Supreme Court Alchemy: Turning Law and Politics into Mayonnaise

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ABSTRACT

How do law and politics intertwine in Supreme Court adjudication? Traditionally, in law schools and political science departments, scholars refused to mix law and politics. Law professors insisted that legal texts and doctrines controlled Supreme Court decision making, while political scientists maintained that political ideologies dictated the justices' votes. In the late twentieth century, some scholars in both disciplines sought to combine law and politics but still conceived of the two as distinct. They attempted to stir law and politics together but ended with an oil-and-water type of mix; law and politics settled apart. The best approach, as presented in this Article, is an institutional interpretivism, positing that politics is necessarily an integral part of legal interpretation and, therefore, Supreme Court decision making. Institutional interpretivism has significant ramifications. For scholars, it suggests that future research should explore the law-politics dynamic. The potential of this approach is demonstrated with an analysis of the Affordable Care Act Case. Meanwhile, for Supreme Court justices, institutional interpretivism suggests that the justices will continue to decide cases as before, by sincerely interpreting legal texts and doctrines. Politics is so deeply embedded in the judicial process that, in most instances, the justices do not consciously consider their political ideologies. Yet, institutional interpretivism reveals that the justices naturally decide in accord with their politics. Law and politics are joined so cohesively, in a stable emulsion, that the justices do not even see their politics at work.

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INTRODUCTION

Law professors and political scientists refused to mix law and politics for much of the twentieth century. Law professors insisted that legal texts and doctrines controlled Supreme Court decision making, while political scientists maintained that political preferences dictated the justices’ votes. On the law side, many scholars believed that political considerations corrupted the judicial process. On the political science side, many believed that judicial opinions disguised political preferences with fancy window dressings.

In recent years, an increasing number of scholars on both sides of the disciplinary divide have recognized a connection between law and politics, yet still, the traditional dichotomy persists. In the legal academy, for example, the persistent harping about activist judges arises from the assumption that law and politics are distinct. Activist judges (and justices) supposedly pursue their political agendas rather than follow the rule of law. Some Supreme Court justices agree that law and politics must remain separate. “To expect judges to take account of political consequences,” wrote Justice Antonin Scalia in 2004, “is to ask judges to do precisely what they should not do.” Meanwhile, political

scientist Martin Shapiro declared: "Courts and judges always lie. Lying is the
technique of the judicial activity." To prove the point, Jeffrey A. Segal and
Harold J. Spaeth sought to test the "mythology of judging." They devised a
"legal model," which hypothesized that "the decisions of the Court are based
on the facts of the case in light of the plain meaning of statutes and the
Constitution, the intent of the framers, precedent, and a balancing of societal
interests." The legal model, as constructed by Segal and Spaeth, demanded
that Supreme Court decisions be "objective, impartial, and dispassionate." Segal
and Spaeth then ran quantitative studies that supposedly revealed the
failings of the legal model. The evidence demonstrated "that traditional legal
factors, such as precedent, text, and intent, had virtually no impact" on Supreme
Court decision making. Segal and Spaeth were unsurprised; they had main-
tained all along that political ideologies determine the justices' votes.

Even more subtle scholars, though, stumble into the law-politics abyss. Renowned first-amendment scholar Robert Post recently published a sophisti-
cated "sociological account of the relationship between law and politics that
suggests how judicial statesmanship [read: politics] can further the essential
social functions of both law and politics." Judicial statesmanship, according to
Post, should be combined with judicial craftsmanship "because law and politics
should be mutually interdependent and sustaining." Yet, Post implicitly sug-
gested that law and politics belong ultimately to separate realms. True, he
sought to mix them beneficially, but he nonetheless explained that "judicial craft
may at times appropriately be supplemented by judicial statesmanship." If
political considerations (judicial statesmanship) may "at times" supplement law
(judicial craft), then apparently, at other times, law may be pristine, untouched
by politics. More egregiously, in a well-received book about the influence of
law on politics, political scientist Gordon Silverstein worried that law some-
times can "undermine or kill" politics. He did not mean this in a good way.
The lethal judicial process can be "narrowing, formalizing, and hardening."

8. Jeffrey A. Segal et al., The Supreme Court in the American Legal System 16–18 (2005).
10. Id. at 32.
11. See id. at 4.
12. Harold J. Spaeth & Jeffrey A. Segal, Majority Rule Or Minority Will: Adherence To Precedent
On The U.S. Supreme Court xv (1999); see id. at 286–315 (summarizing quantitative evidence
regarding the influence of stare decisis on Supreme Court justices).
13. See id. at xv; Segal & Spaeth, supra note 2, at 65.
14. Robert Post, Theorizing Disagreement: Reconceiving the Relationship Between Law and Poli-
15. See id. at 1320.
16. Id. at 1323 (emphasis added).
17. Id.; see id. at 1324 (describing "politics and law as distinct phases").
(2009).
19. See id. at 2.
This Article proposes a path around the law-politics abyss. Scholars, such as Post, conceive of law and politics as distinct, even though they attempt to mix them together. In the end, for these scholars, law and politics inevitably settle apart, like oil and water. A handful of legal and political science scholars, however, have attempted to combine law and politics in a more permanent blend. Think of an emulsion, where two liquids are joined together to form a stable substance, such as mayonnaise. But even these scholars have not explained the mechanism by which law and politics join. How, exactly, do law and politics emulsify? The answer lies in an institutional interpretivism, which reveals that politics is at the heart of the legal interpretive process. That is, politics is inescapably an integral part of legal interpretation and, therefore, an integral part of Supreme Court decision making. To be clear, institutional interpretivism describes the process of Supreme Court decision making as it actually occurs rather than prescribing how it ought to occur. The description, however, necessarily limits the feasibility of normative prescriptions. If politics is integral to legal interpretation, then it would be futile to recommend the justices follow an interpretive method that ostensibly banishes politics by, for example, divining an original constitutional meaning.20

Part I of the Article draws on legal and political science literature to elaborate the traditional scholarly separation of law and politics. Part II begins by describing the oil-and-water approach to Supreme Court decision making. Part II next analyzes the writings of scholars who combine law and politics more permanently, in an emulsion. The final section of Part II explains institutional interpretivism. Part III explores the ramifications of institutional interpretivism for, first, scholars and, then, Supreme Court justices. For scholars, on the one hand, institutional interpretivism has potential for opening new directions in future research. To demonstrate, Part III analyzes the monumental Affordable Care Act Case (ACA Case)—National Federation of Independent Business v. Sebelius.21 In the ACA Case, decided in 2012, the Court upheld President Barack Obama’s flagship health insurance legislation, the Patient Protection and Affordable Care Act of 2010.22 Although Chief Justice John Roberts’s opinion repeatedly proclaimed that politics did not influence the justices,23 an institutional interpretivist analysis reveals a vibrant law-politics dynamic. For Supreme Court justices (and other judges), on the other hand, institutional interpretivism is largely bereft of significance. Yet, this latter conclusion is itself important. It paradoxically means that Roberts, Scalia, and other justices can be

23. Sebelius, 132 S. Ct. at 2577, 2579, 2608. Roberts wrote: “We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation’s elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.” Id. at 2577.
simultaneously correct and incorrect when they insist that they decide cases by focusing on the law and not contemplating politics. They are incorrect because, as revealed by institutional interpretivism, politics is always part of legal interpretation and, therefore, judicial decision making. They are correct, though, because politics is so deeply embedded in the judicial process that, in most cases, the justices do not consciously consider their political preferences (and do not need to do so). Nonetheless, the justices decide harmoniously with their politics. Law and politics are joined so cohesively—in an emulsion—that the justices, quite reasonably, do not even see their politics at work.

A caveat is in order at the outset. Throughout this Article, I refer to particular justices as either conservative or liberal. Although these labels are not especially controversial, it is worth noting that they do not merely reflect my political intuition. Rather, they correspond with various quantitative rankings of the justices’ political ideologies.24

I. THE PURISTS

Numerous scholars are purists. They advocate for an all-or-nothing approach: Judicial decision making is either all law or all politics. If the scholar is in the legal academy, then he or she maintains that the Court must decide cases pursuant to law by drawing on traditional legal materials such as case precedents, statutes, and constitutional text.25 If the scholar is a political scientist, then he or she maintains that politics alone determines Supreme Court votes.26

A. All Law

On the law side, the pristine legal approach is historically rooted in the work of C.C. Langdell, the first dean of Harvard Law School, and his disciples. Teaching in university-based law schools when they initially emerged after the Civil War, the Langdellians treated law as a closed system of rules and axiomatic principles that dictated judicial outcomes.27 The legal system was supposedly autonomous from societal influences. Thus, from the Langdellian

27. Langdell, supra note 1, at viii–ix.
perspective, judges were not to contemplate political interests or even conceptions of justice. Judges were to do one thing: logically apply the rules and principles in a mechanical fashion.

To be sure, nobody today would claim to be Langdellian, yet Langdellian legal science still shapes the practices of law professors. The still-influential 'legal process' scholars of the latter twentieth century, including Henry Hart and Alexander Bickel, emphasized the distinct processes of different governmental institutions. Courts and legislatures operated pursuant to processes unique to their respective goals and functions. Courts, in particular, were to decide cases by following the process of "reasoned elaboration." Judges needed to articulate reasons for a decision, to explain those reasons in a detailed and coherent manner, and to relate the decision to a relevant rule of law applied in a manner logically consistent with precedent. In constitutional cases, reasoned elaboration translated into a requirement that judges decide pursuant to "neutral principles," which supposedly precluded judges (or justices) from using rules or principles that bore any political valence.

An all-law approach is most clearly displayed today by scholars and justices who claim to follow originalism in constitutional interpretation. Most originalists demand that judges discern the (supposedly) objective meaning of the constitutional text as it was understood at the time of its adoption. Constitutional meaning, from this perspective, is static, fixed at the time of its ratification, regardless of changing political and societal contexts. Scalia has explained that an originalist approach is "the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures... To hold a governmental Act to be unconstitutional is not to announce

32. Id.
33. See Wechsler, supra note 1, at 15–35; see Bickel, supra note 30, at 49–59 (applying Wechsler's concept of neutral principles).
34. See Bork, supra note 5, at 5–6, 143–44.
35. Lawrence B. Solum, We Are All Originalists Now, in Constitutional Originalism: A Debate 1, 4 (2011) (articulating the "fixation thesis"). To be sure, the meaning of originalism itself is now contested. Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 720–722 (2011) (discussing the change from old originalism, original intent, to new originalism, original meaning); Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707, 708 (2011) (stating that old originalism "has been mostly displaced by the 'new originalism'").
that we forbid it, but that the Constitution forbids it.” Justice Clarence Thomas, perhaps more than any other current justice, comes closest to following originalism consistently. For instance, Elk Grove Unified School District v. Newdow held that a student’s father lacked standing to challenge the public school recitation of the phrase, “under God,” in the Pledge of Allegiance. Thomas, though, wrote a concurrence that revolved around an originalist analysis of the establishment clause. Referring to the text, contemporaneous interpretations from the time of the framing, and “prevailing” nineteenth-century views of the clause, Thomas concluded that “[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.” In other words, from Thomas’s originalist perspective, the establishment clause should not be incorporated or applied against state and local governments, which should then be free to establish or support religious institutions.

A few political scientists now provide quantitative research supporting some type of legal approach, despite Segal and Spaeth’s rejection of the so-called “legal model.” Using law models different from Segal and Spaeth’s, these other political scientists have concluded that legal texts and doctrines or “jurisprudential regimes” influence judicial decisions. “The Supreme Court is not simply a small legislature,” explain Mark J. Richards and Herbert M. Kritzer. “Law matters in Supreme Court decision making in ways that are specifically jurisprudential. Specifically, jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny the justices are to employ in assessing case factors.” Thus, for instance, Richards and Kritzer’s quantitative research shows that the application of the three-prong doctrinal test from Lemon...
v. Kurtzman influences whether the justices decide that a governmental action violates the establishment clause. More broadly, other quantitative research demonstrates that attorneys' legal arguments sway the justices.

Such quantitative support is important, but even if it were lacking, one should not dismiss the legal approach. Exactly because of a desire to conduct scientific research, most political scientists insist on constructing models that are amenable to quantitative testing. The studied phenomena must be reducible to numeric data. If a potential causal factor cannot adequately fit into a testable model, then these political scientists are apt to relegate that factor to irrelevance. A would-be causal factor that is not scientifically testable—not falsifiable—is no more significant than a specter. Given this precondition for much political science research, one should also recognize the qualitative support for the legal approach. Like quantitative evidence, qualitative evidence is empirical, though unlike quantitative evidence, it cannot be reduced to numeric data. Qualitative research explores relationships, actions, and events that must be interpreted. It can include anecdotal evidence, but it also typically suggests commonalities (and differences) among distinct phenomena. Many historians as well as researchers in some social (or human) sciences rely extensively on qualitative evidence. Such research is generally not falsifiable because testing conditions are not repeatable. A legal historian, for instance, cannot repeat the constitutional framing to test a hypothesis about its causes. Yet, qualitative research can still be empirically valid if the researcher provides an illuminating narrative of the phenomena that is persuasively grounded on the evidence.

46. Id. at 835, 839; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (specifying the three prongs as purpose, effects, and entanglements).
49. "Judicial decision making ... is a practice that mixes legal, strategic, and attitudinal considerations in ways that cannot be fully isolated by scientific investigation." Mark A. Graber, Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction, in The Supreme Court and American Political Development 33, 35 (Ronald Kahn & Ken I. Kersch eds., 2006); cf., Cornell Clayton & Howard Gillman, Introduction, in The Supreme Court in American Politics: New Institutionalist Interpretations 1, 1–2 (Howard Gillman & Cornell Clayton eds., 1999) (noting that there are important unanswered questions and describing the narrow focus of the attitudinal model).
51. Roskin et al., supra note 48, at 12, 26–28; Glossary, supra note 48.
52. For discussions of the human sciences, a term used more frequently in continental studies, see Hans-Georg Gadamer, The Beginning of Philosophy 30–31 (Rod Coltman trans., 1998); Charles Taylor, Philosophy and the Human Sciences (1985).
53. See Georg G. Iggers, Historiography in the Twentieth Century 97–100, 139 (1997); Lisa Webley, Qualitative Approaches to Empirical Legal Research, in The Oxford Handbook of Empirical Legal Research 926, 940–45 (Peter Cane & Herbert M. Kritzer eds., 2010) (explaining the various methods of empirical research and how to evaluate the validity of these methods); see also Ellie Fossey et al.,
Qualitative evidence of the legal approach is boundless. Most lawyers, judges, and law professors would (and do) testify to the sincerity of their reliance on legal texts and doctrines. From their experiences, the invocation of legal materials is significant, not immaterial subterfuge. With specific regard to judicial decision making, Supreme Court justices (and other judges) are subject to professional norms that demand they identify and refer to relevant legal texts and doctrines when deciding a case. The justices thus not only discuss relevant precedents, statutes, and constitutional provisions in their judicial opinions—which admittedly might be for public consumption, to help legitimate their decisions—but also discuss such textual and doctrinal sources among themselves when behind closed doors, during post-oral argument conferences. Perhaps more to the point, the justices sometimes bargain and negotiate among themselves about the contents of their majority opinions, as if the precise wording of a single paragraph or even a single sentence mattered. Furthermore, the justices claim that they never openly discuss or consider partisan politics in relation to pending cases.

B. All Politics

Whereas Segal and Spaeth’s complete dismissal of the legal approach is unpersuasive, their argument that justices vote in accordance with their personal policy preferences is powerful. Perhaps more so than any other political scientists, Segal and Spaeth represent the all-politics position. According to their so-called attitudinal model, “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.” And a justice’s personal policy preferences (or ideological attitudes) are formed exogenously to the legal system; that is, the justice’s preferences do not form

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44. See Philip Bobbitt, Constitutional Interpretation 12–13 (1991) (specifying six “modalities of argument” judges use to decide constitutional cases); Benjamin N. Cardozo, The Nature of the Judicial Process (1921) (discussing how Cardozo decided cases).
45. See Steven J. Burton, Judging in Good Faith (1992) (emphasizing judges’ good faith responsibility to apply the law); Tamanaha, supra note 29, at 194 (emphasizing that judges internalize a “commitment to engage in the good-faith application of the law”).
49. Segal & Spaeth, supra note 2, at 65.
because of his or her institutional position within the federal judiciary. Segal and Spaeth gave this stark example: "Simply put, [William] Rehnquist votes the way he does because he is extremely conservative; [Thurgood] Marshall voted the way he did because he is extremely liberal." Most important, Segal and Spaeth support their conclusion—that Supreme Court decisions are "overwhelmingly explained by the attitudes and values of the justices"—with extensive quantitative evidence. For instance, in a study comparing the justices' ideologies with their votes in criminal cases, Segal and Spaeth concluded that "justices who are more liberal have substantially higher rates of support for accused criminals than do justices who are more conservative. Indeed, the fit of the model is extremely high, with a correlation between ideology and votes of .78 . . . ." From Segal and Spaeth's perspective, the attitudinal model is far superior to the legal model as a method for predicting "judicial behavior" or, in other words, the justices' votes.

While attitudinalists tend to stress the quantitative support for their approach, one should recognize that qualitative evidence also lends credence. An obvious example that demonstrates the power of politics in Supreme Court decision making is the five-to-four decision, Bush v. Gore, which resolved the 2000 presidential election. Numerous scholars, even those who believe that law ordinarily shapes the Court's decisions, argued that this case could not be explained in any way other than as a pure partisan power grab. The conservative majority claimed to apply equal protection reasoning, but it was unique and inconsistent with anything they did before or since. Based on this flimsy justification, the five conservative justices held for George W. Bush and effectively installed him as the next president (which allowed him to nominate conservative replacements for Chief Justice Rehnquist and Justice O'Connor).

Michael Klarman underscored the Court's blatant partisanship by rhetorically

61. Id.
62. Spaeth & Segal, supra note 12, at xv.
64. Segal et al., supra note 8, at 319.
65. Whittington, supra note 60, at 602; see id. at 611 (discussing success of attitudinal model in predicting case outcomes).
69. 531 U.S. at 104–10; Gillman, supra note 68, at 141–43; Balkin, supra note 58, at 1426–35.
70. See 531 U.S. at 126 (Stevens, J., dissenting) (arguing that a principled application of the majority's equal protection reasoning would have also invalidated the original method of counting votes in Florida); Jeffrey Toobin, Too Close to Call (2001) (detailed political account of the election dispute).
asking: "Had all the other facts in the Florida election imbroglio remained the same, but the situation of the two presidential candidates been reversed, does anyone seriously believe that the conservative Justices would have reached the same result?"

Despite such quantitative and qualitative support, the attitudinal model is not the only political science approach to emphasize politics in judicial decision making. Rational choice theorists, such as Lee Epstein, maintain that the justices generally want to vote in accordance with their personal policy preferences but that various institutional constraints might compel the justices to alter their behaviors. Epstein, Jack Knight, and Andrew D. Martin elaborate the rational choice or strategic model: "(1) judges make choices in order to achieve certain goals [usually policy preferences]; (2) judges act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made." Thus, for instance, while Justice Thomas believes that the establishment clause does not apply to state and local governments, he might nonetheless vote with other conservatives who believe otherwise. By strategically modifying his behavior, Thomas enables the conservatives to form a majority and to interpret the establishment clause narrowly, thus allowing governments to propagate and bolster religion more than liberals would allow.

Another approach emphasizing politics maintains that the justices vote in accordance with the predominant political regime. The renowned Robert Dahl wrote the seminal article in this genre in 1957. Based on an empirical study of cases where the Supreme Court had invalidated congressional statutes, Dahl observed that, contrary to popular assumptions, the Court did not protect minorities from majoritarian overreaching. As Dahl phrased it, "it would appear to be somewhat naive to assume that the Supreme Court either would or could play the role of Galahad." To the contrary, the Court inevitably was an integral "part of the dominant national alliance." The Court, therefore, decided cases

75. Dahl, supra note 74, at 284.
76. Id. at 293.
in harmony with the interests and values of that dominant political alliance or regime. "As an element in the political leadership of the dominant alliance,"77 Dahl tersely stated, "the Court of course supports the major policies of the alliance."78 Terri Peretti recently reiterated this regime politics approach:

'Regimists’ focus on the incentives and power of politicians to construct courts in particular ways that would benefit the ruling regime. By granting jurisdiction, encouraging certain types of litigation, and selecting specific justices with specific political and jurisprudential views, elected officials enlist the Court as a partner in their electoral and policy aims.79

Occasionally, when one dominant political regime replaces another, the Court might be temporarily aligned with the former regime. During such times, conflict between the Court and, for instance, the Congress—if it is controlled by the new regime—might be intense. Yet, before long, the Court is likely to be consolidated with the new regime, often because of new appointments to the Court.80 Thus, from the regime politics perspective, the justices rarely depart too far from the political mainstream: "[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."81 An example is Brown v. Board of Education, which held unconstitutional de jure racial segregation in public schools.82 Regimists maintain that Brown did not show the Court boldly championing the rights of a racial minority in the face of majoritarian pressures.83 Instead, the Court in Brown followed the interests and values of a dominant national political coalition or regime that favored the eradication of Jim Crow. White southerners who supported legalized racial segregation had become national outliers; the Court forced them to acquiesce to more mainstream views, as understood from a national vantage.84

The regime politics approach, it should be recognized, can be understood as a specific type of rational choice theory. Regimists agree with rational choice theorists insofar as both groups maintain that institutional constraints prevent

77. Id.
78. Id.
79. Peretti, supra note 41, at 275.
80. Dahl, supra note 74, at 293; Keck, supra note 4, at 322, Mark Tushnet, The Supreme Court and the National Political Order: Collaboration and Confrontation, in The Supreme Court and American Political Development 117 (Ronald Kahn & Ken I. Kersch eds., 2006).
82. 347 U.S. 483 (1954).
84. Mary L. Dudziak, Cold War Civil Rights (2000); Derrick A. Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980). Dahl argued that Brown might not have actually conferred legitimacy on a policy of a dominant national alliance—because a strong political coalition supporting desegregation had not yet formed—but that Brown nonetheless conformed to an explicit or implicit norm widely held by political leaders. Dahl, supra note 74, at 293–94.
justices from arrantly voting pursuant to their personal policy preferences. The difference between regimists and other rational choice theorists is that regimists emphasize that the overriding institutional constraints on the justices arise from other political actors in the predominant regime, including members of the congressional and executive branches. The justices must behave (or vote) in ways that are likely to discourage retributive "attacks on their independence and overrides of their decisions." In fact, since rational choice theorists usually assume that justices would vote according to their personal policy preferences but for various institutional constraints, one might even view the regime politics approach as a stylized version of the attitudinal model.

Nonetheless, many political scientists consider the regime politics approach and the attitudinal model to be opposed against each other in at least two ways. First, attitudinalists emphasize the justices' personal policy preferences but do not speak to the origins of those preferences, whereas regimists care deeply about such origins. Attitudinalists write as if policy preferences "arrive like orphans in the night at the Court's doorstep," while regimists analyze how preferences "are deliberately planted there by the dominant governing coalition." Second, the justices' personal policy preferences sometimes appear to diverge from the values of the predominant regime—for example, when one dominant regime is replacing another. In such instances, attitudinalists insist that the justices follow their personal preferences, while regimists insist that the justices follow partisan (or regime) values—albeit of the prior dominant regime. Basically, attitudinalists stress the freedom and independence of the justices: The "justices behave like any other political actor—only more so, since justices do not have electoral incentives to compromise their ideological preferences." Meanwhile, regimists stress that the justices are, in effect, constantly looking over their shoulders: The justices are constrained at least as much as other political actors, even if the justices need not worry about re-election, and thus the justices largely remain loyal to the predominant regime that brought them to office.

II. A LITTLE BIT OF THIS, A LITTLE BIT OF THAT

Quantitative and qualitative evidence support both law and politics as being causal factors in Supreme Court decision-making. Given that numerous law

86. Segal et al., supra note 8, at 35–37.
87. Id. at 37.
88. Keck, supra note 4, at 322, 328.
89. Peretti, supra note 41, at 289.
90. Id.
91. Keck, supra note 4, at 322, 328.
92. Whittington, supra note 60, at 606.
93. Keck, supra note 4, at 322, 328; see Richard H. Pildes, Is the Supreme Court a 'Majoritarian' Institution?, 2010 SUP. CT. REV. 103 (arguing that the regimist approach is ambiguous because the definition of the dominant regime and what constitutes following it often seem to change).
professors and political scientists are purists, subscribing to an all-or-nothing approach, such evidence might be problematic: How can decision making be all law or all politics if evidence corroborates both approaches? An obvious solution to this problem is to posit that both law and politics influence the justices' votes. And indeed, while many law professors and political scientists remain purists, an increasing number of scholars in both disciplines now argue that some mix of law and politics is at play. But this solution engenders a further problem: How do law and politics combine or interrelate in the decision making process? This Part discusses two possibilities: first, politics sometimes affects Supreme Court decision making, but politics and law nonetheless remain distinct; and second, politics and law are integrally entwined so that decision making is always partly political.

A. Together—Like Oil and Water

Perhaps the most common method for mixing law and politics is to maintain that politics qua politics sometimes enters the judicial decision making process even though law and politics remain independent and separate. At least within the legal academy, the crux of this approach is the belief that traditional legal materials—texts and doctrines—control most cases, but occasionally, in the gaps or on the edges of the law, political (or policy) considerations become relevant. From this perspective, many disputes make easy cases: cases that are so obviously governed by uncontested rules that they are unlikely to reach even a trial court. For instance, a testator must have his or her will witnessed by two individuals; failure to do so results in an invalid will, not in a Supreme Court decision. Political considerations enter the judicial calculus only in those cases where a gap or area of doubt in the law exists, where "the law runs out."

Significantly, advocates of this approach insist that law and politics exist in distinct realms. Law and politics can be stirred together, we might say, but they ultimately remain segregated, like oil and water. Some legal process scholars, for example, maintained that a judge, in appropriate situations, should apply the law "in the way which best serves the principles and policies it expresses." Yet, the judicial process of reasoned elaboration neatly and safely cabined such political concerns so that they would supposedly intrude into judicial deliberations only in certain narrowly defined circumstances. The law supposedly

99. Hart & Sacks, supra note 30, at 165; see id. at 166–67 (discussing the use of policy).
controlled many cases without politics playing any role. A Supreme Court tax decision illustrates this outlook. The eight-justice majority opinion recognized that its proposed interpretation of the relevant statutory provision would allow certain corporate shareholders to realize "a 'double windfall.'" Regardless, the Court deflected such political considerations as beyond its domain: "Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern."

Even political scientists who are fully committed to the attitudinal model, including Segal and Spaeth, acknowledge that law can feasibly govern cases, particularly in the lower courts. "[P]recedent certainly matters to lower court judges," writes Segal, Spaeth, and Sara Benesh. "[N]o such judge worthy of the name is likely to uphold prohibitions on previability abortions, require the segregation of students on racial grounds, or allow public school officials to lead students in prayer service, regardless of the judge's [political] predilections .... Of course, at the level of the Supreme Court, where hard cases are the norm, Segal and Spaeth insist that legal texts and doctrines control the justices' votes in only the rarest of instances, though they grudgingly admit that it sometimes appears to happen—obviously, however, not often enough to cause them to waver in their commitment to the attitudinal model. Some rational choice theorists also assert that legal texts and doctrines are among the institutional constraints that can compel the justices to deviate from their personal policy preferences. Justices "are strategic actors who take into consideration the constraints they encounter as they attempt to introduce their policy preferences into the law," writes a group of political science researchers, who then add that "these constraints often take the form of formal rules or informal norms that limit the [justices'] choices."

In short, scholars on both the legal and political science sides recognize that quantitative and qualitative evidence suggests that some mix of law and politics goes into Supreme Court decision making. In fact, some scholars have attempted to demonstrate that neither an all-law nor an all-politics ap-

101. Id. at 219.
102. Id. at 220.
103. For an extensive quantitative study of the role of law and political ideology in the lower courts, see Frank B. Cross, Decision Making in the U.S. Courts of Appeals (2007).
104. Segal et al., supra note 8, at 30.
105. Id.
106. Id.; Spaeth & Segal, supra note 12, at 5–7.
108. Id.; see Whittington, supra note 60, at 612 (describing rational choice new institutionalism).
109. Law professor, Brian Tamanaha, draws on multiple sources, including quantitative studies of the lower courts, to support his concept of balanced realism, an oil-and-water approach (he admires Cardozo's description of judging, including the notion that judges generally follow the law but must sometimes fill in gaps). Tamanaha, supra note 29, at 125–31.
approach suffices to describe the complexity of the judicial process. Frank Cross, a law professor, and Blake Nelson, a political scientist, joined together to conduct a quantitative study of the Supreme Court directed toward this purpose. They rejected all the univocal descriptions of the Court’s decision making: “An assumption that judges are naïvely legal or political or utterly strategic is too simple to come close to describing the reality of decisionmaking.” Instead, Cross and Nelson found “distinct evidence of ideological decisionmaking, legal-model decisionmaking, and strategic institutional decisionmaking.” Thus, they concluded that “[j]ustices are driven by a complex mix of factors—legal, ideological, and strategic. Models are considerably simplified by an assumption of a single-peaked preference along one dimension.” Even so, Cross and Nelson conceptualized law and politics as distinct. One could presumably measure the effects of legal materials, standing alone, just as one could presumably measure the effects of political ideology (or political preferences), standing alone. “Our results show that judicial [read: political] ideology is an important factor in Court decisionmaking in a large set of cases. They also show that the law actually matters and drives decisionmaking in other cases, governed by certain types of legal rules. The independent effects of institutional deference reveal some role for strategic decisionmaking as well, over and above naïve legal and political decisionmaking.”

B. An Emulsion

The oil-and-water mix of law and politics represents an advance on the all-law and all-politics approaches because it recognizes the quantitative and qualitative evidence supporting both approaches. Even so, the oil-and-water approach retains a vestigial remnant of the purist approaches: Namely, it retains the vision of law and politics as dichotomous, as sharply distinct. This section, therefore, sketches an alternative method for mixing law and politics that overcomes this dichotomy. As an advance over the oil-and-water approach, this alternative does not merely posit that law and politics are occasionally stirred together; rather, they are fully integrated into a permanent emulsion. An emulsion, like mayonnaise or milk, is stable; the components do not settle or separate out. With foreknowledge, one can identify the elements that went into the emulsion—law and politics—but the final product is a unified whole—a Supreme Court decision.

111. Id. at 1492.
112. Id. at 1491.
113. Id. at 1492.
1. What Is the Law-Politics Emulsion?

Some regimists, law professors as well as political scientists, fall into this emulsification category. In discussing Supreme Court decisions, they tend to emphasize the surrounding political contexts, thus accentuating how the justices largely follow the political mainstream. They also, though, discuss relevant legal texts and doctrines and the justices' reliance on these legal materials; law, from this perspective, does not merely mirror social and economic interests. For instance, law professor L. A. Powe unequivocally views the Court "as a part of a ruling regime doing its bit to implement the regime's policies." The Court "is staffed by men (and in recent years a few women) who for the most part are in tune with their times." Yet, Powe also writes about legal developments from the inside, from the lawyer's or judge's perspective. In his most recent book, on the history of the Supreme Court, he explains: "I have written [this book] in the context of history with the insights of political science but remaining true to the ways the justices perceived their own work. Doctrine may be driven by events and the intellectual currents of the times, but nevertheless the justices, for the most part, take it seriously." In an earlier book, on the Warren Court, Powe examined Supreme Court decisions dealing with legislative apportionment that required the Court to displace settled democratic practices and overrule earlier decisions. In 1946, before Earl Warren became Chief Justice, a plurality had held in Colegrove v. Green that a state legislative drawing of congressional district lines presented a nonjusticiable political question. In 1962, however, the Warren Court rejected Colegrove and instead held, in Baker v. Carr, that an allegation of disproportional representation and concomitant vote dilution constituted a justiciable claim, whether for a state legislature, as in Baker, or for the House of Representatives, as in Colegrove. The Baker holding, that disputes over legislative apportionment were justiciable, engendered a series of cases challenging apportionment practices. Most famously, Wesberry v. Sanders, focusing on congressional districts, and Reynolds v. Sims, focusing on state legislative districts, established the doctrine of "one person, one vote." After extensively elaborating the doctri-
nal arguments debated in these cases, including dissenting and concurring as well as majority positions, Powe discussed how these decisions sparked political opposition, especially from those legislators who were likely to lose their seats because of the judicially forced redistricting. Thus, *Baker* and its progeny could certainly be understood as radical, as breaking new doctrinal ground, and as bold defenses of the right to participate in democratic processes. But Powe argued that the Court’s decisions “conformed to the values that enjoyed significant national support in the mid-1960s.” Indeed, the same year the Court decided *Wesberry* and *Reynolds*, a national political coalition would produce the Civil Rights Act of 1964 and, then one year later, the Voting Rights Act of 1965.

Clearly, for Powe, law matters, yet regime politics also influences the justices. A handful of political scientists display a similar outlook. These political scientists fall into two overlapping categories of research: American Political Development (APD) and historical institutionalism. In a definitive book, Karen Orren and Stephen Skowronek explain that APD “grapples with . . . the historical construction of politics, and with political arrangements of different origins in time operating together.” APD is primarily concerned with using the histories of these political arrangements to explain political change or development (and resistance to change). When it comes to research on law and the courts, APD asserts that law and politics are, in effect, emulsified. The question whether Supreme Court decision making is a matter of law or politics, explain Ronald Kahn and Ken I. Kersch, should be “conceptualized as a debate over the respective influences of internal and external factors . . . , with law being an important potential internal influence . . . and electoral politics being a significant potential [external] influence.” Thus, unlike all-politics political scientists, such as the attitudinalists, APD political scientists maintain that “the interplay of the internal and external taking place in courts gives them a certain autonomy from ordinary politics at certain times and in certain areas that leads them to ignore, resist, and even disregard robust political pressure.”

Howard Gillman, for instance, described how the early-twentieth century Court—the *Lochner*-era Court—continued to apply nineteenth-century legal doctrines even

124. Id. at 199–203, 239–52.
125. Id. at 252–55.
126. Id. at 215.
129. Id. at 6.
131. Id. at 19.
though the surrounding political environment was radically changing and rendering the doctrine unworkable.132

Kahn and Kersch emphasize that the autonomy engendered by the interplay between the internal and external—between law and politics—is "distinctive to courts as institutions."133 The resultant APD focus on courts as institutions has led many APD scholars to be characterized as "new institutionalists,"134 and more specifically, "historical institutionalists."135 As the name implies, historical institutionalists, such as Howard Gillman and Mark Graber, are concerned primarily with the historical development of institutions, particularly legal and judicial institutions.136 Like regimists, historical institutionalists are interested in understanding the origins of the justices' political preferences. They aim "to explore the broader cultural and political contexts of judicial decision making [and explain] how judicial attitudes are themselves constituted and structured by the Court as an institution and by its relationship to other institutions in the political system at particular points in history."137 Historical institutionalists view law as a component of the judicial institution that constrains and directs decision making.138 Supreme Court justices, therefore, talk about legal texts and doctrines because they truly believe these legal materials matter, not merely because they need to rationalize their political preferences or goals.139 Legal materials (and legal reasoning) matter because of an institutional imperative: the professional mission of justices sitting on the Supreme Court to interpret and apply the law.140

One ambiguity lingers in much of the work of the emulsification law professors and political scientists. While they see law and politics as integrally

133. Kahn & Kersch, supra note 130, at 18.
135. Graber, supra note 26, at 317; see Rogers M. Smith, Civic Ideals 6, 509–10 n.12 (1997) (discussing historical institutionalism). Rational choice scholars are also sometimes characterized as new institutionalists because of their emphasis on institutional constraints, though there are important differences between rational choice scholars and historical institutionalists. Whittington, supra note 60, at 608–16.
138. Peretti, supra note 41, at 290; see Whittington, supra note 60, at 622 (viewing legal doctrines as cognitive maps).
139. Gillman, supra note 3, at 11–12; Graber, supra note 49, at 35; Whittington, supra note 60, at 619, 629.
entwined, so that Supreme Court decision making is always partly political, they rarely attempt to explain the means by which politics enters the adjudicative process. Put in metaphorical terms, what is the recipe for creating the law-politics emulsion? When Powe touches on this question, he becomes uncharacteristically (for him) vague. "Law is not just politics," he writes, "but judges are aware of the political context of their decisions and are, like everyone else, influenced by the economic, social, and intellectual currents of American society." Barry Friedman, another historically-minded and regime-oriented law professor, offers a fuller explanation, but he still does not delve into the details. One might say that Friedman deals with the mechanism for emulsifying law and politics at a macro- rather than micro-level. He discusses how political pressure is brought to bear on the justices and how presidents seek to appoint justices who will implement their political-constitutional visions, yet for the most part, he does not explain how politics enters into the justices' deliberations of specific cases. Friedman, quite sensibly, views the development of constitutional meaning as arising from a type of "dialogue" between the people and the justices that generates a dialectical synthesis.

The modern era is one of a symbiotic relationship between popular opinion and judicial review. The Court will get ahead of the American people on some issues, like the death penalty or perhaps school desegregation itself. On others, such as gay rights, it will lag behind. But over time, with what is admittedly great public discussion, but little in the way of serious overt attacks on judicial power, the Court and the public will come into basic alliance with each other.

Still, how do the people and the Court achieve a "basic alliance" in any particular case? How, in other words, does politics enter the judicial calculus? Gillman is a historical institutionalist who nearly answers this question. Contrary to all-politics political scientists, Gillman does not dismiss law as irrelevant merely because justices do not apply legal texts and doctrines in a mechanical fashion. Instead, he argues that, within the institution of the Supreme Court, the justices feel a "formal responsibility to decide actual legal disputes based on their best understanding of the law." Judicial decisions, including at the Supreme Court, "are considered legally motivated if they represent a judge's sincere belief that their decision represents their best understanding of what the law requires." A justice, in other words, is ordinarily motivated to interpret the law accurately rather than to pursue explicitly and

141. Politics, supra note 116, at xiv.
142. Id.
143. See Friedman, supra note 3, at 212–25 (discussing FDR's court-packing plan); id. at 313–22 (discussing Reagan's efforts to appoint conservative justices).
144. Id. at 367.
145. Id. at 14–15 (emphasis added).
147. Gillman, supra note 140, at 80.
openly his or her political goals. When a justice interprets and applies the law, however, the justice often must exercise discretion. Here, Gillman follows Ronald Dworkin by distinguishing strong from weak discretion. Strong discretion allows an individual, to a great extent, to do whatever he or she wishes within wide parameters: For example, ‘go to the supermarket, and buy some fruit.’ Weak discretion requires the individual to exercise judgment in following more specific directions or orders: ‘Go to the supermarket, and buy the ripest pears.’ Justices (and other judges), according to Dworkin and Gillman, exercise weak rather than strong discretion, even in hard cases. Thus, “legal norms can matter even if they cannot be mechanically applied—that is, ... law can motivate and even shape a decision without determining the result.” The justice, we might say, still must decide which pears are ripest. Moreover, the judicial exercise of weak discretion “often” coincides with the judge’s “political ideology.” Indeed, political attitudes sometimes can transform “to the point that they become internal to the practice [of judging].”

In sum, Gillman is an emulsification theorist: He maintains that politics is always part of legal interpretation. At one point, he even writes: “Meaning is extracted from [legal] sources by interpreters, and interpreters cannot help but be influenced by their particular cultural, social, and political context.” Yet, when he attempts to explain how politics enters the judicial calculus, he wavers and introduces ambiguities. Many of his explanatory statements include vague qualifiers, such as “often” and “to the extent.” In his explanations, Gillman walks to the edge, but hesitates—then gets tangled in his ropes. He writes: “[S]o long as judges draw on beliefs about public values, because they believe the law recognizes this as an inevitable part of interpretation (in some circumstances), ... then the influence of legality is at work.” Why are public values or politics part of interpretation only “in some circumstances”? Gillman does not elaborate, but his wavering harkens back to an oil-and-water approach to law and politics. In particular, when Gillman follows Dworkin, he implicitly suggests that politics enters the adjudicative process through the exercise of judicial discretion. A judge (or justice) might often exercise discretion, but does not always do so. From this perspective, if the judge does not need to exercise discretion in a specific case, then politics apparently does not enter the calculus. Legal interpretation, it seems, might still sometimes be pure, unaffected by politics.

149. Id. at 486–87.
152. Id. at 488.
153. Id. at 489.
154. Id.
155. Id.
158. Id. at 489–90 (emphasis added).
Why might an emulsification theorist such as Gillman settle for this unsatisfactory explanation? One possible answer is that Gillman, like Friedman, works more on the macro- than the micro-level. As a historical institutionalist, Gillman seeks to describe how the Court as an institution changes (and resists change) in particular political environments. In describing institutional change, Gillman stakes out a distinctive position within the discipline of political science—a position in opposition to the all-politics quantitative political scientists—by maintaining that justices and other judges sincerely interpret legal texts. He is able to explain the interplay of law and politics in the institutional context without delving into the details of the decision making process for specific and concrete cases (though this question apparently intrigues him). Yet, the secret to creating the fully integrated law-politics emulsion can be discovered only at the micro-level. One must start with the presupposition that the justices sincerely interpret legal texts—that the law matters—but then ask: How? How do the justices interpret legal texts? Or, in other words, how do the justices emulsify politics and law?\footnote{159}

2. The Emulsification of Law and Politics: Institutional Interpretivism

To answer this question—the how?—one needs to focus on the heart of the adjudicative process: the interpretation of legal texts and doctrines. As Gillman recognizes, judges feel duty-bound to interpret and apply legal materials, such as case precedents, statutes, and constitutional provisions.\footnote{160} And, also as Gillman recognizes, legal interpretation is not mechanical.\footnote{161} But what does it mean to say that interpretation is not mechanical? In short, no method (or mechanical process) enables one to access some pre-existing and pristine textual meaning.\footnote{162} Interpretation is not an arithmetic problem where one adds the numbers and indubitably arrives at the correct answer.\footnote{163} This is not to say,

\footnote{159. For Gillman, the interpretive turn in political science suggests that, instead of examining judges only from an external or behavioral perspective, political scientists should recognize that judicial actions are meaningful to the judges themselves. Gillman, therefore, emphasizes the institutional mission of the Supreme Court as inbuing the justices' actions (votes, decisions, and opinions) with meaning. Gillman, supra note 141, at 78–80. But the interpretive turn can also urge us to examine more deeply the interpreture processes themselves in judicial practices. E.g., Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325 (1984) (criticizing Fiss's conceptualization of interpretation); Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982) (drawing on Fish's writings to explain interpretation). In other words, if judicial practices are meaningful to judges, as Gillman emphasizes, then one might further ask how such practices are meaningful. That is, how does interpretation (of texts, for example) actually work?
\footnote{160. Gillman, supra note 140, at 80; Whittington, supra note 60, at 623.}
\footnote{161. Gillman, supra note 43, at 485–86.}
\footnote{163. Dworkin explains that there is "no algorithm" to ascertain the right answer. Ronald Dworkin, How Law is Like Literature, in A Matter of Principle 146, 160 (1985).}
though, that there is no correct or right answer to interpretive disputes. Yet, the only means for gleaning the correct meaning of a text is through interpretation itself. Judges, quite simply, must interpret legal texts and doctrines.

So judges must interpret, and interpretation is never mechanical. How, then, does interpretation occur? Most important, an interpreter who turns to a text must always do so from within his or her horizon. Literally, the horizon is the distance that one can see from one’s current position or place. The concept of the horizon, therefore, is both enabling and constraining: We can see as far as the end of the horizon, but we can see no farther. Metaphorically, the interpretive horizon is the range of possible understandings or interpretations that an individual brings to any text. We are empowered to understand texts, but we are also limited to understandings within our respective horizons. And hence, we find politics at the heart of the interpretive process: How, after all, does one’s horizon form? The horizon is constituted by an uncertain amalgamation of one’s interests, prejudices, expectations, and values, all of which are imbued in the individual by prior experiences of culture, politics, and one’s structural position in society. Research in cognitive psychology elucidates. “All mental processing draws closely from one’s background knowledge,” writes Dan Simon. “A decision to cross a street, for example, is contingent on one’s experience-born knowledge about vehicles, motion, and driver behavior. A choice to form a friendship is influenced by one’s knowledge of cues for trustworthiness, love, selfishness, and the like.” Given this formative process, the interpretive horizon is never static. An individual’s horizon moves because of changing experiences of culture, politics, and societal structures. As Simon puts it, one’s “background belief system...is hardly fixed.” Instead, new experiences can cause “background beliefs [to] shift.”

Whenever the Supreme Court justices decide a case, they must interpret legal texts, including the Constitution, statutes, and case precedents. In interpreting legal texts, including doctrines from precedents, the justices necessarily do so

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164. RONALD DWORKIN, IS THERE REALLY NO RIGHT ANSWER IN HARD CASES?, IN A MATTER OF PRINCIPLE 119 (1985).


166. GADAMER, supra note 162, at 282–84, 302, 306.

167. Id. at 133.

168. See id. at 282–84, 295, 302–09 (discussing interpretation coming from within the horizon).


170. Id.

171. See GADAMER, supra note 162, at 282, 293, 461–63 (discussing how traditions change).

172. Simon, supra note 169, at 536.

173. Id.
from the vantage of their respective horizons, which are, in part, necessarily political. Thus, in the vast majority of cases, the justices sincerely interpret legal texts and doctrines, and their sincere interpretations coincide with their political preferences and allegiances.\textsuperscript{174} Put in different words, a proper appreciation of the interpretive process reveals precisely why politics matters in legal interpretation: Justices sincerely interpret legal texts, and politics (as part of the horizon) always shapes sincere interpretation. In short, politics is integral to legal interpretation.

This explanation of the interpretive process has two implications. First, justices and other judges will rarely experience a conflict between their sincere interpretations of legal texts and their political orientations exactly because politics shapes interpretation.\textsuperscript{175} Second, we can appreciate how interpreters come to disagree about textual meaning. Suppose two Supreme Court justices—let’s say, Justices Scalia and Ruth Bader Ginsburg—confront an establishment-cause issue that requires them to interpret the first amendment. They both sincerely interpret the constitutional text and relevant precedents, yet they ultimately disagree about the correct interpretation. Such disagreement suggests neither that one of the justices is insincere—being disingenuous about the best interpretation—nor that a best answer does not exist.\textsuperscript{176} Rather, disagreement arises because the justices approach the constitutional text from significantly different, albeit overlapping, horizons. Their horizons overlap because, in part, both justices have been trained and immersed in the culture of the American legal community, but their horizons diverge because, in part, they have different political commitments.\textsuperscript{177} Scalia’s conservative politics shapes his interpretive horizon, while Ginsburg’s liberal politics shapes her horizon. The justices, in this situation, can attempt to persuade each other of the correct interpretation, and they might do so. Yet, because interpretation is not mechanical—no method can prove the correct answer—disagreement might persist. Such disagreement, it should be clear, is not due to a failure of the interpretive process; rather it is part-and-parcel of the interpretive process. One can never escape the horizon-bound nature of interpretation.

\begin{enumerate}
\item\textsuperscript{175} Such conflict, though, is possible. Feldman, Politics, supra note 174, at 38–39; Feldman, Rule, supra note 174, at 110–16.
\item\textsuperscript{176} Feldman, Politics, supra note 174, at 32; Dan Simon, \textit{A Psychological Model of Judicial Decision Making}, 30 Rutgers L.J. 1, 122–23 (1998) (explaining how, from a psychological vantage, judges authentically perceive themselves as reaching the correct decision).
\item\textsuperscript{177} Psychological research suggests that “[t]he socialization that starts in law school and continues throughout one’s legal career causes those who are trained in this tradition to accept and internalize appropriate norms of decision making.” Eileen Braman, \textit{Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning} 28 (2009); see Feldman, Rule, supra note 174, at 103 (emphasizing the learning of legal traditions).
\end{enumerate}
At the same time, Supreme Court adjudication does have an end point or conclusion: namely, when the justices vote and decide a case. That is, the institutional or structural position of the Court in our governmental system—at the apex of our judiciaries—differentiates Supreme Court adjudication from many other interpretive enterprises. When the justices vote and decide a case, they terminate their interpretive debates about the relevant legal materials, at least temporarily—even though the justices themselves have no more access than anybody else to a mechanical method for resolving interpretive disputes. Compare a Supreme Court case to a dispute between two English professors over the interpretation of Franz Kafka’s *Metamorphosis*. Like Scalia and Ginsburg, the two English professors can attempt to persuade each other of the superiority of their respective interpretations. ‘Gregor’s transformation into a gigantic insect is merely symbolic,’ says the first English professor. ‘No, Gregor really turns into a bug,’ says the second. They can offer reasons for their positions and attempt to refute the other’s reasons. But, ultimately, their dispute might never end because there is no institutional mechanism for reaching a conclusion. But when Supreme Court justices disagree about the best interpretation of the first amendment or any other legal text, there is an institutional means for ending the adjudicative dispute. The justices vote, and the majority wins. Crucially, though, this institutional mechanism does not actually resolve the interpretive dispute. The justices might continue to disagree about the best interpretation of the text, as might lawyers, other judges, and law professors, but the adjudicative dispute is, for all intents and purposes, over. The justices will move on to the next case on the docket. The existence of an institutional mechanism for culminating adjudicative disputes does not, however, change the nature of interpretation. There still is no mechanical process or method for resolving the interpretive disagreement.

Because this explanation of the fully-integrated, law-politics emulsion accentuates both the nature of interpretation and the Court’s institutional position, I refer to it as institutional interpretivism. Two virtues of institutional interpretivism should be underscored. First, it harmonizes with the separate bodies of empirical evidence suggesting that law and politics both influence Supreme

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180. Litigants might have sufficient resources to seek additional remedies, such as a rehearing. In some instances, a losing party might even seek to initiate the constitutional amendment process to overturn a Supreme Court decision. Feldman, Rule, supra note 174, at 105 & nn.15–16.

181. Gillman uses the term, “interpretive institutionalism.” GILLMAN, supra note 140, at 78. Because he puts greater emphasis on institutionalism, while I am emphasize interpretivism, I have switched the ordering of the terms. I previously have called this approach an interpretive-structural theory. Feldman, Rule, supra note 174, at 99–124.
Court decisionmaking. Both these bodies of evidence, which include quantitative and qualitative elements, can be valid because law and politics coincide in the vast majority of cases. In a book-length study, Michael A. Bailey and Forrest Maltzman provide quantitative support for some such type of law-politics emulsion: "Our evidence suggests a nuanced portrait of the Supreme Court and the choices justices make, a portrait of policy-motivated but legally and institutionally constrained justices."

Second, institutional interpretivism facilitates the introduction of an important distinction: politics writ large versus politics writ small. In judicial decision making, politics writ large occurs if a justice or judge purposefully or self-consciously pursues political goals qua political goals (either preferences or allegiances) when deciding a case. Politics writ small occurs if a justice or judge sincerely interprets the relevant legal texts when deciding a case, and in doing so, simultaneously decides in accord with his or her political preferences or allegiances. All-politics and oil-and-water approaches are premised on politics writ large. Obviously, attitudinalists and all-politics regimists maintain that the justices purposefully pursue either their political preferences (attitudinalists) or the goals of the predominant political order (regimists). Oil-and-water approaches assume that politics writ large enters the judicial calculus whenever the law runs out. If a justice encounters a gap in the legal doctrine, for instance, then the justice justifiably pursues politics writ large. But institutional interpretivism posits that justices decide according to a politics writ large in only extraordinary cases. In the vast majority of cases, the justices take seriously their duty to interpret and apply the relevant legal texts and doctrines as best as possible. Of course, according to institutional interpretivism, politics is integral to legal interpretation, so the justices' sincere interpretations coincide with their political

182. Political scientist Lawrence Baum explains the "methodological concept, behavioral equivalence, which means that we cannot distinguish between two possible causes of a pattern of behavior when the effects of the two causes would be the same." Lawrence Baum, Law and Policy: More and Less than a Dichotomy, in What's Law Got to Do With It? 71, 76 (Charles G Geyh ed., 2011).


184. See Feldman, Politics, supra note 174, at 18-19, 30-37 (distinguishing politics writ large from writ small).

185. Cf. Tamanaha, supra note 29, at 187-89 (distinguishing cognitive framing from willful judging).
goals and allegiances. In other words, sincere legal interpretation is politics writ small.186

Once again, cognitive psychology strongly supports the concepts of institutional interpretivism and politics writ small. Research demonstrates that when an individual confronts a complex decision, his or her cognitive system will shift "toward a state of coherence with either one of the decision alternatives."187 Decision makers' motivations or goals, including legal and political goals, substantially affect "their mental processes" and contribute toward this shift to coherence.188 Thus, according to "coherence-based reasoning research," when a justice (or other judge) decides a case, the justice's legal and political views will ultimately tend to coincide rather than conflict.189 Psychologists agree that this tendency to reach coherent conclusions is often unconscious. "[A] judge who identifies as a liberal Democrat may know that she favors affirmative action," explains Eileen Braman,190 "but she may not be aware of whether (or how) that policy preference influences her interpretation of evidence and/or legal authority in cases involving that issue."191 Most important, an individual's coherence-based reasoning in accordance with his or her goals is perfectly natural. As Simon concludes, shifts toward coherent conclusions "do not represent conscious, strategic, or deceitful conduct on the part of a decision-maker; rather, they are the natural consequence of the normal mechanisms of cognitive processing."192

III. RAMIFICATIONS OF INSTITUTIONAL INTERPRETIVISM

A. For Scholars

For legal and political science scholars, institutional interpretivism has important research ramifications. Of course, law professors and political scientists can continue to separate law and politics. They can be purists, relying respectively on all-law or all-politics approaches, or they can be oil-and-water scholars, mixing law and politics but ultimately deeming them independent and separable. And, realistically, we should expect most legal scholars and political scientists to continue along these well-worn paths partly because it is easier to

186. To be clear, I am not attempting to specify the precise degree to which politics influences the justices in any particular case.
187. Simon, supra note 169, at 517.
189. Simon, supra note 170, at 517.
190. BRAMAN, supra note 178, at 30.
191. See id. at 157–58 (discussing unconscious influences); Simon, supra note 169, at 545–46 (discussing lack of awareness).
do so than to strike out in different directions. Political scientists refer to this phenomenon as "path dependence." Institutional arrangements develop because individuals naturally follow behavioral patterns they have previously followed. The past facilitates the present and the future. In light of path dependence, one should expect most legal scholars and political scientists to follow the paths of their respective disciplines. This disciplinary loyalty is not necessarily bad. Disciplines provide tools that can open doors to knowledge. To take one example, political scientists' methods of quantification have led to valuable insights about the persistent influence of politics on Supreme Court adjudication. Thus, following their disciplinary paths, purists and oil-and-water scholars can continue to make important contributions to our knowledge of judicial decision making.

Yet, these scholars will nonetheless be omitting a large part of the decision-making phenomenon. Disciplines provide methods for gaining knowledge but simultaneously constrain the outlooks (or horizons) of practitioners. For instance, a political scientist committed to quantification methods will limit his or her research to events or causes that can be reduced to numeric data (read: quantified). A purist, rejecting interdisciplinary approaches, will leave much of the Supreme Court puzzle scattered and unexamined. All-law scholars will be blind to political influences on Supreme Court adjudication, while all-politics scholars will continue to dismiss legal reasoning in judicial opinions as either subterfuge or delusional nonsense. Oil-and-water scholars at least will account for both law and politics, but they nonetheless will disregard the emulsification of the two within the adjudicative process.

Law and politics together course through Supreme Court decisions and opinions. Only a scholar who recognizes the fully integrated emulsion will be able to explore the richness of the law-politics dynamic. Consider the Affordable Care Act Case—particularly its commerce power component. Congress had invoked the commerce power to justify its enactment of the Affordable Care Act's individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. The individual mandate compels individuals to purchase health insurance even if they would otherwise prefer not to do so. Crucial to the Act's viability, the individual mandate forces practically all Americans, including healthy ones, to share the costs of medical care and health insurance. Chief Justice Roberts's opinion ultimately upheld the

194. Id. at 117–18.
195. SEGAL ET AL., supra note 8, at 20–21.
197. 26 U.S.C. § 5000A (Supp. IV 2010). If an individual is not exempt from the mandate, he or she can satisfy it by purchasing insurance from a private company. Starting in 2014, individuals who do not comply with the mandate must pay a "penalty" to the Internal Revenue Service along with their taxes. 26 U.S.C. §§ 5000A(c), 5000A (g)(1) (Supp. IV 2010).
individual mandate as constitutional pursuant to Congress’s taxing power,198 but when Roberts focused on the commerce power, he concluded that Congress had acted unconstitutionally.199 On this latter point, the other conservative justices—Scalia, Thomas, Samuel Alito, and Anthony Kennedy—fully agreed.200 They nonetheless jointly dissented and refused to join Roberts’s opinion primarily because they disagreed with his taxing power analysis.201

Focusing on the commerce power, one can readily analyze the ACA Case from an all-politics perspective, even though Roberts explicitly insisted that politics did not influence the justices.202 For decades, starting long before the Court decided the ACA Case in 2012, political conservatives had been waging a war against so-called big government. They constantly criticized Congress, in particular, for its attempts at social engineering, especially for liberal objectives. Most conservatives traced expansive congressional power to the New Deal and denounced the Court’s 1937 acceptance of such power.203 Numerous conservative scholars called for the Court to reverse “the mistakes of 1937.”204 From the conservative vantage, Congress repeatedly got things wrong, not only by pursuing the wrong goals but by passing laws that produced unforeseen detrimental consequences. For instance, liberals intended affirmative action programs to increase equality, but conservatives charged that such programs (whether congressionally or otherwise imposed) produced instead both a culture of victimhood among its minority beneficiaries and a sense of resentment among whites.205

Given this background, the Court’s conclusion in the ACA Case vis-à-vis Congress’s commerce power was all too predictable. Quite simply, the five conservative justices—Roberts, Scalia, Thomas, Alito, and Kennedy—outvoted the four liberal justices—Stephen Breyer, Ginsburg, Sonia Sotomayor, and Elena Kagan—and, therefore, reached the conservative result. They invalidated liberal legislation, constrained congressional power, and in so doing, chipped away at big government. Indeed, the Court’s diminishment of Congress’s commerce power, in particular, was especially significant because, among all congressional powers, the commerce power had long been the broadest and most important.206

198. NFIB, 132 S. Ct. at 2599–600.
199. Id. at 2586–89.
200. Id. at 2644, 2648–49 (joint dissent).
201. Id. at 2650–55 (joint dissent).
202. Id. at 2577, 2579, 2608.
206. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (relying on commerce power to uphold civil rights statute).
Indeed, even when Roberts reasoned that Congress had acted constitutionally pursuant to its taxing power, one can discern political calculation. By ultimately upholding the individual mandate and most of the Affordable Care Act, Roberts created a political shield around the Court, albeit a temporary one. If Roberts and the other conservative justices had invalidated the entire statute, liberal scholars undoubtedly would have condemned the decision as a pure political power grab, akin to *Bush v. Gore.* When the public likely would have understood the case similarly. But when Roberts ostensibly reached the liberal result by voting to uphold the individual mandate (pursuant to the taxing power), he reinforced his claim that the Court decides according to law, without regard for politics. As Roberts declared during his confirmation hearings, "Judges are like umpires—umpires don’t make the rules; they apply them." Moreover, by ultimately invoking the taxing power to uphold the Act, Roberts forced the individual mandate into the most unpalatable of current political categories: a new tax. Conservative media reports immediately declared that Obama and the Democrats had clandestinely raised taxes. All in all, the ACA Case looks like a successful political outing for the Chief Justice.

But was it only politics? An all-law scholar could just as readily emphasize Roberts’s legal reasoning. In *United States v. Lopez,* decided in 1995, the Court had articulated a doctrinal framework for determining the scope of Congress’s commerce power. *Lopez* held that Congress had overstepped its power when it enacted the Gun-Free School Zones Act (GFSZA), a generally applicable law that proscribed the possession of firearms at school. The majority opinion began by asserting that the Court would apply a rational basis test, which the Court had been applying to commerce power issues since 1937. The *Lopez* Court, however, reformulated the doctrine to impose judicially enforceable limits on Congress. Under this new or modified rational basis test, as the Court explained, Congress can regulate “three broad categories of activity.”

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ com-

207. 531 U.S. 98 (2000).
209. Robert Schwartz, Like They See ’Em, The NEW YORK TIMES (Oct. 6, 2005), http://www.nytimes.com/2005/10/06/opinion/06schwartz.html?_r=0.
merce authority includes the power to regulate those activities having a substan-
tial relation to interstate commerce, i.e., those activities that substantially affect
interstate commerce.\textsuperscript{214}

The Court quickly concluded that the GFSZA did not fit into the first two
categories: By restricting the possession of firearms at schools, the law targeted
neither the channels nor the instrumentalities of interstate commerce.\textsuperscript{215} Consequently, the Court focused on the third and potentially broadest category:
activities substantially affecting interstate commerce. But after extensive analy-
thesis, the Court concluded that the law also could not be upheld under this
substantial-effects prong of \textit{Lopez}.\textsuperscript{216}

In the \textit{ACA Case}, Roberts focused his commerce power discussion on the
\textit{Lopez} doctrinal framework and specifically, as in \textit{Lopez}, on the substantial-
effects category.\textsuperscript{217} Roberts's legal reasoning emphasized two points: the first
dealt with the constitutional text; the second dealt with judicial precedents.
With regard to the constitutional text, Roberts naturally zoomed in on the
commerce clause.\textsuperscript{218} "The Constitution grants Congress the power to 'regulate
Commerce,'" Roberts explained.\textsuperscript{219} "The power to \textit{regulate} commerce presup-
poses the existence of commercial activity to be regulated."\textsuperscript{220} Thus, based on
the text, Roberts sharply distinguished between the regulation of commerce and
the creation of commerce. In the Affordable Care Act, Roberts reasoned,
Congress was creating rather than regulating commerce because the Act forced
individuals to buy health insurance even if they preferred otherwise. Even
within the somewhat flexible substantial-effects category of \textit{Lopez}, this congres-
sional creation of commerce was impermissible. With regard to judicial prec-
edents, Roberts examined the Court's language in \textit{Lopez} and several other
earlier commerce power decisions involving substantial effects.\textsuperscript{221} Roberts
concluded: "As expansive as our cases construing the scope of the commerce
power have been, they all have one thing in common: They uniformly describe
the power as reaching 'activity.' It is nearly impossible to avoid the word when
quoting them."\textsuperscript{222} Consequently, reasoning from the precedents, Roberts sharply
distinguished action from inaction: Congress can regulate action (or activity)
but not inaction (or inactivity). In the Affordable Care Act, Roberts reasoned,
Congress impermissibly attempted to regulate inaction, that is, the failure or
refusal to buy health insurance.

\begin{itemize}
\item \textsuperscript{214} \textit{Id.} at 558–59.
\item \textsuperscript{215} \textit{Id.} at 559.
\item \textsuperscript{216} \textit{Id.} at 561–65.
\item \textsuperscript{217} \textit{Sebelius}, 132 S. Ct. at 2585–86.
\item \textsuperscript{218} U.S. \textit{CONST.}, Art. I, § 8, cl. 3.
\item \textsuperscript{219} \textit{Sebelius}, 132 S. Ct. at 2586 (quoting U.S. \textit{CONST.}, Art. I, § 8, cl. 3) (emphasis added by
Roberts).
\item \textsuperscript{220} \textit{Id.} (emphasis in original).
\item \textsuperscript{221} For instance, Roberts cites \textit{Lopez}, 514 U.S. at 560; \textit{Wickard} v. \textit{Filburn}, 317 U.S. 111, 125
(1942); and \textit{NLRB} v. \textit{Jones & Laughlin Steel Corp.}, 301 U.S. 1, 37 (1937). \textit{Sebelius}, 132 S. Ct. at 2587.
\item \textsuperscript{222} \textit{Sebelius}, 132 S. Ct. at 2587.
\end{itemize}
In sum, one can reasonably analyze the ACA Case from either an all-politics or an all-law perspective. Yet, both of these purist approaches would miss much. If, instead, one were to follow institutional interpretivism, then a rich law-politics emulsion would be discovered. Institutional interpretivism instructs that, in most cases, the justices sincerely interpret the relevant legal texts and doctrines. The ACA Case exemplifies this rule of thumb. Roberts (and the other conservative justices) started with the commerce clause text and the Court’s doctrinal framework from Lopez. But Roberts, of course, interpreted those legal materials from the position of his own horizon. In other words, he understood the constitutional text and doctrine from the perspective of contemporary conservative politics. Thus, Roberts inclined against a broad congressional commerce power—against big government. But while Roberts (and the other conservative justices) reached the conservative result, he did not disregard text or doctrine. Neither did he disingenuously justify the outcome with post-hoc legal reasoning. Roberts never flexed his institutional muscles so as to decide pursuant to a politics writ large. He did not need to neglect professional norms in such a blatant manner in order to achieve any latent political goals. Rather, he merely needed to interpret the legal materials to the best of his abilities because such interpretation itself embodied politics writ small. Roberts’s political views informed his legal interpretations.

One sees this combination of law and politics at the very center of the ACA Case. Some historical background helps illuminate this phenomenon. From the 1890s through 1936 (the Lochner-era), the Court occasionally invalidated congressional actions by defining and enforcing judicial limits on the commerce power.223 During this period, the justices typically reasoned pursuant to an a priori formalism. The justices claimed to discern the existence, content, and boundaries of certain preexisting categories of activities without inquiring into the consequences of the activities. For instance, manufacturing might be deemed to be an inherently local (as opposed to inherently national) activity, regardless of the product manufactured, the resources used, or the social effects of the manufacturing.224 If deemed local, then the activity was necessarily beyond Congress’s commerce power.225 Starting in 1937, however, the Court repudiated such formalist reasoning in commerce power cases.226 Instead, the Court ostensibly applied a rational basis test, though in practice, the Court consistently deferred to the democratic process. The Court, in other words, refrained from imposing judicial limits on congressional power. From the post-1937 perspec-

tive, congressional overreaching was to be checked at the ballot box, not at the courthouse.227

In reaction to these judicial developments, conservative constitutional scholars eventually joined the long-running conservative critique of big government. They began advocating for a return to a judicial formalism that would constrain congressional power, as had been followed in pre-1937 commerce power cases.228 Unsurprisingly, then, the conservative Lopez majority echoed this scholarly position by casting its substantial-effects prong with a formalist glean. More specifically, the Lopez Court introduced two a priori distinctions: first, economic versus non-economic,229 and second, national versus local.230 If an activity were either non-economic or local, then it could not have a substantial effect on interstate commerce, according to the Lopez Court (and thus, Congress could not permissibly regulate).231 Hence, Lopez presented an elaborate doctrinal framework for determining the scope of congressional power. Pursuant to the Lopez reformulated rational basis test, Congress can regulate in three categories: the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities substantially affecting interstate commerce. To determine whether a particular activity substantially affects interstate commerce, one must ascertain whether the activity is, first, economic or non-economic in nature, and second, national or local in concern.232 Significantly, this doctrine arose from and is animated by a conservative political principle: namely, that the courts should define and enforce judicial limits on Congress’s commerce power pursuant to an a priori formalism.

In the ACA Case, the liberal Justice Ginsburg, concurring in part and dissenting in part, acknowledged that she must apply the Lopez doctrine to the issue of Congress’s commerce power. Even so, she argued that “[s]traightforward application” of the doctrine led to an inescapable conclusion: The Affordable Care Act’s individual mandate was a constitutional exercise of the commerce power.233 Like Roberts, Ginsburg focused on the third category under the Lopez reformulated rational basis test: An activity that substantially affects interstate commerce falls within Congress’s power. She then analyzed the regulated activity—


228. See supra note 205 (citing scholars criticizing mistakes of 1937).

229. Lopez, 514 U.S. at 561.

230. Id. at 567–68.

231. When the Lopez Court distinguished between “what is truly national and what is truly local,” id. “its language echoed the Court’s pre-1937 language distinguishing "a purely federal matter" from "a matter purely local in its character." Hammer v. Dagenhart, 247 U.S. 251, 274–76 (1918).

232. The Lopez Court also suggested that Congress should make detailed findings to support a conclusion that an activity substantially affects interstate commerce. Lopez, 514 U.S. at 562–63.

health insurance and medical care (or health care, in general)—under the two a priori distinctions articulated in *Lopez*. She reasoned that the health care market is both economic in nature and national in scope.234 Individuals who, prior to the Act, chose to go uninsured, inevitably needed to avail themselves of medical services. At some point in time, they entered into and substantially affected the commerce of the national health care market. Ginsburg pointed out that health care providers raise their prices and insurance companies increase their premiums so that insured individuals pay more than their fair share in order to cover costs for the uninsured.235 “Congress found that the cost-shifting... ‘increases family [insurance] premiums by on average over $1,000 a year.’”236 Thus, it is “[b]eyond dispute,” Ginsburg wrote, that “Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce.”237

Roberts disagreed with Ginsburg’s conclusion. Even so, he did not emphasize weaknesses with Ginsburg’s application of the *Lopez* doctrine.238 Rather, he elaborated the doctrine by applying the underlying principle: The Court should define and enforce judicial limits on Congress’s commerce power pursuant to an a priori formalism. He pushed the formalist approach of *Lopez* into new territory in the *ACA Case*. When Roberts focused on the text of the commerce clause, he interpreted it to create a previously unrecognized a priori distinction: regulation versus creation. Congress could regulate commercial activity, but could not create it, as in the Affordable Care Act.239 And when Roberts focused on the Court’s precedents, he interpreted them to create yet another previously unrecognized a priori distinction: action versus inaction. Congress could regulate action (or activity), but could not regulate inaction (or inactivity), again as in the Affordable Care Act.240 In other words, Roberts’s legal reasoning vis-à-vis the constitutional text and judicial precedents flowed from his commitment to a principle underlying the *Lopez* decision—a formalist principle that had arisen from the conservative political critique of post-1937 Supreme Court commerce clause decisions.

I suspect that some readers will react by saying, ‘Yes, but...’ ‘Yes, but isn’t the *ACA Case* really about politics—specifically, the imposition of a conservative program aimed at constraining congressional power (big government)?’ Or, ‘yes, but isn’t the *ACA Case* really about the law—specifically, the interpreta-

234. For example, many of the insurance companies are national. *Id.* at 2617 (Ginsburg, J., concurring in part and dissenting in part).
235. *Id.* at 2611 (Ginsburg, J., concurring in part and dissenting in part).
236. *Id.* (Ginsburg, J., concurring in part and dissenting in part).
237. *Id.* at 2617 (Ginsburg, J., concurring in part and dissenting in part).
238. See *id.* at 2586 nn.3–4, 2587 n.5, 2589 n.6 (addressing some of Ginsburg’s arguments in footnotes).
239. *Id.* at 2586.
240. *Id.* at 2587.
tion of the commerce clause text and the application of the *Lopez* reformulated rational basis test? Both reactions would be reasonable. But by focusing solely on either politics or law, one would miss the dynamics of the law-politics integration in Roberts’s opinion. Only by attending to both law and politics can one understand how Roberts’s interpretation of constitutional text and application of legal doctrine manifested politics writ small. Roberts emphasized the precise language of the commerce clause but interpreted it from his conservative political horizon, manifesting hostility to congressional action. Likewise, Roberts emphasized the *Lopez* doctrinal framework—the reformulated rational basis test—but he applied and elaborated it in accord with his conservative politics. And only by attending to both law and politics can one understand the potential legal and political significance of Roberts’s opinion in the future. In particular, just as the *Lopez* reformulated rational basis test has guided lower court and Supreme Court commerce power cases toward politically conservative conclusions—the invalidation of congressional actions—Roberts’s elaboration of the doctrine in accord with a priori formalism is likely to do the same in the future.\(^2\) To be sure, Roberts’s doctrinal moves do not render these conservative conclusions inevitable, but they became more likely after than before the *ACA Case*. Courts not only might apply the new formalist distinctions of the *ACA Case*—regulation versus creation, and action versus inaction—but might also be emboldened to identify additional formalist distinctions and categories. In this light, the emulsification of law and politics—specifically, the intertwining of legal doctrine and political conservatism—might well be the most interesting aspect of this landmark case.

Moving beyond the *ACA Case*, the interrelated concepts of institutional interpretivism, politics writ small, and the law-politics emulsion raise an interesting (APD-like) point about the interaction of politics and law over time. When the justices interpret the law and decide a case in accord with politics writ small, the justices’ political orientations tend to be shaped by current political disputes. For example, from the late 1960s to the early 1980s, conservatives railed against the supposed activism of the Warren and early Burger Courts.\(^2\)\(^4\)\(^2\)\(^3\) This attack on activism led conservative jurists and legal scholars to advocate for judicial restraint: The justices should defer to legislative judgments rather than impose their own political preferences.\(^2\)\(^4\)\(^3\) Thus, in commercial speech

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cases of the late 1970s and early 1980s, Rehnquist argued that the Court ought to defer to legislatively imposed restrictions on commercial advertising. But political outlooks frequently change more rapidly and readily than do legal doctrines, which are solidified pursuant to the doctrine of stare decisis. Consequently, doctrine that appears to have a conservative (or liberal) slant today might appear differently tomorrow, as the surrounding political environment changes. \textit{Gonzales v. Raich}, a commerce power case decided after \textit{Lopez} but before the \textit{ACA Case}, demonstrates how doctrinal frameworks can slide in unexpected political directions because of changing contexts.\textsuperscript{245} \textit{Raich} presented conservatives (and liberals) with a paradox because the challengers argued that Congress had exceeded its power by enacting a law that proscribed the possession of marijuana.\textsuperscript{246} The conservative justices generally would lean toward restricting congressional power, as they had previously in \textit{Lopez} and would subsequently in the \textit{ACA Case}, but some of those same conservative justices might also wish to allow the government to impose moral values by restricting the use of drugs.\textsuperscript{247} In the end, the moderately conservative Kennedy flipped his vote and joined the liberal justices to uphold the statute. Justice John Paul Stevens wrote a majority opinion that retained the \textit{Lopez} doctrinal framework but reasoned that marijuana possession substantially affected interstate commerce. Even Scalia, too, voted to uphold this statute, though he refused to join Stevens’s opinion. Instead, Scalia’s concurrence (in the judgment) emphasized that this case raised a factually unique situation in which the necessary and proper clause empowered Congress to regulate drug possession.\textsuperscript{248} Notwithstanding \textit{Raich}, the Rehnquist and Roberts Courts have displayed an aggressive conservative righteousness in congressional power cases that contrasts sharply and ironically with the conservative calls for judicial restraint from the Warren and Burger Court years.\textsuperscript{249} The Rehnquist and Roberts Courts have set forth on one of the “most notable binges of congressional-law striking in history.”\textsuperscript{250} In fact, the Rehnquist Court invalidated more congressional acts than had any

\begin{itemize}
  \item \textsuperscript{245} Gonzales, 545 U.S. 1 (2005).
  \item \textsuperscript{246} Id. at 10–15.
  \item \textsuperscript{248} Gonzales, 545 U.S. at 34–40 (Scalia, J., concurring in the judgment).
  \item \textsuperscript{250} Barry Friedman, The Cycles of Constitutional Theory, 67 Law & Contemp. Pros. 149, 161 (2004).
\end{itemize}
previous Court; from 1995 to 2001 alone, the Court struck down thirty federal laws, more than the Warren Court invalidated from 1953 to 1969.\textsuperscript{251}

\textbf{B. For Supreme Court Justices}

Oddly, from one perspective, institutional interpretivism is relatively insignificant to the practice of Supreme Court decision making. Thomas Kuhn's historical study of the Copernican Revolution can help illuminate the relationship between the scholarly insight of institutional interpretivism, on the one hand, and Supreme Court practices, on the other. From the fourth century, B.C.E., to the sixteenth century, C.E.—that is, before Copernicus—the predominant cosmological outlook was the "two-sphere universe."\textsuperscript{252} "[T]he earth was a tiny sphere suspended stationary at the geometric center of a much larger rotating sphere which carried the stars," explains Kuhn.\textsuperscript{253} "The sun moved in the vast space between the earth and the sphere of the stars. Outside of the outer sphere there was nothing at all—no space, no matter, nothing."\textsuperscript{254} Copernicus revolutionized the science of cosmology by proposing that the sun, not the earth, was the center of a solar system with revolving planets, including the earth.\textsuperscript{255} Kuhn notes, however, that, even in the twentieth century, the simpler conception of the two-sphere universe remained functionally useful for many people, including navigators and surveyors. The post-Copernican scientific model of the universe proved too complex for such practical enterprises. Kuhn elaborates: "Most handbooks of navigation or surveying open with some sentence like this: 'For present purposes we shall assume that the earth is a small stationary sphere whose center coincides with that of a much larger rotating stellar sphere.'"\textsuperscript{256} In other words, the two-sphere model continues to work successfully in certain practices, although scientists no longer accept it as true or representative of reality.\textsuperscript{257}

The practice of Supreme Court decision making can be understood similarly.\textit{Scholars} might reject the simplicity of an all-law (or all-politics) approach. An increasing number might recognize the fully integrated emulsion of law and politics. Some might even accept the concept of institutional interpretivism. But institutional interpretivism presents a far more complex depiction of Supreme Court adjudication than do purist and oil-and-water approaches. Indeed, even some political scientists will undoubtedly reject institutional interpretivism exactly because it is too complex; at this point in time, it cannot be reduced to

\textsuperscript{251} See Thomas M. Keck, \textit{The Most Activist Supreme Court in History} 2 (2004); David M. O'Brien, \textit{Storm Center} 31 (8th ed. 2008).

\textsuperscript{252} Thomas S. Kuhn, \textit{The Copernican Revolution} 27 (1957).

\textsuperscript{253} \textit{Id}.

\textsuperscript{254} \textit{Id}.

\textsuperscript{255} \textit{Id.} at 1–2.

\textsuperscript{256} \textit{Id.} at 38.

\textsuperscript{257} \textit{Id.} Likewise, certain practical enterprises continue to be based on Newtonian mechanics, even though Einstein's relativity theory has supplanted it scientifically. Bryan Magee, \textit{Confessions of a Philosopher} 51–52 (1997).
quantifiable criteria. To be certain, we can recognize the law-politics emulsion and measure some aspects of it in quantifiable terms—for example, by using the attitudinal model to measure the influence of political ideology—but ultimately, our acceptance of the emulsion must be based partly on qualitative evidence. Regardless, Kuhn’s discussion of the Copernican Revolution suggests that Supreme Court justices (and other judges) can continue to function in accordance with a simpler purist approach—specifically, an all-law approach. 258

That is, the justices can and will sincerely interpret legal texts and doctrines. They can and will avoid consciously considering their respective political views and overtly discussing potential political consequences of decisions. They can and will, in other words, spurn politics writ large. Thus, Roberts, Scalia, and other justices can continue to declare that, in all honesty, they decide cases pursuant to the rule of law. Perhaps, some justices might admit that they occasionally consult policy factors in the limited manner permitted under an oil-and-water approach. All in all, the practical enterprise of Supreme Court decision-making has worked successfully in the past by following a legal approach and can continue to do so in the future—without any conscious consideration of institutional interpretivism or other fancy law-politics theory.

Of course, politics will nonetheless continue to work below the surface, as politics writ small, as part of the law-politics emulsion embodied in legal interpretation. In fact, the practice of Supreme Court decision making functions so successfully partly because of politics writ small. Institutional interpretivism and politics writ small assure that justices ordinarily experience a correspondence between their interpretive and political views. Consequently, justices rarely confront the angst that would arise if their interpretive and political views diverged: Should I follow the rule of law or my political ideology? Professional and political forces would press in opposite directions. If such cases arose frequently, they would strain the practical enterprise of adjudication. Justices would constantly be questioning professional norms and the usefulness of fidelity to those norms. Fortunately, then, such cases, creating a law-politics angst, are extraordinary—exactly because politics writ small is integral to legal interpretation. 259 Scalia and the other justices, therefore, can go on their merry ways, remaining oblivious to the law-politics emulsification.

Institutional interpretivism and the concomitant politics writ small, however, do not demand heedless ignorance. A justice can be aware of a correspondence between his or her interpretive and political views. To some justices, such correspondence might seem serendipitous, even though it is not; the correspondence arises because of the nature of the interpretive process. In fact, some justices might recognize the operation of institutional interpretivism, might

258. See Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987) (arguing that theories of judicial decision making do not affect the practice).

recognize how politics is integral to legal interpretation. Still, though, such a justice would likely continue to follow professional norms and duties. The justice would continue to vote and decide in accord with his or her best interpretation of the relevant legal materials. For the most part, the practice of Supreme Court decision making would continue as before. Only naiveté would be lost. Our insightful justice would merely be aware that political ideology always informed legal interpretation. Most important, then, such awareness would not be liberating. The justice would not be freed from his or her interpretive horizon and suddenly able to interpret and apply pure law in a mechanical fashion, free of political influence. Likewise, the justice would not be freed to follow his or her politics indiscriminately. The professional norms of judicial decision making would still compel the justice to interpret legal texts and doctrines as best as possible. Escape to either a pure law or pure politics is impossible.260

IV. CONCLUSION

Law. Politics. Two words. The language, the terminology, drives us to distinguish separate and independent concepts. Purists, in effect, conceive of law and politics as ideal types.261 Law is clear, logical, and ordered. Politics is flexible, expedient, and deliberative. As such, law and politics are opposites. Each is taboo to the other. Law destroys politics by enforcing rigidity, while

260. Some originalists now distinguish between interpretation and construction. Amy Barrett, Lawrence B. Solum, Introduction: The Interpretation/Construction Distinction In Constitutional Law, 27 CONST. COMMENT. 1 (2010); Colby, supra note 35, at 731–34. From this perspective, the justices interpret the constitutional text to discern its original public meaning, but they then construct doctrines to implement the meaning. For instance, the justices might read the establishment clause to mean that there should be a wall of separation between church and state. Then, the justices would construct a doctrine, such as the three-part Lemon test, which would facilitate implementing the wall of separation. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). On the one hand, I am agnostic about this distinction between interpretation and construction. From the perspective of institutional interpretivism, the justices interpret both constitutional text and constitutional doctrine (developed in earlier cases). Thus, the crucial component of legal interpretation—the law-politics emulsion—operates whether the justices are focused on text or doctrine. Doctrine, in other words, is just another type of text. On the other hand, I find this distinction misleading because it suggests that the justices can sometimes escape the interpretive process—because construction is differentiated from interpretation—but such escape is impossible. Construction, as the originalists conceive of it, is simply another instance of interpretation. Moreover, the justices themselves rarely distinguish constitutional meaning from doctrine. Rather, they are more likely to perceive their doctrinal statements as manifesting or capturing the textual meaning. Finally, and most important, the distinction between interpretation and construction can lead some theorists to reinscribe the law-politics dichotomy. For these theorists, interpretation is legal, primarily for the courts, while construction is political, primarily for the legislatures. E.g., Keith E. Whittington, Constitutional Interpretation 5–11 (1999). This division of labor between courts and legislatures might also suggest that legal interpretation can be mechanical. See Saul Cornell, The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism, 23 YALE J.L. & Hum.

261. I acknowledge that some theorists whom I identify as oil-and-water types might be seeking some form of emulsification theory, but the language—the separate terms, law and politics—reinscribes the dichotomous conceptions of law and politics.
politics corrupts law by injecting discretion and instrumentalism. But these ideal types do not represent social reality. Law and politics are not opposites. They are not separate and independent. Rather, they naturally draw together into a stable emulsion in Supreme Court adjudication.

Think of Supreme Court decision making as mayonnaise. At a minimum, mayonnaise contains an emulsification of both oil and egg yolks. Nevertheless, one can look at mayonnaise and say, 'This is oil.' Or one can say, 'This is egg yolks.' Each statement would be simultaneously right and wrong, at least in part. After all, it is oil, and it is egg yolks. But exactly because the two join together in a stable emulsion, it is also something very different. It is mayonnaise. In the same way, one can examine a Supreme Court decision and say, 'This is law.' Or one can say, 'This is politics.' Both statements would be partially right and wrong. But in Supreme Court adjudication, law and politics join together in a stable emulsion to make something else, a judicial decision.

Because this Article has focused on judicial decision making, and most jurists and legal scholars follow either an all-law or an oil-and-water approach, I have largely explored the means by which politics enters the judicial (or legal) process. But in the law-politics emulsion, politics is not only integral to law; law is also integral to politics. In fact, law permeates politics in multiple ways. Inside the legal system itself, law channels or frames the manifestation of justices' (and other judges') political preferences and allegiances.²⁶² Put in different words, because law matters, justices generally do not pursue politics writ large, purposefully pursuing political goals qua political goals. A justice is not the same as a legislator or a newspaper columnist advocating for a political objective. Instead, justices implicitly pursue politics writ small as they sincerely interpret legal texts and doctrines. Moreover, as Alexis de Tocqueville observed nearly 200 years ago, many ostensible political disputes in America are transformed into legal issues and decided within the courts.²⁶³

Outside the legal system, the law still channels politics. For instance, when the Supreme Court holds that white primaries are unconstitutional, then the Democratic and Republican parties must modify their practices to comply.²⁶⁴ When the Supreme Court holds that Congress cannot restrict the amount of money that corporations spend on political campaigns, additional corporate funding will flow into the next presidential campaign.²⁶⁵

Finally, legal education affects politics both inside and outside the legal system. Insofar as a law student learns legal texts and doctrines, learns to think like a lawyer, then that student (and, later, graduate) will think about politics

²⁶⁴ See Tushnet, supra note 249, at 52–56; e.g., Smith v. Allwright, 321 U.S. 649 (1944).
²⁶⁵ Citizens United v. FEC, 557 U.S. 310 (2010); Silverstein, supra note 18, at 152–74 (discussing campaign finance).
differently. What appears politically feasible and proper will change. This legal shaping of politics will occur whether the individual eventually practices law on an everyday basis or is elected to a governmental position. Let's say the individual is elected to a state legislature, and the legislature is considering a bill that would limit marriage to only heterosexuals. Presumably, the lawyer-legislator would hesitate and at least consider whether such a statute would violate equal protection. Quite simply, in the United States, politics does not exist without law. One would be hard pressed to imagine a political question that is not permeated through-and-through with legal elements. Perhaps, in a utopian state of nature, individuals could negotiate politically without the prior existence of law. But what would they negotiate about if there were no legal concepts, like property and liberty? And, in any event, the United States is not a utopian state of nature.

Even the definitions of law and politics revolve around the other. The substance of law—what constitutes law—is always subject to political contestation. For political reasons, for example, a president might deny that an issue, such as the legality of abortion, is a political issue and instead insist that it is a constitutional (legal) question to be decided by the courts. Meanwhile, the substance of politics—what constitutes politics—is always shaped by legal structures. Is a societal group's pursuit of self-interest standard political fare, as it would be constitutionally deemed during the post-World War II era, or is it the corruption of politics, as it would be constitutionally deemed during the 1790s? Law and politics appear bound together in an aporetic dance of attraction and repulsion, often pulled so close that they cannot be differentiated.

266. Braman, supra note 177, at 28; Baum, supra note 182, at 79.
267. Whittington, supra note 60, at 66.