

**BIPARTISANSHIP THROUGH THE EYES OF THE SUPREME COURT:
A PERFORMATIVE ANALYSIS OF ‘JUDICIAL LOCKJAW’**

An Undergraduate Research Scholars Thesis

by

CORIE DEPUE

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Dr. James R. Ball III

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ABSTRACT

Bipartisanship Through the Eyes of the Supreme Court: A Performative Analysis of ‘Judicial Lockjaw’

Corie Depue
Department of Performance Studies
Texas A&M University

Research Advisor: Dr. James R. Ball III
Department of Performance Studies
Texas A&M University

My project has produced the first act of a written play examining the concept of judicial lockjaw and bipartisanship’s positive and negative effects on the Supreme Court. My work contributes to the genres of “Theatre of the Real” or “Documentary Theatre” and will expand upon the practice of examining political decisions and law practices through performance. Theatre, more than other mediums, has the power to use multiple forms of media and style to compare and contrast individual justices, ways of speaking, opinions, and cases. This allows performance to submerge an audience in an issue or debate, rather than needing to focus on one way of presenting information. Performance can connect the effects of past decisions and philosophies to their effects today in a way that makes an audience reflect on their own relationship with law and bipartisanship, as well as develop their own opinion.

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SECTION I

RESEARCH QUESTION

Research Questions

My thesis seeks to answer the question, is judicial lockjaw, and the requirement of bipartisanship, a necessary social and legal construct in the operation of the Supreme Court? Secondly, how can dramaturgy and performance as research intercede in the debate over judicial lockjaw?

This concept of judicial lockjaw has been used by scholars to describe what Leslie B. Dubeck defines in her article “Understanding ‘Judicial Lockjaw’: The Debate Over Extrajudicial Activity” as “a phenomenon of self-censorship that prevents judges from speaking about the judicial process and from pursuing extrajudicial activities” (569). Supreme Court Justice Felix Frankfurter, during a speech before the 25th anniversary dinner of the American Law Institute stated that although he felt he was “suffering from what might be called ‘judicial lockjaw,’” he felt that, “even Justices of the Supreme Court need not be wholly tongue-tied” (Frankfurter 656). For a Supreme Court justice to comment directly on judicial lockjaw is relatively rare since even the acknowledgement of its having an impact on the court is a social taboo.

Judicial lockjaw is not required by law, as of the publication of this thesis there is no legal statute addressing the conduct of Supreme Court Justices. Rather, judicial lockjaw is a social idea put upon the Supreme Court of the United States by the expectations of the public. Requiring, in the public’s eyes only, that justices should not address their own political beliefs outside of their questions in oral arguments and written decisions ensures that the Supreme Court operates separately from current political discourse, operating only within the set precedent of

the law, and ensures that the procedural selection of new justices is not a campaign. However, judicial lockjaw also presents several problems. Firstly, if the personal opinions of justices are kept from the public, it is difficult to assess a judge's actions. Secondly, judicial lockjaw is a social expectation that is becoming more and more difficult to uphold. Whether addressed in public or not, the personal ideology of justices is assumed by the public to lean toward one party or another based on their speech in court and their work before being sworn in.

The question of judicial lockjaw is difficult. The removal of this social expectation could undermine the workings of the court but the acceptance of it could make the decisions of the court clearer and their overall work more streamlined. In this way, the question of judicial lockjaw is critical for legal scholars, politicians, and the citizenry. Due to the stakes of this conversation I believe that theatre is the best medium to present both arguments. Theatre not only shows the text of the history and discourse but can also present the stakes and emotional ties inherent in the conversation. Theatre presents the stakes as well as the text in a complete package, where other mediums cannot.

Methodology

Throughout this project I have used playwriting, dramaturgy, and performance as research to address my research questions. These three methods have worked in tandem to achieve a workable draft of the first act of *Bipartisanship Through the Eyes of the Supreme Court*.

Playwriting & Dramaturgy

The main lens of analysis for my work is playwriting and dramaturgy. Playwriting, simply the act of writing a play, has allowed me to work with my primary sources and put them in a dialogue with one another. This has allowed my work to mix time periods and present the

words of different justices as if they were speaking to each other today. It is important to make a distinction between playwriting and fiction or non-fiction writing. Playwriting requires the consideration of actors and directors after the written work is done. In this way, playwriting has allowed me to put more consideration on the physical presentation of the debate and how this will impact an audience's perception and takeaways after a performance.

Similar, but distinct, is dramaturgy, or the theory paired with the practice of dramatic writing. I have used dramaturgy to analyze the works of Moisés Kaufman and David Hare and the techniques and writing styles that they have used in their works. It has been extremely beneficial to review previous works in the genres of theatre of the real and documentary theatre from the perspective of theory, or dramaturgy.

Performance as Research

The second mode of analysis that I used for this project is performance as research. Lewis and Tulk in their editorial, "Why Performance as Research?" write that, "Research and practice exist in a radical positioning: where knowledge formed through the material process of performance can be valued as equivalent to knowledge produced through speculative and analytical models" (1). I have used and will use performance as research in the development of this project as a way of seeking feedback and analyzing the effectiveness and purpose of my work. I will use performance as research as this script develops in a workshop setting with a group of actors. It is important, as a playwright, that I work with other practitioners to assess how my play will be performed and what changes need to be made.

Along with analyzing the performability of my script, I will also be using performance as research as a way to learn more about judicial lockjaw and the arguments that I am presenting. Working with a group of actors with this text is unique in that I will be able to discuss their

opinions and instincts with the text as the work progresses which will give me new insight into the primary sources that I am using and the ways in which I should go about preparing the script for performance. Rather than reviewing these concepts in an academic setting, a workshop will provide insight into the emotional and physical side of the arguments, which will help to more fully develop the script for the theatre.

SECTION II

LITERATURE REVIEW

Theatre of the Real

The first set of previous research that I analyzed when preparing to begin writing was the existing literature and theory on theatre of the real. Carol Martin, Professor of Drama at New York University, defines theatre of the real in her essay “Bodies of Evidence”:

Contemporary documentary theatre represents a struggle to shape and remember transitory history-- the complex ways in which men and women think about the events that shape the landscape of their lives. Those who make documentary theatre interrogate specific events, systems of belief, and political affiliations precisely through the creation of their own versions of events, beliefs, and politics... (17).

Theatre of the real is distinctly different from historical fiction in that it allows analysis of subjects while also “revealing the virtues and flaws of its sources” (Martin 18). Expanding upon Martin’s virtues and flaws is the criticism that the “truth” that documentary theatre professes to extol is always constructed, both literally and figuratively. The speeches, letters, government documents, etc. that documentary theatre pulls from are not the whole truth in themselves but rather a single piece of one person’s perspective, word choice, and worldview and the recreation of these words on-stage is itself a recreation of that flawed truth. Creating documentary theatre with primary sources is a narrated version of a history that is itself already being narrated by those whose words are being chosen for recreation.

The process of creating documentary theatre requires the use of archived material such as interviews, governmental documents, speeches, journals, etc., and within this, the author’s

decisions to select, edit, organize, and specifically present certain pieces within these primary sources is how the work of documentary theatre is done (Martin 18). Martin clarifies the life cycle of these documents in the creation of documentary theatre by saying that, “documentary theatre takes the archive and turns it into repertory, following a sequence from behavior to archived records of behavior to the restoration of behavior as public performance” (Martin 18). This process of taking existing documents and turning them into a theatrical repertoire is a way of embodying the written word. Diana Taylor, Professor of Performance Studies at New York University, in her article “Translating Performance,” discusses this practice: “Embodied practice, along with and bound up with cultural discourses, offers a way of knowing” (45). Documentary theatre relies heavily on this idea of “embodied performance” since it is both real, in the sense that it takes directly from primary sources, and constructed, in that it is being re-performed as a live secondary source.

There has been some criticism of theatre of the real with some theatregoers and critics asserting that it promises more than it can deliver. Stephen Bottoms in his essay “Putting the Document into Documentary: An Unwelcome Corrective?” states that theatre of the real, “...casually obscures the fact that realism and reality are not the same thing, and that unmediated access to ‘the real’ is not something the theatre can ever honestly provide” (57). However, hardly ever have practitioners of theatre of the real asserted that they were presenting complete recreations of history. Carol Martin states that the functions of documentary theatre are, “to reopen trials to critique justice, to create additional historical accounts, to reconstruct an event, to intermingle autobiography with history, to critique the operations of both documentary and fiction, and to elaborate the oral culture of theatre...and daily life” (22). None of these functions,

which represent categories that most contemporary theatre of the real fall into, seek to recreate exact perfection in their approach to history.

Performance and the Law

Performance Studies as a field and traditional theatre practices have been concerned and intertwined with issues of the law since their inception. As legal proceedings are themselves are a heavily choreographed performance, it makes sense that the two fields would interact. Milner S. Ball in his article “The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre,” specifically seeks to examine the law through performance:

“Certainly judicial proceedings are a *source* of drama, as is clear from the works of playwrights from Aeschylus to Shakespeare to Daniel Berrigan. And not infrequently the courtroom provides the *setting* for dramatic moments. This service of judicial proceedings as source and setting for drama suggests, but is not equated with, the allied notion that judicial proceeding are themselves a type of theatre” (81).

This assertion that the law and theater has many parallels makes the critique of the law through performance so compelling. Since engagement with the two, as either a practitioner or audience member, is virtually the same, it is much easier as a playwright to present the law in the theatre and receive engagement from an audience.

David Hare’s Stuff Happens

A notable contributor to contemporary theatre of the real is David Hare. Hare is an Academy Award nominated English playwright, screenwriter, and director. His play, *Stuff Happens*, was written in 2004 as a response to the Iraq War and is written as a mix of direct quotes and fictionalized accounts, which Hare addressed in his Author’s Note:

“*Stuff Happens* is a history play, which happens to center on very recent history. The events within it have been authenticated from multiple sources, both private and public. What happened happened. Nothing in the narrative is knowingly untrue. Scenes of direct address quote people verbatim. When the doors close on the world’s leaders and their entourages, then I have used my imagination.”

Stuff Happens has been the primary influence on my work in terms of dealing with political themes and mixing primary sources and fictionalized content. David Hare utilizes character names such as “An Actor” and “Journalist” to keep his audience’s focus on the words and actions of the main characters such as George W. Bush, Condoleezza Rice, and Colin Powell. I have used a similar technique in my work. The main focus is on the words and actions of the nine justices with the secondary characters acting as a framing device for these main nine. Instead of naming my secondary characters, I have chosen to keep their title their relationship to the court, similar to Hare.

Moisés Kaufman’s Gross Indecency

Gross Indecency: the Three Trials of Oscar Wilde is a 1998 play by playwright Moisés Kaufman that details the 1895 gross indecency trials against playwright Oscar Wilde. In his Author’s Introduction Kaufman writes, “In making *Gross Indecency: The Three Trials of Oscar Wilde* I was interested in two things: First, I wanted to tell the story of these trials. And second- I was interested in using this story to explore theatrical language and form. Specifically, how can theatre reconstruct history?” (xiv). Instead of a direct inspiration for my work, my motivation for my project is similar to Moisés Kaufman’s. Similar to his statement in his author’s introduction, I am seeking to present the historical record behind the debate around judicial lockjaw and use my work to examine the performance of the law and the motivations behind the debate itself.

SECTION III

EXPLANATION OF EXHIBIT

As it stands currently, this undergraduate thesis has produced a revised version of the first act of *Bipartisanship Through the Eyes of the Supreme Court*, which will be developed into a full-length script.

Act I of *Bipartisanship Through the Eyes of the Supreme Court* is the first half of a dramatic work. It was presented as an oral research presentation on March 21, 2019 during Student Research Week at Texas A&M University and included an overview of performance as research, the process of creating an original dramatic work based on real-life events and characters, and a history and background of theatre of the real. It has also been presented in association with the Department of Performance Studies at Texas A&M University as a senior capstone project including an analysis of research and a staged reading of excerpts of the first act.

The playwriting process will continue after the publication of this thesis. Currently, the bulk of the research needed to draft the full play is completed. The next steps will be to draft the second act of the play, organize a series of workshops with a group of actors, revise the play based off of these workshops, then complete the final script and seek publication. After I, as the playwright, complete my first draft of the full script, the most important part of the process will be the workshop, which is a form of performance as research. My workshops will involve gathering a group of actors to work with the script to determine how a show may run, any large revisions that may need to be made, and to get an actor's perspective on the work. Instead of preparing for a full performance of the piece, the workshop will serve to find problems within

the text and to find gaps in the source material that need to be revisited and added. The workshop will not focus on elements of costume, stage design, or even specific stage directions; rather, it will serve as a way for me as the author to get new perspectives on the work as part of the writing process.

I intend to organize a set number of meeting times to work with actors to ensure that the process moves smoothly and that I will have a clear timeline for the completion of the full draft. After my workshop I will continue to revise the play based on my performance as research until the script is ready to move onto publication and/or a staged reading in preparation for an eventual full production.

SECTION IV

REFLECTION

Research Process

Reflecting on the process of creating the first act of *Bipartisanship Through the Eyes of the Supreme Court*, there are several challenges that I faced while balancing the creative work of this project with the requirement of completing a publishable Undergraduate Research Scholars thesis. One of the most important concepts that I have become familiar with while working on this project is performance as research, which in my case has also been dramaturgy as research. I developed so much more of my personal opinion and framework for my play through the writing process than I did while doing more traditional research and combing through archival material and I wish that I had taken more notes and catalogued that journey earlier in the process. While my personal opinions and thoughts on the topic are not a part of the work itself, much of how I approached addressing audience perception and experience while reading or watching this play came out of my own experience while writing and juxtaposing how my thoughts changed and by being exposed to pieces of information presented in different ways. Performance as research has been instrumental to my ability to frame arguments for and against judicial lockjaw in a way that takes an audience's thoughts, worldview, and past experiences into account.

Another challenge that I faced was the visceral difference between research writing, dramaturgical writing, and acting craft, which were all vital elements to the completion of this project. All three require different considerations and styles and I consistently had trouble shifting my mindset between the three to be able to give my best work to each element and to have them work together cohesively. My research writing, specifically for this thesis, was

focused on citable fact and defensible analysis. This was the process of finding my primary sources and ensuring that they each show a different side of the historical record regarding judicial lockjaw. Locating these sources is easier without the necessary consideration of how they would fit in the play and how they could be performed on-stage. My dramaturgical writing was looser and, while still very much focused on factual details and events, was more focused on how to get those pieces of information across to an audience. This is the part of the writing process where I took my primary sources and fit them together to tell a story. The challenge here was to have these pieces in an interesting dialogue while still keeping the bulk of the original text unchanged. Finally, my work with acting craft for this project was more creative and freeing and dealt with the feasibility of working with actors on specific pieces of text and stage directions, but not necessarily the content of the text. All three of these pieces needed to be developed together and needed to be able to work together to create a piece of presentable art but was very difficult for me to consistently work with in tandem.

Overall, while the writing process was very challenging while working on this piece, writing the first act of my play in conjunction with an undergraduate thesis has been instrumental in teaching me how to better combine creative work with scholarly rigor and expectations and be able to present creative pieces in academic settings. Having built these skills as an undergraduate will help me greatly as I continue to develop as a scholar in creative fields in the future, and in my plans to attend law school.

Public Presentation

I presented my work during Texas A&M University's Student Research Week on March 21, 2019. Instead of a staged reading or direct presentation of my creative work, I presented on my process, methodology, and literature review. One challenge that I faced, that I am happy to

have worked through, is to have presented my general concept to an audience that largely did not have a background in performance studies, traditional theatre craft, or dramaturgy. It required me to think through how I worded my abstract and descriptions of concepts like performance as research, documentary theatre, and even the basic steps of dramaturgy more than I have in the past with this project within the Department of Performance Studies. One of my goals after I graduate is to continue developing my script, and hopefully similar scripts and projects, with the end-goal of publication and public performance. The ability to craft and sell my work in a way that is accessible to a wider audience than just individuals in my field is vital to these goals and my public presentation helped me to better see the challenges that I may face and to be able to adjust and change to fit a wider audience.

One of the specific challenges that occurred during my question and answer period at Student Research Week was the difficulty in explaining performance as research as a viable mode of exploration in a traditional academic setting. Many who work in more traditional or widely accessible forms of research may dismiss performance as research since it is rarely discussed and used outside of the field of Performance Studies and can be difficult to explain to those who have not engaged with performance in an academic setting. Moving forward, it will be vital to myself, as a researcher who uses performance as research, and who is very committed to using it in my practice to develop a better explanation of its purpose and use in my field and in research as a whole.

Both of the questions that I was asked by the judges at Student Research Week related more to my future goals and commercial viability of my work, rather than the research process. They asked about the content of my play, and what I plan to add to it in the future, and what my next five steps are in my process of producing a written work. As I approached my presentation

more as an academic explanation of research and less as a proposal or pitch of the creative piece, these questions made me pause, but I am extremely grateful for their line of questioning. It has been easy for me, while working on this project, to get absorbed in the comfort of working within an academic space rather than a competitive creative space. While I am very grateful to have been able to develop my skills as a writer through this project in a protected and non-competitive setting, these questions helped me to begin thinking of my work as not only a contribution to research and performance studies literature, and a learning opportunity, but also as a viable piece to share and enter into the larger, public, and competitive, creative canon.

I have not changed anything in the current iteration of the first act of my play or feel that I would have approached this project up to this point any differently based on this change in mindset, but I anticipate that as I continue working on this script, there will be some changes. While preparing for my presentation, I expected to tweak small things like wording, the way that I explained performance studies topics, and/or have a better understanding of how I would present to individuals with little or no theatre background. However, even though some of these small changes were addressed, the shift in mindset from academic to generally creative and even entrepreneurial from the question and answer section of my presentation has proved to be far more helpful as a general approach to my work and its potential as a creative venture.

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CREATIVE ARTIFACT

Bipartisanship Through the Eyes of the Supreme Court

Characters

The Narrator

Justice One

Justice Two

Justice Three

Justice Four

Chief Justice Five

Justice Six

Justice Seven

Justice Eight

Justice Nine

Lawyer One

(Note: different actors should play the nine justices but the others could be cast as the same actors by discretion of the director.)

ACT I

Scene One: Briefs

(Lights up on a meeting room with all Justices seated. Spotlights move to each as they audibly and animatedly read the briefs, but there is no interaction between Justices.)

Narrator: I, your narrator, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a Supreme Court Justice under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Justice Eight: The Constitution elaborated neither the exact powers and prerogatives of the Supreme Court nor the organization of the Judicial Branch as a whole. Thus, it was left to Congress and to the Justices of the Court through their decisions to develop the Federal Judiciary and a body of Federal law. For all of the changes in its history, the Supreme Court has retained so many traditions that it is in many respects the same institution that first met in 1790, prompting one legal historian to call it, “the first Court still sitting.”

Justice Four: “How foolish for a Justice of the Supreme Court ever to venture from the bench and accept an invitation to speak. Were I back in Cambridge, I could talk-had I not been down here... -on the Chief Justices I have known, the Nine Old Men and the Nine Young Men, and how old men become young, and how young men become old... on the bench. I could talk

about the judicial process from without and from within. I could talk about what goes into the law reports and what goes into the waste basket.”

Justice Seven: “But here I am, suffering from what might be called judicial lockjaw. Judges play a limited role... Judges are not free to re-write statutes to get results they believe are more just... Judges aren’t free to update the Constitution.”

Justice Two: “And when judges don’t respect this limited power, when they substitute their own policy preferences for those in the legislative branch, they take from the American people the right to govern themselves.”

Chief Justice Five: “A great Chief Justice of my home State was asked by a reporter to tell him what was meant by a passage in an opinion which had excited much lay comment. Replied the Chief Justice, ...”

Justice Six: “... Sir, we write opinions, we don’t explain them...”

Justice Three: “This wasn’t arrogance- it was his picturesque, if blunt, way of reminding the reporter that the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand of their own merits without embellishment or comment from the judges who write or join them.”

Justice Six: “In younger and more innocent days, with no premonitions of the future, I took the time from busy days at the Bar to write occasional articles in the law journals on matters of scientific and technical interest, only to experience, in a repentant old age, the unhappy fate of hearing them, on occasion, cited to me in Court in support of both sides of the same question.”

Justice One: “However much the Judge may become accustomed and reconciled to such startling agility of counsel, it requires a larger judicial experience than mine to prepare one to face with equanimity the varying implications which may be drawn by diligent counsel from

his own innocent remarks. So, if what I am about to say should prove to be more dull and uninteresting than even judicial pronouncements are wont to be, I should like to persuade myself that you would attribute it to a newly developed instinct for self-preservation, cautiously applied with an eye to the future.”

Justice Nine: “How I would love to tell you the part with which I agreed, and that which I would like to cross-examine him on. But I do not want to talk about any matters connected with the Supreme Court. I do not like to give mutilated or partial comments. I don’t like to comment on things which I cannot fully bare my mind.”

All Justices: “Today the wide range of political subjects which formerly brought me to Missouri are not for me to discuss. And even other subjects, wholly non-political, must frequently be approached with caution... One of the interesting features of service as a member of the Supreme Court is that before us there must eventually come most, if not all, of the problems of the nation. There is no phase of the struggle of society for its own improvement, no aspect of the clashing relations of men to one another that cannot provoke litigation and require judicial settlement... This imposes a sharp limitation on... a justice’s freedom of discussion in his unofficial capacity. The first requisite of a judicial system is that all its judges be fair. Fairness means many things, but above all it means that no issue may be prejudged-that judges must keep open minds upon genuine issues which they may be called upon to determine.

(Justices exit individually. End scene.)

Scene Two: Oral Argument in Favor

(Open on the courtroom of the Supreme Court of the United States.)

Narrator: We now present the oral argument of Lawyer One, Esq. on behalf of the petitioner.

Lawyer One: Mr. Chief Justice, and may it please the Court: The only plausible interpretation of the available evidence is that these justices who have spoken against judicial lockjaw were unable to maintain the expectations and rigors expected of them in the course of their tenure. Judicial lockjaw is a necessary and crucial practice to uphold the sanctity and word of the Supreme Court of the United States. It ensures that the Court is kept separate from the daily shifts of American politics.

Justice Eight: How can it be said that the Justices that have commented on judicial lockjaw were not duly fit for their office if there is no statute dictating the behaviors of Supreme Court Justices?

Lawyer One: It is not necessary for there to be a written law for a practitioner of any field to know what is required in the course of a day's work. It is also not surprising that there may be those who do not appreciate the constraints that their work requires. The expectation of judicial lockjaw, which has been in place since the Court's inception, is without doubt a necessary feature to the work of the Court. If Justice's engaged openly with political discourse, it would be difficult for the Court to maintain the public's trust in it's decisions. It would be viewed in the same manner as Congress or the Presidency, with honor and dignity, but without the necessary end-all and be-all assurance that the highest Court requires.

Justice Two: It was written in the brief that when judges consider their own policy preferences, they take away the rights of the American people...

Justice Three: ... but doesn't the removal of personal opinion only keep the American people from full access to their rights? Which right, specifically, are we discussing here?

Lawyer One: The right that Justice Frankfurter referenced is the right to decisions made based on the Constitution of the United States and past legal precedent, nothing more. To deviate from these two modes of assessment, and drift into personal opinions of what is right and wrong for the country would invalidate the sanctity of the Court and therefore infringe upon the rights of the people.

Justice Three: There is no Constitutional amendment dictating the behavior of Supreme Court Justices or the rights of the people regarding the Supreme Court. Many address the law but none are directly applicable to this case.

Lawyer One: This is correct. There is no Constitutional right given to the people regarding the actions of the Supreme Court.

Justice Three: So the assertion that judicial lockjaw is a 'right' given to the American people is not technically true, even if it is expected?

Lawyer One: You are correct. Judicial lockjaw is not a Constitutional right but it is a social expectation that has stayed true since the beginning of our country. It is expected by the people of the United States that the Supreme Court conduct its work without giving credence to personal opinion. The precedent of judicial lockjaw is so ingrained in our society that its removal would weaken the Court and remove all trust on the part of the people. It may not be a right but it certainly is expected, and it would hold dire consequences if we were to now turn our back on precedent. With the Court's permission I will hold the rest of my time for rebuttal.

Chief Justice Five: Thank you, counsel.

(End scene.)

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