63</sup> More recently, in *Roper v. Simmons*, the Court similarly determined that states are constitutionally forbidden from putting to death individuals under eighteen years of age.<sup>64</sup>

In these cases, the Court is not splitting the difference within a single decision or between decisions: both *Atkins* and *Roper* establish an outright ban on applying the death penalty to certain individuals. Nor do the opinions contain rhetoric of compromise. At the same time, however, the Court is threading the needle in the broader constitutional and political debate on capital punishment. While it places limits at the margins of the death penalty, it does little to disturb its core.

The Rehnquist Court walked a similar tightrope on gay rights. The competing polar positions in this debate are well known. On the one hand, it may be argued that the Constitution forbids states not only from criminalizing consensual homosexual conduct, but also from limiting marriage to heterosexual relationships.<sup>65</sup> On the other hand is the position that the

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61. U.S. CONST. amend. VIII.

62. See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

63. 536 U.S. 304, 321 (2002).

64. 543 U.S. 551, 578 (2005).

65. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 960 (Mass. 2003) (holding that a refusal to recognize same-sex marriages violated the state constitution).

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Constitution imposes no limits on a state's ability to devise and enforce criminal and civil laws that treat homosexuals differently.<sup>66</sup>

In *Lawrence v. Texas*,<sup>67</sup> the Court entered the fray. Two defendants challenged a Texas law that criminalized "deviate sexual intercourse" between individuals of the same sex on due process and equal protection grounds.<sup>68</sup> The Court struck down the law under the rubric of substantive due process, holding that a state had no legitimate interest in criminalizing private, consensual sexual relations between adults.<sup>69</sup>

On the narrow issue before it, the *Lawrence* Court most assuredly did not thread the needle, as it imposed a strong and broadly framed constitutional restriction on the states. At the same time, however, it implicitly stopped short of stretching its logic beyond criminal prohibitions on homosexual conduct. It noted that the case did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>70</sup> It thus declined to pronounce upon state prohibitions on same-sex unions.

Justice O'Connor, concurring in the result on equal protection grounds, went even further in affirmatively limiting the scope of the constitutional right. She noted that the state could not single out an identifiable group for punishment based solely on moral disapproval.<sup>71</sup> At the same time, however, she expressly refused to enlarge the right beyond the criminal sphere, opining that state interests might be stronger in other areas such as marriage: "Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."<sup>72</sup> Thus, the late Rehnquist Court may have settled once again on a centrist middle path in another highly visible and controversial area of constitutional law.

The death penalty and gay rights cases have another common denominator in the doctrinal tools they draw upon to facilitate split-the-difference jurisprudence. In both areas, the Court looked to the number of states that legislated on the issue in question to help determine its constitutionality. This reliance on numbers can be viewed as splitting the difference in the politics, if not the outcome, of the underlying substantive issue. If enough states prohibit the practice, it will be struck down. If, however, a majority of states still engage in it, the practice may be upheld.

In all three cases discussed above, a majority of states prohibited the practice at issue, contributing in each case to a finding of unconstitutionality. In *Atkins*, the Court noted a rapid decline in the number of states that allowed for

66. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 603-04 (2003) (Scalia, J., dissenting).

67. 539 U.S. 558.

68. *Id.* at 563-64.

69. *Id.* at 578-79.

70. *Id.* at 578.

71. *Id.* at 584 (O'Connor, J., concurring in the judgment).

72. *Id.* at 585.

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capital punishment of the mentally retarded.<sup>73</sup> And in *Roper* it found that the states were increasingly reluctant to put juveniles to death.<sup>74</sup> In both cases, thirty states prohibited the practices altogether.<sup>75</sup> Similarly, the *Lawrence* Court relied on the increasing number of states that have lifted their laws against sodomy. At the time of the decision, only thirteen states still proscribed such conduct.<sup>76</sup>

While not a novel invention,<sup>77</sup> surveying state legislatures readily lends itself to split-the-difference jurisprudence. The Court's examination of public opinion serves as an important political bellwether for difficult jurisprudential determinations. By expressly taking the country's temperature, the Court assures itself that it is not at the extreme.

#### *D. Doctrinal Tools for Splitting the Difference*

As the previous examples demonstrate, the Court's jurisprudence of splitting the difference has been aided substantially by its deployment of doctrinal tools custom made for the task. Such tools were nothing new for the Rehnquist Court. It had, for example, a "reasonable observer" test for whether a public display violates the Establishment Clause<sup>78</sup> and an "undue burden" standard to measure restrictions on abortion.<sup>79</sup> As with the tools we have just examined—case-by-case adjudication of religious displays, express balancing of competing interests, surveys of state enactments, and the like—these tests not only allow, but also invite, the Court to split the difference. Abortion, the most highly charged issue before the courts, provides a good example. In *Stenberg v. Carhart*, the Court found that a Nebraska ban on partial-birth abortion imposed an undue burden on a woman's constitutional right to abortion,<sup>80</sup> but the flexibility of the legal inquiry allowed Justice O'Connor's crucial concurrence to provide a roadmap for modifying the ban so as to remove the unconstitutional burden.<sup>81</sup>

The legal tests on which the Court relied in splitting the difference stand in stark contrast to more traditional standards of constitutional adjudication, such as textualism, originalism, and structural federalism. Split-the-difference doctrinal tools are less process oriented and more fact dependent, thus allowing the Court to more easily analyze cases with an eye toward a middle ground.

73. See *Atkins v. Virginia*, 536 U.S. 304, 313-14 (2002).

74. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

75. *Id.*

76. *Lawrence*, 539 U.S. at 573.

77. See, e.g., *Atkins*, 536 U.S. at 312 (noting prior use of the practice).

78. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

79. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

80. 530 U.S. 914, 938 (2000).

81. *Id.* at 947-51 (O'Connor, J., concurring).

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And they are less rigid, thereby granting the Court greater freedom to craft a difference-splitting result. In short, the doctrinal tools that a split-the-difference Court draws upon are ones that relax constraints on judicial discretion and, for that reason, potentially augment the power of the judiciary at the expense of the other branches of government.

To be sure, tools that provide judicial flexibility vis-à-vis the other branches were also a feature of the earlier Rehnquist Court's conservatism. For example, federal legislation must regulate an activity that "substantially affects" interstate commerce to be valid under the Commerce Clause,<sup>82</sup> or must have "congruence and proportionality" with a judicially recognized constitutional right to pass muster under Section 5 of the Fourteenth Amendment.<sup>83</sup> But the later Rehnquist Court elevated its reliance on loose doctrinal tools and did so not in the service of textually and structurally grounded constitutional principles, but rather in the form of a split-the-difference approach.

## II. THE LURES OF SPLIT-THE-DIFFERENCE JURISPRUDENCE

The case for split-the-difference jurisprudence is not an insubstantial one. In fact, I do not intend "split the difference" to be a pejorative term. Many purists will use the label disparagingly, but the fact is that public life is not pure in the sense that one side or another gets everything it wants. Sometimes, in fact, one wins by not losing everything. Splitting differences is above all an act of compromise. If the wheels of national life are often greased with compromise, courts should not themselves shy away from seeking it. A court that compromises by rejecting the criminalization of private consensual activity but not requiring state recognition of civil unions or same-sex marriages may be perceived as advancing an important national value. The most passionate participants in the dispute will be dissatisfied with any compromise, but those with a greater sense of distance or detachment will often perceive a compromise as fair.

A court that compromises by splitting differences may also be seen as philosophically moderate. The Rehnquist Court in its last years was sometimes called the O'Connor Court, a description that was intended to recognize the Court's new cloak of moderation. Moderation is a trait that the public admires in the judiciary. It is one closely associated with proper judicial temperament. Moderation also suggests balance and evenhandedness. If the political process is to be occasionally hot blooded, the judicial process was intended to be the antithesis—cooler, more detached, and more prone to weigh competing values and alternatives. The *Hamdi* plurality, for example, made clear its view that the writ of habeas corpus "allows the Judicial Branch to play a necessary role in

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82. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

83. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

maintaining [the] delicate balance of governance” between executive discretion in wartime and the protection of individual liberty.<sup>84</sup> Splitting the difference demonstrates moderation as nothing else. Allowing the Ten Commandments on the statehouse grounds but not inside the courthouse itself may be a supremely Solomonic result. Such moderation permits the Court to stay above the fray and to assume a statesmanlike pose.

Split-the-difference jurisprudence also allows the Court to position itself in the same ideological realm as most Americans. On social issues in particular, most Americans are not at the extremes. They are in the middle. Thus, the argument runs, the Court should seek to be there too. The late Rehnquist Court was by and large in tune with the country. In distinguishing between criminal prosecution of private consensual acts between adults and same-sex unions, the Court sought to be where most Americans were on the question of gay rights. In upholding both a woman’s fundamental right to reproductive choice and reasonable restrictions on underage and late-term exercises of that choice, the Court looked to be in sync with the views of most Americans. In sustaining capital punishment generally, but rejecting it for juveniles and the mentally retarded, the Court was also not drastically out of line with public opinion—in fact, it tallied up state legislative enactments on juvenile and mental retardation executions just to make sure. And in rejecting rigid racial quotas, but permitting recognition of racial diversity as one of a totality of goals in college and professional school admissions, the Court once again attempted to place its finger on the public pulse.

Splitting the difference thus enabled the Rehnquist Court in its final years to craft narrow rulings that reflected, by and large, the temper of the times. As the Court’s swing vote, Justice O’Connor personified the hold-the-center trend. Thoughtful commentators saw in her rulings not a grab for judicial supremacy, but an appealing sense of judicial modesty. Dean John Jeffries of the University of Virginia School of Law characterized her case-by-case approach as “more in the common-law tradition” and theorized that “Americans generally have more confidence in judges who do not reach too broadly.”<sup>85</sup> Professor Cass Sunstein saw in splitting the difference a welcome development of judicial minimalism.<sup>86</sup> In rejecting the formulation of broad and sweeping rules, the Court left democracy more freedom to operate.<sup>87</sup> In this view, splitting the difference embodies all the virtuous attributes of the anti-ideologue. Ideologues were said to be bent on imposing their views from the

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84. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

85. JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 287 (2005) (quoting John Jeffries, Dean, Virginia School of Law).

86. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 36 (2005).

87. *See id.* at 35-36; *see also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME].

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top down. The pragmatists, by contrast, were disposed to decide things from the bottom up—a fact-driven approach divested of the dangers of judicial preconceptions.<sup>88</sup>

In splitting the difference on contentious social questions, the Court was not just in the place that most Americans preferred. It also allowed the country to muddle through. Muddling through is not the worst way for a nation to approach the domestic issues that most inflame the passions of the body politic. Justice Lewis Powell paved the way for such a course in his crucial single opinion in *Regents of the University of California v. Bakke* more than a quarter-century ago.<sup>89</sup> In striking down the medical school's reservation of 16 of 100 places in its entering class for members of favored minorities, Powell noted that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."<sup>90</sup> The opinion simultaneously approved, however, "an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process."<sup>91</sup> The opinion purposefully blurred the edges of the volatile affirmative action controversy and avoided a definitive resolution of the validity of race-based remedies under the Fourteenth Amendment at all costs. It allowed the lower courts and the political process to grapple with a host of arcane and lower-profile questions such as what findings of past discrimination were necessary to support a race-conscious remedy and how narrowly tailored that remedy should be.

"The true legacy of Powell's approach to racial preferences," writes Dean Jeffries, "lies in the enduring ambivalence of the law's reaction to them."<sup>92</sup> The late Rehnquist Court took the Powell approach to heart. In *Grutter*, the Court forthrightly pronounced:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>93</sup>

The Court's pragmatic premise was that the country remained in a transitional period in which race should be used sufficiently to enhance educational diversity and integrate minorities into the mainstream, but not so much as to create a sense of racial entitlement on those preferred or a sense of racial embitterment on those excluded. The result seems almost purposefully to

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88. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 87, at 9.

89. 438 U.S. 265, 269-324 (1978); see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 455-501 (1994).

90. 438 U.S. at 307.

91. *Id.* at 318.

92. JEFFRIES, *supra* note 89, at 501.

93. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

create a level of uncertainty in the law, in which a fractured nation could find refuge. The split outcomes of *Grutter* and *Gratz* seem designed to mute racial feelings and to refocus the efforts of all sides on expanding, rather than dividing, the pie. The cases also divert attention from the issue of race to problems with a greater prospect of common ground. History may conclude that splitting the difference failed to advance the ideal of a race-blind republic but was far preferable to the Court's disastrous pronouncements on race relations in the late nineteenth century.<sup>94</sup>

Splitting differences conferred benefits not only on the nation, but also upon the Court itself. By reflecting the temper of the times and blurring the edges of social controversy, the late Rehnquist Court avoided a significant public backlash. This was no small achievement. A strong and sustained public reaction can call into question a court's legitimacy. The institution itself—and its place in a democratic polity—can be on the line.

On occasion, as with *Brown v. Board of Education*,<sup>95</sup> the Court must spend its institutional capital in the name of constitutional values our nation holds most dear. But those occasions may be less numerous than is generally thought. A court running counter to national sentiment is not invariably right, nor is the nation invariably wrong. The *Lochner* Court exalted freedom of contract to nip even the bud of social reform.<sup>96</sup> The Court, for a period in the 1930s, imprudently injected itself into the debate over national economic recovery.<sup>97</sup> While the Warren Court's early innovations in criminal procedures were constructive,<sup>98</sup> the constant stream of pro-defendant decisions threatened to stoke further the all-too-violent tendencies of the age. In each case, an institutional crisis of sorts erupted, only to be averted by retirements permitting presidents such as Roosevelt and Nixon to make propitious changes in the Court's personnel.

Splitting the difference on one volatile matter after another spared the Rehnquist Court a category four or five backlash and all the disruption that would ensue. The Court's generally moderate stance—and Justice O'Connor's standing as a moderate in particular—probably enabled the Court to survive its most controversial decision, *Bush v. Gore*,<sup>99</sup> with limited damage to its reputation and prestige. The Court majority needed more from O'Connor than

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94. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

95. 347 U.S. 483 (1954).

96. *Lochner v. New York*, 198 U.S. 45 (1905).

97. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (finding certain provisions of the Bituminous Coal Conservation Act of 1935 unconstitutional); *United States v. Butler*, 297 U.S. 1 (1936) (finding certain provisions of the Agricultural Adjustment Act unconstitutional).

98. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (warning of rights prior to police questioning); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

99. 531 U.S. 98 (2000).



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her vote. Without the legitimacy imparted by Justice O'Connor's assent, the decision might have become even more inflammatory.

To be sure, the 2004 election did feature some public backlash to the overreach of judicial authority. The close Bush victory in pivotal Ohio reflected to some degree the rising concerns of social conservatives over increasing judicial solicitude for such matters as gay rights.<sup>100</sup> The most fierce public reaction, however, was not over a Rehnquist Court case, but over a Massachusetts Supreme Court decision extending state constitutional protection to gay marriages<sup>101</sup> and a Ninth Circuit decision invalidating public school recitations of the words "under God" in the Pledge of Allegiance.<sup>102</sup> Some portion of the public may well have feared that the increasingly progressive Rehnquist Court might eventually embrace those holdings itself, but that apprehension did not become the reality. If it had become the reality, the Court would have abandoned those virtues and advantages that inhered in its more circumspect, split-the-difference approach.

Finally, splitting the difference on issues surrounding personal privacy, capital punishment, church-state separation, and the like has allowed the Court to maintain a position as a protector of individual rights. Nothing in the Constitution presupposes that the Court would be the sole guarantor of civil liberty. As the recent debates in Congress over interrogation standards for detainees and renewal of the Patriot Act have demonstrated,<sup>103</sup> the political branches are meant to play important roles in protecting rights as well. Nonetheless, because so many provisions of the Bill of Rights relate to the criminal justice system, and because the life tenure of judges insulates them more fully from majoritarian pressures, the courts have come by custom and tradition to play the leading role in the protection of civil liberty.

The vigilant guardianship of personal rights thus has a long and honorable constitutional pedigree, and by splitting the difference on questions of capital punishment, gay rights, and reproductive and religious freedom, the Court sought to reserve for itself a more sensitive role with regard to rights than it would have assumed if it had adopted a posture of pure judicial restraint. Had the late Rehnquist Court not split the difference—had it simply abandoned the fields of reproductive choice, sexual intimacy, and public display of religious symbols solely to legislatures—it may have left itself open to the charge of

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100. See, e.g., James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4.

101. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); see, e.g., Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 460-72 (2005) (detailing negative reaction to *Goodridge*).

102. *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002); see, e.g., Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057, 2060 (expressing congressional disapproval of the Ninth Circuit's *Newdow* decision).

103. See, e.g., Eric Schmitt, *President Backs McCain on Abuse*, N.Y. TIMES, Dec. 16, 2005, at A1; Sheryl Gay Stolberg, *Senate Agrees to a Six-Month Extension of the Patriot Act*, N.Y. TIMES, Dec. 22, 2005, at A30.

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abdicated the Court's historical duty to buffer minorities against whatever majoritarian pressures were prevalent at the time.

Closely related to the question of rights is the need for basic tolerance of differences in a democratic society. Even the most decent society is not immune from manifestations of prejudice, and majorities in any community may be prone to like others who are most like themselves. This vulnerability to the feeling of sameness, whether it be in matters of race, religion, sexual preference, political viewpoint, or whatever, can lead to ugly moments. Thus, as John Hart Ely has famously argued, majorities are encouraged under our Constitution to enact their beliefs into law, but not beyond the point where they subject racial, religious, political, or lifestyle minorities to what can reasonably be seen as prejudice or persecution.<sup>104</sup> Viewed in this light, *Lawrence v. Texas*<sup>105</sup> is not a radical constitutional innovation, but an immensely traditional decision, located in the best American tradition of openness to all. Since, for example, the conservative view on affirmative action is to judge fellow Americans on their individual qualities and contributions, then *Lawrence* may be seen in the same light—i.e., that of a constitutionally unitary nondiscrimination principle. The Rehnquist Court at twilight thus found the difference between enumerated and unenumerated rights not to be the dispositive test. In the end, it proved of less importance than the need to expand the American embrace to gay citizens.

Split-the-difference jurisprudence thus embodies a set of largely pragmatic virtues that allow the Court to play the role many Americans expect it to play—that of a somewhat circumspect guardian of rights that is not oblivious to the changes taking place outside the courtroom. To the extent the public thinks about the Court at all, it probably thinks of outcome more than process. The alarm that other actors in our system may have felt at the Court's expanding powers and receding commitment to process was lessened by the fact that its accretion of authority came in increments. And splitting the difference may actually have allowed the late Rehnquist Court to play a stabilizing role that preserved both the institution's prestige and the country's equilibrium. The sum of the case for splitting differences is so intensely pragmatic as to be almost political, but then the Court has probably never been a wholly apolitical body. When viewed politically, the verdict on the performance of the Rehnquist Court at twilight could have been far worse.

### III. THE PERILS OF SPLIT-THE-DIFFERENCE JURISPRUDENCE

However persuasive the case for splitting differences may seem, it still comes up short. And the deficiencies do not go primarily to result. The

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104. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-77 (1980); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that "prejudice against discrete and insular minorities may be a special condition").

105. 539 U.S. 558 (2003).

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drawbacks of splitting the constitutional difference pertain more to methodology than to ideology, and they thus touch the very heart of the constitutional order.

Of course, the proponents of splitting the difference have likewise sought to identify with that order. As noted in Part II, they have invoked widely admired judicial traits and American values. In this view, splitting the difference should be applauded as a moderate, restrained, narrowly crafted approach to law that has allowed the Supreme Court to position itself in the American mainstream while honoring the commitment to national pluralism and protection of minority rights. These values are important, and if the best way to respect them is by splitting constitutional differences, the whole debate should end. But in fact, these same advantages inhere in equal or greater measure in an approach that rejects splitting constitutional differences in favor of greater respect for the role of the political branches and for the dictates of positive law.

Splitting the difference ought not to be confused with judicial restraint. It is often marketed as such, on the theory that the Court did not speak in the broad or absolute way it might have. When it split the difference in *Newdow*, by declining to rule one way or the other on “under God” in the Pledge, the Court opined that “the prudent course” would be for the Court “to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”<sup>106</sup> By this reckoning, a Court that still permits capital punishment, some public religious expression, some regulation of abortion, some use of the sentencing guidelines, and some modification of the criminal justice model in pursuit of the war on terrorism is indeed practicing judicial restraint.

In some relative sense, this may be true. Yet it remains the case that most of the late Rehnquist Court decisions that split the difference put a significant dent in democratic decisionmaking. In invalidating the execution of juveniles, *Roper* toppled a practice allowed by twenty state legislatures.<sup>107</sup> In ruling unlawful the execution of the mentally retarded, *Atkins* invalidated another application of the death penalty permissible in twenty states.<sup>108</sup> In ruling laws that criminalized consensual sodomy unconstitutional, *Lawrence* struck down the statutes of thirteen states.<sup>109</sup> In *Stenberg*, the Court invalidated not only the Nebraska partial-birth abortion ban but, for all intents and purposes, similar bans in twenty-nine other states and a federal ban as well.<sup>110</sup> In *Booker*, the

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106. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004).

107. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

108. *Id.*; *Atkins v. Virginia*, 536 U.S. 304 (2002).

109. *Lawrence*, 539 U.S. at 573.

110. *Stenberg v. Carhart*, 530 U.S. 914, 983 (2000) (Thomas, J., dissenting) (noting that twenty-nine other states had similar laws); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (striking down the federal partial-birth abortion ban), *cert. granted*, 126 S. Ct. 1314 (2006).

Court altered Congress's preferred Federal Sentencing Guidelines structure.<sup>111</sup> One can justifiably applaud the result in some or all of these decisions. But it is only fair for those applauding the outcomes to recognize that fellow Americans may be dismayed. To defend a result is very different from trying to sell decisions overturning scores of statutes as some sort of exercise in judicial restraint.

In praising the common law method and minimalist rulings as examples of restraint, Dean Jeffries and Professor Sunstein make an important point.<sup>112</sup> The Court is far less likely to make a fatal mistake by feeling its way than by subjecting the political system to a sudden jolt. But splitting the difference allows democratic freedoms to be eroded incrementally, especially since the propelling force behind the Court's gradual encroachments are the Court's own prior pronouncements. The fear of gradualism looms especially large in the conservative mind, since the immediate precursors to *Roe v. Wade*<sup>113</sup> could so easily be seen as both incremental and innocuous. *Griswold v. Connecticut* dealt at heart with nothing more than private contraceptive use among married couples.<sup>114</sup> *Eisenstadt v. Baird* may have been slightly more aggressive, but it too was careful to premise its decision upon equal protection grounds and to deal with nothing more than contraception.<sup>115</sup> Whatever one's present view of *Roe v. Wade* might be, the decision must be seen historically as the culmination of earlier minimalist steps.<sup>116</sup> Thus, for a court freed from the inhibitions of constitutional history, text, and structure, today's minimalism prepares the way for tomorrow's maximalism. The jurisprudence of minimalist decisions and common law methods may still be one of a one-directional and anti-democratic bent.

And of course there is, at least in theory, "no federal general common law."<sup>117</sup> Justice Brandeis's statement in *Erie* may be second in renown only to Chief Justice Marshall's in *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>118</sup> Both statements are crucial to American law—Marshall's because it establishes the essential power of judicial review and Brandeis's because it limits that very power by differentiating statutory and constitutional interpretation from common law development. To the extent that constitutional interpretation adopts common law methods, and encourages judges to build case by case a corpus of constitutional law from the contours of their own experience, it would seem

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111. *United States v. Booker*, 543 U.S. 220 (2005).

112. *See supra* notes 85-88 and accompanying text.

113. 410 U.S. 113 (1973).

114. 381 U.S. 479 (1965).

115. 405 U.S. 438 (1972).

116. *See* LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 72-101 (2005).

117. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

118. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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that Justice Brandeis himself might find something amiss. For the wisest, most reflective common law judge was always subject to being corrected by the most impulsive state legislature, even if, as judges were wont to remind, enactments in derogation of the common law were to be narrowly construed.<sup>119</sup> To see the common law method in the absence of this democratic check—i.e., to see it as a model for constitutional interpretation—is to grant the Justices a power that classic common law judges never possessed.

I have placed such emphasis upon judicial restraint for the reason that restraint is more likely to be grounded in law. Splitting constitutional differences is, by contrast, more likely to be grounded in policy and wisdom. The late Rehnquist Court was in some ways a very wise court, and it is not a bad thing at all to wish judges to possess a profound understanding of human nature and experience. Law, however, becomes necessary precisely because we have such divergent views of what is wise and about whose wisdom should carry the day.

In its last years, the Rehnquist Court became progressively unable to distinguish between those occasions that legitimately called for the exercise of judicial wisdom and those that called for the application of law. Some contexts do indeed call for wise decisionmaking. For example, the Constitution makes a strong textual commitment to free religious exercise and forbids, at a minimum, the establishment by government of any church or faith. But beyond that, the First Amendment provides sparse guidance on how close cases such as *McCreary* and *Van Orden* should be decided.

Justice Breyer, whose vote was crucial in upholding the Texas statehouse grounds display of the Ten Commandments and in invalidating the Kentucky courthouse posting of the same, called the Texas display a “borderline” and “fact-intensive” case for which he saw “no test-related substitute for the exercise of legal judgment.”<sup>120</sup> In short, the occasion called fairly for judicial wisdom, because the Constitution authorized judicial involvement but provided no neat answers.

Justice Breyer’s effort to split the difference on the Texas and Kentucky displays is open to the customary criticism of all fact-based balancing—that it provides no clear test or principle to apply another day. The unwillingness of Justice Breyer to bind himself to rules does leave greater room for judges to roam at will. But Chief Justice Rehnquist’s adoption of “passivity” as the plurality’s test for upholding public religious messages is no model of clarity either.<sup>121</sup> One can, in short, debate all the judicial line-drawing in the Ten

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119. See, e.g., *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”).

120. *Van Orden v. Perry*, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring in the judgment).

121. See *id.* at 2861 (plurality opinion) (classifying the display as a “passive

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Commandments cases, but debating its wisdom is not the same thing as questioning its legitimacy. Wisdom is legitimate in resolving the tension between the divisiveness likely to result from excessive religious symbolism and the division equally likely to follow an attempt to exclude all manifestations of faith from any public setting.

The more plainly enumerated the underlying right, the more judicial wisdom is appropriate in determining the application of that right in particular cases. By this standard, the application of judicial wisdom in the Court's more recent cases on abortion, capital punishment, and gay rights is problematic. Shorn of a solid footing in the text, history, and structure of the Constitution, the cases struggle to explain why the wisdom of judges should supplant the wisdom of everyone else. The Constitution exhibits no intrinsic preference for legal wisdom over lay wisdom, or judicial wisdom over political wisdom. In *Roper* and *Atkins*, the Court trumped not only legislative wisdom, but also the wisdom juries might have applied in determining whether horrendous crimes deserved the legislatively sanctioned capital sentence.

The great and singular danger to the judicial reputation throughout history has been that of overreach. That is because judges are appointed for life, insulated on purpose, and drawn from the ranks of one profession only. In return for such extraordinary privileges, the American Republic asks only that judges abjure personal preference for the commands of enacted law. Self-denial is an admired trait, particularly as it pertains to curbs on the appetite for power. Self-denial is not enhanced by the elevation of wisdom over law or, indeed, by splitting differences in areas where courts do not belong.

The late Rehnquist Court flirted dangerously with overreach and aggrandizement, declining to recognize that "the subjective character, the insecure foundations, of its constitutional jurisprudence"<sup>122</sup> called for some greater measure of modesty and restraint. The Court's comments on the most volatile subjects imaginable assumed a philosophical rather than a legal tone. The most famous examples are the Court's expansive declarations in *Lawrence* that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"<sup>123</sup> and earlier in *Casey* that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>124</sup> But the expansiveness did not stop there. The Court's decisions on domestic social controversies drew on random rulings from international tribunals,<sup>125</sup> which

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monument"); *id.* at 2864 (noting that the display was "far more passive" than the one struck down in *Stone v. Graham*, 449 U.S. 39 (1980)).

122. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 102 (2005).

123. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

124. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

125. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Lawrence*, 539 U.S. at 573; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

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were wholly unaccountable to either the American people or their fundamental charter of self-governance. Sadly, neither the philosophical flourishes nor the international law insights were at all necessary to the Court's rulings. Together, the Court's indulgences risked hardening hearts that needed winning over and helped negate the very image of moderation that splitting the difference was designed to create.

The question thus posed is whether the Court's most enlightened judgments can withstand the drawbacks of the Court's chosen methods. The dilemma reaches its poignant heights in *Lawrence*, where the inhumanity of prosecuting consensual homosexual relations cannot ultimately obscure the ruling's skimpy foundation in constitutional history, structure, and text. Methodology matters supremely in the law, if it is not to become the kissing cousin of politics. The Court's reluctance to accept the discipline of legal method led the *New Republic*'s Jeffrey Rosen to declare on the occasion of Samuel Alito's nomination that "the last thing the country needs is another O'Connor to short-circuit all of our most contested political debates. By splitting every difference, she aggrandized her own power at the expense of Congress and the states."<sup>126</sup> That judgment unfortunately overlooks the rich totality of a distinguished public servant's long career, but it underscores the fact that the late Rehnquist Court had been running serious jurisprudential risks.

The foremost risk in overreach is that of politicizing the Court itself. As I have noted, there is a thin line between the unabashedly pragmatic exercise of splitting differences and the practice of politics itself. By 2005, the verdict on the Rehnquist Court began to emerge in political terms. Judge Richard Posner titled his 2005 *Harvard Law Review* foreword *A Political Court*, though he was careful to note that political did not mean partisan.<sup>127</sup> Professor Mark Tushnet had no such reservation: "The Rehnquist Court was a Republican Supreme Court, with one wing concerned primarily with the size of government (the traditional Republican concern), and the other with the newer issues animating the modern Republican Party."<sup>128</sup> O'Connor and Kennedy, Tushnet thought, "were perhaps the last representatives of an older, country club Republicanism," while Scalia and Thomas were more attuned to the social-issues agenda of the contemporary conservative movement.<sup>129</sup> Rehnquist, Tushnet concluded, was harder to characterize, because he "spanned both wings."<sup>130</sup>

Those who disagree with the Supreme Court's decisions often find ways to

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126. Jeffrey Rosen, *Answer Key: Decoding Samuel Alito Jr.*, NEW REPUBLIC, Nov. 21, 2005, at 16, 16.

127. See Posner, *supra* note 122, at 39.

128. MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 70 (2006).

129. *Id.*

130. *Id.*

characterize those decisions as political. And a certain amount of political characterization of the Court is inevitable, given its inescapable involvement in the public debates of the day. But it remains true that repeated portrayals of the Court as political erode both the Court's own moral authority and the mystique of law. A citizenry bred to cynicism about a politicized judiciary may take a similarly jaded view of the social compact itself. Splitting difference after difference using doctrinal tools not based in constitutional text or structure makes the view of a political Supreme Court a more plausible one. Thus, the great risk in splitting differences: the result in any one case seems sensible enough, but the impression left by all cases is that of a Court in no-man's land—a Court that has lost the legitimacy conferred by law and cannot gain the sanction conferred by elective politics.

As noted in Part II, split-the-difference jurisprudence lays claim to important values, among them tolerance, moderation, compromise, and protection of individual rights. But advocates of restraint under law need not cede these softer values to supporters of splitting constitutional differences. As to tolerance, stateways do change folkways, and it can be argued that *Lawrence* furthered public tolerance for the most basic rights of gay Americans. But tolerance directed by judicial mandate may not be as profound or as durable as tolerance achieved through the political arena. Whether constitutional decisions assist or impede lasting democratic progress has been widely debated in the context of abortion.<sup>131</sup> What cannot be debated is that the country's attitudes toward homosexuality are becoming more decent and accepting independent of any court decision.<sup>132</sup> At the time of *Lawrence*, moreover, criminal sanctions for consensual same-sex conduct were on their way out. The offense existed in only thirteen states, and prosecution even in those states was a rarity.<sup>133</sup> The Court's coup de grace may have brought acclaim to itself, but it lost faith in the more generous instincts of the American people and denied democracy the fruits of a major achievement.

Tolerance of course begins at home. The Court's authority to require others to show tolerance for different views will be weakened if it shows little tolerance for differences itself. A constitutional decision is in one sense a "my way or the highway" proposition. It imposes on the people of every state and locality one and only one way of doing things. It is irreversible except through constitutional amendment, judicial overruling, or the slow and uncertain process of replacing the Justices themselves. When it constitutionalizes a subject, the Court says in effect that there is no room for difference, that the Court's view renders the views of others all but irrelevant. Thus a decision that

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131. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992).

132. See, e.g., Klarman, *supra* note 101, at 443-45 (documenting the growing public acceptance of homosexual relationships as demonstrated by public opinion, legislative enactments, corporate employee benefits, and portrayal in popular entertainment).

133. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).



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purports to split the constitutional difference can in effect be an exercise in neither tolerance, compromise, nor moderation, but rather a judicial version of *l'état, c'est moi*.

The Court's attempt to corral the powers of state on sensitive social questions thus runs counter to the constitutional structure. Our federal system does not really differ from the First Amendment in requiring judges to respect most profoundly views with which they most profoundly disagree. It is ever so easy for judges to trumpet the First Amendment in order to protect speech of which they approve. It is so very simple for judges to invoke the values of our federal system to uphold state laws that they favor. What is difficult is to summon those values on behalf of laws and views that the judge finds uncongenial. Yet it is for this precise reason that we have judges—to remind us that law in essence requires respect for positions that are not our own.

Citizens are forced to show this respect every day and in every way, bereft as they are of the option of transmuting personal preferences into declarations of unconstitutionality. Perhaps in *Roper v. Simmons*<sup>134</sup> the Court surmised that, in invalidating capital sentences only for those under eighteen, it was just splitting differences, and that was no big deal. After all, the Court noted, during the past decade only Oklahoma, Texas, and Virginia had executed persons for offenses committed as juveniles.<sup>135</sup> Relying once again on “[t]he opinion of the world community” regarding juvenile execution,<sup>136</sup> on “scientific and sociological studies” regarding juvenile immaturity,<sup>137</sup> and on “evolving standards of decency” within the American states themselves,<sup>138</sup> the Court annulled the practices of twenty states permitting execution of offenders under the age of eighteen.

Viewed methodologically, *Roper* was in fact a big deal. Again, the lesson of law for citizens is that one cannot do all one wishes. Yet selective and freewheeling inquiries of the kind pursued in *Roper* will come in time to seem self-willed. The impression is hardly dispelled by the Court's explicit creation of a Proprietary Constitution. Whereas *Marbury* said it was the duty of courts to say “what the law” is,<sup>139</sup> the *Roper* majority declared that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”<sup>140</sup> The explicit personalization of constitutional interpretation cannot be what *Marbury* had in mind. The Court acknowledged that the states themselves had been moving in the direction of banning juvenile execution, but, as in *Lawrence*, it refused to let democracy finish the task. Instead, it

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134. 543 U.S. 551 (2005).

135. *Id.* at 565.

136. *Id.* at 578.

137. *Id.* at 569.

138. *Id.* at 561 (internal quotation marks omitted).

139. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

140. *Roper*, 543 U.S. at 563 (internal quotation marks omitted).

announced a premature consensus on the subject that preempted political debate. All the international opinion and social science that might have legitimately informed that debate was snatched from the same people whose assent to the new judicial formulation was commanded.

Seen in this light, split-the-difference jurisprudence cannot fairly lay claim to the values of tolerance, moderation, and compromise with which it is promoted. Our political system is the vehicle for participatory compromise, our federal system is the vehicle for tolerance of differing views and solutions, and our legal system is the vehicle for ensuring that those compromises and differences receive their due respect in court. Splitting constitutional differences has upended all these understandings. It is to their great credit that Chief Justice Rehnquist and Justice O'Connor saw the impending dangers in *Roper* and voted in dissent.<sup>141</sup>

There remains the value of individual rights. As we have seen, splitting constitutional differences has enabled the Court to present itself as a defender of such rights. Even on the score of individual rights, however, the Court has not been consistent. For example, *Grutter v. Bollinger* split the difference by allowing race to be used as a factor in the review of applications for admission to institutions of higher education, so long as the system did not devolve into specified set-asides for particular races and ethnicities.<sup>142</sup> The Court nonetheless credited Michigan Law School's effort to attract a "critical mass" of minority students sufficient to bring to the school the educational benefits of racial diversity.<sup>143</sup> Chief Justice Rehnquist saw in the critical-mass objective an unblushing attachment to group rights in the form of "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."<sup>144</sup> But the Fourteenth Amendment speaks in unmistakably individual terms, forbidding the state to deny "to any person within its jurisdiction the equal protection of the laws."<sup>145</sup> Consideration of group characteristics over individual ones in the face of the Fourteenth Amendment's language represents the apogee of split-the-difference pragmatism. The Court's willingness, in Justice Kennedy's words, to risk "compromising individual assessment" for race-based review<sup>146</sup> probably means there is no constitutional principle so important that it somehow can't be split.

When we think of individual rights, we think naturally of the dichotomy between the individual and the state. Rights are something asserted against the state, and decisions protecting against state infringement of the right to

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141. See *id.* at 587-607 (O'Connor, J., dissenting); *id.* at 607-30 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

142. 539 U.S. 306 (2003).

143. *Id.* at 335-39.

144. *Id.* at 386 (Rehnquist, C.J., dissenting).

145. U.S. CONST. amend. XIV, § 1.

146. 539 U.S. at 391 (Kennedy, J., dissenting).

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reproductive choice, the right to consensual sexual expression, the right to free religious exercise, and the right to be free of cruel and unusual punishment all have a certain resonance with constitutional traditions. But what happens when the state itself is not the enemy of rights? What happens when the state is trying to protect the rights of individuals, too?

This is what makes some of the late Rehnquist Court's most controversial decisions so hard. In the area of abortion, the state's main interest is protecting the rights of the fetus. In the area of capital punishment, one state interest is vindicating the rights of the victim and his or her surviving family. The fact that these rights may be those of the unborn or the deceased does not lessen the fact that they remain intensely individual. That the individual rights and lives the state seeks to safeguard are indisputably those of innocents only compounds the difficulty.

In areas where the state itself presses the case for individual rights and life, splitting the constitutional difference becomes more and more an exercise in moral relativism. Always a precision balancing act, splitting differences risks conveying rising illusions of omniscience when applied repeatedly to the weightiest matters of life and death. Capital punishment is brutal, but no more so than murder. Reproductive choice is desirable, but no more so than protection of potential life. The questions are so hard and so intractable, in fact, that we open them to constant reexamination by state and federal legislatures, state and federal courts, juries, and governors exercising clemency—each of them informed, we hope, by whatever legal, medical, scientific, and religious insight our society can bring to bear. Multiple voices and multiple arenas provide better assurance that profound tensions have not been swept aside than another five-to-four decree. Justices who purport to strike the proper balance for us in these matters may miss the point that being right ultimately means leaving open the paradoxical possibility of being terribly wrong.

#### CONCLUSION

Few major constitutional debates are clear-cut propositions, and the debate over split-the-difference jurisprudence will prove no exception. As we have seen, splitting differences has real benefits. The outcomes of cases are often sensible, the Court itself is often statesmanlike, and the spacious language of the Constitution is often seductive. Splitting differences allows the Court to appear simultaneously cautious and progressive, and the Rehnquist Court at twilight struck the balance exquisitely. No one was more adroit in this regard than Justice O'Connor. It is to her credit that the Rehnquist Court was perceived as both prudent and humane.

It seems almost churlish, therefore, to lament the demotion of textual fidelity, structural analysis, and historical perspective within the constitutional hierarchy. Yet such things comprise the raw materials of law and define the discipline of legal method. Without them, judges will be nomads and lose their

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distinctive way within the American system. The slow accretion of authority that comes from splitting differences does not guarantee the Court reciprocal accretion of respect. Americans deserve not a liberal Court, not a conservative Court, not even a wise or Solomonic Court, but a Court that respects the limits of its power and the place of others within the constitutional structure. Why that goal has proven so very difficult to achieve remains the greatest of constitutional mysteries.

It seems unfair by way of epitaph to saddle Chief Justice Rehnquist with all the jurisprudence of the Court that bears his name. Most of the decisions splitting constitutional differences did not win his vote. He remains a principled Chief Justice who glimpsed the constitutional promised land at the beginning of his tenure, but was never quite permitted at the end to enter it. His own brand of judicial restraint and respect for the role of states within the federal system fell prey to the split-the-difference approach. The loss was not simply personal. The ideal of courts as bodies of law, and of democracy as a robust arbiter of differences, began to slip slowly from America. Without these values, there can be neither lasting liberty nor lasting order. Americans should not need to ask their Court the question posed by freedom fighters everywhere: You rule, but by what right?