The Discourse of Judging

John Brigham, University of Massachusetts - Amherst
August 12, 2011

*The Discourse of Judging* a Special Issue for “Studies in Law, Politics and Society,” Austin Sarat, ed.


John Brigham, UMass Amherst

Commentary on the decision making of justices on the Supreme Court, from the academy, particularly Political Science, to “the mainstream media,” is increasingly comfortable with political explanations for judicial decisions. Indeed, currently it is hard to find a place for law among serious students of the judiciary. Yet, in confirmation hearings for the Supreme Court, nominees regularly argue that only law will be a factor in their decision-making. The nominees disavow or simply deny the prevailing wisdom in the academy. Today, the difference between the two perspectives seems total. That is, in explaining what judges do, it seems it is either law or politics and it is nearly impossible to imagine a place for both.

This was not the case when C. Herman Pritchett first established that there were political dimensions of judging in his work on the Roosevelt Court in 1946. Over a half century later, Supreme Court nominee John Roberts was very clear that he believed his political orientation would not be a factor in his judging when he testified before Congress. Judges, he said, were like umpires and politics was no more relevant to what they did than it would be to calling “Balls” and “ Strikes.” This claim came only a few years before *The New York Times* announced that the Roberts Court was “the most conservative in decades” (Liptak, 2010). This paper proposes that in the last 50 years the position that holds it is law that governs the decisions of judges has become quite hostile to those who would suggest politics plays a role. This is sometimes called the formalist position. Here it will be simply described as the law or legal position. Law, as a basis for judgment, has recently seemed to be so antithetical to politics that the tension has become something of a cliché. At the same time, the
perspective that looks to politics, which has roots in Legal Realism and political jurisprudence, has itself become more extreme and less nuanced. Indeed, the view that there is politics on American appellate courts has become so extreme as to be the complete opposite of the view that law plays a role. Indeed, both have become caricatures and lack the nuance that comes from incorporating both.

After examining the way these worlds have been divided, by attention first to politics and then to law, the paper considers the possibility of a synthesis that is not only attainable but may have once been the characteristic way of thinking about how those trained in the law think about their field. This approach involves a return to something like what Pritchett engaged in and probably should represent. The synthesis would recognize that in institutional settings like the Supreme Court there is a mix of law and politics at work in judging. The relevance of this fact is applied to the challenges presented by those who are critical of the Citizen’s United decision (2009). Nomination hearings, commentary in the national media and the discourse of law and social science will be examined. I will also draw on arguments made in Constitutional Language (1978), originally written as a dissertation for Pritchett and comments directed at Keith Bybee’s work, All Judges Are Political (2010). This recent book offers a unique version of the synthesis aspired to in this paper.

Seeing Politics in Law

During the summer of 2010, in an article in The New York Times, under the headline, “Court Under Roberts Is Most Conservative in Decades,” Adam Liptak used political science data to establish the Roberts Court’s conservative orientation, both in direction and in its extent. The premise of the Liptak article introduced in political science in the 1940s and pretty much established as conventional wisdom by the 1950s, is that judicial opinion has political dimensions or attitudes and that these can be measured on a scale from the most conservative to the most liberal. A key finding, which focused on judicial review, was that, “When the Rehnquist court struck down laws, it reached a liberal result more than 70 percent of the time. The Roberts court has tilted strongly in the opposite direction, reaching a
conservative result 60 percent of the time” (Liptak 2010). The article held that the political orientations of all judges could be arrayed on a continuum in the fashion known in political science as “the attitudinal model.” Liptak’s analysis is based on the percentage of conservative opinions rendered by the Court. The analysis also measured the conservatism of justices and found four of the six most conservative justices who had served since 1939 to be serving on the Roberts Court. The Times article demonstrated that the view that there is politics in the judiciary has become mainstream.

The position, though widely accepted, is also quite extreme. Some of the extremism is “sensational” and some is a matter of argumentation. In commenting on the emergence of the Roberts Court, Liptak holds, “But only one change — Justice Alito’s replacement of Justice O’Connor — really mattered.” This is journalistic sensationalism. But it’s the kind of sensational statement that goes largely unnoticed. In the last generation or so it is this focus on politics at the expense of law that is the new reality. It is really quite a radical, uncompromising and one-dimensional reality. The source for the above quote is Lee Epstein, but the explicit quote attributed to her “That’s a real switch in terms of ideology,” is less extreme than the way the analysis is presented. In this regard, the nature of the jurisprudential perspective regarding what is going on has changed. Now, the strong suggestion is what, or even all, we need to know about the Supreme Court is the political orientations of the justices. We don’t need to know if they reason well, are devoted to law or pride themselves in a judicial temperament or their detachment from political influences. We simply need to know if they are conservative or liberal, Republican or Democrat, pro Choice or pro Life.

When Liptak’s article came out, public law scholars were ecstatic. There they were, featured in a big spread in The Times, the paper of record for many law scholars in the United States. A number of these scholars, like Epstein and Harold Spaeth, were mentioned in the article. The pride spread through the community. I, however, felt somewhat critical. I felt the need to object to the article for leaving law out of the story. I sent the following message to the Law and Courts list, a discussion group of legal scholars who cover things like the authority of courts and judges.
As a student of C. Herman Pritchett my take on The New York Times story was bittersweet. Sure Herman thought it was silly to deny that there is politics at the Supreme Court or in constitutional law. But he also thought it silly, and dangerous, to act as if that is all there is. I felt Pritchett's passion for law. I witnessed it in Archibald Cox and I read about it with Felix Frankfurter. When The Times treats the story of the Constitution or the Supreme Court as little more than box scores and political scales they do a disservice to those students of the Constitution who are passionate about law. You have only to look at Pritchett's treatise on the Constitution to sense the significance he saw in basic rights like due process and equal protection or structures like federalism or bicameralism. A decision of the Supreme Court might be understood in terms of politics but for Pritchett (or Cox or Frankfurter) the Constitution could never be “just” politics. I believe this is also true of Sotomayor and Ginsberg. I think that is why we should worry more than just a little about what The New York Times has been doing in the name of Political Science.

The position offered by The New York Times, and supported by some circles in political science, is not simply the insertion of politics into law. It is a perspective on judging that all but entirely leaves law out of the picture. It seems that in this jurisprudential angle the politics of positioning in the academy dumbed “up” the claims for scientific politics. That is, it pursued scientific truth that included provable models. These needed a firm foundation and it was thought that the foundation had to be beyond the conventions of ordinary discourse, the political position went forth and multiplied under the banner of its revelations being true. It’s not that what it says is wrong. Indeed, the Roberts Court IS very conservative and may well be the most conservative in history. Its rather that the perspective does not situate the choices judges make in a legal context and gives the impression that all we need to know about the Roberts Court is that it is very conservative (Epstein and Knight, 1997).

This extreme position on politics is associated in political science with the “attitudinalist” perspective. Although linked in its origins to C. Herman Pritchett’s work, which will be discussed below, the extreme political perspective was championed by Glendon Schubert (1965) and Harold
Spaeth (1972) in the 1960s and 1970s and then taken up by Jeff Segal (1984) and Lee Epstein (George and Epstein, 1992) in the 1980s and 1990s. The biblical foundation is Segal and Spaeth’s *The Supreme Court and the Attitudinal Model* published in 1993. The success of this group in populating the field over the last fifty years is impressive.

Various forces led to the development of the extreme position on politics in law. Perhaps the main influence on the development of the political position on judging was scientific aspiration and the sense in professional journals that this was “where the action is.” The desire among students of government, who had been content to work with eclectic methods that included legal, literary, philosophical and historical, to become political scientists led to a mode of inquiry based on politics as a force or influence that could be distinguished from normative frameworks. Advocacy and its handmaidens, the humanities, would be left behind along with the institutional dynamics of courts and the profession of law that had come to constitute legal life. From Pritchett’s original formulation, Glendon Schubert and Harold Spaeth posited the primacy, and in many respects the exclusivity, of politics on the important Appellate Courts. Following a half-century of development in this area, beginning with the publication of Pritchett’s book, the attitudinalists defended their turf with subtle expansions and aggressive responses as they moved into the 21st century. These political science scholars of courts received the article in *The New York Times* as a kind of vindication.

*The Current Legal Position*

Part of understanding the extreme nature of the position taken by *The Times* with regard to the significance of politics on the Court involves realizing the extreme and uncompromising positions that seem, against all odds, to be thriving on the traditional, formalist, legal or “other” side of the law v. politics debate in jurisprudence. It seems odd to find such unrelenting confidence in positions that go so flatly against the accepted wisdom in the academy. Perhaps part of the insight needs to deal with the fact that it is so extreme.
Judge John Roberts in his hearings on nomination to become Chief Justice of the United States flatly denies the relevance of politics in judging. In his opening statement given September 12, 2005 he offered that, “Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them.” The next day, speaking of judicial method, Roberts offered the opinion that “Saying a judge is result oriented, that type of judge, that’s about the worst thing you can say about a judge.”

Since other nominees have taken the same tack, it deserves note that the confirmation process is a highly charged political environment where denial of politics, even talking politics, has its advantages. The challenges of the nomination process are to avoid controversy. Roberts seemed very comfortable during the process and engaged in animated exchanges with the Senators. One of the most free flowing and indicative of the confidence Roberts has in his ability to draw a line between law and politics came in questioning from Senator Charles Schumer of New York. Schumer, not without confidence himself, tried to get the Chief Justice to slip up and admit that his refusal to offer opinions on issues of the day was untenable. Schumer seemed like he was trying to capture something of the absurd. But Roberts responded at every turn. At one point the discussion turned to opinions on movies.

SCHUMER: Let me just say, sir, in all due respect -- and I respect your intelligence and your career and your family -- this process is getting a little more absurd the further we move. ... It's as if I asked you: What kind of movies do you like? Tell me two or three good movies. And you say, "I like movies with good acting. I like movies with good directing. I like movies with good cinematography." And I ask you, "No, give me an example of a good movie." you don’t name one I say, "Give me an example of a bad movie." 

SCHUMER: You won’t name one. Then I ask you if you like "Casablanca," and you respond by saying, "Lots of people like 'Casablanca.' (LAUGHTER) you tell me it’s widely settled that "Casablanca" is one of the great movies.
SPECTER: Senator Schumer, now that your time is over, are you asking him a question?

SCHUMER: Yes. (LAUGHTER)

I am saying, sir -- I am making a plea here. I hope we’re going to continue this for a while, that within the confines of what you think is appropriate and proper, you try to be a little more forthcoming with us in terms of trying to figure out what kind of justice you will become.

SPECTER: We will now take a 15 minute break, reconvene at 4:25.

ROBERTS: Mr. Chairman, could I address some of the...

SPECTER: Oh, absolutely. Absolutely. I didn’t hear any question, Judge Roberts...

ROBERTS: Well, there were several along the way.

LEAHY: ... want to break anyway. You go right ahead.

ROBERTS: I ‘all be very succinct.

SPECTER: You are privileged to comment. This is coming out of his next round, if there is one.

(LAUGHTER)

SCHUMER: I guess there ‘all be.

ROBERTS: First, "Dr. Zhivago" and "North by Northwest."

(LAUGHTER)

It is not just the nomination process that probes the prospect of politics on the judiciary and leads justices to respond defensively. After he had been confirmed, Chief Justice Roberts pointedly criticized the partisan atmosphere after President Barack Obama’s first state of the union address in 2010. He mentioned in particular the president’s criticism of the Court’s decision in *Citizen’s United*, which led to the justices being surrounded by cheering Democrats and Justice Samuel Alito being caught on camera shaking his head in disagreement with the President.

Roberts’ criticism came in a speech at the University of Alabama Law School in March of 2010 and was in response to a student question. He distinguished his concern as not being about criticism generally but about the setting where justices in their robes are in the front row of an address with
significant partisan dimensions. According to Roberts, “…[T]here is the issue of the setting, the circumstances and the decorum. The image of having the members of one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the court – according the requirements of protocol – has to sit there expressionless, I think is very troubling.” The Obama administration responded by calling attention back to the ruling and its political implications, which the President called a break from precedent in his state of the union address.

In oral argument, which the current Chief Justice has engaged in energetically, he has a partisan spirit and barely moderates his criticism of liberal positions. As Jeffery Toobin reports in his New Yorker article (2009), Roberts is relentless in his challenges to counsel. And, it appears to me, the Chief Justice focuses on counsel opposing the conservative position but his position on judging is often sophisticated and nuanced. Similarly, in the decisions themselves, the judges, all of whom have a legal background and serve for life, are at pains to show that their decisions are exercises of professional, rather than political, judgment. In Bush v. Gore (2000), as in most Supreme Court cases, the Court argues that it is not political while the political dimensions of the case are all over it. In a number of Roberts’ decisions it’s hard to find the kind of formulaic invocation of law that we saw in his confirmation testimony (Citizens United, 2009; McDonald, 2010; Baze, 2008).

But there are important Roberts’ opinions that rely on a kind of simple analytic positivism that denies the relevance of politics on the Court and postulates straightforward reasons for ruling as he does. For instance, in Bong Hits (2007), Roberts’ opinion rejects “Frederick’s argument that this is not a school speech case…[t]he event occurred during normal school hours. It was sanctioned by Principal Morse ‘as an approved social event or class trip,’ and the school district’s rules expressly provide that pupils in ‘approved social events and class trips are subject to district rules for student conduct.’” He also relies on Morse, the principal, who “when she saw the sign, she thought that “the reference to a ‘bong hit’ would be widely understood by high school students and others as referring to smoking marijuana.” And “… dismissing the banner as meaningless [a suggested interpretation] ignores its
undeniable reference to illegal drugs.” Finally, and famously, in Parents Involved v. Seattle (2007) Roberts offered that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This statement is not about the meaning of law in a precise sense. Rather, it is about the meaning law has and it suggests a more straightforward interpretation of law’s impact and consequences than might be thought conventional for judges.

Thus, in the process of nomination, it is the professional mysteries “of bench and bar” that pushes the discussion of law and politics into extreme forms. In the contest over the reception of decisions, as exemplified in the 2010 State of the Union address, the claim that judging can and should be removed from politics has more obvious political dimensions. And in various cases, the opinions of the justices are at pains to establish that their rulings are based in law rather than politics.

**Pritchett’s “Original” Position**

The introduction of politics into the conventional wisdom about how judging proceeded had a more complex beginning. Prof. C. Herman Pritchett, a professor at the University of Chicago, had relatively limited objectives in the 1940s as a student of the courts and the Constitution. He sought to demonstrate that political considerations could explain some judicial choices. His interests directed the research to the first Justice Roberts, Owen Roberts. Pritchett wanted to nail down the importance of Roberts’ switch because that move shifted the Court’s majority from opposition to the New Deal to greater acquiescence in the Roosevelt’s governmental response to the Depression. When Pritchett first began to publish his work, there were some who denied that politics was part of the judicial process. Pritchett wanted to demonstrate that, beyond a reasonable doubt, politics was an aspect of what the Court did. In his scholarship and in his life, Pritchett did not deny the relevance of legal considerations.

These legal considerations are, for the most part, the institutional truths that make decision making in the judiciary different from making decisions in the Congress or the Executive Branch. Things like life tenure, judgments based on cases rather than statutes, the relative insulation of the
decision makers from the public, the tradition of precedent and the distinctively legal processes of argumentation made the judiciary different. Some of these considerations lead to the unanimous decisions that have been so characteristic of courts like the one Pritchett worked on. Other considerations are the context that reveals what it means for an opinion to be written in one way, rather than another. Instead of antagonists on opposite sides of a law/politics divide the struggle, for Pritchett, was over the introduction of different methodological considerations.

Pritchett opens *The Roosevelt Court* (1948) with characteristic humility. He reports that he “began to wonder” what it was in a particular case and in the lives of the justices “that led them to disagree” (1948: xi). He went on to identify an interest in “the influence of individual predilections on the development of law.” In discussing his inspiration and the investigatory process he makes it clear he is not a lawyer but a political scientist. In this orientation, he says he brings a set of skills and interests to the study of law. He is very conscious that he is bringing an orientation somewhat outside that of the lawyer. As an investigator, Pritchett is drawn to dissent because it represents an opening into attitudes and values that are, he says, impossible to see in unanimous decisions. The suggestion is that away from the dominant and characteristically legal agreement on outcomes that unanimous cases represent, Pritchett proposed a way to see politics. With both considerations brought to bear, the suggestion is, one has a more complete story.

One facet of Pritchett’s perspective with a bearing on its relevance for our understanding of law and politics today should not be all that different from the present attitudinal orientation. This is the focus on “judicial decision making.” Decision making, as he presents it is the stuff of politics that interacts with the stuff of law. The research is treated as if it was going on “inside” the institutional setting that we conventionally (or conventionally when he wrote) think of as the place where we find this politics.

Pritchett clearly thought that recognizing the politics in judging would elevate our understanding of the courts and place our knowledge of them on a sounder foundation. And, while the focus of his
work is to introduce a more rigorous political analysis there is interesting commentary that reveals more of the interface or intertwined nature of law than we traditionally associate with Pritchett. For instance, in his Preface, Pritchett quotes Walton Hamilton to the effect that the decision of a court “…differs from the ordinary decision of everyman about an everyday matter as a critical intellectual process differs from a half intuitive experience” (1948: xiv). Pritchett, and Hamilton offer their respect for this higher-level process and their desire to clarify it, not destroy it. And then, in discussing the lack of enthusiasm reported on the Court for his work he says he is amicus curiae, friend of the court. Pritchett not only remained interested in doctrinal legal developments as evidenced by his monumental constitutional law text but he was concerned that the perception of greater certainty that numbers are accorded may not be deserved. He believed that the certainty might be illusory if applied to the law generally rather than carefully circumscribed hypotheses. To C. Herman Pritchett, fact gathering and counting ought to have remained grounded in the stuff of law and not spin itself “out into a void.” He seemed, in his classes to be troubled by the extremes on both sides. As I recall, from sitting in those classes from 1973-75, this meant he was concerned about the approach taken by Wallace Mendelsohn on the on hand and Glendon Schubert on the other.

In 1998 I participated in a session commemorating the 50th Anniversary of Pritchett’s The Roosevelt Court. It was a thoughtful project and it directed some of its attention to Pritchett’s role in the early expressions of behaviorism. My working relationship with Pritchett had ended over 20 years before but I had seen Herman at meetings and kept in touch. All the while he helped me a great deal with my career and came to APSA meetings regularly until just before he died in 1995. Jeff Segal and other “attitudinalists” had put the panel together. These were the presumed inheritors of the Pritchett legacy. For the session, I had prepared remarks to honor my teacher and, I assumed, continue the tradition of acknowledging his contribution to an important movement in the field. But I found the session to be far more critical. Pritchett was held up by commentators as someone who at best didn’t “go far enough” and potentially may even have been a closet believer in the existence of a distinctive
field of law. I had in fact once thought the attitudinalists might be on the wane. That they might have burned out in a Glendon Schubert fantasy but this “celebration” of the last 50 years appeared to have been a revision of the inherited wisdom as to Pritchett’s place at the founding. It was a powerful restatement of their aspirations for the next half-century.

A few years ago, William Ford, of the John Marshall Law School in Chicago wrote a very helpful analysis of Pritchett’s place in the discipline (2006). He published it in the online journal *Empirical Legal Studies* which is devoted to work in the tradition of Herman Pritchett, but which, as we have seen, often distinguishes current scholarship from Pritchett’s. Ford takes up a piece by Barry Friedman from earlier in the year (2006) in which Friedman explores the origins of the law v. politics divide. For Friedman, political scientists were enamored of Legal Realism and they sought to describe how judges were deciding cases. Legal scholars, on the other hand, stuck with efforts to convince judges how cases should be decided. While critics of Pritchett’s work, like Wallace Mendelsohn (1963), cast him in an extreme light, others have seen Pritchett in more moderate terms.

Lawrence Baum (2003) carefully describes the framework offered by Pritchett as holding that judicial choice was “… free choice, but among limited alternatives and only after [the judge] has satisfied himself that he has met the obligations of consistency and respect for settled principles which his responsibility to the Court imposes upon him” (Baum; See also, Pritchett, 1954). Ford emphasizes Pritchett’s recognition of value in approaches other than behavioral or Realist but he concludes that these other approaches became less fashionable and were dropped from the journals. This led to uneven development where “traditional” law work became associated with law school and the teaching of Constitutional Law and public law scholarship in political science journals became associated with the behavioral approach.

*Back to the Future*

Rather than helping us to understand the nature of the legal system, the current dramatic
dichotomy between law and politics makes it hard to see what is distinctive about legal politics. This is particularly true with regard to reactions to the *Citizens United* case. Here, a majority of justices on the Supreme Court held that corporations have a constitutionally protected right to put money into political campaigns. When President Obama criticized the decision at the State of the Union address in 2010, he spoke directly to the Justices of the Supreme Court who sat before him in their official robes. Justice Samuel Alito reacted to the President by shaking his head. This was widely seen as a partisan response. Chief Justice Roberts spoke instead of it being unseemly for the robed justices to be sitting in the midst of such a partisan setting. To the extent that Roberts speaks to institutional facets of the political system that treat judicial decisions as a special kind of politics, the reaction to *Citizens United* will have to take those things into account. These include the super majoritarian requirements of a constitutional amendment to overturn a constitutional decision of the Supreme Court.

Some current scholarship promises progress in making these institutional dimensions of judicial power more central to judicial scholarship generally and political science scholarship in particular. In the spring of 2011 I commented on Keith Bybee’s book *All Judges Are Political, Except When They Are Not* at the New England Political Science Association meeting in Hartford. What I said was…

*I was going to say Keith’s book seemed simple enough but I think I was imagining what he was doing, before reading it. After all we have known judges are political for at least 75 years even though it has not been “official.” Upon more diligent examination, like looking at the cover, I have to admit Bybee’s approach is complex.*

*For one thing, I had trouble getting past the title… at least its pretty clear the title is not simple. Then there are the images on the cover… lots of different fonts and then political buttons and a button for the Supreme Court…a political button. What is that all about? Well, you never know if you should hold an author responsible for his cover, much less judge a book by it but all this external action is indicative of a quiet contribution.*

*When you open the book, right off you notice it’s not simple. For instance, it’s not just about the*
Supreme Court. The book is about our understanding that judges are political but that somehow they get away with saying they are not. The book accepts that we have known about this politics for a long time. Yet, the judges have us believing they are somehow different in spite of the fact that we know they are not.

Inside I was brought back to the title, actually to the subtitle, or, a word in the subtitle. I was brought back to “hypocrisy.” And, not just to “hypocrisy” but Keith takes us to “hypocrisy, insincerity and other forms of pretense.” This book is a serious engagement with the authority of judges. Where their authority comes from and why it persists. Why we let them get away with it.

I remember some years ago that Leif Carter began Reason in Law, a thoughtful book on the legal process (which Tom Burke now co-edits), by saying that he would disabuse the reader of the notion that judges are neutral arbiters (Carter, 1979). This was one of “Five Misconceptions of Law,” which included the idea that “Rules of Law Resolve Conflicts,” and that “Laws Should be Stable,” and “Judges Know What They Are Doing.” I had trouble using the book because my students didn’t have the misconceptions Leif assumed. The students at the University of Massachusetts didn’t believe judges were neutral (or police or teachers for that matter). I thought they were “way ahead” of Leif, but perhaps they just had a different orientation. Certainly their life experiences had been different.

We have come a long way since that first edition. The book is now edited with Tom Burke and no longer contains the naïve “Five Misconceptions of Law” (Carter and Burke, 2009). We need to trumpet a new starting point. This is the special aspect of Bybee’s book. It starts from political jurisprudence, where (as I said above) I think that my students have been all this time. This is where Leif, and Tom, have come around to. The political perspective is our new beginning. This is where The New York Times is. Politics is all over the courts. In the matter of theorizing about judging, Keith is starting out way ahead of where jurisprudence has been for a while. So its not surprising that he gets somewhere new. I would like to consider where he gets. Although this is not a fully articulated place, it’s a really good place to be starting at. I would add a few considerations.
For one thing, one wonders how to conceptualize “beyond hypocrisy.” It is not nice to say the justices are hypocrites and to Keith, nice is important. I agree with Keith that candor or honesty is not a panacea. It is not going to set things, other than the record, straight. But for Keith courtesy is a key and I admit to struggling with courtesy. I can see its potential. There is some peace and courtesy in judicial process. But I think it is a bit more a style or symptom than a core element of judicial authority.

Keith writes of “the constructive use of pretense” and his approach is quite wonderful. There is indeed an aspect of the current acceptance of politics in judging and judging as “above” politics that is not completely rational or straightforward. But recognizing there is something politically consequential to pretense is simply a beginning. I think courtesy and pretense suggest a kind of terrain, a framework rather than a full-blown description of how judges secure authority. I have done some of the work in Material Law (2009).

Clearly the legal process endures with contradictions rather than in spite of them. For Keith a kind of façade make this possible. I like façade; it’s a cool idea, the way Keith uses it. But the idea sounds an awful lot like the Realist critique. It sounds like the “cult of the robe,” in different cloth perhaps.

Court worship is itself a cultish endeavor. I have said that more than once. But I think that it is in courtness rather than law that we find the answer to the puzzle Keith presents. As Martin Shapiro taught us…we need a place of resolution. In spite of their flaws we have come to think that we need courts.

So the key to the law/politics relationship, and to cases like Bush v. Gore, was certainly not the revelation of partisanship in the courts and it may have been related to courtesy. I think that if Al Gore had focused on partisanship in the decision the resolution of the election might have gotten ugly. Lots of people thought this. But Al Gore was not just being courteous. He was reflecting a resignation, a sense, widely shared, that there was no place other than the courts to go for a resolution of the very political quandary that confronted us all.
The dichotomy between law and politics, like the formation of the American political system into two major parties in the political system, forces us into oppositional camps inadequately understanding the opposition. While we are used to this in war, maybe even politics, the dichotomy loses what is distinctive and most interesting about law. As many have pointed out these distinctive features are institutional (Hays, 2011; Brandwein, 2006; Gilman, 1993).

Basic institutional practices, like the idea of judicial review or the elevated status of the U.S. Supreme Court, are aspects of American politics that combine law and politics. Pritchett saw these things as essential to an understanding of how law works and they amount to the sort of constraints on behavior that Bybee identifies with courtesy and manners. American law has come to see Marbury v. Madison as foundational. Indeed, the institutional lore on Marbury reads a highly contested case from 200 years ago as a foundation for the authority of judges. Thus the modern institutional meaning of an old and politically charged legal conflict gives authority to judges in the United States whatever their politics. And the Court itself, once a minor player in the national government operating out of decidedly inelegant quarters in the basement of the U.S. Capitol now commands respect that rivals the other branches. That respect too is an institutional reality that combines law and politics. These dimensions of American legal life provide the background for Al Gore’s gracious and courteous acceptance of the Court influenced outcome of the 2000 presidential election. Institutional power of this sort was a given for Pritchett and it is given new life in Bybee’s formulation. We are in an exciting time for the study of judicial decisions. Perhaps it is even the dawn of a more sophisticated paradigm.

Bibliography


Segal, Jeffery. 1984. "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases (1962-


Cases


*Marbury v. Madison* 1 Cranch 137 (1803)

*McDonald v. Chicago* 561 U.S. ___ (2010)

*Morse v. Federick* 551 U.S. 393 (2007)


Endnotes

i There are other areas, like equal protection, where Justice Roberts makes a virtue of ignoring conventional wisdom. See *Parents Involved* (2008).

ii I have not found Justice Roberts commenting on the decision, although, obviously (since he was a
Bush appointee) he was not on the Court at the time.

iii I sought to be striking off on my own in the tradition I associated with Pritchett and his wonderfully clever student Walter Murphy.