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FIGHTING THE TOFU: LAW AND POLITICS IN SCHOLARSHIP AND ADJUDICATION

*Stephen M. Feldman**

ABSTRACT

Law professors and political scientists often aim to deny, control, or otherwise tame the dynamic interactions of law and politics that are integral to adjudication. The University of Chicago Law Review recently published an issue containing two such articles: Charles L. Barzun's *Impeaching Precedent* and Eric A. Posner and Adrian Vermeule's *Inside or Outside the System.* Both articles sought to police the boundary between law and politics, between the internal and external. The two articles, however, struggled to reach that shared goal in strikingly different and ultimately irreconcilable ways, both of which were unavailing. And that is my point: the law-politics dynamic in judicial decision making cannot be tamed regardless of how a scholar attacks it. In the future, scholars should devote more energy to exploring rather than subduing the law-politics dynamic.

INTRODUCTION

Law and politics dynamically interact in judicial decision making. Yet much legal as well as political science scholarship tries to deny, control, or otherwise tame the law-politics dynamic. The dynamic, though,

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cannot be subdued. Scholars, therefore, should devote more time and energy to exploring rather than taming the relations between law and politics in adjudication.

To explain and illustrate this thesis, I focus on two provocative articles recently published in a single issue of the University of Chicago Law Review.[1] Being one of the most prestigious legal journals, the Chicago Law Review often publishes interesting pieces, yet the juxtaposition of these two articles was extraordinary. They contradicted each other.[2]

In *Impeaching Precedent*, Charles L. Barzun argued that a litigant should be allowed to introduce evidence that would impeach or discredit judicial precedent. Impeaching evidence would show that the court, which had decided the precedent, had relied on improper or "extralegal" factors.[3] In *Inside or Outside the System?*, Eric A. Posner and Adrian Vermeule asserted that many law review articles are internally inconsistent. For example, Posner and Vermeule observed that numerous authors adopt an external view, such as a political science perspective, when criticizing a Supreme Court decision. Those same authors, though, switch to an internal view of the judicial process when recommending an alternative to the Court's decision.[4] Posner and Vermeule issued a call for consistency. If an author begins with an external perspective, then the author should maintain that perspective throughout his or her article.[5]

The conflict between Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside or Outside* was not obvious. To the contrary, at first glance, the articles appeared complementary. Both pieces concerned the nature of adjudication and scholarship analyzing adjudication. Both pieces distinguished between internal and external views of adjudication, and in so doing, both relied on the inveterate distinction between law and politics. A judge embedded within judicial and legal practices—that is, adhering to the internal view—supposedly applies the law and disregards politics when deciding a case. But a political scientist analyzing that judicial decision might instead follow an external view, focusing

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[1] Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013); Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013).

[2] Law journals occasionally publish symposium issues that contain conflicting pieces. But a symposium invites multiple authors to present divergent views about the same topic.

[3] Barzun, *supra* note 1, at 1630.

[4] Posner & Vermeule, *supra* note 1, at 1754-56.

[5] *Id.* at 1796.

on politics while disregarding the law.[6]

Given the overlap of the articles, the Law Review editors might have been unaware of the conflict.[7] If so, the editors probably became uncomfortable when Barzun subsequently submitted an essay criticizing the Posner and Vermeule article.[8] Barzun articulated multiple criticisms of *Inside or Outside*, but he eventually reached the crux of the matter. Posner and Vermeule's thesis threatened the coherence of Barzun's argument.[9] Ultimately, Posner and Vermeule's *Inside or Outside* contradicted Barzun's *Impeaching Precedent*, and Barzun sought to defend his position.[10]

I revisit the conflict but for different purposes. I have no interest in taking sides, in choosing between Barzun, on the one side, or Posner and Vermeule, on the other. Instead, I am interested in what the disagreement reveals about adjudication and legal scholarship in general. Specifically, the tension between Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside or Outside* suggests that scholarship analyzing adjudication often amounts to fighting the tofu.[11]

Some problems or issues are like tofu. One can wrestle with them, pushing and pulling this way and that, but the fight is futile. Despite struggling desperately to control the tofu, "you get nowhere."[12] A large segment of scholarship about judicial decision making seeks to tame the dynamic interactions of law and politics. Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside or Outside* fall into that category. Both articles sought to police the boundary between law and politics, between the internal and external. The two articles, though, struggled to reach that goal in strikingly different (and inconsistent) ways, both of which were unavailing. And that is my point: the law-politics dynamic

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[6] For discussions of the relation between law and politics, see Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics into Mayonnaise*, 12 GEO. J. L. & PUB. POL'Y 57 (2014) [hereinafter Feldman, *Alchemy*]; 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 (2005) [hereinafter Feldman, *Harmonizing*]; Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601 (2000).

[7] Of course, I am conjecturing about the editors' (collective) state of mind. The editors might have intentionally chosen to publish the articles together because they conflicted.

[8] Charles L. Barzun, *Getting Substantive: A Response to Posner and Vermeule*, 80 U. CHI. L. REV. DIALOGUE 267 (2013) [hereinafter *Response*].

[9] *Id.* at 286-90.

[10] *Id.* at 286-88.

[11] NATALIE GOLDBERG, WRITING DOWN THE BONES 25 (2d ed. 2005).

[12] *Id.*

in judicial decision making cannot be tamed regardless of how a scholar attacks it.

At the outset, it might help to explain certain terms, especially as they relate to the distinction between law and politics. Most important, and as will be elaborated, the fundamental law-politics distinction is more slippery than is often assumed. Some political scientists who study adjudication, particularly Supreme Court decision making, adopt a narrow definition of politics for purposes of their quantitative studies. They might maintain that a justice votes in accord with politics if he or she votes pursuant to his or her policy preferences or political attitudes.[13] The political scientist might then derive the justice's preferences, attitudes, or ideology from newspaper characterizations (during the nomination and confirmation process) or the political party of the appointing president.[14] Even so, the key distinction in many analyses of adjudication is between proper and improper considerations. That is, does the judge (or justice) consider proper or improper factors when deciding a case? The identification of proper and improper factors is typically derived from an internal rather than external viewpoint.[15] Arguably, within the practice of law and adjudication, judges are supposed to decide cases pursuant to legal rules or doctrines derived from case precedents, statutes, or other legal texts. A decision grounded on legal rules or doctrines is proper, but a decision based on other factors is improper.[16] What might those other factors be? Frequently, they are politics, narrowly defined, but they can be anything other than traditional

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[13] *See* Robert E. Goodin & Hans-Dieter Klingemann, *Political Science: The Discipline*, *in* A NEW HANDBOOK OF POLITICAL SCIENCE 3, 7-9 (1996) (discussing nature of politics); *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

[14] JEFFREY A. SEGAL ET AL., THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM 319 (2005) (relying on newspaper editorials); *see generally* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (study of Court of Appeals relying on party of appointing president). For an extensive discussion of different measurements of political ideology, see LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES (2013).

[15] *See* H.L.A. HART, THE CONCEPT OF LAW 86-88 (1961) (distinguishing internal and external views).

[16] *See* HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164-67 (1st ed. 1958) (arguing that judges should use "reasoned elaboration" to decide cases); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-35 (1959) (arguing that judges should decide constitutional issues pursuant to "neutral principles").

legal rules, doctrines, and texts.[17] For instance, a decision arising from the religious and cultural backgrounds of a judge would be improper.[18] Such a decision is improper precisely because it is based on factors that are supposedly external to the legal process. Proper and improper considerations, in other words, can also be called, respectively, internal (inside or proper) or external (outside or improper). Indeed, from the internal standpoint, any external consideration can be called political, loosely defined. If a Protestant judge consistently holds against Muslim Free Exercise complainants, that outlook can be deemed political, even if it is unrelated to the Republican or Democratic parties.[19] In this broad sense, law and politics are opposed, standing on their own respective sides of a crucial boundary. Meanwhile, scholarly analyses of judicial decision making can also be distinguished as internal or external. An internal analysis revolves around the rules and doctrines that are appropriate or proper considerations from the inside of legal and judicial processes. An external analysis focuses on factors that are deemed improper from the inside of legal and judicial processes. With regard to examinations of Supreme Court adjudication, a political scientist's study focusing on politics is an external analysis, while a law professor's study focusing on rules and precedents is an internal analysis.

I dwell on this terminology partly because Barzun, Posner, and Vermeule occasionally invoked distinctions that are misleading or beside the point. For instance, at one stage of his argument, Barzun maintained that he was not concerned with the law-politics dichotomy. Rather, he claimed, his analysis focused on the distinction between proper and improper considerations for adjudication.[20] He offered two examples of improper considerations: decisions based on "the judge's personal gain or in naked racial animus."[21] But Barzun's argument would become trite if he were truly focused on such a limited set of (obvious-

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[17] *See* Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 798 (2003) ("judges make choices in order to achieve certain goals.").

[18] *See* Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012) (lower court study concluding American Muslims were at disadvantage in Free Exercise cases).

[19] *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 271 (2005) (defining politics capaciously); *see generally* 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 (2004) (lower court study concluding judge's religion is most salient factor affecting outcome of religious freedom cases).

[20] Barzun, *supra* note 1, at 1644.

[21] *Id.* at 1645.

ly) improper considerations. How many cases involve a judge deciding in accord with a bribe? How many judges currently spout racist epithets from the bench? Nowadays, when a critic denounces a judge or court for deciding based on improper considerations, the critic most often accuses the judge or court of being influenced by politics, sometimes in subtle ways. Indeed, the predominant view among political scientists is that Supreme Court justices persistently vote or decide in accord with their politics rather than the law.[22] Consequently, elsewhere in *Impeaching Precedent*, Barzun repeatedly equates improper motivations with "political pressure."[23]

Part I of this Essay examines Barzun's *Impeaching Precedent.* Barzun sought to police the law-politics boundary but only after explicating the nature of legal argument and judicial decision making. He argued that extralegal factors can become legitimate legal considerations in certain limited circumstances. In the end, Barzun wanted to protect the sanctity of the law, properly defined. Part II turns to Posner and Vermeule's *Inside or Outside.* They, too, sought to police the law-politics boundary, but for a different purpose. Posner and Vermeule wanted to encourage consistency in scholarship. They argued that scholars who jump back and forth between law and politics, between the inside and the outside, slip into incoherence. Part III uncovers the tension between Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside or Outside.* Although both articles aimed to police the law-politics boundary—to tame the law- politics dynamic—Barzun's goal of shifting the boundary conflicted with Posner and Vermeule's goal of discouraging scholarly movement between the two sides, the inside and the outside. Part IV explores what the conflict between the two articles reveals about the nature of adjudication and legal scholarship. While both articles sought to subdue the law-politics dynamic that is integral to legal interpretation and adjudication, the conflict between the articles inadvertently highlighted the dynamic. The juxtaposition of the two articles underscores that legal scholars and political scientists are driven to try to tame the law-politics dynamic, yet such efforts must inevitably fail. The conclusion recommends that scholars devote more energy to exploring rather

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[22] SEGAL & SPAETH, *supra* note 13, at xv-xviii, 65; *see* Gabriel A. Almond, *Political Science: The History of the Discipline*, *in* A NEW HANDBOOK OF POLITICAL SCIENCE 50, 68-75 (Robert E. Goodin & Hans-Dieter Klingemann eds., 1996) (discussing behavioral revolution in political science).

[23] Barzun, *supra* note 1, at 1626, 1671; *see id.* at 1679 ("social or political pressure").

than subduing the law-politics dynamic.

I. PROTECTING THE SANCTITY OF THE LAW

Barzun's *Impeaching Precedent* danced around and over the boundary between law and politics, but in the end, was primarily concerned with the internal practice of law and adjudication. Barzun began his article by demonstrating how litigants sometimes use history as a clearly legitimate mode of legal argument.[24] Philip Bobbitt made this point previously. He argued that judges, when deciding constitutional issues, invoke six "modalities of argument," including text and doctrine, but also history.[25] Most obviously, old originalists maintain that historical evidence of framers' intentions demonstrates fixed constitutional meaning, while new originalists argue that historical evidence of the original public meaning of the constitutional text is determinative.[26]

Regardless, Barzun was not especially interested in the patently legitimate uses of historical evidence. Instead, he asked this specific question: "When deciding whether to follow one of its precedents, should a court consider historical evidence indicating that the precedent was decided on the basis of improper motivations or as the result of political pressure?"[27] As Barzun emphasized, such a use of historical evidence would be more controversial. Nevertheless, he offered several examples of when Supreme Court justices suggested this invocation of history would be appropriate.

For instance, in *Seminole Tribe of Florida v. Florida*, decided in 1996, the Court held that the Commerce Clause did not empower Congress to abrogate state sovereign immunity, protected under the Eleventh Amendment.[28] The majority opinion, written by Chief Justice William Rehnquist, relied on the 1890 decision, *Hans v. Louisiana*, as a foundation for interpreting the Eleventh Amendment.[29] The Eleventh

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[24] *Id.* at 1633-36.

[25] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991); *see* PHILIP BOBBITT, CONSTITUTIONAL FATE 9-24 (1982) (discussing historical arguments).

[26] *E.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) (using new originalism); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (using old originalism); *see* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 B.Y.U. J. PUB. L. 283, 284-86 (2014) (distinguishing old and new originalisms).

[27] Barzun, *supra* note 1, at 1626.

[28] Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996) (overruling Pa. v. Union Gas Co., 491 U.S. 1 (1989)).

[29] *Id.* at 54-55, 64-65, 67-69.

Amendment explicitly states that the federal judicial power "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[30] Thus, the Eleventh Amendment expressly bans suits based on diversity jurisdiction but does not expressly refer to federal question suits. Nevertheless, *Hans* unanimously held that the Eleventh Amendment bars federal question suits for damages brought against a state by its own citizens, as well as by citizens of other states and foreign nations.[31] Yet, as many scholars have argued, *Hans* is problematic from both theoretical and historical standpoints.[32]

Barzun's discussion of *Seminole Tribe* emphasized the history surrounding *Hans*, which animated an exchange between Rehnquist and Justice David Souter, who dissented in *Seminole Tribe*.[33] Souter's dissent, joined by Justices Ginsburg and Breyer, maintained that *Hans*, the key to the *Seminole Tribe* decision, could not justifiably be grounded on the Eleventh Amendment.[34] Why did the *Hans* Court reach an unprincipled conclusion? According to Souter, "history provides the explanation."[35] The Court's institutional weakness during the post-Reconstruction Era pressured the justices to decide incorrectly.[36] Hans claimed that Louisiana had violated the Contract Clause of the Constitution by changing state law to avoid paying interest on state bonds.[37] Louisiana replied that the Eleventh Amendment barred Hans, a citizen of the state, from suing. Like many former Confederate states, Louisiana had accumulated enormous debt during Reconstruction by selling bonds to raise capital. Before long, Louisiana and other states sought to repudiate their obliga-

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[30] U.S. CONST. amend. XI.

[31] Hans v. La., 134 U.S. 1 (1890).

[32] John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and 'Federal Courts,"* 81 N.C. L. REV. 1927 (2003).

[33] Barzun, *supra* note 1, at 1629-30.

[34] *Seminole Tribe*, 517 U.S. at 120-23 (Souter, J., dissenting). Souter stated that the Court decided *Hans* "on the basis of a principle not so much as mentioned in the Constitution." *Id.* at 120 (Souter, J., dissenting).

[35] *Seminole Tribe*, 517 U.S. at 120 (Souter, J., dissenting).

[36] *Id.* at 120-23 (Souter, J., dissenting).

[37] *Hans*, 134 U.S. at 2.

tions under these bonds.[38] When Reconstruction ended, after the Hayes-Tilden election compromise of 1877, federal troops withdrew from the South.[39] At that point, the federal government lacked the power to enforce its mandates in the face of state resistance. If the Court had upheld Hans's claim against Louisiana, the justices reasonably feared that the state would ignore the judicial decision and order.[40] In fact, as Souter noted, Louisiana's brief to the Court warned the justices that the state would remain "recalcitrant."[41] Souter therefore concluded: "So it is that history explains, but does not honor, *Hans*."[42]

Rehnquist's majority opinion in *Seminole Tribe* criticized Souter's method of argument. Rehnquist wrote: "The dissent disregards our case law [read: *Hans*] in favor of a theory cobbled together from law review articles and its own version of historical events."[43] In other words, Rehnquist denigrated the dissent because Souter did not limit his critique of *Hans* to the internal view of adjudication. Souter was not solely discussing legal rules or doctrines derived from case precedents, statutes, or other legal texts. From Rehnquist's perspective, Souter could legitimately criticize *Hans* for misreading the text of the Eleventh Amendment, to take one example, but Souter could not legitimately criticize *Hans* by adopting an external view of the Court's adjudicative process. In Rehnquist's words, Souter had provided an "extralegal explanation" of the *Hans* decision by exploring its historical and political context.[44] Ultimately, Rehnquist condemned Souter for doing "a disservice to the Court's traditional method of adjudication."[45]

Barzun sought to demonstrate why Souter's argument—as well as other similar political and historical arguments—should be deemed a legitimate method for impeaching or discrediting a precedent, such as

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[38] On the bonds and their repudiation, see ERIC FONER, RECONSTRUCTION 383-88 (1988); JOHN V. ORTH, JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 53–57 (1987); Gibbons, *supra* note 32, at 1969-78.

[39] For discussions of the 1877 compromise, see FONER, *supra* note 38, at 575-87; STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 162-63 (2008).

[40] "Given the likelihood that a judgment against the State could not be enforced, it is not wholly surprising that the *Hans* Court found a way to avoid the certainty of the State's contempt." *Seminole Tribe*, 517 U.S. at 121 (Souter, J., dissenting).

[41] *Id.*

[42] *Id.* at 122 (Souter, J., dissenting).

[43] *Id.* at 68.

[44] *Id.*

[45] *Id.* at 69.

Hans.[46] Barzun, that is, sided with Souter over Rehnquist. Barzun did not claim that political and historical discussions are always legitimate modes of legal or constitutional argument.[47] Barzun devoted a large chunk of his article to theoretical discussions of why and how stare decisis operates in order to discern when such discussions of politics and history should be relevant and legitimate.[48] Because law is a practice based "on sources of authority"[49] such as case precedents, Barzun concluded that a court, when weighing precedent, should consider political and historical evidence that bears on whether the earlier decision "was motivated by 'extralegal' considerations."[50] If, for example, evidence shows that improper extralegal considerations motivated the Supreme Court justices in an earlier decision, then that decision should carry less precedential weight. Hence, from Barzun's perspective, the *Hans* Court's political concerns about institutional weakness during the post-Reconstruction Era should legitimately bear on the strength of *Hans* as precedent—just as Souter maintained in *Seminole Tribe*.

Why did Barzun make this argument? He wanted to police the boundary between law and politics, between the inside and outside of legal argument. But his argument was multilayered. Although Barzun wanted to police the boundary, he wanted to move it first. Pursuit of his argument, Barzun stated, "requires breaking down the boundaries that sometimes divide various subdisciplines of law, including historical, doctrinal, and philosophical scholarship."[51] Hence, in *Seminole Tribe*, Rehnquist castigated Souter for using extralegal political and historical evidence, but Barzun explained why a court can sometimes legitimately consider such political and historical evidence. In a sense, Barzun sought to specify circumstances when a type of extralegal argument could be brought into the legal fold. The extralegal would become le-

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[46] "My claim, in short, is that the effort to historicize or impeach a past decision is a legitimate and potentially useful means of evaluating a decision's authority as a matter of precedent." Barzun, *supra* note 1, at 1631.

[47] Barzun stated that such political and historical discussions were relevant only "under certain circumstances." *Id.* at 1672. Thus, he explored when legal practice would "authorize" such considerations. *Id.* at 1655.

[48] *Id.* at 1645-72.

[49] *Id.* at 1680.

[50] *Id.* at 1672.

[51] *Id.* at 1631. Barzun admitted: "Adjudication—particularly constitutional adjudication, but not only there—is already rife with deep and pervasive disagreement, reflected in the frequent splits on the Supreme Court, about what counts as valid sources of law and methods of interpretation." *Id.* at 1675.

gal.[52] Barzun wanted to bring Souter's political and historical critique of *Hans* within the internal view of adjudication. But then Barzun would raise the fence again, and the boundary between the inside and the outside, between law and politics, would be intact. What political and historical evidence would be welcome into the sphere of legal argument? Evidence showing that improper considerations, such as political concerns, had motivated a court would be permissible. In other words, even though Barzun shifted the boundary between inside and outside, he ultimately reiterated that certain considerations were improper, outside, and extralegal. If Barzun had his way, he would transform the political and historical into the legal, but only in certain limited situations. As Barzun stated, "what is in dispute is precisely the character of legal argument."[53] He was not concerned equally with the respective natures of law *and* politics. In the end, he wanted to protect the inside, to uphold the sanctity of law.

II. MAINTAINING CONSISTENCY

In *Inside or Outside the System?*, Posner and Vermeule called for consistency in scholarship. They pointed out that "the behavioral premises of economics, psychology, and political science" have increasingly influenced legal scholars over the previous four decades.[54] For example, most economists assume that individuals act rationally in their own self-interest.[55] This assumption has animated much public law scholarship, particularly as manifested in public choice theory. Public choice theorists assume that all government officials, including members of Congress, rationally pursue their own self-interest. When legislators debate a bill, they calculate whether enactment will promote or diminish their chances for re-election.[56] They do not act in pursuit of a common good or public interest. By following this public choice approach, theorists

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[52] "[T]here is no reason why historicist interpretations that explain away whole lines of the Court's past doctrine as a product of social, political, or economic forces could not be central to its interpretive approach." *Id.* at 1680.

[53] *Id.*

[54] Posner & Vermeule, *supra* note 1, at 1796.

[55] ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 54 (1990); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3-4 (7th ed. 2007).

[56] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 1-11 (1991) (summarizing public choice theory); DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 126-32 (2012) (discussing public choice and rational choice theories).

have demonstrated that majority voting, as in democracy, is frequently an irrational means for making group decisions. Democratic decision making cannot maximize the satisfaction of individual interests, at least under certain conditions.[57] Thus, public choice theorists maintain that when the government legislates—for example, by imposing environmental regulations—the legislative decisions do not rest on a rational calculation of costs and benefits. They arise from interest group maneuvers rather than social utility.[58]

This type of scholarship is prototypical external scholarship—that is, it views the government process from the outside rather than the inside. Legislators might believe and declare that they are acting for the common good or on principle, but public choice theorists ignore such declarations (unless they regard the declarations as subterfuge intended to promote the legislator's self-interest). This external scholarship has obviously influenced Posner and Vermeule. Their own writings often reflect such an outlook.[59] Yet, in *Inside or Outside*, they also respect internal scholarship—that is, scholarship that adopts the viewpoints of actors on the inside of public institutions, including Congress and the judiciary. Hence, Posner and Vermeule do not categorically repudiate traditional law review articles whose authors discuss whether the Supreme Court justices correctly interpreted precedents and constitutional text.[60] In another coauthored article, which defended traditional (internal) legal scholarship from an external political science attack, Vermeule wrote: "Legal scholars often are just playing a different game than the

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[57] *See* FARBER & FRICKEY, *supra* note 56, at 38-62 (explaining Arrow's Theorem); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 1 (1982) (arguing social choice theory calls democracy into question).

[58] *E.g.*, Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing courts should not presume that legislative decisions are rational); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECONOMICS 3 (1971) (discussing regulatory capture). The economist Mancur Olson was a leader in exploring collective action problems in government. MANCUR OLSON, THE RISE AND DECLINE OF NATIONS (1982); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971).

[59] *E.g.*, MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006); ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION (2011); Eric Posner & Alan O. Sykes, *International Law and the Limits of Macroeconomic Cooperation*, 86 S. CAL. L. REV. 1025 (2013); Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417 (2010).

[60] Many law reviews are filled with such traditional legal scholarship. *E.g.*, Lawrence J. MacDonnell, *Integrating Use of Ground and Surface Water in Wyoming*, 47 IDAHO L. REV. 51 (2010); Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317 (1997).

empiricists play, which means that no amount of insistence on the empiricists' rules can indict legal scholarship—any more than strict adherence to the rules of baseball supports an indictment of cricket."[61]

The gist of Posner and Vermeule's article, *Inside or Outside*, is that when a scholar adopts a particular approach or method at the beginning of an article, he or she should consistently follow that same method throughout the entire article. When a scholar fails to maintain consistency, the scholar is guilty of the "inside/outside fallacy," to use Posner and Vermeule's terminology.[62] "The inside/outside fallacy occurs when the theorist equivocates between the external standpoint of an analyst of the constitutional order, such as a political scientist, and the internal standpoint of an actor within the system, such as a judge."[63] In articulating the inside/outside fallacy, Posner and Vermeule drew inspiration from economists who have identified a "determinacy paradox."[64] The determinacy paradox can arise whenever an analyst (or reformer) explicitly or implicitly views an institution from more than one perspective. Suppose the analyst criticizes the institution from perspective 1, which asserts that specific causal factors determine behavior within that institution. The analyst cannot switch to perspective 2 to recommend solutions if that latter perspective disregards the perspective 1 causal factors. Institutional actors could not suddenly or magically escape the power of the perspective 1 causal factors.[65] To the contrary, those factors determine behavior (according to perspective 1).[66] Posner and Vermeule want to import the determinacy paradox into legal theory, though they prefer the term, inside/outside fallacy, when discussing

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[61] Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153-54 (2002).

[62] Posner & Vermeule, *supra* note 1, at 1745-46.

[63] *Id.* at 1745.

[64] *Id.* at 1747.

[65] *See* Thráinn Eggertsson, *State Reforms and the Theory of Institutional Policy*, 19 REVISTA DE ECONOMIA POLITICA 49 (1999); Posner & Vermeule, *supra* note 1, at 1747.

[66] Posner and Vermeule described the determinacy paradox as follows:

> If the analyst endogenously derives the behavior of actors within the system for purposes of diagnosis, the analyst must also endogenize those actors' response to any advice the analyst might give. If the analyst stands outside the system for purpose of diagnosis, it is inconsistent to assume an internal standpoint for purpose of prescription, with the narrow exception of strictly instrumental advice about how rationally self- interested actors may best promote their interests.

Posner & Vermeule, *supra* note 1, at 1747.

law.[67]

When a legal scholar falls prey to the inside/outside fallacy, the reader is confronted with "a kind of methodological schizophrenia."[68] As Posner and Vermeule elaborated the typical article suffering from the inside/outside fallacy:

> [T]he diagnostic sections of a paper draw upon the political science literature to offer deeply pessimistic accounts of the ambitious, partisan, or self- interested motives of relevant actors in the legal system, while the prescriptive sections of the paper then turn around and issue an optimistic proposal for public-spirited solutions.[69]

For example, in *Ways of Criticizing the Court*, Frank H. Easterbrook argued, from an external (public choice) viewpoint, that the Supreme Court could not reach consistent outcomes in Establishment Clause cases because collective action problems infect any multi-member institution, such as the Court, that decides pursuant to majority voting.[70] If Easterbrook had concluded his article by advocating that one particular Establishment Clause position is best in principle and that, therefore, the Court should follow it, he would have been guilty of the in-

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[67] Posner and Vermeule's claim to draw insight from economics for the inside/outside fallacy underscores their leanings toward external views of the legal process. Going back to at least the 1930s, numerous scholars who have focused on law and judicial institutions, including law professors as well as political scientists, have examined the relationships between the internal and external views. John Dickinson, *Legal Rules: Their Function in the Process of Decision*, U. PENN. L. REV. 833 (1931); Feldman, *Alchemy*, *supra* note 6; Feldman, *Harmonizing*, *supra* note 6; Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65 (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter Gillman, *Idea*]; 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) [hereinafter Gillman, *What*]; Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 L. & SOC. INQUIRY 309 (2002); Whittington, *supra* note 6; *see* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001) (law professor and political scientist argue that quantitative study shows that Supreme Court decision making is based on both law and politics). In fact, at one point, Posner and Vermeule explained that they preferred the term inside/outside fallacy over the term determinacy paradox, because the former "underscores that, in such cases, the analyst confuses internal and external perspectives—traditionally a central issue for legal theory." Posner & Vermeule, *supra* note 1, at 1789 (citing H.L.A. Hart's classic distinction of the internal and external, HART, *supra* note 15, at 86-88).

[68] Posner & Vermeule, *supra* note 1, at 1745.

[69] *Id.*

[70] Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

side/outside fallacy.[71] Easterbrook's own external argument—that the justices cannot decide Establishment Clause issues consistently—precluded such a conclusion, which would be based on an internal viewpoint.

Posner and Vermeule focused on a more complex example, an article entitled *Separation of Parties, Not Powers*, co-authored by Daryl J. Levinson and Richard H. Pildes.[72] Levinson and Pildes emphasized that many constitutional scholars accept a Madisonian conception of separation of powers.[73] As James Madison explained in his *Federalist* essays, non-virtuous officials in each federal branch would seek to aggrandize power to their own respective branch.[74] Members of Congress would seek to protect and expand congressional prerogatives, while the president would seek to protect and expand executive branch powers. But the ambitions of Congress would offset those of the president, and vice versa. Institutional rivalries would prevent any one branch from accumulating excessive power and tyrannizing the people. But Levinson and Pildes argued that this description of separation of powers does not account for the significant role of political parties in our government system.[75] Levinson and Pildes draw on political science research to demonstrate that, in most contexts, an official's party, whether Democratic or Republican, is far more important than an official's branch of government. Loyalty to party, not loyalty to federal branch, motivates congressional and executive branch officials. More specifically, in a period of divided government, where Republicans control one branch and Democrats control the other, the two branches will frequently and strongly oppose each other. In these circumstances, separation of powers works roughly to check and balance the legislative and executive branches. Competition between parties, however, not between branches, produces this type of separation of powers. But in a period of unified government, where one party controls the presidency and both houses of Congress, then the two branches will generally support and cooperate with each other. In these instances, Congress will not strong-

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[71] Easterbrook did not make this mistake.

[72] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); *see* Posner & Vermeule, *supra* note 1, at 1755-59 (discussing Levinson and Pildes's article).

[73] Levinson & Pildes, *supra* note 72, at 2316-25.

[74] THE FEDERALIST NO. 10, at 77-84 (James Madison), No. 51, at 320-25 (James Madison) (Clinton Rossiter ed., 1961).

[75] Levinson & Pildes, *supra* note 72, at 2325-29.

ly oppose the president, nor vice versa. With unified government, in other words, separation of powers does not effectively check or balance the executive and legislative branches. Indeed, in times such as today, where we have highly polarized and ideologically united parties, unified government would shrink separation of powers to nothingness.[76]

In *Inside or Outside*, Posner and Vermeule agreed with Levinson and Pildes's insights into the functioning of separation of powers.[77] Even so, Posner and Vermeule were less interested in Levinson and Pildes's insights than in the structure of their article, *Separation of Parties, Not Powers*. Posner and Vermeule emphasized that Levinson and Pildes's "diagnosis rests on an external account of the system of partisan competition, one that draws upon political science and economics to explain the motivations of actors in the constitutional order."[78] Posner and Vermeule had no problem with that external diagnosis. Their concerns arose when, in the latter part of *Separation of Parties, Not Powers*, Levinson and Pildes began recommending "proposals for ameliorating the harms of unified government."[79] According to Posner and Vermeule, Levinson and Pildes switched to an internal perspective in this section of their article, and thus they tripped over the inside/outside fallacy.

For instance, Levinson and Pildes argued that, because ideologically united parties undermine the separation of powers, actions diminishing party unity would help restore effective checks and balances.[80] But Posner and Vermeule point out that *a person or group* has to take action to diminish party unity. The passive voice allows an author to avoid specifying the subject who takes such action, but the active voice requires the author to identify the acting subject.[81] Levinson and Pildes maintained that one way to diminish party unity would be to reduce the number of safe congressional districts. A safe district is one that is so full of either registered Republicans or registered Democrats that elec-

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[76] Levinson and Pildes "emphasize that the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party." *Id.* at 2315; *see* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005) (discussing polarization).

[77] Posner & Vermeule, *supra* note 1, at 1755-56.

[78] *Id.* at 1756.

[79] *Id.*

[80] Levinson & Pildes, *supra* note 72, at 2380-83.

[81] Posner & Vermeule, *supra* note 1, at 1758-59.

tion results are foregone conclusions.[82] Who, however, would act to reduce the number of safe districts? asked Posner and Vermeule.[83] In many states, the state legislature establishes congressional districting. Just like in Congress, though, ideologically united parties control many state legislatures. If one follows the external political science view, emphasizing party loyalty and power, then a state legislature has little incentive to draw district lines that would reduce the number of safe congressional districts.[84] To be sure, Levinson and Pildes argued that in a state with a referendum or initiative process, such as California, voters might be able to bypass the state legislature. Yet, this solution would work only in those states with such legislature-bypass procedures, and even in those states, only if the voters themselves were motivated to jump through the hoops needed to change the system.[85] In many states, then, change would not come unless state legislators wanted a change. Thus, insofar as Levinson and Pildes suggested that state legislators should act in accord with principle, so that separation of powers would be invigorated, they were switching to an internal view. And that was Posner and Vermeule's point: Levinson and Pildes's critique of separation of powers in our party-dominated system was based on an external view, but their prescriptions for improving separation of powers were based on internal views.

Levinson and Pildes also recommended that the Supreme Court adopt a "default rule" that would help invigorate separation of powers.[86] They explained that, in the post 9/11 cases, the Court had embraced "the Madisonian expectation that Congress will compete aggressively with the President for power and vigilantly monitor and check presidential decisionmaking."[87] Consequently, the Court broadly construed congressional actions as authorizing novel executive actions in the "war on terror."[88] But the Court, Levinson and Pildes pointed out, did not account for party cohesion in a time of unified government.

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[82] Levinson & Pildes, *supra* note 72, at 2380.

[83] Posner & Vermeule, *supra* note 1, at 1759.

[84] *See* Levinson & Pildes, *supra* note 72, at 2382 (discussing how California state legislators resisted pressure to switch to open primaries).

[85] *See id.* at 2382-83 (discussing changes implemented in California through an initiative, which was subsequently held unconstitutional in Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)).

[86] Levinson & Pildes, *supra* note 72, at 2354.

[87] *Id.* at 2351.

[88] *Id.* at 2351-52.

Thus, they recommended a default judicial rule that would account for the influence of political parties on the separation of powers:

> When it is not clear whether congressional statutes prohibit the executive action at issue or simply do not address it, and Congress is controlled by the President's political party, perhaps courts should follow [a rule] tilting toward prohibiting presidential action (particularly when that action amounts to a novel expansion of executive power).[89]

Such a rule would manifest an assumption that, in a unified government, the president can readily gain congressional support and approval.[90] Simultaneously, "the flipside of [this] default rule might be that courts should more generously construe statutes as supporting executive authority when government is divided."[91]

Once again, Posner and Vermeule criticized Levinson and Pildes for recommending a solution that depended on disregard for their initial external viewpoint. Levinson and Pildes's argument assumed that Supreme Court justices would adopt the recommended judicial default rule because of, in Posner and Vermeule's words, "public-spirited judging" rather than party loyalty.[92] The justices, that is, would supposedly seek to improve government functioning, particularly with regard to separation of powers. But Posner and Vermeule asked, "Why should the judges be any different?"[93] Much political science research, as Posner and Vermeule pointed out, demonstrates that party ideologies strongly influence judges, particularly Supreme Court justices.[94] For example, if the majority of justices are Republican appointees, then an analyst should not expect the Court to adopt a rule that would restrain a Republican president—whether it is called a default rule or otherwise. Posner and Vermeule observed: "If the system is structured and pervaded by partisan competition, as Professors Levinson and Pildes argue, then one cannot turn around and assume that the judges will be immune."[95]

Posner and Vermeule did not seek to repudiate Levinson and

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89 *Id.* at 2354.

90 *Id.*

91 *Id.*

92 Posner & Vermeule, *supra* note 1, at 1757.

93 *Id.*

94 *Id.*

95 *Id.* at 1757-58.

Pildes's entire argument. To the contrary, Posner and Vermeule appeared to admire and agree with Levinson and Pildes's external analysis of separation of powers. Party ideology and loyalty, in fact, wreak havoc on the Madisonian system of checks and balances. Posner and Vermeule aimed to encourage scholarly consistency. If an author—or co-authors, such as Levinson and Pildes—analyzes an institution and identifies a problem from an external standpoint, then the author should not prescribe a solution from a standpoint internal to the institution. If the author does so, then he or she is guilty of the inside/outside fallacy. Posner and Vermeule concluded on a bleak note: "It follows from what we have said that political science and law may have less to say to one another than many constitutional theorists currently suppose."[96] When law professors and political scientists attempt to enrich each other's understandings of government institutions, their "talk across disciplines constantly threatens to descend into incoherence."[97] Ultimately, then, Posner and Vermeule sought to police the boundary between law and politics, between the inside and outside. To them, the boundary was sharp and fixed. If a scholar started on one side of the line, then the scholar needed to stay on that side, at least for the duration of the particular article or book.

III. THE CONFLICT

The conflict between Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside or Outside* can now be uncovered. Barzun, on the one hand, and Posner and Vermeule, on the other hand, shared overlapping goals. They sought to police the boundary between law and politics, between the inside and outside. Their reasons for doing so, however, differed considerably. Barzun wanted to contest the boundary. He wanted to bring extralegal considerations within the legal realm, and then reconstruct the fence between the legal and political sides. Basically, he wanted to maintain the boundary but only after moving it. Posner and Vermeule had no interest in contesting the boundary between law and politics. To them, the boundary was clear. The law was on one side, on the inside of legal and judicial practices.

Politics was on the other side, on the outside of legal and judicial practices. The crux of their argument was that too many scholars jump

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[96] *Id.* at 1797.

[97] *Id.*

back and forth, between the two sides. When scholars did so, they were guilty of the inside/outside fallacy and rendered their arguments incoherent.

Barzun recognized that Posner and Vermeule's thesis threatened his argument. In *Getting Substantive: A Response to Posner and Vermeule*, Barzun criticized *Inside or Outside* in multiple interrelated ways.[98] I focus here on one key criticism because it eventually reveals the deep tensions between their respective arguments. Posner and Vermeule repeatedly claimed that "[n]othing in our argument is substantive, or empirical."[99] They claimed neutrality. They supposedly favored neither an internal view of legal and judicial practices, emphasizing adherence to the rule of law, nor an external view, emphasizing that judges follow their own self-interest or political ideologies. Posner and Vermeule merely wanted a scholar to choose one view and stick to it. Barzun, though, argued that Posner and Vermeule were disingenuous in claiming neutrality. They, in fact, favored the external view.[100]

Barzun was correct, to a degree. At several spots in *Inside or Outside*, Posner and Vermeule prioritized the external view. For instance, at one point, Posner and Vermeule suggested that even if judges believe they decide according to the rule of law or the public good, they do not necessarily do so. Political ideology is the puppeteer controlling the judge-marionettes. "[J]udges need not . . . subjectively experience themselves as casting votes along partisan lines; the mechanism operates behind the judges' backs, through bias rather than ill intentions."[101] Elsewhere, Posner and Vermeule stated: "[J]udges do not stand outside the system [of self-interested partisan action]; judicial behavior is an endogenous product of the system."[102] Yet, the thrust of *Inside or Outside* was unquestionably to plead for scholarly consistency, not to advocate in favor of an external (political science) view. Thus, even though Posner and Vermeule encouraged scholarly consistency, they were guilty of inconsistency. They sometimes adopted a neutral stance, neither favoring the inside nor the outside, but other times, they favored the outside.

Why did Posner and Vermeule occasionally prioritize the external

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[98] *Response*, *supra* note 8.

[99] Posner & Vermeule, *supra* note 1, at 1796. For similar statements, see *id.* at 1745, 1748-49, 1778, 1797.

[100] *Response*, *supra* note 8, at 273-74, 284, 288.

[101] Posner & Vermeule, *supra* note 1, at 1757.

[102] *Id.* at 1764.

view despite aiming for neutrality? Because they understood the external view as a type of trump card. Once it is played, it defeats all other cards on the table, regardless of their suit or rank. The external view is the joker that changes the entire game.[103] From Posner and Vermeule's perspective, once a scholar acknowledges that any government officials pursue self-interest, then the scholar must assume that all government officials pursue self-interest. When they criticized Levinson and Pildes's *Separation of Parties, Not Powers*, Posner and Vermeule argued that if Levinson and Pildes maintained that some legislators pursue self-interest or partisan advantage, then Levinson and Pildes must assume that all legislators act similarly. A scholar should not assume that Congress functions in accord with party ideologies but that state legislatures pursue higher principles.[104] Yet, Posner and Vermeule pushed their argument further by crossing institutional lines. They argued that if Levinson and Pildes maintained that legislators pursue self-interest, then Levinson and Pildes must assume that judges do so also. If government officials in one institution follow party ideology, then officials in all institutions necessarily follow party ideology. Consequently, if members of Congress follow partisan lines, Supreme Court justices do the same.[105]

As Barzun recognized, this cross-institutional argument was problematic.[106] Different institutions can operate differently. In fact, one can distinguish one institution from another precisely because they follow different rules and practices and pursue different goals. We can distinguish baseball from cricket because they have different rules, practices, and goals, even though both are sports that feature a batter trying to hit a thrown ball. Likewise, a scholar can distinguish legislatures from courts even though both are government institutions. In a pluralist democracy, self-interest and party ideology might drive members of Congress, but the rule of law might nonetheless constrain Supreme Court justices.[107] After all, federal judges are politically insulated. They have lifetime appointments and protected salaries. Alexander Bickel argued years ago that even if legislators are constantly subject to political pres-

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[103] I refer to the joker here as the ultimate trump rather than as a wild card.

[104] Posner & Vermeule, *supra* note 1, at 1756, 1759; *see* Levinson & Pildes, *supra* note 72, at 2382-83 (discussing state legislatures and primary rules).

[105] Posner & Vermeule, *supra* note 1, at 1756-58; *see* Levinson & Pildes, *supra* note 72, at 2354-55 (discussing judicial default rule).

[106] *Response*, *supra* note 8, at 274-77.

[107] *Id.* at 274-75; *see* HART & SACKS, *supra* note 16, at iii-iv, 2-4 (emphasizing different institutions).

sures, the Supreme Court's political insulation allows the justices to reason about and articulate enduring principles.[108]

Barzun acknowledged that Posner and Vermeule anticipated and criticized this type of argument, distinguishing legislative and judicial institutions.[109] Posner and Vermeule insisted that even if federal judges are insulated from political pressure, then "[t]hat insulation liberates the judges to indulge their preferences [and] the preferences that are indulged may themselves be partisan ones."[110] In other words, when pushed, Posner and Vermeule reacted by prioritizing the external view and politics. "Judges are inside the political system," they wrote, "not outside it."[111] Thus, Posner and Vermeule played the political science trump card. "The literature in political science on the determinants of judicial voting finds a strong partisan influence. [The] single best predictor of judicial votes in cases where there is disagreement is generally the political party of the appointing president."[112]

One might criticize Bickel's argument—in fact, the later Bickel questioned his earlier faith in the Court's capacity to identify enduring principles[113]—but that does not render his (or a similar) argument incoherent, as Posner and Vermeule would suggest.[114] A Bickel-like argument would look incoherent only if the external political science view acts like a joker, trumping all other cards. From that perspective, as soon as Bickel acknowledged that self-interested partisan politics channel congressional actions, he must assume that self-interested partisan politics channel all government institutions, including the Court. Any scholarly switching between the inside and outside, between law and politics, is likely to descend into nonsense. As Posner and Vermeule put it, "analysts who speak both as political scientists and as legal theorists must be careful not to switch their hats so rapidly that they end up attempting to wear two hats at the same time."[115]

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[108] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 24-25, 58 (1962).

[109] *Response*, *supra* note 8, at 275-76.

[110] Posner & Vermeule, *supra* note 1, at 1757.

[111] *Id.*

[112] *Id.*

[113] ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 99, 165 (Yale U. Press ed., 1978) (1970).

[114] *See* Posner & Vermeule, *supra* note 1, at 1797 ("talk across disciplines constantly threatens to descend into incoherence"). Posner and Vermeule did not expressly discuss or even cite Bickel, though they attacked a Bickel-like argument. *Id.* at 1757-58.

[115] Posner & Vermeule, *supra* note 1, at 1757-58.

Posner and Vermeule's reaction to the Bickel-like position revealed why Barzun saw *Inside or Outside* as a threat. Barzun sought to demonstrate that discussions of the outside can be relevant on the inside, at least in certain limited circumstances. Barzun wanted to contest the boundary between law and politics. As he explained in his *Response to Posner and Vermeule*, "what kinds of arguments can and cannot be made from 'inside' the legal system is constantly an open and contested question."[116] Thus, Barzun sought to specify circumstances when a court could legitimately consider extralegal political and historical evidence as a means of impeaching a precedent. But as Barzun realized, Posner and Vermeule might have condemned his attempt to move between the inside and outside, even if Barzun's hopping between inside and outside was only temporary. When Barzun moved from one side to the other, he might have tripped over Posner and Vermeule's inside/outside fallacy.

Moreover, whereas Posner and Vermeule sometimes prioritized the external, Barzun ultimately emphasized the internal. Indeed, Barzun insisted that legal scholars are themselves on the inside, and that they should recognize the role they play in the practice of law and adjudication. Legal scholars are never "outside the system," according to Barzun.[117] Legal scholars, he wrote, "contribute (even if in small ways) to the development of those same legal norms that they analyze and comment on."[118] Barzun even suggested that legal scholars should attempt to bolster faith in the rule of law regardless of contrary evidence. "[W]hat divides legal scholars is not so much the 'perspective' they adopt but rather their relative willingness to hold onto a set of expectations for lawyers, politicians, judges, or legal scholars like themselves, even in the face of evidence that those expectations frequently and repeatedly go unmet."[119] Consequently, while Barzun wanted to contest the boundary between law and politics, his final goal was to rebuild the fence dividing the inside from the outside. A legal scholar or judge can contest the boundary, but wherever the boundary is placed, the sanctity

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[116] *Response*, *supra* note 8, at 286.

[117] *Id.* at 289.

[118] *Id.*

[119] *Id.* at 289-90. Barzun's argument here is reminiscent of Paul Carrington's argument that critical legal scholars should not be allowed to teach in law schools because they will destroy students' faith in the rule of law. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

of the inside must be respected.[120]

IV. FIGHTING THE TOFU

What does the conflict between Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside and Outside* reveal about the nature of adjudication and legal scholarship? Each article, in its own way, attempts to tame a law-politics dynamic that lies coiled at the core of judicial decision making.[121] But rather than taming the dynamic, the conflicting articles shine a spotlight onto the dynamic.

The law-politics dynamic exists because of the nature of legal interpretation. When judges, including Supreme Court justices, decide cases, they must interpret legal texts, whether the Constitution, statutes, case precedents, or otherwise. Legal interpretation is never mechanical.[122] No algorithmic method reveals the correct meaning of the text.[123] Despite this lack of method, lawyers, judges, and law professors nonetheless can sincerely debate the right or best meaning of a text.[124] Still, no method can prove the right or best meaning as an objective fact. The interpretive process itself is the only path to the truth of a text.[125] If one believes that a proffered interpretation of a text is mistaken, then one can offer reasons that might persuade the initial interpreter to ac-

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120 As Barzun concluded, "if a sufficient number of lawyers and judges agree [with his argument about impeaching evidence], then what was once a paradigmatically 'external' explanatory account may become a perfectly valid form of legal argument from the 'internal' perspective." *Response*, *supra* note 8, at 287.

121 A growing number of scholars are exploring the law-politics dynamic. Cross & Nelson, *supra* note 67; Feldman, *Alchemy*, *supra* note 6; Feldman, *Harmonizing*, *supra* note 6; BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009); Gillman, *Idea*, *supra* note 67; Gillman, *What*, *supra* note 67; Graber, *supra* note 67; Whittington, *supra* note 6; *see* Lee Epstein et al., *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 713 (2012) (political scientist, law professor, and judge jointly labeling the Court "a mixed ideological-legalistic judicial institution").

122 Gillman, *What*, *supra* note 67, at 485-86; *see* HANS-GEORG GADAMER, TRUTH AND METHOD xxi, 89, 137, 140, 144, 159, 164-65, 295, 309, 462, 477-91 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989) (discussing how no method can lead unequivocally to an interpretive truth); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) (explaining interpretation).

123 GADAMER, *supra* note 122, at 295, 309, 365; Ronald Dworkin, *How Law is Like Literature*, *in* A MATTER OF PRINCIPLE 146, 160 (1985).

124 Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, *in* A MATTER OF PRINCIPLE 119 (1985); *see* GADAMER, *supra* note 122, at 297-98 (discussing true textual meaning).

125 Jürgen Habermas, *The Hermeneutic Claim to Universality* (1971), *in* JOSEF BLEICHER, CONTEMPORARY HERMENEUTICS 181, 183 (1980).

cept a better textual reading. Yet, an ironclad proof is impossible. Legal interpretation is not an arithmetic problem.[126]

A judge always interprets the text from within his or her horizon.[127] The interpretive horizon metaphorically connotes the range of possible understandings that an individual brings to any text. An interpreter can see to the edge of the horizon but no farther. The concept of the interpretive horizon resonates with a simple psychological point: "All mental processing draws closely from one's background knowledge."[128] But a judge's horizon or interpretive background is not a private possession. It arises from the judge's experience and education within a community (or communities) and the community's cultural traditions.[129] Consequently, political ideology contributes strongly to a judge's horizon, yet the horizon is not solely a matter of politics, narrowly defined. Religion and other cultural components all contribute.[130] A judge who was educated at an American law school, practiced law, and decided prior cases, understands and generally abides by the internal practices of law and adjudication. Those internal practices—the know-how of the law—are part of the judge's horizon.[131] In most cases, therefore, the judge will attempt in good faith to interpret the relevant legal texts correctly.[132] But again, this interpretive process is not me-

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126 *See* GADAMER, *supra* note 122, at 165, 294, 332, 372 (arguing that meaning is gleaned only through interpretation or understanding); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1958) (rejecting the picture theory of language); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L. J. 1773, 1779 (1987) (arguing against theory as "an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice").

127 GADAMER, *supra* note 122, at 282-84, 302, 306.

128 Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision-Making*, 71 U. CHI. L. REV. 511, 536 (2004).

129 The Gadamerian concept of the horizon overlaps with Stanley Fish's concept of an interpretive community. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 303-04 (1980); *cf.*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 43-51 (2d ed. 1970) (explaining the concept of a paradigm).

130 *See* GADAMER, *supra* note 122, at 282-84, 295, 302-09 (discussing concept of the interpretive horizon); Simon, *supra* note 128, at 536 (discussing development of background beliefs).

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

132 Gillman, *Idea*, *supra* note 67, at 80; Whittington, *supra* note 6, at 623; *see* STEVEN J. BURTON, JUDGING IN GOOD FAITH 35-68 (1992) (emphasizing judges' good faith responsibility

chanical. The judge's political preferences (and religious and cultural background) will influence the interpretive conclusions. This political influence is not a corruption of the legal and judicial process; it is inherent to the process.[133] Thus, for example, when Chief Justice Roberts and Justice Ginsburg disagree about the proper interpretation of the Commerce Clause and the scope of congressional power, neither justice is lying or being disingenuous.[134] To the contrary, each justice believes that he or she is correctly interpreting the Constitution. Their interpretive horizons, though, shape their respective conclusions.[135]

This description of legal interpretation underscores that law and politics are always intertwined in the adjudicative process.[136] This law-politics dynamic presents a problem to law professors, political scientists, and other scholars interested in studying adjudication. Many scholars display "irrational exuberance" in their efforts to describe and study adjudication as either pure law or pure politics.[137] They seek to deny one part of the law-politics dynamic and to focus exclusively on the other. One reason for such exuberance is the drive for discipline.[138] When a student is educated in an academic or professional discipline, the student is simultaneously empowered and constrained.[139] The tools

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to apply the law); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 194 (2010) (emphasizing that judges internalize a "commitment to engage in the good-faith application of the law").

[133] *See* GADAMER, *supra* note 122, at 282-84, 302, 306 (explaining horizon); Habermas, *supra* note 125, at 183 (explaining interpretation).

[134] *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (discussing the constitutionality of the Affordable Care Act under the Commerce Clause); *see* Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. CAL. INTERDISC. L. J. 17 (2008) (discussing whether Supreme Court nominees and justices lie).

[135] For further discussions of interpretation, see Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296, 299-315 (2005); Stephen M. Feldman, *Made for Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 53-63 (2000).

[136] *See* Feldman, *Alchemy*, *supra* note 6, at 78-83 (describing the emulsification of law and politics in Supreme Court adjudication).

[137] *Cf.*, ROBERT J. SHILLER, IRRATIONAL EXUBERANCE ix, 1-2 (2d ed. 2005) (drawing title of book from speech by Alan Greenspan); Feldman, *Alchemy*, *supra* note 6, at 61-69 (tracing purist approaches to the law-politics dichotomy).

[138] *See* Eileen Braman & J. Mitchell Pickerill, *Path Dependence in Studies of Legal Decision-Making*, *in* WHAT'S LAW GOT TO DO WITH IT? 114, 117-18 (Charles Gardner Geyh ed., 2011) (explaining how members of disciplines follow their respective disciplinary methods).

[139] On the development of professions and disciplines, see ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS (1988); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE

or methods of the discipline—for instance, political science—enable the student to study events or phenomena in a new and often enlightening way.[140] Novel insights into the events or phenomena become possible. At the same time, the student is trained to use the particular disciplinary tools rather than other tools or methods. If the disciplinary methods cannot be brought to bear on a question, then the question is not worth pursuing.[141] Indeed, a scholar who does not use the proper methods is likely to be, in a literal sense, disciplined. Colleagues in the field will not respect the rogue scholar's work.[142] If the rogue seeks to publish a paper in a peer-review journal, then colleagues will reject the manuscript.[143] For this reason, academic and professional disciplines naturally tend to become increasingly specialized, isolated, and parochial.[144]

Thus, disciplinary methods channel scholars to understand phenomena, such as judicial decision making, in particular ways.[145] The

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(1991). Barzun has commented on the nature of disciplinary knowledge. Charles Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 6-7 (2013) [hereinafter Barzun, *Forgotten*].

[140] *See* HA-JOON CHANG, ECONOMICS: THE USER'S GUIDE 3 (2014) (emphasizing how professions develop jargon as means for insiders to communicate).

[141] *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 3 (2011) (arguing that a useful model must be testable); SEGAL, *supra* note 14, at 20-21 (arguing that, in political science, only research based on a model that quantifiable data can falsify is legitimate).

[142] "[D]isciplinarity is not simply a matter of individual choice, the pursuit of individual interests, or an individualized search for truth. Rather, it is the product of a set of social forces of normalization and education." Jack Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 954 (1996).

[143] *See* MICHELE LAMONT, HOW PROFESSORS THINK (2009) (comparing evaluative criteria in different disciplines); Ross J. Corbett, *Political Theory Within Political Science*, 44 PS: POL. SCI. AND POLS. 565 (2011) (emphasizing that many political scientists try to exclude non-quantifiable or non-falsifiable methods from the discipline).

[144] STEVE FULLER, PHILOSOPHY, RHETORIC, AND THE END OF KNOWLEDGE 33 (1993); *see* BRYAN MAGEE, CONFESSIONS OF A PHILOSOPHER: A JOURNEY THROUGH WESTERN PHILOSOPHY 364-65 (1997) (discussing professionalization in philosophy). For example, the discipline of economics assumes "the economy is autonomous from other social institutions," FRED BLOCK & MARGARET R. SOMERS, THE POWER OF MARKET FUNDAMENTALISM 24 (2014).

[145] Pierre Bourdieu has written extensively about an individual's entry into and participation in an arena or field of power, including a profession or discipline. *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805 (1987) (focusing on legal profession); DAVID SWARTZ, CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU 117-42 (1997) (discussing Bourdieu and entry into a field of power); Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J. L. & HUMAN. 323, 324-25 (2004) (relating discipline of law to Bourdeiu).

tools we possess direct or influence our outlook and behavior. If I have a hammer, then I am looking for a nail. If I have a screwdriver, then I am looking for a screw. If I have a hammer but find only a screw, I probably will try hammering it anyway. The distinct disciplinary methods of law and political science inevitably push law professors and political scientists to perceive and study adjudication differently. In other words, education or training in their respective and distinct disciplines engenders different interpretive horizons for law professors and political scientists. Indeed, their respective disciplinary methods often push law professors and political scientists to seek purity in adjudication. Law professors have been educated to focus on the rule of law. They were trained to parse cases, decipher complex statutes, and carefully read the Constitution and other texts. Law professors were educated to denounce politics as fouling the adjudicative process. Politics, from this perspective, is foreign to judicial decision making.[146] Meanwhile, political scientists have been educated to study and quantify politics, especially as manifested in government institutions. When political scientists study the government institution of the courts, including the Supreme Court, they are inclined to see politics at play. They are likely to be skeptical of judicial declarations concerning legal principles and doctrines.[147]

These disciplinary urges lead to incessant efforts to tame the law-politics dynamic at the heart of adjudication. The nature of legal interpretation inextricably links law and politics. They are intimately intertwined in judicial decision making. Yet, law professors and political scientists have sought their own respective purities for decades, and they will inevitably continue to do so in the future. Their disciplinary drives

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[146] For discussions of the development of law as an academic discipline, see BRUCE A. KIMBALL, THE INCEPTION OF THE MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL 1826-1906 (2009); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994); ROBERT S. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); 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 (2004); Christopher Tomlins, *Book Review*, 59 J. LEGAL EDUC. 657 (2010).

[147] For discussions of the development of the discipline of political science, see JOHN G. GUNNELL, THE DESCENT OF POLITICAL THEORY (1993); Clyde Barrow, *Political Science*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 310 (William A. Darity, Jr., ed., 2d ed. 2008); Lee Epstein et al., *Ideology and the Study of Judicial Behavior*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 705 (Jon Hanson ed., 2012); John G. Gunnell, *Political Science on the Cusp: Recovering a Discipline's Past*, 99 AM. POL. SCI. REV. 597 (2005); Jonathan Cohn, *Irrational Exuberance*, NEW REPUBLIC, Oct. 25, 1999, at 25; *see also* EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION 14-19 (2009) (describing history of political science).

pressure them to focus either on the rule of law or the rule of politics. On the political science side, for instance, Jeffrey A. Segal and Harold J. Spaeth maintained that Supreme Court justices vote their political preferences.[148] They argued that quantitative studies demonstrate not only the power of politics over the justices but also the falsity of the "legal model."[149] They concluded that "traditional legal factors, such as precedent, text, and intent, [have] virtually no impact" on Supreme Court decision making.[150] On the law side, constitutional originalists are merely the latest legal scholars to claim that they can purify legal interpretation of political influence. Most originalists insist that they can discern a fixed and objective constitutional meaning.[151] Randy Barnett, a leading new originalist, explicitly argued that the "appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials."[152] Politics, then, is supposedly banished from legal interpretation (including, in particular, constitutional interpretation).

Such denials of either law or politics in adjudication are not the only means of attempting to tame the law-politics dynamic. Another common approach is to police the boundary between law and politics—ostensibly forcing each to remain on its respective side. Regardless, all such efforts to subdue the law-politics dynamic amount to fighting the tofu. They are likely to be as frustrating and futile as wrestling with that squiggly white gelatinous mass. The law-politics dynamic will not succumb no matter how much or how often scholars deny it, police it, or otherwise try to tame it. The law-politics dynamic will remain at the core of adjudication.

From this perspective, both Barzun's *Impeaching Precedent* and Pos-

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148 SEGAL & SPAETH, *supra* note 13, at xv-xviii, 65.

149 *Id.* at 33-53.

150 HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT xv (1999); *see* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). Segal and Spaeth are leading attitudinalists, but rational choice political scientists also emphasize the influence of politics on adjudication. *E.g.*, Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiæ*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215, 216 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing rational choice or strategic approach).

151 Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009); *see* Lawrence B. Solum, *We are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011) (emphasizing "the fixation thesis" of originalism).

152 Barnett, *supra* note 151, at 660.

ner and Vermeule's *Inside and Outside* are revealed to be attempts to fight the tofu. Like so many legal scholars before him, Barzun wanted to maintain the sanctity of the legal system. He would admit the occasional impurity into the system, but only if it could help neutralize worse impurities. To a degree, Barzun followed in the "legal process" tradition, which in fact, he explicitly defended in another article.[153] Consistent with legal process, Barzun's *Impeaching Precedent* sought to specify the proper contours of the adjudicative process. Thus, Barzun focused on the inside of the process. He would allow the occasional non-legal consideration to become a factor, but only in closely cabined and demarcated circumstances.[154] While Barzun's argument was complex, he ultimately sought to police the boundary between law and politics, between the inside and outside. No less so than Posner and Vermeule, Barzun tried to tame the law-politics dynamic.

Posner and Vermeule's desire to police the boundary between law and politics was conspicuous; it was the crux of their article. They viewed the internal and external perspectives as necessarily inconsistent. "If the internal perspective is correct," they wrote, "then the behavioral premises of the external perspective must seem wrong or at least questionable."[155] But "[i]f the external perspective is correct, then it is hard to see how agents will act any differently from the way they do [based on legal or internal arguments]."[156] Basically, then, a scholar adopting the internal approach and exploring legal doctrine needed to stay on the inside. A scholar adopting an external approach and exploring exogenous causes of legal and judicial behavior needed to stay on the outside. The inside and the outside, law and politics, should not meet. Legal scholars and political scientists, they concluded, just do not have much "to say to one another."[157] If they try to talk across the disciplinary boundary, they are likely to descend into incoherence.

Ironically, the conflict between Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside and Outside* turned a spotlight on the law-

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153 Barzun, *Forgotten*, *supra* note 139; *see* HART & SACKS, *supra* note 16 (articulating the legal process approach).

154 In their classic legal process materials, Hart and Sacks explained that in common law and statutory interpretation cases, reasoned elaboration requires a judge, in carefully circumscribed contexts, to apply the law "in the way which best serves the principles and policies it expresses." HART & SACKS, *supra* note 16, at 165.

155 Posner & Vermeule, *supra* note 1, at 1789.

156 *Id.*

157 *Id.* at 1797.

politics dynamic, despite Barzun's and Posner and Vermeule's respective efforts to tame the dynamic and fight the tofu. Scholars who fight the tofu, as already explained, often deny a crucial aspect or element of adjudication, either law or politics. Indeed, they often deny the law-politics dynamic in its entirety. But any scholar who emphasizes one side of the law-politics dynamic and repudiates the other side will be open to criticism. Any scholar on the other side of the fence can readily attack. Those standing on opposite sides, whether on the inside or outside, often gaze across the boundary with hostility. Hence, political scientists Segal and Spaeth were not satisfied to provide quantitative evidence showing that political attitudes motivate Supreme Court justices. Segal and Spaeth also sought to prove that law was irrelevant to Supreme Court adjudication.[158] Likewise, legal scholars ranging from C.C. Langdell and his disciples, writing in the late-nineteenth century, to the legal process scholars of the mid-twentieth century, to the constitutional originalists writing today, have sought to deny or limit the effect of politics on judicial decision making.[159] When hostility or conflict between the inside and outside erupts, the existence of the law-politics dynamic becomes especially prominent. It can no longer remain hidden at the core of adjudication. Thus, when Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside and Outside* were juxtaposed in a single issue of the University of Chicago Law Review, tension rose to the surface. In particular, with Barzun seeking to uphold the sanctity of the inside, of legal and judicial processes, and with Posner and Vermeule occasionally favoring the outside, conflict became unavoidable. Instead of subduing the law-politics dynamic, as they all desired, they underscored the futility of their endeavors. Tofu splattered all over the kitchen.

Regardless, in the future, other scholars will seek to tame the law-politics dynamic.[160] Disciplinary methods assure the perpetuation of ef-

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158 SEGAL & SPAETH, *supra* note 13, at 33-53.

159 *E.g.*, C.C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS 21 (2d ed. 1880); C.C. LANGDELL, CASES ON CONTRACTS viii-ix (2d ed. 1879) (preface to 1st ed.); *see* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 83-105 (2000) (discussing Langdellian legal science).

160 *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (arguing for textualist method of statutory interpretation); Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575 (2014) (focusing on judicial independence and judges' nonlegalistic decisions); Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 L. & SOC'Y REV. 889 (2012) (quantitative study empha-

forts to focus solely on law or politics in adjudication. While such efforts will inevitably continue, they fail to confront a growing amount of empirical evidence. As Segal and Spaeth emphasized, substantial quantitative evidence shows that political scientists can explain and predict judicial outcomes, particularly at the Supreme Court, based on political attitudes or preferences.[161] "Simply put," Segal and Spaeth wrote, "[William] Rehnquist votes the way he does because he is extremely conservative; [Thurgood] Marshall voted the way he did because he is extremely liberal."[162] Yet, simultaneously, substantial quantitative evidence shows that scholars can explain judicial outcomes, including at the Supreme Court, based on legal doctrines. Mark J. Richards and Herbert M. Kritzer have conducted multiple quantitative studies concluding that legal doctrines or, in their words, "jurisprudential regimes," influence judicial decisions.[163] In fact, a growing amount of quantitative research suggests that both law and politics shape judicial decisions. For instance, in a book by a political scientist (Lee Epstein), an economist (William M. Landes) and a federal judge (Richard A. Posner), the authors considered whether legal doctrine or political ideology shaped judicial decision making in the federal courts, including the district courts, the courts of appeals, and the Supreme Court. Their quantitative studies revealed that "ideology influences judicial decisions at all levels of the federal judiciary. But the influence is not of uniform strength—we have found, for example, that it diminishes as one moves down the judicial hierarchy—and it does not extinguish the influence of conventional principles of judicial decision-making."[164] In another book-length quantitative study, Michael A. Bailey and Forrest Maltzman concluded that both law and political preferences matter to Supreme Court justices,[165]

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sizing ideological forces influencing justices).

[161] SEGAL & SPAETH, *supra* note 13, at 208-60; *see* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1599 n.24, 1600 n.25 (2000) (summarizing quantitative studies supporting the attitudinal model).

[162] SEGAL & SPAETH, *supra* note 13, at 65.

[163] Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 L. & SOC'Y REV. 827 (2003); Mark J. Richards & Herbert L. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); *see* Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 L. & SOC'Y REV. 259 (2007) (study showing that attorneys' arguments influence Supreme Court justices).

[164] EPSTEIN, *supra* note 14, at 385. According to these authors, "federal judges are not just politicians in robes, though that is part of what they are." *Id.*

[165] BAILEY & MALTZMAN, *supra* note 141, at 15-16; *see* Michael A. Bailey & Forrest Maltzman,

though "the influence of specific legal doctrines varies across justices."[166] Qualitative evidence (empirical evidence that is not quantified) also shows that both law and politics influence adjudication.[167]

When abundant empirical evidence points to the causal influence of both law and politics, denial of either one becomes questionable, to say the least. Of course, this evidence has not stopped originalists from declaring that originalism is "working itself pure."[168] From this internal legal perspective, "[w]ords have original meanings that are fixed no matter what current majorities may say to the contrary."[169] But this declaration, suggesting that politics is irrelevant to constitutional adjudication, is no less problematic than political scientist Martin Shapiro's assertion: "Courts and judges always lie. Lying is the nature of the judicial activity."[170] If anything, rather than uttering such sophistries, scholars in both political science and law should devote more attention to the law-politics dynamic itself. Instead of trying to tame the dynamic,

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Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court, 102 AM. POL. SCI. REV. 369 (2008) (reaching similar conclusions).

166 BAILEY & MALTZMAN, *supra* note 141, at 143; *see* PAMELA CORLEY ET AL., THE PUZZLE OF UNANIMITY (2013) (study emphasizing substantial plurality of Supreme Court decisions that are unanimous and concluding that law constrains justices from following political ideology); SUNSTEIN, *supra* note 14 (study of federal courts of appeals concluding that both politics and law influence judges). Frank Cross has conducted numerous quantitative studies concluding that law and politics both influence judicial decision making. Frank B. Cross, *Law is Politics*, *in* WHAT'S LAW GOT TO DO WITH IT? 92 (Charles Gardner Geyh ed., 2011); Cross & Nelson, *supra* note 67. For a summary of much of the empirical research pointing in the various directions, see Friedman, *supra* note 19, at 274-75.

167 In a historical study of Civil War and Reconstruction adjudication, Mark Graber concluded that judicial decision making "is a practice that mixes legal, strategic, and attitudinal considerations in ways that cannot be fully isolated by scientific investigation." Mark Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 33, 35 (Ronald Kahn & Ken I. Kersch eds., 2006); *see* LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 3-4 (2014) (explaining difference between quantitative and qualitative evidence); Feldman, *Alchemy*, *supra* note 6, at 64-67 (explaining quantitative and qualitative evidence and discussing forms of qualitative evidence suggesting that law and politics both matter).

168 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1114 (2003).

169 Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 701 (2009).

170 Martin Shapiro, *Judges as Liars*, 17 HARV. J. L. & PUB. POL'Y 155, 156 (1994). In a related vein, Gordon Silverstein worries that politics functions best when law does not constrain its operation. Law can narrow and harden political debate and even can "undermine or kill" politics. GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 3-4 (2009).

explore how it works. In other words, stop fighting the tofu.

A distinction between politics writ small and politics writ large can help elucidate the law-politics dynamic. If a judge (or justice) disregards the law and decides a case in order to achieve a political goal qua political goal, then that judge has engaged in politics writ large. The judge acts like a legislator, consciously and purposefully following his or her political preferences or allegiances. For example, many commentators have argued that the conservative justices decided *Bush v. Gore* because they wanted George W. Bush rather than Al Gore to be the next president.[171] The justices invoked the Equal Protection Clause, but its application was unique and inconsistent with prior Equal Protection Clause cases.[172] Such instances of politics writ large are rare. Judicial decision making in accord with politics writ small, however, is common. When a judge sincerely interprets the relevant legal texts and decides a case (or votes to decide a case) accordingly—with the judge's horizon, including political ideology, naturally shaping the judge's interpretation and decision—then the judge has decided pursuant to politics writ small.[173] Politics writ small, that is, inheres in legal interpretation. Or to put it conversely, legal interpretation is politics writ small. The concept of politics writ small accentuates that a judge (or justice) always interprets legal texts from within his or her horizon, which encompasses political preferences or allegiances.[174]

A crucial point emerges from the distinction between politics writ large and writ small. Precisely because politics writ small is integral to legal interpretation, judges' (or justices') sincere interpretations of legal texts typically coincide with their political goals and allegiances. In most cases, especially at the Supreme Court level, justices do not experience a conflict between their sincere interpretations of the relevant texts and doctrines and their political preferences or allegiances. A justice rarely

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171 Bush v. Gore, 531 U.S. 98 (2000); HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 2-5, 185-89 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 759 (2001).

172 531 U.S. at 104-10; GILLMAN, *supra* note 171, at 141-43.

173 *See* Feldman, *Alchemy*, *supra* note 6, at 82-83 (distinguishing politics writ large from politics writ small); TAMANAHA, *supra* note 132, at 187-89 (distinguishing cognitive framing from willful judging).

174 *See* Feldman, *Alchemy*, *supra* note 6, at 82-83. Suppose one imagines a situation where a judge has a hunch about the proper result in a case and then searches the legal materials for precedential and doctrinal support. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986). In my terminology, both the judge's hunch and the judge's interpretation of the legal materials would entail politics writ small.

considers a case and reasons as follows: 'The best interpretation of the relevant texts and doctrines necessitates conclusion X, but my political preference is conclusion Y. What should I do?' Instead, the justice likely reasons as follows: 'The best interpretation of the relevant texts and doctrines necessitates conclusion Z (and fortuitously, conclusion Z coincides with my political preference).' Of course, such correspondence between law and politics is not truly fortuitous; it is built into the interpretive process. Moreover, this correspondence between law and politics in interpretation and adjudication accords with the empirical evidence. If, as discussed, ample quantitative evidence suggests that both law and politics influence judicial decision making, then maybe it is true: Both law and politics influence judicial decision making.[175]

While a few Supreme Court decisions, such as *Bush v. Gore*, seem to illustrate politics writ large, far more cases manifest politics writ small. In fact, numerous constitutional law cases are fascinating because of the law-politics dynamic. A constitutional law professor could study or teach *Marbury v. Madision* by focusing on the legal doctrine of judicial review and John Marshall's textual arguments for judicial review.[176] Or a political scientist could study or teach *Marbury* by emphasizing the political conflict that had developed during the 1790s between the Federalists, led by Alexander Hamilton and John Adams, and the Republicans, led by Thomas Jefferson and James Madison.[177] From this perspective, *Marbury* pitted a Federalist Chief Justice, Marshall, against the Republican President, Jefferson, and Secretary of State, Madison. But either of these approaches to teaching *Marbury* would miss a large part of the story— namely, the law-politics dynamic. Marshall interpreted the constitutional text, particularly Article III on judicial power, but he did not discover some fixed and objective meaning. The text did not explicitly grant the Court the power of judicial review over either the executive branch or Congress.[178] Yet, Marshall's reading of the Constitution was reasonable and in accord with a developing contemporary understanding of the judicial role in American government.[179] Simultaneously,

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[175] *E.g.*, BAILEY & MALTZMAN, *supra* note 141, at 143; EPSTEIN, *supra* note 14, at 385.

[176] 5 U.S. (1 Cranch) 137 (1803).

[177] On politics in the 1790s, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC (1993).

[178] U.S. CONST., art. III, § 2.

[179] On the developing concept of judicial review, see SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005); Gordon S. Wood, *The Origins of Judicial Review Revisited, or*

Marshall's conclusions, that the Court had the power of judicial review over the executive branch and Congress, corresponded with his Federalist political orientation. Even so, he walked a legal tightrope over a political minefield of Republican opposition. While reasonably interpreting the constitutional text to reach doctrinal conclusions consistent with his political ideology, he ultimately gave Jefferson and Madison the result they wanted. He held that the Court lacked jurisdiction to grant the requested relief to a Federalist appointee, William Marbury, who hoped to secure a position as a justice of the peace in Washington, D.C.[180]

One more example should suffice. A rich law-politics dynamic imbued *United States v. Lopez*, the landmark commerce power case.[181] *Lopez* held that Congress had exceeded its commerce power when it enacted the Gun-Free School Zones Act (GFSZA), a generally applicable law proscribing the possession of firearms at school. A scholar (or teacher) could describe *Lopez* as a bald political decision. When the Court decided this case, in 1995, political conservatives were in the midst of an attack against so-called big government. They constantly criticized Congress, in particular, for its attempts at liberal social engineering.[182] They traced expansive congressional power to the New Deal and denounced the Court's 1937 acceptance of such power.[183] One can, therefore, readily analyze *Lopez* from this political perspective. The five conservative justices—Scalia, Thomas, Kennedy, O'Connor, and Rehnquist, who wrote the majority opinion—outvoted the four liberal justices—Stevens, Souter, Breyer, and Ginsburg— and, therefore, reached the conservative conclusion. They invalidated liberal legislation, constrained congressional power, and in so doing, chipped away at big government.[184]

How the Marshall Court Made More Out of Less, 56 WASH. & LEE L. REV. 787 (1999).

[180] *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 (1991) (discussing Marshall Court); James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992) (discussing Marshall Court and *Marbury*, in particular); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L. J. 1 (same).

[181] U.S. v. Lopez, 514 U.S. 549 (1995).

[182] *See, e.g.*, NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION (1978) (criticizing affirmative action programs).

[183] W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see Lopez*, 514 U.S. at 599 (Thomas, J., concurring) (stating that the Court took a "wrong turn" in 1937); Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U. L. REV. 5, 20 (1988-1989) (arguing that Court should reverse "the mistakes of 1937").

[184] *See, e.g.*, SEGAL, *supra* note 14, at 70 n.67 (citing *Lopez* as example of conservative Rehnquist Court decision).

But this political analysis does not explain the landmark status of *Lopez*, which revolves around legal doctrine. Rehnquist's majority opinion began by presenting the Commerce Clause text and asserting that the Court would apply it in accord with a rational basis test, the doctrine the Court had consistently applied in commerce power cases since 1937.[185] Unlike in many of those prior post-1937 cases, however, Rehnquist did not apply the rational basis test as a mechanism of judicial deference to congressional judgment and the democratic process.[186] With only two exceptions—and the Court had quickly overruled one of the two—the post-1937 Court had upheld every congressional action taken pursuant to the commerce power.[187] If the people did not like congressional action, the Court had consistently reasoned, then the people could vote for new legislators.[188] But in *Lopez*, Rehnquist reformulated the rational basis test rather than deferring to Congress and the democratic process.[189] In so doing, Rehnquist added formalist distinctions that resonated with pre-1937 Supreme Court commerce power decisions— distinctions that the post-1937 Court had repudiated.[190] For instance, Rehnquist relied on an ostensible dichotomy separating economic from non-economic activities; he reasoned that gun possession at schools (the subject matter of the GFSZA) is a non-economic enterprise unrelated to commerce.[191] To Rehnquist, 'economic' and 'non-economic' were a priori categories, and gun possession could readily be placed in one (non-economic) rather than the other (economic). Breyer's (liberal) dissent argued contrariwise, emphasizing that, from a practical standpoint, educational activities closely intertwine with economic (commercial) development. "Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial

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185 *Lopez*, 514 U.S. at 552-53, 557.

186 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120-29 (1942) (upholding an application of Agricultural Adjustment Act of 1938).

187 In the two previous cases invalidating congressional commerce actions, the Court focused primarily on the Tenth Amendment. N.Y. v. U.S., 505 U.S. 144 (1992); Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

188 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-56 (1985).

189 According to the reformulated rational basis test, Congress could regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activities substantially affecting interstate commerce. *Lopez*, 514 U.S. at 558-59.

190 *Id.* at 559-68; *see id.* at 627-28 (Breyer, J., dissenting) (criticizing Rehnquist's formalism).

191 *Id.* at 561.

purposes, and one cannot easily separate the one from the other."[192] Disregarding this criticism, Rehnquist used similar pre-1937 formalism when he reasoned that gun possession at schools is a local rather than a national matter and thus falls outside Congress's commerce power. His distinction between "what is truly national and what is truly local"[193] even echoed language from the Court's 1918 decision in *Hammer v. Dagenhart*, which held that Congress had exceeded its commerce power by regulating child labor.[194] Indeed, Rehnquist cited numerous pre-and post- 1937 commerce power decisions to support his reformulation of the rational basis test into a type of formalist doctrine.[195]

The most interesting aspect of *Lopez* was neither the doctrine, standing alone, nor the political orientation, standing alone. Rather, it was the law-politics dynamic—the interrelationship of the law and the politics. Rehnquist and the other conservative justices started with a rational basis doctrine that had exemplified judicial restraint and deference to democracy and manifested liberal political acceptance of government. They transformed it into a doctrine implementing aggressive judicial oversight of and limitations on congressional power and embodying politically conservative distrust of government. Rehnquist's choice of relevant precedents—both pre- and post-1937—manifested the justices' concern for the legal doctrine, including the precise reformulation of the rational basis test as encompassing formalist distinctions.[196] Moreover, the law-politics dynamic underscores that *Lopez* had potentially significant legal *and* political consequences for the future. In particular, the *Lopez* reformulated rational basis doctrine has guided

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[192] *Id.* at 629 (Breyer, J., dissenting) (emphasis in original).

[193] *Id.* at 567-68.

[194] The *Hammer* Court distinguished "a purely federal matter" from "a matter purely local in its character." Hammer v. Dagenhart, 247 U.S. 251, 274, 276 (1918).

[195] *E.g.*, Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964); Houston, E. & W. T. R. Co. v. U.S., 234 U.S. 342 (1914).

[196] The *Lopez* Court's emphasis on the lack of congressional findings also reintroduced a doctrinal mechanism that had facilitated the judicial imposition of substantive limitations on congressional power during the pre-1937 era. *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 356 (2001) (describing "rigorous review of the legislative record" as characteristic of pre-1937 Supreme Court decision making). For instance, in *Hill v. Wallace*, decided in 1922, the Court invalidated a statute as beyond the commerce power partly because Congress had failed to find that the evidence showed the regulated activities burdened interstate commerce. 259 U.S. 44, 68-69 (1922); *cf.*, Board of Trade v. Olsen, 262 U.S. 1, 31-38 (1923) (upholding statute similar to the one invalidated in *Hill* partly because Congress made sufficient findings).

courts in subsequent cases to invalidate congressional actions.[197] To be sure, the doctrine does not render these conservative conclusions inevitable, but they became more likely after than before *Lopez*.[198]

These examples, *Marbury* and *Lopez*, suggest that scholars (and teachers) should devote less energy to policing the law-politics boundary and more to exploring the law-politics dynamic. Boundary policing and other attempts to tame the law-politics dynamic are doomed to futility and can push scholars in untoward directions. For instance, Barzun's ultimate goal of protecting the sanctity of law, the purity of the inside, cannot succeed. Law, in some pristine sense, cannot be shielded from politics or other improper considerations because legal interpretation and judicial decision making always embody the law-politics dynamic and entail politics writ small. Meanwhile, when Posner and Vermeule concluded that legal scholars and political scientists have little to say to one another,[199] they got it exactly backwards. Academic and professional disciplinary methods might create high walls between law and politics, between the inside and outside, but those disciplinary methods do not change the nature of adjudication. Adjudication encompasses a law-politics dynamic that scholars should excavate and analyze. We should draw on the methods of law, when useful, the methods of political science, when useful, and any other disciplinary (or interdisciplinary) methods that can help elucidate the law-politics dynamic.[200]

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[197] *E.g.*, U.S. v. Morrison, 529 U.S. 598 (2000) (invalidating Violence Against Women Act as beyond congressional power); Fla. ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011) (invalidating individual mandate in Affordable Care Act).

[198] *Cf.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (invalidating individual mandate in Affordable Care Act as beyond Congress's commerce power but upholding it pursuant to Congress's taxing power); Gonzales v. Raich, 545 U.S. 1 (2005) (upholding federal law proscribing the possession of marijuana). The Rehnquist Court invalidated more congressional acts than had any previous Court. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY 2 (2004); DAVID M. O'BRIEN, STORM CENTER 31 (8th ed. 2008); Barry Friedman, *The Cycles of Constitutional Theory*, 67 L. & CONTEMP. PROBS. 149, 161 (2004).

[199] Posner & Vermeule, *supra* note 1, at 1797.

[200] One could reasonably argue that Posner and Vermeule's recommendation to separate law and politics is in tension with Vermeule's own theory of constitutional systems. In *The System of the Constitution*, Vermeule emphasized that a system "can have emergent properties that cannot be deduced by inspecting their components or members in isolation, one by one." VERMEULE, *supra* note 59, at 8. Although Vermeule did not identify law and politics as components of the American constitutional system, his theory would seem to fit adjudication. In other words, in a sense, law and politics go into the judicial decision making process, but they together create something distinct from the separate components. One drawback to conceptualizing adjudica-

Indeed, Posner and Vermeule derived their conception of political science from the mainstream of the discipline—scholars like Segal and Spaeth who emphasize the self-interested pursuit of political goals—but some political scientists are themselves concerned with the interrelationship of law and politics. This cadre of political scientists have adopted a label to identify their alternative approach to research: American Political Development (APD).[201] APD focuses on the developmental histories of political institutions and how those institutions respond to subsequent political changes.[202] For instance, does a particular institution, such as the Supreme Court, accommodate or resist particular political changes?[203] In an APD book focused on Supreme Court adjudication, Ronald Kahn and Ken I. Kersch conceptualized the ostensible law- politics dichotomy in adjudication "as a debate over the respective influences of internal and external factors . . ., with law being an important potential internal influence, . . . and electoral politics being a significant potential [external] influence."[204] From their perspective, adjudication engenders an "interplay of the internal and external" that produces a degree of judicial independence, "a certain autonomy from ordinary politics at certain times." That is, courts are unique government institutions precisely because of the law-politics dynamic.[205]

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tion in this manner is that it suggests that law and politics can be isolated in the judicial process. I am arguing, though, that the law-politics dynamic cannot be broken into pure law and pure politics.

[201] KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004). Barzun, in his *Response*, has a footnote citing to APD scholarship. *Response*, *supra* note 8, at 277 n.33.

[202] ORREN & SKOWRONEK, *supra* note 201, at 6.

[203] *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993) (discussing how the *Lochner* Court continued to apply legal doctrine despite significant political changes).

[204] Ronald Kahn & Ken I. Kersch, *Introduction*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 1, 18 (2006).

[205] APD scholars view law as a component of the judicial institution that contributes to the formation of judges' attitudes and political preferences. Cornell Clayton & Howard Gillman, *Introduction*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 1, 2 (Howard Gillman & Cornell Clayton eds., 1999); Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 L & SOC. INQUIRY 273, 290 (2010). In other words, APD scholars reject the notion that judges' political preferences are independent of courts as institutions. Because of this emphasis on the operation of institutions, some APD scholars are referred to as historical (or new) institutionalists. Graber, *supra* note 67, at 317.

CONCLUSION

Law and politics are inextricably bound together in legal interpretation and adjudication. The law-politics dynamic is inescapable, untamable. Nevertheless, disciplinary methods will drive legal scholars and political scientists to attempt to subdue the dynamic in various ways, such as denying the dynamic and policing the ostensible law-politics boundary. But scholars, including law professors and political scientists, should resist these disciplinary urges. We have only begun to tap our understanding of the law-politics dynamic and should encourage research in this direction.

I do not deny the possibility of studying law or politics without attending to the other. Political scientists, studying adjudication, can continue to focus solely on politics. Likewise, law professors can continue to focus on legal texts and doctrines. Such isolationist studies can provide useful information about adjudication, but neither approach can describe the entirety of the adjudicative process. I should emphasize, then, that this Essay concerns both adjudication and scholarship about adjudication. I recommend a particular direction for scholars—namely, giving sustained attention to the law-politics dynamic—which contravenes Posner and Vermeule's suggestion that the disciplines of law and political science have little to share with each other. But my recommendation about scholarship stems from my analysis of adjudication— emphasizing the law-politics dynamic at the core of legal interpretation—which undermines Barzun's desire to preserve the sanctity of law.[206]

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[206] While my argument leads to recommended changes in legal scholarship, it does not necessarily suggest changes in legal and judicial practices. In other words, an awareness of the law-politics dynamic and politics writ small does not necessitate any change in adjudication. Feldman, *Alchemy*, *supra* note 6, at 93-95. Law professors, political scientists, and historians have observed that adjudication, especially constitutional adjudication, entails a subtle negotiation over the separation of law and politics. These scholars have emphasized that, in *Marbury* and other cases, Chief Justice Marshall helped carve from the political realm an area of potential controversy, largely related to property and wealth. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 189-93 (1990); O'Fallon, *supra* note 180, at 221; Wood, *supra* note 179, at 803-05. By suggesting that property and wealth were matters of law, Marshall placed them within the control of (Federalist) federal judges rather than democratic majorities. My argument, revolving around the law- politics dynamic, might initially appear inconsistent with this observation—that cases often entail negotiating over law and politics. But in truth, my argument not only is consistent with but illuminates it. The key is to distinguish between politics writ small and writ large. Insofar as scholars point to constitutional cases as involving negotiation over the separation of law and politics, the scholars implicitly refer to politics writ large (as politics rather than law). If property rights are placed within the legal realm,

My criticisms of Barzun's *Impeaching Precedent* and Posner and Vermeule's *Inside or Outside* do not completely repudiate their arguments. I agree with Barzun when he argues that the nature of legitimate legal argument is not static. It is open to contestation. Plus, I sympathize with Posner and Vermeule's call for consistency in scholarship if it is diluted into a call for clarity. In light of the law-politics dynamic that is at the heart of adjudication, scholars should not be limited to following only a legal or only a political science approach. When scholars switch their analytical standpoints, though, they should clarify their respective disciplinary perspectives, whether the discipline is law, political science, or some interdisciplinary combination. And given the limits of our current methodological tools in law and political science, scholars seeking to penetrate and explore the law-politics dynamic should be open to and experiment with interdisciplinary methods.

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then legislators supposedly should not engage in a politics writ large that would directly change the nature of those property rights. Changes to property rights would trigger legal issues resolvable in the courts. But these legal issues—the legal realm negotiated in opposition to the political realm—are not matters of pristine law. They are not purified of all politics. To the contrary, whenever courts adjudicate issues within this legal realm, the courts are engaged in politics writ small. In other words, when scholars argue that cases negotiate a separation between law and politics, the scholars are too vague. To be precise, these cases negotiate a separation between the law-politics dynamic (the legal realm), on the one side, and politics writ large (the political realm), on the other side. Politics—or, at least, politics writ small—is never erased from the legal realm.