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“SUPREME” COURTS AND THE IMAGINATION OF THE REAL: AN ESSAY IN HONOR OF MIRJAN DAMAŠKA*

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Summary

In *Local Knowledge, Fact and Law in Comparative Perspective*, Clifford Geertz brought his interpretive method of cultural analysis to bear on the relationship between local systems of law and the cultures in which they are situated. Geertz’ argument can be summed up by his aphorism: “Law is but part of a distinctive manner of imagining the real.” I explore this puzzling statement by examining the role of supreme courts in constructing and maintaining the “imagined real” of the society in which they function. Using the Supreme Court of the United States as my principal example I claim that these courts are among the institutions that validate commonly held but culturally constructed notions of time, place, and the collective self. The focus is not on the content of judicial decisions but on the institutions and their practices. A brief conclusion situates my arguments within the broader point that fundamental socially constructed beliefs are created and sustained by the institutions through which they are expressed.
Preface

Joining the other contributors to this volume I salute Professor Damaška for his many years of teaching and his prolific and powerful scholarship. In both of these endeavors, Mirjan has employed his astoundingly wide familiarity with legal regimes throughout the world to broaden the perspectives of countless professors and students. Mirjan came to the American academy with an enviable facility with languages and a habit of mind that looked far beyond his native Croatia, supplemented by a powerful intellect and rigorous work habits. I first discovered his many gifts when in the mid-eighties I encountered The Faces of Justice. As we say in New York, I was “blown away” by the breadth of the work and its imaginative and persuasive thesis. The book inspired and encouraged my then-budding goal to study procedure as a human construct embedded in culture and politics, a recent example of which you will find in the essay that follows. I end this short tribute by acknowledging the sometimes overlooked quality of Mirjan’s prose: He is the Vladimir Nabokov of comparative law. Like Nabokov he was born and educated in an Eastern European country and English was his third (or was it his fourth or fifth) language. And like that master of fiction, Mirjan brings a felicity to scholarly writing in English that is not “merely” clear and readable, it is, dare I say it, poetic. Mirjan, please keep educating us!

Introduction

“Law,” to quote Clifford Geertz’ intriguing aphorism, “is but part of a distinctive manner of imagining the real.”1 I have puzzled over this quote and the indeed much else in Geertz’ classic essay, Local Knowledge, Fact and Law in Comparative Perspective2 for a good number of years,

2 RICHARD A. SHWEDER, Something Else: The Resolute Irresolution of Clifford Geertz, COMMON KNOWLEDGE Vol. 13 No. 2, p. 191 (2007) (Clifford Geertz was “arguably the best-known and most influential American anthropologist of the past several decades…”). A common theme of Geertz’s critics is that his prose style was needlessly complex and that, by calling attention to itself obscured the failings of his theses, see, e.g., Stephen William Foster, Local Knowledge: Further Essays in Interpretive Anthropology, AMERICAN ANTHROPOLOGY., Vol. 87, pp. 164, 165 (1985) (book review) (“…his essays fall flat; what they say evaporates on close inspection.”). Other criticism raises questions about the interpretive method of understanding cultures, see Jonathan Lieberson,
much to my intellectual provocation and profit. Koan-like, Geertz’ assertion disturbs us with its pithy oxymoronic phrase: The “real,” is axiomatically not “imagined.” The “imaginary” is only “real” in the spheres of poetry, novels, and video games. And what has “law” got to do with it? But like a Zen master, Geertz uses the koan form “as an aid to meditation and a means of gaining intuitive knowledge.” In this spirit I will focus primarily on those most public of courts, the “supreme” courts, and will explore their role in the collective project of imagining and maintaining a socially adopted reality. I argue that in common with all courts they help to shape and validate our notions of time, space, and human relations and, being “supreme,” have a distinctive capacity to do so. They of course do not do so alone. They are but “part” of the imagination of the real - one of the constructions through which we represent reality to ourselves and others; one strand in the self-spun web of meaning (to again borrow from Geertz) in which we are suspended. Nor is this the only thing they do. In setting my own tack I do not mean to deny the essential instrumental functions these courts provide in their respective jurisdictions. I do hope to shed some light from another angle. I will not bottom my argument on the social and cultural effects of the judicial holdings. I therefore eschew claims like “Roe v. Wade” led to

Interpreting the Interpreter, THE NEW YORK REVIEW OF BOOKS, March 15, 1984 at 39, 46 (Geertz fails to resolve the confusion inherent in interpreting cultural “texts” because he does not provide a way “to distinguish what is “in” the “text” and what is supplied by the “reader.”). Geertz’ work is also explored in Oscar G. Chase, Law, Culture and Ritual (New York University Press 2005).


4 As discussed below, the term ”supreme court” is problematic, unless used as a proper noun in reference to a particular court. See n. 32, infra.

5 Geertz uses this metaphor in explaining his understanding of culture:

The concept of culture I espouse … is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical. Geertz, Clifford, The Interpretation of Cultures (Basic Books, New York 1973) at 5.

He employs the metaphor again in Local Knowledge, this time with direct reference to the rule of law:

“Man” as A.M. Hockocart remarked “was not created governed” and the realization that he has become so, severally and collectively, by enclosing himself in a set of meaningful forms, “webs of signification he himself has spun” to recycle a phrase of my own, leads us to an approach to adjudication that assimilates it not to a sort of social mechanics, a physics of judgment, but to a sort of cultural hermeneutics, a semantics of action.

Geertz, 2000 at 182.

6 For recent descriptions and analysis of the role of new supreme and constitutional courts in the protection of democratic governance in states that have emerged in the post-fascist and post-Soviet period, see Michele Taruffo, Le funzioni delle Corti supreme. Cenni generali, Annuario di Diritto Comparato e di Studi Legislativi (2011) 11; Rolf Stürner, The New Role of Supreme Courts in a Political and Institutional Context from the German Point of View, Id., 335; Wojciech Sadurski, La crescita delle Corti costituzionali nei paesi dell’Europa centrale e orientale dopo la caduta del comunismo: alla ricerca del monopolio sulla giustizia Costituzionale, Id., 305. See also Samuel Issacharoff, Constitutional Courts and Democratic Hedging, 99 Georgetown Law J. 961 (2011).

promiscuous sexuality,” for however true (or not) that statement might be, my different goal is to describe how the establishment and practices of an institution called the Supreme Court helps to create and maintain the “real” by which we all live.

Before turning to the specifics of my inquiry, I discuss in Part I the interpretive background that informs this enterprise and its relation to supreme courts. In Part II I show how the Geertzian approach illuminates the usually unacknowledged role of supreme courts in constructing and maintaining social understandings of time and space. Part III argues that the institution of supreme courts is instrumental to the project of modern community’s successful imagination of itself as “just” and “civilized.”

I. Supreme Courts in Interpretive Context

In brief, this essay reflects a long-term interest in the “cultural” study of law, a pursuit inspired in at least in the form here pursued by Clifford Geertz and especially by Local Knowledge. Geertz was the pioneer in this endeavor, not in so much in that he applied ethnology to legal systems, - this had been earlier pursued by Malinowski, Evans-Pritchard, Gluckman, Nader, and others – but because he was the first to apply the hermeneutic, or “interpretive,” method to the ethnology of law. The sub-title of the book in which the Local Knowledge essay appears makes the point. It is “Further Essays in Interpretive Anthropology” (my emphasis). Since I pursue the same path in the pages that follow, and since the interpretive method itself has been subject to interpretation (not to mention obloquy and hagiography), we should note that Geertz describes this “turn of anthropology” as toward a “heightened concern with structures of meaning in terms of which individuals and groups of individuals live out their lives, and more particularly with the symbols and systems of symbols through whose agency such structures are formed, communicated, imposed, shared, altered [and] reproduced…[which] leads us into an approach to adjudication that assimilates it not to a sort of social mechanics … but to a sort of cultural hermeneutics, a semantics of action.” He claims that “legal process” is really about

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8 E.g., Jonathan Klick & Thomas Stratmann, The Effect of Abortion Legalization on Sexual Behavior: Evidence for Sexually Transmitted Diseases, 32 J. Legal Stud. 407, 408 (June 2003) (arguing that “legalizing abortion laws lowered the cost of sexual activity, leading individuals to engage in more sex, causing an increase in STDs.”).
9 Geertz’ work is also explored in [omitted to protect anonymity.]
10 LOCAL KNOWLEDGE at 3-5 (Geertz briefly discusses some of his intellectual forbears).
11 See note 2, supra.
12 LOCAL KNOWLEDGE at 182.
“seeing to it that our visions and our verdicts ratify one another.”\textsuperscript{13} This says something about the law’s imagination of the real, for if vision and verdict are not in sync the anxiety costs will be high and one must yield to the other. Our “visions” of reality will shape our processes on the path to fact and, necessarily, the facts we find. Geertz’ prescience in this regard has been borne out by the work on cultural cognition pursued by Dan Kahan and others. “Cultural cognition refers to the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews.”\textsuperscript{14} The tendencies referenced have been observed in a variety of settings\textsuperscript{15}. The verdicts, to return to Geertz, ratify the visions.

Paul Kahn adds his own gloss on the application of hermeneutics to law in his book (one might say “manifesto”), \textit{The Cultural Study of Law}. Urging us to think about law from a “cultural” point of view he calls for a step back from the reformist agenda that informs much of contemporary legal scholarship. As he sees it, legal scholars are not studying law as a separate social construct but are embedded in law and are “doing law” even as they analyze and seek to reform it. He uses the telling analogy of the study of religion in divinity school as compared with its study in a department of religious studies; the former examines text to find correct interpretations of dogma, while the latter explores the origins and role of religion in society and in its variant forms. Kahn urges us to think about law from outside, with belief suspended. This requires us to set aside our reformist impulse, at least temporarily. But what would a cultural study of law look like? Having opened his book with a critique of contemporary legal scholarship Kahn’s second chapter offers a “sketch of the most basic areas of a new discipline.”\textsuperscript{16} He intriguingly calls the chapter “Imagining the Rule of Law.” Apart from acknowledging his debt to Geertz, this chapter title makes us wonder, in what sense is the rule of law a product of imagination? And of whose? Kahn’s answer is that the rule of law is “a social practice.” To live under it “is to maintain a set of beliefs about the self and community, time and space, authority and representation.” Are these "beliefs" merely imagined? Kahn wrestles with this problem in the light of his commitment to a “cultural study” through two related exercises. First, a Socratic inquiry into existing practices which does not assume any a priori correctness - a “bracketing of

\textsuperscript{13} \textit{LOCAL KNOWLEDGE} at 181.


\textsuperscript{15} \textit{Id.} at 21-22.

any truth claims for or about law.”17 Second, a coupling of that Socratic “philosophical critique” with that of “thick, anthropological description – i.e., investigating instances of practice in their layered character of multiple juxtaposed meanings.”18 It is this dual process that “is both the end and the technique of a cultural study of law’s rule.19 Cultural inquiry “is not a step in a progression towards truth. Rather, it is a product of the imagination that stands slightly apart from other products of the imagination.”20 The cultural student of law must bring to bear her properties of imagination by temporarily standing outside that collective product of imagination – the rule of law.

Curiouser and curiouser. So far we have Geertz positing an “imagination of the real” with the law’s help and Kahn’s “imagined” conception of an” imagined” rule of law. Can an interpretive account of supreme courts add to either our appreciation of that method or to the place of those courts in our imagined world? My affirmative answer is bottomed on the view that supreme courts are part of a learned “system of symbols” that “provide human beings with a meaningful framework for orienting themselves to one another, to the world around them, and to themselves.”21 Through these symbols we create the world in which we live and sustain our creation, “suspended in our own web”. This is not to say that we are free to create any world we can imagine. We are constrained by the physical world in which we are born and by existing mentalities of culture and relations of power.

Institutions, however, are not lying about in nature to be picked up or stepped on. The “rule of law” and its associated institutions cannot be constituted until they are imagined. Imagination is in this sense necessary to the creation of real institutions. Their continued existence depends on the collective mental commitment to their existence, a continued effort of imagining that they are what we believe them to be. A supreme court is – what? A building. A series of written decisions. A group of people designated as judges (or clerks or secretaries or janitors) who “are” the court which exercises power, but only so long as the polity remains committed to this ephemeral incorporeal concept.

Pierre Bourdieu recognized the dependence of the reality of courts on a reflexive process, even as courts are constrained by the requirement that symbolic power be “realistically

17 Kahn at 34.
18 Kahn at 36.
19 Kahn at 36.
20 Kahn at 39.
21 Geertz, supra at 250.
adapted to the objective structures of the social world.” Bourdieu understood, then, that “[t]he specific property of symbolic power is that it can be exercised only through the complicity of those who are dominated by it.” Accordingly, “the law can exercise its specific power only to the extent that it attains recognition, that is, to the extent that the element of arbitrariness at the heart of its function…remains unrecognized. The tacit grant of faith in the juridical order must be ceaselessly reproduced.” Bourdieu provides several brief explanations for why the law obtains “the complicity of those who are dominated by it.” First, there are people “who are already believers [in law] by virtue of the practical affinity uniting them with the interests and values fundamental to legal texts and to the ethical and political inclinations of those who have the responsibility of applying them.” For “the dominated,” complicity is “all the more certain because it is unconscious.” Complicity is “subtly extorted” by appeals to the objective, normalizing, and universalizing nature of law. And if it lacks those appealing qualities just yet, we can imagine them as achievable.

Bourdieu’s subtle extortion of complicity through the “universalizing nature of law” is aided by the grandiose but inaccurate prefix “supreme” applied to certain courts. This itself requires an imaginative leap and a willful blinding to the reality that no court is truly “supreme.” For example, the power of the Supreme Court of the United States is limited to specific kinds of disputes by the Constitution and statute. It is, speaking legalistically, “supreme” only in that it is “the court of last resort for all questions of federal law.…”

The generic reference to tribunals as “supreme courts” also requires an imaginative leap. There is an informal convention in comparative law literature under which courts with ultimate decisional power over some issue or issues are colloquially called “supreme courts” even if their power is limited to the prescribed categories. This is so whether or not the word “supreme” even

22 Id. at 839.
23 Id. at 844.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 U.S. Const. Ar. III, Sec,. 2.
31 28 U.S.C. Sec. 1257. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 65, 8th ed. (Bureau of National Affairs, Inc. Washington D.C. 2002) (“What emerges from this constitutional description of appellate jurisdiction is that it is Congress, not the Constitution or the Supreme Court, that defines the precise metes and bounds over the specified ‘cases and controversies.’”).
appears in their actual titles.\textsuperscript{32} (It does not in many of the courts to be discussed\textsuperscript{33} and none are in fact “supreme” in every sphere of the law even of the state that has constituted them.\textsuperscript{34}) Indeed, Judge Guido Calabresi that the U.S. Court of Appeals for the Second Circuit, although it “may not be called a Supreme Court,” is nevertheless supreme “in most senses of the word.”\textsuperscript{35}

\textsuperscript{32} Commentators and the public generally conceive of supreme courts as courts of last resort situated at the apex of the legal hierarchy or courts with final authority over the meaning of a constitution. \textit{See} John Henry Merryman & Vincenzo Vigoriti, \textit{When Courts Collide: Constitution and Cassation in Italy}, 15 AM. J. OF COMP. L. 665, 682 (1966) (characterizing Italy’s Supreme Court of Cassation as supreme because it sits “at the apex of the system of ordinary courts, [and] exercises the final power to review decisions of the lower courts in substantive areas within the ordinary jurisdiction”); \textit{but see} Jason Mazzone, \textit{When the Supreme Court is Not Supreme}, 104 NW. U. L. REV. 979, 980 (2010) (characterizing the “supremacy” of the United States Supreme Court as “the authority to determine, for everyone else, and in particular for every other court, what the Constitution of the United States means and requires”); \textit{see also} Sofie M.F. Geeroms, \textit{Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Repeal Should Not be Translated...}, 50 AM. J. COMP. L. 201, 202-03 (2002) (“From a civil law perspective, the term 'supreme court' did not seem to be appropriate to describe the highest court. The highest courts in a civil law system imply courts concerned only with the final review functions while in the common law systems the supreme courts perform both the final review and appellate functions. On the other hand, from a common law point of view, the term 'supreme court' might encourage an association with courts having jurisdiction on constitutional issues which is definitely not the case for the civil law courts involved. As a result, I have given preference to the term 'high courts'.”). The phrase “supreme court” is often applied broadly to final appellate courts, resulting in situations where in a single country multiple courts vie for “supreme” status. \textit{Compare} Alec Stone Sweet, \textit{The Politics of Constitutional Review in France and Europe}, 5 INT’L. CONST. L. 69, 71 (2007) (discussing the influence of France’s Constitutional Council on “the work of France’s other supreme courts, the Cour de Cassation and the Conseil d’État”) (emphasis added); \textit{also} Francesco G. Mazzotta, \textit{Precedents in Italian Law}, 9 MSU-DCL J. INT’L L. 121, 146 (2000) (describing the Italian Supreme Court of Cassation as Italy’s “supreme tribunal” when the Italian Constitutional Court has the final authority to interpret the Constitution) with Geeroms, \textit{Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Repeal Should Not be Translated...}, 50 AM. J. COMP. L. at 202 (“[T]he relationship between word and concept is often not identical in the different legal languages: for instance, the Cour de cassation can hardly be called a supreme court in the American sense.”).

\textsuperscript{33} For example, the French Cour de Cassation and other courts of cassation exercise final, general appellate jurisdiction, but are not termed “supreme” courts.

\textsuperscript{34} \textit{See} Vittoria Barsotti , Vincenzo Varano, \textit{Il nuovo ruolo delle Corti supreme nell’ordine politico e istituzionale: una prospettiva comparatistica} in Vittoria Barsotti, Vincenzo Varano, eds., Annuario di diritto comparato e di studi legislative 7-11 (2011). Michele Taruffo provides an overview of the variety of institutions referred to as “supreme”, \textit{see} Le funzione delle corte supreme, Cenni generali \textit{Id.}, 11. Other contributors to the same volume described power struggles between supposedly “supreme” courts, see Loïc Cadet, \textit{Le role institutionnel et politique de la Cour de cassation en France: tradition, transition, mutation?} \textit{Id.}, 183; Wojciech Sadurski, \textit{La Crescita delle corte costituzionali nei paesi dell’Europa centrale e orientale dopo la ceduta del comunismo: alla ricerca del monopolio sulla giurisdizione Costituzionale}, \textit{Id.}

\textsuperscript{35} Guido Calabresi, \textit{Courts and Judges and their Context}, in Vittoria Barsotti , Vincenzo Varano, eds., \textit{Il nuovo ruolo delle Corti supreme nell’ordine politico e istituzionale: Dialogo di diritto comparato}, 81, 86 (2011) (“Our court may not be called a Supreme Court, we don’t call it that way, and yet in most senses of the word we are. We (my Court) decides three thousands cases a year, of which two or three will be taken up by the Supreme Court of the United States and we know perfectly well which ones those are. Indeed, often we can create the fact that they’re taken up. I can say ‘Posner in Chicago decided this and he is wrong’ – and I like to do that – if I do that the Supreme Court probably will take the case to ensure uniformity. Or I can say ‘Posner in Chicago decided this, but situations there are different from the ones here and so we decide this’, which says to the Supreme Court ‘don’t be in a hurry, we can live with this, hear from some other circuits before you jump in.’ So we know when we are final, and in a sense supreme, and when we are not, and we write differently. We always decide, but when we know it’s going up
Furthermore, many judicial bodies that possess the ultimate power to interpret the constitution are not only not labeled “supreme” but are not even termed “courts”—though we might otherwise recognize their power to interpret their national constitutions as the power of a “supreme court.” The broad use of this inaccurate label is perhaps merely a matter of convenience. And yet the phrase “supreme court” (in whatever language) is too loaded to be devoid of emotive power. In English the term usually refers to a specific court, and is associated with great status as well as authority. Thus, the U.S. Supreme Court has an almost sacred significance in the United States and even beyond, but the generic term itself immediately conveys a certain status. “Supreme” is unavoidably supreme. Consider the quasi-comical situation in my own state of residence, New York. For historical reasons the trial court of general original jurisdiction bears the title of “The Supreme Court of the State of New York.” The “highest” court, in the sense of final appellate review power, however, is the New York Court of Appeals. One Chief Judge of the Court of Appeals has urged that the state constitution be amended to change the name of the trial court from the “Supreme Court” to the “Superior Court” or some other anything-but-Supreme appellation. The proponents of the change suggested that it would avoid confusion on the part of the general public as to which court was the “highest” in the state, but the sitting Supreme Court judges, citing history, custom, and their own status concerns, have resisted—thus far successfully—any such name change or other diminution of their status. They are obviously not arguing about a label that is without meaning to them and the world they inhabit. As Wojciech Sadurski wrote in the context of his discussion of constitutional courts, “Self-congratulatory rhetoric supports the position of both the

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37 American colonies designated courts as “Supreme” by title well prior to the 1789 Constitution, e.g. The “Supreme Court of Judicature” founded in the colony of New York, Daniel J. Hulsebosch, Constituting Empire, New York and the Transformation of Constitutionalism in the Atlantic World 50 (North Carolina Press 2005)(the provincial Supreme Court of Judicature was created in 1691).

38 Edward Greenfield, Why Justices’ Group Opposes Single-Tier Trial Court, N.Y. L.J., Dec. 9, 1953, p. 1. (The proposal would also have integrated some “lower” trial courts into the new Superior Court. This, too, was resisted by the Supreme Court judges, in part because it would undermine the prestige of the Supreme Court.).
constitutional judiciary and law professors linked with each other in a symbiotic relationship.”39 So, too, with our relationship to “supreme” courts.

This “gilt” by association is supported by much of public opinion in many parts of the world. National “supreme” courts generally occupy a favorable position in public opinion.40 One study published in 1998 showed that although “[f]ew people are extremely pleased with their national high courts…few are displeased”41 and although there is “a great deal of variability across countries in diffuse support of the national high courts,”42 “trust in the national high court is quite widespread in most countries.”43 In summary, high courts “are in general relatively salient, and most mass publics are satisfied with the outputs of the institutions.”44 Accordingly, courts, and particularly supreme and constitutional courts, have assumed an increasing amount of power over the past few decades.45

39 SADURSKI, RIGHTS BEFORE COURTS, A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE xiv (Springer 2005).
41 Id. at 348.
42 Bulgaria boasted the lowest institutional commitment at 18.6% and the United States boasted the highest institutional commitment at 76%. Gibson et al, On the Legitimacy of National High Courts, 92 Am. Pol. Soc’y Rev. at 348-49. Public opinion of the U.S. Supreme Court fluctuates, however, and has dropped considerably in more recent years, and by one measure its approval rating was down to 43% in 2013, Andrew Duggan, American’s Approval of Supreme Court Near All-Time Low, www.gallup.com/poll//163586/americans-approval-supreme-court-near-time-low (July 19, 2013), last visited March 20, 2014).
43 Compare Sabino Cassesse, The Will of the People and the Command of the Law, in Vittoria Barsotti, Vincenzo Varano, eds., Annuario di diritto comparato e di studi legislative 137, 139 (2011)17, 20-21 (“According to [Barry] Friedman, the Supreme Court does not usurp the People’s power, but, rather, provides the People with something that the People itself desires. There is substantive consonance between the People’s will and the Court’s decisions. An ‘alignment of the justices with popular will’ takes place; the Court is in the ‘mainstream of public opinion.’ Friedman adds that ‘the Court has so much political capital that the public will accept a few decisions (apparently even the major ones) with which it disagrees.’ Thus, ‘judicial power exists at popular dispensation’” (citing The Will of the People 324, 355, 374, 358, 370. (Farrar, Strauss & Giroux eds., 2007).
44 Gibson et al, On the Legitimacy of National High Courts, 92 Am. Pol. Soc’y Rev. at 352. But see Duggan, American’s Approval of Supreme Court Near All-Time Low, supra, note 42.
Gibson and Caldeira hypothesize that legitimacy stems in part from the “dense syndrome of legitimizing symbols courts employ” to connect “with symbols of fairness and legality.” Courts use symbolism in multiple ways. First, courts represent their work as the mechanical application of legal rules rather than value-laden judgment or policymaking. Second, “citizens may be influenced by symbols such as the attire of judges, the honorific forms of address, and the temple-like building in which courts are typically housed.” These symbols are effective because they are “processed with little or no conscious awareness of [their] influence …” and because they “activate pre-existing attitudes and beliefs, rendering observable events understandable.” As an example, Gibson, Lodge, Taber, and Woodson describe the symbolism of the U.S. Supreme Court in the wake of *Bush v. Gore*:

“A deeply reverential tone characterized the coverage of the Court (in sharp contrast to the tone in the coverage of the Florida Supreme Court). When the Court announced its decision, it was almost as if white smoke were merging from a judicial Sistine Chapel, announcing the selection of a new pope.”

These authors suggest that “[a] more far-reaching implication here is that to the extent the symbols promote their effect subconsciously, the cognitive aspects of the specific cases would be secondary, perhaps only brought into consideration if explicitly highlighted.”

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46 Id. at 202, 214. See also Judith Resnik and Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 207, 231 (2013) (“The Court’s architecture and imagery indeed looked back, to enlist the authority of lawmakers long gone through reliance on what historians call ‘invented traditions— new practices dressed up to seem longstanding.’ And it worked. The building has come to be ‘treated with almost excess affection . . . as officially old—even though it is not very old.’ (Quoting Paul Spencer Byard, Representing American Justice: The United States Supreme Court, in CASS GILBERT, LIFE AND WORK, at 272, 283.)

47 Id. (Gibson and Calderia point to a passage from Justice Scalia’s opinion in *American Trucking Assns., Inc. v. Smith* to exemplify this phenomenon: “To hold a government Act to unconstitutional is not to announce that we forbid it, but that the Constitution forbids it” (Citing American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J. concurring) (emphasis in original)).

48 James L. Gibson et al, *Can Judicial Symbols Produce Persuasion and Acquiescence? Testing a Micro-Level Model of the Effects of Court Legitimacy*, Presented at the 2010 Annual Meeting of the Midwest Political Science Association, Chicago, IL, at 1. On the building that houses the U.S. Supreme Court, see Judith Resnik and Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 J. of Supreme Court History 207 (2013)(discusses the iconic aspects of the building, concluding that “Thus, the building has lived up to its pretensions. … Viewed from abroad as well as from within, the Court has come to stand for the propositions that adjudication is central to the relationships between government and those governed and that women as well as men of all colors can be in all of the roles that the justice system has to offer.” Id. at 233.

49 Id. at 6-7.

50 Id. at 7.

51 Id. at 24. See also Gibson & Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 Law & Soc’y Rev. at 198 (“From existing research on public attitudes toward law and courts, legal researchers know that, generally, to know more about courts is to hold them in higher esteem.”).
Thus, for reasons sounding in some combination of convenience, the limits of language, and the projection of grandeur, we have imagined that there are “supreme” courts throughout the developed world. Perhaps our imagining has produced a kind of reality, as, to give one example, in the sometimes-heard usage, the Corte de Cassazione is the “supreme court” of Italy. But is it? Since 1957 when the Corte Constitutionale became operational Cassazione has had to share its claim to be the final authority on Italian law with the newcomer when it comes to Constitutional matters. This pattern has been found in many of the nations that have created a constitutional court to supplement a court of cassation or other court of ultimate appeal. Very few have adopted an apparently readily available alternative, i.e., to expand the jurisdiction of the supreme appellate court to include powers over constitutional issues. Why not? One theory that goes back to Hans Kelsen is that constitutional adjudication required “much more creativity and political nuance … than could be expected from a continental-style professional judiciary used to narrow interpretations of a code.” Additionally, it has been said, the post-war governments that established constitutional courts intended that they would have greater legitimacy because they would be distinguished from the existing “supreme” courts that had cooperated with the defunct repressive regimes. The symbolic meanings powerfully conveyed by constitutional courts have sometimes overlapped but have also differed from those associated with “supreme courts.” Much depends on the context and locality of inquiry. In this essay I will differentiate these two kinds of courts as analysis requires and will use the term supreme court to refer generically to all courts with the power of ultimate review over general jurisdiction lower courts. My present purpose in insisting on the inadequacy of the appellation of “supreme” is to

52 Mauro Cappelletti, John Henry Merryman, and Joseph M. Perillo, The Italian Legal System 80 (Stanford 1967).
53 The Corte costituzionale was introduced by the Italian Constitution which came into effect on January 1st, 1948. The Corte began to operate in 1956.
54 But c.f., Sadurski, Rights Before Courts, supra, p. 2, reporting that Romanian Constitutions adopted prior to WW II allowed the Court of Cassation and Justice to exercise judicial review. Some supreme courts have arrogated the power of judicial review to themselves without legislative authorization. Canada is a relatively recent example, see Sarah Harding, The Supreme Court of Canada, Annuario, supra, note 6, 281. A well-known earlier example is the Supreme Court of the United States’ decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
55 DAVID ROBERSTON, THE JUDGE AS POLITICAL THEORIST, CONTEMPORARY CONSTITUTIONAL REVIEW 12 (Princeton U. Press 2010). See also MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 142-146(Clarendon Press 1989), (describing the imitations of the European judiciary and suggesting this as a prime reason new and special judicial bodies were constituted to undertake constitutional review).
56 E.g., Wojciech Sadurski, La Crescita delle Corti Costitutionali Nei Paesi Dell’Europa Centrale e Orientale Dopo La Caduta del Comunismo: Alla Ricerca del Monopolio sulla Giustizia Costituzionale in Annuario, supra, at 307 ; Samuel Issacharoff, Constitutional Courts and Democratic Hedging, 99 GEO. L.J. 961, 970 (2011) (establishing a new court avoided the problem of lustrating the judges of the pre-existing courts).
unmask the imaginative work that underlies the very title of such courts. We make this elusive
institution real by acting on what was—and is—a product of our imagination.

That imagination is a precondition in order for institutions to be “real” should not be
controversial. But I take Geertz to make a more problematic claim—that this “distinctive manner
of imagining the real” extends as well to the physical world, the world of fact so close to the
heart of any legal system and to the everyday metaphysics by which we live our lives. To
understand the role of law in the creation and maintenance of the “real” in that sense requires a
suspension of our commitment to what Richard Shweder calls “naïve” realism, “…the
experience of reality as an immediacy contained within appearances, as experienced, for
example, in the extraordinary achievements of ‘ordinary’ visual perception. It is the experience
of a relationship between inside and outside, so proportionate, coincidental, and graceful that no
difference is noticed between the real and the apparent, and no disharmony felt between the
nature of our response to it or representation of it.” By contrast, “[a]rtful realism is the
theoretical account of how the experience of immediacy is achieved, when, if you think about it,
reality must always be beyond experience, transcending appearance, distant, hidden, buried
within, or at the very least separate and somewhere else.” After briefly discussing traditional
attempts to deal with this problem, Shweder observes, “Postmodern realists see no way across
the gap between appearance-sensation-experience and reality, except through an irrepressible act
of imaginative projection. … Reality-testing is, unavoidably, a metaphysical act, implicating the
knower as well as the known.”

It is in this latter sense that Geertz refers to the “imagination of the real.” He posits that
law and legal practices are among the systems of symbols that help the members of a particular
society collectively mediate the disharmony between the real and the apparent, as described by
Shweder: “The rendering of fact so that lawyers can plead it, judges can hear it, and juries can
settle it is just that, a rendering … At base, it is not what happened but what happens that law
sees.” Legal judgments are therefore a “representation” of the real. In Local Knowledge

58 Id. at 354.
59 Id. at 355-56.
60 LOCAL KNOWLEDGE at 173.
61 Id. Summarizing, according to Geertz, the Islamic tradition integrates the normative aspects of a dispute into the
fact-finding through practices designed to reveal the “rightness” of the disputants. Normative witnessing, the
primary example he uses, traditionally allowed the judge to rely on the moral standing of the witnesses for the
parties, see id., 187-95. The Indic tradition he summarizes tied fact-finding to the dharma of the individual, that is,
Geertz illustrates this insight by using three different legal systems, the Islamic, the Indic, and the Malaysian, asking in each case how the relationship between law and fact plays out. He shows that the determination of “what happened” (the “if” in the “if, then,” syllogism of judgment) reflects the underlying cultural assumptions of the people involved just as do normative priorities (the “then” in the syllogism), so that the “legal representation of fact becomes normative from the start.”

The Western belief that, put crudely, there is a clear and universal distinction between “fact” and the normative prescriptions called “law” is itself an imagined way of seeing the world. I have argued elsewhere that law and legal process affect views of the real world insofar as they validate specific, culturally and politically held methodologies for understanding what the world is like. Legal process is not like religion; it is not a separate sphere that uses special rules to determine what the universe is like which are not applicable to quotidian life. In the modern world legal fact-finding purports to apply a methodology transferable to and from other investigative techniques. It is, however, no less culture-free. Geertz makes the point in the title of his essay: knowledge, it suggests, is as local as law. This theme, however, demands that I return for a moment to the constraints on our imaginative productions. I said earlier that we are constrained by the attributes of the physical world. I add here that those constraints are themselves constrained by the divergent ways in which and from which we apprehend them.

his place and its accompanying duties in the society, id. at 195-207.. Judgments were expected to reflect the “‘total value of the individual’s existence.” Id., at 205. The Malaysian tradition, d., 207-215,is described as more concerned with procedures leading to consensus and thus community harmony (adat) than with the truth, in the Western sense. “What matters finally is that unanimity of mind is demonstrated, not so much the verdict itself, which is mere denouement… but in the public processes by which it has been generated.” Id. at 211.

62 Id. at 174.
63 [Citation omitted to protect anonymity.]
64 Id. at 231 (Geertz refers to the importance of culturally held legal process and threats to it in Local Knowledge: “What is at risk, or felt to be, are the conceptions of fact and law themselves and of the relations they bear to one another – the sense, without which human beings can hardly live at all, much less adjudicate anything, that truth, vice, falsehood, and virtue are real, distinguishable and appropriately aligned.”).
65 Local Knowledge at 215 (Geertz acknowledges Ludwig Wittgenstein as the “patron saint of what is going on here.”). See also EDUARDO VILLALTA, LOCAL KNOWLEDGE, LOCAL LEBNSFORM: THE WITTGENSTEINIAN PROJECT ON GEERTZ’ THEORY OF LAW (2011) (on file with the author) (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS Book I, §440 (Ascombe, Hacker & Schulte Trans., Blackwell 4th ed. 2009) (Although he does not elaborate the point it would appear that he refers to Wittgenstein’s distinction between things we claim to know and ways of knowing. Our local “language games” contain foundational beliefs that cannot be verified because they “are not premises or demonstrable theses, but ‘world-pictures,’ and they are not learned through instruction as to their individual, constituent components, but are ‘swallowed down’ alongside the things we do learn. It is in this way that our linguistic constructions ultimately come to connect with our conception of reality. The language games we use are set up around certain conceptions of reality, and certain doubts about reality cannot be expressed in certain games, while certain presumptions are inherent in others.”).
When my granddaughter fell off her scooter, skinned her knee and got up crying I have no doubt that the fall, knee, and tears were real (goodness help me were I to tell her grandmother that the child was “imagining” that she fell). Matters get more difficult when we ask why she fell and what we should do about it. Was it ineptness on her part? Failure of adult supervision? Her big sister gave her a shove? A defect in the manufacture of the scooter or construction of the sidewalk? Witchcraft at the hands of a family enemy? Godly punishment for wrongs done in a former life? Or just, “stuff happens”? Any one of these would be deemed the most likely in one or another culture in which the issue was addressed. And each such culture would have its own way of determining the unknowable truth and how to deal with the consequences. The constraints on our imagination are as loose as our reasoning is variant.66

In this section I have explored some aspects of the ways in which law is “a part of a distinctive manner of imagining the real”67 and have argued that the institutions of “supreme” courts have a special place in the collective mentality of many societies. In the following sections I turn to the ways in which these courts help us to maintain our ideas of time and space. The argument depends in large part on the claim that the latter concepts – varying as they do among cultures – are to that extent imaginaries that become by collective agreement “real.”

II. Supreme Courts and the Construction of Space and Time

In our daily lives we are not much troubled by conceptual problems raised by space and time. In our unhurried reflective moments things may be different. Did time “begin”? Will it end? Could it exist without movement within space? Does space have an outer boundary? Where am I, personally in space and time? How do I know that space and time existed before I was born? How do I (or we) measure time? To what extent does the perceived passage of time affect my actions and internal life? That these questions are pervasive in human experience is shown by the universal sense of wonder that has led to creation and end-of-the-world myths found in every society.

Time

66 On this general issue see Geertz, Common Sense as a Cultural System in Local Knowledge, supra, pp. 73-93.
67 Geertz, supra note 1.
Whether as a meta or quotidian concept, time is neither demarcated nor experienced in the same way in every culture.\textsuperscript{68} Even among the less “exotic” societies of the modern world, time is perceived and experienced differently in one society than in another.\textsuperscript{69} A shared sense of time is essential to identification with a group. Standard time is thus among the essential coordinates of intersubjective reality, one of the major parameters of the social world.\textsuperscript{70} Indeed, a refusal to comply with a group’s concept of time and way of measuring it is a way of expressing and maintaining separate identity.\textsuperscript{71} The creation and maintenance of a common time is thus a necessary task of national government. But this “can be achieved only if the crucial differences among time’s form can be effectively suppressed.”\textsuperscript{72} Supreme courts help us manage the difficulties inherent in the conceptualization of time and are one of the agencies that implicitly suppress potentially competing alternatives. They support the imaginative process by which “our” understanding of time is a matter of common sense. To take the case I know best, the U.S. Supreme Court provides institutional and symbolic support for our sense of time in a manner that history books cannot. The Court reifies the past as an aspect of linear time by invoking it to effect. Every Opinion, whether that of the majority of justices who vote in support of it or of a sole dissenter, relies on and invokes prior events, typically a line of previously decided cases but often in combination with a statute or constitutional provision. Even if the Court departs from precedent it will almost never disregard it entirely. It will either deny the

\textsuperscript{68} See, e.g., Geertz, Person, Time, and Conduct in Bali in The Interpretation of Cultures, 360, 391-398 (describes the ways in which Balinese notions of time differ from those held elsewhere; RENATO ROSALDO, CULTURE AND TRUTH; THE REMAKING OF SOCIAL ANALYSIS 109-126 (Beacon Press 1993) (describing the different understandings of time in societies in which clock time is not paramount); E.E Evans-Pritchard, Nuer Time Reckoning, 12 Africa 189, 208 (claims that “the Nuer have no concept of time and, consequently, no developed abstract system of time reckoning ... [T]here is no equivalent expression in the Nuer language for our word ‘time’ ...”)

\textsuperscript{69} The role of law in the development and imposition of modern concepts and measurement of time in the United States and elsewhere is described in Eviatar Zerubavel, The Standardization of Time: A Sociohistorical Perspective, 88 Am. J. of Sociology 1 (1982). See discussion in E.T. & M.R. HALL, UNDERSTANDING CULTURAL DIFFERENCES, 13-22 (Intercultural Press 1990) (describes “monochromic” and “polychromic” time systems and the cultures in which each predominates); see also Rosaldo, supra at 110 (describes the “protracted struggle that eventually resulted in the ‘time-discipline’ that appears so natural in Anglo-American society.”); Geert Hofstede, Culture’s Consequences 351-352, 359 (Sage Publications, 2\textsuperscript{nd} ed. 2000) (documents significant differences among counties and country groups with respect to “long term” and “short term” orientation where “Long Term Orientation stands for the fostering of virtues oriented towards future rewards, in particular perseverance and thrift. Its opposite pole, Short Term Orientation, stands for the fostering of virtues related to the past and present, in particular, respect for tradition, preservation of ‘face’ and fulfilling social obligations”).

\textsuperscript{70} Eviatar Zerubavel, The Standardization of Time: A Sociohistorical Perspective, 88 Am. J. of Sociology 1, 2 (1982).

\textsuperscript{71} See examples at Zerubavel, supra, at 18.

\textsuperscript{72} Carol J. Greenhouse, Just in Time: Temporality and the Cultural Legitimation of Law, 98 Yale L. Journal 1631, 1637 (1989).
departure by distinguishing the instant case from the prior, or it will assert that the prior case is no longer binding either because it was based on some mistake of history or interpretation or (rarely) because it no longer meets the needs of the society. That such reasoning is inherent in the judicial process of a legal system dependent on *stare decisis* should not obscure its role in maintaining our commonsense view of the linear nature of time held both by the court and the community it helps to govern. It makes the past and its heroes and villains real to us in a way that is not so different from the way the landscape of Australia makes the Dreaming real to the aboriginal peoples. The Court takes us outside of our own lifetimes, assuring us of the continuous flow of time that transcends us. This theme reaches the bizarre in the justices’ practice of introducing a quotation from an Opinion penned by a long-dead member of the Court with the phrase “As we said in [name of case] …” or “We held in [name of case] that …” An aboriginal anthropologist examining this way of using the past might conclude that there is a whiff of ancestor worship in the judicial air. She would have reasonable grounds for thinking so. A former judge of the New York Court of Appeals (the State’s “supreme” court) told me once that one of the pleasures of the job was to preface a quote from an opinion by the revered Judge (later Justice) Benjamin Cardozo with the words “As we said in …” Of course there was no “we” who said anything. Other members of the court may have agreed with the result and in general accepted the language of the writing judge, but the Opinion itself is the work of the judge who is credited by name as its author. The use of the indefinite and otherwise inappropriate plural “we said” in judicial writings is sometimes attributed to the goal of depersonalization: The decision is not to be seen as the work of a single person’s inclination or of the justices who agreed with it. Rather, the author and the Court’s majority are controlled by the prior decisions of the court. The “we” is the collectivity of the justices over extended time which is governed by and merely applying the law. It suggests a collectivity that began at least with the creation of the Court and continues into an endless future.

73 Fred R. Myers, *Pintupi Country, Pintupi Self*, Smithsonian Institution Press (1986), 47-70. “Throughout Australia, the Aboriginal outlook on human life and the universe is shaped by a distinctive and subtle conception that they refer to in English as The Dreaming.” Id. at 47. Geographical features have an “iconic relationship to The Dreaming” by providing clues to its history and meaning. Id. at 67. See also illustrations at 65.  
75 Judge Cardozo served on the New York Court of Appeals from 1917 until 1932 when he was appointed to the Supreme Court. He died in 1938.
Americans, including Supreme Court justices, do not, of course, believe that time began with the Revolution or that even legal time began with the ratification of the Constitution. In one chamber of the collective consciousness law originated when Moses was entrusted with the commandments, or perhaps earlier when the god of the Judeo-Christian bible set the rules for Eden and, as a “just God” punished their violation.\footnote{For a recent citation to the “Old Testament” see \textit{Hamdi v. Rumsfeld}, 542 U.S. 507, 586 (2004)(Justice Thomas dissenting): “In Old Testament days, when judges ruled the people of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary. The [C]ourt's decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing.” \textit{Ramirez de Arellano v. Weinberger}, 745 F.2d 1500, 1550-1551 (C.A.D.C.1984) (dissenting opinion) (footnote omitted). See also \textit{id.}, at 1551, n. 1 (noting that “[e]ven the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief”).} This biblical past is reflected in the prayer with which the clerk opens each session “God save the United States and this honorable court.”\footnote{Supreme Court of the United States, The Court and Its Procedures, \texttt{www.supremecourt.gov/about/procedures.aspx} (last visited on March 16, 2015). On the biblical origins of the American law, see Paul Kahn, The Reign of Law: Marbury v. Madison and the Construction of America 70-73 (1997).} The “Greek temple” design of the Supreme Court building (inadvertently but necessarily referring to other gods) is also a transparent invocation of other mythic pasts – the Periclean democracy, the Roman republic, and (more darkly) the Roman empire. And while the Court has not explicitly embraced Blackstone’s assertion that the common law either always existed or began in mists of history beyond recalling,\footnote{Hart v. Massanari, 266 F.3d 1155, 1165 (9th Cir. 2001)(“Blackstone … noted that ‘the “law” and the “opinion of the judge” are not … one and the same thing; since it sometimes may happen that the judge may mistake the law’; in such cases the precedent simply ‘was not law.’ 1 William Blackstone \textit{Commentaries} 70-71 (1765).”) See also 1 Blackstone \textit{Commentaries} 43-45, 68-74 (1765).} the pre-revolutionary law of England still governs the reach of the Seventh Amendment’s guarantee that the right to a civil jury “shall be preserved” because it is that law which is preserved.

The Opinions not only instantiate the past, they speak to our hopes for a future that will be in the large continuous with that past and this present. \textit{Stare decisis} assures us that this year’s Opinions will be cited and relied on, or distinguished, or overruled but certainly invoked in days to come. Sometimes this is made explicit, as when a dissenting justice predicts either or both that the decision will be regretted and that it will be overruled in some distant future. Indeed, when
the *Lawrence v. Texas*[^79] decision struck down *Bowers v. Hardwick*[^80], it invoked and adopted the latter’s dissenting opinion by Justice Stevens in *Lawrence*.[^81] Legislatures cannot similarly comfort us. They act in the here and now. They may but typically do not invoke the past. They look forward but with the realization that today’s enactment can be repealed tomorrow. No Supreme Court opinion can ever be repealed. It can be distinguished or overruled or even legislatively reversed, but it remains forever in the Reports and in whole or part can be rediscovered and relied upon when it has come back into political and intellectual fashion.

“Judicial opinions … are designed to be read in an indefinite future with the expectation that they will invoke in the reader a continuing loyalty to the rule of law.”[^82] The justice who the uses “we held” or “we said” in referring to a court of the distant past know that the same trope will be used decades hence connects herself with a venerable institution and projects her life into a future that will last as long as the Republic if not beyond.[^83] It can be seen as a vainglorious act, like commissioning a bronze sculpture of oneself. It is certainly an important part of the psychic income of the job. But its effect is not limited to the members of the court. It serves the court’s audience as well by vicariously reassuring us that time extends both before and after us. Our deeds, too, will survive us.[^84] It connects us as well to the glorious past and grand future of the Republic. Americans have always projected their national project to a more perfect future. Posterity is a birthright of the nation. One of the goals of the people who wrote the U.S. Constitution and those who “ordain[ed] and establish[ed]” it, was “to insure the Blessings of Liberty to ourselves and our Posterity.”[^85]

In addition to supporting a collective conception of time supreme courts reflect and reinforce the role of time in social interactions, thereby affecting the experience of time’s passage in daily life. Cultural comparatists have distinguished between “monochromic” and

[^81]: Lawrence v. Texas, 539 U.S.558, 577-78.
[^82]: Kahn supra, p. 125.
[^83]: *Cf.* Sarah Harding, *Courts in Context*, in Vittoria Barsotti ,Vincenzo Varano, eds., *Il Nuovo ruolo delle Corti supreme nell’ordine politicoe istituzionale*, Diaologo di diritto comparato, Quadernit 1, 137, 140 (2011) (“In the common law world we tend to think of court decisions as finite legal snapshots in time; ‘concrete’ cases that have come to their conclusion, never to be litigated again in the same manner or factual configuration”) (as Professor Harding focuses on the Court’s relationship with the other branches of government, rather than past versions of itself, her conclusion is not problematic for my argument).
[^85]: U.S. Const. Preamble.
“polychromic” time. Some cultures place a higher value on punctuality and time limits than others. The difference can lead to misunderstanding and anger. 86 The U. S. Supreme Court, consistent with American culture generally, imposes time rules strictly and publicly, reinforcing the cultural norm. 87

The role of the supreme courts of other nations in connecting the polity to the past and an imagined future depends on other referents that have meaning within those societies and are quite different. In France, for example, the Cour de Cassation traces its origins to that country’s revolution and the enshrining of the legislature as the sole source of law. Stare decisis being an obvious violation of that principle, one can see the very brief opinions of that court, intentionally sounding as inexorably compelled by the general principles of the relevant code, as an incorporation of events that provide a vital referent of French political time.

The chief legacy of the Revolution was not judicial submission to the discipline of the codes but a deep-seated, widely held conviction that judges lacked lawmaking power. The judges joined in this disclaimer and expressed it through a cryptic style of opinion writing whose main purpose was to prove their dutiful submission but which left them in fact more free. 88

86 E.T. & M.R. HALL, UNDERSTANDING CULTURAL DIFFERENCES, 13-22, supra note __.
87 John Paul Stevens, Five Chiefs, A Supreme Court Memoir, 172 (2011) (describes the rigidity with which Chief Justice Rehnquist imposed time rules governing oral argument: “His careful herding ensured that we entered the courtroom at precisely 10:00 every time.”) But see id. at 210 noting that Chief Justice Roberts allowed “occasional and minor deviations from strict enforcement [of time limits on oral arguments].” Compare this approach, and its attitude about time, with that of the Court in earlier times: When John Marshall was Chief Justice, “[a] single oral argument could go on for more than four hours at a stretch, and could consume more than a week of the Court’s time.” Clare Cushman, Court Watchers: Eyewitness Accounts in Supreme Court History (Rowman & Littlefield 2011) at 22. In 1871 the Court limited each lawyer’s argument to two hours and each side to two advocates. It was reduced again in 1871 to two hours per side, id. at 124, and in the 1920s to one hour and two counsel per side, id. at 126. In 1970 the current limit of 30 minutes per side was adopted under Chief Justice Burger, id.

Here, too, the Court reflected and signaled the validity of changing ideas about time. The greater concern for timeliness and “saving” time was largely driven by the incorporation of technology into social and economic life. Eviatar Zerubavel, The Standardization of Time: A Sociohistorical Perspective, 88 Am. J. of Sociology 1, 6 (1982). According to Zerubavel, the first public service to run on a “strict schedule” was the British stagecoach mail service in the late 18th century: “Given the inherent relation between temporal reality and punctuality … the mail service also came to symbolize the latter even before the rise of the factory.” By the mid-19th Century the development of railroads, together with the rise of the factory were “spreading the significance of punctuality and precise timekeeping among the general population …” Id., 6-7. Similar effects were felt in the United States, id., 8-10. By the 20th century, business-like efficiencies were incorporated into public life. See Oscar G. Chase, Law, Culture and Ritual: Disputing Systems in Cross-Cultural Contest (NYU Press 2005) at 83-4.

Supreme courts are institutional and reified symbols of a society that has existed and will exist over time. Necessarily they reassure us that our understanding of time – time as we imagine it – is real. They privilege a certain view of time and help to suppress competing conceptions.

Space

As I write this I am, according to Google, at 42.0206007 degrees north and 73.2011645 west. Put another way I would say I am in the Town of Norfolk in the State of Connecticut. Most importantly for some purposes, I am in the United States. But what does that mean? Every one of those descriptions is a referent to some line or set of lines or point on a map which is itself an imaginary picture of the world. Though the product of human creativity, these places are real in as much as we act upon them. Each of them is in large part given reality through law. Law is quintessentially constructive of our ideas of space, even including the latitude and longitude of every spot on earth.89 The Constitution of the United States invokes and thereby validates concepts of space at several key points. The “supremacy clause” in Article VI provides that the Constitution, Laws, and Treaties made under its authority shall be the “supreme Law of the Land.” It is unclear what “Land” is referred to in this clause because, for example, laws of the United States can regulate activities outside its geographic boundaries such as the conduct of American soldiers. As Allan Erbsen points out, the terms “law” and “land” are inter-referential: “Law is in part a function of place, yet places are creations of law.”90 Whatever “Land” means in this context it exists only because law has imagined it. Space is more specifically invoked in the Fourteenth Amendment which, critically, defines citizenship territorially by stipulating that “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” 91 It goes on to define the rights of “citizens.” Whether one is a citizen or not depends in part on one’s place of birth within a space that is created and defined by law and has no existence outside of law. When the limits of space are contested (where does the United States begin and end?) it falls to courts – ultimately the Supreme Court, to more precisely draw the imaginary line, if only for the government of which it is a part. Courts have a particular connection with space because doctrines governing

89 For a discussion of the development of national and international adoption of a system of time based on coordinates of latitude, see Eviatar Zerubavel, The Standardization of Time: A Sociohistorical Perspective, 88 Am. J. of Sociology 1, 8-17 (1982).
91 U.S. Const. Art. XIV, Sec. 1.
their jurisdiction often refer to geographical indicators. This is true both for the “competence” (subject matter jurisdiction) and jurisdiction over persons and property.92

Because the concept of the nation is the most important instantiation of space in the regime of law, it is arguably the most important determinant of our notion of space and location. Supreme courts are symbolic representations of a nation’s existence and character and are essential to making this imagined entity real. It is hard to think of an entity we would recognize as a nation that did not have judiciary capped by a supreme court. This is because the mental construction of the idea of a nation must include institutions that have symbolic resonance – that symbolize “nation” through signs that citizens and foreigners, including foreign nations, can recognize as conveying nationhood. At one time the necessary symbols of nationhood included a monarch with attributes that inspired or coerced allegiance from a sufficient number of persons to endure. These would typically include claims of divine approval and ceremonial rites that projected and displayed their monarchic qualities.93 Though in some places still apparently useful, monarchs are no longer necessary or indeed helpful in state formation. “Thrones may be out of fashion, and pageantry too; but political authority still requires a cultural frame in which to define itself and advance its claims…”94 The “cultural frame” of the state includes ceremonials designed as such (some redolent of monarchal times like honor guards, executive palaces, oaths of office) but also the institutions of statehood that function symbolically as well as pragmatically. None of the attributes of the state exist apart from symbols that provide meaning to the conception. A nation is recognizable only through the institutions created and operating in its name. One such is the exercise of power within its borders. But the power of some person or persons to control a certain geographic space by force does not constitute its limits as borders, or establish that space as a nation, or those persons as a government. Nor does the lack of control over the entire claimed space mean that the claiming entity is not a nation. Parts of Latin-America, Africa, and the Middle East provide examples of both points. To assist the mental recognition of “stateness” the area over which sovereignty is claimed must be given symbolic form. These are given physical representation, as “borders” or “frontiers”. Without frontiers

93 See Geertz, Centers, Kings, and Charisma: Reflections on the Symbolics of Power, in LOCAL KNOWLEDGE, supra, 121-146 (describes the “royal progress” and its role in establishing and demonstrating the power of the monarch). See generally DAVID I. KERTZER, RITUAL, POLITICS AND POWER (Yale University Press 1988).
94 Centers, Kings, and Charisma, supra, 143.
there is no state. (The nations of the EU are currently enduring the stress of “free movement,” not only because they want to exclude undesirable immigrants but, I suggest, because they are recognizing that without frontiers their statehood is in question.) But frontiers, as I previously noted, are only imagined lines drawn on maps that are themselves imaginary pictures of the Earth. “Physical spaces are real – they have substance and dimension. But legal spaces are merely fictions that facilitate the public ordering of interactions in the physical world.”95 Fictional spaces like nations are made real by collective belief in them and thus the willingness to erect markers on them, to impose restrictions on how and by whom they can be traversed, and to die in defense of them. Supreme courts aid the collective belief in the reality of borders in part because they represent a commitment to a “rule of law” applicable to a discrete population, largely defined by the territory claimed as the state’s borders. The rule of a particular law, pronounced by a particular court is in the modern world an essential representation of a collectivity as a state. Nationhood involves at a minimum the power to exclusive control over the law applicable within it. Moreover the presumed commonality of the law applicable to persons within the nation requires the symbolic uniformity that only a supreme court can represent. The United States may be an extreme example. Paul Kahn observes “Without a common ethnic, racial, or religious heritage, American identity is peculiarly dependent on the idea of law.”96 Whether the “rule” is one of “law” as understood by liberal legal scholars is beside the point. It is the representation that counts. The existence of a court with ultimate power to say the law within the borders, that is, to police the lower courts’ tendencies to regionalize the law, is critical.97 No wonder that so far as I can discover virtually every entity claiming nationhood has a court system that includes a supreme court with authority to review and correct erroneous lower court decisions.98

In this context we can see how a supreme court, understood here as a court that can review the decisions of courts inferior to it, is key to a rule of law imagined as unitary within the state, but not applicable beyond. This is especially important when the state is made up of

95 Allan Erbsen, Constitutional Spaces, 95 Minnesota L.Rev. 1168, 1266 (2011).
96 Kahn, supra at 9.
97 On the complexities of the geographic reach of law, particularly constitutional law, see Allan Erbsen, Constitutional Spaces, 95 MINNESOTA L. REV. 1168 (2011).
98 The Comparative Constitutions Project data shows that virtually all national constitutions (178 out of 184) provide for a supreme court that is supreme in the sense that it has final appellate review. Zachary Elkins, et. al., Characteristics of National Constitutions, Version 1.0, Comparative Constitutions Project (last modified May 14, 2010), available at http://www.comparativeconstitutionsproject.org/index.htm.
formerly independent political bodies but gets tricky when on-going federalism is contemplated. A post-unification supreme court represents to its public that there is but one nation, one “law.” Depending on the degree of power reserved to the federal components that representation can be controversial as has frequently been the case in the U.S. While the American Constitution reserves to state courts the power to adjudicate non-federal private law claims, for most Americans the Supreme Court is nonetheless thought of as the “Highest Court in the Land.”

This idea is not close to the truth: Apart from the described supremacy of the state courts in the sphere reserved to them by Article III the reality is that the Supreme Court is able to review only a tiny fraction of the cases in which its review is sought, and willing to review even fewer. There is hardly “one law” in the United States, but that is not relevant, or is rather relevant only to make the point that it is the Supreme Court as we imagine it, not as it really is, that makes it a powerful symbol of nationhood. To the extent that the U.S. Supreme Court is limited to federal claims, that, too, is a representation of the divided government that is so important to American politics. It is the retention of final authority to say “their” law in their own space that makes that space real.

The importance of the U.S. Supreme Court as a signal to its own people and to other nations was understood by the framers of the U.S. Constitution. Alexander Hamilton, writing in 1787 prior to the Constitution’s ratification urged as one of its merits the establishment of “one SUPREME TRIBUNAL.”

Referring to the then-existing Articles of Confederation, which lacked a national supreme court, he wrote: “The faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the People of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?” As adopted, the Constitution met Hamilton’s expectations by providing for “one supreme court” and

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99 Federal courts, including the Supreme Court exercise only that jurisdiction permitted by U.S. Const. Art. III.  
101 The Federalist No. 22, supra p. 144. See also The Federalist No. 80, p. 534, 535 (“What for instance would avail restrictions on the authority of state legislatures, without some constitutional mode of enforcing the observance of them?”)  
specifying that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority.”\textsuperscript{103}

For Hamilton and other supporters of ratification a supreme court was necessary to express the nationhood of the thirteen “sovereign states.” David M. Golove and Daniel J. Hulsebosch make a convincing claim that the Framers’ purposes in adopting a constitution granting supreme power to its central government went beyond legalistic assurances to foreign powers that they could rely on its treaties and financial obligations.\textsuperscript{104} “The fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a ‘civilized state’ worthy of equal respect in the international community.”\textsuperscript{105} To be “civilized” included a commitment to the Enlightenment project. “Membership in this larger civilization—linked across space by cultural ties of sympathy, benevolence and commerce—was desirable in its own right, and served the psychological needs of the many founders who viewed themselves … as ‘citizens of the world.’”\textsuperscript{106} To achieve these goals, “Statehood had to be performed [and] that performance would have to be convincing.”\textsuperscript{107} The “convincing performance” was the ratification of the Constitution critically including a “supreme” court with the power to enforce federal laws and obligations.

The acts of meaning\textsuperscript{108} expressed in the nascent United States Constitution were the adoption of a nationally binding constitution and creation of a supreme court with apparent power to enforce that constitution. These acts presaged similar developments in many post-colonial nations.\textsuperscript{109} The desire to assure national control over sub-sovereign entities at least partially explains the emergence of judicial review in several other countries. Australia’s 1901 constitution, which was influenced by the United States Constitution,\textsuperscript{110} established the High Court of Australia. Though the Australian constitution does not expressly authorize it, the High

\textsuperscript{103} U.S. Const. Art. III Sec. 2.
\textsuperscript{104} David M. Golove & Daniel J. Hulsebosch, supra note 93.
\textsuperscript{105} David M. Golove & Daniel J. Hulsebosch, supra at 935.
\textsuperscript{106} Id. at 938. See also id. at 973-975 (describing attributes of virtue in the civilized world envisioned by the Framers).
\textsuperscript{107} Id. at 943.
\textsuperscript{108} See Jerome Bruner, Acts of Meaning (describes the process through which specific institutional behaviors give meaning in the instant society).
\textsuperscript{109} See text at notes 101-106.
Court exercises judicial review based loosely on implications of the constitutional text but largely on original meaning. 111 The framers of the Australian constitution intended that the High Court would exercise judicial review to resolve federalism issues. 112 Indeed, in a 1956 opinion that High Court explains that judicial review is axiomatic to a federal system, stating that “[t]he conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the government were placed in the federal judicature.” 113 Similarly, Canadian judicial review arose out of a need to resolve federal conflicts. Although the British judiciary did not exercise judicial review in interpreting British laws, the Judicial Committee of the Privy Council frequently exercised judicial review over federalism questions in Canada in the eighty years prior to the 1949 constitutional amendment that abolished appeals to the Privy Council. 114 Another example is the Indian Supreme Court, created in 1950 soon after India obtained independence, which was designed to deal with both federalism issues as well as to protect fundamental rights. 115 In all of these cases the national supreme court is one way of reifying the unity of the nation.

III. The Representation to Self and Others of “Justness”

Beyond symbolizing the nation as a unitary whole, supreme courts help a people create the kind of state they are in by providing a representation of their aspirational collective virtues. The state expresses not only that we are but also who we are, what kind of people we proclaim ourselves to be, morally and politically, as a collectivity. In this context I refer to constitutional courts as well as to supreme courts; in the post-World War II, post-colonial, post-Soviet world, constitutional courts have been in many states the institution through which they proclaim their

111 Id. at 287.
112 One indication that Australian judicial review was established to resolve federalism questions is that the Australian constitution does not contain a bill of rights. Foley, Australian Judicial Review, 6 Wash. U. Global Stud. L. Rev. at 285 (explaining that the Australian Constitution “is principally concerned with the relationships between federal and state parliaments, executives, and courts”). But even more directly, the framers expressly discussed judicial review modeled after Marbury v. Madison. Id.
114 See Jenna Bednar et al., A Political Theory of Federalism, pp. 223-70 in Constitutional Culture and Democratic Rules (John Ferejohn et al., eds. 2001), at 243
115 However, the Indian constitution also “sows the seeds of erosion of fundamental rights” by expressly authorizing preventive detention and emergency executive powers. See Burt Neuborne, The Supreme Court of India, 1 Int’l J. Const. L. 476, 478 (2003).
modernity and just-ness. While lacking the “supreme” emblem I discussed above, the “constitutional” appellation serves a similar emotive-bearing quality, especially given the history of the nations discussed below.116

The institution of a supreme or constitutional court is indispensable in this regard. The people of most modern states want to see themselves as just, and want others to regard them so as well. To be seen both at home and abroad as freedom loving and rights protecting – a “just” state – is to be worthy of respect and support. Like the newborn American nation, states wish to express “cultural ties of sympathy, benevolence and commerce” that qualify them as “citizens of the world:”117

[T]he people of new states are simultaneously animated by two powerful, thoroughly interdependent, yet distinct and often actually opposed motives—the desire to be recognized as responsible agents whose wishes, acts, hopes, and opinions ‘matter,’ and the desire to build an efficient, dynamic, modern state. The one aim is to be noticed: it is a search for an identity, and a demand that the identity be publicly acknowledged as having import, a social assertion of the self as ‘being somebody in the world.’ The other aim is practical: it is a demand for progress, for a rising standard of living, more effective political order, [and] greater social justice….118

In the modern world a supreme court with power to protect human rights is an essential symbolic representation of those qualities. A just state cannot be imagined without such a court. Unlike the United States, however, most of the nations that have been born or “born again” in the sense that they emerged as democracies after a period of tyranny have separated the power of constitutional review from general appellate review by creating a separate constitutional court.119 Austria, Germany, Italy, Portugal, and Spain adopted constitutional courts based closely on Kelsen’s original Austrian model.120 John Ferejohn sees these Austrian-based constitutional courts as arriving in waves: first, the Austrian, German, and Italian courts, which immediately

116 See supra note 56 and accompanying text.
117 Hulsebosch and Golove, supra, n. 93.
119 Tom Ginsburg, The Global Spread of Constitutional Review, in THE OXFORD HANDBOOK OF LAW AND POLITICS 81 (Keith E. Whittington et al. eds. 2001). Exceptions include Japan, whose constitution was imposed by the U.S. following W.W. II, India, id. at 85, and Pakistan, id. at --.
120 Ginsburg, note 111, supra.
followed World War II, then the Spanish and Portuguese courts, which followed the fall of fascist regimes in the 1970s\textsuperscript{121} and finally the post-Soviet courts, which also followed the Austrian model, as a third wave in this pattern.\textsuperscript{122} The symbolic meaning of these developments differs from the supreme court model in that the constitutional courts are more directly expressive of a concern for human rights. It is a signal to its own population and to the “civilized world” that the adopting nation is entitled to internal and international respect.

According to Lach and Sadurski, post-fascist and post-Soviet countries adopted constitutional courts because the “institutional novelty” of special constitutional courts “created a symbolic break from past political arrangements.”\textsuperscript{123} Ruti Teitel recognizes that “access to constitutional courts through litigation enables a form of participation in the fledgling democracy,” serving as a “potent symbol of new government openness.”\textsuperscript{124} Furthermore, new constitutional courts with “explicit mandates to engage in judicial review” act as “guardians of a constitutional order,” regulating state power and upholding individual right, “thus creating a rights culture.”\textsuperscript{125}

Germany is an excellent example of the signifying power of a Constitutional Court to its own people. According to Rolf Stürner the Constitutional Court is “the most popular institution of German state authority,” noting that “[i]ts function as a reliable custodian of the rule of law and constitutional rights is an essential element of modern German identity.”\textsuperscript{126} He adds: “The significance of the Federal Constitutional Court’s role in defining Germany’s post war identity cannot be overestimated. There is no meaningful political or social issue in Germany’s post war history…that was not the subject of a constitutional dispute and determined by the Federal Constitutional Court.”\textsuperscript{127}

The Constitutional Court of South Africa reified the post-apartheid rebirth of that country so powerfully that \textit{Invictus}, the popular movie celebrating the end of apartheid, should perhaps have featured the establishment of that court rather than the dramatic success of the integrated

\textsuperscript{122} \textit{Id.} On the post-Soviet nations see also Sadurski, Annuario, 305, 306.
\textsuperscript{123} \textit{Id.}
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} Rolf Stürner, \textit{The New Role of Supreme Courts in a Political and Institutional Context from the German Point of View}, Annuario 335, 342.
\textsuperscript{127} Rolf Stürner, \textit{The New Role of Supreme Courts in a Political and Institutional Context from the German Point of View}, Annuario 335, 347.
but predominantly white national rugby team famously cheered on by President Mandela. The court did more to signify the reality of change: The Constitutional Principles laid out in the Interim Constitution and later incorporated into the final Constitution include commitments to “achieving equality between men and women and people of all races,” protecting “universally accepted fundamental rights, freedoms and civil liberties,” promoting “diversity of language and culture,” recognition of “indigenous law,” and a “right to self-determination by any community sharing a common cultural and language heritage.” 128 Obviously these values reflected the aspirations of those who had struggled to bring democracy to South Africa. In some sense, however, the constituting of the Court was necessary to make the South African Constitution itself real, rather than the other way around. A product of a Multi-Party Negotiating Process, the Interim Constitution created the Constitutional Court and laid down thirty-four fundamental “Constitutional Principles” which would govern the drafting of the final Constitution. 129 Another section of the Interim Constitution provided that “[t]he new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect until the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles” enumerated in Schedule 4. 130 Thus, the final Constitution, which opens with the language of popular consent, i.e., “We the people of South Africa,” was tied to the approval of the eleven justices of the Constitutional Court. 131 After hearings in the spring of 1996, the Constitutional Court rejected the Constitutional Assembly’s proposed Constitution on the grounds that several of its provisions conflicted with the Constitutional Principles enumerated in the Interim Constitution. 132 In effect, the Court “declar[ed] the constitution unconstitutional.” 133 Well aware of the potential for backlash against the decision, the Court dedicated a portion of an extensive opinion to explaining the “Nature of the Court’s Certification Function.” 134 The Court began this section by invoking the classical defense of judicial power as tied to and limited by the rule of law, stating that “[f]irst and foremost it must be emphasized that

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134 See First Certification Case at ¶¶ 26-30.
the Court has a judicial and not a political mandate.” As in many new democracies, establishing the disjuncture between law and politics was important for the Court because the prior oppressive regime relied on “its appeal to the definitions and enforcement mechanisms of law” to legitimate policies antithetical to the new democracy. Edwin Cameron, who was subsequently appointed to the Court, observed, “[f]rom apartheid, we carry a legacy of skepticism about law…. Under apartheid, the law was used to define and enforce a system of racial classification and racial subordination that was recognized, almost universally, as reprehensible.”

After the Constitutional Assembly redrafted the Constitution to reflect the Court’s judgment, the Court certified the Constitution. Aware of the sensitive nature of certification, the Court’s Opinion in the First Certification Case emphasized that it had “no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [new Constitution], save to the extent that such choices may be relevant either to compliance or non-compliance with the [Constitutional Principles].”

Thus, from the outset, the Constitutional Court was charged not just with reaching technical legal judgments based on rules, but with applying standards to enforce the fundamental principles that defined the new nation and took an expansive view of its role as the interpreter of the nation’s values. In the 1995 case State v. Makwanyane, the Court emphasized the uniqueness of the South African Constitution:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic,
universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the
Constitution.\textsuperscript{140}

In the \textit{Makwanyane} case the Court also signaled the new reality by invoking the African cultural
value of “ubuntu” in analyzing the constitutionality of the death penalty.\textsuperscript{141} One South African
justice has observed that ubuntu is “an African notion” that is “not easily defined,”\textsuperscript{142} but in
general stems from values of “[g]roup solidarity, conformity, compassion, respect, human
dignity, humanistic orientation and collective unity.”\textsuperscript{143} The only textual basis for the legal
status of ubuntu lies in the National Unity and Reconciliation Act of 1995, which observes that
“the Constitution states that there is a need for understanding but not for vengeance, a need for
reparation but not for retaliation, a need for ubuntu but not for victimization.”\textsuperscript{144} Despite this
thin basis, ubuntu animated the justices’ opinions in the \textit{Makwanyane} case. One justice has
argued that ubuntu ought to be treated as a fundamental constitutional value, observing both that
the “Constitution brings to an end the marginal development of customary law\textsuperscript{145} or indigenous
principles” and that “\textit{Ubuntu}/ism, which is central to age-old African custom and tradition,
abounds with values and ideas that have the potential for shaping not only indigenous law
institutions, but South African Jurisprudence as a whole.”\textsuperscript{146} Here the Court imagines a reality in
which the heritage of black citizens is now to be not only appreciated but dominant.

In both the German and South African cases, among many others, the Constitutional
Courts so vital to the envisioned quality of the new state is literally given concrete form. Grand
courthouses have long been symbols of the authority and legitimacy of the government. Resnik
and Curtis argue that the architecture of courts at “the national, regional, and transnational levels
is deeply self-conscious, engaged with history by seeking either to embrace and link to traditions
or to create distance from them.”\textsuperscript{147} The German Federal Constitutional Courthouse, built in the
1960s, symbolizes the break from the “oppressive pathos-filled historical forms in which the

\begin{footnotesize}
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\item\textsuperscript{140} State v. Makwanyane, 6 BCLR 665 (1995), at ¶ 262.
\item\textsuperscript{141} State v. Makwanyane, 6 BCLR 665 (1995), at ¶ 130.
\item\textsuperscript{143} Id. at 17.
\item\textsuperscript{144} Preamble, National Unity and Reconciliation Act of 1995, Act 95-34 (July 26, 1995).
\item\textsuperscript{145} The 1996 Constitution provides that: “The institution, status and role of traditional leadership, according
customary law, are recognised, subject to the Constitution.” S. Afr. Const. 1995, § 211(1).
\item\textsuperscript{146} Justice Mokgoro, \textit{Ubuntu and the Law in South Africa}, 4 BUFF. HUM. RTS. L. REV. at 20.
\item\textsuperscript{147} Judith Resnik & Dennis Curtis, \textit{REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-
STATES AND DEMOCRATIC COURTROOMS} (2011), at 349 (hereinafter \textit{REPRESENTING JUSTICE}).
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authoritarian state had found architectural expression.” It features a celebrated glass façade that communicates a new commitment to transparency, accessibility, and civic engagement. Within the same decade that the courthouse was built a constitutional amendment created a right for any individual to file a constitutional complaint with the Federal Constitutional Court, a legal expression of the architectural commitment to accessibility.

The physical embodiment of the South African Constitutional Court presents a more complicated relationship with the nation’s past, simultaneously breaking with the institutionalized racism and oppression that characterized the apartheid regime and preserving the memory of that regime. Emblazoned with the colored lettering of the Court’s title in the eleven official languages of South Africa, the building rises from the remnants of the Old Fort prison, where Nelson Mandela was at one time detained. The prison had already been established as a national monument at the time the courthouse was commissioned. The once-segregated cell blocks had housed black prisoners beneath white prisoners, yet many South Africans viewed the prison as place for community solidarity to which supporters had once brought food and books. Constitutional Court Justice Albie Sachs described the goal of the courthouse project as the conversion of “intense negativity” into “optimism” about the new legal regime. In contrast to the barbed-wire encrusted walls beneath the courthouse, the building itself features modern architecture and expansive glass facades that symbolize the Court’s openness. This effort to communicate the new Court’s accessibility to the public extends to the functionality of the large foyer, which frequently hosts “exhibitions, discussions, dance, and other performances” in order to allow the public to use the building. Unlike many new court buildings, public spaces in the courthouse provide a view of the administrative apparatus, symbolizing the transparency of the Court. Much as the great architecture, mosaics, painting, and sculpture of the middle ages and the renaissance made scripture real to the illiterate masses,

149 Resnik & Curtis, REPRESENTING JUSTICE, 341.
151 Resnik & Curtis, REPRESENTING JUSTICE, 352.
152 Id. at 353.
153 Id. at 351.
154 Id. at 355.
modern courthouses can project an imagined reality out to a public largely ignorant of legal doctrine.

Constitutional courts are also a representation by the nation to others, a message of belonging to the “civilized world.” In some cases this may be a more important goal than communicating to the internal public. A very recent example of an explicitly outward-signaling new nation is Kosovo, which declared independence from Serbia in 2008 and soon thereafter adopted a constitution which explicitly refers ensures that “the state of Kosovo will be a dignified member of the family of peace-loving states in the world.” Kosovo’s constitution guarantees compliance with all the leading international human rights agreements which, “in the case of conflict, have priority over provisions of laws and other acts of public institutions.” In Article 19, dealing with the “Applicability of International Law,” Kosovo’s Constitution declares that “[r]atified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.” To enforce these provisions incorporating and according deference to international law, the Constitutional Court is established as the “final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.” Furthermore, the Constitutional Court must review the “compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution” and perform a “review of the constitutionality of the procedure followed.” Thus, the popular will of Kosovo is subordinate to international norms, and the Constitutional Court is charged not only with enforcing international human rights agreements over the laws of Kosovo, but with preventing an amendment to the Constitution that would conflict with a properly ratified treaty. The promise of a supreme court to review international

155 See Golove and Hulsebosch at 1063-1064.
158 Id. art. 19.
159 Id. art. 112.
160 Id. art. 113, § 2(4).
agreements demonstrates a nation’s “respectability as defined by contemporary norms.”\textsuperscript{161} It is part of the process of identifying and seeking admission to an “imagined…‘civilized world.’”\textsuperscript{162}

Representation need not necessarily reflect reality. We can easily identify states that have constitutional courts that are presented as protectors of human rights which are more sham than real. Ukraine, Georgia, and Russia come to mind. Perhaps they were “Potemkin courts” all along. Or perhaps the story is more complex. Law is “but part” of the imagination of the real. The adoption by newly constituted nations of “an institution, legal concept, or structure” from donor societies is dependent can be problematic.\textsuperscript{163} Although a legal transplant “preserves its role and qualities and is able to provide for the same effects as in the donor system,” it is also “intrinsically linked to the multi-natural factors of social value, and is authentic to as well as workable in only certain ‘donor’ societ[ies].”\textsuperscript{164} “Supreme” courts provide one example of such a legal transplant. Focusing on the constitutional courts in Poland and Ukraine, Yegor Vasylyev observes that some post-Soviet constitutions deemed the prior constitution-making processes of other nations “a foreign experience worth following.”\textsuperscript{165} Influences included the German Basic Law, the French conception of a parliamentary republic, the common law system in place in the United States and the United Kingdom, and “the factor of joining (or intending to join) international organizations based on democratic principles.”\textsuperscript{166} Yet similar constitutional provisions often took radical divergences, suggesting that a new nation’s past history of governance played a more central role in the development of these new nations. Despite achieving independence from the Soviet Union roughly contemporaneously, drawing on similar influences, and establishing similar constitutions, Poland and Ukraine have had far different constitutional experiences. In Poland, “the Constitutional Tribunal…has become an effective and important—perhaps the most important—tool to overcome the past in the functioning and making of law.”\textsuperscript{167} On the other hand, in Ukraine the Constitutional Court “has never been seen

\textsuperscript{161} Golove & Hulsebosch, \textit{A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition}, 85 N.Y.U. L. REV. at 936.


\textsuperscript{164} Id.

\textsuperscript{165} Id. at 5.

\textsuperscript{166} Id.

\textsuperscript{167} Id. at 7.
as authoritative and impartial.”168 Vasylyev attributes these different outcomes to the effects of national memory: Poland had developed several prior constitutional documents over the previous centuries,169 whereas Ukraine had almost always existed as a province rather than a nation-state prior to post-Soviet independence.170 Vasylyev explains that “[i]n new democracies old rules of the game might to some extent be preserved in institutional memory as well as in everyday habits of individuals.”171 Despite the fact that the Polish and Ukrainian constitutional courts were doctrinally similar172 and emerged from similar constitution-making processes, these constitutional courts were the products of different collective imaginations of nationhood.173 Poland had a long history of struggle to maintain its nationhood and sought to “capitalize on Western liberal…patterns,” whereas Ukraine “basically had no experience in nation-state building at all.”174 With less institutional memory of nationhood to draw upon, the Ukrainian Constitutional Court had the difficult task of imagining Ukraine as a rights-observing nation before it could become so, thus illustrating Bourdieu’s point:

“[T]he will to transform the world by transforming words for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions, can only succeed if the resulting prophecies or creative evocations, are also, at least in part, well-founded pre-visions, anticipatory descriptions.”175

Though both countries adopted similar institutional features, they took on divergent meanings as a result of differing national collective memories of what constitutionalism meant. Extrapolating from these theories and the historical record, we could surmise that to the Poles the Constitutional Tribunal symbolized the completion of a newly invigorated nation, whereas Ukraine’s Constitutional Court represented another iteration of past authoritarian regimes. The make-up and functionality of these two courts bears out this theory. The Polish Constitutional

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168 Id.
169 Id. at 10-11 (describing Poland’s “rich indigenous constitutional heritage”).
170 Id. at 12 (“the whole history of Ukraine is a history of a province, albeit, an important one, of other states”).
171 Id. at 9.
172 See id. at 6 (characterizing the Polish Constitutional Tribunal as similar to the Ukrainian Constitutional Court).
173 Id. at 13 (explaining that a review of the comparative historical backgrounds of Poland and Ukraine “reveals essentially different national constitutional memory directly linked to a memory (or lack thereof) of nation-building”).
174 Id.
Tribunal was populated with law professors who had supported democratic opposition to the Soviet regime, whereas the Ukrainian Constitutional Court was populated with “old-communist school academics from [the] notorious Academy of Procuracy and apparatchiks who faced the independence with no particular ideas on how to build an independent state.”176 Vasylyev concludes that:

“Overall, the whole constitution-making process in Poland was a search (and sometimes a struggle) for a new constitutional pattern upon [a] new political landscape (however mixed), while in Ukraine it was dominated by a desire of [the] former communist elite to stay in power and maintain socialism, the nation-state itself still disputed.”177

No doubt the paths of these countries were informed by the ideologies, personal ambitions, and resources of local leaders and neighboring countries, but the particular historical relationship of each to nationhood and national identity importantly affected the results.

Gaps between the society we imagine to be produced by a rights-protecting supreme court and lived experience is not limited to laggard democracies in “born again” legal systems. Brown v. Board of Education178 is a source of national pride in the U.S., seen as a meaningful product of the Supreme Court as a protector of minority rights. But educational institutions in the United States remain largely segregated. In a recent term, my required Procedure course at NYU School of Law (widely regarded as a liberal institution) only a few of the ninety students in class appear to be of African ethnicity.) Is that too anecdotal? According to Gary Orfield, [O]ur two largest minority [public school] populations, Latinos and African Americans are more segregated than they have been since the death of Martin Luther King more than forty years ago. Schools remain highly unequal …in terms of … key aspects of schooling. Segregated nonwhite schools are segregated by poverty as well as race.” 179 Through Brown the Supreme Court allows us to imagine the world we live in. For most whites, it is the “real” world. But another lesson of Brown may be that whites had the power to segregate blacks (through private schooling, moves to suburbia, and housing segregation techniques) regardless of the Court.

176 Id. at 15.
177 Id. at 16.
In his recent book, *The Will of the People*, Barry Friedman argues that “[o]ver time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values.”\[^{180}\] If it is correct, Friedman’s thesis illuminates the role played by the U.S. Supreme Court as an institution that allows us to imagine that through law, their imagined world is made real. – that the world they live in is the world required and blessed by law. Perhaps it is the case that other supreme courts are similarly influenced and similarly give meaning to the pervasive values of their peoples.

CONCLUSION

What do supreme courts have to tell us about the koan with which this essay begins? And what does the concept of law’s contribution to the imagination of the real tell us about supreme courts? These questions inform each other. Two hands clapping? When we appreciate the imagined but nonetheless influential reality of the very concept of supreme courts, and when we further appreciate how these courts are “but part” of our distinctive manner of imagining our sense of place, time, causation, and fact, we begin to unravel the double process of imagining a regime called law through which our collective imagination helps create a world in which we can live meaningful lives.

To conclude with a thought experiment, let us ask ourselves how, apart from law, communities create and maintain a system of belief and way of living out those beliefs. Myth, spirituality, hierarchal authority, or parts of all of those become only another distinctive manner of imagining the real.