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CONTENTS

CONSTITUTIONAL NIHILISM: POLITICAL SCIENCE AND THE DECONSTRUCTION OF THE JUDICIARY

Wayne Batchis[1]

PREFACE

This essay is a polemic. As an attorney turned political scientist, it reflects my reaction to a pervasive theme that permeates much of the political science literature, particularly within the subfield of law and politics. It is intended to air concerns that will likely resonate with many in the legal community. Legal professionals who have had the opportunity to study political science scholarship are no doubt shocked by the wide gulf that appears to exist between assumptions of some political scientists and the professional norms of the legal profession. Political science has produced a significant body of scholarship that portrays judges as mere political actors, intent on carrying forth a primarily ideological agenda. This is a troubling distortion of what judges and other legal professionals are explicitly trained to do – interpret the law objectively. It is my genuine hope that this essay will help shed light on this contradiction.

INTRODUCTION

Social scientists take a lot of abuse. Indeed, academia has long been a veritable punching bag for journalists, political pundits, religious leaders, politicians and social critics of all stripes. Academics, and social scientists in particular, have been

[1] Assistant Professor of Political Science, University of Delaware; Ph.D., Johns Hopkins University; J.D., University of Pennsylvania Law School.

accused of dwelling in an isolated elitist bubble – the proverbial ivory tower. They lose touch with the day-to-day social realities they purport to study, or so the argument goes. Indeed, even many social scientists would admit that in attempting to boil down the social world to its quantitative essence, the subjective reality of those studied is an all-too-frequent casualty. To make matters worse, the academic echo chamber tends to exaggerate this omission. Thus, to the outside observer, peering inside the university walls can have the flavor of intergalactic travel – exposing the viewer to the harsh light of academia's alien perspective on common understandings of social reality.

Of course, academia is endowed with a unique mission. The challenge scholars have always faced is making academic knowledge palatable for public consumption; for it is certainly the underlying hope of most scholars that what begins as a publication in an esoteric academic journal may ultimately have the potential to broaden and deepen public understanding of social phenomena. Nevertheless, this reframing of reality runs the risk of defying and contesting the commonly held self-image of its subjects. Although challenging the normative status quo has always been one important function of academic research, such challenges must eventually be reconciled with reality. Otherwise scholarship risks either irrelevancy or, even worse engendering contempt for, and planting seeds of doubt about, essential social institutions. Regrettably, a considerable volume of political science literature, particularly that which examines the operation of the United States Supreme Court, appears to do just this. It does so by unabashedly and unapologetically conflating the role of politics with that of the courts.

THE CONFLICTING VIEWS

Courts constitute a fundamental piece of America's ingenious political puzzle. In Federalist 78, Alexander Hamilton articulated the founders' vision of the judiciary as a constrained yet vital, politically distinct yet essential, branch of government. While Hamilton makes clear that the courts are not to be superior to the legislative and executive branches, famously dubbing the court "the least dangerous to the political rights of

the Constitution,"[2] the courts' narrowly drawn role in the political system is essential to the nation's health and well-being. "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts."[3] By establishing an institutional framework that merged judicial independence with weak formal powers ("neither FORCE nor WILL"[4]), America's founding fathers carefully sought to ensure that the judiciary remain distinct from the other political branches.

Today this ideal of judicial objectivity, a principle that compels judges to apply the law without regard to political considerations, is still alive and well among legal professionals in the courtroom and among legal academics responsible for training future judges and lawyers. In fact, principles of judicial impartiality and integrity are not merely imposed through informal socialization (or "mythologization" according to many political scientists) within the profession; such expectations for judicial behavior are codified in the American Bar Association's Model Code of Judicial Conduct. The ABA's Model Code is imbued with notions rooted in the founders' conception of the judiciary's circumscribed role in America's political structure. The code unequivocally asserts that "[a]n independent and honorable judiciary is indispensable to justice in our society."[5] "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[6] In order to maintain the institutional legitimacy of the courts, the profession itself demands an awareness of, and concern for, the external perception of judicial impartiality. "'Impartiality'. . . denotes absence of bias or prejudice . . . as well as maintaining

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[2] THE FEDERALIST NO. 78, at 284 (Alexander Hamilton) (McLeans's ed. 1788).

[3] *Id.*

[4] *Id.*

[5] MODEL CODE OF JUD. CONDUCT Canon 1 (2004).

[6] MODEL CODE OF JUD. CONDUCT Canon 2A (2004).

an open mind in considering issues that may come before the judge."[7] Such a requirement is a sharp contrast with the expectations of other political actors, who are frequently rewarded for rigid adherence to the political ideology they were explicitly elected to promote. Canon 3 of the Code demands that "[a] judge shall be faithful to the law and . . . shall not be swayed by partisan interests . . . ."[8] Yet, many political scientists would beg to differ.

To be fair, social scientists were not the first to scrutinize the institutional behavior of the judiciary. As I shall explore later, three quarters of a century ago, the first "legal realists" begin to question the dominant assumptions of the legal community. This school of thinkers, most famously articulated in Karl Llewellyn's *The Bramble Bush, A Realistic Jurisprudence, and the Common Law Tradition*, sought to replace the lofty expectations attributed to sage-like judicial decision-makers with a new, unabashed skepticism. Llewellyn argued that to most thinkers:

> [*R*]*ules* are the heart of the law, and the arrangement of rules in orderly coherent system is the business of the legal scholar, and argument in terms of rules, the drawing of a neat solution from a rule to fit the case at hand – that is the business of the judge and of the advocate. All of which seems to me rather sadly misleading.[9]

Fortunately, mainstream legal academia has largely abandoned the self-defeating premises of legal realism in favor of a more traditional conception of legal analysis. According to the traditional view – a perspective that is second nature to most legal practitioners – legal analysis requires a rigorous application of law to the facts at hand, with careful attention paid to preserving the judge's role as a neutral and objective

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[7] MODEL CODE OF JUD. CONDUCT Terminology (2004).

[8] MODEL CODE OF JUD. CONDUCT Canon 3B(2) (2004).

[9] Karl Llewellyn, *The Bramble Bush, A Realistic Jurisprudence, and the Common Law Tradition, in* THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY 53, 54 (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996).

arbiter of the law. While legal reasoning is admittedly, at times, more of an art than a science, legal training indoctrinates its students with a constrained set of tools designed to encourage judicial integrity, predictability and stability. Through a combination of respect for legal precedent, rules of statutory interpretation and reliance on broad, well-established legal principles, the judiciary seeks to maintain public trust when legal uncertainty or conflict arises. Stephen Feldman, in his incisive article dissecting the stark dichotomy between the views of the legal establishment and political scientists, refers to this principled, traditional perspective on judicial decision-making as the "internal view."[10] According to Feldman, a variant on the "external view," once the province of the legal realists, now dominates political science.[11]

Because social scientists often seek to understand the social world from a macro perspective, they frequently exhibit an understandable degree of skepticism for the individualized, internal conception of social behavior. Thus, in the case of judicial decisionmaking, generalizable patterns of behavior are conceptualized not as examples of disciplined legal analysis, but in accordance with the ideological predisposition of the judges,[12] as a political reflection of the President who appointed them,[13] or as part of an agenda-driven strategy to best further the judges' public policy goals.[14] While not without merit, these perspectives on judicial behavior are in direct conflict with what judges are self-consciously trained to do. Indeed, the framework espoused by many political scientists to explain judicial decisionmaking, if adopted and accepted by practicing judges,

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[10] Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89, 89 (2005).

[11] *Id.*

[12] *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge Univ. Press 2002).

[13] LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS, 132 (Oxford Univ. Press 2005).

[14] *See generally* FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (Cambridge Univ. Press 2000).

would result in the explicit violation of codified judicial ethics these judges pledge to uphold.

This inconsistency is alarming for a number of reasons. As Feldman points out, the startling gulf between legal academia (representing an "internal view" of law) and political science (with its "external view") may in part reflect the troubling tendency for "academics in the respective disciplines" to "studiously avoid any serious engagement with members of the other discipline."[15] Greater interdisciplinary interaction is a laudable goal; it has the potential to expand the breadth and depth of scholarly research. More of a concern, however, is the potentially adverse impact of scholarship that is, in essence, hostile to the ideals of the legal profession. Such scholarship has the potential to insidiously disparage a judge's indispensable role in the American political structure, while at the same time creating animosity toward political science. The role of judges in the American political system was first envisioned by the framers of the United States Constitution and has adapted remarkably well to over 200 years of tumultuous political history. It is *not* a myth, as some political scientists would suggest. The framers' bounded and principled conception of the judiciary is a model that continues to be diligently and respectfully carried forward by today's legal professionals.

The political science profession has without a doubt contributed a tremendous deal to our collective understanding of the functioning of the Supreme Court and the judicial process. Years of research on the Court, from a political rather than legal perspective, have produced a remarkable volume of insightful scholarship, providing new ways of understanding judicial behavior. Indeed, the exclusively internal perspective of legal academia and the legal profession generally neglects to examine the Supreme Court as political institution. Thus, political science offers an opportunity to look beyond legal doctrine and examine the courts from an outsider's point of view. Just as Darwin made religious adherents a bit queasy, external scholarship on legal institutions is bound to make legal scholars and judges uncomfortable. It will inevitably detect new patterns of behavior that might, in some cases, contradict firmly embedded assumptions about judicial decisionmaking. If the

[15] Feldman, *supra* note 10, at 90.

pursuit of knowledge is to continue unabated, the study of the judiciary, as with any other focus of scholarly attention, cannot be considered sacred – the quest for greater understanding invariably ruffles some feathers. However, what *is* troubling is the *degree* to which some political scientists go, intentionally or not, in effectively degrading the entire legal profession by denying that the internal, doctrinally rooted perspective has any validity *whatsoever*.

Of course, the degree to which political scientists "politicalize" the court (or what I shall call, "politicalization") varies widely. In its most egregious manifestation, political scientists blithely dismiss judicial reasoning as a mere artifice designed to legitimate political preferences. Thus, while political science offers a valuable political perspective on America's legal institutions, it risks over-politicalization. A brief survey of some of the political science literature addressing the Supreme Court illustrates the frequent severity of this politicalization.

A POLITICAL SCIENCE SAMPLER

David O'Brien, in his excellent foundational treatise *Storm Center: The Supreme Court in American Politics*, provides a thorough introduction to the Court as a political institution. O'Brien, while generally respectful of the Court's circumscribed role in America's political structure, peppers his text with subtle suggestions that this separation of powers might just constitute bit of a façade. Early on in his book, he acknowledges the existence of skepticism of the Court, but seemingly places some distance between himself and these critics, gently refuting their allegations. O'Brien argues that "*critics* charge, the Court has become a "super legislature."[16] But the Court's responsibility has always been to interpret the Constitution. Political conflicts are raised to the level of constitutional intelligibility."[17] This argument reflects a nuanced understanding of the subtle and delicate distinction between legislation and legal interpretation.

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[16] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 30 (7th. ed. 2005) (emphasis added).

[17] *Id.*

Yet, as the book progresses, O'Brien proceeds to present the same claims he seemed to contest as self-evident fact. "The current Court's power," O'Brien later asserts, "enables it to *assume the role of a super legislature*."[18] On the same page, O'Brien claims that the Court "sets its own substantive agenda for policy making."[19] "Justices demonstrate policy leadership by persuading others to vote in ways (in the short and long run) favorable to their policy goals."[20] Thus, in the course of approximately two-hundred pages, the Supreme Court has gone from an interpretive body that must, at times, interpret the Constitution in order to resolve certain constitutionally-relevant political conflicts, to a quasi-legislative group of men and women who strive to further an explicit, policy-driven agenda! The latter conception is troubling not only because it distorts the Court's critical political function, but because it impugns the integrity of the judges themselves as well as the judicial community as a whole. It is a conception that is clearly at odds with the mandates of judicial independence and nonpartisanship in the ABA's Model Code of Judicial Conduct.

Lee Epstein and Jeffrey A. Segal are even less subtle in presenting a politicalized portrait of judging. In their examination of the appointment process, *Advice and Consent: The Politics of Judicial Appointments*, the authors directly counter deeply-rooted claims of the legal establishment. Without qualification, they argue that "[f]ederal judges, especially Supreme Court justices, are more often than not ideological rather than principled decision makers, and ideological in ways that their nominating presidents would applaud."[21]

I see two major difficulties with this argument. First, it establishes a false dichotomy. Principled judicial interpretation and judicial philosophy (what Epstein and Segal misconstrue as "ideology") are not mutually exclusive. Judicial determinations invariably require a significant dose of discretion. These

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[18] *Id.* at 218 (emphasis added).

[19] *Id.*

[20] *Id.* at 252.

[21] EPSTEIN & SEGAL, *supra* note 13, at 119.

"judgments" will clearly be influenced by a judge's general views on judicial interpretation. It is one thing to assert the somewhat self-evident fact that it is in the interest of a president to appoint judges whom he believes have judicial philosophies that best suit his political philosophy. It is quite another to conclude that this means that judicial and political determinations are one and the same. Indeed, the evidence the authors' cite to support their conclusions seem to subvert their own argument. According to these scholars, Antonin Scalia, ostensibly the personification of the prototypical conservative "judicial ideologue," cast "liberal" votes approximately 34 percent of the time![22] The fact that the most extreme of the purportedly "ideological" judges can find it in his heart to vote against his so-called policy preferences more than one-third of the time certainly makes a strong case that judges do indeed act on legal principle.

Epstein and Segal cavalierly turn Alexander Hamilton on his head. In order to bolster their argument that Supreme Court judges, even more than judges on other courts, are predisposed to act on their political preferences, the authors cite the fact that the justices on the highest Court in the land "have lifetime appointments . . . have no fear of being overruled . . . [and] have almost no ambition for higher office . . . ."[23] Consequently, according to the authors, "Supreme Court justices have more freedom to act on their political preferences . . . ."[24] Of course, these institutional and structural designs were explicitly included in the Constitution to have the very opposite effect. As Hamilton so eloquently opined:

> [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . as nothing can contribute so much to its firmness and independence as

[22] *Id.* at 126 fig.5.3.

[23] *Id.* at 127.

[24] *Id.*

> permanency in office, this quality may therefore be justly regarded as an indispensable ingredient.[25]

Thus, the structural attributes of the judiciary were designed with the intention of allowing principle to take precedence over politics, *not* the other way around.

Perhaps the most ambitious and influential conception of judicial behavior to emerge from the wealth of political science literature on the Supreme Court is Harold Spaeth's "attitudinal model." This model strives to explain and predict judicial decisionmaking quantitatively, on the basis of individual justices' purported policy preferences. Indeed, Jeffrey A. Segal and Harold J. Spaeth's tome, *The Supreme Court and the Attitudinal Model Revisited*, takes its own unique brand of constitutional nihilism to new levels. Regretfully, the authors employ a decidedly slash and burn approach to advocating their distinctive formula for understanding the judiciary. Accordingly, they insult and trample upon any view that might impinge upon their narrow vision of the judicial process.

The authors unilaterally dismiss the so-called "unsophisticated view that judges are objective, dispassionate, and impartial in their decision making."[26] By implication, of course, the entire American Bar Association, which demands precisely that judges be objective, dispassionate, and impartial, must be composed of either naïve simpletons or self-deluded fools. Deconstructing the premises of an entire profession requires stepping on a lot of toes; thus, these rather audacious scholars are compelled to decry the "unfortunate" fact that "judges are reluctant to admit the obvious."[27] In response to Justice Scalia's uncontroversial claim that viewing a court's "decisions as *creating* the law, as opposed to *declaring* what the law already is . . . is contrary to that understanding of 'the judicial Power,' [in article III of the U.S. Constitution] . . . " the authors retort: "intelligence does not preclude self-deception."[28]

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[25] THE FEDERALIST NO. 78, at 284 (Alexander Hamilton) (McLeans's ed. 1788).

[26] SEGAL & SPAETH, *supra* note 12, at 6.

[27] *Id.*

[28] *Id.* at 10-11 (quoting Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring).

This inflammatory and condescending rhetoric is not reserved for the judicial establishment; to Segal and Spaeth the entire American public has been successfully duped. The authors opine that "Americans find it unsettling to admit to judicial policy making because we have surrounded judicial decisions with a panoply of myth . . . ."[29] Of course, without the so-called myth there could be no judiciary at all.

Surely, if one were so inclined, one could deconstruct almost any social institution. Instead of merely critiquing certain aspects of an institution's functioning, one could simply profess that because a particular institution is imperfect, it is nothing like what it claims to be. However, such arguments are ultimately counterproductive. Segal and Spaeth, by framing their analysis as an either-or proposition, vastly simplify complex questions of legal and constitutional theory and transform philosophical positions into one-dimensional caricatures. One might surmise that the authors' loaded rhetoric is an attempt to distinguish themselves from other thinkers. Yet, even the most accomplished of jurists openly acknowledge that judicial decisions, while primarily rooted in traditional legal analysis, must involve some consideration of external factors. As former Chief Justice William Rehnquist conceded:

> We read newspapers and magazines, we watch news on television, we talk to our friends about current events. No honorable judge would ever cast his vote in a particular case simply because he thought the majority of the public wanted him to vote that way, but that is quite a different thing from saying that no judge is ever influenced by the great tides of public opinion that run in a country such as ours.[30]

To criticize a particular court or judge for appearing *excessively* influenced by external rather than doctrinal concerns might indeed be a valid criticism. To argue that legal analysis is mere window-dressing is to engage in constitutional nihilism.

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[29] *Id.* at 10.

[30] WILLIAM H. REHNQUIST, THE SUPREME COURT 192 (new ed. 2001).

The arguments Segal and Spaeth put forward to support their thesis that the traditional, legal conception of judicial decision making is a "myth" are simply not credible. For example, they claim:

> Assertions that judicial decisions are objectively dispassionate and impartial are obviously belied by the fact that different courts and different judges do not decide the same question or issue the same way, to say nothing of the fact that appellate court decisions – particularly, those of the United States Supreme Court – typically contain dissenting votes.[31]

Of course, this is absurd, for it fundamentally misunderstands what it means to be a legal *professional.*

Professionals, by virtue of the nature of their job, are required to use their discretion. The fact that two professionals arrive at differing conclusions says much more about the requirements of their position than the presence of some nefarious "mythology." Does the fact that two doctors choose to treat the same ailment in differing ways reflect the "mythology" of the Hippocratic Oath? Does this variation in approach derogate the assumption that health care professionals are committed to the objective, dispassionate medical treatment they were taught to provide through years of rigorous medical training? Of course not!

It is indeed unfortunate that Segal and Spaeth choose to employ such absolutist rhetoric, for their analysis offers a compelling, yet partial, explanation for certain judicial behavior. By so vehemently disregarding the internal view of legal scholarship they risk alienating themselves from those they purport to study, and as a result, reduce the likelihood that the legal community will look to their research for insight. Just as a sociologist need not feel compelled to discredit the fine work of psychologists in order to prove the validity of her sociological research, there is little reason why external scholarship of the courts, such as the attitudinal model, should not be capable of coexisting with traditional legal analysis. Curiously, from the

[31] SEGAL & SPAETH, *supra* note 12, at 26.

explanation and justification these scholars provide for their chosen methodology, one might arrive at this very conclusion – that two valuable forms of scholarship are flatly incompatible.

Segal and Spaeth are careful to stipulate that their modeling approach "postulates that attempting to learn everything about one thing may not be the best approach to knowledge . . . . Learning the most important factors that affect thousands of decisions might be far more beneficial than learning all there is to know about a single decision."[32] Thus, the authors appear to concede that there are indeed many valid routes to knowledge. Segal and Spaeth acknowledge that "[a] model is a simplified representation of reality; it does not constitute reality itself."[33] With this admission in mind, it is utterly confounding that the authors are so dogmatic in their critique of the "legal model" (their words) of judicial behavior.

Lest you leave this brief survey of political science research with the belief that all political scientists universally shun those who profess to believe in the validity and significance of legal analysis, it is important to note that many political scientists do not, in fact, subscribe to this view. The "New Institutionalists," an emerging school within political science, have shown a greater willingness to "bridge the abyss between law and political science . . . ."[34] This is a step in the right direction. Many other political scientists and theorists, such as Bruce Ackerman, Cass Sunstein and Robert Katzmann have exhibited an impressive ability to cross traditional academic boundaries, acting as both law professor *and* social scientist. The work of these scholars tends to accord greater respect to both sides of the academic aisle.

Nevertheless, it remains regretfully clear that public law literature is all too frequently intent on cavalierly dismissing the internal legal perspective. Political science should not feel the need to express hostility toward the premises of legal scholarship in order to prove its legitimacy as social science. And while the implications of such behavior are troubling from the standpoint of the political science profession itself, there are

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[32] *Id.* at 45.

[33] *Id.*

[34] FELDMAN, *supra* note 10, at 92.

many other reasons to be alarmed by this phenomenon. Legal professionals, and judges in particular, have been subject to a barrage of criticism from a full spectrum of complainants throughout society. In order to offer greater context to my critique of the role of political science, I shall now turn to broader question of judicial legitimacy.

THE ASSAULT ON JUDGING

Any informed citizen would need to be willfully blind to deny that judges have become the subject of increasingly vociferous political and social scrutiny. Judges are stuck in a precarious political position. On one end of the political spectrum, they are lambasted as "judicial activists" bent on co-opting the policy-making role of the legislature. At a conference sponsored by Georgetown University and the American Law Institute, Chief Justice John Roberts, certainly a judicial conservative by most measures, recently acknowledged the troubling cacophony of voices on the right intent on condemning judicial behavior. In urging his audience to defend the judiciary, he cited Ronald Reagan's heroic characterization of judging as requiring "the lonely courage of a patriot . . . ."[35]

On the left, the situation is no rosier. Many critics are convinced that judges are mere proxies for their elite social group, exploiting their professional prestige in service of a status quo that favors the privileged. Indeed, Justice Roberts, in the same speech, acknowledged that attacks on the judiciary are "utterly bipartisan."[36] On the margins, both conservative and liberal critiques might carry a grain of truth. Yet these political caricatures of our "least dangerous branch" are much more likely the exception than the rule. In between these two positions exists a vast middle ground. This middle makes up a majority of judges, those who are committed to performing their job in a manner consistent with their professional commitment to objectivity – systemically favoring neither a privileged status quo nor an activist agenda. As a part of the critical third branch

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[35] Tony Mauro, *Roberts, Gonzales Speak on Judicial Independence*, THE LEGAL INTELLIGENCER (Phila., Pa.), Oct. 3, 2006 at 4.

[36] *Id.*

of American government established by Article III of the United States Constitution, judges are keenly aware of their unique duty to uphold the rule of law.

While the contemporary political climate has caused the conservative critique of so-called judicial activism to be particularly visible, examples of the liberal, anti-elitist position also plays a significant role in current debates over the appropriate role of the judiciary. Both can be culled from recent debates over Supreme Court nominees. Controversy over the appointment of now Chief Justice Roberts, failed nominee Harriet Miers and the most recently appointed associate, Justice Samuel Alito, have been colored by generalized critiques of the judiciary by both the left and right. During the second day of the Alito hearings, candidate Alito was aggressively questioned by conservative senator Lindsey Graham. Graham espoused the now familiar argument that "politicians [and] people like me . . . want a judge who looks at things very narrowly, that doesn't make a bunch of stuff up[.]"[37] Implicit in this statement is the assumption that many judges, as part of their routine practice, make decisions on the basis of their own personal policy views rather than the dictates of the law.

Senator Edward Kennedy, an indisputably iconic figure of American liberalism, chided the candidate for his purported judicial bias for the moneyed and powerful:

> In an era when too many Americans are losing their jobs or working for less, trying to make ends meet, in close cases Judge Alito has ruled the vast majority of the time against the claims of the individual citizens. He has acted instead in favor of government, large corporations and other powerful interests.[38]

Kennedy bolstered this claim by citing a study in which constitutional scholar Cass Sunstein found that Justice Alito, while sitting on the Third Circuit Court of Appeals, had ruled

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[37] *Hearing on Judge Samuel Alito's Nomination to the Supreme Court Before the Sen. Comm. on the Judiciary*, 109th Cong.429 (2006) (statement of Sen. Lindsay Graham).

[38] *Id.* at 12 (statement of Sen. Edward Kennedy).

against individuals in 84 percent of his dissents.[39] If one were to take the claims of Senators Graham and Kennedy at face value, it would be easy to understand why the public might come to think of the judiciary as a mere arm of political interests. Critiques of the judicial branch by politicians out to further their own agenda are encouraged by political scientists who implicitly validate such condemnation, or at least skepticism, by characterizing judges as merely furthering their own "policy preferences."

Before one jumps to accept the conventional critique of either the left or the right, it may be instructive to recall that, of the nine justices sitting on the current Supreme Court, seven justices were appointed by Republican presidents. These are conservative presidents who proudly touted their "law and order" policies and "traditional family values." Yet this contemporary Supreme Court, largely the product of conservative executive appointments, has, in recent years, unequivocally scaled back on the permissibility of the death penalty by concluding that imposing capital punishment on those who are mentally retarded or who are minors constitutes unconstitutional cruel and unusual punishment under the 8th Amendment of the U.S. Constitution;[40] protected the personal autonomy of homosexuals by reversing its own decision of less than two decades prior, which rejected a constitutional right of homosexual sodomy; [41] upheld the constitutionality of affirmative action;[42] prevented Congress from imposing unduly speech restrictive child-protective anti-pornography legislation on the internet;[43] and repeatedly circumscribed the Bush administration's attempts to limit due process in the name of the "war on terror."[44]

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[39] *Id.*

[40] *See* Atkins v. Virginia., 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

[41] *See* Lawrence v. Texas., 539 U.S. 558 (2003).

[42] *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

[43] *See* Ashcroft v. ACLU, 542 U.S. 656 (2003).

[44] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld 548 U.S. 557 (2006); Boumediene v. Bush, 128 S. Ct. 2229 (2008).

Why is it that the courts never cease to surprise us? How can it be, that with all of the passion and politicking involved in judicial nominations, the conventional wisdom from the world of political science, political punditry and activism often proves to be flat wrong? Accurate predictions as to how a particular nominee will rule in the future are notoriously difficult to achieve. Conservative activists have attempted to pressure their political leaders by chanting "no more Souters," referring to Supreme Court Justice David Souter, appointed by George H. W. Bush in 1990, who caught many conservatives off-guard with his moderate jurisprudence.[45] Protest as they might, judges, by virtue of their constitutionally endowed position, are not mere ideological pawns. Activists on both sides of the aisle are bound to be disappointed if they seek judges who will rigidly pursue a particular ideological agenda. While elected officials may frequently guide their actions in accord with their personal passions, or those they believe best reflect the feelings of their constituents, such behavior is inconsistent with a judge's constitutional role.

Courts are functionally and normatively constrained in a number of ways. The most apparent of these limitations is the judicial mandate of passivity. Judges are not authorized to behave proactively, like their political brethren. Courts do not *seek out* political change; they are in fact constitutionally limited to the cases and controversies that knock on their door. Ours is a system of *separate* powers. The court's passive, circumscribed role in America's larger political system has been established and reinforced from the earliest days of the republic – ever since President George Washington's request for an advisory opinion on July 18, 1793 regarding the obligations of the 1778 Franco-American Treaty was politely declined by a Supreme Court citing separation of powers "problems."[46] In addition, rules of standing establish detailed constraints on who may bring suit, generally limiting the privilege to those who suffered direct injury. Finally, jurisdictional restrictions ensure that only those

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[45] *See, e.g.*, Robert D. Novak, *No More Souters*, Feb. 12, 2001, http://townhall.com/columnists/RobertDNovak/2001/02/12/no_more_souters.

[46] THE OXFORD COMPANION TO THE SUPREME COURT 18 (Kermit Hall et al. eds. 1992).

claimants with sufficient connections to a designated geographic region can bring issues to a particular court in the first place. Nevertheless, with the aid of many reputable political scientists, the tenacious notion that the judiciary is an imperious ideological force that is immune from the shackles that restrain other political actors continues to persist.

In addition to ignoring the procedural limits discussed above, this perception is facilitated by a complete disregard for the normative constraints judicial actors face. The contentious debate over the judiciary's role tends to overlook the most significant source of limitation on judicial behavior. As emphasized earlier, judges are part of a profession. The legal profession is not merely constrained, but defined, by an extensive array of institutionalized norms that frame its identity. It is this feature of the law that distinguishes it from other political institutions. Judge Becker of the Third Circuit Court of Appeals succinctly described this unique judicial perspective: "I think that the public does not understand what happens when you become a judge," Becker opined.[47] "When you take that judicial oath, you become a different person. You decide cases not to reach the result that you would like, but based on what the facts and the law command."[48] Law and the practice of law is largely an intellectual construct. This fact might partly explain the public's suspicion of legal practitioners to which Becker alludes. Although the constraints on the judiciary are far less tangible, far less visible to the naked eye, they are no less substantial than those imposed on the other political branches.

Judge Aldisert, also of the Third Circuit, elaborated on this point, emphasizing that "the great Cardozo taught us long ago the judge, even when he is free, is not wholly free. He is not to innovate at pleasure. This means that the crucial values of predictability, reliance and fundamental fairness must be honored."[49] Of course, how one defines innovation is a matter of dispute. One man's cautious interpretation of the law might

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[47] *Confirmation Hearing on the Nomination Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong. 655-56 (2006) (statement of J. Edward R. Becker).

[48] *Id.*

[49] *Id.* at 660 (statement of J. Ruggero J. Aldisert).

appear to another to be a significant departure from precedent. Disagreements among judges are an inevitable result of the imperfect art of judicial interpretation – the outcome will always be subject to dispute. However, to assert that such judicial incongruities are, in general, a mere reflection of ideological differences akin to the contentious wrangling of politicians is to disrespect and misunderstand the entire basis of the legal profession. As Judge Aldisert professed while speaking on behalf of a judicial nominee on the opposite end of the ideological spectrum, "[j]udicial independence is simply incompatible with political loyalties . . . ."[50]

The objectivity that marks judicial professionalism is crafted through years of study and practice. It is an ethic that has its origin in the first day a burgeoning legal professional finds himself in a law school lecture hall. Arriving law students are immediately and relentlessly bombarded with the full range of controversial societal issues and must learn to analyze this onslaught through a legal, apolitical lens. Students are introduced to a new way of thinking, reasoning and understanding the world. The goal of legal education is to endow future legal practitioners with the narrow intellectual framework that is essential to the effective analysis of legal issues. This framework firmly limits and directs legal reasoning. What is remarkable is that the ubiquitous confusion among first-year law students is miraculously transformed into a dull and weighty boredom by their third year. What was initially terrifying becomes utterly mundane. What does such a transformation suggest? This is a sure indication that the necessary conversion has taken place. While the novelty of legal reasoning may have dissipated, a legal mind has been sculpted. Through years of legal practice this intellectual construct becomes increasingly rigid; diverging from its dictates become less and less likely.

To the non-jurist, irritation (or occasionally praise) may be associated with the phrase "thinking like a lawyer." Certainly legalistic thinking, the product of extensive legal indoctrination and practice, may at times appear tedious and frustrating to the layperson. However, restrictive yet rigorous legalistic reasoning is precisely the constraint that prevents a judge from exhibiting

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[50] *Id.*

the kind of unbridled and reckless freedom political scientists sometimes attribute to the judicial branch. Ironically, the deep chasm that persists in dividing the legal scholars and professionals who appreciate the profound constraints of legal analysis from those political scientists who adopt a more cynical, subjective view of judging may find its origin in a school of thought first cultivated *inside* the halls of the legal academy.

PHILOSOPHICAL ROOTS: *LEGAL REALISM AND ITS PROGENY*

The legal realists of the early 20th century were the first widely read modern scholars to aggressively scrutinize legal decisionmaking. Now largely out of favor within mainstream legal scholarship, these scholars broke new ground by boldly challenging the deferential view of judicial behavior – one that uncritically accepted legal reasoning at face value. To legal realists, the fact that practitioners profess to be firmly wedded to rules and precedent was of little consequence. To these skeptics, the vast stockpile of contradictory case law and statutory authority allowed judges to justify their own political preference, rather than arrive at a "correct" legal conclusion.[51] Critical Legal Theorists such as Duncan Kennedy followed in the footsteps of the legal realists, and suggested that judges, effectively immune from impeachment and much political criticism, are able to make decisions that are contrary to established legal rules.[52]

How such scholars characterize judicial action has much to do with their conception of law itself. For example, Karl Llewellyn, in his classic statement on legal realism *The Bramble Bush*, juxtaposed his definition of law with the common view that it is simply "a set of rules of conduct" that is "laid down by the state."[53] To Llewellyn, the law is not the rules themselves, but what officials actually *do* about disputes.[54] However, a more

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[51] *See* FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY 51 (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996).

[52] *See id.* at 53.

[53] Llewellyn, *supra* note 9, at 54 (emphasis omitted).

[54] *See id.*

holistic perspective of law as an institution – one that *is* consistent with legal professionalism – would incorporate rules and actions *as well as* the constraints under which legal actors frame their behavior.

The law is unique among professions in that it lies entirely within the domain of ideas. Legal practitioners must place complete reliance upon the subtle distinctions of meaning attributed to the written word, in the form of both statutory and case law. However, because the law is understood to be a system of rules, and it is generally believed that rules should, and can be, clear-cut, the ether-like quality of law is particularly difficult for many to accept. It is likely that it will always be deeply troubling to many that law is often not conducive to black-or-white answers. Still, this does not mean there are *no* answers, or that all answers are a mere product of a judge's arbitrary political preferences.

Legal philosopher Ronald Dworkin's conception of "Law as Integrity" helps elucidate the jurist's delicate role:

> Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole. No actual judge could compose anything approaching a full interpretation of all of his community's law at once.[55]

Thus, it might be said that conservative judicial incrementalism and so-called judicial activism are necessitated by the nature of law itself. Bruce Ackerman eloquently explains:

> Many thoughtful people suspect that the stories modern constitutional lawyers tell are infinitely malleable, best treated as transparent covers for more pressing political convictions. For skeptics, there is no such thing as *the* professional narrative

[55] Ronald Dworkin, *Law's Empire*, *in* THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY 90, 97 (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996).

> – just stories that liberals or conservatives, reactionaries or radicals, tell one another . . . .
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> I disagree. I believe that . . . at any moment of time, even the most powerful of our lawyers and judges are profoundly constrained by the patterns of argument built up by the legal community over the past two centuries of disputation . . . .[56]

Admittedly, it would be much more satisfying to have laws that are capable of the level of certainty and predictability garnered from, for example, elementary arithmetic. Many social scientists have spent the bulk of their careers engaged in an attempt to discover a universal formula for explaining human behavior, be it theoretical or quantitative, to no avail. This quest of many social scientists for generalizable explanations of social behavior is in many respects analogous to the plea of judicial critics who seek retrenchment of "excessive" judicial discretion. In an attempt to illustrate and critique what he characterizes as extreme judicial freedom, Llewellyn famously cited purportedly contradictory "canons of construction" relied upon by legal practitioners. He contrasted, for example, the rule that "[a] statute cannot go beyond its text" with the principle that "[t]o effect its purpose a statute may be implemented beyond its text."[57] Yet, all he is truly telling us is that all rules have exceptions. They are nonetheless rules, rules that make up a critical element of the legal institution. Exceptions do not necessarily equal discretion run amok.

Clearly, a judge must resist the temptation to follow his or her personal predilections rather than the mandates of rigorous legal analysis. This does not exclude the possibility that two judges, engaging in analysis of a similar issue, will arrive at disparate outcomes. This is an inevitable aspect of their role as professionals and is consistent with a position that requires the exercise of substantial discretion. It explains why society has set the judicial bar remarkably high, generally requiring not only years of rigorous legal training and practice but significant

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[56] 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 39 (1991).

[57] Llewellyn, *supra* note 9, at 58.

evidence that the potential judge has the requisite temperament to fill such a crucial role.

Unlike the assembly line worker or other occupations that require primarily mechanistic, non-discretionary functions, a legal professional must exercise his or her judgment at every turn. Although the stakes are often lower, other professionals face a similar challenge. For example, a professor of American Government faces stylistic choices such as whether to lecture or promote class discussion. She might opt to focus on the power of the presidency or the role of grass roots activists. She might emphasize historical development rather than contemporary politics or vice-versa. In fact, few would argue that there is one correct way to teach such a class. The professor must use her judgment as to what approach works best for her and the particular students she is teaching. One might not care for her style and prefer an alternate approach. It might even be argued that one pedagogical method is more appropriate or "better" than another. Unless, however, she professed that the American Civil War began in 1941, awarded the highest grades to those students who provided her with personal favors, or engaged in any other form of blatant malfeasance, she could not be accused of violating her professional duty. By the nature of her job, a professor must, as with a judge, exercise significant discretion. Yet there are clear, undeniable limits to this discretion.

Legal reasoning may be difficult for the legal outsider to comprehend. In contrast, when an elected official makes policy, the decisionmaking process and end product are usually sufficiently clear. When the minimum wage is increased, for example, both the worker who receives a paycheck and the business owner who must increase pay will observe and understand the result, regardless of whether they agree or disagree with the new policy. Legal decisionmaking is a different matter entirely. The outcome of a legal contest often turns on subtle and esoteric distinctions in "fact" and "law" that necessitated that the controversy be subject to the judicial process in the first place. The legal system is designed to deal with matters that do not have easy answers. It does this not by saying: "Okay judge, we have a conflict here, you decide what you think is right, however you want, because no one else is willing or able to do it." Arbitrary judicial decisionmaking is antithetical to the rule of law. Judges play a crucial role as part of a political system designed to maintain social order, and as

such they must act in accordance with the rules and norms that constitute America's legal institutional framework. A great deal of public trust is required to make such a system work. The public must believe that judicial holdings are grounded in objective, principled legal analysis, not in the whims of an individual justice.

Any ordered society will inherently face innumerable conflicts that need to be resolved, and to do so requires someone to decide what the rules say and how they apply. Without constraints, such a feat could not be accomplished while concomitantly maintaining the public trust – unless of course the judges were also kings. The rigors of law school education and legal practice help guarantee that judges are trained to work within tightly drawn rules of interpretation and norms of practice that help ensure that their decisions are credible and maintain the respect of the people who entrusted them with the power to make such judgments. While individual judges must certainly not be immune from criticism, broad attacks on the entire judicial process misconstrue the fundamental nature of the legal institution and threaten to shake public confidence in the judiciary.

CONTEMPLATING THE SOURCE OF EXTERNALIST HEGEMONY

A PROFESSIONAL BIAS?

Why is it then that many political scientists so steadfastly insist that the entire legal community is deluded by a cult-like mythology? Is the "cult of the robe," as O'Brien terms it,[58] simply so alluring, as many political scientists seem to suggest, that even the most brilliant, accomplished jurists are unable to discern "the truth?" Or, in the alternative, are there forces at work inspiring political science's dogmatic rejection of the legal establishment's perspective? Why do social scientists see such a different reality than the legal establishment? Could this stark contrast in worldview be the product of self-interested professional incentives that encourage insularity and possessiveness over one's academic domain? As Feldman points

[58] O'BRIEN, *supra* note 16, at 33.

out, "[p]rofessionalization typically entails the control of a specific type of knowledge, thus enabling a group – the members of the profession – to monopolize a segment of the economic marketplace."[59]

Indeed, the study of law from a political science perspective comes with its own unique set of challenges that in many ways distinguish it from other social scientific pursuits. Unlike other endeavors in political science, those who study public law must contend and compete with a massive, preexisting infrastructure of legal education. Legal academics abound, not only to train aspiring lawyers and judges in the nation's multitude of law schools, but to provide mandatory, lifelong continuing legal education to working professionals. Upon reflection, it is only natural that political scientists feel the need to differentiate themselves from this morass of legal educators. Public law scholars naturally strive to justify and perpetuate their own existence and relevance. It would be unfortunate if some political scientists are allowing careerism to compel them not only to distinguish themselves from the broader scholarly community, but to discredit all who do not "see the light."

Suppose, on the other hand, that it is not careerism at all, but a broader tendency within political science to shun normative arguments in favor of quantitative, rationalist frameworks. Indeed, an analogous dialogue has been taking place between those political scientists who argue that self-interested (or rational choice) dilemmas can fully account for institutional behavior, and those who assert that there are multiple motives behind the choices political actors make – many of which *are* consistent with institutional normative ideals. Joseph M. Bessette, for example, in an engaging exploration of deliberation in the United States Congress, persuasively argues against much of the accepted conventional wisdom within political science.[60] Bessette refutes the presumed primacy of political ambition, instead favoring a deliberative model consistent with the intentions of America's founding fathers.[61] Mainstream political

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[59] Feldman, *supra* note 10, at 90-91 (citation omitted).

[60] JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY & AMERICAN NATIONAL GOVERNMENT (1994).

[61] *Id.*

science "argue[s] that the reelection incentive is the key to understanding and explaining congressional behavior. Ambition for reelection directs congressional attention away from policymaking and programmatic concerns and toward much more politically useful activities . . . ."[62] While it may indeed be naïve to view America's elected politicians as selfless Platonic guardians who openly debate and explore the issues of the day in order to propagate idealized public policy in the interest of the common good, much political science has landed firmly on the other end of the continuum. According to Bessette, rational choice theorists, as well as those scholars who focus on bargaining and group theory, take a position that completely rejects, or ignores, the normative expectations for deliberation imbedded in the institutional framework of the United States Constitution. According to Bessette, the implications of this position are deeply troubling. "[I]f arguments about the merits of pending proposals are utterly without force in Congress, then even the most public-spirited legislator may soon be moved by a deepening cynicism of his job and his institution to give up on public goals and salvage whatever private benefits he can."[63] Could the same be said of a judge who is insidiously infected by the pervasive cynicism perpetuated by certain strains of political science? Might this hypothetical judge, inundated by public and academic skepticism of the judiciary, begin to lose faith in the principled conception of the law he once swore to uphold?

A SUPREME COURT BIAS?

In addition to the professional bias by political scientists discussed above, there are other conceivable explanations for the frequently caustic rejection of the internal view of legal reasoning by much of the political science establishment. Perhaps it is a byproduct of public law's tendency to focus on the Supreme Court rather than lower federal or state courts. The nine members of the United States Supreme Court clearly constitute a miniscule (and non-representative) subset of the American judiciary, yet this highest of courts often tends to be

[62] *Id.* at 63.

[63] *Id.* at 65-66.

the primary, if not exclusive, focus of political scientists who study legal institutions. As any student who has taken an undergraduate course in Constitutional Law prior to attending to law school would attest, studying Supreme Court jurisprudence without broader legal context provides the skewed impression that the justice system is primarily an arbiter of heated political disputes.

Certainly the Supreme Court, more than any other court, is responsible for legal line-drawing on the most sensitive, precarious and momentous of social issues. The notoriously ambiguous language of the United States Constitution requires the court to articulate the boundaries of fundamental Constitutional rights. Indeed, it would not be an exaggeration to state that the Supreme Court's holdings have a direct bearing on what it means to be an American. As a natural result of the High Court's mission to determine and articulate the subtle legal contours of the Constitution, the issues it confronts are by definition both legal and political. This practice admittedly does require a significant degree of judicial discretion, perhaps more than any other American court. The issues the Supreme Court must wrestle with arouse the deepest of political passion among both the general public and the politicians who govern them.

Thus, we might ask: is the Supreme Court sui generis? By virtue of its crucial position in the judicial hierarchy, the Supreme Court's role is sharply distinguishable from the rest of the judiciary. Arguably, this distinction makes the court more "political" or politically oriented. Yet fundamentally, the Supreme Court serves the same vital function as all other courts.

Where legal conflicts or ambiguities arise, lower courts are routinely required to interpret the meaning of the statutes passed by America's democratically elected officials. Federal and state laws are frequently modified in accordance with the policy preferences of legislators who are directly accountable to their constituents, and therefore must presumably be somewhat responsive to the electorate's wishes. If the public is unsatisfied with the way laws are applied in the courtroom, such laws can easily be undone, and new law can be enacted.

The Constitution is no different. The stakes may be higher, the fundamental law of the land may require a supermajority of both Congress and the States to amend, but the Constitution is essentially just one big, important statute that must be interpreted like any other. Admittedly, the Framers had the

foresight to understand the danger of tyranny of the majority, and thus made it much more difficult to alter the Constitution legislatively (whether or not this is somehow "anti-democratic" or poses a "counter-majoritarian difficulty" I leave for a future discussion). Most importantly, the Founding Fathers had the wisdom to delegate ultimate responsibility for telling us what the Constitution means to the judicial branch. The above might read like the contents of a high school civics text, yet many political scientists seemingly have forgotten these basic tenets. While it might be tempting – especially for a political scientist – to frame a particular Supreme Court decision or interpretive approach as a mere reflection of a judge's politics, such a characterization sadly ignores the massive wealth of accumulated judicial doctrine and professional norms that have served as a guide to independent, apolitical legal analysis. Normative expectations as to how the American political structure should and must function are both foundational and indispensable to our system of government.

If indeed the Supreme Court is not what it purports to be because it addresses volatile political questions, if the nine members are merely legislators in snazzy black robes, then perhaps all those high school civics books should be burned on the pyre. Why not simply create a "Constitutional Interpretation Committee" in Congress and do away with the court entirely? If the most cynical of political scientists are correct, it would make no difference. In fact, if the Supreme Court were to merge with Congress, some might contend that this would be an improvement, for at long last this "imperial" judiciary would be directly accountable to the voters. This, of course, would be a dire mistake. The health of our polity demands that the courts remain largely apolitical. The Framers understood that an independent judiciary is an essential check on the other branches of government. We cannot and should not forget this.

The Supreme Court, unlike other courts, has almost complete discretion over the cases is chooses to hear. Some scholars have argued that the Court's selection of cases for its docket is primarily reflective of the judges' political ideology. However, there is no way to prove this assertion. As Chief Justice Rehnquist has explained, "there are really only two or three factors involved in the certiorari decision – conflict with other courts, general importance, and perception that the

decision is wrong in the light of Supreme Court precedent."[64] Many political scientists would surely profess that the Chief Justice's explanation is just code for allowing judges to further their policy preferences. However, political scientist Charles Epp acknowledges that "the justices' beliefs about the Supreme Court's institutional role constrain the influence of raw preferences" in selecting cases.[65]

It is important to remember that decisions such as *Roe v. Wade*[66] and other hot-button cases lie at the very margins of the judicial process. For every *Bush v. Gore*[67], there are a vast number of opinions that have no apparent relationship to judicial ideology, and many more in which judges vote against their so-called policy preferences. In fact, newly minted Supreme Court Justice Samuel Alito, who, as a nominee to the Court was repeatedly attacked by liberal activists subscribing to the view that Supreme Court Justices are mini-legislators, authored a first high court opinion that must have discouraged many political scientists. *Holmes v. South Carolina* is a pro-defendant decision, holding that states may not prevent criminal defendants from introducing evidence at trial suggesting that another person committed the crime.[68] Barry Scheck, a former president of the National Association of Criminal Defense Lawyers, stated that the "ruling is a strong signal that the Supreme Court is taking the right of defendants to prove their innocence very seriously and is taking a critical look at forensic evidence."[69] A policy preference? I think not.

As United States Circuit Court Judge Robert Katzman, a former Georgetown University Professor of Law and Public

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[64] REHNQUIST, *supra* note 30, at 235.

[65] Charles R. Epp, *External Pressure and the Supreme Court's Agenda, in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 255, 259 (Cornell W. Clayton & Howard Gillman eds., 1999).

[66] 410 U.S. 113 (1973).

[67] 531 U.S. 98 (2000).

[68] Holmes v. South Carolina, 547 U.S. 319, 331 (2006).

[69] Tony Mauro, *Alito Pens First Opinion as a Supreme Court Justice*, LEGAL TIMES (Wash., D.C.), May 8, 2006, at 10, *available at* http://law.com/jsp/article.jsp?id=1146487050419.

Policy who was trained as *both* a political scientist and a lawyer has explained:

> Judges may have policy preferences, but in the overwhelming number of cases, they are guided by powerful norms of precedent, deference, procedural regularity, and coherence. Judicial decisionmaking is an edifice. The vision of freewheeling judges, acting according to their own policy objectives, is faulty. Indeed, there are many cases in which judges reach decisions at odds with their own preferences and policy objectives because of the need to be faithful to congressional meaning or the norms of decisionmaking.[70]

This conclusion has most recently been confirmed in an extensive study of federal appellate judicial voting by Cass Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki.[71] The study compared and contrasted voting behavior of circuit court judges appointed by Republican presidents to votes by those appointed by Democratic presidents.[72] Unsurprisingly, the results did show some significant differences in judicial voting in cases addressing certain contentious issues such as affirmative action, environmental policy, and sex discrimination.[73] However, more illuminating is what the researchers did *not* find. In many other controversial areas, such as criminal appeals, federalism, takings, and punitive damages they found *no* significant difference between the votes of appointees of Democrats and those judges appointed by Republicans.[74] Furthermore, even where disparities do exist,

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[70] ROBERT A. KATZMANN, COURTS AND CONGRESS 57 (1997) (footnote omitted).

[71] CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

[72] *Id.*

[73] *Id.* at 24, 30, 34.

[74] *Id.* at 48.

these differences are "not overwhelmingly large."[75] In the authors' words, their data can be seen "as a real tribute to the rule of law – as suggesting that, most of the time, the law is what matters, not party or ideology."[76] In fact, votes by "nearly half" of Democratic appointees, and votes by "two-fifths" of Republican appointees belied ideology-based assumptions – that is, these votes were the opposite of what one might predict, "stereotypically conservative" and "stereotypically liberal" respectively.[77]

WHY WORRY?

After considering this overview of political science scholarship, a natural reaction might be: so what? Why does this matter? I believe that it is important for several reasons. Presumably, political science, as an academic discipline, has a responsibility to make a positive contribution to the accumulated body of human knowledge. Certainly, at minimum, academics should be cognizant of the potential harm their theories might cause. Political science that adopts constitutional nihilism risks exacerbating growing political hostility toward the courts. Increased public cynicism and distrust of the judiciary is a threat to America's political structure. Indeed, without a trusted judiciary, there can be no rule of law.

As alluded to earlier, academics have historically found themselves the target of much criticism, particularly from the segment of the population that accuses the academy of ivory towerism. This critique expresses concern that universities are disseminating a distorted version of reality to those most susceptible to manipulation, and thus indirectly perpetuating fallacious and harmful views throughout society. It is a criticism that is strikingly relevant to the issue of constitutional nihilism in the academy.

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[75] *Id.* at 82.

[76] *Id.*

[77] CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

Political science does matter. Regardless of the extent to which political science scholarship is utilized within the legal community – by legislators who attempt to improve upon the judicial institution, or by political activists who seek to affect change through litigation – it is an undeniably critical tool of education. Undergraduate college students who register for law-related political science courses will likely take much from their experience. Let us suppose, hypothetically, that students leave the academy with the belief that judicial objectivity is a mere ruse designed to fool the gullible masses. It is very likely that such students will, as a result, exhibit reduced trust in the American judiciary. To these graduates, the rule of law itself will appear dubious, for if the judiciary cannot be trusted to apply the law objectively, law becomes mere words on paper.

College graduates tend to be society's rule makers rather than rule breakers, and therefore the vast majority, although distrustful of judicial authority, will thankfully not be inspired to flagrantly flout the law as an act of contempt toward an institution they do not respect. However, if these disillusioned graduates vote, if they make their political voice heard, or if they become a part of the political establishment itself, they are more likely than not to confront the judiciary with a degree of cynicism that would make Alexander Hamilton cringe. They may be observed bitterly disregarding judicial decisions that displease them, cynically dismissing the Supreme Court as a bunch of judicial activists. These college graduates, enlightened by the insights culled from their undergraduate education, might find themselves questioning just why it is that judges are given such broad authority in our democracy in the first place. In other words, not only will they lack an appreciation for the indispensable role independent judges play in America's political system, they may express hostility toward their institutional role. As educated citizens with political clout, they might advocate reducing judicial authority and independence. The cumulative result would be the elimination or dilution of the framers' institutional check on the other branches of government, to the detriment of the Constitution's fragile equilibrium. As Alexander Bickel has so eloquently pointed out, cynicism is a mortal sin "because it propagates a self-validating picture of reality. If men are told complacently enough that this is how things are, they will become accustomed to it and accept

it. And in the end this is how things will be."[78] It would indeed be an ironic fate if political science inspired the weakening of our political system!

Political science literature that assumes courts to be fundamentally politically motivated, without acknowledging that such a conclusion is normatively problematic, feeds fuel to the fire of both conservative and liberal critics of court behavior. Such scholarship bolsters the arguments of those who decry judicial activism, by confirming their worst fears. To conservatives, a generous interpretation of the First Amendment by the Supreme Court is no longer merely a legitimate legal conclusion with which they happen to be uncomfortable, but a usurpation of power by a left-wing, agenda-driven group of political activists whose black robes and solemn manner are mere subterfuge. If the Court construes the First Amendment narrowly, the liberal will likewise feel righteously indignant that the Court is not sufficiently activist, but feel powerless and frustrated when he realizes that the Court is not accountable; because federal judges are appointed for life, he has no recourse. Both the conservative and liberal would thus be left frustrated and resentful of the Court's power. Of course, the Supreme Court was never intended to be a policy maker.

CONCLUSION

While many of the Supreme Court's decisions are bound to have profound policy repercussions, unapologetically blurring the Constitutional lines between the political branches does a disservice to the health of our democracy. Admittedly, America's founding fathers were well aware that the separation of powers is not, and cannot be, absolute. In many ways, the separate branches of government constitute artificial distinctions. To the degree that social scientists succeed in injecting a healthy skepticism into the debate over the role of the judiciary in our political system, they enhance and invigorate our crucial ongoing national dialogue. Unfortunately, the poisonous rhetoric of a politicalized judiciary emanating from

[78] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84 (Yale Univ. Press, 2nd ed. 1986) (1962).

certain political science literature falls far outside of the boundaries of healthy skepticism, and in fact resembles a form of Constitutional nihilism. Even worse, one gets the uneasy feeling that many of the proponents of the politicalized view of the court are profoundly oblivious of how radically subversive their assumptions are. Our Republic's fragile equilibrium could not withstand a judiciary dominated by political actors with distinct "policy agendas." This conception is simply unworkable. Judges would no longer be judges; they would be politicians, pure and simple.

Certainly, Congress will continue to hold quasi-judicial hearings; the President will not stop issuing executive orders that have the force of law comparable to legislation; and the Supreme Court will interpret the Constitution in a way that will inevitably impact policy and be colored by the political worldview of the individual justices. Yet, at root, the American political system works. Fundamentally, it is the Congress that legislates, the President who executes the law, and the judiciary that interprets the law. Functions may bleed somewhat into one another as do the colors on a painter's canvas – I do not decry those who point out this fact. To remain meaningful, the political branches must maintain their distinct identities, just as a realist's landscape must distinguish the trees from the sky.