Nothing New Under the Sun: The Law-Politics Dynamic in Supreme Court Decision Making

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Abstract

Recent events have seemed to inject politics into American judicial institutions. As a result, many observers worry that the Supreme Court, in particular, has become politicized. According to this view, the Justices should decide cases in accordance with the rule of law and be unmoved by political concerns. These worries arise from a mistaken assumption: that law and politics can be separate and independent in the process of judicial decision making. But at the Supreme Court (as well as in the lower courts, for that matter), decision making arises from a law-politics dynamic. Adjudication in accord with a pure rule of law is a myth. Both law and politics shape legal interpretation and adjudication. Yet, it is worth emphasizing, the ongoing debate over whether Supreme Court decision making is either law or politics is thoroughly political. This Essay elaborates on these assertions and explores their ramifications.

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I. INTRODUCTION

Recent events have seemed to inject politics into American judicial institutions. For example, a Republican-controlled Senate refused to consider President Barack Obama’s nominee for the Supreme Court, and President Donald Trump, dissatisfied with a lower court ruling, denounced the court’s “so-called judge.” These events have intensified many observers’ worries that the Supreme Court, in particular, has become politicized. Pursuant to this view, the Justices should decide cases in accordance with the rule of law and be unmoved by political concerns.

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making arises from a law-politics dynamic.⁵ Adjudication in accord with a pure rule of law is a myth. Both law and politics shape legal interpretation and adjudication. Yet, it is worth emphasizing, the ongoing debate over whether Supreme Court decision making is either law or politics is thoroughly political. This Essay elaborates on these assertions and explores their ramifications.

Part II of this Essay articulates two traditional and opposed views of Supreme Court adjudication: a pure-law approach typically voiced by law professors, and a pure-politics approach voiced by many political scientists. Advocates of a pure-law view usually condemn the intrusion of politics into adjudication. Politics, they argue, corrupts the neutral application of the rule of law. Part II also acknowledges variations within the two disciplines, law and political science. Not all law professors follow a pure-law approach, and not all political scientists follow a pure-politics approach. Nevertheless, law professors and political scientists usually retreat to their respective disciplinary methods when pushed (for example, to explain a hard Supreme Court case). Part III explains an intermediate approach to Supreme Court decision making. Namely, law and politics dynamically interact in legal interpretation and therefore in adjudication. Part III explains why this law-politics dynamic undermines the traditional worries about the mixing of politics into judicial decision making yet acknowledges that the political stakes revolving around the opposition between law and politics are high. Part IV, the conclusion, explores the futility and potential harms that arise from an insistence on a pure-law approach.

II. THE TRADITIONAL VIEWS OF SUPREME COURT ADJUDICATION: PURE LAW OR PURE POLITICS

Traditionally, two opposed views of Supreme Court decision making have existed side-by-side. In the legal academy, professors have mostly

claimed that the Court decides cases by following the rule of law. The law—
that is, legal rules and doctrines—are embodied in texts such as the Constitution,
statutes, and case precedents. Thus, by reading these texts, Supreme Court Justices
discern the appropriate rules and apply them to the facts of the instant case. Most
important, then, from this law standpoint, politics should not influence the Justices. The law must be pure; politics corrupts the judicial
process. The Justices must apply preexisting rules rather than making rules
according to their political goals. In the earliest university-based law schools,
during the post-Civil War era, the Langdellian legal scientists generally
followed this approach, viewing law as a closed system of rules and axiomatic
principles. Those rules and principles, according to the Langdellians, were
autonomous from societal and political influences. Thus, when deciding
cases, judges were supposed to logically apply the rules and principles while
disregarding their political preferences and even their conceptions of Justice.

This pure-law approach is currently manifested most clearly in new
originalism. According to new originalists, judges must interpret the constitu-
tional text in accord with its original public meaning. Constitutional mean-
ing, from this perspective, is static, fixed at the time of its ratification,
regardless of changing political and societal circumstances. Thus, "[w]ords have
original meanings that are fixed no matter what current majorities may say to
the contrary." Moreover, as Randy Barnett insists, "original public meaning
is an objective fact that can be established by reference to historical materi-
als." According to Justice Scalia, originalism is the only interpretive method
consistent with the rule of law rather than politics. The originalist method,

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6. E.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 16 (1959); C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES viii–ix (2d ed. 1879) (preface to 1st ed.) (expressing the importance of teaching law students to apply "certain principles or doctrines . . . . to the ever-tangled skein of human affairs").

7. LANGDELL, supra note 6, at viii–ix.


But cf. Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging 13–63 (2010) (arguing that Langdellians were not pure formalists, but acknowledging that almost all legal historians characterize them as such).

9. Lawrence B. Solum, We Are All Originalists Now, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011) (articulating the "fixation thesis").


Scalia wrote, "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 that we forbid it, but that the Constitution forbids it."\(^{12}\)

Meanwhile, starting in the 1940s, political scientists began describing Supreme Court adjudication as a product of the Justices’ political preferences or attitudes rather than their adherence to legal rules and doctrines.\(^{13}\) As political (and other social) scientists developed quantitative methodology, they refined their political description of Supreme Court decision making.\(^{14}\) According to Jeffrey A. Segal and Harold J. Spaeth’s 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.”\(^{15}\) A Justice’s ideological attitudes or personal policy preferences are formed exogenously to the legal system; that is, the Justice’s preferences do not form because of his or her institutional position within the federal judiciary.\(^{16}\) Thus, when Justices Alito and Ginsburg disagree about the result in a case, they disagree precisely because Alito is politically conservative while Ginsburg is progressive.\(^{17}\) Some political scientists, most notably Lee Epstein, acknowledge that Justices sometimes adjust their votes because of strategic considerations, such as the desire to maintain a judicial majority in a case.\(^{18}\) But according to the pure-politics approach, Supreme Court opinions, with their elaborate lines of reasoning built on legal texts and precedents, are either irrelevant (at best) or duplicitous (at worst). “Courts and judges always lie,” wrote Martin Shapiro.\(^{19}\) “Lying is the nature

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13. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 23 (1948) (noting that the post-New Deal Court was regarded by many to be composed of “yes-men” appointed by President Roosevelt “who were to transform the Court into a monolithic instrument for justifying the goals of their leader in true totalitarian fashion.”).


15. SEGAL & SPAETH, supra note 14, at 65.


17. SEGAL & SPAETH, supra note 14, at 65.


of the judicial activity."  

To be sure, the two disciplines, law and political science, do not have monopolies on either of the respective viewpoints—either the legal or the political science vantage. Some law professors have adopted perspectives that resonate closely with the predominant political science view. In the 1930s, some of the more radical legal realists questioned the force and coherence of legal rules.  

In fact, those realists helped set the stage for the early political science descriptions of the Court as a political institution. Today, an increasing number of law professors reject a pure-law approach while acknowledging that politics plays a role in Supreme Court decision making. Eric Segall goes so far as to insist that the Supreme Court does not decide like a traditional court at all. The Justices decide cases "based much more on personal and contestable value judgments than legal reasoning." The Justices, in other words, "are not bound by preexisting law in any meaningful sense of the word bound." Meanwhile, some political scientists acknowledge that law plays some role in Supreme Court adjudication; the Justices do not merely vote their politics. The historical institutionalists, including Howard Gillman and Mark Graber, are among the leaders in questioning an all-politics political science view. "Judicial decision making," writes Graber, "is a practice that

20. Id.
23. BARRY FRIEDMAN, THE WILL OF THE PEOPLE 367-68 (2009) (explaining constitutional meaning as arising from a type of “dialogue” between the people and the Justices); Kate Webber, It Is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII, 89 ST. JOHN’S L. REV. 841, 842, 844, 853 (2015) (arguing that the Court’s Title VII decisions are political).
25. Id. at 2.
26. Id. at 9.
mixes legal, strategic, and attitudinal considerations in ways that cannot be fully isolated by scientific investigation.”28

Typically, though, most law professors and political scientists retreat to their respective disciplinary approaches when pushed to explain a specific Supreme Court decision.29 Two academic conferences underscore this point. First, the Association of American Law Schools (AALS) and the American Political Science Association (APSA) jointly sponsored a Conference on Constitutional Law during the summer of 2002. The purported goals of the conference were “ambitious,” as it would “seek to foster interdisciplinary approaches to constitutional law.” Specifically, law professors and political scientists were to join together and become “part of a collaborative community.”30 Yet, despite these worthwhile goals, the respective and distinctive disciplinary methods repeatedly surfaced throughout the conference. To be sure, political scientists discussed law, and law professors discussed politics. But, in the end, political scientists repeatedly and unequivocally assumed that political attitudes primarily determined Justices’ votes, while law professors assumed that legal rules chiefly determined judicial outcomes. This result was predictable. If one is trained in the methods of a particular discipline, then when pressed to discuss a difficult case or problem, one naturally draws on that methodological know-how. To use a perhaps trite metaphor, if you only have a hammer, then you will try hammering, regardless of the problem.

My second example underscoring this point is the 2017 Pepperdine University School of Law Symposium Conference on The Supreme Court, Politics, and Reform. The call for proposals described the subject matter as follows: “Whether the political deadlock over the Merrick Garland nomination provides a stark indication that the U.S. Supreme Court has become an unduly political institution and, if so, what internal and external reforms might address this problem.”31 The crux of this call for papers was a concern that the
Court “has become ... unduly political.” Of course, “unduly” is an ambiguous qualifier, but from a pure-law perspective, any political influence is excessive or undue. For this reason, originalists repeatedly insist that constitutional interpretation is objective. Moreover, according to the call for proposals, if the Court has become (unduly) political, then the assumption was that reform or remedy was necessary. In other words, the call for papers suggested that law professors would and should be disturbed by the possibility that the Supreme Court is a political institution and must seek to retain the purity of the legal system. If Supreme Court decision making is political, then it is corrupt or illegitimate. Our very discipline, the law, depends on the existence of a distinct form of reasoning—legal reasoning—that can be explained and taught as separate from other disciplines, such as politics, economics, history, and sociology.

To be clear, I do not intend to criticize the Pepperdine Law Review and the Pepperdine University School of Law. To the contrary, I want to emphasize that Pepperdine is no different from any other law school in this regard. At both the 2017 Pepperdine University School of Law Symposium Conference and the 2002 joint AALS and APSA Constitutional Law conference, many of the law professors were from schools often ranked in the top twenty. I do not doubt that the top twenty schools often tend to be more interdisciplinary than other schools, but still, law professors most often talk about the law when discussing hard Supreme Court cases.

Unquestionably, public commentators and politicians typically echo and advocate for the pure-law view of Supreme Court decision making: the Justices should decide according to the rule of law and should not allow politics to influence their votes or decisions. For example, in a New York Times Op-Ed, Ilya Shapiro wrote: “A judge’s job is to apply the law to a given set of facts as best he or she can and let the political chips fall where they may.” When he was still a Senator, Jeff Sessions said: “What our legal system demands . . . is a fair and unbiased umpire, one who calls the game according to

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33. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949) (arguing that discussions of policy are appropriate only if there is a gap in the law).

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the existing rules.”

During confirmation hearings, Supreme Court nominees need to avow fealty to the rule of law. John Roberts famously stated, “Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them . . . . [I]t’s my job to call balls and strikes and not to pitch or bat.”

If one holds to the pure-law view—that Supreme Court Justices should follow the rule of law rather than making the rules to fit their political preferences—then when politics intrudes into the adjudicative process, the Court’s decisions become tainted. This concern, for the political tainting of the Court, is precisely what precipitated this symposium. Numerous recent events have supporters of the legal view worried about the politicization of the Court.

As the conference call for proposals suggested, the Senate Republicans’ refusal to give Merrick Garland even a hearing or a confirmation vote, either up or down, highlighted a political aspect to the Supreme Court’s business. This Republican refusal seemed to proclaim that the political orientation of a Justice—or at least the political orientation of a Democratic nominee—would affect his or her votes once on the Court.

Subsequent events have exacerbated concerns about the politicization of the entire federal judiciary, not only the Supreme Court. When a federal district judge, James L. Robart, blocked Donald Trump’s Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States, which banned immigrants and travelers from seven predominantly Muslim countries, Trump publicly denounced Robart as a “so-called judge” and called the ruling “ridiculous.”

With an appeal pending at the Ninth Circuit Court of Appeals, Trump castigated the “courts [for] seem[ing] to be so political.”

40. Fuller, supra note 2.
Many commentators believed that Trump’s politically motivated attacks on the judiciary threatened the rule of law.42 Even Justice Gorsuch, Trump’s nominee for the open Supreme Court seat, called Trump’s attacks “demoralizing” and “disheartening.”43

III. SUPREME COURT ADJUDICATION IS LAW AND POLITICS

A. The Law-Politics Dynamic

Most of these concerns about the politicization of the Court are ill-conceived. Supreme Court decision making is and always has been partly political. Simultaneously, Supreme Court decision making is and always has been legal. Contrary to the predominant and opposed legal and political science views, Supreme Court decision making arises from a law-politics dynamic. Neither pure law nor pure politics determines Supreme Court votes and decisions. In most cases, the Justices sincerely interpret legal texts and precedents, but the Justices’ respective political horizons always influence how they interpret the law.

Legal interpretation ineluctably plants the law-politics dynamic within adjudication. Most important, legal interpretation is never mechanical.44 No algorithmic method (or mechanical process) enables one to access some pre-existing and pristine textual meaning.45 Legal interpretation is never like an arithmetic problem where the Justice adds the numbers and arrives at an indubitably correct answer.46 Despite this lack of method, however, interpretive
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 disputes have correct or right answers.47 Yet, the only means for gleaning the correct meaning of a text is through interpretation itself.48 If one believes that a proffered interpretation of a text is mistaken, then one can offer reasons that might persuade the initial interpreter to accept a better textual reading. But there is no escape from interpretation.49

A Supreme Court Justice always interprets legal texts from within his or her horizon.50 The interpretive horizon metaphorically connotes the range of possible understandings that an individual brings to any text. An interpreter can see to the edge of the horizon but no farther. As a general matter, we are empowered to understand texts, but we are also limited to understandings within our respective horizons.51 Significantly, a Justice’s horizon (or anybody else’s horizon, for that matter) arises from the Justice’s experience and education within a community (or communities) and the community’s cultural traditions.52 Consequently, political ideology contributes strongly to a Justice’s horizon, yet the horizon is not solely a matter of politics, narrowly defined. Religion and other cultural components all contribute; one’s horizon is not a purely private possession.53 A Justice who was educated at an American law school, practiced law, and decided prior cases understands and generally

abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice”).

47. RONALD DWORKIN, Is There Really No Right Answer in Hard Cases?, in A MATTER OF PRINCIPLE 119 (1985); see GADAMER, supra note 44, at 297–98 (discussing true textual meaning).


53. See GADAMER, supra note 44, at 282–84, 295, 302–09 (discussing concept of the interpretive horizon). Thus, I agree with Eric Segall when he writes: “Political preferences drive the Justices’ constitutional decisions to some degree but so do their life experiences, religious and moral values, and other subjective beliefs.” SEGALL, supra note 24, at 8.
abides by the internal practices of law and adjudication.\textsuperscript{54} Those internal practices—the know-how of the law—are part of the Justice’s horizon.\textsuperscript{55} In most cases, therefore, the Justice will attempt in good faith to interpret the relevant legal texts correctly.\textsuperscript{56} But again, this interpretive process is not mechanical. The Justice’s political preferences (and religious and cultural background) will influence the interpretive conclusions. This political influence is not a corruption of the legal and judicial process; it is inherent to the process.\textsuperscript{57} Thus, when Justices Alito and Ginsburg disagree about the proper interpretation of the Commerce Clause, neither Justice is lying or being disingenuous.\textsuperscript{58} Each Justice believes that he or she is correctly interpreting the Constitution, but their interpretive horizons shape their respective conclusions.\textsuperscript{59}

As politics always contributes to one’s interpretive horizon, law and politics are inherently intertwined within legal interpretation. Consequently, Supreme Court decision making always entails the operation of a law-politics dynamic. The concept of pure law within adjudication, of a pristine legal decision bereft of all political influence, is incoherent. Unsurprisingly, then, a growing body of quantitative evidence corresponds with the proposition that both law and politics—a law-politics dynamic—animates Supreme Court adjudication. First, as I already mentioned, political scientists have generated a

\textsuperscript{54}“All mental processing draws closely from one’s background knowledge. A decision to cross a street, for example, is contingent on one’s experience-born knowledge about vehicles, motion, and driver behavior.” Simon, supra note 51, at 536.

\textsuperscript{55}“The very ability to formulate a [judicial] decision in terms that would be recognizably legal depends on one’s having internalized the norms, categorical distinctions, and evidentiary criteria that make up one’s understanding of what the law is.” STANLEY FISH, Still Wrong After All These Years, in DOING WHAT COMES NATURALLY 356, 360 (1989); see Steven D. Smith, Believing Like a Lawyer, 40 B.C. L. REV. 1041, 1045 (1999) (emphasizing that lawyers and judges remain committed to a traditional view of legal reasoning).

\textsuperscript{56}See GADAMER, supra note 44, at 282–84, 302, 306 (explaining horizon); Habermas, supra note 48, at 185 (explaining interpretation).

\textsuperscript{57}See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 645, 647 (2012) (discussing the constitutionality of the Affordable Care Act under the Commerce Clause); Feldman, Supreme Court Nominees, supra note 5 (discussing whether Supreme Court nominees and Justices lie).

substantial body of quantitative evidence showing that the Justices’ votes appear to follow their political preferences. Second, the political scientists Mark J. Richards and Herbert M. Kritzer have performed several quantitative studies suggesting that legal doctrines shape judicial decisions. 60 “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.” 61 More “[s]pecifically, 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.” 62

Third, recent studies suggest that both law and politics contribute to judicial decisions in an uncertain and shifting mix. One book summarizes its quantitative studies as concluding “that ideology influences judicial decisions at all levels of the federal judiciary. But the influence is not of uniform strength—we have found, for example, that it diminishes as one moves down the judicial hierarchy—and it does not extinguish the influence of conventional principles of judicial decision-making.” 63 Another book-length quantitative study concludes that both law and political preferences matter to Supreme Court Justices, 64 though “the influence of specific legal doctrines varies across Justices.” 65

To appreciate the implications of the law-politics dynamic for Supreme Court decision making, one should distinguish politics writ large from politics writ small. 66 Politics writ large is the purposeful or self-conscious pursuit of


61. Richards & Kritzer, supra note 60, at 315.

62. Id. Thomas Keck concludes that judges decide cases “partly in light of distinctive judicial values and practices.” THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 4 (2014).

63. LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 385 (2013). “[F]ederal judges are not just politicians in robes, though that is part of what they are . . . .” Id.


65. Id. at 143; see CASS R. SUNSTEIN, ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (study of federal courts of appeals concluding that both politics and law influence judges). Frank Cross has conducted numerous quantitative studies concluding that law and politics both influence judicial decision making. FRANK B. CROSS, Law is Politics, in WHAT’S LAW GOT TO DO WITH IT? 92 (Charles Gardner Geyh ed., 2011); Frank B. Cross & Blake J. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 NW. U. L. REV. 1437 (2001).

66. Feldman, Supreme Court Nominees, supra note 5 at 18–19, 30–37 (distinguishing politics writ
political goals qua political goals. Members of Congress routinely engage in politics writ large. If a Supreme Court Justice were to ignore the law and purposefully vote to decide a case in accord with a preferred political goal qua political goal, then that Justice would be pursuing politics writ large. But in most cases, the Justices do not do so. Instead, they engage in politics writ small. That is, in the typical case, a Justice sincerely interprets the relevant legal texts and votes to decide a case accordingly—with the Justice’s horizon, including political ideology, naturally shaping the Justice’s interpretation and vote. Politics writ small is embedded in legal interpretation, or in other words, legal interpretation is politics writ small.

Crucially, a Justice’s sincere interpretation of a legal text typically corresponds with his or her political goals precisely because of politics writ small. This correspondence occurs because the Justice’s political ideology, as part of his or her interpretive horizon, influences the Justice’s interpretive conclusions. Thus, a Justice rarely experiences a conflict between his or her sincere interpretations of the relevant texts and his or her political preferences.

Once we understand the relationship between politics writ small and judicial decision making, then we can fully appreciate the significance of the previously discussed quantitative evidence. Quite reasonably, some quantitative studies demonstrate that the Justices follow the law, other studies demonstrate that they follow their politics, and yet other studies demonstrate that they follow both the law and the politics. All of these studies make sense once

large from politics writ small).


68. See Feldman, Supreme Court Alchemy, supra note 5, at 82–83 (distinguishing politics writ large from politics writ small); TAMANAH, supra note 8, at 187–89 (distinguishing cognitive framing from willful judging).

69. Cognitive psychology 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.” Simon, supra note 51, at 517. According to “coherence-based reasoning” research, when a Justice must decide a case, the Justice’s legal and political views will tend ultimately to coincide rather than conflict. Id. at 517. This tendency to reach coherent conclusions is perfectly natural and often unconscious. EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 30, 157–58 (2009); Simon, supra note 51, at 545–46.
we recognize that Supreme Court decision making is politics writ small: when the Justices interpret the law, they simultaneously follow their politics (writ small).  

B. The Politics of the Debate Over Supreme Court Adjudication

If we return to the question raised by the conference call for proposals—have recent controversies revealed that the Court has become (unduly) political?—the answer is, “No.” The Court has always interpreted the law and decided cases pursuant to a law-politics dynamic, pursuant to politics writ small, in other words. That has not apparently changed. To be sure, if the Court were to begin deciding pursuant to politics writ large, then we could discuss a significant transition. But the evidence does not support that conclusion.

Of course, recent controversies have spotlighted the political aspect of Supreme Court decision making. Consequently, public perceptions of the Court’s adjudicative process might have shifted. Yet, public opinion polls leave much ambiguity regarding widespread perceptions of Supreme Court decision making. Generally, people seem to criticize the Court for being either too liberal or too conservative based on the respondent’s own political attitudes and recent (newsworthy) Court decisions. A conservative Republican is unlikely to criticize the Court for being too conservative when recent decisions are conservative (likewise for liberal Democrats). Unsurprisingly, polls reveal that the public has had wildly fluctuating approval and disapproval ratings of the Court. Most likely, these inconsistent ratings reflect recent rulings and the public’s political mood. If anything, then, one might infer from the polls that many people implicitly subscribe to the pure-law view. When the Court reaches an agreeable decision—agreeable from an individual’s political standpoint—then the individual apparently views the decision as following from the rule of law. The Court is condemned for being an unduly political institution only when it reaches decisions that contravene a respondent’s political views.

Finally, any polls concerning public perceptions of the Court should be approached warily. Surveys suggest that most Americans know and care little

70. E.g., BAILEY & MALTZMAN, supra note 64, at 143; EPSTEIN, supra note 63, at 385.
about the Court. One 2016 poll revealed that almost 10% of college graduates believed the television judge, Judge Judy, sat on the Court; the percentage rose to 13.1 when the poll expanded beyond college graduates. A 2015 poll found that 32% of Americans could not identify the Supreme Court as a branch of the United States government, while 28% believed 5-4 Court rulings were "sent back either to Congress for reconsideration or to the lower courts for a decision."

My own (anecdotal) experience suggests the need for skepticism when evaluating public perceptions of the Court. Shortly after Justice Scalia’s death, I happened to go to the dentist. My dentist, an articulate man approximately in his mid-30s and obviously a graduate of college and dental school, knows that I am a law professor. Consequently, he told me that he thought Scalia was a great Justice. By coincidence, I had recently published an article on the history of originalism. When I soon needed to return to the dentist, I asked him with trepidation if he would be interested in reading my article. His response? He had never heard of originalism. At that point, I decided not to ask him why he admired Scalia.

Nevertheless, this incident with my dentist suggests a larger point. Individual viewpoints about the Supreme Court and its method of decision making are political. Even people like my dentist who know little or nothing about constitutional theory and interpretation can have strong opinions about the Court—if they think about the Court at all. Thus, while recent controversies about the Court and judicial decision making have neither changed Supreme Court adjudication, nor have they rendered Supreme Court decision making unduly political—these controversies might have temporarily stirred public awareness of and debates about the Court. For instance, exit polls from the 2016 presidential election revealed that 21% of voters named Supreme Court

75. Eric A. Posner & Cass R. Sunstein, Institutional Flip-Flops, 94 TEx. L. REv. 485 (2016) (arguing that vigorous institutional commitments—for example, to federalism—change when necessary to fit one’s political ideology).
appointments as the most important factor in determining their votes, an increase of 14% over the 2008 election. Even so, prior to the 2016 election, surveys suggested that Supreme Court appointments was only the ninth most important issue.

Regardless, many law professors, political scientists, lawyers, judges, public commentators, and politicians care intensely about Supreme Court decision making. Like with my dentist, though, when such individuals express their views about the Court, their statements often arise from their political orientations. Their statements are often politically motivated and can have political consequences. For example, in an essay published in 2005, Justice Gorsuch, still a practicing attorney at the time, suggested his belief in a pure-law viewpoint while blaming liberals for politicizing the judiciary. According to Gorsuch, “liberal activists” had “become addicted to the courtroom.” Consequently, the judiciary was “losing its legitimacy,” and judges were being “viewed and treated as little more than politicians with robes.”

Gorsuch’s claims underscore what is at stake politically in disputes about the nature of judicial decision making. Most often, those who claim that Supreme Court decisions should be pristine, based on a pure rule of law, seek to

79. See Adam S. Chilton & Eric A. Posner, An Empirical Study of Political Bias in Legal Scholarship, 44 J. LEGAL STUD. 277, 279–304 (2015) (presenting empirical study showing that political ideology influences legal scholarship). If one focuses on the opposition between the traditional views of law professors and political scientists, one can readily recognize that members of both professions have vested political interests in bolstering their respective disciplinary outlooks and methods. This is simple turf protection. MICHELE LAMONT, HOW PROFESSORS THINK: INSIDE THE CURIOUS WORLD OF ACADEMIC JUDGMENT (2009) (comparing evaluative criteria in different disciplines); Ross J. Corbett, Political Theory Within Political Science, 44 POL. SCI. & POL. 565 (2011) (emphasizing that many political scientists try to exclude non-quantifiable or non-falsifiable methods from the discipline). See generally STEVE FULLER, PHILOSOPHY, RHETORIC, AND THE END OF KNOWLEDGE: A NEW BEGINNING FOR SCIENCE AND TECHNOLOGY STUDIES (1993) (emphasizing the effects of disciplinary boundaries).
81. Id.
82. Id.
seize the political high ground. These advocates insist that they are politically neutral and that Court decisions should also be politically neutral. Any intrusion of politics into Supreme Court decision making corrupts the judicial process. For the last fifty years or so, dating back to the Warren Court, conservatives have typically articulated this position (and continue to do so). For them, a conservative Supreme Court decision is a politically neutral decision. Hence, originalists insist that originalism is the only legitimate method of constitutional interpretation because all other methods allow politics to influence interpretive conclusions.\textsuperscript{83} Regardless, as the Roberts Court has solidified the conservative hold on the Supreme Court, progressives have begun to flip the argument upside down.\textsuperscript{84} In 2015, Democratic Senator Sheldon Whitehouse criticized the “extreme judicial activism within the conservative bloc of Justices on the Supreme Court—reaching a new pinnacle under Chief Justice John Roberts.”\textsuperscript{85}

IV. CONCLUSION: THE FUTILITY AND HARM OF A PURE-LAW APPROACH

Ultimately, to insist that the Supreme Court follow a purely legal approach, that politics should not influence Court decisions, is futile (from a scholarly rather than political perspective) because legal interpretation and judicial decision making are inherently politics writ small. The law-politics dynamic cannot be subdued and eliminated. As I have argued elsewhere, to argue for pure law is like fighting the tofu.\textsuperscript{86} One can try to overcome the law-politics dynamic, to eradicate politics from judicial decision making—and many scholars have tried—but one’s efforts will be as frustrating as wrestling with a squiggly, white, gelatinous mass of tofu. The law-politics dynamic—


\textsuperscript{84}. \textit{Jason E. Whitehead, Judging Judges: Values and the Rule of Law} 1–3 (2014) (noting that judges on both sides of the political divide criticize the other side for not following the rule of law).


that is, politics writ small—will remain part of adjudication no matter how much or how often scholars deny it, police it, or otherwise try to subdue it.\textsuperscript{87}

The quest for pure law is also likely to be harmful. Advocates for pure law resemble neoliberal advocates for a pure or free economic marketplace. Neoliberals (and other libertarians) pressure us into seemingly endless arguments over the scope of government regulation and interference with the free market. Market failures are inevitably blamed on government interference.\textsuperscript{88} In other words, according to neoliberals, the market works best or even perfectly when government—that is, politics—is banished. But as Robert Reich underscores, the free market is a myth.\textsuperscript{89} Economic transactions do not occur unless the government designs and enforces the rules of the marketplace. Hence, instead of wasting time debating government restrictions on the market, we should examine and discuss the effectiveness and fairness of the current rules and possible government improvements of the marketplace.\textsuperscript{90}

Likewise, advocates for pure law (as well as political scientists arguing for pure politics) pressure us to dwell on the degree to which politics is contaminating our judicial processes. For instance, we devote endless resources to debates over originalism versus non-originalism or to arcane distinctions among various manifestations of originalism. Should we be old originalists or new originalists?\textsuperscript{91} Which originalist approach will take us to the most refined, the purest, level of constitutional meaning—beneath the political infestation? But instead of seeking the impossible, the banishment of politics from Supreme Court decision making, we should be exploring the operation and manifestations of the law-politics dynamic.\textsuperscript{92}

Here is an example. In 2015, Genevieve Lakier published an article, The

\begin{itemize}
  \item \textsuperscript{87} Feldman, Fighting the Tofu, supra note 5.
  
  
  \item \textsuperscript{89} ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW 3–6, 84–85 (2015); see also THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 20–21 (Arthur Goldhammer trans., 2014) (emphasizing that economic inequality arises from political choices rather than unalterable market forces).
  
  \item \textsuperscript{90} REICH, supra note 89, at 6–7, 11, 153–54.
  
  \item \textsuperscript{91} Stephen M. Feldman, Constitutional Interpretation and History: New Originalism or Eclecticism?, 28 BYU J. PUB. L. 283, 284–86 (2014) (distinguishing old and new originalisms).
  
  \item \textsuperscript{92} Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 GEO. L.J. 1113, 1114 (2003) (arguing that originalism is “working itself pure”).
\end{itemize}
Nothing New Under the Sun

Invention of Low-Value Speech, in the Harvard Law Review.93 Lakier provides a historical critique of the two-level theory of free speech.94 According to the two-level theory, the First Amendment fully protects most expression but does not protect (or weakly protects) certain low-value categories of expression, such as incitement, obscenity, and fighting words.95 As Lakier correctly points out, the post-1937 New Deal Court basically invented the two-level theory while simultaneously asserting that it was historically grounded in the original understanding of the First Amendment.96 Despite the New Deal Court’s historical errors, most subsequent courts and commentators have accepted many of its assertions.97

Lakier gets most of the history correct.98 The problem is that her argument revolves almost entirely around theory and doctrine—the history of the two-level theory and the doctrine of free speech. Lakier’s history is arid and bereft of nuance. In actuality, the New Deal Court forged the two-level theory in the crucible of political crisis. During the 1930s and early 1940s, the nation confronted mass industrialization, urbanization, dramatic shifts in population demographics, a massive and long economic depression, the rise of totalitarian and fascist governments abroad, and a World War.99 Early in the 1930s, the practices of American democracy dramatically changed, and those new practices were described and justified by the development of pluralist democratic theory late in the decade and over the next twenty years or so.100 One cannot fully grasp the Court’s incredible transformation of free-speech doctrine during these years, including the emergence of the two-level theory, without accounting for this crucial political context. How much did the Court alter its approach to free-speech issues? During the World War I era and the

94. Id.
97. Lakier, supra note 93, at 2207–11.
99. Id. at 291–348, 383–419.
100. Id. at 291–382. For examples of political and constitutional theorists articulating pluralist democracy, see generally WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS: THE NATIONAL GOVERNMENT (1949); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS (1942).
1920s, the Court upheld every government punishment of expression.\footnote{101} The First Amendment protection of speech and writing was flimsy, at best. But starting in 1937 and in the immediately following years, the Court upheld one First Amendment claim after another.\footnote{102} Free expression became, quite suddenly, a constitutional “lodestar[].”\footnote{103}

Why does it matter that Lakier presents a thin history of free-expression developments? Because based on her history (of theory and doctrine), she recommends a rather tepid modification of the Roberts Court’s approach to free speech. Lakier does not face the political, social, and economic crises confronting the nation today and the potential implications of those crises for free expression. Like the New Deal court, the Roberts Court faces a nation and world in critical flux.\footnote{104} The nation and world today are characterized by deteriorating international agreements, the rise of new authoritarian demagogues, the Internet and digital technology, gross income and wealth inequality in the United States and the world, mass incarceration in America, unprecedented political polarization in America, multinational corporations, globalization, mass surveillance, and terrorism around the world.\footnote{105} Yet, the
Roberts Court decides free-expression cases by invoking originalism and the traditional philosophical rationales for free expression such as self-governance and the marketplace of ideas. The Court decides cases like Citizens United v. Federal Election Commission, upholding (or creating) a right for corporations to spend unlimited sums on political campaigns, and then the Justices claim that their conclusion is neutral and apolitical.

But, of course, the Court’s decisions, including Citizens United, are never neutral and apolitical. The law-politics dynamic always animates legal interpretation. The Justices cannot escape politics writ small. When law professors propagate a pure-law account of Supreme Court decision making, we implicitly encourage disregard of the social, economic, and political contexts and ramifications of decisions. Even if we spout platitudes such as “we are all realists now” but then retreat to the parsing of cases and the analyses of doctrine to explain judicial decisions, we present only a partial and misleading depiction of the decision making process. Instead of exploring the operation of the law-politics dynamic, we worry about whether politics is contaminating Supreme Court adjudication. It is well past time for law professors to realistically analyze and assess Supreme Court decision making.

106. Citizens United v. FEC, 558 U.S. 310, 353 (2009) (invoking original meaning of First Amendment to support invalidation of restrictions on corporate campaign spending); id. at 339 (invoking self-governance rationale); id. at 354 (invoking the marketplace-of-ideas or search-for-truth rationale).