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Do Supreme Court Nominees Lie? The Politics of Adjudication

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Abstract:

When John Roberts and Samuel Alito testified during their Senate confirmation hearings, they promised to decide cases apolitically in accord with the rule of law. Yet, during their first terms on the Supreme Court, they repeatedly voted to decide cases consistently with their conservative political ideologies. One must wonder: did Roberts and Alito lie? This Essay answers this crucial question by critiquing the theories of Richard Posner and Ronald Dworkin, two of the most prominent jurisprudents of this era. While Posner and Dworkin have vehemently attacked each other, they both maintain that Supreme Court adjudication of hard cases is politics writ large: the justices self-consciously and expansively decide cases according to their political ideologies. From this perspective, Roberts, Alito, and other Supreme Court nominees either purposefully lie or are naively ignorant when they proclaim fidelity to an apolitical form of adjudication. But, as this Essay argues, Posner and Dworkin share a common error. Although they correctly recognize that Supreme Court adjudication is political, they mistakenly assume that it therefore must be writ large. Instead, it is politics writ small. Legal interpretation is never mechanical. The justices sincerely interpret and apply the law, but the justices' political ideologies necessarily shape their interpretations of the relevant legal texts. Thus, in the typical case, the justices' best interpretations of the law coincide with their respective political ideologies. Supreme Court adjudication as politics writ small largely obviates the need for a judicial politics writ large. One might, consequently, criticize Roberts's and Alito's interpretations of legal texts, like the Constitution, without necessarily questioning their integrity.

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During their Senate confirmation hearings, John Roberts and Samuel Alito both vowed to be modest and restrained Supreme Court justices. They would faithfully apply the Constitution and doggedly follow the rule of law rather than actively imposing any particular political ideology. In a widely reported proclamation, Roberts explained, "Judges are like umpires—umpires don't make the rules; they apply them."[1] Yet, after the Roberts Court's first two terms, few observers doubt whether Roberts and Alito have turned the Court to the political right. Numerous articles have appeared in mass-media periodicals juxtaposing, on the one hand, Roberts's and Alito's declarations of apolitical fidelity to law and, on the other hand, their sharply conservative votes in case after case.[2] Among other conservative decisions, the Roberts Court has upheld restrictions on abortion, limited employee rights to recover for pay discrimination, and chided school districts for considering students' races as a means to integrate public schools.[3]

So, did Roberts and Alito lie during their confirmation hearings?[4] Did they duplicitously proclaim dedication to the rule of law while secretly planning to implement their political

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[1]Robert Schwartz, *Like They See 'Em*, New York Times, Oct. 6, 2005, at A37.

[2]David Von Drehle, *The Incredible Shrinking Court*, Time, Oct. 11, 2007 <http://www.time.com/time/magazine/article/0,9171,1670489,00.html> (accessed Jan. 2, 2008); Jeffrey Rosen, *Courting Controversy*, Time, June 28, 2007 <http://www.time.com/time/magazine/article/0,9171,1638444,00.html> (accessed Jan. 2, 2008); Simon Lazarus, *More Polarizing than Rehnquist*, American Prospect, May 2007, at 23.

[3]Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007) (proscribing reliance on race in assigning students to schools); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162 (2007) (limiting employee remedies for pay discrimination); Gonzales v. Carhart, 127 S.Ct. 1610 (2007) (upholding restictions on partial-birth abortion).

[4]*See* Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U.L. Rev. 1069, 1070 (2006) (describing Roberts as being "disingenuous").

agendas? While I disagree with the justices' votes in practically every controversial case, Roberts and Alito most likely answered senators' questions honestly. And the justices have probably applied the rule of law in good faith during their initial terms. But how is this possible when they repeatedly vote for the conservative judicial outcome? Most simply, law and politics are not opposites. Roberts, Alito, and other justices do not necessarily disregard the law merely because they vote to decide cases consistently with their respective political ideologies. As a general matter, Supreme Court justices can decide legal disputes in accordance with law while simultaneously following their political preferences.

I elaborate this thesis by critiquing the theories of Judge Richard Posner[5] and Professor Ronald Dworkin,[6] two of the most prominent jurisprudents of this era. Embattled opponents, Posner and Dworkin have for years relentlessly attacked each other while developing strikingly different depictions of law and adjudication.[7] Despite their opposition, Posner and Dworkin together challenge a primary assumption of traditional jurisprudence—an assumption featured during Roberts's and Alito's Senate confirmation hearings. Most senators, jurists, and legal scholars assume that legal interpretation and judicial decision making can be separated from politics. A judge or justice who decides according to political ideology skews or corrupts the judicial process.[8] Posner and Dworkin reject this traditional approach, particularly for hard cases

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[5]Richard A. Posner, Law, Pragmatism, and Democracy (2003) [hereinafter Posner, Law]; Richard A. Posner, The Problematics of Moral and Legal Theory (1999) [hereinafter Posner, Theory]; Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31 (2005) [hereinafter Posner, Foreword].

[6]Ronald Dworkin, Justice in Robes (2006) [hereinafter Dworkin, Robes]; Ronald Dworkin, Freedom's Law (1996) [Dworkin, Freedom]; Ronald Dworkin, Law's Empire (1986) [hereinafter Dworkin, Empire]; Ronald Dworkin, Taking Rights Seriously (1978) [hereinafter Dworkin, Seriously].

[7]Ronald Dworkin, *Darwin's New Bulldog*, 111 Harv. L. Rev. 1718 (1998); Ronald Dworkin, *In Praise of Theory*, 29 Ariz. St. L.J. 353 (1997); Richard A. Posner, *The Problematics Of Moral And Legal Theory*, 111 Harv. L. Rev. 1637 (1998); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1 (1998).

[8]For descriptions and constructive criticisms of traditional doctrinal scholarship, see Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & Soc. Inquiry 89, 96-98 (2005);

at the level of the Supreme Court. Each in his own way asserts and explains the power of politics in adjudication: the justices self-consciously vote and thus decide cases according to their political ideologies. Posner and Dworkin agree that the justices do not and should not decide hard cases by applying an ostensibly clear rule of law in a mechanical fashion. The justices must be political in an open and expansive manner.[9] Supreme Court adjudication is, in other words, politics writ large.

The conflicts between Posner and Dworkin stem from their distinct views of politics. Posner views politics as a pluralist battle among self-interested individuals and groups. He therefore argues that Supreme Court adjudication, manifesting politics writ large, should (and in fact does) entail a pragmatic focus on consequences. The justices should resolve cases by looking to the future and by aiming to do what is best in both the short- and long-terms.[10] Dworkin, repudiating a pragmatic politics of self-interest, favors instead a politics of principles. Thus, according to Dworkin, the justices should resolve hard cases by applying law as integrity. They should theorize about the political-moral principles that fit the doctrinal history—including case precedents and constitutional provisions—and that cast the history in its best moral light.[11] Consequently, although Posner and Dworkin both describe the Supreme Court as a political institution—as engaging in politics writ large—their theories otherwise clash tumultuously. Posner sees an adjudicative politics of interest and unmitigated practicality, while Dworkin sees an adjudicative politics of principles and coherent theory.

Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257, 257-60 (2005). For examples of such legal scholarship, see Johnny C. Parker, *Equal Protection Minus Strict Scrutiny Plus Benign Classification Equals What? Equality of Opportunity*, 11 Pace L. Rev. 213 (1991); Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 Wayne L. Rev. 1317 (1997). For an optimistic assessment of legal scholarship, arguing that an increasing number of legal scholars are drawing upon political science literature, see Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 Law & Soc. Inquiry 511 (2007).

[9]Dworkin, Robes, *supra* note 6, at 1-35; Posner, Foreword, *supra* note 5, at 41-42.

[10]Posner, Law, *supra* note 5, at 13, 71.

[11]Dworkin, Empire, *supra* note 6, at 52-53, 90.

Unfortunately, both Posner and Dworkin—like Roberts, Alito, and the senators who questioned them—remain stuck within the magnetic field of the traditional law-politics dichotomy. While most jurists, legal scholars, and senators are pulled to the law pole—maintaining that law mandates case results—Posner and Dworkin are pulled to the opposite pole. If politics matters to adjudication, they seem to say, then politics must become the overriding determinant of judicial outcomes. Supreme Court adjudication must be politics writ large. If true, then Supreme Court nominees who declare their fidelity to the rule of law do, in fact, lie: current and future justices decide cases by hewing to their political ideologies, not to legal doctrines and precedents. But struggling against the forces of the law-politics dichotomy, Posner and Dworkin overcompensate. They neglect another possibility: namely, that Supreme Court adjudication is politics writ small. As Posner and Dworkin emphasize, the Court is a political institution: the justices' political ideologies always and inevitably influence their votes and decisions. But usually the justices do not self-consciously attempt to impose their politics in an expansive manner. To the contrary, the justices sincerely interpret and apply the law. Yet, because legal interpretation is never mechanical, the justices' political ideologies necessarily shape how they understand the relevant legal texts, whether in constitutional or other cases.

Part I of this Essay elaborates Posner's description of pragmatic adjudication and Dworkin's theory of principled adjudication.[12] Part II explains why, contrary to Posner's and Dworkin's positions, Supreme Court decision making is most often politics writ small. Because of the integral role that politics plays in legal interpretation, a justice's interpretive judgment will in most instances coincide with her political ideology, including pragmatic concerns and political morality. In the typical case, then, a justice would not self-consciously vote to promote her political ideology. Doing so would be unnecessary (from a political standpoint); the justice would only need to vote in accordance with her best interpretive judgment.[13] Part II closes by

[12] *See infra* text accompanying notes _-_.

[13] *See infra* text accompanying notes _-_.

linking Posner's and Dworkin's disputes to their respective misunderstandings of the (legal) interpretive process.[14] Part III, the Conclusion, briefly explains the implications of an adjudicative politics writ small for the controversy surrounding Roberts and Alito.[15]

I. Posner, Dworkin, and Adjudication as Politics Writ Large

A. Posner and Pragmatic Adjudication

Posner explicitly argues that Supreme Court adjudication, especially in constitutional cases, is politics writ large.[16] The justices self-consciously vote (and thus decide cases) in accordance with their political ideologies. The Supreme Court, in this way, is unique, according to Posner. Lower court judges, Posner writes, generally are "tethered to authoritative texts, such as constitutional and statutory provisions, and to previous judicial decisions."[17] That is, lower court judges follow the law, except in the unusual case "when the law is uncertain and emotions aroused."[18] But at the Supreme Court, "the issues are more uncertain and more emotional and the judging less constrained."[19] Because of the Supreme Court's institutional position within our constitutional system—at the apex of the judicial hierarchy—the Court is overtly, broadly, and consistently political. "A constitutional court composed of unelected, life-tenured judges, guided, in deciding issues at once emotional and politicized, only by a very old and in critical

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[14] *See infra* text accompanying notes _-_.

[15] *See infra* text accompanying notes _-_.

[16] Posner writes:

> From a practical standpoint, constitutional adjudication by the Supreme Court is … the exercise of discretion—and *that is about all it is*. If … the Court is asked to decide whether execution of murderers under the age of eighteen is constitutional, *it is at large*. Nothing compels a yes or a no. [There are] no external constraints on the Justices' decision.

Posner, Foreword, *supra* note 5, at 41-42 (emphasis added).

[17] *Id*. at 40.

[18] *Id*. at 48.

[19] *Id*. at 49.

passages very vague constitution (yet one as difficult to amend as the U.S. Constitution is), is potentially an immensely powerful political organ."[20] In fact, when deciding constitutional issues, the Court "is political in the sense of having and exercising discretionary power as capacious as a legislature's."[21] Thus, Posner describes one recent case as "a naked political judgment," and explains that "the Justices exercise vast discretion, thrashing about in a trackless wilderness."[22]

Based on this conclusion—that Supreme Court adjudication is politics writ large—Posner recommends that the Court be "modest" and "pragmatic."[23] Given the potency of the justices' political power, Posner argues they should generally defer to legislative judgments. The Court should "be restrained in the exercise of its power."[24] When this "very high threshold" for deference is overcome, however, then the Court should embrace its political role and "focus on the practical consequences" of its potential decisions.[25] "[T]he pragmatic judge aims at the decision that is most reasonable, all things considered, where 'all things' include both case-specific and systemic consequences, in their broadest sense."[26] In other words, pragmatic adjudication is a "forward-looking" method that emphasizes consideration of immediate effects (case-specific consequences) as well as the value of following the rule of law (systemic consequences).[27]

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[20]*Id*. at 40.

[21]*Id*. Constitutional issues, such as the scope of free speech, are "quintessentially political issues." Posner, Law, *supra* note 5, at 231.

[22]Posner, Foreword, *supra* note 5, at 62, 90 (citing Roper v. Simmons, 125 S. Ct. 1183 (2005)).

[23]Posner, Foreword, *supra* note 5, at 54, 90.

[24]*Id*. at 102.

[25]*Id*. at 54, 90.

[26]Posner, Law, *supra* note 5, at 13.

[27]*Id*. at 71.

Pragmatic adjudication intertwines with Posner's notion of democratic politics. He distinguishes between two types of democracy: deliberative and pragmatic. Deliberative democracy is "idealistic, theoretical, and top-down."[28] Voters and elected officials reason about "what is best for society as a whole," and then pursue this "public interest rather than … selfish private interests."[29] Deliberative democracy, as such, "'gives moral argument a prominent place in the political process.'"[30] Posner rejects deliberative democracy as infeasible and normatively unattractive, and instead endorses pragmatic democracy, which "is realistic, cynical, and bottom-up."[31] Following Joseph Schumpeter, Posner views politics largely as a competition for votes among political elites.[32] More specifically, democracy is "a method by which members of a self-interested political elite compete for the votes of a basically ignorant and apathetic, as well as determinedly self-interested, electorate."[33] Posner insists that this form of democracy is legitimate exactly because of its pragmatic consequences: it seems to work. And the Supreme Court's exercise of judicial review is legitimate for the same reason: it is pragmatically effective. "[L]egitimacy is acceptance, and acceptance [by the American people] is … based on practical results—on delivering the goods."[34] Thus, Posner does not pretend that pragmatic democracy logically entails pragmatic adjudication; to the contrary, he admits that "judicial

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[28]*Id*. at 130.

[29]*Id*. at 131.

[30]*Id*. at 132 (quoting Amy Gutmann & Dennis Thompson, Democracy and Disagreement 346 (1996)).

[31]Posner, Law, *supra* note 5, at 131. For instance, Posner writes that deliberative democracy "hopelessly exaggerates the moral and intellectual capacities, both actual and potential, not only of the average person but also of the average official (including judge)." *Id*. at 144.

[32]Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (1942).

[33]Posner, Law, *supra* note 5, at 16; *see id*. at 144 (describing pragmatic democracy).

[34]*Id*. at 234.

enforcement of the Constitution truncates rather than vindicates democratic choice."[35] Regardless, from Posner's pragmatic perspective, the effectiveness and widespread acceptance of pragmatic judicial review establishes its "democratic legitimacy."[36]

Finally, despite Posner's emphasis on the Court's political power, he insists that Supreme Court decisions are "lawlike" in two ways.[37] First, though the justices must be *political*, they need not be *partisan*. Because they are appointed for life, justices are not pressured, as are legislators, to hew to the party line; they do not fret about the party support needed for reelection. "Democratic and Republican Justices are much less Democratic and Republican than their counterparts in elected officialdom, often to the chagrin of the appointing Presidents."[38] Thus, Posner concludes, "[n]onpartisanship, unlike ideological neutrality," is not only "an attainable ideal," but is also "the cornerstone of a realistic conception of the 'rule of law'—a concept, a practice, of enormous social value."[39] Second, Posner asserts that political justices can still be impersonal. We can expect a justice to "set to one side the personal characteristics of the litigants."[40] Posner applauds this expectation as both "realistic" and "invaluable." "Justice is blindfolded in this way in order to prevent judges from being swayed by the politics, personalities, connections, etc., of the litigants—for law administered by judges swayed in those ways does not provide an adequate framework for an orderly and prosperous society."[41]

To illustrate, what are the ramifications of pragmatic adjudication for the issue of abortion? In 1973, *Roe v. Wade* held that the constitutional right of privacy protects a woman's

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[35]*Id*. at 232.

[36]*Id*. at 208.

[37]Posner, Foreword, *supra* note 5, at 75.

[38]*Id*.

[39]*Id*. at 75-76.

[40]*Id*. at 76.

[41]*Id*.; Posner, Law, *supra* note 5, at 284-85.

interest in choosing whether to have an abortion until viability (through the first two trimesters of a pregnancy).[42] Posner accentuates that *Roe* was unequivocally "a legislative judgment."[43] Of course, from Posner's perspective, many constitutional decisions are legislative or political decisions; that fact alone does not reflect on a case's legitimacy. But Posner criticizes *Roe* on pragmatic grounds. Even if the justices contemplated the consequences likely to flow from its decision, they apparently "ignored an important consequence—the stifling effect on democratic experimentation of establishing a constitutional right to abortion."[44] *Roe* precluded state legislatures from trying diverse types of restrictions on abortions and examining the varied social and political results. According to Posner, *Roe* was a "bad pragmatic" decision because "the Court's pragmatism was one-sided."[45] Unsurprisingly, those states that maintained strict legislative prohibitions against abortion in 1973 are the same states where women today find it difficult to procure an abortion "because of hostility [and] intimidation."[46]

B. Dworkin and Principled Adjudication

Like Posner, Dworkin distinguishes two forms of democracy—rule-bound and principle-bound—which roughly correspond with Posner's democratic types. In rule-bound communities, on the one hand, individuals have "antagonistic interests or points of view."[47] Individuals (and interest groups) engage in political negotiations with others in an effort to craft communal rules that favor their respective positions. Politics is all about consequences: "each person tries to plant the flag of his convictions over as large a domain of power or rules as possible."[48] In a

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[42]410 U.S. 113 (1973).

[43]Posner, Law, *supra* note 5, at 124.

[44]*Id*. at 125.

[45]*Id*.

[46]*Id*.

[47]Dworkin, Empire, *supra* note 6, at 210.

[48]*Id*. at 211.

principle-bound community, on the other hand, individuals "accept that they are governed by common principles, not just by rules hammered out in political compromise."[49] The mutual commitment to principles generates a different type of politics. Politics becomes "a theater of debate about which principles the community should adopt as a system, which view it should take of justice, fairness, and due process."[50] Dworkin unequivocally favors a politics of principles as the higher form of politics.[51]

Legal concepts, Dworkin continues, are political concepts. Legal and judicial disputes and, more broadly, legal theories "cannot sensibly be understood as linguistic analyses, or neutral accounts of social practices."[52] Instead, legal disputes and theories constantly question "what the law is" and "what turns on" the various views of the law.[53] "And all this is deeply, densely political."[54] Thus, political morality is central to the law; it is, particularly, at "the heart of constitutional law."[55] And when Dworkin asserts that legal concepts and theories are political, he refers, of course, to a politics of principles. From Dworkin's standpoint, then, adjudication and jurisprudence are interpretive practices. They require an interpreter—a Supreme Court

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[49]*Id*.

[50]*Id*.

[51]Bernard Crick gives a more traditional definition of politics.

> Politics … can be simply defined as the activity by which differing interests within a given unit of rule are conciliated by giving them a share in power in proportion to their importance to the welfare and the survival of the whole community. And, to complete the formal definition, a political system is that type of government where politics proves successful in ensuring reasonable stability and order.

Bernard Crick, In Defence of Politics 22 (2d ed. 1972).

[52]Ronald Dworkin, *A Reply by Ronald Dworkin*, *in* Ronald Dworkin and Contemporary Jurisprudence 247, 254 (Marshall Cohen ed., 1983).

[53]*Id*. at 256.

[54]*Id*.

[55]Dworkin, Freedom, *supra* note 6, at 2.

justice, let's say—to impose a purpose (or principle) on legal practice to make it "the best possible."[56] But the interpreter cannot impose any purpose whatsoever; rather, the "history or shape" of prior legal practice "constrains the available interpretations."[57] Interpreters (justices) can and do disagree about how to cast specific legal concepts or broader theories of law so that they become "the best [they] can be."[58] For instance, concepts like liberty and democracy "function in ordinary thought and speech as interpretive concepts of value: their descriptive sense is contested, and the contest turns on which assignment of a descriptive sense best captures or realizes that value."[59]

Dworkin's depiction of adjudication as an interpretive practice leads to his theory of law as integrity. This general theory of law strives "to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as [it is found] and the best justification of that practice."[60] Judges, including Supreme Court justices, resolve disputed legal claims by looking to two "dimensions" or factors: "fit and justification."[61] To answer a specific legal question, a judge must articulate and apply a principle that fits prior precedents and practices. If the judge applies a principle that does not fit—that disregards prior judicial precedents, let's say—then the community will have "dishonored its own principles."[62] If more than one principle fits the data of the past, then the judge must articulate a theory (of principle) that best justifies the particular realm of law (for instance, products liability law, or free speech law).[63] That is, the judge should

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[56]Dworkin, Empire, *supra* note 6, at 52.

[57]*Id*.

[58]*Id*. at 53; *see id*. at 87-90 (discussing judicial interpretation and disagreements); Dworkin, Robes, *supra* note 6, at 10-12 (discussing law as an interpretive concept).

[59]Dworkin, Robes, *supra* note 6, at 150.

[60]Dworkin, Empire, *supra* note 6, at 90.

[61]*Id*. at 255.

[62]*Id*. at 257.

[63]*See id*. at 444 n.20 (explaining how fit might not resolve some cases).

articulate a political and moral theory that places the prior practices into the best moral light. And in some cases, the judge might realize that he or she needs to ascend to a higher level of justificatory principles. The judge, for instance, might seek to justify, in the best moral light, all of tort law or all of constitutional law. Or the judge might go even higher and attempt to justify the entire legal system. Thus, based on the level of "justificatory ascent,"[64] legal theories might be "more or less ambitious."[65]

> The more ambitious try to find support for their conceptions of legality in other political values—or rather, because the process is not one-way, they try to find support for a conception of legality in a set of other, related, political values, each of these understood in turn in a way that reflects and is supported by that conception of legality.[66]

The most ambitious (or best) judges would aim for both "a vertical and a horizontal ordering" of the legal system.[67] Precedents, rules, and principles would all be coherently integrated and justified.[68]

How would Dworkin resolve *Roe v. Wade*, the prototype of a hard case? He begins by examining prior cases that involved procreation, including most importantly *Griswold v. Connecticut*, which held that a constitutional right of privacy allows married couples to choose to use contraceptives.[69] Dworkin reasons that a "principle of procreative autonomy" not only fits

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[64]Dworkin, Robes, *supra* note 6, at 80.

[65]*Id*. at 170-71.

[66]*Id*. at 171.

[67]Dworkin, Seriously, *supra* note 6, at 117.

[68]"Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community," Dworkin explains. Dworkin, Empire, *supra* note 6, at 255. "They try to make that complex structure and record the best these can be." *Id*.; *cf*., Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument 7-8 (2005) (describing and criticizing Dworkin's approach).

[69]381 U.S. 479 (1965).

Griswold and its progeny but also best justifies those decisions from a moral standpoint.[70] "Procreative decisions are fundamental … because the moral issues on which a procreative decision hinges are religious. … They are issues touching the ultimate point and value of human life itself."[71] Given this, Dworkin adds that integrity requires the Court to enforce the principle of procreative autonomy in the abortion context as well.[72] While political prudence might have suggested that the Court uphold a right to use contraceptives without recognizing the more controversial right to choose abortion, integrity forbids such pragmatic "political compromises."[73] Indeed, instead of pragmatically retreating, Dworkin takes his argument, that the Court rightly decided *Roe*, to higher levels of justificatory ascent. Procreative autonomy embodies a higher principle of privacy, which "limits a state's power to invade personal liberty when the state acts, not to protect rights or interests of other people, but to safeguard an intrinsic value."[74] And climbing even higher, Dworkin finds that privacy is an aspect of a wider political-moral principle: the government must "treat everyone subject to its dominion with equal concern and respect."[75] The government, therefore, must "not infringe [individuals'] most basic

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[70]Dworkin, Freedom, *supra* note 6, at 102.

[71]*Id*. at 102-03.

[72]*Id*. at 102-04.

[73]*Id*. at 103.

[74]*Id*. at 101. Dworkin adds:

> A state may not curtail liberty, in order to protect an intrinsic value, (1) when the decisions it forbids are matters of personal commitment on essentially religious issues, (2) when the community is divided about what the best understanding of the value in question requires, and (3) when the decision has very great and disparate impact on the person whose decision is displaced.

Id. at 101-02.

[75]*Id*. at 73.

freedoms, those liberties essential, as one prominent jurist put it, to the very idea of 'ordered liberty.'"[76]

C. Adjudication and Politics

Despite the tensions between Posner's and Dworkin's respective approaches, they both view adjudication as politics writ large. To be sure, Dworkin's theory of adjudication is not as conspicuously political as Posner's for at least two reasons. First, Posner's position is transparent: in no uncertain terms, he declares that Supreme Court decision making is expansively political. Dworkin's arguments are far more complex; discerning the elements of Dworkin's multilayered philosophical contentions requires greater degrees of perspicacity and effort. Second, the political elements of Posner's theory can be readily grasped because Posner invokes a familiar type of democratic politics that has predominated in the United States since World War II. Posner explicitly follows Joseph Schumpeter, but Schumpeter was merely one of numerous political theorists who articulated various forms of pluralist democracy during the postwar years. Pluralist democratic theories maintained (and still maintain) that politics is about the pursuit of self-interest. Democracy is a set of processes that structures how individuals and interest groups push, negotiate, and compromise in their struggles to satisfy their preexisting desires.[77] Dworkin rejects this now commonplace concept of democratic politics (at least in adjudication), but he does not repudiate politics; rather, he articulates a different form of democratic politics, a politics of principles. Thus, he unequivocally declares that law must be a "political enterprise."[78] "[A]n interpretation of any body or division of law … must show the

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[76]*Id*. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

[77]*E.g.*, Robert A. Dahl, Democracy and its Critics (1989); Robert A. Dahl, A Preface to Democratic Theory (1956); *see* Stephen M. Feldman, Free Expression and Democracy in America: A History (University of Chicago Press, forthcoming 2008) (describing the historical development of pluralist democracy); Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. Pa. J. Const. L. 47, 57-62 (2006) (same).

[78]Ronald Dworkin, *Law as Interpretation*, *in* The Politics of Interpretation 249, 264 (W.J. Thomas Mitchell ed., 1983).

value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve."[79] For this reason, Dworkin calls for "a *fusion* of constitutional law and moral theory"[80]—where moral theory encompasses "political morality"[81] and "political theory."[82] Law and politics must be joined. Unsurprisingly, then, critics from both the political right and left attack Dworkin for advocating "judicial lawmaking"[83]—that is, "judicial legislation—judges making law, not interpreting it."[84]

So, no less than Posner, Dworkin advocates for an adjudicative politics writ large. The differences between Posner and Dworkin lie largely in their distinctive conceptualizations of politics. To Posner, politics requires a pragmatic emphasis on future consequences. Politics is governed by interest, not principle. Moral philosophy and abstract theory are mostly irrelevant in Posner's world, "with its unillusioned understanding of human nature."[85] Thus, for Posner, Supreme Court adjudication should be no less pragmatic than is democratic politics.

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[79]*Id*.

[80]Dworkin, Seriously, *supra* note 6, at 149 (emphasis added).

[81]Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, *in* A Matter of Principle 119, 143 (1985).

[82]*Id*. Sotirios A. Barber and James E. Fleming, who interpret and follow Dworkin, prefer to talk of a fusion of constitutional law with "moral philosophy," though they define moral philosophy to include "political philosophy." Sotirios A. Barber & James E. Fleming, Constitutional Interpretation 29 n.42 (2007). They then assert that Dworkin "blurs" any possible distinction between moral philosophy and political philosophy "by speaking of normative questions of justification in constitutional interpretation as matters of 'political morality.'" *Id*. (citing Ronald Dworkin, A Matter of Principle 143-45, 165 (1985)).

[83]Keith E. Whittington, Constitutional Interpretation 41, 58 (1999).

[84]Barber & Fleming, *supra* note 82, at 95; *see* Robert Bork, The Tempting of America 214 (1990) (arguing that Dworkin's approach would empower judges "to force a better moral philosophy upon a people that votes to the contrary"); Whittington, *supra* note 83, at 54 (arguing that Dworkin advocates for "judicial activism"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 85 n.336 (1994) (arguing that, contrary to a method of fidelity, "Dworkin's method [apparently] would entail much more in the way of policymaking and principle-espousing discretion for the judge"). *See generally* Barber & Fleming, *supra* note 82, at 91-107 (discussing criticisms of Dworkin).

[85]Posner, Law, *supra* note 5, at ix.

Adjudication is not grounded on some higher principles or the requirements of democratic processes. Adjudication is legitimate precisely because it is pragmatic—it works and is widely accepted. Dworkin views politics contrariwise: principle, not interest, should govern. Dworkin's approach might not correspond with the currently predominant conception of democracy, but it nonetheless remains politics, albeit in a highly abstract and stylized form. To Dworkin, then, adjudication should be as principled as is democracy. Judges resolving concrete legal disputes often must advert to abstract political-moral principles and sometimes must ascend to the highest levels of moral and political theory. Adjudication and democracy must logically cohere in a government of integrity: adjudication is legitimate precisely because it harmonizes with a government of principles.[86]

Both Posner's and Dworkin's theories are important partly because they impugn traditional legal scholarship and its assumption that judicial decision making is distinct from politics. Legal scholars—like most judges and attorneys, as well as senators in Supreme Court confirmation hearings—usually assume that the justices resolve cases by analyzing and applying legal doctrines embodied in precedents, statutes, and the Constitution. Most legal scholars, Posner observes, continue "to pretend that the Justices are engaged in a primarily analytical exercise that seeks 'correct' answers to technical legal questions."[87] If a scholar wishes to criticize a specific Court decision, the scholar demonstrates either how the justices "got the law wrong," or perhaps even worse, how the justices followed their politics instead of the law.[88] By stressing that politics influences Supreme Court adjudication, both Posner and Dworkin

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[86]Posner recognizes the implications of Dworkin's broad definition of law. "When law is defined to include, under the rubric of 'principle,' the ethical and political norms that judges use to decide the most difficult cases, decision according to law and decision according to political preference become difficult, sometimes impossible, to distinguish in a society as morally heterogeneous as ours." Richard A. Posner, The Problems of Jurisprudence 22 (1990).

[87]Posner, Foreword, *supra* note 5, at 49.

[88]*Id*. at 34; *cf*., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) (arguing that the Court errs when it does not decide in accordance with neutral principles).

challenge "the way more familiar to lawyers, law professors, and judges."[89] Needless to say, though, if Posner and Dworkin are correct—if Supreme Court adjudication is politics writ large—then any Supreme Court nominee who declares that he or she will apolitically decide cases in accordance with the rule of law is either purposefully lying or naively ignorant.

II. Adjudication as Politics Writ Small

Despite their significance, Posner and Dworkin both seriously overstate their cases. Supreme Court adjudication is political, but it is politics writ small rather than writ large. Despite Posner's assertions, the rule of law is more than merely being nonpartisan and impersonal.[90] A judge, or more to the point, a Supreme Court justice, interprets legal texts, whether constitutional provisions, precedents, or otherwise, and usually applies the best interpretation to resolve specific cases. Courts decide cases in accordance with "authoritative texts," to use Posner's terminology.[91] Yet, legal interpretation is inherently political, whether at the Supreme Court or lower court level. When a justice interprets, let's say, the first amendment,

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[89]Posner, Foreword, *supra* note 5, at 33. Many contemporary law professors acknowledge that adjudication often is not mechanical. Judges (including Supreme Court justices) should follow legal rules, these contemporary law professors explain, but sometimes a rule is ambiguous or conflicts with other rules. In such cases, law professors admit, judicial decision making becomes more political. Judges must turn to policy considerations to fill the legal gaps or resolve the conflicts. Even so, these legal scholars still sharply separate law and politics. The influence of politics (or policy considerations) supposedly is neatly cabined: judges should turn to policy only if and when "the law runs out." Frederick Schauer, *Judging in a Corner of the Law*, 61 S. Cal. L. Rev. 1717, 1729 (1988); *cf*., Friedman, *supra* note 8, at 257-60 (criticizing traditional normative legal scholarship for ignoring politics).

[90]Posner's assertion, that we can reasonably expect a judge (including a Supreme Court justice) to disregard the personal characteristics of a litigant, is questionable. Empirical studies suggest that judges are often influenced by factors such as religion. *See* Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision Making*, 15 Wm. & Mary Bill Rts. J. 43, 45-52 (2006) (summarizing empirical research on the influence of religion). For instance, in one extensive study, the authors concluded: "In our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decisionmaking was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community." Gregory C. Sisk, et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St. L.J. 491, 614 (2004). In another study, the author identified factors that influence judges' decisions regarding gay rights. Daniel R. Pinello, Gay Rights and American Law (2003).

[91]Posner, Foreword, *supra* note 5, at 40.

the justice's political ideology necessarily shapes his or her understanding of the provision. Politics always contributes to judicial decision making, but this contribution does not engender bald political pronouncements, whether derived from pragmatic concerns or moral theorizing. In other words, Supreme Court decision making is usually politics writ small.[92]

A. On Interpretation

The interpretation of legal texts is never mechanical—never the mere implementation of a method that cuts directly to the truth of the text.[93] No justice, or lower court judge for that matter, can directly access some plain meaning supposedly embodied in a text. Rather, a justice always gleans textual meaning from her own perspective. And her perspective arises from a variety of sources, including cultural background, religious orientation, social position, economic wealth, partisan commitments, and political morality. To put this in Gadamerian terms, a justice can see or understand a legal text only from her interpretive "horizon," with political ideology—including pragmatic concerns and political morality—constituting one significant aspect of the horizon.[94]

As Hans-Georg Gadamer explains, an individual's horizon simultaneously enables and constrains her interpretation (or understanding) of a text. Each of us is socialized within certain communal traditions, which inculcate us with expectations, interests, and prejudices. Our expectations, interests, and prejudices—encompassing our political ideologies—open us to the text, give us an initial direction or outlook, and thus enable us to discern the text's meaning. Without our expectations, interests, and prejudices, the text would be a blank, without meaning.

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[92]*See* Friedman, *supra* note 8, at 333 ("Politics and law are not separate, they are symbiotic"). For a collection of essays emphasizing the intersection and interplay of law and politics in Supreme Court adjudication, see *The Supreme Court and American Political Development* (Ronald Kahn & Ken I. Kersch eds., 2006).

[93]The lack of a method that can guide interpretive or hermeneutic practices is the ironic point of Hans-Georg Gadamer's title to his book, *Truth and Method*. No method can reveal an objective truth or meaning for a text. Hans-Georg Gadamer, Truth and Method xxi, 295, 309 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989).

[94]*Id*. at 282-84, 302, 306.

We would not have a place to start (imagine trying to understand a text if you did not know any language). Yet, our expectations, interests, and prejudices also constrain our possible understandings of a text. One can see within the range of the interpretive horizon, but cannot see beyond the horizon's edge. When we turn to a text, we can perceive its meaning, but our perceptions are necessarily limited.[95]

If my interpretation of a specific text contravenes that of another interpreter, then I can try to persuade him or her of the correctness of my interpretation. Indeed, each interpreter might press his or her interpretation as the best, until and unless one is persuaded otherwise. We reasonably discuss textual meaning—we debate which meaning constitutes the best interpretation—even though we can never prove that one particular interpretation is necessarily right. While a right or best answer (or interpretation) might exist, it cannot be proven because textual meaning cannot be discovered through some mechanical or methodical process. In short, interpretation is not a mathematics problem. In Dworkin's words, there is "no algorithm" to ascertain the right answer.[96] Yet, the lack of an indubitable conclusion does not manifest a failure; rather, it reflects the nature of the interpretive process itself.[97]

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[95]For more extensive discussions of Gadamer's hermeneutics, see Georgia Warnke, Gadamer: Hermeneutics, Tradition, and Reason (1987); Joel C. Weinsheimer, Gadamer's Hermeneutics: A Reading of *Truth and Method* (1985); Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 Contemp. Pol. Theory 296, 301-03 (2005); Stephen M. Feldman, *Made For Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 Phil. & Soc. Criticism 51, 53-63 (2000). For applications of Gadamerian philosophy to jurisprudence, see Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 Mich. L. Rev. 166 (1996); Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 Iowa L. Rev. 661 (1991); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609 (1990); Francis J. Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. Rev. 523 (1988).

[96]Ronald Dworkin, *How Law is Like Literature*, *in* A Matter of Principle 146, 160 (1985).

[97]*See* Feldman, *supra* note 8, at 99-103 (discussing disagreements among interpreters). "[I]t is the law itself … on which a decision properly rests and on the basis of which, carefully articulated, it commands assent. A decision is not a proof; it does not afford certainty, and reasonable persons may disagree." Weinreb, *supra* note 68, at 92.

If this picture accurately depicts the process of legal interpretation, then why do lawyers and judges so often agree on the meaning of particular texts? Is not each interpreter locked within his or her own respective horizon or perspective? And if so, then how can there be easy cases, where most lawyers and judges agree on the result? The answer to these questions lies in the communal quality of interpretation. Each individual does not merely have his or her own private horizon of expectations, interests, and prejudices; rather, each person's horizon is engendered by the community's traditions, cultures, societal structures, and so forth. Thus, many lawyers and judges share overlapping horizons encompassing generally uncontested cultural values and societal practices. Lawyers and judges participate in the same or overlapping (legal) communities and consequently share traditions, which in turn generate similar expectations, interests, and prejudices.

The purpose of law school, to a great degree, is to acculturate a student—a would-be lawyer—to the traditions of the legal profession so that the student is imbued with the proper expectations, interests, and prejudices. The student will (or should) have learned the methods (or know-how) appropriate to discussing and resolving legal issues.[98] After a student finishes a course in constitutional law, for instance, the student will know that constitutional issues can be legitimately resolved by reference to, among other things, constitutional text, framers' intentions, and governmental structures, but not by reference to the Sunday comics. A student who attends pharmacy school instead of law school, meanwhile, will not be equipped with the know-how appropriate to interpreting legal texts in accordance with professional norms (though the pharmacy student will have the know-how to understand a doctor's instructions regarding pharmaceutical prescriptions). The pharmacy student might realize that reliance on the Sunday

[98] *See* Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 Law & Soc'y Rev. 135, 137 (2006) (emphasizing how law students are socialized).

comics would be inappropriate, but might not know that reference to the framers' intentions or governmental structures would be legitimate.[99]

B. The Institution of the Supreme Court in Relation to Legal Interpretation

Given Posner's and Dworkin's arguments that Supreme Court justices engage in politics writ large, one must ask why a justice should even bother interpreting 'relevant' legal texts. If the politics-writ-large thesis is valid, why would a justice not ignore the texts and vote according to her political ideology? In fact, such a scenario is possible. Justices are empowered to decide cases precisely because they are Supreme Court justices. That is, a justice's structural position—as a Supreme Court justice—within the institutions of our governmental system enables her to cast a vote in resolving a case before the Court. A justice is not empowered to vote because she is especially skilled at deciphering the best interpretation of a legal text (though such skill might have contributed to her appointment to the Supreme Court).[100] Consequently, in any particular case, a justice can disregard the relevant texts, or can disingenuously interpret the texts (not seeking the best interpretation), but still the justice is structurally (or institutionally) empowered to cast a vote. In such circumstances, the justice could vote based solely on political ideology.

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[99]Philip Bobbitt argues that judges can draw on six "modalities of argument" to decide constitutional cases legitimately:

> historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).

Philip Bobbitt, Constitutional Interpretation 12-13 (1991) [hereinafter Bobbitt, Constitutional Interpretation]; *see* Philip Bobbitt, Constitutional Fate (1982) (elaborating the modalities of constitutional argument). I do not agree with Bobbitt's suggestion that the six modalities of argument are, in a sense, a closed set. To me, the sources informing constitutional interpretation can always be contested.

[100]Justice Robert Jackson once wrote: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (quoted in Posner, Foreword, *supra* note 5, at 60 n.98).

While possible, such a scenario is unlikely. Why so? Why are justices likely to follow their best interpretive judgments of legal texts rather than casting them off in favor of a politics writ large? First, certain cultural traditions surround the structural position of a Supreme Court justice within the institution of the federal judiciary. These cultural traditions include professional norms and duties, which demand that justices identify and refer to relevant legal texts when deciding a case. Unsurprisingly, then, the justices not only discuss relevant precedents, statutes, and constitutional provisions in their judicial opinions, but they also discuss such doctrinal sources when in conference with each other.[101] The justices might feasibly write their opinions for public consumption, to help legitimate their decisions, but they do not debate the meanings of legal texts during post-oral argument conferences for public consumption—because the public is not present to observe the discussions.[102] Indeed, the justices often 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 made a difference.[103] My point here is not that the justices deliberate together, where one might change the mind of another. As Posner points out, the justices rarely influence each other during post-oral argument conferences.[104] Henry Hart's admonition that the justices must allow sufficient time for "the maturing of collective thought" was a legal-process "pipe dream," as Posner phrases it.[105] Regardless, the

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[101]*See* Lindquist & Klein, *supra* note 98, at 137 (emphasizing how the justices appear to take law seriously).

[102]*E.g.*, The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 415-17 (Del Dickson ed., 2001) (noting the discussions in *Mueller v. Allen*, 463 U.S. 388 (1983)).

[103]Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 Am. Pol. Sci. Rev. 305, 307 (2002); Paul Wahlbeck, et al., *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 Am. J. Pol. Sci. 294 (1998).

[104]Posner, Foreword, *supra* note 5, at 72-75.

[105]Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 100 (1959); Posner, Foreword, *supra* note 5, at 60; *see* Stephen M. Feldman, American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage 119-36 (2000) (explaining legal process scholarship).

fact that the justices make up their own minds, uninfluenced by the other justices, does not diminish the importance that the justices place on the relevant legal texts. They take seriously their professional duties to interpret precedents, statutes, and constitutional provisions.[106] Even Posner, at one point, admits that the justices "believe they conform" to a "law-constrained" conception of judicial decision making.[107]

Second, and most important, the justices (and other judges) rarely will experience any tension or conflict between their political views and their best interpretations of the relevant legal texts. Politics and interpretation are likely to coincide. This correspondence is not merely fortuitous; it arises because of the nature of the interpretive process itself. Political ideology shapes a justice's horizon, which in turn shapes the justice's interpretation of legal texts. In other words, a justice will usually experience a correspondence between her political views and her interpretive judgments exactly because political ideology constitutes an integral part of the interpretive process. Legal interpretation is politics writ small: politics ensconced within the interpretive process.

Given that legal interpretation is politics writ small, the likelihood of experiencing conflict between political and interpretive judgments is remote. The justices can sincerely fulfill their institutional duty to follow the rule of law, even as they simultaneously follow their own political ideologies. A crucial point here is that, for the most part, the justices are not disingenuous. Their best interpretive judgments *do* correspond with their political preferences exactly because their politics constitute a substantial portion of their interpretive horizons. For this reason, the justices rarely need to choose between their political ideologies and the best interpretive result (and following professional norms). They need not choose because they do not perceive a choice. They can have their cake and eat it too: they can follow the rule of law,

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[106]*See, e.g.*, Bobbitt, Constitutional Interpretation, *supra* note 99, at 12-22 (describing how judges can draw on six modalities of argument to decide constitutional cases legitimately).

[107]Posner, Foreword, *supra* note 5, at 52.

as they interpret it, without political compunction.[108] And because legal interpretation is politics writ small, Supreme Court decision making is rarely politics writ large. The justices are unlikely to contemplate baldly and boldly asserting their political ideologies because they would not see any (political) advantage in doing so. They can follow professional norms, sincerely interpreting legal texts, while simultaneously gratifying their political desires, albeit tacitly.[109]

C. The Implications of an Adjudicative Politics Writ Small for Dworkin and Posner

Dworkin would agree with my assertion that the justices typically follow their best interpretive judgments, even though (or because) those judgments are partly political. Whereas Posner separates law and politics—Supreme Court adjudication is political rather than legal—Dworkin includes politics within law—within the interpretive process. In his early writings, Dworkin explicitly emphasized this point, that political-moral principles were part of the legal system.[110] More recently, he has claimed that he no longer cares about this "taxonomic" question: whether principles should be categorized as law.[111] Even so, he still depicts 'law as integrity' as "theory-embedded," where political-moral principles and abstract theory are part of (or embedded inside) legal reasoning.[112] Thus, while he no longer finds the taxonomic question worth debating, his approach at least implicitly places political-moral principles and theory within the legal process. And precisely because of the prominence he affords to political morality, Dworkin contends that he "explains why both scholars and journalists find it reasonably easy to classify judges as 'liberal' or 'conservative.'"[113] Dworkin elaborates:

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[108]*Cf*., Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 Duke L.J. 1405, 1435 (2000) (emphasizing connection between law and social norms).

[109]Barry Friedman emphasizes that political scientists and legal scholars can fruitfully work together because of the intersection of law and politics. Barry Friedman, *Taking Law Seriously*, 4 Perspectives on Politics 261 (2006).

[110]Dworkin, Seriously, *supra* note 6, at 22-39.

[111]Dworkin, Robes, *supra* note 6, at 4-5, 264 n.6.

[112]*Id*. at 51-52, 56.

[113]Dworkin, Freedom, *supra* note 6, at 2.

> The best explanation of the differing patterns of [judges'] decisions lies in their different understandings of central moral values embedded in the Constitution's text. Judges whose political convictions are conservative will naturally interpret abstract constitutional principles in a conservative way, as they did in the early years of [the twentieth century]. Judges whose convictions are more liberal will naturally interpret those principles in a liberal way, as they did in the halcyon days of the Warren Court.[114]

Regardless of whether Dworkin places political morality inside or outside law, he ultimately exaggerates the role of political ideology, as does Posner. Of course, Dworkin and Posner describe politics in strikingly different ways. Dworkin, in a sense, tries to tame the interpretive process through his description of politics as principle. He recognizes that interpretation can never be reduced to a mechanical method, but he nonetheless attempts to channel it so that only certain aspects of the interpretive horizon are relevant to adjudication. In reality, an individual's interpretive horizon is a messy conglomeration of innumerable interrelated factors, including cultural background, social position, economic wealth, and political ideology. Yet Dworkin, when describing adjudication, wants to isolate political ideology as the primary if not sole determinant of a judge's interpretation of ambiguous legal texts. Moreover, he then wants to stylize political ideology so that it entails a judge's self-conscious contemplation of only political-moral principles and theory. But neither interpretive horizons, in general, nor political ideologies, more specifically, can be forced into these boxes. Dworkin's notion of politics as principle is too idealized to describe accurately the political motivations of either legislators or judges. For instance, many political scientists cite empirical studies to support an "attitudinal model" of Supreme Court adjudication:[115] researchers predict variations in Supreme Court decisions because the justices vote their "personal policy

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[114] *Id*. at 2-3.

[115] Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 64-69 (1993).

preferences."[116] As Jeffrey A. Segal and Harold J. Spaeth declare: "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."[117] Even if the attitudinal model overly simplifies the justices' voting behaviors,[118] Dworkin wrongly dismisses the influence crass political incentives like self-interest exert on adjudication.

But exactly because Dworkin reduces politics to principle, he then comfortably bloats its importance in adjudication, which he consequently transforms into politics writ large. Again, Dworkin's adjudication is not a politics writ large of preferences and interests, but a politics writ large of political-moral principles and theory. Dworkin, in effect, wants to magnify one element of political ideology—namely political morality—so that it not only overwhelms other political factors but also becomes the determinative force in adjudicating hard cases. Hence, Dworkin errs similarly to Posner. Posner casts Supreme Court adjudication as a politics writ large of pragmatic self-interest, and in doing so, he overlooks the actual though more limited role that pragmatic self-interest plays in legal interpretation. Likewise, Dworkin casts Supreme Court adjudication as a politics writ large of political morality, and in doing so, he overlooks the actual though more limited role that political morality plays in legal interpretation. Political ideology, including pragmatic self-interest and political morality, always contributes to a justice's

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[116]Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* Supreme Court Decision-Making: New Institutionalist Approaches 1, 1 (Cornell W. Clayton & Howard Gillman eds., 1999). Gillman and Clayton criticize the attitudinal model as being too simplistic. *Id*. at 3-7.

[117]Segal & Spaeth, *supra* note 115, at 65.

[118]Political scientists have never persuasively demonstrated that legal doctrine does not influence judicial decision making. Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 L. & Soc. Inquiry 465 (2001). To the contrary, some recent empirical studies conclude that legal doctrines (or "jurisprudential regimes") shape judicial decisions. Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 Law & Soc'y Rev. 827, 839 (2003); Richards & Kritzer, *supra* note 103, at 305-07; *see* Lindquist & Klein, *supra* note 98, at 148-57 (arguing that both political ideology and jurisprudential considerations influence justices).

interpretive horizon and thus always influences the interpretation of legal texts. But political ideology does not exhaust the interpretive horizon and does not completely determine adjudicative outcomes.

A justice's interpretive horizon encompasses many factors that ordinarily remain tacit, resting quietly in the background. These factors wield influence as the justice interprets the relevant legal texts, but the justice usually does not dwell on any specific factor. Instead, the justice focuses on interpreting the relevant legal texts as best as possible. To be certain, in any particular case, the justice could become aware of one such interpretive factor, could bring it from the background to the foreground, and could focus her analysis around this factor. But in doing so, the justice would risk grating against the professional norms of the judiciary. For example, religious orientation typically contributes to an individual's interpretive horizon, but a justice who overtly relied on religious beliefs to resolve a judicial dispute would clearly violate the expectations for the judicial office.[119] A justice who openly voted in accordance with pragmatic self-interest would likewise be criticized for disregarding professional norms. And a justice who overtly philosophized about a theory of political morality to decide a case (or cast a vote) would at least be questioned on professional grounds: the justice, critics would sarcastically charge, thought she was a professional philosopher rather than a lawyer and judge. In the words of Robert Bork, if the Constitution speaks ambiguously on a particular issue, such as whether the death penalty is permissible, then "[i]t does no good to dress the issue up as one in moral philosophy."[120] Philosophical theorists, like Dworkin, seek "the subversion of the law's foundations."[121]

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[119]*See* Feldman, *supra* note 90, at 45-52 (discussing empirical research showing that religion influences judges).

[120]Bork, *supra* note 84, at 214.

[121]*Id*. at 136.

Dworkin anticipates this potential critique of his argument. He describes this "professional objection" as follows:[122]

> 'We're just lawyers here. We're not philosophers. Law has its own discipline, its own special craft. When you go to law school, you are taught what it is to think like a lawyer, not a philosopher. Lawyers do not try to decide vast theoretical issues of moral or political theory. They decide particular issues at retail, one by one, in a more limited and circumscribed way. Their vehicles of argument are not the grand ones of the philosophical treatise, but the more homespun and reliable methods of close textual analysis and analogy.'[123]

Unsurprisingly, given Dworkin's anticipation of the 'professional objection,' he offers a response.

> [Reflective people reason] from the inside out. They begin with a particular concrete problem, and with reasons to worry whether they can defend their position against objections that it is arbitrary or inconsistent with their other views or convictions. Their own sense of intellectual, moral, and professional responsibility, therefore, dictates how general a 'theory' they must construct or entertain to put these doubts to rest. When their responsibility is particularly great—as it is for political officials—they might well think it appropriate to test their reflections against the more comprehensive and developed accounts of other people, *including moral and legal philosophers*, who have devoted a great deal of time to worrying about the issues in play. People turn to these sources not with the expectation of finding definitive answers—they know that the sources will disagree among themselves—but rather for rigorous tests of their convictions, for fresh ideas if they find that their convictions need repair, and, often, for theoretical guidance

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[122]Dworkin, Robes, *supra* note 6, at 65.

[123]*Id*.

they can follow in reworking their opinions into more accurate and better-supported convictions.[124]

In other words, Dworkin maintains that Supreme Court justices and other judges, as reflective people, sometimes not only rely explicitly on professional philosophers but do so out of judicial (professional) duty. This assertion borders on the absurd, as demonstrated by Posner himself. Even Dworkin acknowledges Posner's remarkable academic and judicial capabilities: "Judge Richard Posner—you know, the lazy judge who writes a book before breakfast, decides several cases before noon, teaches all afternoon at the Chicago Law School, and performs brain surgery after dinner."[125] Seemingly, if any contemporary judge could measure up to Dworkin's ideal judge, Hercules—that paragon of philosophically principled adjudication—it would be Posner.[126] Yet, Posner claims not even to try. Why does Dworkin allow his argument to drift into Neverland, into the realm of the ridiculous? In part, Dworkin loses his bearings because he does not recognize the distance between professional philosophers and other Americans, including most intellectuals. Philosophers themselves cultivate this chasmal distance. They have constructed a professional discipline that requires arcane knowledge supposedly beyond the ken of other individuals (read: those who have not attained a Ph.D. in philosophy). To be clear, philosophers are no different from other academic professionals in this regard.[127] But given the nature of academic professionalism, justices and other judges are unlikely to read philosophy journals for guidance in legal questions. Philosophy journals are written for professional philosophers, not for well-educated Americans. Dworkin's error here might be due to his own position within the academy. He has purposely become a public intellectual who tries to

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[124]*Id*. at 80 (emphasis added).

[125]*Id*. at 51.

[126]Dworkin, Empire, *supra* note 6, at 238-40 (discussing Hercules).

[127]*Cf*., Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. Legal Educ. 471, 473-87 (2004) (describing the law professor's development as an academic professional).

communicate with the intelligentsia (however small it might be).[128] He has published numerous essays, for instance, in the *New York Review of Books*.[129] And indeed, Dworkin's efforts have brought him more renown than is common for an academic, but it has simultaneously provoked some other professional philosophers to heap ad hominem scorn on him.[130] Regardless of Dworkin's own status as a public intellectual and professional philosopher, most of his contemporary academic philosophers are not frequently read by anyone other than philosophy professors and students. John Locke and David Hume have not published recently in the *Journal of Philosophy* or the *Philosophical Review*.[131]

To be clear, my criticism of Dworkin's approach as too stylized and extreme (and thus too unrealistic) does not mean that the Supreme Court justices and other judges should never consider political morality. Certainly, judges might contemplate the political morality and theory of the American governmental system to help resolve certain issues, including some constitutional questions.[132] For example, during the World War II era, the justices sometimes

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[128]*See* Richard Hofstadter, Anti-Intellectualism in American Life (1962) (describing the rise of American anti-intellectualism).

[129]Most of the essays in his book, *Freedom's Law*, were first published in the *New York Review of Books*. Dworkin, Freedom, *supra* note 6, at 391-92.

[130]*E.g.*, Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 Rutgers L.J. 165 (2004) (dismissing Dworkin as a has-been); *see* Michael Steven Green, *Dworkin v. The Philosophers: A Review Essay on Justice in Robes*, 2007 U. Ill. L. Rev. 1477 (discussing the widespread disdain for Dworkin's philosophy among professional philosophers).

[131]Much has been written about how law review articles have little influence today on judicial decision making. Feldman, *supra* note 127, at 487-89; Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 Okla. L. Rev. 659 (1998). Common sense suggests that philosophy publications would have even less influence on judges.

[132]Thus, my repudiation of Dworkin's approach does not translate into an endorsement of judicial minimalism, where judges would largely be limited to reasoning by analogy from case precedents. Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999). Sunstein's mistake is, in a sense, the mirror image of Dworkin's mistake. Both theorists seek to constrain justices in extreme ways: Dworkin by limiting the justices to abstract philosophical theorizing about political morality, and Sunstein by limiting them chiefly to narrow and shallow decisions based on stilted analogical reasoning.

contemplated the nature of democracy when deciding free-expression disputes.[133] In *West Virginia State Board of Education v. Barnette*, which held in 1943 that a public school's compulsory flag salute violated the first amendment, Justice Robert Jackson reasoned: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."[134] Even in those cases, however, the justices fell far short of the sustained philosophical theorizing that Dworkin encourages. The extraordinary former Harvard law professor Felix Frankfurter, more than any other justice, might have most nearly approached Dworkin's ideals. Dissenting in *Barnette*, Frankfurter argued that the judicial enforcement of first-amendment rights would ultimately undermine democracy.

> Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.[135]

But even Frankfurter would have disappointed Dworkin. As a justice, Frankfurter was limited to writing judicial opinions—albeit, in some instances, unusually long ones. He might occasionally rely on his notion of democratic theory, but he still could not write a treatise on political theory and morality. He had another case to decide, another opinion to write. And most frequently—as was true in his *Barnette* dissent—Frankfurter invoked democratic theory only to justify deferring

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[133]*See* Stephen M. Feldman, *The Theory and Politics of First-Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom*?, 8 U. Pa. J. Const. L. 431, 433-74 (2006) (discussing the interrelations of constitutional theory, constitutional politics, and Supreme Court adjudication during the 1930s and 1940s).

[134]319 U.S. 624, 641 (1943).

[135]*Id*. at 670-71 (Frankfurter, J., dissenting).

to a legislative determination, not to facilitate the judicial articulation of substantive political-moral principles.[136]

D. When Political and Interpretive Judgments Diverge

When the justices decide a case, they generally follow professional norms and sincerely attempt to interpret the relevant texts as best as possible. But, because interpretation is political, a justice's best interpretation of a text usually coincides with the justice's political ideology. Legal interpretation and, therefore, Supreme Court decision making are politics writ small. And because Supreme Court adjudication is politics writ small, the justices are unlikely to perceive a need to engage in politics writ large, whether of the Posnerian or Dworkinian variety. Yet, any individual justice can occasionally experience a conflict between interpretive judgment and political ideology. Politics always is part of interpretation, but it is never the whole of interpretation. Because politics contributes to but does not completely fill a justice's interpretive horizon, a justice might realize in any particular case that her interpretive judgment does not coincide with her political ideology, whether based on pragmatic concerns or political morality. In such cases, given the justice's institutional position—she is empowered to vote as a Supreme Court justice—she must choose between two paths: follow her interpretive judgment, or follow her politics. Evidence suggests that, in these rare situations, the justices have in different cases gone down both respective paths. So, for instance, as Posner acknowledges, "empirical studies of the voting patterns of Supreme Court Justices never find that [political] ideology explains anywhere near 100% of the Justices' votes."[137] Indeed, he believes "Justice Scalia when he says that his vote to hold flag burning constitutionally privileged was contrary to his legislative preferences."[138] Posner suggests that the justices are most likely to disregard their political

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[136]*E.g.*, Colegrove v. Green, 328 U.S. 549, 552-56 (1946) (Frankfurter, J., plurality opinion) (reasoning that the nature of democracy renders the drawing of congressional district lines a political question and therefore nonjusticiable).

[137]Posner, Foreword, *supra* note 5, at 49.

[138]*Id*. at 50 (citing Texas v. Johnson, 491 U.S. 397 (1989)). Posner also believes "Justice Thomas when he says he wouldn't vote for a law criminalizing homosexual sodomy even as he

inclinations (and thus follow their interpretive judgments) in cases involving relatively "trivial [political] issues."[139] "No one (except, naturally enough, the two military veterans on the Supreme Court—Chief Justice Rehnquist and Justice Stevens—both of whom dissented in the flag-burning cases) could get excited over flag burning."[140] And, to be sure, if one were to target a recent case where the justices seemed most obviously to follow their politics instead of their interpretive judgments, it would be *Bush v. Gore*, where the political stakes were momentous. In a five-to-four decision, the five most conservative justices voted together, relying on a novel equal protection argument to hold in favor of George W. Bush, thus effectively installing him as President.[141]

Two points about such cases—when interpretive judgments and politics diverge—should be emphasized. First, to identify a case when a justice's interpretive judgment and political ideology conflicted will always be problematic. A researcher cannot know for certain what constituted a justice's best interpretive judgment. The researcher, like anybody else, can only interpret the legal materials to arrive at his or her *own* best interpretive judgment—a process which is never mechanical—and then the researcher must conjecture about whether the justice would have arrived at the same conclusion (given the justice's known political-interpretive propensities). A justice's declarations about such conflict might be helpful in identifying cases, yet a researcher should be skeptical, given that such declarations will often be self-serving. A justice is far more likely to pronounce a conflict when he or she then claims to follow the law,

dissented from the decision invalidating such laws." *Id*. (citing Lawrence v. Texas, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting)). In *Planned Parenthood v. Casey*, Justices O'Connor, Kennedy, and Souter explained in their joint opinion that they would vote to reaffirm the "central holding" of *Roe v. Wade* despite "whatever degree of personal reluctance any of us may have, not for overruling it." Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992); Roe v. Wade, 410 U.S. 113 (1973).

[139]Posner, Foreword, *supra* note 5, at 50.

[140]*Id*.

[141]531 U.S. 98 (2000).

not politics—like Scalia in the flag burning case. After all, the justice will be proclaiming his own supposed neutrality and objectivity, his own professionalism—since he supposedly disregarded his political ideology. Meanwhile, in a case like *Bush v. Gore*, where the justices seem to follow their politics, they are unlikely to admit as much—because they then would be admitting they had contravened professional norms.[142]

Second, and most significant, such cases of conflict will be rare. A justice's political ideology, as a constitutive component of her interpretive horizon, will lead the justice to interpret relevant legal texts congruously with her politics. Such correspondence between interpretive judgment and politics will, of course, seem serendipitous—isn't it funny how my interpretation of the Constitution so often fits my political ideology?—but it's not. It's built into the structure of the interpretive process itself. Unlike Dworkin's and Posner's respective depictions of adjudication as politics writ large, my description of adjudication as politics writ small does not unrealistically twist or stylize judicial decision making. Instead, Supreme Court adjudication as politics writ small accounts for the contributions of political ideology inherent within the interpretive and judicial processes.[143]

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[142]For a more extensive discussion of cases of conflict, see Feldman, *supra* note 8, at 110-16.

[143]*See* Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, *reprinted in* There's No Such Thing as Free Speech and it's a Good Thing, Too 200 (1994) (criticizing Posner for moving from a pragmatist philosophy to a pragmatist program that advocated for the Court to decide in a pragmatist fashion). A recent empirical study of the federal courts of appeals supports the thesis that adjudication is politics writ small. The authors concluded that "in some contexts, [judges'] political commitments very much influence their votes." Cass R. Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 350 (2004). Yet the authors add: "But this is only part of the story. It would be possible to see our data as suggesting that most of the time, the law is what matters, not ideology." *Id*. at 336. The authors emphasize, in particular, "the disciplining effect of precedent and law—a factor that might be labeled 'professionalism,'" as well as the influence of "legal and political culture." *Id*. The authors expanded their discussion in Cass R. Sunstein, et al., *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006). *See generally* Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 Cornell L. Rev. 873 (2008) (reviewing Frank B. Cross, Decision Making in the U.S. Courts of Appeals (2007)) (discussing empirical research showing that political ideology moderately affects judicial decision making). For additional empirically-grounded discussions focusing on the interplay of doctrine and politics in the lower courts, *compare* James C. Brent, *An Agent and Two Principals:*

E. A Source of Disagreement Between Posner and Dworkin

Posner and Dworkin both depict adjudication as politics writ large, yet ironically, each conceives of adjudicative politics in a way that precludes his counterpart's approach. Posner recommends that Supreme Court justices resolve cases pragmatically, deciding so as to achieve the best consequences. From Posner's vantage, Dworkinian political-moral theorizing should not and, in fact, cannot guide adjudication. "[T]he analytical tools employed in academic moralism—whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or reflective equilibrium, or some combination of these tools—are too feeble to override either narrow self-interest or moral intuitions."[144] Consequently, Posner observes, "academic moralism is helpless when intuitions clash or self-interest opposes, and otiose when they line up."[145] Indeed, according to Posner, political-moral theorizing not only is irrelevant to adjudication but also is extraneous to moral judgments.[146] Dworkin is no less harsh in his criticism of Posner. Principled adjudication, Dworkin insists, must uphold law as integrity. But in Posner's pragmatic adjudication, as disparaged by Dworkin, "the truth of propositions of law is a wasteful distraction from the goal that [judges] should pursue single-mindedly, which is the improvement of their political community."[147] Ultimately, Posner's "pragmatism comes to nothing" precisely because it lacks the grounding of a political-moral theory.[148] Although Posner "insists that

U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act, 27 Am. Pol. Q. 236 (1999) (suggesting that traditional legal arguments have greater influence on lower court judges than on Supreme Court justices) *and* Gillman, *supra* note 118, at 481-82 (mentioning research that suggests precedents have greater influence on lower courts than on Supreme Court) *with* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal For Improving American Justice*, 99 Colum. L. Rev. 215, 217-18 (1999) (emphasizing that empirical evidence also supports the view that political ideology strongly influences lower court decision making).

[144]Posner, Theory, *supra* note 5, at 7.

[145]*Id*.

[146]*Id*. at 3.

[147]Dworkin, Robes, *supra* note 6, at 23.

[148]*Id*. at 24.

judges should decide cases so as to produce the best consequences," Dworkin writes, "he does not specify how judges should decide what the best consequences are."[149]

Posner and Dworkin are each driven to describe an adjudicative politics writ large and simultaneously to denounce the other's approach because in part they fail to recognize that adjudication is politics writ small. In fact, while both challenge the law-politics divide commonly assumed in traditional legal scholarship, they both nonetheless retain remnants of that persistent dichotomy. Posner, recall, suggests that lower court judges typically are "tethered to authoritative texts," unless the law happens to be "uncertain and emotions aroused." Whereas Supreme Court decisions are to a great degree "lawless"—the justices vote according to pragmatic political considerations—lower court judges decide according to the law.[150] Posner, it seems, believes that in the proper circumstances legal interpretation and adjudication can, in effect, be mechanical and apolitical.[151] Dworkin's retreat to the law-politics dichotomy is less obvious. First, he banishes pragmatic politics from adjudication. Only his highly stylized politics of principles is allowed into the realm of law.[152] Second, he maintains that concepts can

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[149]*Id*.

[150]Posner, Foreword, *supra* note 5, at 41.

[151]Posner says little directly about how lower courts decide cases. Yet, his comparisons between Supreme Court and lower court decision making connotes an unmistakable contrast: the Supreme Court is political writ large, while the lower courts apply the law. For instance, Posner writes:

> The adjudication of constitutional cases at the Supreme Court level is dominated by cases in which the conventional sources of legal authority, such as pellucid constitutional text or binding precedent … do not speak in a clear voice. If they did, the Court would rarely have to get involved in the matter; it could leave it to the lower courts.

Posner, Foreword, *supra* note 5, at 42-43.

[152]Whereas Dworkin favors the moral politics of a principle-bound community to the pragmatic politics of a rule-bound community, he does not deny the possibility of pragmatic politics. Rather, he bars pragmatic politics from *adjudication* while allowing it in the *legislative* arena. In adjudication, Dworkin sharply distinguishes principles from policies. By following law as integrity, judges should apply principles, but judges should never decide according to policy considerations. Dworkin's effort to cabin policy concerns, to separate policies from the political ideology of principles, further illustrates how he tries to stylize politics to an extreme. Brian Leiter claims that "after Neil MacCormick's seminal *Legal Reasoning and Legal Theory*

be understood in a "preinterpretive sense," which is descriptive rather than normative.[153] Thus, we can discuss a preinterpretive concept of law that is "fairly uncontroversial."[154] Like Posner, then, Dworkin seems to believe that in certain circumstances we can understand concepts immediately or directly—that one's interpretive horizon, in general, and political ideology, more specifically, do not necessarily come into play and render meanings disputable. Apparently, Dworkin's assertion of a preinterpretive sense is in tension with his implicit taxonomic placement of political-moral principles within the legal process itself.[155] Perhaps partly for that reason, he qualifies the notion of a preinterpretive sense by acknowledging that "some kind of interpretation is necessary even at [the preinterpretive] stage" of understanding.[156] But simultaneously, he peppers his discussion with phrases suggesting that understanding can sometimes be prior to interpretation, that understanding can be apolitical, culturally neutral, and non-normative. He refers, for instance, to the "brute facts of legal history"[157] and to the "raw data" of preinterpretation, as if a judge could directly access historical precedents and doctrinal rules without interpreting them.[158]

and John Bell's *Policy Arguments in Judicial Decisions*, Dworkin quietly abandoned this wildly implausible claim [distinguishing policies from principles]." Leiter, *supra* note 130, at 172-73 (citing John Bell, Policy Arguments in Judicial Decisions (1983); Neil Maccormick, Legal Reasoning and Legal Theory (1978)). Yet, Leiter is clearly wrong on this ground. Both MacCormick and Bell published well before Dworkin published *Law's Empire* in 1986. Yet, in that book, Dworkin explicitly reaffirmed his earlier distinction between principles and policies. Dworkin, Empire, *supra* note 6, at 221-23, 243-44, 438 n.30; *see* Dworkin, Seriously, *supra* note 6, at 22 (distinguishing principles and policies).

[153]Dworkin, Empire, *supra* note 6, at 105.

[154]*Id*. at 92.

[155]*See supra* text accompanying notes 110-113.

[156]*Id*. at 66.

[157]*Id*. at 255.

[158]*Id*. at 67. Likewise, Dworkin talks of the "raw behavioral data" of social practices, including legal practice. *Id*. at 52. "Dworkin infers, without noticing the inconsistency, that identifying the preinterpretive features of law must itself be an interpretive endeavor." Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 Okla. City U. L. Rev. 41, 123 (2002); *see* Stanley Fish, *Working on the Chain*

Ultimately, Posner and Dworkin, each in his own way, both appear to suggest that interpretation and therefore adjudication can sometimes and in some ways be apolitical. When the justices become political, then, they must do so self-consciously and aggressively—or so Posner and Dworkin assume. This assumption leads Posner and Dworkin to dwell on the adjudicative stance appropriate for a politically assertive Supreme Court justice: a politically pragmatic adjudication for Posner and a politically principled adjudication for Dworkin. Yet, contrary to their arguments for adjudicative politics writ large, legal interpretation and adjudication are always politics writ small. Justices decide cases by interpreting legal texts, and the understanding of a legal text always arises from within one's interpretive horizon, which enables as well as constrains interpretation. Given that a justice's interpretive horizon always shapes her understanding of legal texts, political ideology necessarily influences adjudication. There is no other way to decide cases in accordance with law.

III. Conclusion: Do Supreme Court Nominees Lie?

Returning to the political controversy surrounding the early Roberts Court that introduced this Essay, what are the implications of an adjudicative politics writ small? Did Roberts and Alito purposefully lie during their Senate confirmation hearings when they promised to remain faithful to the rule of law? Have they foregone their promises of fidelity to the Constitution so as to pursue their conservative political agendas?

While my description of Supreme Court adjudication as politics writ small does not justify the Roberts Court's decisions, it does defend the integrity of the justices. Roberts, Alito, and other Supreme Court nominees and justices sincerely proclaim that they decide cases according to the rule of law. They faithfully interpret the relevant legal texts, whether constitutional provisions, judicial precedents, or otherwise. Yet, the justices' interpretive conclusions always arise from within their respective political horizons. In most instances, then,

Gang: Interpretation in the Law and in Literary Criticism, *in* The Politics of Interpretation 271, 272-78 (W.J. Thomas Mitchell ed., 1983) (criticizing Dworkin for misunderstanding the structure of the interpretive process).

politically conservative justices like Roberts and Alito interpret legal texts in ways that correspond with their conservative outlooks. While this convenient coincidence between legal interpretation and politics might easily be attributed to disingenuousness—the justices determinedly and duplicitiously follow their politics despite their invocations of legal doctrine—such is not the case. Rather, the correspondence between interpretation and politics arises from the nature of the interpretive process itself.[159] Consequently, liberal justices would act no differently from Roberts and Alito: they would interpret legal texts in accordance with their political ideologies (reaching, therefore, liberal conclusions), all the while insisting earnestly and truthfully that they followed the rule of law.

[159] *See generally* John Ferejohn, *Positive Theory and the Internal View of Law*, 10 U. Pa. J. Const. L. 273, 302-03 (2008) (arguing that internal and external views of law are not necessarily inconsistent); Lori Ringhand, *"I'm Sorry, I Can't Answer That": Positive Scholarship and the Supreme Court Confirmation Process*, 10 U. Pa. J. Const. L. 331, 357-58 (2008) (arguing that political science scholarship, emphasizing the role of political ideology in Supreme Court decision making, should help shape the types of questions asked during Senate questioning of nominees).