

**AT WHAT IS THE SUPREME COURT COMPARATIVELY  
ADVANTAGED?**

*R. George Wright\**

“People . . . often seem stunned when they hear the theory of comparative advantage.”\*\*

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## I. INTRODUCTION

We often wonder, especially in controversial cases, whether the Supreme Court has reached the best result.<sup>1</sup> In some cases, we may also wonder whether the Court has adopted a proper method of interpreting the Constitution.<sup>2</sup> A bit more abstractly, we may wonder about matters such as the proper size of the Court's workload,<sup>3</sup> even as the number of requests for Supreme Court review has historically increased.<sup>4</sup>

Each of these concerns bears upon a vitally important but commonly overlooked question: How should the Supreme Court, given its unavoidable constraints<sup>5</sup> and scarcities of recourses,<sup>6</sup> best be devoting its<sup>7</sup> time, energy, and

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<sup>1</sup> Witness, for example, the discussions following the Court's decision in the healthcare case of *National Federation of Independent Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>2</sup> For representative approaches to constitutional interpretation, see, for example, PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–1209 (1987). For a lively debate on such matters, see the various perspectives in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998).

<sup>3</sup> On the decreasing number of cases addressed on the merits, see, for example, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1234–46 (2012) (decreased mandatory Supreme Court jurisdiction, along with increased ideological polarization); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1373–74 (2006). For Supreme Court docket analyses by Term, see, for example, *The Statistics*, 125 HARV. L. REV. 362 (2011).

<sup>4</sup> According to the Court's website, "[t]he Court's caseload has increased steadily to a current total of more than 10,000 cases on the docket per term. The increase has been rapid in recent years." *The Justices' Caseload*, SUPREME CT. OF THE U.S., <http://www.supremecourt.gov/about/justicecaseload.aspx> (last visited Oct. 10, 2013). After the intensive winnowing process, formal written opinions may be delivered in perhaps only 80 to 90 of those cases. *See id.*

<sup>5</sup> For example, short of a constitutional amendment, most of the Court's efforts must relate somehow to particular federal cases or controversies. *See, e.g.*, U.S. CONST. art. III, § 2; *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

<sup>6</sup> For a vivid sense of some of the limitations in time, energy, relevant expertise, and in powers of reflection and judgment of ordinary, non-superhuman, non-Herculean judges, see RONALD DWORKIN, *LAW'S EMPIRE* chs. 7–10 (1986). Accuracy in decision-making is clearly a scarce and costly good: "increasing accuracy is socially costly, because it requires a lengthier and higher-quality legal process." STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS* 451 (2004).

<sup>7</sup> Of course, it would for many purposes be misleading to think of the Supreme Court as reducible to the sitting Justices and the vector of their individual efforts. We must consider the role of Supreme Court clerks, staff, and librarians as well. *See, e.g.*, Todd C. Peppers & Christopher Zorn, *Law Clerk Influence On Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008) (clerks as exerting a detectable ideological effect, over and above any "selection effects" in being chosen by a particular Justice in the first place);

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attention? To oversimplify: What sorts of things should the Supreme Court be seeking to accomplish, by which means, and what sorts of things should it distinctly not be seeking to accomplish, by one means or another? Or, to oversimplify even more severely: What, broadly, should the Supreme Court be doing, and not doing?

Common sense suggests that the answers to these questions turn out to be defective. Thus common sense tells us that the Court should, within the bounds of what is otherwise permissible, do whatever is the most “important” legal task. Or that the Court should do a variety of “important” tasks. Or whatever the Court is “best” at doing. Or better at doing than any other institution that might also undertake the task in question. We would need a theory as to why the Court, and no one else, should do the legally most important tasks.

In this context, being “best” at a task might mean something like the most accurate, or the fastest, or requiring the least effort, or something like the “most efficient,” or the most productive, again relative to any other institution that might undertake the same or similar task. These sorts of judgments would often be rough, intuitive, and speculative. But we do not live in a world that either permits more precision in such judgments, or that rewards our inattention to such matters.

Thus common sense suggests, perhaps, that the Court should, within the bounds of what is otherwise permissible, devote its efforts to those tasks—perhaps one, or a few, or many tasks—at which it can outperform alternative law-making institutions.

Common sense, however, is in this respect seriously flawed.

The thesis of this Article is that the Court should in this important respect seek to improve upon common sense, for the sake of the broad public well-being.

In particular, the judgment that the Supreme Court is better at some task than any other law-making institution does not mean that the Court should rightly undertake that task at all. The Court’s being better, or more efficient, at some legal task than other institutions does not mean that the Court, rather than another institution, should perform the task in question. It is actually entirely reasonable to conclude that the Court should not undertake, let alone emphasize, some important tasks at which it is the undisputed performance champion. It is also possible that for the sake of the public well-being, the Court should, remarkably, undertake some tasks that other institutions would be better at, or more efficient in performing.

This thesis may seem mysterious, if not implausible, in seeming to invite unnecessary inefficiencies. But the thesis is rooted, by loose but

illuminating analogy, in the crucial normative<sup>8</sup> idea of what is called comparative advantage.<sup>9</sup> Below, this Article briefly presents the most basic logic and value of the idea of comparative advantage.<sup>10</sup> This Article then develops the comparative advantage analogy<sup>11</sup> in the American legal context, and critically assesses the Supreme Court's actual activities, choices, and priorities.<sup>12</sup> The idea of comparative advantage in the Supreme Court context may not be intuitive, but it has much to recommend it.

## II. THE SUPREME COURT AND THE GENERAL IDEA OF COMPARATIVE ADVANTAGE

### A. *The Institutional Position of the Supreme Court*

Supreme Court Justices, individually and collectively, along with their various assistants, do not face a market in which they must turn a literal financial profit by selling units of particular goods and services to willing buyers.<sup>13</sup> The Justices do not, in that narrow literal sense, compete with the various alternative producers of law, including Congress, congressional staffs,

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<sup>8</sup> For the difference between descriptive, or positive, versions of the idea of comparative advantage, and normative versions, with which this Article will be primarily concerned, see Alan V. Deardorff, *Benefits and Costs of Following Comparative Advantage* 7 (Jan. 12, 1998) (discussion paper), available at <http://www.fordschool.umich.edu/rsie/workingpapers/Papers401-425/r423.PDF>.

<sup>9</sup> The idea of comparative advantage is usually traced to economist David Ricardo, with credit being shared with Robert Torrens, James Mill, and John Stuart Mill. For an account of the early development of the idea, see John Aldrich, *The Discovery of Comparative Advantage*, 26 J. HIST. ECON. THOUGHT 379, 380–84 (2004).

<sup>10</sup> See *infra* Part II. The argument below that following, by loose analogy, the normative principle of comparative advantage can enhance the “well-being” of the overall public does not presuppose any particular method of determining “well-being.” Well-being need not be a matter of wealth maximization, preference satisfaction, or of utility calculations. For background, see, for example, JAMES GRIFFIN, *WELL-BEING* (1989).

<sup>11</sup> The principle of comparative advantage was initially applied to the realm of international trade in commodities. See Aldrich, *supra* note 9, at 380. The principle need not be confined to that context, however, as it is largely a reflection of the widely applicable idea of opportunity costs and is inseparable from familiar forms of cost-benefit analysis. See Deardorff, *supra* note 8, at 6–8. There are many important differences between the scarce resources, incentives, motivations, and stewardship obligations of bureaucrats, including Supreme Court Justices, on the one hand, and those of property-owning buyers and sellers facing explicit monetary prices and profitability constraints in a competitive market. See, e.g., Laurent A. H. Carnis, *New Perspectives on the Economic Approach to Bureaucracy*, 13 Q.J. AUSTRIAN ECON. 52, 56 (2010) (referring to the work of Ludwig von Mises).

<sup>12</sup> See *infra* Parts III–IV.

<sup>13</sup> See sources cited *supra* note 11. Nor does the Court explicitly trade or sell portions of its output, at variable prices, to anyone, including to other governmental actors that produce law as an output.

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the President, administrative agencies and their staffs, state legislatures, arbitrators, trial court and administrative law judges, and inferior appellate courts. But in a broader sense, the Court competes with these institutions as an alternative source of law.

Even with its substantial resources, the Court faces limits of time, energy, expertise, budget, prestige, and authority.<sup>14</sup> The Court produces, at whatever cost, a broad range of goods and services. Some of these goods and services will be more or less concrete, others more abstract and intangible. Their value can be assessed in various ways. They range from providing solutions to particular disputes; to resolving coordination problems; to presenting general legal guidance of a substantive or procedural nature; all the way to producing, or perhaps detracting from, social predictability, fairness, basic rights-recognition, economic efficiency, solidarity, and overall regime legitimacy.<sup>15</sup>

The Court does not produce these goods and services in isolation from the various alternative producers of law referred to above.<sup>16</sup> The Court not only cooperates, but in some ways competes, with each of those alternative law producers.<sup>17</sup> Any choice of a supplier of law from among competing producers, including the Court, may be alterable.<sup>18</sup> Even as a competitive law producer, though, the Court's product is also a complementary contribution, along with those of its competitors, to the jointly produced overall rule of law.<sup>19</sup> But these

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<sup>14</sup> See sources cited *supra* notes 5–7.

<sup>15</sup> On coordination problems, see John M. Finnis, *Law as Coordination*, 2 *RATIO JURIS* 97, 97 (1989). On fairness and efficiency in general with an emphasis on the latter, see generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). Consider also the contrast between, say *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>16</sup> See *supra* text accompanying notes 13–14.

<sup>17</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (hierarchical status of congressional judgments as to the 14th Amendment standard to which states should be held); *Cooper v. Aaron*, 358 U.S. 1 (1958) (hierarchical status of state legislature's and governor's judgment as to federal constitutional law and its binding authority); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (hierarchical status of state supreme court decisions on matters of federal law); *Marbury v. Madison*, 5 U.S. 137 (1803) (hierarchical status of congressional judgment as to federal statutory constitutionality).

<sup>18</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>19</sup> Thus the provisions of, say, federal health care and insurance reflect the joint, more or less coordinated, contributions of Congressional legislation in the form of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119; the Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (agency implementing regulations; and any state opt-out decisions). For more uniformly harmonious, complementary contributions by the Supreme Court to particular laws or regulations conceived of as joint projects, see various *Chevron*-type cases, including *Mayo Foundation for Medical Education v. United States*, 131 S. Ct. 704 (2011); *Long Island Care at Home v. Coke*, 551 U.S. 58 (2007); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). For a less harmonious ultimate

complications should not obscure the fact that on various fronts, the Court is one possible source or producer of law among others.

Importantly, the Court's products and methods can, within limits, vary. In some respects, the Court has great discretion. The Court's legal products can, in particular, be made with greater or lesser efficiency. From the standpoint of overall well-being, the Court's activities and priorities can be well-directed or misdirected. Depending on one's vantage point, the Court's activities and priorities may bear significant costs.

Crucially, the Court's chosen priorities and pursuits must, inescapably, involve what are called opportunity costs.<sup>20</sup> The opportunity cost of the Court's decisions may fluctuate importantly when the Court chooses to do more of one thing rather than another.<sup>21</sup> And, equally importantly, the opportunity cost of other institutions' producing the same or similar legal product may also vary.<sup>22</sup> Crucially, the Court may, relative to other institutions, be much better at certain tasks, and only slightly better, relative to other institutions, at other tasks.

We take up the basic idea of comparative advantage and the related idea of (comparative) opportunity cost immediately below. First, though, it is useful to notice the significance of what is at stake. The Supreme Court cannot address every significant matter within the permissible scope of its jurisdiction.<sup>23</sup> The Court must inevitably set priorities for itself, including priorities as to cases and subject matter.<sup>24</sup> As well, the Court must set other priorities, involving serious tradeoffs, as to methods, techniques, standards, and limits of its investigation, research,<sup>25</sup> and deference.<sup>26</sup> All such priority-setting involves significant effects and significant opportunity costs.

The public stakes are substantial in this largely discretionary priority-setting practice used by the Court. Well-chosen Court priorities, given what other institutions could do, might reduce various sorts of important social conflicts, and important injustices, along with various costly social uncertainties.<sup>27</sup> Well-directed critical attention to the Court's decision-making

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joint legal product, see, for example, *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 600 (2004) (Court determining a particular EEOC interpretation of the Age Discrimination in Employment Act to be "clearly wrong").

<sup>20</sup> See *infra* Part II.B. Again, our reference, by analogy, to opportunity costs is meant to keep open the range of ways in which the relevant costs and values can be measured. See sources cited *supra* note 10.

<sup>21</sup> See *infra* Part II.B.

<sup>22</sup> For discussion, see *infra* Parts II.B., III.

<sup>23</sup> See *supra* note 4 and accompanying text.

<sup>24</sup> See *infra* Parts III.A., IV on Supreme Court case selection.

<sup>25</sup> See *infra* Parts III.B–D.

<sup>26</sup> See *infra* Part III.B. in particular on questions of "legislative fact" and related concerns.

<sup>27</sup> For background, see Mancur Olson, *Do Lawyers Impair Economic Growth?*, 17 LAW & SOC. INQUIRY 625, 625 (1992). Lack of Court deference to legislative and administrative policy

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as to its own priorities and practices might well promote the long-term health of the society.<sup>28</sup> Scholars have argued, for example, that the public good would be promoted if courts, including the Supreme Court, were less deferential toward statutes and regulations, and the factual findings and judgments embodied therein, that reflect mere political or interest group pressures and self-serving bargains.<sup>29</sup> The extent to which this important argument is actually well-founded is among the issues briefly addressed in Section III below.

In the meantime, we should first clarify our references to opportunity cost and to institutional comparative advantage.

### *B. Opportunity Cost and the Supreme Court's Choices Among Activities*

The idea of opportunity cost finds its home in describing behavior in markets, as distinct from bureaucracies.<sup>30</sup> But the idea of opportunity cost is broad, fundamental, and important. It can be applied by analogy, with appropriate modifications, even to Supreme Court Justices and to the Court as a whole, as well as to other law-making institutions.

The breadth of the idea of opportunity cost is illustrated by the fact that all activities unavoidably involve an opportunity cost. Thus buying a Lamborghini, going to the movies, obtaining a legal education, scouring a judicial record, investigating claims made in a legislative history or in the Federal Register, evaluating an empirical claim of fact, assessing an administrative agency's prediction, taking a stroll, and even contemplating the

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judgments in particular, and even unpredictable shifts in the patterns of such deference, can introduce unnecessary uncertainties, with socially damaging consequences. *See id.* at 625–26 (“court-made changes in laws . . . can introduce new uncertainties and problems that limit economic growth”). For a classic discussion of several forms and senses of ‘uncertainty,’ see FRANK H. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* (Signalman Publishing 2009) (1921). Professor Knight also distinguishes the idea of opportunity cost. *Id.* at 36.

<sup>28</sup> For extended discussion, see, for example, IX GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES* 150 (1985).

<sup>29</sup> *See, e.g.,* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 33 (1991) (“[A] wave of articles by legal scholars in various areas of law has argued that interest group theory justifies changing judicial review to make it less deferential to political outcomes”); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 226–27 (1986) (identifying various advocates of a judicially “activist approach to non-public-regarding statutes”).

<sup>30</sup> *See* James M. Buchanan, *Opportunity Cost*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 7296, 7298–99 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008), available at [http://www.dictionaryofeconomics.com/article?id=pde2008\\_O000029&edition=pde2008\\_pde2008&field=content&q=&topicid=&result\\_number=6](http://www.dictionaryofeconomics.com/article?id=pde2008_O000029&edition=pde2008_pde2008&field=content&q=&topicid=&result_number=6). Opportunity costs are in the most basic sense borne by the chooser, and in that limited sense not shiftable to other persons or to the public in general. But as Professor Buchanan recognizes, “[t]here may, of course, be consequences of a person’s choice that impose utility losses on other persons.” *Id.* at 3.

starry heavens above and the moral law within,<sup>31</sup> all involve an opportunity cost.

Among the above examples, the Lamborghini, the movie ticket, and the legal education involve costs in the much more familiar form of explicit financial payments to the provider of the good or service in question. But those goods and services, along with the various judicial activities, the stroll, and even the contemplation, also involve opportunity costs.

For our purposes, we can define opportunity cost, at least by analogy, as the value of the chooser's best available alternative to the activity actually chosen.<sup>32</sup> Buying a Lamborghini may, for example, preclude buying a condo, or retiring a year earlier. Going to the movies may rule out an afternoon of game-playing in one's basement, or taking a stroll. Taking a stroll may require giving up grass-cutting income, or a movie. Contemplation may, as its opportunity cost, in a rare case, involve the loss of thousands of dollars in income.

Law students recognize not only the payment of tuition, but opportunity costs in the form of lost or reduced gainful employment while studying law full time. Most importantly for our purposes, Supreme Court personnel should recognize the opportunity costs of engaging in activities like scouring a judicial record, scrutinizing a legislative history or the Federal Register, assessing empirical claims, or second-guessing an administrative prediction.<sup>33</sup>

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<sup>31</sup> For an endorsement of the latter activities, see IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (1788), reprinted in *PRACTICAL PHILOSOPHY* 133, 269 (Mary J. Gregor trans., 1996).

<sup>32</sup> We do not here need to specify how value is to be measured, as long as we are open not only to the subjective value to the chooser, but to the value, in the form of utility or otherwise, to other persons or groups, including those affected favorably or unfavorably by the choice of activity in question. And we should recognize that the best single alternative forfeited by a particular choice may actually be complex, multi-faceted, or somehow plural. For brief mainstream discussions of the idea of opportunity cost, see, for example, Buchanan, *supra* note 30, as well as N. GREGORY MANKIEW, *PRINCIPLES OF MICROECONOMICS* 54, 260 (6th ed. 2011); Robert E. Hoskin, *Opportunity Cost and Behavior*, 21 *J. ACCT. RES.* 78, 78 (1983) (“[A]lthough the evidence is somewhat mixed, decision makers seemed to ignore or underweight [opportunity] costs,” particularly as “opportunity cost information is oftentimes unavailable or not collected”); Oscar W. Jensen, *Opportunity Costs: Their Place in the Theory and Practice of Production*, 3 *MANAGERIAL & DECISION ECON.* 48, 48 (1982) (referring to opportunity cost discussions that do not involve a market, or indeed any person other than the decision-maker in question); David R. Henderson, *Opportunity Cost*, *LIBRARY OF ECON. AND LIBERTY*, <http://www.econlib.org/library/Enc/OpportunityCost.html> (last visited Oct. 11, 2013) (noting that costs that are incurred inescapably, regardless of whether one chooses the original activity or the otherwise foregone activity, do not count as opportunity costs of the original activity). For further research on the extent to which opportunity costs, which are both important and usually inexplicit, are ignored, see Shane Frederick et al., *Opportunity Cost Neglect*, 36 *J. CONSUMER RES.* 553, 554–60 (2009).

<sup>33</sup> For discussion of possible examples, see *infra* Parts III.B–D. Again, opportunity costs, strictly, are directly borne by the choosing party, and not by those affected by the choice, but this does not seem significant for our purposes, as suggested in *supra* note 30.



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Supreme Court Justices should, crucially, be more aware of the possibility that some of the activities they choose to engage in may have, from a public perspective, unnecessarily and unjustifiably large opportunity costs.

Such considerations are admittedly likely to be vague, and often impossible to meaningfully quantify. Similarly hazy are the possible methods by which the Court could be informally encouraged to avoid unnecessarily large “public,” or what we might call third party, opportunity costs.<sup>34</sup> But the stakes are large enough to justify persevering along those lines, despite the inevitable imprecision and the recourse to analogy.

By itself, the idea of an analogy to opportunity cost is close to the heart of the analysis of Supreme Court practice below. But opportunity cost applies even to a single individual, or a single institution, in utter isolation—like Robinson Crusoe himself.<sup>35</sup> The idea of opportunity cost can be applied to the Court, and to its personnel, in a more realistic way by recognizing that other institutions also act as sources of law.<sup>36</sup> When we place the idea of opportunity cost in the context of an analogy to the idea of comparative advantage,<sup>37</sup> the value of thinking about the Supreme Court’s opportunity costs can be further expanded.

C. *The Normative Principle of Comparative Advantage and the Proper Role of the Supreme Court*

In the loose sense required for our purposes, an individual<sup>38</sup> may, or may not, hold a comparative advantage<sup>39</sup> with respect to other actors in

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<sup>34</sup> See Buchanan, *supra* note 30, at 1–2; Hoskin, *supra* note 32, at 79.

<sup>35</sup> See Jensen, *supra* note 32, at 48, for the Robinson Crusoe reference.

<sup>36</sup> See *supra* text accompanying notes 13–19.

<sup>37</sup> This is not at all to suggest that an individual person, or a single institution, cannot hold a comparative advantage in producing some good or service. See, e.g., Michael Sattinger, *Comparative Advantage in Individuals*, 60 REV. ECON. & STAT. 259, 259 (1978); Edward M. Scahill, *Did Babe Ruth Have a Comparative Advantage as a Pitcher?*, 21 J. ECON. EDUC. 402, 402 (1990) (“Even if a player were to have an absolute advantage over his teammate at two positions, . . . he should specialize in that position for which his advantage is greater. A teammate should fill the position for which the former player has an absolute advantage, but a comparative disadvantage.”).

<sup>38</sup> See *id.*

<sup>39</sup> For textbook introductions to the idea of comparative advantage, see, for example, PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 30–34 (2d ed. 2009); N. GREGORY MANKIEW, *PRINCIPLES OF ECONOMICS* 54–55 (6th ed. 2011). See also Ronald Findlay, *Comparative Advantage*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 1 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008), available at [http://www.dictionaryofeconomics.com/article?id=pde2008\\_C000254&edition=current&q=comparative%20advantage&topicid=&result\\_number=1](http://www.dictionaryofeconomics.com/article?id=pde2008_C000254&edition=current&q=comparative%20advantage&topicid=&result_number=1); Morgan Rose, *A Brief History of the Concept of Comparative Advantage*, LIBRARY OF ECON. AND LIBERTY (Aug. 6, 2001), <http://www.econlib.org/cgi-bin/printarticle2.pl?file=Columns/Teachers/comparative.html>.

producing some good or service. The idea of a comparative advantage requires clarification, however. After all, there is a literal sense in which any advantage implies a comparison between at least two actors.

The simplest kind of advantage is not what the economists call a comparative advantage. The simplest kind of advantage is instead known as an absolute advantage. One producer of a particular good has an absolute advantage over another producer of that good if the first producer is simply faster, more efficient, more productive, or “better,” at producing that good.<sup>40</sup>

Consider an example. Let us suppose that the Supreme Court can produce a critical assessment of a fact-and-policy-laden legislative history in three days, whereas an administrative agency would require at least four days to produce a comparable quality assessment of the same legislative history. In such a case, the Supreme Court would hold an absolute advantage over the agency in producing the good—the assessment—in question.<sup>41</sup>

On that basis, we might be tempted to recommend that since the Supreme Court is faster or “better” at such a task, the Court, rather than the agency—or any other entity less efficient at such a task than the Court—should normally perform the task in question. But then, by analogy, we notice that professional athletes do not normally take on other paid work involving, say, dexterity, coordination, or lifting ability, even when their time is available—and even if we assume that the professional athlete could do the job much more efficiently than any other available candidate.<sup>42</sup> Athletes thus do not do, even for money, everything at which they are clearly best at doing.

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<sup>40</sup> Among the classic economists, Adam Smith is often associated with the idea of absolute advantage, and David Ricardo with the idea of comparative advantage. For brief discussions of absolute versus comparative advantage, see, for example, Monica Das, *Absolute and Comparative Advantage*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 2 (William A. Darity, Jr. ed., 2d ed. 2008), available at [www.skidmore.edu/~mdas/AbsoluteandComparativeAdvantage.pdf](http://www.skidmore.edu/~mdas/AbsoluteandComparativeAdvantage.pdf); *Economics A-Z*, ECONOMIST, [www.economist.com/economics-a-to-z/c#node-2159328](http://www.economist.com/economics-a-to-z/c#node-2159328) (last visited Oct. 11, 2013). For some complications, see Edmund Conway, *Ricardo's Theory Shows That Win-Win Situations Do Exist*, THE TELEGRAPH (Sept. 1, 2009, 5:55 PM), <http://www.telegraph.co.uk/finance/economics/6122712/Ricardos-theory-shows-that-win-win-situations-do-exist.html>. A law, or a kind of law, could for our purposes count as a relevant “good.”

<sup>41</sup> As descriptions of the way the world operates, simple models of trade as reflecting either absolute or comparative advantage principles are likely to be unrealistic in various ways. See the sources cited *supra* note 40. As well, the areas in which a producer holds an absolute or comparative advantage may well change over time for a variety of reasons. See *id.*; SUNY LEVIN INST., TRADE AND GLOBALIZATION 8–23 (2013), available at <http://www.globalization101.org/uploads/File/Trade/tradeall.pdf> (discussing absolute and comparative advantages as affected by, among other factors, government policies).

<sup>42</sup> But see *Snapper Drafts Brett Favre to Promote its Lawn Mowers*, GROUNDS MAINTENANCE, [http://grounds-mag.com/news/snapper\\_brett\\_favre/](http://grounds-mag.com/news/snapper_brett_favre/) (last visited Oct. 11, 2013) for the case of Brett Favre and the utility derived from cutting his own lawn, with or without financial compensation.

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The idea of comparative, as distinct from absolute, advantage helps explain this. The idea of comparative advantage suggests that even if the Supreme Court could do every judicial task, including legislative fact assessment, better than any other institution, the public well-being, overall, would actually be better served if the Court avoided performing many such tasks. Other institutions, including Congress, agencies, state legislatures, arbitrators, and other courts may well hold crucial comparative advantages, relative to the Supreme Court, even if the Supreme Court holds an absolute advantage in all such tasks. The Court may be hugely superior at certain tasks, and only slightly superior at other tasks, at which it does not hold a comparative advantage.

The important idea is that comparative, as distinct from absolute, advantage is a matter of comparing the opportunity costs of two producers of some particular good. Generally, one entity holds a comparative advantage in producing a good where it can do so with a lower opportunity cost<sup>43</sup> than the opportunity cost that is incurred by another entity in producing, at least roughly, the same good. We thus ask how much value must one entity give up, or not produce, in choosing to produce the particular good in question, compared to the value that a competing producer must give up, or not produce, in choosing to produce that same or similar good. Where an entity holds a great advantage over other producers of some goods, but a lesser advantage in producing other goods, it will not hold a comparative advantage in the latter cases.

Thus the professional athlete may be better at heavy landscaping tasks than, say, a college student seeking summer income, and thus may hold an absolute advantage. But the opportunity cost of landscaping, to the professional athlete, may be missing a lucrative professional game, or a crucial practice, in which thousands of fans and much value may be somehow invested. The opportunity cost of landscaping for the college student, on the other hand, might be a substantially lesser amount—perhaps foregone barista income for that same period of time.<sup>44</sup>

What this suggests, normatively, is that the professional athlete, and the college student, and the public in general, comprising sports fans as well as coffee drinkers, might well all be better off if the professional athlete chooses

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<sup>43</sup> See *supra* Part II.B.

<sup>44</sup> For a quick recounting of the basic logic involved here, see, for example, Paul M. Johnson, *Comparative Advantage, A GLOSSARY OF POL. ECON. TERMS*, [www.auburn.edu/~johnspm/gloss/comparative\\_advantage](http://www.auburn.edu/~johnspm/gloss/comparative_advantage) (last visited Oct. 11, 2013). Notice that the opportunity cost usually refers to the highest value (realistically) available alternative activity, which otherwise could have been engaged in. We might instead ask about the value of the activity that the actor in question actually would have chosen. But this approach would in its own way be no less speculative. For our purposes, focusing on what an actor supposedly would have done, rather than on the best that they realistically might have done, would reduce the normative guidance-value of our inquiry.

not to do the heavy landscaping work, despite his superiority at that task.<sup>45</sup> The overall value of what is jointly produced by both parties can be increased if the professional athlete thus limits the scope of his activities, regardless of his broader talents.

The idea of comparative advantage suggests, by analogy, that even if we assume, say, that the Supreme Court is better than any other institution at assessing complex matters of legislative fact<sup>46</sup> and policy, the Court may well be best advised, for the sake of the greater overall well-being, to not engage in such an activity, or at least to substantially defer to the judgments of other entities in such matters.

The key point is this: while the Court is busily and expertly engaged in just such activities, it is necessarily foregoing the performance of other tasks of great public value—perhaps far greater public value than some other entity would have to forego creating if that entity were primarily responsible for assessing complex matters of legislative fact and policy.

That is, the opportunity cost of the Court's devoting its time, attention, effort, and other resources to more or less re-determining matters of legislative fact, compared to the opportunity cost of a specialized agency's making or reviewing its own such determinations—whatever we count as a product corresponding to the Court's result—is likely to be greater in the case of the Court. The public value of the Court's most significant alternative activity thereby foregone is likely to be greater than that of the agency or other governmental entity. The Court should thus typically avoid or minimize engaging in just this sort of legislative fact re-determination process, given its typical lack of a comparative advantage in this area.

One would then naturally wonder where in general the Supreme Court is likely to have a comparative advantage, if it does not have a comparative advantage in investigating and assessing the cogency of arguments over legislative fact and policy. Again, hard and indisputable data on such matters will unfortunately not be available.<sup>47</sup>

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<sup>45</sup> One entity's specializing where it has a comparative advantage, leaving the production of other goods to other producers where it has an absolute but not a comparative advantage due to its higher opportunity cost, may benefit both entities and increase overall value. See SUNY LEVIN INST., *supra* note 41; Gregory W. Bowman, *The Comparative and Absolute Advantages of Junior Law Faculty: Implications for Teaching and the Future of American Law Schools*, 2008 BYU EDUC. & L.J. 171, 183–84 (discussing cases in which all parties benefit).

<sup>46</sup> For a brief discussion and citations to some of the literature on matters of complex legislative fact and policy, see *infra* Parts III.A.–III.B.

<sup>47</sup> See Hoskin, *supra* note 32, at 78. Consider also complications such as possible self-serving motives, contrary to the public well-being, that may taint the products of any decision-making entity. See, for example, the issues of judicial deference to an agency's determination of the scope of its own jurisdiction posed in *City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 524 (2012), and the question of judicial deference to arguably self-serving administrative agency determinations, as discussed in Timothy K. Armstrong,

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But we might well imagine that every day devoted by an individual Justice, or by the Court, to pursuing just such matters must unavoidably be one fewer day devoted to resolving the nation's most disruptive, uncertain, and otherwise costly basic constitutional tradeoffs, at the level of principle. Or one fewer day of resolving the most socially costly splits in the federal circuits. Or even one fewer day invested in enhancing the persuasiveness or guiding power of the Court's constitutional opinions. It is not difficult to imagine that the Supreme Court ordinarily holds a comparative advantage over other entities at one or more of the latter such tasks. We further explore these possibilities below.

### III. COMPARATIVE ADVANTAGE, OPPORTUNITY COST, AND THE COURT'S CHOICES AMONG SPECIFIC TASKS AND METHODS

#### A. *The Court's Discretionary Tasks in General*

Within broad limits, the Court has a choice of tasks and methods. The Court, it has been said, "is awash in an ocean of discretion."<sup>48</sup> The public value created by their choices of tasks and methods, and the execution thereof, is, however, not unconstrained. Judge Richard Posner has colorfully argued that

the Justices are less representative of the American public than elected officials are. They also lack ready access to much of the information that elected officials obtain routinely in the course of their work. They have much smaller, less specialized staffs, and as lawyers they have professional biases and prejudices that can distort their legislative judgments. Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring an exaggerated opinion of their ability and character.<sup>49</sup>

More specifically, the breadth of the Supreme Court's assumed responsibilities has not always prompted the Justices to develop expertise in, for example, statistical methodologies, or in the key social sciences.<sup>50</sup>

Is it possible, though, to imagine a Supreme Court that tends, more than it does currently, to specialize where it likely holds a comparative advantage, and to avoid tasks where it likely does not? Perhaps Supreme Court Justices are in this respect open neither to changes in their incentives, nor to

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*Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 206–07 (2004).

<sup>48</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 272 (2008).

<sup>49</sup> *Id.* at 306.

<sup>50</sup> *See id.* at 312.

reassessing their practices and priorities at their own initiative. Perhaps the Justices, like many other long-term government officials, tend to maximize their own preference satisfaction, as potentially distinct from the public well-being.<sup>51</sup> Or perhaps the Justices are devoted chiefly to advancing a single goal: “making the law more consistent with their policy preferences.”<sup>52</sup> And perhaps “[n]either mass public opinion, the views of relevant elite groups, nor any other segment of the world outside the Court has control over the Justices’ choices.”<sup>53</sup>

But even if this is all true, it is still possible that increasingly focusing its efforts on matters where the Court holds a comparative advantage could tend to enhance the Court’s influence, esteem, and the Court’s own institutional satisfaction. Supreme Court Justices certainly may not all share identical priorities.<sup>54</sup> They may, like most of us, pursue a variety of goals and values.<sup>55</sup> Among these goals may be not only promoting their basic policy preferences,<sup>56</sup> and promoting their reputation or level of respect among prestigious evaluators,<sup>57</sup> but genuinely “seeking to serve the public interest”<sup>58</sup> as well.

Each of these latter goals could promote greater judicial attentiveness to considerations of comparative advantage. Admittedly, some Supreme Court Justices might be reluctant to surrender any of their current judicial tasks to any other lawmaking entity.<sup>59</sup> But it is possible that the reputation of and the respect accorded the Court by elite groups could eventually come to depend more significantly on judgments as to comparative advantage. Or the Court could increasingly appreciate how considerations of comparative advantage might promote its most basic legal preferences, as well as its conception of the public

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<sup>51</sup> See, e.g., Morris Silver, *Economic Theory of the Constitutional Separation of Powers*, 29 PUB. CHOICE 95, 96 (1977).

<sup>52</sup> LAWRENCE BAUM, MOTIVATION AND JUDICIAL BEHAVIOR 6 (Mar. 30, 2007), available at [www.faculty.virginia.edu/judging/Documents/motivation.lb.pdf](http://www.faculty.virginia.edu/judging/Documents/motivation.lb.pdf); Lawrence Baum, *What Judges Want: Judges’ Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 755 (1994).

<sup>53</sup> Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1580 (2010).

<sup>54</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 572 (7th ed. 2007).

<sup>55</sup> See, e.g., POSNER, *supra* note 48, at 11 (citing “income, power, reputation, respect, self-respect, and leisure”); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1531 (2009) (the Supreme Court as “a group of nine judges who make strategic decisions that are motivated by a wide range of preferences, values, and commitments”).

<sup>56</sup> See sources cited *supra* note 52.

<sup>57</sup> See, e.g., POSNER, *supra* note 48, at 11.

<sup>58</sup> Anthony Downs, *A Theory of Bureaucracy*, 55 AM. ECON. REV. 439, 442 (1965) (referring, classically, to bureaucratic officials generally, rather than to judges or Supreme Court Justices in particular).

<sup>59</sup> At a more general level, see *id.* at 449 (ongoing struggles between agencies regarding their range of “territory”).

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good.<sup>60</sup> The Court might also increasingly appreciate that obtaining reliable information, especially in technical or social-scientific-intensive areas, is costly<sup>61</sup> for the Court, in various ways.

The Court's own caseload, or its gate-keeping criteria, could easily be adjusted to steer the Court's efforts toward the kinds of activities where the Court is likely to hold a comparative advantage.<sup>62</sup> The relevant Supreme Court Rule refers specifically to the existence of "an important federal question" in two separate sections,<sup>63</sup> and to "an important question of federal law" in a third section.<sup>64</sup> The Rule specifically discourages petitions alleging merely "erroneous factual findings."<sup>65</sup> With regard to matters such as circuit splits on clearly less significant matters, if such splits must be resolved at all, one can imagine that a comparative advantage at such a task might be held either by Congress, by the outlier circuit or circuits, or by a hypothetical court established to resolve less than momentous circuit splits.<sup>66</sup>

At both the initial caseload or gate-keeping stages, and then beyond, the Court would be well-advised to focus its institutional time and energy, and its other resources, on activities in which, as far as can reasonably be determined, the Court likely holds a comparative advantage over alternative producers of law—and correspondingly, to avoid, to the extent possible, those activities in which it does not hold a comparative advantage.

Thus, as we have suggested above,<sup>67</sup> the Court should typically avoid self-directed research into disputable matters of legislative fact and social science. The Court should typically avoid sifting complex and indeterminate

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<sup>60</sup> See *supra* notes 56–58 and accompanying text.

<sup>61</sup> See Downs, *supra* note 58, at 445. See also *id.* at 442 (noting that "[d]ecisionmakers have only limited capabilities regarding the amount of time they can spend making decisions, the number of issues they can consider simultaneously, and the amount of data they can absorb regarding any one problem").

<sup>62</sup> See SUP. CT. R. 10.

<sup>63</sup> *Id.* at R. 10(a)–(b).

<sup>64</sup> *Id.* at R. 10(c). Not all conflicts among circuit court decisions, or other decisions addressing federal constitutional issues, regardless of their degree of compatibility with Supreme Court case law, need be thought of by the Court as "important."

<sup>65</sup> *Id.*

<sup>66</sup> For an exceptionally interesting general discussion of the Court's use of its certiorari case selection process, see *United States v. Pleau*, 680 F.3d 1, 23 (1st Cir. 2012) (en banc) (Torruella, J., dissenting), *petition for cert. filed*, 81 U.S.L.W. 3127 (Aug. 21, 2012). For further discussion, see LEE EPSTEIN, JEFFREY SEGAL & HAROLD SPAETH, *SETTING THE NATION'S LEGAL AGENDA: CASE SELECTION ON THE U.S. SUPREME COURT 1*, available at <http://epstein.usc.edu/research/cert.pdf> (last visited Oct. 4, 2013) (Court is rejecting 99% of requests for review via certiorari, and annually determining less than 100 such cases on the substantive merits); Frederick Schauer, *Is It Important To Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 78–86 (2010).

<sup>67</sup> See *supra* text accompanying notes 46–48.

legislative histories and administrative records. But beyond the legislative record, the Court should also avoid even brief, limited, unguided forays into factual research, particularly where the opportunities for expert critique of the Justices' assumptions and findings are limited.

These general recommendations are not in the slightest based on the assumption that the Justices are less than fully competent at such tasks. Our assumption could even be that the Court invariably executes such tasks superbly well, and indeed "better" than any other governmental or legal entity. The excellence of the Court at such tasks is for our purposes not in issue. The problem is instead that the principle of comparative advantage, building on differences in the opportunity cost of engaging in such activities, suggests that the public well-being could be enhanced if the Court left such activities to other entities when the Court appears to lack a comparative advantage.

*B. Judicial Review of Legislative Factfinding*

Let us briefly expand on these considerations. The Court is, as we have seen,<sup>68</sup> reluctant to review findings of ordinary adjudicative fact, in the sense of what particular events actually occurred in a given case.<sup>69</sup> That is, the Court typically avoids re-determining which of two cars had the red light, or entered the intersection first. But the Court's attitude toward re-determining, and even investigating, the legislative facts that inform policy judgments,<sup>70</sup> is more ambivalent. Legislative facts are often broader questions of social science, such as the effects of violent video games, or the consequences of decriminalizing a drug. The Court's attitude seems to vary from a principled rejection of re-determining legislative facts<sup>71</sup> to a more aggressive, noticeably less deferential attitude toward legislative fact determinations by other entities.<sup>72</sup> A number of commentators have, not surprisingly, focused their attention on improving—as distinguished from limiting—the Court's own determinations of legislative fact based on "general data."<sup>73</sup> Common sense admittedly suggests that

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<sup>68</sup> See SUP. CT. R. 10; see also *supra* note 65 and accompanying text.

<sup>69</sup> See Kenneth C. Davis, *An Approach to the Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942), cited in Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 111–12 (1988).

<sup>70</sup> See sources cited *supra* note 69.

<sup>71</sup> See, for example, the logic of *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 463–64 (1981) (environmental effects of cardboard and plastic milk cartons).

<sup>72</sup> See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669–711 (1981) (judicially reassessing the weight, as well as the legitimacy, of the putative safety interest as actually furthered by the state statute at issue); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 771–781 (1945) (safety consequences of varying limits on train lengths).

<sup>73</sup> See Woodhandler, *supra* note 69, at 113 (citing the views of several proponents of reform of the judicial response to questions of legislative fact).



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“improving” is often a good thing. From our perspective, however, such reform would amount to the Court’s improving its performance of tasks that the Court typically should not undertake regardless.

C. *Court Review of Legislative History*

In a loosely related way, the familiar debates over whether the Court’s scouring of legislative history is largely just a “makeweight” activity that mostly reinforces prior convictions<sup>74</sup> are, for our purposes, beside the point. Whether the criticisms of recourse to legislative history presented by Justice Scalia<sup>75</sup> are valid or not is similarly beside the point. Even if such problems could be overcome, and the Court were “best” at parsing legislative history, it is likely that some other entity, such as the administrative agency most directly involved in a case, faces a lower opportunity cost in producing its own assessment of legislative history, than does the Supreme Court. In the same length of time, and for the same effort, the Court could, instead, say, uniquely promote an important constitutional right, or even avoid a constitutional disaster.

In contrast, the specialized agency, if not assessing the legislative history, might well maximize the public value of its time and energy by, let us reasonably say, doing some fraction of the work necessary to begin to promulgate a rule pursuant to a statute within its purview. The agency’s opportunity cost would thus likely be, in comparison with the Supreme Court’s, modest. In such circumstances, the public well-being would evidently be best served by leaving the interpreting of legislative history largely to the agency, given its likely lower opportunity cost.

D. *Supreme Court Extra-Record Research*

A similar analysis, and a similar conclusion, are involved in typical cases of research into factual issues outside the judicial record, undertaken by

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<sup>74</sup> For a noteworthy debate on this point, see the opinions of Justices Stevens and Scalia in *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276–79 (1996) (Stevens, J., concurring); *Id.* at 279, 280–81 (Scalia, J., concurring in part and concurring in the judgment). For commentary and perspectives, see Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206–07 (2000).

<sup>75</sup> See *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 267 (2004); *Bank One Chicago*, 516 U.S. at 279–81 (Scalia, J., concurring in part and concurring in the judgment). For further critique and some responses, see Alex Kozinski, *Should Reading Legislative History Be An Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813–15 (1998). For an influential more positive view, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992).

Supreme Court Justices and their staff.<sup>76</sup> Some, but not all, of the crucial decision-making in such cases can be delegated to staff. Consider the recent example of Justice Breyer's extra-record research in *Brown v. Entertainment Merchants Ass'n*,<sup>77</sup> a case involving state regulation of the sale or rental of violent video games to minors.<sup>78</sup> In *Brown*, Justice Breyer discussed the nature of his extra-record research, the extent of the research delegation to staff, and some important elements of his research criteria and methodology.<sup>79</sup>

Justice Breyer's extra-record social science research involved, at a minimum, his own characterization of each of a substantial number of presumably complex research articles as either supporting or not supporting the California Legislature's concern for the well-being, primarily, of the minors in question.<sup>80</sup> Doubtless the overall research task can in a sense today be performed—by any genuinely qualified person—faster, more thoroughly, and

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<sup>76</sup> For discussions of this practice from a variety of perspectives, see, for example, Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1263 (2007) (“[J]udges facing unfamiliar and complex scientific admissibility decisions can and should engage in independent library research to better educate themselves about the underlying principles and methods”); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 26–35 (2011); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1305–11 (2012); Adam J. Siegel, Note, *Setting Limits On Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium*, 86 CORNELL L. REV. 167, 168 (2000) (“[E]ven if such independent factual inquiries by judges may increase the likelihood of ‘correct’ admissibility determinations, such activities run counter to the spirit of our judicial system, which encourages the vigorous adversarial presentation of evidence and affords all parties unbiased and impartial gatekeepers”). For a crucial underlying endorsement of extensive appellate judicial research in general, see *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) (“[o]ur present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions”). See also *id.* at 69 (Leventhal, J., concurring).

<sup>77</sup> 131 S. Ct. 2729, 2761, 2771–72 (2012) (Breyer, J., dissenting).

<sup>78</sup> See *id.* at 2761–62 (Breyer, J., dissenting).

<sup>79</sup> Justice Breyer prefaced his elaborate bibliographical listings with the following remarks:

With the assistance of the Supreme Court Library, I have compiled these two appendixes listing peer-reviewed academic journals on the topic of psychological harm resulting from playing violent video games. The Library conducted a search for relevant articles on the following databases. . . . The following search terms were used. . . . After eliminating irrelevant matches based on title or abstract, I categorized these articles as either supporting . . . or not supporting/rejecting the hypothesis that violent video games are harmful. . . . Many, but not all, of these articles were available to the California Legislature or the parties briefing this case. I list them because they suggest that there is substantial (though controversial) evidence supporting the expert associations of public health professionals that have concluded that violent video games can cause children psychological harm. . . . And consequently, these studies help to substantiate the validity of the original judgment of the California Legislature, as well as that judgment's continuing validity.

*Id.* at 2771–72 (Breyer, J., dissenting).

<sup>80</sup> See *id.* (Breyer, J., dissenting).

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often more cheaply than several generations ago.<sup>81</sup> But the increased speed with which such tasks can be performed by nearly any technically competent researcher does not tell us much about the opportunity costs of someone's doing the task, or about, specifically, relative changes in the opportunity cost of different persons' doing the task.

In the case of Justice Breyer's extra-record research in *Brown*, the payoff of the research was said to be (further) evidence that there are "substantial,"<sup>82</sup> though "controversial,"<sup>83</sup> grounds for the California statute in question. But most of the studies were, as Justice Breyer notes, already citable by parties or expert amici, and available to the California Legislature at the time of statutory enactment.<sup>84</sup>

As well, taking merely the purported bottom-line of each article at face value, with each article counted as no less and no more than one, meta-analyses aside, may be appropriate for some purposes, but less appropriate for other purposes. It may not be clear that we should expect serious statistical or other methodological flaws at equal rates in the studies that find, and in the studies that do not find, any interesting correlations. The degree to which even a large number of valid studies genuinely tell us something about the phenomenon we really care about, rather than about merely some loose surrogate phenomenon instead, may also be surprisingly modest.<sup>85</sup>

But these concerns are for our purposes actually minor. They suggest mainly that the value of perusing such studies may be limited. And our primary concern is again not with whether Supreme Court Justices, Congress,<sup>86</sup> or state legislatures ordinarily best handle such empirical studies, in the course of producing their legal product. We may again merely assume that the Court handles such empirical materials better than, say, legislatures do in producing their own legal product. We assume that at some stage, such research is worth doing. Our primary concern is instead with the comparative opportunity costs of the Court and of the legislature or the administrative agency in producing

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<sup>81</sup> See, e.g., Larsen, *supra* note 76, at 1290–91. We thus do not attempt to place any weight on the fact that *Brown* was argued on November 2, 2010, and not decided until June 27, 2011.

<sup>82</sup> *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 2771.

<sup>85</sup> See John P. A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 696, 696–701 (2005), available at <http://www.plosmedicine.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pmed.0020124&representation=PDF>. See also Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J. (Summer 2010), [www.city-journal.org/printable.php?id=6330](http://www.city-journal.org/printable.php?id=6330).

<sup>86</sup> For a thoughtful perspective on the optimal roles of the Supreme Court and Congress in the broader realm of social fact-finding, see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170, 1206 (2001). See also *id.* at 1206 ("Congress is better positioned to find social facts, but it is far from clear that Congress has the incentives to make full use of its superior factfinding resources.").

their respective corresponding legal products. In cases of extra-record research, it seems unlikely that the Court, or its members, typically holds a comparative advantage.

Certainly, rational persons facing a choice among tasks will concern themselves with more than just opportunity costs. It is possible to believe that in a given case, a general kind of case, or even in all cases, the Court's legal product will be more socially valuable—a better product—than the corresponding product of any other law-creating entity. Or one could believe to the contrary. A case can certainly be made that American judicial review in general has historically led to decidedly mixed results.<sup>87</sup>

In any event, and regardless of what we think about the value of one form or another of judicial review, the value of the idea of comparative advantage remains. We can call any Supreme Court decision the same product, a better product, or a worse product than the corresponding lower court decision, legislative statute, or administrative rule. Such characterizations make little difference for our purposes. The Court need not be producing the same product as other institutions for the idea of comparative advantage to apply. David Ricardo's classic example of England and Portugal's producing wine and cloth,<sup>88</sup> and engaging in trade in these items, illustrates this point. No assumption need be made that Portuguese wine—in general, or any particular variety thereof—is the same product as English wine.<sup>89</sup> Portuguese wine may be more valued than English wine. We may think with similar freedom about the differences between Supreme Court and the law-products of other entities, while still applying, by analogy, the idea of comparative advantage.

Of course, David Ricardo's discussion<sup>90</sup> considers possible overall benefits accruing from explicit trade or exchange between England and Portugal. In the *Brown*<sup>91</sup> case, by contrast, neither the Court nor Justice Breyer even attempted to engage the California Legislature or anyone else in anything like a voluntary, explicit exchange of one or more goods. The Court majority in *Brown* at most rejected the "offer" of the California legislative product.<sup>92</sup>

The absence of any explicit trade, among law-producing institutions, of multiple goods merely means, as we have said,<sup>93</sup> that we are using the idea of

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<sup>87</sup> See the numerous examples alluded to in R. George Wright, *The Distracting Debate Over Judicial Review*, 39 U. MEM. L. REV. 47, 53–56 (2008).

<sup>88</sup> See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 119–43 (Dover 2004) (1817).

<sup>89</sup> For a mixed picture of the results of recent English winemaking, see *The History of English Wine*, [www.english-wine.com/history.html](http://www.english-wine.com/history.html) (last visited Oct. 3, 2013).

<sup>90</sup> See RICARDO, *supra* note 88, at ch. 7.

<sup>91</sup> See *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738–42 (2011).

<sup>92</sup> See *id.* and accompanying text.

<sup>93</sup> See, e.g., *supra* note 8 and accompanying text.

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comparative advantage by analogy, in an extended sense, for its considerable power in exposing the limits of common sense.

For our purposes, it is irrelevant whether the public benefits of institutions' focusing on their relative opportunity costs, and on pursuing tasks at which they hold a comparative advantage, accrue through explicit trade or not. All else equal,<sup>94</sup> professional athletes should not, for the sake of the public well-being, do their own law maintenance, given the relatively great opportunity cost of doing so. Their hiring or bartering with anyone else to do such work is secondary. And an analogous conclusion could be reached in contexts in which the Supreme Court expends its resources but is not engaged in explicit trading with other law-producing entities.

It is also possible to investigate the opportunity costs of the Court's reassessing matters of legislative facts, of scouring legislative histories, and of researching technical issues beyond the accumulated record. In many such cases, we may conclude that even if the Court is in some sense better at such an activity than any other law-making entity, the opportunity cost for the Court—perhaps resolving on principled, doctrinal grounds a deeply costly circuit split on a practically vital matter—seems disturbingly high. And this conclusion would be of fundamental importance.

But the fullest applications of the doctrine of opportunity cost and comparative advantage clearly arise when we have a product of a legislature or of an agency on the one hand, and the more or less comparable<sup>95</sup> product of the Supreme Court on the other. In such cases, we can investigate the respective value of whatever the legislature or the agency<sup>96</sup> on the one hand, and the Court

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<sup>94</sup> See *supra* note 42 and accompanying text.

<sup>95</sup> The most readily comparable cases will typically involve an administrative agency's adjudication of a case, followed, eventually, by the Supreme Court's adjudication of the same case. In these cases, we can ask what the Supreme Court could have done instead if it had not taken the case, and we can ask, at least, what the administrative agency could have done if it had not decided the case at some relatively high internal agency level, with the Court not becoming involved at a later point.

<sup>96</sup> A number of the legion of *Chevron* cases involve some sort of attempt by both a specialist administrative agency and the Supreme Court to produce law in the form of an interpretation of a term in a statute, or a determination of whether a particular policy can count as legally reasonable. Deference issues can amount to a question of who is to produce the legal product. The seminal case is *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984). For a sampling of the various division-of-labor or law-production permutations, see *United States v. Home Concrete & Supply*, 132 S. Ct. 1836, 1843 (2012) (Breyer, J., plurality opinion) (Congress as sometimes explicitly or implicitly determining the proper judicial versus agency division of labor through leaving a legislative gap); *Mayo Foundation for Medical Education v. United States*, 131 S. Ct. 704, 713–14 (2011) (implicit delegation by Congress to agency, resulting in *Chevron* deference by the Court to the reasonable agency rule); *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009) (agency must present permissible and good reasons for a conscious change in agency policy); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007) (discussing some implicit indicators of congressional intent that the courts should defer to the relevant agency); *Gonzales v. Oregon*, 546 U.S. 243, 268–69 (2006) (under the circumstances,

on the other, could have realistically produced if they had left the matter in question more largely to another entity, or even not produced the legal product at issue. Precision in such analyses will of course never be attainable. But in some cases, we may reach plausible and illuminating results.

The easiest and clearest such cases will typically be those cases to which the Supreme Court has devoted significant time and effort, but which are either relatively inconsequential, in terms of doctrinal constitutional and all other values, or else that could be decided, with arguably equal overall public value, for either party. Consider the opportunity cost of such cases. Those cases could have been replaced on the Court's docket by cases that allow for the possibility of the important advancement or defense of basic doctrinal constitutional rights, or by cases that allow for avoiding substantial losses in public well-being, including immense overall pecuniary losses.

But we can also learn from more complicated cases. We consider below first some general background, and then a recent constitutional case, or at least an apparent constitutional case, with disputed legislative facts. In particular, we consider the related legal products, in both their statutory and Supreme Court versions, in the symbolically laden and emotionally fraught "Stolen Valor" case.

#### IV. CONTESTABLE LEGISLATIVE FACTS, A VANISHING CONSTITUTIONAL ISSUE, AND THE PROBLEM OF LOCATING COMPARATIVE ADVANTAGE

##### A. *Some Theoretical Background*

We have assumed that the Supreme Court will often hold a comparative advantage over legislatures and agencies in resolving uncertainties over important principled questions of constitutional right, along with other important and high-valued activities often reflected in its annual docket. This is not primarily a matter of the Court's own arguably self-serving declaration, in *Marbury v. Madison*,<sup>97</sup> that it is "the province and duty of the judicial department to say what the law is."<sup>98</sup>

Instead, resolving important, high-value cases is how the Court most valuably spends its time. The decrease in the public value, however measured, of the Court's activities when it neglects such matters can be severe, in both absolute and relative terms. The Court's superiority over other law-making

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the agency rule as entitled only to weaker judicial deference under *Skidmore*); *National Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981–82 (2005) (discussing *Chevron* deference in the context of an agency's change of interpretation); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Breyer, J., for the Court, listing five factors to be considered, in a close case, in choosing between relatively high *Chevron* stage two deference, and relatively low *Skidmore* deference toward an agency's interpretation of a statutory term).

<sup>97</sup> 5 U.S. 137 (1803).

<sup>98</sup> *Id.* at 177.

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institutions at important doctrinal or principled constitutional matters may be much greater than its superiority in other activities. Leaving such genuinely important federal constitutional matters to Congress,<sup>99</sup> the agencies, state legislatures, or to state courts,<sup>100</sup> while the Court addresses less significant matters where it lacks a comparative or an even absolute advantage, seems ill-advised from the standpoint of overall public well-being.

The principle that the Court holds a comparative advantage over other law-producing institutions in determining matters of crucial constitutional rights is, doubtless, not utterly without exception. But that principle reflects our sense of the Court's relative detachment from current politics, its relative insulation from political pressures and from most interest group influences, differences in professional background, greater opportunities for reflection, and institutional differences in professional ethos.<sup>101</sup> Many of these general differences come into play most significantly in crucial constitutional cases.<sup>102</sup>

*B. The Alvarez "Stolen Valor" Case in Particular*

But not all constitutional cases—indeed not all constitutional cases involving individual first amendment rights—fit the above comparative advantage template. Consider, as a likely such exception, the recent Supreme Court case of *United States v. Alvarez*.<sup>103</sup> In our simplified version<sup>104</sup> of the *Alvarez* case, we envision a federal statute that criminalizes, under many circumstances, the knowingly false assertion that the speaker has been awarded any of several military medals. The statute in question<sup>105</sup> makes no reference to fraud, to any intent to obtain any benefit, or to any intended or actual tangible, concrete harm to any person.<sup>106</sup> The statute would normally fall under the classification of a content-based restriction on speech.<sup>107</sup>

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<sup>99</sup> See *id.*

<sup>100</sup> See *Martin v. Hunter's Lessee*, 14 U.S. 304, 343–48 (1816).

<sup>101</sup> For a classic background study, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

<sup>102</sup> Consider the Court's willingness to reverse its own recent precedent on compulsory public school Pledges of Allegiance, in the middle of the Second World War. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>103</sup> 132 S. Ct. 2537 (2012).

<sup>104</sup> For a less oversimplified discussion of *Alvarez*, see R. George Wright, "What Is That Honor?": *Re-Thinking Free Speech in the "Stolen Valor" Case*, 61 CLEV. ST. L. REV. 847, 851 (2013).

<sup>105</sup> The Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (codified at 18 U.S.C. § 704 (2012)).

<sup>106</sup> See *id.*

<sup>107</sup> See *Alvarez*, 132 S. Ct. at 2543–44 (plurality opinion).

Whether the Supreme Court actually held a comparative advantage, relative to Congress, in determining or “producing” the legal outcome in this area is doubtful in the extreme. Several considerations lead us to that conclusion. First, and most importantly, the *Alvarez* case presents a remarkably narrow, and indeed almost entirely insignificant, regulation of speech that is also remarkably even-handed toward any imaginable underlying viewpoint anyone might wish to adopt. The circumstances in which anyone wishing to make any meaningful statement, on any subject, must conclude that the best way to make that point is to intentionally lie about, precisely, having personally been awarded a military medal are vanishingly small, if not utterly non-existent. If there is any speech-repressive impact to this statute, the reality of such impact is microscopic.

The statute in question, even if assumed to have some detectable genuine effect on freedom of speech, is as evenhanded as it is vanishingly narrow. The statute is not skewed in relation to any imaginable viewpoint, pro or con, on military medals; their purpose or value; the criteria or selectivity of their award; military honor or honor in general; any military policy or practice; or on war in general or any war in particular.<sup>108</sup> Whether the Act more generally undermines any of the typically cited underlying reasons or goals at stake in specially protecting speech—including, ironically, the desire to promote the search for truth—is also doubtful.<sup>109</sup>

Finally, and less significantly for our purposes, the nature and the weight of the government interest in discouraging the dilution of the honor associated with military medals resulting from intentionally false claims to have personally been awarded such a medal is unusually difficult to pin down. The *Alvarez* plurality’s assessments in this respect are unsurprisingly not clear.<sup>110</sup> And neither our contemporary culture, nor the broader historical culture, is anything like unequivocal as to the public value, with or without reference to medals, of either military honor<sup>111</sup> in particular or honor in general.<sup>112</sup>

In light of these unusual considerations, and especially of the minimal free speech interest genuinely at stake in *Alvarez*, the typical logic<sup>113</sup> of attributing comparative advantage in producing principled constitutional free speech law to the Court here seems largely, though not entirely, inapplicable. The Court’s opinion in *Alvarez* did, admittedly, resolve an emerging split in the

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<sup>108</sup> For elaborations and qualifications, see Wright, *supra* note 104, at n.18 and accompanying text.

<sup>109</sup> See *id.* at notes 23–25 and accompanying text.

<sup>110</sup> See *Alvarez*, 132 S. Ct. at 2548–49.

<sup>111</sup> For one perspective, see Brief for the American Legion as Amicus Curiae Supporting Petitioner, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210), 2011 WL 6210435.

<sup>112</sup> For references, see Wright, *supra* note 104, at n.2.

<sup>113</sup> See *supra* text accompanying notes 97–102.



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federal appellate circuits on a question of federal criminal law.<sup>114</sup> But this particular circuit split would not rank, in terms either of real constitutional values or of economic stakes, as a high priority for resolution.

Let us then reasonably assume that if the Court had declined to address the Stolen Valor Act, at the very least for a further term or two, it could instead have addressed the constitutional or the economically most important case it otherwise would have left unresolved. In any given Court term, there may be obvious such candidates, and perhaps unique opportunities.

Observers with different priorities would arrive at different candidates for the single most valuable and appropriate case as a replacement for *Alvarez*. But some such cases are by consensus better than others. A complication is that if litigants knew in advance that the Court was now more attuned to considerations of comparative advantage in selecting its case docket, that might raise the incentives of public interest groups and other litigants to press important cases upon the Court. But on balance, that would hardly seem a bad thing. The Court would still have the final say over its docket and caseload.

In any event, if the Court had not addressed *Alvarez* and the Stolen Valor Act, it could instead have addressed some crucial issue of, say, national environmental protection over the long term; energy independence; federal or state-level budgeting or public pension obligations; immigration or any of several broad civil rights issues; educational access or quality; or the separation of powers regarding war and peace. For the Court to devote too much of its docket to lesser cases will generally be inadvisable, for reasons roughly akin to why pro athletes should not take time off from their valued professional employment in order to cut their own or someone else's grass.<sup>115</sup>

From among the available pool of genuinely significant cases, the Court presumably could have chosen a case the resolution of which would have reflected the Court's comparative advantage. As we have seen, the Court is in general more typically reflecting its comparative advantage when, from a detached perspective, it reinforces or establishes a broad principle of basic constitutional law or of the public well-being, rather than expending its own scarce resources on more or less questionable re-examinations of matters of legislative fact,<sup>116</sup> contestable readings of legislative history,<sup>117</sup> or engaging in

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<sup>114</sup> Contrast the Ninth Circuit result in *United States v. Alvarez*, 638 F.3d 666 (9th Cir. 2011) (denying rehearing en banc), with an opposing Tenth Circuit result in *United States v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012), *vacated*, 684 F.3d 962 (10th Cir. 2012).

<sup>115</sup> See *Snapper Drafts Brett Favre to Promote its Lawn Mowers*, *supra* note 42.

<sup>116</sup> See *supra* Part III.B. For a sampling of resource-consuming but ultimately doubtful Supreme Court re-findings of matters of legislative fact, sometimes consistent with the original legislative determination, see, for example, *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (second-guessing the University of Michigan largely on the efficacy and affordability of admissions policies at the undergraduate mass-application level); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506–07 (1996) (plurality opinion) (effectively second-guessing the state legislature on the viability and degrees of effectiveness of alternative regulatory approaches);

its own time-consuming extra-record research of dubious additional genuine value.<sup>118</sup> There is at this point substantial public benefit to be derived from the Court's increasing its attention to producing law where it can reasonably be said to hold a comparative advantage over other law-making institutions.

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*Maine v. Taylor*, 477 U.S. 131 (1986) (displaying extraordinary deference to the state's findings of legislative fact in a dormant commerce clause context, where such deference is commonly thought unjustified); *Lochner v. New York*, 198 U.S. 45, 57–64 (1905) (essentially taking issue with the state's legislative judgment on matters of health and safety, though hinting, as well, at the problem of organized interest group-dominated legislation at the expense of the broader, unorganized public), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (re-assessing an extensive FDA administrative record on the substantiality of the likelihood that the FDA's graphic warning label regulations of cigarette packages would materially advance the stated interest in reducing smoking rates).

<sup>117</sup> See *supra* Part III.C.

<sup>118</sup> See *supra* Part III.D.