

“SUPREME” COURTS AND THE IMAGINATION OF THE REAL

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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.

Introduction

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

“seeing to it that our visions and our verdicts ratify one another.” 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.” The tendencies referenced have been observed in a variety of settings. 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”), *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.” 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 any truth claims for or about law.” 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.” It is this dual process that “is both the end and the technique of a cultural study of law’s rule. 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.” 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.” 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 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 appears in their actual titles. (It does not in many of the courts to be discussed and none are in fact “supreme” in every sphere of the law even of the state that has constituted them. 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.” 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, as I discuss below, 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 constitutional judiciary and law professors linked with each other in a symbiotic relationship.” 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. One study published in 1998 showed that although “[f]ew people are extremely pleased with their national high courts...few are displeased” and although there is “a great deal of variability across countries in diffuse support of the national high courts,” “trust in the national high court is quite widespread in most countries.” In summary, high courts “are in general relatively salient, and most mass publics are satisfied with the outputs of the institutions.” Accordingly, courts, and particularly supreme and constitutional courts, have assumed an increasing amount of power over the past few decades.

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.”

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 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* 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. 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.

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” 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

Whether as a meta or quotidian concept, time is neither demarcated nor experienced in the same way in every culture. Even among the less “exotic” societies of the modern world, time is perceived and experienced differently in one society than in another. 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. 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. 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.” 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 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.

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. This biblical past is reflected in the prayer with which the clerk opens each session "God save the United States and this honorable court." 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, 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. *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* decision struck down *Bowers v. Hardwick*, it invoked and adopted the latter's dissenting opinion by Justice Stevens in *Lawrence*. 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 re-discovered 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." The justice who 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. 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. 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."

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

“polychromic” time. Some cultures place a higher value on punctuality and time limits than others. The difference can lead to misunderstanding and anger. The U. S. Supreme Court, consistent with American culture generally, imposes time rules strictly and publicly, reinforcing the cultural norm.

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.

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. 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.” 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.” 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 their jurisdiction often refer to geographical indicators. This is true both for the “competence” (subject matter jurisdiction) and jurisdiction over persons and property.

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. 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...” 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 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.” 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.” 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. 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.

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 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 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.”

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. “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.” 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.’” To achieve these goals, “Statehood had to be performed [and] that performance would have to be convincing.” 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 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. 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, established the High Court of Australia. Though the Australian constitution does not expressly authorize it, the High Court exercises judicial review based loosely on implications of the constitutional text but largely on original meaning. The framers of the Australian constitution intended that the High Court would exercise judicial review to resolve federalism issues. 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.” 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. 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. 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 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.

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:”

[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....

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. Austria, Germany, Italy, Portugal, and Spain adopted constitutional courts based closely on Kelsen’s original Austrian model. John Ferejohn sees these Austrian-based constitutional courts as arriving in waves: first, the Austrian, German, and Italian courts, which immediately followed World War II, then the Spanish and Portuguese courts, which followed the fall of fascist regimes in the 1970s and finally the post-Soviet courts, which also followed the Austrian model, as a third wave in this pattern. 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.” 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.” 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.”

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.” 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.”

The Constitutional Court of South Africa reified the post-apartheid rebirth of that country so powerfully that *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 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.” 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. 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. 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. 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. In effect, the Court “declar[ed] the constitution unconstitutional.” 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.” 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 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.

In the *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. One South African justice has observed that ubuntu is “an African notion” that is “not easily defined,” but in general stems from values of “[g]roup solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity.” 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.” Despite this thin basis, ubuntu animated the justices’ opinions in the *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 or indigenous principles” and that “*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.” 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.” The German Federal Constitutional Courthouse, built in the 1960s, symbolizes the break from the “oppressive pathos-filled historical forms in which the 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, 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 agreements demonstrates a

nation's "respectability as defined by contemporary norms." It is part of the process of identifying and seeking admission to an "imagined... 'civilized world.'"

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. 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]." "Supreme" courts provide one example of such a legal transplant. ...

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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 Education* 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." 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.

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." 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.