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THE DILEMMA OF IGNORANCE:
PGA TOUR, INC. v CASEY MARTIN

Hans Kelsen observed, famously, that no legal act was completely determined by the law.¹ And although the truth of Kelsen's statement is obviously contingent upon adopting a particular and contested understanding of just what the law is,² his observation is a useful reminder that even those who subscribe to the possibility of strong constraint by legal rules and legal precedents must acknowledge that those rules and precedents can only take us so far. Like a frame without a picture, to employ another Kelsenian observation,³ legal rules and legal precedents may determine the

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¹ Hans Kelsen, *Pure Theory of Law* 349 (M. Knight trans, California, 2d ed 1967) (“[E]very law-applying act is only partly determined by law . . .”). See also Richard H. Fallon, Jr., *Ruminations on the Work of Frederick Schauer*, 72 *Notre Dame L Rev* 1391, 1402 (1997) (judicial decision making can be “bound, but not necessarily determined, by law.”).

² Under a range of antipositivist views, law is not a separate and pedigreed domain, but is better understood in terms of what judges do, and in terms of the ability of judges and other legal decision makers to draw on the full universe of socially recognized political acts. See Ronald Dworkin, *Law's Empire* (Harvard, 1986); Ronald Dworkin, *Taking Rights Seriously* (Harvard, 1978); Ronald Dworkin, *A Reply by Ronald Dworkin*, in Marshall Cohen, ed, *Ronald Dworkin and Contemporary Jurisprudence* 261–63 (Duckworth, 1984) (describing as “law” all of the standards that judges have a duty to apply). Under this view, of course, every legal act is tautologically entirely determined by law.

³ Kelsen, *Pure Theory of Law* 245 (cited in note 1). See also Hans Kelsen, *Introduction to the Problems of Legal Theory* 80 (Bonnie L. Paulson and Stanley L. Paulson trans, Clarendon/Oxford, 1992).

boundaries of plausible legal decision without determining precisely what is to be done within those boundaries.

If legal decision making often, to take the weaker view, or inevitably, to take the stronger, leads us into the realm of “non-law,” then the looming question is what judges are to do when they enter this realm. H. L. A. Hart suggested that judges find themselves exercising “discretion” when law runs out,⁴ but offered little help in thinking about what a judge actually *does* when she exercises discretion, and what sources of information and enlightenment are relevant to its exercise.⁵ Indeed, in likening the exercise of discretion to the practice of legislation, and in describing the exercise of discretion as “a fresh choice between open alternatives,”⁶ Hart might have been suggesting either that the nature of judicial discretion was not the concern of the legal theorist, or perhaps that judges were as legally unconstrained in looking for guidance in exercising discretion as legislators were in enacting legislation.

That judicial discretion is legally unconstrained is, given these understandings of “law,” tautologically true. Yet the tautology is singularly helpful in thinking more broadly about what judges actually *do* in exercising their discretion, and in thinking more normatively about what judges *should* do when they are compelled to exercise discretion. This question of judicial behavior within the domain of discretion is especially important in considering the role of judges in courts of general jurisdiction, for such judges will necessarily be cast into the role of making decisions about matters as to which their antecedent knowledge is most likely to be negligible, and also cast into the role of using methodologies far afield from anything they would have been required to study in law school.⁷ And although the information-providing functions of tri-

⁴ H. L. A. Hart, *The Concept of Law* 125–30 (Clarendon/Oxford, 1961).

⁵ Hart did observe that the judge’s decision would not simply be arbitrary, H. L. A. Hart, *Problems in the Philosophy of Law*, in *Essays in Jurisprudence and Philosophy* 106–07 (Clarendon/Oxford, 1983), an observation that is consistent with Hart’s (correct) view that nonlegal judgments can be more or less sound as a matter of morality, politics, or policy. For useful elaboration of Hart on indeterminacy and the discretion that follows from it, see Brian Bix, *Law, Language, and Legal Determinacy* 18–35 (Clarendon/Oxford, 1993); John Gardner, *Concerning Permissive Sources and Gaps*, 8 *Oxford J Legal Stud* 457 (1988). See also Marisa Iglesias Vila, *Facing Judicial Discretion: Legal Knowledge and Right Answers Revisited* (Kluwer, 2001), especially at 4–76.

⁶ Hart, *The Concept of Law* at 125 (cited in note 4).

⁷ If law consists of everything that judges do or everything that judges should do, see note 2, and if legal education, legal training, legal reasoning, and thinking like a lawyer

als, appeals, and judge-initiated research can often take judges some way down the road leading from ignorance to expertise, there are limits to just how much we can expect judges to know about the full range of domains into which their docket takes them. As a consequence, judicial discretion will often be a process in which judges would ideally be required to have a degree of expertise that they simply do not possess. Yet although judges may often lack the degree of expertise to decide the issues before them, they may also find themselves compelled by their docket or the legal indeterminacy of the relevant law to make just those decisions. How judges, individually and collectively as the judicial system, react to what we might uncharitably call the “dilemma of ignorance” is one of the central issues in judicial decision and in the design of judicial institutions.

The dilemma of ignorance has rarely been presented with such clarity—and such publicity—as it was in *PGA Tour, Inc. v Casey Martin*,⁸ a case that but for *Bush v Gore*⁹ would have attracted more public attention than any other during the 2000 Term. For *PGA v Martin* not only had all of the elements of a morality play—a likable and talented but physically disabled underdog takes on the uncaring, tradition-bound, and country-club-based establishment of the sport of the rich—but also presented the issues in the widely followed context of professional sports. More specifically, by being centered on the publicly understandable issue of what accommodations to Martin’s physical handicap were inconsistent with the essence of golf, *PGA v Martin* presented the issue of judicial expertise, or lack thereof, with a clarity that matched its publicity. *PGA v Martin* is important, therefore, in part because its very publicness is likely to increase its impact, but even more because it is such an important example of judges grappling explicitly with the di-

are defined as anything that would help a judge or lawyer perform that task, then considering what judges do when the law and their legal skills run out is tautologically uninteresting. But if we think of law as at least a partially limited or differentiated domain, in which law school is different from a school of public policy, and a bar examination tests for skills narrower than all of the skills necessary to good decision making, then my distinction between legal and nonlegal decision, a distinction that guides this article and the consciousness of most judges and most lawyers, makes sense. See Frederick Schauer and Virginia J. Wise, *Legal Positivism as Legal Information*, 82 Cornell L. Rev 1080 (1997).

⁸ 121 S Ct 1879 (2001).

⁹ 121 S Ct 525 (2000).

lemma of what to do when they are forced to make decisions requiring knowledge that they simply do not possess.

I. CASEY MARTIN'S CASE

Casey Martin is a young and talented professional golfer. A college teammate of Tiger Woods on the Stanford University golf team, Martin had won a large number of amateur tournaments before turning professional, and it is fair to say that he is one of the two or three hundred best golfers in the world, no mean accomplishment in a sport played by tens of millions. Martin also, however, suffers from Klippel-Trenaunay-Weber Syndrome, a congenital and degenerative circulatory disorder that, in Martin's case, obstructs the flow of blood from his right leg back to his heart. The consequences of this for Martin are that his right leg has atrophied, that he suffers from severe pain in that leg, and that he consequently has great difficulty walking significant distances. Moreover, walking for an extended time subjects Martin to a heightened risk of hemorrhaging, blood clots, bone fractures, and, conceivably, having his right leg amputated.

The game of golf that ordinary recreational golfers play is not a game in which walking between shots is a requirement. Neither the formal nor informal rules of golf prohibit the employment of motorized carts, and their use has become widespread. Indeed, many upscale golf courses, especially in resort areas, require their use, partly to speed up play, and partly because the rental fees provide a substantial revenue source for golf courses. For vast numbers of casual golfers and a great many quite serious ones, golf is a game in which the player is transported between shots in an electric cart holding golf clubs, lunch, beverages, and spare clothing in addition to the two golfers who ride in it.

At the highest competitive levels, however, the situation is different. The National Collegiate Athletic Association requires golfers playing in NCAA tournaments to walk the entire course and to carry their own golf clubs. And although professional golfers are not required to carry their own clubs, the Professional Golf Association requires players to walk the entire course when playing in tournaments on the PGA Tour, on the Buy.com Tour (formerly the Nike Tour, and the highest level of American professional golf except for the PGA Tour), and when competing in the final stage

of the qualifying tournament (Q-School) to determine which golfers will earn regular playing privileges on either the PGA or Buy.com tours.¹⁰

Because of his affliction, Martin had secured from the NCAA and the PAC-10 athletic conference an exemption from their “walk and carry” requirements when he was a college golfer at Stanford. When playing in golf tournaments in college, therefore, Martin was permitted to ride in a golf cart rather than walk, and to use the golf cart rather than his shoulder to carry his clubs. Upon attempting to qualify to play in PGA tournaments, however, no such exemptions were forthcoming. Martin’s application for an exemption from the “no-carts” rule was denied by the PGA, which insisted that all competitors play under the same conditions, and insisted as well that the element of fatigue that comes from walking the entire golf course (a typical professional level golf course is about four miles long taking the shortest distance from tee to hole, although no golfer would be able to traverse it in such a direct line) is an essential part of the conditions of competition for competitive professional golf at the highest levels.

Martin sued the PGA under the Americans with Disabilities Act (ADA) of 1990,¹¹ claiming that the PGA’s failure to allow an accommodation to Martin’s disability violated 42 USC § 12182 (b)(2)(A)(ii), which includes within the statutory definition of “discrimination” the “failure to make reasonable modifications” for disabled individuals.¹² According to Martin, permitting him to ride in a golf cart while playing in PGA tournaments was just such a “reasonable modification,” so that the PGA’s failure to allow him to ride constituted a failure to make a reasonable modification and was thus a violation of the Act.

In response, the PGA relied on a different clause of the same

¹⁰ These rules are discussed in the Court’s opinion, 121 S Ct at 1884–85.

¹¹ 42 USC § 12101 et seq (1998).

¹² It is important to recognize at the outset that the Americans with Disabilities Act is not simply an antidiscrimination law. It requires that accommodations be made to persons with disabilities, although there is a disagreement within the literature over the extent to which accommodation differs from antidiscrimination. See generally Samuel Issacharoff and Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?* 79 NC L Rev 307 (2001); Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv L Rev 642 (2001); Christine Jolls, *Accommodation Mandates*, 53 Stan L Rev 223 (2000); Pamela S. Karlan and George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L J 1 (1996).

section, a clause excusing a failure to make a “reasonable modification” when the party engaging in the alleged discrimination “can demonstrate that making such modifications would *fundamentally alter* the nature” of the “goods, services, facilities, privileges, advantages, or accommodations” to which a complainant sought access.¹³ On the central dispute in the case, therefore, the issue was joined on the question whether allowing Martin to ride in a motorized golf cart while the other competitors were compelled by the rules to walk would “fundamentally alter the nature” of professional competitive golf, with the PGA claiming that it would and Martin claiming that it would not. To Martin, walking was a requirement not essential to the nature of professional golf, much like the PGA’s requirement that competitors in its tournaments not wear short pants.¹⁴ But to the PGA, walking, however peripheral it might be to the nature of casual golf, or even to the nature of golf played on its Senior Tour by professional golfers over the age of fifty, was an essential feature of professional golf at the highest competitive level. To the PGA, high-level professional competitive golf without walking was like, to use Wittgenstein’s famous metaphor, “chess without the queen.”¹⁵

Martin prevailed in the District Court,¹⁶ where the trial judge concluded that the element of fatigue injected by walking a golf course could not be considered significant, and that in any event the fatigue that Martin suffered over the course of eighteen holes because of his affliction was greater than the fatigue that a non-disabled golfer would suffer by virtue of having to walk. To the District Court, therefore, accommodating Martin’s disability by allowing him to ride in a cart would be a reasonable modification not fundamentally altering the nature of the activity. The District Court’s conclusion was upheld by the Ninth Circuit,¹⁷ the Ninth

¹³ 42 USC § 12182(b)(2)(A)(ii) (1998) (emphasis added).

¹⁴ On the PGA’s requirement that competitors on the PGA and Buy.com tours (and, until recently, their caddies) wear long pants regardless of the weather, see Collin Bessonet, *Q & A on the News*, Atlanta Journal and Constitution (April 12, 2000), p 2A; *Ask Us*, St Petersburg Times (Sept 3, 1998), p 12C.

¹⁵ The statement appears not in any of Wittgenstein’s published writings, but in the recollections of his contemporary, the philosopher John Wisdom. See David Lehman, “Wittgenstein’s Ladder,” <www.webdelsol.com/litarts/david_lehman/wittgenstein.htm>.

¹⁶ *Martin v PGA Tour, Inc.*, 994 F Supp 1242 (D Or 1998).

¹⁷ *PGA Tour, Inc. v Martin*, 204 F3d 994 (9th Cir 2000).

Circuit's ruling in Martin's favor coming just a day before a contrary ruling by the Seventh Circuit in a case brought by another golfer against the U.S. Golf Association,¹⁸ the organization that runs most amateur golf in the United States as well as the U.S. Open golf tournament.

In the Supreme Court, Justice Stevens wrote for a seven-member majority, affirming the Ninth Circuit and accordingly upholding Martin's claim under the Americans with Disabilities Act.¹⁹ Much of the majority opinion, as well as much of Justice Scalia's dissenting opinion, was taken up with the question whether the ADA applied at all. For Justice Stevens and the majority, the PGA's qualifying competition and its tournaments were public accommodations, partly by virtue of their taking place on golf courses which are generally themselves places of public accommodation, and partly by virtue of the qualifying competition being open to anyone with \$3,000 and two letters of recommendation. In his dissenting opinion,²⁰ Justice Scalia, joined by Justice Thomas, insisted that the majority had misread the coverage provisions of the Americans with Disabilities Act, which limit the Act's coverage to "clients and customers" desiring to obtain "goods and services." For the dissenters, Martin was not a client or customer seeking to obtain goods or services, but rather provided the services that others might seek to obtain. Martin was not seeking to obtain entertainment, argued the dissent, but was himself the entertainment, and thus not within the coverage of the Act.

The question of the coverage of the Act is an important one, but arguably of less pervasive importance outside the domain of antidiscrimination law than is the Court's treatment of the question whether making an accommodation for Martin would "fundamentally alter the nature" of professional golf. On this issue not only were the majority and dissenting opinions in even sharper disagreement than they were on the issue of coverage. More significantly, the character of that disagreement turns out to be highly instructive in illuminating the pervasive issue of judicial expertise, or lack thereof, and the implications of the issue of judicial exper-

¹⁸ *Olinger v United States Golf Assn*, 205 F3d 1001 (9th Cir 2000).

¹⁹ Technically, Martin won only the right to an individualized determination and not the right to use a golf cart. 121 S Ct at 1897-98.

²⁰ *Id* at 1898.

tise for the question of judicial power. Although the issue of judicial expertise about golf is not one likely to arise with great frequency, the question of judicial expertise about areas in which judges and Justices have limited familiarity is omnipresent. Rarely has a case presented this question with such clarity and with such public understandability, and golf as a case study in the consequences of judicial ignorance is what makes *PGA v Martin* of potentially enduring importance.

II. THE SUPREME COURT ON THE NATURE OF GOLF

On the merits of controversy, Casey Martin's case turned on the question whether allowing Martin to use a motorized golf cart in PGA tournaments would "fundamentally alter the nature" of competitive professional golf at the highest level, as the PGA claimed, or would instead be no more consequential to the "nature" of the activity than, say, the attire of the competitors. Even if the "fundamentally alter the nature" language had not appeared in the statute, it is conceivable that the same issue would have arisen in the context of trying to determine which accommodations to a disability were "reasonable" and which were not, but the explicit inclusion of the "fundamentally alter the nature" language focuses the inquiry, and focused the debate in the Supreme Court.

In concluding that allowing Martin to use a cart would not fundamentally alter the nature of the activity, Justice Stevens said that "[a]s an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf."²¹ This is a curious statement, since what Justice Stevens describes as an "initial matter" subject to preliminary "observ[ation]" is what might reasonably be thought to be the very matter at issue. If using carts is inconsistent with the fundamental character of the game of golf, then the PGA would plainly have the right to prevail under the "fundamentally alter" language in the statute. But if the use of carts is consistent with the fundamental character of the game, then Martin's use of a cart could hardly be said to fundamentally alter the nature of the activity. It is true, of course, that riding in a golf cart could be consistent with the fundamental character of

²¹ Id at 1893.

golf but not consistent with the fundamental character of high-level professional competitive golf, and presumably this possibility explains why Justice Stevens treats the question of the fundamental character of (all of) golf as an “initial matter.” But the conclusion that inquiry into the fundamental nature of high-level professional golf is largely dependent on the fundamental nature of ordinary golf played by ordinary people is just what the PGA denied, so this conclusion can hardly be thought of as preliminary. Treating as an initial matter something so close to the major point of contention is thus a curious way of proceeding, although it does turn out to explain much of the majority’s reasoning.

To support the conclusion that high-level professional competitive golf is not fundamentally altered by allowing one or even several competitors to ride in carts, Justice Stevens relies heavily on the unstated assumption that high-level professional competitive golf is a member of the category “golf,” rather than on the plausible alternative assumption that high-level professional competitive golf is a member of the category “high-level professional competitive sports.” The latter is hardly ridiculous, and it is possible that this latter categorization explains part of the PGA’s motivation in insisting on the no-carts rule. Professional golfers, like professional bowlers and professional pool players, tend to obsess about whether they are “really” athletes, worried that to far too many people professional golf seems more akin to competitive bass fishing than it does to “real” sports like football, basketball, and the decathlon. Accordingly, it would not be surprising to find the PGA exaggerating the importance of physical endurance in the course of trying to explain to outsiders to that domain the nature of professional golf.²²

But once the Court sees professional golf as a member of the category “golf,” perhaps in part because it may also suspect that the PGA and its witnesses are exaggerating the importance of fitness and stamina for success as a professional golfer, the Court must then inquire about the nature of that category. It is clear that the word “golf” is correctly, as a matter of ordinary linguistic use

²² One of the witnesses at trial was Jack Nicklaus, 121 S Ct at 1887 n 14, who testified that “physical fitness” as well as “fatigue” were “part of the game of golf.” Nicklaus himself, however, although now plainly fit at age sixty-two, could charitably have been described as portly during the early years of his greatest professional success. Indeed, he was then routinely chided as “Fat Jack” in the press and by jealous competitors.

age, applied to variations on the rules of golf ranging quite far from the formal rules of golf.²³ Justice Stevens implicitly relies on this common understanding about the fundamental nature of golf, but rests his conclusion even more heavily on the history of the game. He insists that “[f]rom early on, the essence of the game has been shot making—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.”²⁴ Drawing on both early (1744) and current golf rules,²⁵ and on secondary sources describing the history of golf, the Court concludes that walking, although obviously a necessary feature of golf in its early days when motorized transportation had not been invented, was not even then part of the concept of golf, and consequently that recent developments in golfer transportation and golf club carriage are peripheral to the “essential” character of the game. Whatever the answer might be to the question “Is it chess without the queen?” the answer to the question “Is it golf without walking?” is to the majority plainly yes.

All this turned out to be too much for Justice Scalia. Arguing that competitive sports were necessarily defined by arbitrary rules (Why eighteen holes and not nineteen? Why three strikes rather than four?), he accused the majority of treating golf as if it were a matter of Platonic essences²⁶ when in fact it was simply a matter of arbitrary rules.²⁷ And as long as the rules were arbitrary, Justice

²³ In recent times the most prominent example of this phenomenon is former President Clinton, whose liberties with the rules of golf go well beyond winter rules, mulligans (“do-overs”) on the first tee, and other modifications of the rules common among casual golfers of Clinton’s skill level. For a sample of published accounts, see Glenn F. Bunting, *Game Fits President to a Tee*, Los Angeles Times (Nov 13, 1997), p E1; Melinda Henneberger, *Tom DeLay Holds No Gavel, but a Firm Grip on the Reins*, New York Times (June 21, 1999), p A1; Tim Tucker, *Shooting a 60 with President Mulligan*, Atlanta Constitution (Aug 16, 1999), p 1D.

²⁴ 121 S Ct at 1894.

²⁵ Id. The official rules of golf provide at best ambiguous support for the majority’s position, since those rules explicitly permit tournament organizers to require that “[p]layers shall walk at all times during a stipulated round.” Id at 1885 n 3.

²⁶ Id at 1902, 1903, 1905.

²⁷ This prompted the rejoinder from Justice Stevens that Justice Scalia was taking an [uncharacteristically] “postmodern” position. Id at 1897 n 57. The charge of postmodernism seems a bit confused, however, since one can in decidedly nonpostmodern fashion believe that certain facts are institutionally contingent without believing that all facts are contingent or socially constructed. John R. Searle, *The Construction of Social Reality* (Free Press, 1995). Believing that law, golf, the game of bridge, and the Brooklyn Bridge are socially constructed does not entail believing that gravity, giraffes, and the Grand Canyon are social constructions.

Scalia argued, there was no way around treating the rules as set by the sport's governing body as final, and, more importantly, no way around treating the answers given by the sport's governing body as the definitive answers to what properties could be eliminated or modified without "fundamentally alter[ing]" the nature of the activity. For Justice Scalia, professional golf is what the PGA says it is.

That the subject of the litigation was golf added fuel to Justice Scalia's ire. It is difficult to determine whether Justice Scalia objected to the majority's venture into determining the essence of golf because it was beyond the Justices' expertise or simply beneath their dignity.²⁸ But to the dissenters the determination of which of the features of the rules of professional golf were essential and which were not—which rules would, if changed, fundamentally alter the nature of the activity and which would not—would take the Court well beyond its area of competence, and well beyond the proper deployment of the judicial function.

"Blame Congress and not us," Justice Stevens and the majority can be understood as responding. Pointing out that the "fundamentally alter the nature" and "reasonable modification" language is in the statute itself,²⁹ Justice Stevens argued that the task of determining whether golf without walking is really golf was a task that Congress had through the explicit words of the Americans with Disabilities Act compelled the courts to take on. For the majority the question and the task that Justice Scalia found silly were nevertheless a question and a task that was compelled by the ADA's language. By including the words "fundamentally alter," Congress had explicitly and knowingly, or so the majority insists, put the courts in the business of determining the "fundamental nature" of a host of enterprises required by the ADA to make accommodations. That the Supreme Court found itself engaged in the enterprise of determining the fundamental nature of golf was not at all about golf, insists the majority, but was instead a function of the fact that golf is one of myriad enterprises whose fundamen-

²⁸ "Is someone riding around a golf course from shot to shot *really* a golfer? . . . Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question." 121 S Ct at 1902–03 (Scalia, J, dissenting).

²⁹ *Id* at 1897 n 51.

tal nature it has become the statutory duty of the courts to determine.

III. ON THE NATURE OF JUDICIAL EXPERTISE

The debate between the majority and the dissent in *PGA v Martin* is not primarily about golf, and not even primarily about the “fundamentally alter the nature” language in the Americans with Disabilities Act. Rather, it is about the nature of judicial expertise. For Justice Scalia the courts have ventured into an area outside of their competence, and even if Congress has with its language statutorily authorized the excursion the courts would be better off interpreting that authorization as narrowly as possible. For the majority, by contrast, the statutory authorization should be taken at face value,³⁰ with the courts being no more authorized to fail to go where Congress sends them than they are to go where Congress has not sent them.

The debate about judicial expertise, however, is unlikely to be illuminated by rehearsing generations-old disputes about the proper sources for statutory interpretation. Rather, we can perhaps shed some light on the issue by examining just what the Supreme Court does when it finds itself—whether willingly or not—venturing into an area in which its expertise is not immediately apparent. And golf is just such an area. By all accounts the Supreme Court contains just one serious golfer—Justice O’Connor—although it is highly likely that most of the others have played occasionally and that all of the others have a basic understanding of the idea of the game. But it is highly unlikely that any of the Justices have anything approaching serious expertise about the game, its history, or its traditions. If we frame the question in terms of whether any of the Justices could have been qualified at trial as an expert witness

³⁰ Indeed, the majority’s jibes at Justice Scalia might have avoided the misdirected charge of postmodernism, see note 27, and have been better directed against the inconsistency between his reluctance to take the congressional mandate to look at the “fundamental . . . nature” at face value and his oft-stated commitment to the text when engaged in statutory interpretation. See *Green v Bock Laundry Machine Co.*, 490 US 504, 527–30 (1989) (Scalia concurring in the judgment); *Chisom v Roemer*, 501 US 380, 404–05 (1991) (Scalia dissenting); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in Amy Guttmann, ed., *A Matter of Interpretation: Federal Courts and the Law* 3, 16–17, 23–37 (Princeton, 1997). See also Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 Harv J L & Pub Pol 401 (1994).

on golf according to the standards of the Federal Rules of Evidence, there is no indication that the answer would have been yes.

It is, of course, central to the judicial function that judges determine controversies involving topics about which the judges themselves are not expert. Instead, judges, at trial, listen to competing stories, hear the testimony of experts, and determine, when there is no jury, which side has the better of the argument. Whether the controversy be about the existence of conspiracies in restraint of trade, the causes of automobile or airline accidents, or for that matter the nature of the game of golf, it is (possibly) too late in the day to suggest that courts should be limited in their jurisdiction to topics about which the judges (and, a fortiori, juries) have antecedent and genuine expertise. Although having decisions made on the basis of just such expertise is at the heart of the idea of decisions made by specialized administrative agencies—the Securities and Exchange Commission, the Occupational Safety and Health Administration, and the National Endowment for the Arts, for example—this quite plausible approach to institutional design has rarely been thought to supplant the role of courts of general jurisdiction. And although there are courts whose jurisdiction is defined by the expertise of the judges—the Court of Military Appeals, the Court of Customs and Patent Appeals, the Court of International Trade, and the bankruptcy courts, for example—these are again best thought of as the exceptions and not the rule.

The traditional picture of the catholic capacities of courts of general jurisdiction, however, relies heavily on the nature of the trial. At trial witnesses can testify, documents can be introduced, and properly qualified experts can offer their opinions. The process of making a trial record, so the traditional picture has it, is precisely the process by which the judiciary informs itself about matters that would otherwise have been beyond its ken. If to determine the matters before it a trial courts needs to know about the structure of the airline industry, the harmfulness of cigarettes, or the norms of the stock markets, the law of evidence and the rules of procedure stand ready to facilitate obtaining that information.

On appeal, however, things are different, for the capacity of appellate courts to obtain new information, especially new information whose accuracy is likely to be contested by one or the other of the parties—and therefore not subject to judicial notice—is drastically limited. Indeed, the most famous exceptions to this

principle turn out to be hardly exceptions at all. The psychological tests cited by the Supreme Court in *Brown v Board of Education*³¹ to support the proposition that separate but equal education was not equal at all were, even apart from questions about their soundness,³² tests that had been presented at trial and were there subject to cross-examination. And even the early uses of the so-called “Brandeis Brief”³³ were not uses to establish the contested question of which social policies were wise, sound, or optimal, but rather were uses to establish the far less contested questions of which social policies had such a minimal degree of empirical and public support that they could satisfy the standards of what later was to become rational basis scrutiny.³⁴ But when the question is whether the appellate court is the appropriate forum for the presentation of new and centrally contested nonlegal information, the traditional answer is that it is not.

Under this traditional picture, the Supreme Court’s approach to the “what is the essence of golf?” question that was at the heart of *PGA v Martin* might have been expected to be an approach relying heavily on the findings below. Yet there is very little in the majority opinion to suggest that the Court’s conclusion that walking is not part of the essence of golf was simply an affirmation of a finding below. There is nary a word about a deferential posture to findings of fact below, nor about a standard of review—abuse of discretion, substantial evidence, arbitrary and capricious, or whatever—that gives primacy to findings of fact at the trial level. All of the language in Justice Stevens’s opinion is the language of his having decided the issue, along with six of his colleagues, and not the language of having affirmed someone else’s decision of the issue. Twice the majority refers to the District Court’s findings about fatigue,³⁵ but the overwhelming tone of the majority opinion is that, to quote directly, “we have demon-

³¹ 347 US 483 (1954).

³² See note 55 and accompanying text.

³³ As in, most prominently, *Muller v Oregon*, 208 US 412 (1908).

³⁴ See the discussions in Dean Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U Pa L Rev 637 (1966); David Bryden, *Brandeis’s Facts*, 1 Const Comm 281 (1984); Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 Supreme Court Review 75; Jeffrey Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U Fla L Rev 236 (1983).

³⁵ 121 S Ct at 1895–96, 1897.

strated”³⁶ that the walking rule is not essential to the game of golf, even at the highest professional competitive levels, and that allowing a waiver of the rule would not “fundamentally alter the nature” of that enterprise. What emerges clearly from the majority opinion is the conclusion that it is the majority and not the trial judge who has determined that riding in a golf cart is not inconsistent with the fundamental nature of high-level competitive professional golf.

That the language of *PGA v Martin* is the language of independent Supreme Court decision and not the language of deference to findings below is not surprising. In the first place, the Court took the case, at least in part, because of a circuit split between the Ninth and Seventh Circuits. And when the circuits are split on the crucial issue, there would be no point in using the language of deference, because deciding to defer to one decision below rather than to another that reached the opposite conclusion on the very matter in issue is ordinarily to independently decide the issue and not to ratify a lower court decision. Deciding for *A* rather than *B* on the very issue on which *A* and *B* differ is typically not to defer to *A* or to *B*.³⁷ It is to decide. In addition, the notoriety of the case likely made it less possible for the Court to base its decision on simple deference to a decision below. It is hard enough for the Court to succeed in conveying to the public and to the press that its denials of certiorari do not represent decisions on the merits. It would be even harder to suggest, for one of the cases the Court did decide on the merits during the term, that it was only ratifying a decision below, an outcome that could be different in the Supreme Court were there to have been a different conclusion at trial. Finally, and relatedly, relying too heavily on the fortuity of a particular trial judge having decided in a particular way on the basis of a particular case presented by particular parties is inconsistent with a Supreme Court that routinely decides fewer than a hundred cases a year out of the close to eight thousand with

³⁶ *Id.* at 1896.

³⁷ On occasion the decision for *A* rather than *B*, or vice versa, may be a product of one of the options presenting reasons for deference not presented by the other—a more careful opinion, a more experienced judge, or a more extensive record, for example. But more commonly such characteristics will not be determinative, and a reviewing court deciding which of two conflicting opinions below to prefer will find itself delving into the merits of the controversy.

which it is presented. While the image of the Supreme Court as merely a decider of cases between the parties persists, at least in the academic literature,³⁸ this role is belied by the minuscule number of cases decided by the Court, with each case attracting much attention by the parties, the public, and the Justices, and with each case expected to guide the behavior of, noncontroversially, thousands of lower federal and state court judges, and, somewhat more controversially,³⁹ hundreds of thousands of state and federal legislative, executive, and administrative officials. For multiple reasons, therefore, it is not surprising that the Court made the decision *its* decision, and that the conclusion about the central issue of the fundamental nature of the game of golf was one reached by the Justices themselves and defended in just those terms.

The question then shifts: On what grounds and on the basis of what information did the majority make that decision? Here the opinion is again illuminating. For the proposition that striking the ball and not the method of transporting the golfer and her or his clubs from hole to hole lies at the “essence”⁴⁰ of the game of golf the Court relies on a book by one K. Chapman entitled *Rules of the Green*.⁴¹ For the proposition that various dimensions of golf, including the methods of transporting clubs from hole to hole, have changed numerous times over the years without changing the essence of the game as shot-making the Court relies on *The Random House International Encyclopedia of Golf* and *Golf Magazine’s En-*

³⁸ See, for example, Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Georgetown L J 347, 349 (1994); Edward Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 NYU L Rev 123 (1999); Thomas Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L Rev 43 (1993). For the contrary view, that the Supreme Court should face directly its role as a lawmaker and think about its processes and its opinion-writing practices in light of that role, see Larry Alexander and Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const Comm 455, 478–81 (2000). See also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 807–11 (1982); Frederick Schauer, *Opinions as Rules*, 62 U Chi L Rev 1455 (1995).

³⁹ Compare Alexander and Schauer, *Defending Judicial Supremacy* (cited in note 38); Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359 (1997), with Mark Tushnet, *Taking the Constitution Away from the Courts* 27–29 (Princeton, 1999); Neal Devins and Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va L Rev 83 (1998); Hartnett, *A Matter of Judgment, Not a Matter of Opinion* (cited in note 38); Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 Wm & Mary L Rev 849 (1998).

⁴⁰ 121 S Ct at 1893 (“essence”), 1894 (“essential”).

⁴¹ *Id* at 1894 n 39.

cyclopedia of Golf.⁴² And for the proposition that uniform conditions are less important to golf than they might be to, say, bowling, or basketball, to take two sports played indoors on relatively uniform surfaces, the Court draws its information from, in part, a report in the *Arizona Republic* of a freak hole-in-one on the PGA Tour.⁴³

Two things are noteworthy about these citations. First, they are not peripheral or incidental to the Court's major concern. Rather, they support one side (or so the majority suggests) rather than another of the factual issue—What are the essential features of golf?—that will determine the case. Second, and even more interestingly, none of these sources appears in the record below, in the opinions below,⁴⁴ in the briefs of the parties, or in the briefs of any of the amici. In other words, the Court locates these sources itself. Seven Justices, only one of whom is a serious golfer, with the assistance of approximately twenty-eight law clerks, no more than four or five of whom are likely to be serious golfers, and the library staff of the Supreme Court library, again unlikely to have a large number of serious golfers in their midst, are wandering relatively unguided (by golf expertise) through LEXIS, WESTLAW, the Internet, and various other sources of nonlegal information in order to decide which of the contingent features of golf are actually essential features of golf.

The nature of the knowledge the Court brings to bear on the issue is underscored by the sources the Court does use. Two of these, as just noted, are encyclopedias, which one might at first think of as plausible sources. But consider the fact that in neither the 1999 nor the 2000 Terms did the Supreme Court cite *Corpus Juris Secundum* even once. This will of course come as no surprise to legal insiders, who recognize that citing to legal encyclopedias is disfavored. But if legal encyclopedias are disfavored as sources of authoritative guidance on law—we immediately recognize those who rely on them as, at best, novices, and, at worst, total outsiders—then could not the same thing be true of golf? Is it possible that the Court's sources of guidance on the essence of golf are analogous to someone who, looking for authoritative guidance on

⁴² Id at 1894 n 40.

⁴³ Id at 1895 n 48.

⁴⁴ Including the opinions in *Olinger*, the Seventh Circuit case.

the essence of torts, relied on *Torts in a Nutshell* and the “Torts” headings in *Corpus Juris Secundum* or *American Jurisprudence*?⁴⁵

There is no need to belabor the point further, because it should be fairly obvious that the knowledge the Court uses to make its central decision is nonexpert knowledge on an issue as to which expertise is in theory available.⁴⁶ If it is central to the very idea of courts of general jurisdiction that they will function more as disinterested generalists than as sources of knowledgeable analysis of the nonlegal areas with which the law frequently intersects and relies, then few cases demonstrate this more clearly than *PGA v Martin*.

Although the infrequent appearance of golf on the dockets of the nation’s appellate courts makes the point about nonexpertise especially clear in the context of *PGA v Martin*, it would be a mistake to assume that the issue is in any way a limited one. Consider, for example, the Sherman Antitrust Act,⁴⁷ whose mandate to the courts to determine which “contract[s], combination[s] . . . or conspirac[ies]” are in restraint of trade, is not dissimilar to the ADA’s mandate to the courts to determine which enterprises would be fundamentally altered by making accommodations to the disabled. And just as the determination of the fundamental nature of golf might better be assessed by golf insiders than by Supreme Court Justices, so too might the determination of which forms of corpo-

⁴⁵ I am not so naive as to ignore the possibility, indeed the probability, that the Justices, having made their decision, simply sent the clerks and librarians out to find nonlegal support for a decision already made. But of course much the same could be said about legal sources as well. If we accept (perhaps counterfactually, to the legal realist) that legal sources are decision-guiding rather than just decision-justifying, then it is certainly plausible that much the same can be said about nonlegal sources. To be skeptical about the use of nonlegal sources while not skeptical about legal sources assumes the very matter in issue, which is the question of the sources of judicial guidance in hard cases. Moreover, even if the exact nonlegal sources the Court uses are little more than the product of law clerks and librarians filling in the blanks for decisions already made, the sources found and then used may still provide a useful surrogate for contemplating the question of just how the Court obtains its knowledge of golf, or economics, or anything else. On all of this, see Frederick Schauer and Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J Legal Stud 495 (2000).

⁴⁶ That expertise is available is not the same as disinterested expertise being available, and a special problem in *Martin* was the extent to which the available expertise on golf was closely aligned with the PGA Tour, and the available expertise on Klippel-Trenaunay-Weber syndrome was closely aligned with Martin. Specialists in particular diseases rarely take the position that the diseases are not so bad, and specialists in particular sports rarely take the position that the sports are not so demanding.

⁴⁷ 15 USC § 1 (1998).

rate behavior would interfere with trade be better assessed by those with training in microeconomics, particularly those with a specialization in the economics of industrial organization. Similarly, when the Racketeer Influenced and Corrupt Organizations (RICO) Act limits its coverage to “patterns” of criminal activity,⁴⁸ again it is plausible to suppose that the knowledge required to determine what should or should not be a “pattern” under the act would be knowledge much more likely to be possessed by law enforcement experts or congressional investigating committees than by Supreme Court Justices.⁴⁹ And increasingly in recent years, Justice Breyer has been lamenting the fact that the Supreme Court finds itself having to decide issues involving and requiring scientific knowledge that none of the members of the court possess, and that are often at best dimly illuminated by the briefs and other formal materials before the Court.⁵⁰

Given the pervasive presence of what Justice Jackson referred to as the “majestic generalities” of the Constitution,⁵¹ the phenomenon of appellate courts in general and the Supreme Court in particular engaging in fact-based policy determinations on the basis of information contained neither in the record nor in the Justices’ own expertise is even more pervasive in constitutional adjudication. When the Supreme Court in *New York Times Co. v Sullivan*⁵² drastically limited the scope of libel law because of a commitment to the policy of unchilled criticism of public officials (and later public figures⁵³), it based its judgment on the empirical and economic judgment, not supported either in the record or in any empirical

⁴⁸ 18 USC § 1965(5) (1998).

⁴⁹ For the Supreme Court debate on this very issue, compare the opinions of Justice Brennan for the majority and Justice Scalia, concurring in the judgment, in *H.J., Inc. v Northwestern Bell Telephone Co.*, 492 US 229 (1989). For a sample of resistance to taking on such a statutorily mandated policy-making task, see *Georgia Ass’n of Retarded Citizens v McDaniel*, 716 F2d 1565, 1581–82 (11th Cir 1983) (Hill, dissenting). See generally Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 NC L Rev 1253, 1307–17 (2000); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 Cleve St L Rev 285, 424–27 (1984).

⁵⁰ See Stephen Breyer, “Closing Address” at Conference on DNA and the Criminal Justice System, John F. Kennedy School of Government, Harvard University, Nov 21, 2000.

⁵¹ *West Virginia Bd of Educ. v Barnette*, 319 US 624, 639–40 (1943).

⁵² 376 US 254 (1964).

⁵³ *Curtis Publishing Co. v Butts*, 388 US 130 (1967); *Associated Press v Walker*, 388 US 130 (1967).

information then available, that the media would refrain from criticizing public officials and public policy if the common law of libel were allowed to continue. This may well be true, but there are plausible reasons to believe it may be false, and equally plausible policy alternatives not explored by the Court.⁵⁴ This is not to say that the Court's judgment casting aside the common law was wrong; but it is to say that its judgment, right or wrong, was based on what was at best armchair economics and at worst casual speculation, not about the law itself, but about the newspaper industry, its organization, and the incentives of its inhabitants. Much the same can be (and has been) said about the empirical and policy basis for the exclusionary rule,⁵⁵ and it has been a recurrent criticism of the Court's reliance on psychological studies in *Brown*.⁵⁶ And the Court's statistical misstatements in *Craig v Boren*⁵⁷ provide little basis for confidence that the Court can handle the empirical and statistical analyses that are an important, even if not complete, part of a full-blown policy analysis.

None of this, however, may be merely about statutes or the Constitution, or merely about American courts. Rather, the phenomenon of lawmaking on the basis of dimly informed policy speculation can arguably be said to be an accurate, even if possibly mean-spirited, characterization of the entire common law process. When common law courts modify a common law rule, they do so not only on the basis of principles, as Ronald Dworkin has long maintained,⁵⁸ but also on the basis of policy, as Dworkin denies but Melvin Eisenberg has persuasively demonstrated.⁵⁹ In ways

⁵⁴ See Frederick Schauer, *Uncoupling Free Speech*, 92 Colum L Rev 1321 (1992).

⁵⁵ See Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?* 16 Creighton L Rev 565 (1983).

⁵⁶ See especially Edmund Cahn, *Jurisprudence*, 30 NYU L Rev 150 (1955). See also Charles Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L J 421 (1960); Frank Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 70 Calif L Rev 275 (1972).

⁵⁷ 429 US 190 (1976), in which Justice Brennan's opinion for the Court inferred from a .18 percent arrest rate for females and a 2.00 percent arrest rate for males that the correlation between gender and driving while intoxicated in the relevant age group was only 2 percent.

⁵⁸ Ronald Dworkin, *A Matter of Principle* (Harvard, 1987); Ronald Dworkin, *Law's Empire* (Harvard, 1986); Ronald Dworkin, *Taking Rights Seriously* (Harvard, 1978).

⁵⁹ Melvin A. Eisenberg, *The Nature of the Common Law* (Harvard, 1988).

that Holmes identified more than a century ago, the path of the common law is a path consisting of empirical assessment, behavioral speculation, and normative analysis far more than it is a path of logical deduction or any other form of distinctively legal reasoning.⁶⁰ Once we recognize that the common law at its heart is a process in which what had previously been thought to be the rules are modified in the process of application, we recognize as well that this is not and cannot be a process that is entirely rule-based.⁶¹ Rather, like any rule-making or rule-remaking process, it is a process in which determining what the rule should be on the basis of knowledge about the state of the world and knowledge about the nature of human behavior in response to rules is of the essence.

In struggling to identify the essence of golf, therefore, the Supreme Court in *PGA v Martin* does not appear to have departed nearly as much from traditional judicial practice as the dissent appears to suggest. It is true that the Court's knowledge of golf at the highest level may have been amateurish, but there is no reason to believe it was any more amateurish than the Court's knowledge of newspaper practices in *New York Times v Sullivan*, its knowledge of educational psychology in *Brown*, or for that matter its knowledge of the empirical dimensions of voting behavior in *Bush v Gore*.⁶² If there is indeed a dilemma of ignorance plaguing the common law process, and plaguing in similar fashion adjudication centered on linguistically indeterminate statutes or constitutional provisions, then this is not a dilemma anywhere near unique to *PGA v Martin*. Instead, *PGA v Martin* may have only presented in a

⁶⁰ This appears to be the best understanding of Holmes's view that the life of the law is not logic but experience. Oliver Wendell Holmes, *The Common Law* 1 (Little Brown, 1881). See also Oliver Wendell Holmes, *The Path of the Law*, 10 Harv L Rev 457 (1897).

⁶¹ See Frederick Schauer, *Is the Common Law Law?* 77 Calif L Rev 455 (1989).

⁶² The Court in *Bush* places some weight on the fact that 2 percent of the ballots in any presidential election fail to select a candidate for President, 531 US at 103, and relies in significant part for that proposition on an article in the *Omaha World-Herald* on Nov 15, 2000, entitled "Balloting Problems Not Rare But Only in a Very Close Election Do Mistakes and Mismarking Make a Difference." It turns out that the author of the article was one Matt Kelley, a twenty-nine-year-old reporter for the *World-Herald* who was so junior upon his arrival at the paper a few years earlier that the only office that could be found for him was a quickly converted closet, resulting in his colleagues referring to him as "Closet Boy." See Michael Kelly, 'Closet Boy' Makes History, *Omaha World-Herald* (Dec 14, 2000), p 19. Closet Boy's information may well have been accurate, but it does give pause about the Court's sophistication in locating nonlegal information, even the nonlegal information that seems important to the Court's decisions.

particularly accessible way a problem historically ignored by the blind faith in the ability of the common law to “work itself pure.”⁶³

IV. THE MANAGEMENT OF IGNORANCE

We can identify (at least) four strategies for dealing with the dilemma of ignorance. The first is the one represented by the majority opinion in *PGA v Martin*, and might best be seen as a form of muddling through. Yes, appellate decision making requires more factual knowledge not contained in the record than the traditional Blackstonian view of adjudication recognized,⁶⁴ this strategy acknowledges, but that does not conclusively condemn the process. By having multimember appellate courts, and nine members in the Supreme Court, the process ameliorates some of the dilemma of ignorance by increasing the range of skills and experiences represented on the court. And with diligent assistance in the form of law clerks and library staffs, the judges have the ability to remedy some of their ignorance by doing their own research as and when the nature of the case demands it. Moreover, it is commonly the case, especially in the Supreme Court, that an adversary process coupled with liberal allowance of amicus briefs⁶⁵ will bring to the Court a vast amount of information otherwise unavailable to the Justices. If *PGA v Martin* had not been about golf but had been about a more obscure sport—curling, for example—it still would have been the case that the materials available to the Justices from the record below, from the parties, and from the amici would have given nine people of considerable experience, a diversity of opinions, and presumably good judgment most of the raw material they would have needed to make an intelligent, even if not demonstrably correct, decision.

From a somewhat different perspective, the muddling through represented by the majority opinion in *PGA v Martin* and the overwhelming bulk of most appellate constitutional and common law adjudication, as well as much appellate statutory adjudication,

⁶³ *Omychund v Barker*, 26 Eng Rep 15, 33 (1744) (Lord Mansfield). See also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353, 377–81 (1978).

⁶⁴ I take Blackstone to be the exemplar of the belief that legal decision is not very much a matter of experience and largely a matter of logic and discovery.

⁶⁵ See Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici Before the Supreme Court*, 78 Wash U L Q 789 (2000).

might be little cause for alarm. Although it may seem scary to have major issues of policy determined by nine relatively uninformed people assisted by thirty-odd twenty-somethings surfing the Web, similarly dismal characterizations can be applied to the alternatives. Legislation is as often based on anecdote as analysis, interest group influence in legislative determinations is rampant,⁶⁶ staff influence is considerable,⁶⁷ and legislative hearings are typically performances rather than attempts by the legislature or one of its committees to obtain information. Although romantic glorification of the judicial process may be the characteristic pathology of many lawyers and most American law professors, correcting for this by unwarranted glorification of the legislative process is no more justified. And even if so-called expert decision making, whether by administrative agencies or blue-ribbon commissions, may solve some of the dilemma of ignorance, the process is not immune from regulatory capture, the agendas of the experts, and numerous other pathologies.⁶⁸ So even if muddling through is the best we can say about the process in cases like *PGA v Martin*, perhaps muddling through by a group of moderately intelligent, moderately electorally unaccountable, and moderately disinterested decision makers does not look nearly so bad when we compare it to the likely alternatives.

At the opposite pole from muddling through and being comfortable with it is the second approach, represented by Justice Scalia's dissent. For Justice Scalia the courts should be protective of their own comparative advantage, and should not venture into domains in which they have little expertise and little hope of obtaining it. And although the majority in *PGA v Martin* properly points out that the task that Justice Scalia finds distasteful for the judiciary appears to be compelled by the open-ended and policy-laden statu-

⁶⁶ See John Ferejohn and Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 Georgetown L J 565 (1992); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum L Rev 223 (1986).

⁶⁷ See *Hirschey v Federal Energy Regulatory Commission*, 771 F2d 1, 7-8 (DC Cir 1985) (Scalia concurring); *Wallace v Christensen*, 802 F2d 1539, 1559-60 (9th Cir 1986) (Kozinski, concurring in the judgment); Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, in Robert A. Katzmann, ed, *Judges and Legislators: Toward Institutional Comity* 90 (Brookings, 1988).

⁶⁸ See Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale, 1997).

tory language, perhaps the best way of understanding Justice Scalia's views, here and elsewhere, is as proposing a new canon of nonjusticiability. Just as the *Aschwander*⁶⁹ rule urges courts to interpret statutes in ways that (seem to⁷⁰) avoid deciding a constitutional question, so too might Justice Scalia's canon urge courts to interpret statutes in ways that forestall the necessity of courts taking on tasks for which they are institutionally ill-equipped. Under this view, Justice Scalia's insistence that *Martin*, as a competitor, was not covered by a statute aimed at customers was not (only) about the issue of statutory coverage taken in isolation. It was also part of a strategy designed to prevent the Court from being forced to decide issues beyond its competence, such as the issue of whether walking was an essential or merely a contingent component of the game of golf.

Although it is true that Justice Scalia's skepticism about engaging in seemingly authorized exercises of statutory interpretation that take the Court too far into the realm of policy would appear to apply to constitutional interpretation and common law decision making as much as it applies to statutory interpretation, Justice Scalia's views about these enterprises mirror his views about the proper approach in *PGA v Martin*. When he urges the avoidance of balancing tests in constitutional adjudication,⁷¹ or when he lauds rule-based decision making as opposed to case-by-case adjudication,⁷² he can be understood as evidencing throughout much of his jurisprudence the same doubts about judges as policy analysts as he does in *Martin*. That Congress has given the courts the task, he might very well say, is not the end of the analysis, for this is a task that the courts can and should try their best to avoid.

Intriguingly related to Justice Scalia's position is the third strategy for dealing with the dilemma of ignorance, a strategy repre-

⁶⁹ *Aschwander v Tennessee Valley Authority*, 297 US 288, 347-48 (1936) (Brandeis concurring).

⁷⁰ The *Aschwander* rule is better understood as an indirect way of deciding constitutional questions rather than as a way of avoiding them. See Frederick Schauer, *Aschwander Revisited*, 1995 Supreme Court Review 71. See also Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 BC L Rev 1003 (1994).

⁷¹ See, for example, *Bendix Autolite Corp. v Midwesco Enterprises*, 486 US 888, 902 (1988) (Scalia concurring).

⁷² Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

sented by Ronald Dworkin's distinction between principle and policy. Putting aside the descriptive accuracy of his view that courts are engaged in decisions of principle and not of policy,⁷³ Dworkin's normative position is still that principle and not policy is what courts are best at, and that principle and not policy is what courts should do. Because policy involves trade-offs and compromises, he argues, it is best left to legislatures. Only when the question is a matter of principle, and thus only when the views of the majority are essentially irrelevant,⁷⁴ should courts consider themselves empowered. And although Dworkin does not pause for long over what policy analysis actually involves, it is implicit in his view that determining matters of principle is largely a moral/philosophical enterprise as to which the messy world of empirical fact is largely beside the point. If, as he has said, the rights of a criminal defendant are matters of principle existing independent of the effect (except in cases of catastrophe) on the effectiveness of crime control generally,⁷⁵ then there would be no need for empirical investigation into the consequences on crime control of one rather than another approach to, say, the privilege against self-incrimination. And because questions of equality are similar issues of principle existing independent of whether enforcing equality rights would increase or decrease the utility or welfare of the population at large, then once again judges who stick to issues of principle can safely avoid the kinds of empirically based policy inquiries that are outside their appropriate competence.

Although Dworkin's view that judges should stick to principle and stay away from policy bears important affinities with Justice Scalia's views, it is not clear that the two would have come to the same conclusion about *PGA v Martin*. If the rights of the disabled are themselves seen as matters of principle and not matters of policy, then it would be right, according to Dworkin, to recognize and enforce them even at the expense of detracting from the fundamental nature of some enterprise that was not itself rights-protective. And if statutory language is seen not as definitive but

⁷³ See Eisenberg, *The Nature of the Common Law* (cited in note 59).

⁷⁴ See Dworkin, *Taking Rights Seriously* at 190–98 (cited in note 58).

⁷⁵ Ronald Dworkin, *The Rights of Myron Farber: An Exchange*, *New York Review of Books* (Oct 26, 1978), p 34.

merely as the traces of something deeper, as Dworkin maintains,⁷⁶ then Dworkin could well have come to a conclusion in *Martin* more aligned with the majority than the dissent. For present purposes, however, that is a side issue, less important than identifying a view that, like Justice Scalia's, takes policy as outside of the judicial ken, and that would also, albeit perhaps in different ways, seek to ensure that the courts in their decisions stayed away from making the kinds of policy determinations that characterized the majority in *Martin*.⁷⁷

Most interesting, however, is the fourth strategy for dealing with the dilemma of ignorance, a strategy best exemplified on the Supreme Court by Justice Breyer and most actively promoted off the Supreme Court by Judge Posner.⁷⁸ Both Breyer and Posner recognize the necessity of nonlegal expertise in the making of judicial decisions, and recognize as well that judges are unlikely to have or to be able to obtain by traditional methods the necessary expertise. But unlike Justice Stevens, whose opinion Justice Breyer did join, neither Posner nor Breyer in their extrajudicial writings endorses the status quo of just muddling through. Rather, both, and especially Justice Breyer, advocate structural and procedural changes in the judiciary that would make it easier for judges to obtain the kinds of information they need in order to make the decisions that modern society requires of them. Whether it be more intensive training of judges in the techniques of empirical analysis, as Judge Posner has long advocated, or an increased ability for courts themselves to call on expertise without having to rely

⁷⁶ Ronald Dworkin, *Law's Empire* (cited in note 58), at 20–23. More recently, Dworkin has, consistent with the view articulated by Justice Stevens in *Martin*, taken broad legal language as representing a mandate or even a command to take on the tasks encompassed by the broad language. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 2–9 (Harvard, 1996).

⁷⁷ There is a substantial risk, however, that these avoidance strategies will at times turn out to be less successful than their proponents suppose. Will Justice Scalia and those following him mask contested empirical issues as questions of law? Will Dworkin and those following him announce as principle and not policy issues that in fact contain contested empirical and policy judgments? To the extent that these pathologies are possible—if you have a hammer, every problem looks like a nail—the Scalia/Dworkin approach of defining judicial jurisdiction by reference to judicial comparative advantage may turn out to be illusory, and alternative approaches, including muddling through, may turn out at least to bring the benefits of transparency about what it is that the judges are actually doing.

⁷⁸ Richard A. Posner, *Overcoming Law* 208–10 (Harvard, 1995); Richard A. Posner, *The Problems of Jurisprudence* 132–36 (Harvard, 1990). More generally, see Richard Posner, *The Problematics of Moral and Legal Theory* (Harvard, 1998).

on the expertise hired by the parties, as Justice Breyer has famously urged,⁷⁹ both of them depart dramatically from the approach of Justice Scalia.⁸⁰ For Scalia the competence of the courts is a given, and the docket and the issues the courts take on need to be adjusted accordingly. But for Justice Breyer and Judge Posner, the docket and the issues are the given, and it is the competence of the courts that needs adjustment.

When applied to *PGA v Martin*, the Breyer-Posner approach opens up numerous possibilities at both trial and appellate levels. Most modestly, judges could simply recognize their own shortcomings, and self-consciously try to remedy them, not by on-the-fly web surfing but by semi-intensive immersion in the issues as and when they arise. Or, as suggested by Justice Breyer,⁸¹ judges could wait to decide issues until extrajudicial policy debates have ripened, and could themselves even be part of these larger discussions. More radically, judges at trial could call their own experts,⁸² and more radically yet, appellate courts could retain more ability than they now have to obtain information not offered by the parties, or to suspend proceedings and require the parties to provide additional information.

More broadly yet, judges could continue to press against the

⁷⁹ *General Electric Co. v Joiner*, 522 US 136, 147 (1997) (Breyer concurring); Stephen Breyer, *The Interdependence of Science and Law*, 82 *Judicature* 24 (1998).

⁸⁰ It is possible, however, that Justice Breyer, Judge Posner, and many others will misapprehend the nature of the relevant expertise. Is the relevant expertise about science policy, for example, the expertise of the scientist, as the scientists would have us believe, or the policy analyst, as the policy analysts would have us believe, or the science policy specialists, as the science policy specialists (some but not all of whom are scientists) would have us believe? Is the relevant expertise in *Martin* the expertise of the golfer, the sports physiologist, the physician, or someone else? Given that the identity of the expert is likely to be contested, and that claims of expertise will be clothed with the self-interest of experts in asserting that their expertise is most important, the role of the judge as ignorant but disinterested arbiter may become more appealing.

⁸¹ Breyer, "Closing Address" (cited in note 50).

⁸² Fueled by Justice Breyer, this has been an area of active debate and prescription. See *MediaCom Corp. v Rates Technology, Inc.*, 4 F Supp 2d 17, 29–30 (D Mass 1998); Joe S. Cecil and Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 *Emory L J* 995 (1994); Thomas M. Crowley, *Help Me Mr. Wizard! Can We Really Have "Neutral" Rule 706 Experts?* 1998 *Detroit Coll L Rev* 927; Ellen E. Deason, *Court-Appointed Expert Witness: Scientific Positivism Meets Bias and Deference*, 77 *Or L Rev* 59 (1998); Samuel Gross, *Expert Evidence*, 1991 *Wis L Rev* 1113, 1220 (1991); Laurel Hooker, Joe S. Cecil, and Thomas E. Willgang, *Assessing Causation in Breast Implant Litigation: The Role of Science Panels*, 64 *L & Contemp Probs* 139 (2001). For a more general look at the question, see Scott Brewer, *Expert Testimony and Intellectual Due Process*, 107 *Yale L J* 1535 (1998).

hold that two of the most important of litigation traditions have on judicial decision making. The first of these is that the ideal number of parties to a lawsuit is two. Although class actions, derivative suits, interpleader, impleader, cross-claims, institutional litigation, and numerous other devices of twentieth-century civil procedure have made inroads against the traditional model of one plaintiff and one defendant,⁸³ that model still shapes the legal and judicial consciousness⁸⁴ and still stands as a barrier to the kind of policy approach that would recognize that outside of traditional litigation the number of interests is likely to be more than two, and that the all-or-nothing, winner-take-all approach of traditional litigation is likely to be unsatisfactory.

Second, the traditional litigation model is based on litigation as a contest under strict rules. Among the most constraining of these rules is that the parties and not the judge control the informational terrain on which the contest will be contested. This is most apparent in traditional English practice, according to which judges are prohibited from conducting their own research, even legal research. If an authority is not cited by the parties, then it cannot be part of the decision, however important it might be. And although this approach, which still holds sway in Great Britain and many other common law countries, is substantially more constraining than the American approach, the nature of litigation, at both trials and appeals, is still within the penumbra of the English tradition, and is still a procedure in which the parties and not the judge are the primary controllers of the information that determines the outcome. The capacity of a court to depart from party-provided information—whether factual, legal, or expert—and obtain the information it needs is a valuable advance from thinking

⁸³ See Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv L Rev 4 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv L Rev 1 (1979). See also Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge, 1998); Theodore Eisenberg and Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv L Rev 465 (1980); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L J 635 (1982).

⁸⁴ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv L Rev 353 (1978); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L J 1265; Robert Nagel, *How Useful Is Judicial Review in Free Speech Cases?* 69 Cornell L Rev 302 (1984). See also Neal Devins, *I Love You, Big Brother* (Book Review), 87 Calif L Rev 1283 (1999).

of courts as referees of tournaments to thinking of courts as the makers of decisions with important policy implications beyond the interests of the litigants before them. Such a step will enable courts to make policy more intelligently, but of course it is only a first step.

V. CONCLUSION: FROM LEGITIMACY TO INSTITUTIONAL COMPETENCE

Debates about judicial power, in the United States and elsewhere, have been almost exclusively about legitimacy, and we still labor under the burden of the thinking that the “counter-majoritarian difficulty”⁸⁵ is the only productive way of addressing the allocation of powers in a multifaceted political system.⁸⁶ The assumption has always been that majority rule is the default position, and that judicial power, especially when exercised by nonelected judges in the federal and some state systems, is consequently in need of special justification and in equal need of limitations on its scope.

The question of legitimacy is not unimportant, but it is a mistake to think it the only question worth asking. Society through the various devices of democracy is not only a policy-maker but is also an institutional designer. And although the role and limits of majority rule and popular accountability are important issues of institutional design in any democracy, there are others as well. Chief among these others is a cluster of questions falling under the heading of institutional competence. Which kinds of institutions are better at making which kinds of decisions, independent of questions of majority rule? Which kinds of decisions require short-term popular accountability, and which are made better when they are removed from it? Which kinds of decisions are dependent on factual information, and how might they be acquired? Which decisions are ones in which there could be genuine expertise, and, for those decisions, should experts make the decisions,

⁸⁵ Alexander Bickel, *The Least Dangerous Branch* 16 (Yale, 2d ed 1986). For an example, see Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U Pa L Rev 759 (1997).

⁸⁶ For an intriguing look at the history of this pathology, see Laura Kalman, *The Strange Career of Liberal Legalism* (Yale, 1996).

and, if so, how should the experts be chosen and how should they make their decisions? Which interests should be heard before a policy is made, and which interests should have standing to object to a policy? How should decisions and policies be implemented, and what should be the relationship between the making of a policy and its implementation?

This series of questions merely scratches the surface. The question of institutional design is far more complex than a short series of big questions. But it is also far more complex than the majoritarian/countermajoritarian straitjacket into which far too many institutional design questions involving the judiciary have been strapped. Only when we recognize that the full range of questions of institutional design are as pertinent to the judiciary as they are to other societal decision-making institutions can we begin to make real progress.

Questions of judicial institutional design have been burdened not only by assuming that questions about majoritarianism are the only ones worth asking, but also by traditional and arguably erroneous views about the nature of judicial decision making. Despite a hundred or more years of legal realism in its various forms, we still believe that the kinds of skills that were taught in the first year of law school in 1956 are the kinds of skills that are most relevant to deciding most of the cases that wind up in our appellate courts. Yet cases like *PGA v Martin*, far more typical than it is exceptional, challenge that belief in the most direct of ways. As long as the judicial task involves questions like “What is golf?” as much as it involves questions like “Is there a remedy under the Securities Act of 1933 against the use of a misleading statement in the sale of an unregistered security?”⁸⁷ the judiciary and those of us who comment on its performance will be faced with the alternatives of suggesting, as Justice Scalia has suggested, that the judiciary should behave to minimize the necessity of answering questions like the former, or with suggesting, as Justice Breyer has suggested, that the judiciary should modify its methods so that it

⁸⁷ See *Gustafson v Alloyd Co.*, 115 S Ct 1061 (1995), criticized in Edmund W. Kitch, *Gustafson v Alloyd Co.: An Opinion That Did Not Write*, 1995 Supreme Court Review 99. I use this example only because it strikes me as one in which the skills required to answer the question are much more the skills of close reading and analysis of a highly complex statutory scheme than is the question whether walking is part of the fundamental nature of tournament golf.

can start to answer questions like the former with the same sophistication that it uses to answer questions like the latter.

Indeed, *PGA v Martin*, precisely because of and not in spite of the fact that it is about golf and not about securities regulation, and because of and not in spite of the fact that it was so widely followed in legal and nonlegal circles alike, may actually turn out to be especially important in molding future discussions of judicial expertise. That is, one of the incidental benefits of the case having been about golf is that the question of expertise was not quite on the surface initially in the way it is when the issue is science rather than sports. If the required expertise is about DNA testing, the causes of cancer, or the theory of relativity, it is usually obvious to judges and to other nonscientists confronting these topics that they are out of their depth and in need of assistance. When the question is golf, however, or is any of a large number of other policy issues that may appear somewhat less esoteric at first or even second glance, the temptation to assume that expertise is not relevant and that the knowledge of the curious generalist is sufficient will be much greater. The fact that junk science is about science often is sufficient to raise the proper degree of suspicion, but junk politics, junk sociology, junk policy analysis, or even junk golf can often sneak in undetected. Yet although the confidence of the curious generalist in her nonexpert knowledge of golf or the economics of industrial organization will be greater than her confidence in her nonexpert knowledge of the theory of relativity, this confidence may well be misplaced. It is no coincidence that almost all of the existing debate about judicial nonexpertise has been about science, but it is the great virtue of the debate in *PGA v Martin* that it demonstrates so well that the issues range far beyond science, and that the problems of judicial ignorance may be even more pressing when the technical modesty that science tends to engender is not present.

