

## Keynote Address

# JUDICIAL TAKINGS, JUDICIAL SPEECH, AND DOCTRINAL ACCEPTANCE OF THE MODEL OF THE JUDGE AS POLITICAL ACTOR

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### I. INTRODUCTION

For years, academics from a variety of disciplines have set forth a rich literature asserting that judges' policy preferences, rather than adhesion to neutral legal principles, determine legal results in close cases.<sup>1</sup> Much of this writing, referred to here as "Judicial Political Realism,"<sup>2</sup> relies upon empirical studies, which show that a judge's

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1. See RICHARD A. POSNER, *HOW JUDGES THINK* 7 (2008). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (applying an attitudinal model to examine the decisions and decision-making processes of the Supreme Court); James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *POL. BEHAV.* 7 (1983) (discussing the development of theories of judicial behavior); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 *NW. U. L. REV.* 743 (2005) (presenting empirical accounts of judicial behavior); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (analyzing empirical research on judicial behavior).

2. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 *U. CHI. L. REV.* 831, 834–35 (2008). Sunstein and Miles appear to use the term "New Legal Realism" to apply generally to the entire field of empirical literature that seeks to ascribe the results in judicial decisions to factors other than the dispassionate application of legal principles and doctrine. In this paper, I will use the term Judicial Political Realism as referring to the literature that describes judicial decision-making as based on the personal political preferences of the judges. I use the term to incorporate both the studies that explain judicial decisions as directly reflecting the political preferences of the judges (i.e., a judge will vote to vindicate abortion rights if she is

ideology (usually determined by referencing the political party of the judge's appointing president<sup>3</sup>) significantly explains patterns of judicial votes.<sup>4</sup> Some studies take these results and conclude that law—in terms of legal rules and doctrine—is largely irrelevant. Other studies assert that law may constrain decision making, but only partially, and even then a judge's reliance on law may be better explained as strategic decision-making that takes into account institutional limitations and possible political backlash<sup>5</sup> in order to allow the judge to effectuate her policy preferences over the long term rather than in only the immediate case before her.<sup>6</sup> In either case, the thrust of these studies is to depict judges as political actors promoting their own policy goals, rather than as dispassionate decision-makers neutrally reaching results in cases based upon the dictates of legal rules, doctrine, and reasoning.

Not surprisingly, the practicing bar, judges, and (most) legal academics generally have not warmly received the Judicial Political Realist literature. Most lawyers like to believe that legal rules, legal doctrine, and legal reasoning matter even in close cases. They think that there are good legal arguments and bad legal arguments and that the strength of the argument pushes the judge one way or another in choosing among plausible outcomes. Most judges, in turn, do not like to view themselves as merely political actors akin to state legislators. They like to see their actions as guided by high legal principle rather than by base political preference. Most legal academics, of which I am one, would prefer not to tell our students that when they argue their first case in court, they might as well only stand up and say, “Your Honor, this is a close case and since you are going to do whatever you want anyway based upon your normative inclinations, I will just sit down.”

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pro-choice) and studies that suggest a judge may pursue a political agenda by strategically voting against his political preference in a given case in order to effectuate his political agenda over the long term.

3. The party of the appointing president is only one of a number of measures of ideology that has been used in this literature and, in fact, what should be the appropriate measure is very much disputed. *See id.* at 836 n.23 and cited authorities therein.

4. *See id.* at 831.

5. *See generally* Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POLS. 1018 (2004) (contending that public opinion, including fears of public backlash, affects judicial decision-making).

6. *See generally* LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (contending that judges will sometimes sacrifice short-term policy goals in favor of long-term results).

The implication that judges are only political actors effectuating their own policy preferences is enormous. To quote Judge Richard Posner, “[i]f changing judges changes law, it is not even clear what law is.”<sup>7</sup> Further, if there is no “law” external from the judges’ preferences, it is not clear why judges (many of whom are not elected) should have their particular political agendas trump those of other political actors. Where does a court’s legitimacy come from if not from its role in upholding the Rule of Law? Furthermore, if legal decisions primarily rest on a judge’s preexisting preferences, then what is the meaning or purpose of legal rules, doctrine, or reasoning?

The resistance of the legal profession to the challenges posed by the Judicial Political Realists is therefore understandable. Even beyond believing that rules of law make a difference,<sup>8</sup> the legal profession has a vested interest in seeing the role of the judiciary as one of “call[ing] balls and strikes,” in the words of Chief Justice Roberts,<sup>9</sup> and not as one of advancing its own political agenda with little internal constraint. It has a similar interest in asserting that rules, doctrine, and reasoning matter. If not, the enterprise of lawyering is merely a charade.

Against this background, it is interesting to note two recent United States Supreme Court cases in which the Court, or at least some of its Justices, appears to allow the notion that judges are political actors to infiltrate constitutional doctrine. In the first, *Republican Party of Minnesota v. White*,<sup>10</sup> the Court ruled that a state could not prohibit candidates for judicial office from announcing their views on issues that might come before them.<sup>11</sup> For First Amendment purposes, judicial candidates are to be treated no differently than legislative candidates; the voters are entitled to know the candidates’ views on the issues and they are expected to support or oppose a candidate on that basis.<sup>12</sup> The implicit suggestion in *White* mirrors the

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7. POSNER, *supra* note 1, at 1.

8. See Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 689 (2004) (“[I]deological struggle . . . makes nonideological judging necessary to realize the rule of law.”); Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1741–51 (1988) (contending that judges can decide cases without inserting nonlegal policy considerations into their decision making).

9. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee for Chief Justice of U.S. Supreme Court).

10. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

11. *Id.* at 788.

12. *Id.* at 781–82.

judges-as-political-actors critique—judges, like legislators, bring political agendas to their service.

In the second case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>13</sup> four Justices, in an opinion authored by Justice Scalia, argued that the Court should recognize a doctrine of “judicial takings”—meaning that a change in property rights resulting from a judicial opinion entitles the aggrieved property owner to the same sort of compensation that a property owner would receive if the change to her rights occurred as a result of legislative enactment.<sup>14</sup> To these Justices, there was no constitutional difference between judicial and legislative action for the purposes of the Takings Clause.<sup>15</sup> Even more graphically than in *White*, the judicial takings theory advanced in *Stop the Beach Renourishment* sets forth the vision of judges as political actors. Judicial decisions are not to be treated as interpretations of law but as exercises of raw political power akin to legislative enactments.

The Court in neither *White* nor *Stop the Beach Renourishment* stopped to address the view of judges as political actors inherent in their opinions. This paper does so. After first canvassing the specifics of both the *White* and *Stop the Beach Renourishment* opinions, it discusses what these cases say about the nature of judging and judicial institutions.

Part II sets forth the necessary background. It discusses the Judicial Political Realist model of judging and shows how this model contrasts with the traditional account of legal decision-making, which sees the judicial obligation as adherence to the Rule of Law. Part III discusses the *White* and *Stop the Beach Renourishment* decisions and demonstrates how both opinions reflect the Judicial Political Realist

13. *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Prot.*, 130 S. Ct. 2592 (2010).

14. *Id.* at 2601–02. Justice Scalia advocated in favor of recognizing a judicial takings doctrine in Parts II and III of his opinion, in which he was joined by Chief Justice Roberts and Justices Thomas and Alito. The remaining Justices concurred in the judgment and joined Parts I, IV, and V of the opinion, but did not believe that the constitutionality of judicial takings should be decided in the case at bar because there was clearly no taking (and thus the question of just compensation need not be resolved). *See, e.g., id.* at 2618 (Breyer, J., concurring in part and concurring in the judgment) (“[T]he plurality unnecessarily addresses questions of constitutional law that are better left for another day.”). Justice Kennedy’s opinion also expressed serious reservations as to whether a doctrine of judicial takings should ever be recognized. *See id.* at 2613 (Kennedy, J., concurring in part and concurring in the judgment).

15. *Id.* at 2602 (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property . . .”).

account. Part IV inquires why the Justices in *White* and *Stop the Beach Renourishment* proceeded as they did. Part V then discusses the negative implications for judicial institutions inherent in the doctrinal acceptance of the Judicial Political Realist model. Part VI then offers a brief conclusion.

Before proceeding, two taxonomical notes are in order. First, the paper uses the term “Judicial Political Realist” to refer only to those accounts which suggest that a judge’s political preferences guide legal decisions, whether in the short term (the “attitudinalist” model)<sup>16</sup> or in the long term (the strategic model).<sup>17</sup> In so doing, it omits reference to critiques suggesting that gender or other such factors are determinative in legal decision-making.<sup>18</sup> Second, unless otherwise indicated, any reference to *Stop the Beach Renourishment* refers to the opinion authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito.

Finally, I should reemphasize that I am not asserting that the Justices signing on to the *White* or *Stop the Beach Renourishment* opinions explicitly or intentionally adopted the Judicial Political Realist model. Rather, I contend that both cases are substantial moves towards the incorporation of the model of judges as political actors into constitutional doctrine and both cases therefore raise the institutional concerns associated with that account.

## II. BACKGROUND

In popular perception, judges decide (or should decide) cases by strict adherence to the Rule of Law. While not precisely defined, this proposition appears to be divided into two subcomponents. The first is that judges have a duty to decide cases according to external, neutral principles. The second is that judges should not allow personal beliefs or philosophy to influence their decisions.

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16. See sources cited *supra* note 2.

17. See, e.g., McGuire & Stimson, *supra* note 5; EPSTEIN & KNIGHT, *supra* note 6; Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001) (discussing the institutional context of judicial behavior); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964) (discussing judicial power to shape public policy).

18. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) (dissecting the effects of gender on judicial decision-making); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004) (concluding that judges’ religious beliefs can affect judicial decision-making).

The belief that judges have a duty to decide cases in accordance with the Rule of Law is deeply ingrained in our political culture and has considerable political resonance. Critics of controversial judicial decisions, for example, strive to delegitimize the opinions with which they disagree by attacking the deciding judge or judges as acting outside the Rule of Law—sometimes characterizing the judge or judges’ actions as “legislating from the bench”<sup>19</sup> or suggesting that the judge or judges engaged in “judicial activism.”<sup>20</sup> These attacks, moreover, are not limited to condemning decided cases, but are also used in political discourse to generate resistance to an opposing party’s judicial nominees.<sup>21</sup> Thus, both Republicans and Democrats commonly criticize each other as insufficiently committed to the Rule of Law and as having the intent to nominate judicial “activists” who will only further the party’s political agenda.<sup>22</sup> This Rule of Law rhetoric continues throughout the nominations process as virtually every nominee to the federal bench solemnly declares that she will never let her personal views influence her judicial decision-making, knowing full well that if she were to say something different her nomination would self-destruct.<sup>23</sup>

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19. Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 940 (2007).

20. *Id.* at 938.

21. See Solum, *Judicial Selection: Ideology Versus Character*, *supra* note 8, at 664 (quoting Senator Charles Schumer’s *New York Times* essay regarding opposition to judicial nominees on ideological grounds); Dinh, *supra* note 19, at 935–37 (discussing political criticisms of the judiciary).

22. For example, in response to the Supreme Court seat vacated by Justice Souter, Republican Senator Orrin Hatch, the ranking Republican on the Senate Judiciary Committee, spoke to President Obama, urging him “not to nominate a ‘judicial activist’” and to “choose a nominee who . . . would uphold the rule of law.” Alexander Mooney, *Hatch to Obama: No Judicial Activist*, CNN.COM POLITICAL TICKER (May 4, 2009, 9:01 PM), <http://politicalticker.blogs.cnn.com/2009/05/04/hatch-to-obama-no-judicial-activist>. Along similar lines, the nomination of Justice Alito caused a stir among Democrats who saw Alito as an advocate of the far-right wing of American politics. Peter Baker, *Alito Nomination Sets Stage for Ideological Battle: Bush’s Court Pick is Appeals Judge With Record of Conservative Rulings*, WASH. POST, Nov. 1, 2005, at A1, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/10/31/AR2005103100180.html>.

23. The most recent high-profile nominee to adopt this stance during her confirmation hearings was Justice Elena Kagan. *Elena Kagan*, N.Y. TIMES (updated Oct. 4, 2010), [http://topics.nytimes.com/top/reference/timestopics/people/k/kagan\\_elena/index.html?scp=1&sq=kagan%20confirmation%20hearings&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/k/kagan_elena/index.html?scp=1&sq=kagan%20confirmation%20hearings&st=cse). Ironically, in a 1995 article, then-Professor Kagan advocated for a more rigorous confirmation process for judicial nominees by calling for a “meaningful discussion of legal issues,” and criticizing the confirmation hearings of Justices Breyer and Ginsburg as “official lovefests.” Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1995)). See William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 534 n.45 (2005) (providing

The popular perception that judges are bound by an externally imposed rule of law also has a long-standing counterpart in legal theory. It is called Legal Formalism<sup>24</sup> and for much of our history it dominated the legal theory debate.<sup>25</sup> To Formalists, law is deterministic, meaning that there are “right” legal decisions dictated by a correct application of the relevant legal principles. Judges may make mistakes in deciding cases, but Formalism suggests that judges correctly applying the appropriate rules to a given case should reach the same legal result.

Interestingly, however, although popular culture continues to subscribe to the notion of the inviolability of the Rule of Law, Formalism has been under siege by legal theorists in the United States since at least the 1870s.<sup>26</sup> Today, as Professor Frederick Schauer notes, there are probably very few legal theorists, if any, who continue to accept the Formalist claim in its original form.<sup>27</sup>

The reason for Formalism’s demise was a devastating attack brought on by the so-called Legal Realist School. Led by such scholars as Jerome Frank<sup>28</sup> and Karl Llewellyn,<sup>29</sup> Legal Realists argued that law was not externally based, but rather derived from the institutions empowered to decide cases. To the Realists, law was indeterminate and judges’ decisions depended as much on context as upon strict application of rules of law.<sup>30</sup> Justice Holmes’s statement

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other examples of Supreme Court nominees declining to address political views during confirmation hearings).

24. FREDERICK SCHAUER, THINKING LIKE A LAWYER 29–35 (2009) [hereinafter SCHAUER]; See generally Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (discussing legal formalism). The notion that judges are constrained by an externally imposed rule of law has also been referred to as “legalism.” POSNER, *supra* note 1, at 41.

25. Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731 (2009) (“Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences . . . .” (quoting VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 30 (2006))).

26. At least one scholar suggests that the rejection of Formalism may have begun contemporaneously with its rise. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 29–33 (2010).

27. See SCHAUER, *supra* note 24, at 125.

28. See JEROME FRANK, LAW AND THE MODERN MIND (1930) (setting forth the Realist account of judicial decision-making).

29. See KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930) (setting forth the Realist account of judicial decision-making); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (same).

30. SCHAUER, *supra* note 24, at 128.

that “[t]he life of the law has not been logic; it has been experience”<sup>31</sup> is probably the most famous summary of this position.

Notably, the Legal Realist position challenged only the notion that law was externally derived. The Realists did not speak to the question of whether law was “political” in the policy-pursuing sense of the term, nor did they address whether law was merely a function of the political positions of the judges who decide cases.<sup>32</sup> Those concepts had yet to be crystallized. Their focus was instead on the development of law as a whole and not the individual preferences of sitting judges.

The idea that law is essentially political was far more central to the work of the Critical Legal Studies movement.<sup>33</sup> But like the Legal Realists, the Critical Legal Theorist account was systemic rather than individualistic. They saw law as a manifestation of the political dominance of entrenched power structures,<sup>34</sup> meaning that the law, taken as a whole, should be understood as favoring the interests of already politically dominant groups over the rights of the disenfranchised and marginalized.<sup>35</sup> Like the Legal Realists before them, the Critical Legal Theorists did not address whether law was merely the political preferences of the deciding judges.<sup>36</sup> That next step was to be the mission of the Judicial Political Realists.

Interestingly, the Judicial Political Realist account began in earnest outside the realm of legal theory, in the province of political science. Judicial Political Realism, moreover, unlike Legal Realism and Critical Legal Studies, based its critique upon empirical study and not on theory. Specifically, the political scientist Harold Spaeth tracked judicial votes in ideologically laden cases and, measuring those results against the perceived ideology of the judge, found empirical support for the proposition that judges decide cases in accord with their ideological values rather than by the application of legal rules and doctrine.<sup>37</sup> He referred to this method of judicial

31. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

32. See Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 *LEGAL THEORY* 111, 119 (2010) (“But it was not the thesis of the Realists that judges decided in accordance ‘with their political views’!” (citation omitted)).

33. See *id.* at 118 n.36 (discussing the Critical Legal Studies movement); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 *DUKE L.J.* 84, 97 (1995).

34. SCHAUER, *supra* note 24, at 146; Hasnas, *supra* note 33, at 97.

35. See Hasnas, *supra* note 33, at 97 (stating that judges’ preservation of social hierarchies is veiled by the Rule of Law concept).

36. Leiter, *supra* note 32, at 188 n.36.

37. See SEGAL & SPAETH, *supra* note 1, at 65.



decision-making as “attitudinalist.”<sup>38</sup> Later writers have since added to (or modified) Spaeth’s attitudinal model by demonstrating that a judge’s willingness to vote in accord with her ideological predispositions may be affected by institutional incentives, and that a judge may strategically vote in a particular case in order to achieve ideological vindication over the long term.<sup>39</sup> Nonetheless, Spaeth’s overall premise, that judges decide cases based on preexisting preferences, rather than by objective applications of legal doctrine, remains essentially in place.<sup>40</sup>

The empirical accounts of Spaeth and others, studying how judges actually behave, were for many years largely ignored by the legal community. As Judge Posner wrote, “[t]hese theories are expounded in a rich literature ignored by most academic lawyers . . . and by virtually all judges.”<sup>41</sup>

More recently, however, legal academics have begun to take notice.<sup>42</sup> Further, the Judicial Political Realist model has received reinforcement from another source as well—the United States Senate, or at least some United States Senators opposing a particular President’s judicial nominee. Asserting that a judge’s preexisting philosophies can influence her decision making, these Senators have begun inquiring into judicial philosophy in confirmation hearings even as the nominees’ stock answer—that they will not let their personal beliefs affect their judicial decision-making—remains exactly the same.<sup>43</sup>

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38. *Id.*

39. See generally McGuire & Stimson, *supra* note 5; EPSTEIN & KNIGHT, *supra* note 6; Cross & Nelson, *supra* note 17; MURPHY, *supra* note 17.

40. Perhaps even more empirically established than Spaeth’s view—that judges are primarily motivated by their preexisting ideology when deciding cases—is the assertion that, when deciding cases, judges are motivated by factors other than legal doctrine. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1155 (showing by an empirical study of the Supreme Court’s 2002 Term that a forecasting machine that is “indifferent to specific doctrine and text” can predict the results in Supreme Court cases better than doctrinal experts).

41. POSNER, *supra* note 1, at 7.

42. See generally, Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 856 (2008) (discussing the implication of empirical scholarship for doctrinal analysis); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (discussing the relationship between traditional legal scholarship and empirical studies of judicial behavior).

43. See, e.g., Charles E. Schumer, Op-Ed., *Judging By Ideology*, N.Y. TIMES, June 26, 2001, at A19, available at [http://schumer.senate.gov/about\\_chuck/op-ed\\_ideology.html](http://schumer.senate.gov/about_chuck/op-ed_ideology.html) (arguing for a “return to a more open and rational debate about ideology when [senators] consider

Law itself has remained largely unaffected by the Judicial Political Realist attack.<sup>44</sup> Lawyers argue cases as if doctrine matters and judges decide cases by citing text, precedent, and history and never intimate that personal ideology rather than legal principle guides their decision. Legal academics—other than those specifically examining judicial behavior—continue to analyze law in its own terms and not relative to the judges deciding the cases. The criticism that a judge has inserted her political beliefs into a judicial decision, rather than adhering to the Rule of Law, still resonates as a powerful condemnation of that judge’s actions. It is neither intended, nor taken, as accepting the proposition that an expected part of the judicial function is that a judge will insert her political preferences into law.<sup>45</sup>

Part IV, below, discusses why this may be so. For the moment, however, it is worth discussing two Supreme Court cases, *Republican Party of Minnesota v. White* and *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, in which the account of judges as political actors appears to have made inroads into judicial doctrine.

### III. DOCTRINAL ACCEPTANCE OF THE MODEL OF THE JUDGE AS POLITICAL ACTOR

#### A. *Judicial Speech and Republican Party of Minnesota v. White*

In *Republican Party of Minnesota v. White*,<sup>46</sup> Gregory Wersal, a candidate for the position of Associate Justice of the Minnesota Supreme Court, challenged the constitutionality of a Minnesota Canon of Judicial Conduct providing that a candidate for judicial office could not “announce his or her views on disputed legal or political issues.”<sup>47</sup> Under this Canon, for example, a candidate could not declare her views on such matters as abortion, capital punishment, criminal sentencing, or tort reform without incurring the risk of

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nominees”).

44. To be sure, there have been some doctrines adopted by courts that are designed to lessen the chances that judges’ policy preferences might affect their decisions. See *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), discussed *infra* notes 102–06 and accompanying text.

45. Notably, even leading empirical scholars such as Mitu Gulati and Stephen Choi evaluate a judge’s independence from others in her political party as an attribute of judicial excellence. Mitu Gulati & Stephen Choi, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004).

46. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

47. MINN. CODE OF JUDICIAL CONDUCT, CANON 5(A)(3)(d)(i) (2000).

ethical sanction. Claiming that this provision prevented him from campaigning on, or even mentioning, his views on controversial issues, Wersal alleged that Minnesota's judicial canon violated his rights under the First Amendment.<sup>48</sup>

In a 5–4 decision, the United States Supreme Court, in an opinion written by Justice Scalia, agreed with the plaintiff.<sup>49</sup> The Court first held that because speech relating to a candidate's qualification lies at the core of the First Amendment,<sup>50</sup> the Minnesota Canon could be upheld only if it was “narrowly tailored, to serve a compelling governmental interest.”<sup>51</sup> After then finding that the state's asserted interests of promoting judicial impartiality and the appearance of judicial impartiality were not sufficiently compelling, the Court ruled that the provision was unconstitutional.<sup>52</sup>

The Court's decision in *White* was not unexpected. The Court was exactly on point in noting the critical importance of freedom of speech to political campaigns for elected office. Indeed, to some First Amendment theorists, the *raison d'être* for protecting freedom of speech is its role in fostering self-government.<sup>53</sup> There is no speech more directed at this purpose than speech designed to help voters make informed decisions. Furthermore, in *White* itself there was no doubt that the judicial canon in question severely restricted the ability of judicial candidates to reach out to their constituencies.

What is more significant about *White* for our purposes, though, are the justifications about the nature of judicial decision-making that the Court offered in defense of its holding. The State argued that the Canon promoted judicial impartiality because a candidate who had not taken a position on a controversial issue would be more open to

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48. The Minnesota Republican Party and others parties joined Wersal as plaintiffs in the case, contending that their First Amendment rights were violated because the Canon's restrictions meant they were denied sufficient information from which they could determine whether to support Wersal's candidacy. *White*, 536 U.S. at 770.

49. *Id.* at 788.

50. *Id.* at 774; see also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971) (“And if it be conceded that the First Amendment was ‘fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’ then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”).

51. *White*, 536 U.S. at 775.

52. *Id.* at 776.

53. The self-governance rationale is most closely associated with the writings of Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, 15–16, 24–27, 39 (1948). See also Harry Kalvin, *The New York Times Case: A note on the Central Meaning of the First Amendment*, 1960 SUP. CT. REV. 1 (1960).

ruling on either side of that issue should it come before her as judge. A candidate who had taken a position on an issue, in contrast, would be more likely to rule on the side of the issue on which they had campaigned. The Court, however, viewed the type of impartiality that the state could permissibly promote far more narrowly, seeing it only as a “lack of bias for or against either party to the proceeding.”<sup>54</sup> To the Court, an impartial judge was not one without predispositions to vote in certain ways on certain issues; rather, it meant only that the judge was not biased against a particular party in a particular proceeding.<sup>55</sup> Thus, a judge who as a candidate may have expressed her views on how an issue should be decided would still be considered impartial. As the Court stated:

[W]hen a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.<sup>56</sup>

Notably, the foregoing passage is by itself significant in setting the stage of a Judicial Political Realist account of judicial decision-making. It explicitly rests on the proposition that a judge is likely to bring preexisting views to her legal decisions. But the Court did not stop there. To the *White* Court, eliminating a judge’s preconceptions is unattainable:

For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: “Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.”<sup>57</sup>

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54. *White*, 536 U.S. at 775.

55. *Id.* at 776.

56. *Id.* (emphasis omitted).

57. *Id.* at 777–78 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)). Indeed, the Court went on to suggest that finding a judge without preexisting views would not even be desirable. Again citing Chief Justice Rehnquist, the Court stated: “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of

To be sure, *White* need not be read as embracing a Judicial Political Realist account. It could be viewed as standing only for the more modest proposition that judicial candidates have preexisting opinions on legal issues and that the interests of an informed electorate should allow a judicial candidate to communicate those views to her constituency. *White*, however, is not so easily constrained. After all, *White* also struck down Minnesota's provision prohibiting judicial candidates from announcing their political views.<sup>58</sup> By holding that judicial candidates can campaign for votes on the basis of their political positions, the opinion suggests that judicial decisions, like legislative decisions, are appropriately products of political choice. In that sense, *White* normalizes the view that judicial decisions may be based on political preference and not rules of law. A decision on the constitutionality of gun control, for example, is determined not on the basis of what the Constitution means, but on whether a state's electorate has elected pro-gun or pro-gun control jurists.

Of course, *White*'s apparent acceptance of the Judicial Political Realist account might be defended on grounds that the insertion of politics in judicial decision-making necessarily follows from any legal system that elects judges. Under this view, *White* should not be extrapolated to apply to the Court's view on the enterprise of judicial decision-making generally. It only applies to decision making by elected judges. Perhaps. But the fact that a state elects its judges does not mean that it has endorsed, or even acquiesced in, the view that rules of law should be politically determined. The states that utilize elections as their method of judicial selection did not adopt that system for this reason. Rather, the primary reasons animating the broad movement by the states to a system of judicial elections<sup>59</sup> were

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constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Id.* (quoting *Laird*, 409 U.S. at 835).

58. MINN. CODE OF JUDICIAL CONDUCT, CANON 5(A)(3)(d)(i) (2000). The Court's decision protecting the right of judicial candidates to campaign on their political views also suggests that the Court believes those views are relevant to how judges decide cases. Why, after all, would an informed electorate need to know if a judge was pro-life or pro-choice if those political dispositions were irrelevant to the judge's decision making?

59. The key time period in which this movement took place was 1846–1860. See Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections after Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 107 (2005). Mississippi actually predated this trend and became the first state to call for the election of all state judges in 1832. Vermont, Georgia, and Indiana, meanwhile, elected trial-court judges at the local level in the early 1800s. See MATTHEW J. STREB, *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 9 (2007). Electing judges was also not unknown at the time of the ratification of the Constitution.

general notions of Jacksonian democracy and concerns for protecting the independence of judges.<sup>60</sup> The purpose of these measures was not to allow voters to pick and choose the meaning of legal rules.<sup>61</sup> Moreover, the states have continued to reject the notion that judicial elections should be seen as vehicles for placing rules of law up for political referenda. That is why Minnesota's judicial canon (and those of other states) prohibited judges from campaigning on their political views. The notion, in short, that political preferences should determine legal rules of decision does not inevitably flow from the nature of judicial elections. It does, however, flow directly from *White*.

### *B. Judicial Takings and Stop the Beach Renourishment*

The recognition of the doctrine of "judicial takings" in Justice Scalia's opinion in *Stop the Beach Renourishment* is, in many ways, even more significant jurisprudentially in its acceptance of the Judicial Political Realist model than is the Court's opinion in *White*. *White* used the Judicial Political Realist model only as part of its justification for rejecting the State's argument in favor of curbing a judicial candidate's speech rights. The implicit message in Justice Scalia's recognition of judicial takings in *Stop the Beach*

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Vermont's 1777 Constitution, in force until Vermont became a state in 1791, called for the popular election of some lower-court judges. VT. CONST. of 1777 § 27.

60. See Rapp, *supra* note 59, at 9 (attributing the states' move to judicial elections as part of the wave of Jacksonian democracy). As Streb writes, "the rise of Jacksonian democracy gave more power to the people and raised questions about the accountability of judges. Not electing state judges was considered to be undemocratic, and the Jacksonian era was dominated by beliefs in expanded suffrage and popular control of elected officials." *Id.*

Other scholars suggest that the reasons underlying the states' adoption of judicial elections were more complex. See Caleb Nelson, Note, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190-92 (1993). That is, the delegates from various states not only discussed the desirability of judicial elections in terms of democratic populism or judicial independence, but also raised a number of other issues. To Nelson, "the arguments on both sides were sophisticated . . . Most delegates clearly had more in mind than merely applying the democratic principle." *Id.* at 192. Nelson asserts that the real underlying force that led to judicial elections was an overall suspicion of government. Nelson, *supra*, at 203. He writes:

The rise of the elective judiciary marked not a mere transfer of power from one branch of government to another, but an effort to decrease official power as a whole. It arose from the people's profound distrust of their own government, whose officials could not be counted upon to act in the citizenry's best interests. *Id.*

61. To be sure, as Kermit Hall explains, there were some who supported judicial elections who were concerned with judicial activism and who believed that elections could help curb judicial overreaching. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 348 (1983). But, as Hall maintains, the primary support for judicial elections was to preserve judicial independence and not to undercut it. *Id.* at 342-43.

*Renourishment*, however, goes much further and suggests that substantive rules of constitutional law need to be refashioned in light of the Judicial Political Realist account. Before we get to this point, however, it is necessary to provide some background to the underlying takings issue.

### 1. The Takings Clause

The Takings Clause provides that no “private property [shall] be taken for public use, without just compensation.”<sup>62</sup> As its text indicates, the Takings Clause does not prohibit the government’s seizure of property for public use, but only requires the government to provide compensation in the event that it does so.<sup>63</sup> Its underlying rationale, as the Court has explained, is not to prevent the government from acting in the public interest, but to assure that the government does not force “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>64</sup> Significantly, although the Takings Clause is most commonly associated with eminent-domain proceedings<sup>65</sup>—where the government seizes an owner’s property, permanently or temporarily, for public purpose<sup>66</sup>—a takings claim, known as a “regulatory taking,” can arise when a government’s regulatory action is “so onerous that its effect is tantamount to a direct appropriation or ouster.”<sup>67</sup>

### 2. Judicial Takings

The theory of “judicial takings” is that the protections of the Takings Clause should also apply to the decisions of the judicial branch. Under such a doctrine, property owners whose rights are

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62. U.S. CONST. amend. V.

63. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

64. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (“[The Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government.”).

65. *See* *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (“[T]he classic taking is a transfer of property to the State or another private party by eminent domain . . .”).

66. *See generally, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (holding that the government’s seizure and operation of a coal mine to prevent a national strike of coal miners constituted a taking).

67. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528 (2005). As the *Lingle* Court noted, the test for when regulatory takings should be recognized, first set forth by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is rather enigmatic: “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Lingle*, 544 U.S. at 548 (quoting *Mahon*, 260 U.S. at 415).

sufficiently adversely affected by a judicial decision are entitled to compensation just as much as property owners whose rights are adversely affected by an executive or legislative branch decision. As Professor Barton Thompson explains, the theory of judicial takings rests in exactly this symmetry, and he offers the following example in support:

Under the traditional common law rule, owners of beachfront property hold title down to the mean high tide line. If the executive or legislative branch of a state government were to order private beachfront owners to permit the public onto the portion of their beaches between the mean high tide line and the vegetation line, without compensation, the United States Supreme Court would almost certainly hold that the state had taken the beachowners' property in violation of the Constitution. If, on the other hand, a state court were to reject the traditional common law rule, overrule its prior decisions, and hold that private owners exercise dominion only to the vegetation line, this might not be considered an unconstitutional taking. The immediate consequence to the beachowners, however, is identical: in both cases, they have lost the exclusive right to a portion of what they justifiably had thought was their beach.<sup>68</sup>

Although some courts have recognized the principle of judicial takings,<sup>69</sup> the United States Supreme Court has never formally accepted the doctrine.<sup>70</sup> Indeed, a few of its decisions indicate that Takings Clause protections do not apply to judicial decisions.<sup>71</sup> That issue, however, was placed squarely before the Court this past term in *Stop the Beach Renourishment*.<sup>72</sup>

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68. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1450 (1990).

69. See, e.g., *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 482–83 (D. Haw. 1978) (holding that the Hawaii Supreme Court's decision violated the Fifth Amendment's takings protections); *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1975) (finding that a Hawaii Supreme Court decision that converted private water rights to public water rights was a taking).

70. The roots of the doctrine in the United States Supreme Court can be traced, however, to Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) ("Of course the [Washington Supreme Court] did not conceive of this action as a taking. . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*.").

71. See, e.g., *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364–66 (1932); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680–81 (1930). For an excellent, thorough analysis and chronology of the judicial takings concept, see Thompson, *supra* note 68, at 1463–72.

72. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) ("We consider a claim that the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment.").



### 3. *Stop the Beach Renourishment*

*Stop the Beach Renourishment* presented the Court with a judicial takings claim by a group of beachfront property owners in an area of Florida that had suffered serious beach erosion. In response to this erosion, the owners' communities sought to engage in a beach restoration project that would fill in land by inserting sand deposits between the edge of owners' property and the water. By Florida statute, the beach created as a result of the new sand deposits would belong to the state,<sup>73</sup> meaning that the property owners' land would no longer touch the water<sup>74</sup> even though they would not lose any actual acreage. Further, the owners would also not have the right to take ownership through the common-law property right of accretion to land created by any natural expansion of the beach, a right they would have enjoyed had their property continued to abut the water.<sup>75</sup>

Contending that this loss of land touching the water and the loss of their rights of accretion constituted a taking,<sup>76</sup> the owners challenged the project in the Florida state courts. The case eventually reached the Florida State Supreme Court, which ultimately rejected the owners' claims, holding that Florida property law did not protect the owners' asserted property interests.<sup>77</sup> The property owners then appealed to the United States Supreme Court, asserting that the decision of the Florida Supreme Court changed preexisting Florida law and was therefore itself a taking.<sup>78</sup>

The United State Supreme Court in an 8–0 decision<sup>79</sup> found for the State with all the participating Justices agreeing that the Florida Supreme Court decision did not violate the owners' constitutional rights. The Justices differed, however, as to whether the Court should

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73. *Id.* at 2599.

74. Florida law did provide that the landowners would continue to have the right of access to the water over the state-owned lands. *Id.*

75. *Id.*

76. *Id.* at 2600. Because no land of the property owners was actually seized under the project, the owners' claim in *Stop the Beach Renourishment* was in the nature of a regulatory taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

77. See *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008).

78. See *Stop the Beach Renourishment*, 130 S. Ct. at 2600–01. As noted in the Court's opinion, although the Supreme Court of Florida did not address the question that was presented in the petition for writ of certiorari, the Supreme Court granted certiorari because the decision of the state court itself was challenged as violating federal law. *Id.* at 2600 n.4.

79. Justice Stevens did not participate in the decision.

recognize a judicial takings doctrine. Justice Breyer, writing for himself and Justice Ginsberg, contended that the Court should not reach the question in *Stop the Beach Renourishment* because the facts so clearly indicated that no taking of any kind had occurred.<sup>80</sup> Thus, they concluded that it would be better to preserve the recognition issue for a later date.<sup>81</sup> Justice Kennedy, writing for himself and Justice Sotomayor, agreed that the Court should not reach the issue under the facts before them, but Justice Kennedy's opinion also expressed serious reservations about whether the Court should ever recognize the doctrine.<sup>82</sup> In Justice Kennedy's view, the remedy for any judicial decision that improperly invaded the property owners' rights should be found in the Due Process Clause and not the Takings Clause.<sup>83</sup>

The critical opinion for our purposes, however, was authored by Justice Scalia. Although holding that the property owners were unable to demonstrate that there was a judicial taking under the facts in *Stop the Beach Renourishment* itself,<sup>84</sup> Justice Scalia's opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, asserted that a judicial takings doctrine should be recognized.<sup>85</sup> To Justice Scalia, "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."<sup>86</sup>

80. See *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring in part and concurring in the judgment).

81. *Id.*

82. See *id.* at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that a judicial takings doctrine would effectively sanction the right of courts to take property from state residents without holding these courts to the same fiscal and political constraints applicable to regulatory agencies).

83. See *id.* at 2614–15 (“If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.”).

84. See *id.* at 2613. According to Justice Scalia, a judicial takings claimant, in order to successfully maintain a judicial takings claim, must show that the challenged judicial decision amounted to an “elimination of an established property right.” *Id.* at 2608. Justice Scalia ruled, however, that the property owners in *Stop the Beach Renourishment* were unable to meet this standard because Florida property law was not sufficiently settled in their favor. See *Id.* at 2610–13.

85. See *id.* at 2601 (“Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.”).

86. *Id.* Justice Scalia also defended recognition of the doctrine on textual grounds. Specifically, he argued that the text of the Takings Clause, unlike other constitutional provisions such as the Ex Post Facto Clauses, U.S. CONST. art. I, § 9, cl. 3 and U.S. CONST. art. I, §10, cl. 1, does not mention a specific branch of government. *Stop the Beach Renourishment*, 130 S. Ct. at 2601. Justice Scalia asserts, “[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.” *Id.*

Justice Scalia's opinion in *Stop the Beach Renourishment* marks a stark example of Judicial Political Realism in action. To begin with, Justice Scalia's express equation of a taking by judicial decree and a taking by legislative fiat is a direct endorsement of the notion that judicial decision-making is indistinguishable from legislative action. To Justice Scalia, a judicial decision that upsets an owner's settled property interests is a political one, not a legal one. His rhetorical move of ascribing both judicial and legislative action to the "State"<sup>87</sup> only reinforces this proposition. Justice Scalia's diminishment of the role of law in the Florida Supreme Court's decision could not be clearer.

The significance of equating legislative takings with judicial decisions affecting property rights is even more remarkable given the classically legislative nature of a takings action.<sup>88</sup> As discussed above, a legislative taking occurs when the government appropriates property for public purpose. In such circumstances, the Takings Clause protects the property owner by requiring the government to pay for the appropriation. A government deciding whether to "take" property for a public purpose is then faced with the policy calculus of determining whether the benefit of the proposed action is worth the cost of its funding,<sup>89</sup> both in relation to the value of the project itself and in relation to the other funding priorities facing the government at that particular moment. This type of calculus, as the Court noted in a

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Actually, there may be such a reason. As Justice Scalia later acknowledges in his *Stop the Beach Renourishment* opinion, the Framers likely did not believe that courts had the power to "change" common law. *Id.* at 2606 ("[T]he Constitution was adopted in an era when courts had no power to 'change' the common law." (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 69–70 (1765); *Rogers v. Tennessee*, 532 U.S. 451, 472–78 (Scalia, J., dissenting))). But if the Framers did not believe that courts could change law, as Justice Scalia argues, there would have been no reason for them to include the courts in the anti-takings provision. If, after all, the courts cannot change the law, they cannot effectuate a judicial taking, which, by definition, requires a change in the law. Justice Scalia does not deny this point, rather his response is only a textualist argument that when constitutional text is clear, the interpretive question "is not what [the Framers] envisioned but what they wrote." *Stop the Beach Renourishment*, 130 S. Ct. at 2606. Of course, even in his textualist assertion, Justice Scalia is not on solid ground, as the Taking Clause does not mention the courts.

87. *Id.*

88. See Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 433–34 (2001). As Walston argues, the ability to effectuate a taking derives from the exercise of the police power, a power enumerated to the legislative branch (and importantly, not to the judiciary). A taking "involves an inherently legislative function, not a judicial one." *Id.*

89. See *Stop the Beach Renourishment*, 130 S. Ct. at 2613–14 (Kennedy, J., concurring in part and concurring in the judgment) (noting that some states allow their officials to reconsider whether to effectuate a taking after a jury verdict sets the amount of compensation).

previous case, is inherently legislative.<sup>90</sup>

A court weighing property rights, in contrast, would neither inquire about, nor have the necessary information to evaluate, the political wisdom of a forced purchase or how that cost should relate to other funding priorities. A court presumably would ask an entirely different set of questions: Does preexisting precedent support the property claim? Is the claim based on common-law principles? What are the potential precedential effects in recognizing (or not recognizing) a property right in this instance? Will the types of policy considerations that have traditionally justified doctrinal changes in the law support this decision (if the decision does indeed depart from existing precedent)? Justice Scalia's depiction of the judicial decision as legislative, however, suggests that even if a court reached a conclusion on the allocation of property rights based upon these sorts of legal considerations, its judgment should still be considered a political, and not a legal, decision.

Finally, depicting a judicial property rights decision as a taking furthers the Judicial Political Realist notion that judges are political actors in yet another way. Certainly, a court in any given case can decide an issue in a manner that improperly undercuts the settled rights of property owners. If it did so, however, one would expect the decision to be criticized as "wrong" as a matter of law. But this is where characterizing the court's action as a taking becomes so significant. Because takings jurisprudence presumes that the state has the legitimate power to take private property for public purpose (subject to a compensation requirement), a judicial takings theory must also presume that a court has the legitimate power to take private property (subject to compensation).<sup>91</sup> This means even the most egregious decision by a court invading private property rights for public use can never initially be criticized as "wrong" or even unconstitutional; it can *only* be described as requiring compensation.<sup>92</sup>

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90. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("[T]he power of eminent domain is a legislative function."). As Roderick Walston notes, also indicating that the takings power is not judicial is the fact that it stems from the police power, a power a court does not have. See Walston, *supra* note 88, at 433–34 ("The courts, unlike legislatures, do not exercise the police power; rather, they exercise solely an interpretive function.").

91. See *supra* notes 71–72 and accompanying text.

92. For this reason, Justice Kennedy's argument—that judicial decisions improperly affecting property rights should be analyzed under the Due Process Clause—makes far better sense. See *supra* note 82 and accompanying text. See also Walston, *supra* note 88, at 433–38 (arguing that because judicial decisions are a result of different institutional functions than are

It becomes unconstitutional only if the required compensation is not forthcoming.<sup>93</sup> Justice Scalia's equation of judicial decrees to legislative fiats thus suggests that there are no legal bounds to a judicial decision, there is only political calculus—a conclusion that could come straight from the Judicial Political Realist account.

#### IV. *WHITE*, *STOP THE BEACH RENOURISHMENT*, AND THE EFFORT TO CONSTRAIN JUDICIAL POWER

*White* and *Stop the Beach Renourishment* did not have to be reasoned as they were. Even if the Justices joining those decisions believed that Minnesota's judicial canon was unconstitutional or that property owners needed to be constitutionally protected from judicial decisions that upset settled expectations, there were other options. In *White*, for example, the Court's opinion itself offered an alternative justification for striking down the challenged provision—specifically that the provision was “woefully underinclusive” in accomplishing the state's purposes because it affected only what a candidate could say after declaring to run and not what she may have stated up until she announced her candidacy.<sup>94</sup> The opinion did not need to assert that all judges have preconceived views that necessarily affect judicial decision-making in order to reach its result.<sup>95</sup>

Similarly, in *Stop the Beach Renourishment*, those supporting the view that property owners need to be protected from errant judicial decisions could have relied on Justice Kennedy's view that any improper judicial invasion of settled property rights could be

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legislative decisions, they should be seen as bound by the Due Process Clause and not the Takings Clause).

93. A taking that is not for public use, of course, could be ruled unconstitutional on that ground. See *Kelo v. City of New London*, 545 U.S. 467, 477 (2005); *Haw. Housing Authority v. Midkiff*, 467 U. S. 229, 245 (1984).

94. *Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002) (“The short of the matter is this: In Minnesota, a candidate for judicial office may not say ‘I think it is constitutional for the legislature to prohibit same-sex marriages.’ He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”).

95. Justice O'Connor's concurring opinion also provided another possible ground for decision; i.e., that it was the problem of electing judges, and not what judicial candidates might say on the campaign trail, that created the actual risk of judicial bias and therefore any bias issues rested with Minnesota's method of judicial selection and not its ethical canons. *Id.* at 788–92 (O'Connor, J., concurring).

overturned under a due process challenge<sup>96</sup>—a view far more consistent with the proposition that courts are bound by legal rules than is Justice Scalia’s judicial takings characterization of court decisions as akin to legislative actions. Why, then, did the *White* and *Stop the Beach Renourishment* opinions proceed as they did and seemingly adopt the view of the judge as political actor?

To be sure, it could be argued that the Supreme Court’s doctrinal recognition of the proposition that law is not derived from external, objective sources is nothing new. In 1938, in one of its most notable cases, *Erie Railroad Co. v. Tompkins*,<sup>97</sup> the Court decided that the federal courts had to look to state common law rather than federal common law in deciding non-statutory claims. Prior to *Erie*, the federal courts had relied on their own interpretations of the “general” common law in deciding such cases based on the premise that, regardless of forum, the common law derived from a universal source.<sup>98</sup> The *Erie* Court ruled, however, that because law could no longer be considered to be derived from a “transcendental body of law outside of any particular state,”<sup>99</sup> displacing state common law with federal common law offended principles of federalism and exceeded the federal courts’ power.

But while *Erie* might (and should) be considered a Legal Realist decision, it was not a Judicial Political Realist decision in the sense of suggesting that state and federal judges were acting to further their own political preferences. *Erie* suggested that both statutory and common law were positivistic—that is, that law did not derive from external sources. *Erie* said nothing about the reasons why a court might decide as it did and did not question the motivations or dispassion of the rendering court.<sup>100</sup> The implication in *Stop the Beach*

96. See *Stop the Beach Renourishment*, 130 S. Ct. at 2614–15 (Kennedy, J., concurring in part and concurring in the judgment) (“The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the *Due Process Clause*.” (emphasis added) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005))).

97. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

98. See *Swift v. Tyson*, 41 U.S. 1, 19 (1842) (“And we have not now the slightest difficulty in holding, that [the Rules of Decision Act], upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.”).

99. *Erie*, 304 U.S. at 79.

100. Some scholars have suggested that *Erie* was concerned with curbing undue policy making by the federal courts. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary*

*Renourishment* and *White*, in contrast, is that judicial decisions are vehicles designed to accomplish political purpose. *White* explicitly holds that judges may campaign to further political agendas. Subjecting judicial property-law decisions to a takings analysis, as in *Stop the Beach Renourishment*, implies that those property-law decisions are predicated upon the rendering court's desire to pursue a certain public policy course and not upon its dispassionate interpretation of the law. Neither of these propositions can be assigned to *Erie*.<sup>101</sup>

It could also be argued that *White* and *Stop the Beach Renourishment* are rooted in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>102</sup> In *Chevron*, the Court held that courts must defer to federal agency interpretations of ambiguous statutes and, critically for our purposes, based this decision in part on the desire to prevent judges from inserting their "personal policy preferences" into statutory interpretation.<sup>103</sup> But, while the clear implication of *Chevron* is the unremarkable proposition that judges *can* insert their political preferences into their decision, *Chevron*, unlike *White*, does not suggest that they will inevitably do so.<sup>104</sup> Indeed, by assigning to courts the initial determination of whether a statute is ambiguous, *Chevron* appears to presume that judges are fully able to avoid deciding at least some issues by political preference.<sup>105</sup> Nor does *Chevron* suggest,

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*International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007). *But see* Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595, 596–99 (2008) (refuting this contention).

101. In this respect it is notable that neither *White* nor *Stop the Beach Renourishment* cites the *Erie* decision. For the argument that *Erie* does lead to the recognition of the doctrine of judicial takings see W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1531 (2004).

102. 467 U.S. 837 (1984).

103. *Id.* at 865.

104. Nonetheless, there is significant literature arguing that despite *Chevron*'s stated goal of avoiding judicial policy-making, the two-step framework has actually increased the effect of a judge's policy preferences. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–26 (2006); Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 68–83 (1994); William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus*, 68 NEB. L. REV. 454, 486–90 (1989); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1068–72 (1995). *But see* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Court of Appeals*, 15 YALE J. REG. 1, 48 (1998) (arguing that the effect of personal policy preferences on judicial decision-making is no more pronounced under *Chevron* than under pre-*Chevron* understandings).

105. The *Chevron* analysis proceeds in two steps. *Chevron*, 467 U.S. at 842. The first

like *Stop the Beach Renourishment*, that it is permissible for courts to make pure policy. Rather, *Chevron* is a case designed to limit the exercise of judicial policy-making, not license it.<sup>106</sup>

So why, to repeat the question, would the Justices who joined *White* and Justice Scalia's opinion in *Stop the Beach Renourishment* go beyond precedent and choose to frame the issues before them in a way that diminishes the role of law as a guiding force in judicial decision-making? It is one thing, after all, for those on the outside to contend that judges are essentially only political actors; it is another when that message comes from the United States Supreme Court itself.<sup>107</sup>

Two possible reasons emerge. First, the Justices may have thought that the Judicial Political Realist account is accurate. As discussed above,<sup>108</sup> many social scientists accept this view and the proposition enjoys substantial empirical support.<sup>109</sup> The *White* and *Stop the Beach Renourishment* opinions then might just be judicial attempts to reconcile the legal system with the Judicial Political Realist account.<sup>110</sup>

Ascribing the Judicial Political Realist mantle to the specific Justices joining *White* and the Justice Scalia opinion in *Stop the Beach Renourishment*, however, seems mistaken. As Judge Posner noted, the theory that law binds judges “remains the judiciary’s ‘official’ theory of judicial behavior” and it is one that has been “proclaimed most emphatically by Justices of the Supreme Court.”<sup>111</sup> There seems little

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requires the Court to apply its interpretation of the federal statute if the statutory language is clear. *Id.* at 842–43. The first part of *Chevron* assumes that judges can make legal decisions without being influenced by personal preferences. *Chevron*'s required deference only applies in the second step—when the statutory language is unclear and policy considerations serve as a tie-breaker between competing statutory interpretations. *Id.* at 843.

106. The argument that *White* and *Stop the Beach Renourishment* are also designed to check against judicial overreaching will be discussed below. See *infra* notes 115–16 and accompanying text.

107. See *supra* Part III.

108. See *supra* Parts I and II.

109. See *supra* notes 2–8 and accompanying text.

110. A multitude of legal scholars have attempted such a reconciliation by advocating for reform. See, e.g., John Ferejohn, *The Law of Politics: Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 66–67 (2002) (calling for the reform of confirmation rules to lessen the effects of politics on the judiciary); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494 (1992) (arguing that to reduce the politics of judicial confirmations, the Senate should take a stronger role); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 784–91 (2008) (proposing that all appellate panels should have at least one judge from each of the two major political parties).

111. POSNER, *supra* note 1, at 41.



reason to suspect that the Court's most conservative Justices would veer from this "official" account. Justice Scalia, moreover, who wrote both *White* and *Stop the Beach Renourishment*, has been a tireless critic of those judges whom he believes insert their political preferences into law.<sup>112</sup> He has also vigorously and continually asserted that politics should not determine the results in cases and does not determine results, at least when he is the decision maker.<sup>113</sup>

The second, and more likely, explanation is that the decisions in *White* and *Stop the Beach Renourishment* can be seen as part of the efforts by the Court's conservative wing to combat perceived judicial overreaching by other judges. Viewed in this way, the message is clear. If judges are acting politically, they should be held accountable politically.

Without doubt, the Court's decision in *White* and the recognition of a doctrine of judicial takings in *Stop the Beach Renourishment* directly promote judicial accountability. In *White* that accountability takes place in the ballot box,<sup>114</sup> as the sitting judges will have to answer to the voters for their "political" decisions. In *Stop the Beach Renourishment* the accountability takes place by forcing the state to bear the costs of its courts' political choices.<sup>115</sup>

But if that is the strategy in *White* and *Stop the Beach Renourishment*, it is risky business because the logic of those decisions impugns all judicial decision-making, not just those decisions that certain Justices on the Court perceive as overreaching. The premise that judicial decisions inevitably reflect political bias does not allow

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112. See, e.g., *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected . . .").

113. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989).

114. See Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 55-56 (2008) (arguing that *White* was aimed at making the state courts more responsive to popular input because the White majority was concerned that the state courts had overused their independence to stray too far from majoritarian preferences).

115. Justice Scalia's *Stop the Beach Renourishment* opinion was also clearly designed to prevent state courts from doing an end run around the Supreme Court's decision in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), a case in which the Court held that the determination of whether a legislative action affecting property rights constituted a taking depended upon the owners' settled property expectations. Notably, the Court in *Lucas* explicitly forewarned that it would police state-court common-law decisions to assure they did not alter the background law to avoid a takings finding. *Id.* at 1032 n.18. Perhaps not surprisingly, Justice Scalia also authored the *Lucas* decision.

for exception and does not exclude Justices sitting on the United States Supreme Court. If lower-court decisions are inevitably political, the same must be said of the decisions of the Supreme Court—including those Supreme Court decisions that characterize the lower-court decisions as being improperly political. According to the Judicial Political Realist account, Supreme Court decisions that react to the perceived political overreaching of the lower courts are no more than political judgments themselves.

Consider how this understanding might play out in a takings case. Assume that a state supreme court rules that its decision adversely affecting a plaintiff's property rights is not a taking. Further assume that the United States Supreme Court disagrees and would find the state-court decision to be a taking. If all judicial decision-making is politically based, the Supreme Court decision is on no firmer ground than the state-court decision because both are based upon the deciding judges' political views. There is no obvious legal justification as to why the United States Supreme Court should replace a state court's political determination of whether a particular action constitutes a taking with a contrary political determination of its own. The decisions of both courts, under this theory, are only political actions.

It might, of course, be contended that a state-court common-law decision is not functionally equivalent to a Supreme Court's constitutional decision because common law is based upon constantly changing policy determinations while constitutional law is defined by fixed principles. But this contention is descriptively inaccurate. Even Justice Scalia acknowledges that the rules of constitutional law change.<sup>116</sup> Alternatively, it might be argued that a state court's common-law decision is not functionally equivalent to a Supreme Court's constitutional-law decision because the former is a policy choice while the latter is an apolitical interpretation of law. But if, as *White* seems to suggest, judicial decisions inevitably reflect judge's predispositions, no particular judicial decision can be characterized as a purely legal interpretation.

Still another response might be to contend that, at least with respect to the recognition of a judicial takings doctrine, the characterization of either the state or Supreme Court opinion as

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116. See *Republican Party of Minn. v. White*, 536 U.S. 765, 784; see also *Teague v. Lane*, 489 U.S. 288, 311 (1989) (acknowledging that the Court makes "new rules" of criminal procedure).

political is beside the point. The focus, rather, is only whether the state-court opinion upset settled expectations.<sup>117</sup> Consider, however, the implications of an approach to judicial decision-making that suggests that any time a court upsets settled ownership expectations, the court's decision should be subject to a takings analysis. In *Lucas v. South Carolina Coastal Council*,<sup>118</sup> for example, the Court ruled that a state law designed to prevent beach erosion created a taking when it rendered a landowner's property valueless. If the Court subsequently overturned the *Lucas* decision would it, or the United States government, have to compensate the owner because the Court changed the law in a way that upset the landowner's expectations? Or, if the Court reversed the line of political patronage cases holding that the First Amendment prevents public employers from hiring and firing employees on account of party affiliation,<sup>119</sup> a change in law specifically advocated by Justice Scalia,<sup>120</sup> would newly fired employees be able to seek constitutional redress because the Supreme Court upset settled expectations that they would be protected from patronage decisions?<sup>121</sup> The logic of *Stop the Beach Renourishment* suggests that they should. The Justices who joined the *Stop the Beach Renourishment* opinion, I suspect, would hold that they should not.

This leads to the argument that the *White* and *Stop the Beach Renourishment* Justices presumably really want to make—that *their* decisions are based on the Rule of Law and are therefore valid exercises of judicial power, while judicial decisions based on policy preferences are illegitimate uses of judicial power. That criticism, however, could be stated directly without adopting a jurisprudence that treats judges as inherently political actors. Furthermore, it could be stated more persuasively and without internal contradiction because, whether or not they choose to admit it, the Justices' Judicial Political Realist approach undercuts the legitimacy of their own decisions as much as it undercuts the legitimacy of the decisions they condemn. There is, after all, an inherent paradox in the Court's

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117. Notably, this is how Justice Scalia framed the issue of how a taking should be determined in his *Lucas* opinion. See *Lucas*, 505 U.S. at 1027–32.

118. 505 U.S. 1003 (1992).

119. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

120. *Rutan*, 497 U.S. at 96 (Scalia, J., dissenting).

121. Cf. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that entitlements should be considered property).

adoption of the Judicial Political Realist account in that it makes the Court's adoption of that model itself subject to its own critique—that its decision to do so is based on politics and not law.

No doubt there are political abuses in the use of judicial power that can and should be curbed, but using Judicial Political Realism to attack those excesses falls under its own weight. Further, as discussed in the next section, it also causes more harm to judicial institutions than it potentially cures.

#### V. THE DIMINISHMENT OF THE RULE OF LAW INHERENT IN THE JUDICIAL POLITICAL REALIST ACCOUNT

That both *White* and *Stop the Beach Renourishment* appear to accept the Judicial Political Realist account of judges as political actors does not mean that the decision to do so is wrong. Social scientists, after all, have supported the Judicial Political Realist account with empirical evidence,<sup>122</sup> and the rationales offered in *White* and *Stop the Beach Renourishment* present at least plausible accounts of judicial behavior. At the same time, however, the view that judges are political actors is not indisputably correct. There are many scholars, including leading judges, who vehemently contend that rules of law serve to constrain judicial decision-making<sup>123</sup> and that responsible judges successfully separate their political views from their judicial decisions.<sup>124</sup>

Nonetheless, even if the evidence is mixed, the choice between the two models of judicial decision-making should not be random selection, at least for a court. As the following subsections demonstrate, there are serious institutional costs imposed upon the judiciary by the vision of the judge as political actor that a court, if not a social scientist, should find especially hard to ignore.

##### A. *The Judicial Political Realist Account Suggests Judicial Review Is Inconsistent with Democratic Principles*

The first major concern inherent in the view of the judge as political actor is that it suggests that the power of judicial review is

122. See POSNER, *supra* note 1.

123. See, e.g., Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1953 (2009).

124. See Solum, *Judicial Selection: Ideology Versus Character*, *supra* note 8.

inconsistent with democratic principles. The power of courts to strike down popularly enacted legislation (the power of judicial review) is premised on the notion that the courts are interpreting the law, not that they are pursuing their own political agendas. As Chief Justice John Marshall famously stated in *Marbury v. Madison*,<sup>125</sup> “it is emphatically the province and duty of the Judicial Department to say what the law is.”<sup>126</sup> If judicial decisions are based on politics and not law, however, the underlying rationale for granting courts the power of judicial review evaporates. Instead, the power simply becomes the power of one political body (the judiciary) to override the decisions of another.

Seen in this light, there is no apparent reason to allow the courts to have the last word. Rather, democratic principles cut in exactly the opposite direction. The legislative and executive branches are politically accountable to the voters, while the judiciary is not. As such, democratic theory suggests that the decisions of the politically accountable branches should prevail.<sup>127</sup>

Creative arguments have been advanced to the contrary. Professor Eric Posner, for example, contends that even if judicial decisions are based at least in part on the political bias of the rendering court, allowing judicial decisions to trump those of the politically accountable branches still serves the important purpose of providing another check on political action.<sup>128</sup> To Posner, judicial review is just another of the many obstacles to legislative enactment provided by the Constitution and the legislative process. But unlike the barriers to enacting legislation created by bicameralism,<sup>129</sup> presentment,<sup>130</sup> and the various other veto points in the legislative process,<sup>131</sup> judicial

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125. *Marbury v. Madison*, 5 U.S. 137 (1803).

126. *Id.* at 177.

127. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 134–35 (1893); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004).

128. See POSNER, *supra* note 42, at 855 (“[J]udicial bias (within limits) does not matter at all and could even be beneficial in a system, such as ours, where judges are expected to block or restrict government actions, including statutes and regulations, that are themselves likely to reflect ‘bias.’”).

129. U.S. CONST. art I, § 1.

130. U.S. CONST. art. I, § 7, cl. 2–3.

131. See WILLIAM N. ESKRIDGE, PHILLIP P. FRICKEY, ELIZABETH GARRETT, *LEGISLATION* 66 (2007) (noting the various “choke points” in the legislative process, such as legislative committee review, legislative amendment, the filibuster, etc., that can kill a bill before it has a chance to achieve final passage); see also Mathew McCubbins, Roger Noll, & Barry Weingast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57

review ends the debate without the possibility of political compromise. It is therefore far more definitive in defeating the popular will than are the other countermajoritarian structures. Furthermore, because the Court, unlike the other branches, does not respond to the voters, the institution with the final say on the legality of political action is the institution that is the most insulated from the democratic process. This raises not only democratic-process concerns, but also the question of whether such an insulated body is informed enough to make the difficult political and policy determinations that come before it.<sup>132</sup>

From a democratic-process perspective, then, an unelected judiciary having the power of judicial review is inevitably problematic.<sup>133</sup> This power can be justified when the Court's decisions are based on the Rule of Law, but there is little or no reason to authorize such power when the Court's actions are based on a vision of judicial review as no more than political second-guessing.<sup>134</sup>

*B. The Judicial Political Realist Account Undermines the Court's Perceived Legitimacy*

The Judicial Political Realist account also undercuts the courts' perceived legitimacy. As the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>135</sup> explained:

[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.<sup>136</sup>

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LAW & CONTEMP. PROBS. 3 (1994) (referring to the various veto points that occur along the legislative process).

132. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254–55 (2009).

133. Alexander Bickel, in his seminal book, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986), coined the phrase “countermajoritarian difficulty” to refer to the inherent tension between judicial review and the democratic process. See also, Dinh, *supra* note 19, at 931–32; Dimino, *supra* note 114, at 61.

134. See *Chevron, U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 866 (1984) (“[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”).

135. *Planned Parenthood of Se. Pa. v. Casey* 505 U.S. 833 (1992).

136. *Id.* at 865. The issue before the Court in *Casey* was whether *Roe v. Wade*, 410 U.S. 113 (1973), should be overturned. As the above-cited passage indicates, preserving the Court's

Based as it is on popular perception, however, judicial legitimacy is inevitably strained by courts' obligation to review the constitutionality of popularly enacted measures. When courts use their power to strike down measures in areas that excite the public's interest, such as school prayer, abortion, and flag burning, among others, the courts' actions can and do generate significant hostile public response. And there lies the problem. The courts' duty to strike down popularly enacted measures places the source of the Court's legitimacy—public acceptance—under constant threat.<sup>137</sup> The judiciary must rely “on public sentiment to enable it to oppose public sentiment,”<sup>138</sup> and it must do so in an environment where it is continually testing the limits of public support.

To be sure, the meaning of judicial legitimacy is itself subject to a number of interpretations<sup>139</sup> and is not always defined as strict adherence to an objective rule of law.<sup>140</sup> But there is one constant theme: legitimacy depends on the courts' decisions being seen as based on a greater principle than simply the judiciary's imposition of its own political agenda.<sup>141</sup> As Professor John Yoo writes, “only by acting in a manner that suggests that its decisions are the product of law rather than politics can the Court maintain its legitimacy.”<sup>142</sup> There is no reason, after all, for people to accept judicial decisions that invalidate popular measures if those decisions are nothing more than the judiciary's trumping of popular political preferences with political preferences of their own.<sup>143</sup> Characterizing judicial decisions as

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legitimacy was the guiding reason that *Roe* was not overruled. See *Casey*, 505 U.S. at 845–46.

137. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2610–11 (2003) (referring to historical attacks on the judiciary for providing decisions that opposed public opinion).

138. Dimino, *supra* note 114, at 59.

139. See Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). Indeed the question of how the Court can best maintain its legitimacy has engaged some of our most prominent legal academic minds for decades. See, e.g., BICKEL, *supra* note 133; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 929, 930 (1983).

140. It has been argued, for example, that in order to be legitimate, a judicial decision must also comport with morality. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 747 (1991).

141. See Dinh, *supra* note 19, at 931–32; Wechsler, *supra* note 139, at 10–20.

142. John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 781–82 (2001).

143. There is little to suggest, for example, that a judge's political decisions are likely to be superior to those of other political actors. The best argument, in that respect, is that the fact that judges are more insulated from the political fray than are “other” political actors means that their political judgments are likely to be less influenced by short-term considerations. But while

political thus cuts at the very heart of the reason why the public should perceive those decisions as legitimate.

*C. The Judicial Political Realist Account Undercuts the Constitutional System of Checks and Balances*

The Judicial Political Realist account also subverts any reason the other branches should defer to the judiciary when their own power is challenged. Consider *United States v. Nixon*,<sup>144</sup> in which the Court, over a claim of executive privilege, ordered the President to turn over tapes to a special prosecutor, or *Hamdi v. Rumsfeld*,<sup>145</sup> in which the Court held that a United States citizen held as an enemy combatant must be allowed an opportunity to contest his enemy-combatant designation. In both cases, the President had strong institutional reasons to oppose the Court's decisions and yet in both cases the President acceded to the Court's authority.

Why, though, should an elected President defer to an unelected judiciary if the latter's decision is based on no more than political or policy judgment? Had the President been able to characterize the Court's action as merely "political" and not based on the Rule of Law, he would have a powerful argument for potential disobedience. He could assert in *Nixon*, for example, that he need not turn over the tapes because the executive branch has the political authority to decide what matters are protected by executive privilege and the political views of the Court on privilege issues should be discounted. In *Hamdi*, he could claim that a decision not to comply with the Court's order could be justified because, as President, he has a far greater understanding of why complying with the order might prevent him from fulfilling his constitutional duties than does the Court. Thus, the President could argue, with considerable political resonance, that he is entitled to reject the Court's decision because he is in a far better position than the Court to weigh the national security interests at stake in detaining suspected enemy combatants, and that compliance with the Court's relatively uninformed "political" decision

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insulation from political pressures may lead to better results in some circumstances, it may lead to unrealistic decisions in others. Furthermore, even if insulation from political pressures provides some decisional benefits, those benefits may not outweigh the fact that a judge, whose primary training is legal, does not have the particularized training necessary to reach the best results on policy issues dealing with such matters as the environment, national security, and even campaign finance.

144. *United States v. Nixon*, 418 U.S. 683, 715–16 (1974).

145. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004).



could place American lives at risk. A President taking such actions in today's political climate would, of course, face enormous fallout, but if the perception is that the Court is only a political actor, a President might be able to pursue such courses with very little political cost. It is only because the Court's decisions are imbued with an authority derived from the Rule of Law that those decisions demand respect from the other branches. Recharacterizing the Court's decisions as merely political takes away much of the President's (and Congress's) motivation to comply and thereby threatens the constitutional system of checks and balances.<sup>146</sup>

#### *D. The Judicial Political Realist Account Fosters Judicial Political Activism*

At this point, those who believe that political decision-making by judges is a serious concern might respond that the "harms" to judicial institutions noted above are all to the good. If judges are essentially political actors, democratic values are threatened, judicial decisions should not be perceived as legitimate, and judicial orders need not merit obedience from the other branches. If the Judicial Political Realist account is accurate, in short, the true nature of judicial behavior should be exposed.

Ironically, however, the Judicial Political Realist critique and its apparent adoption in *White* and *Stop the Beach Renourishment* may actually serve to increase judicial political activism, not curtail it. First, doctrinal acceptance of the model of the judge as political actor eliminates one of the best guards against judicial overreaching—public criticism of the judge as acting outside her appropriate judicial role. In the present climate, as Professor Viet Dinh explains, public accusations of judicial activism have a negative connotation, the stigma of which serves as a check on the otherwise unaccountable branch.<sup>147</sup> For this reason, criticizing judges for judicial activism serves to confine judicial excess by "reminding judges to perform their proper function as members of the judicial branch—interpreters of the Constitution."<sup>148</sup> But there is little corrective effect to be had in

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146. See Martin H. Redish, *Legal Realism and the Confirmation Process: A Comment on Professor Nagel's Thesis*, 84 NW. U. L. REV. 886, 887 (1990); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 426–27 (1996) (noting that the Court's power to check the other branches depended upon it exercising judicial authority to expound upon existing law and not to create new law).

147. Dinh, *supra* note 19, at 939–40.

148. *Id.* at 940.

accusing a judge of having decided a case based upon her political motivations if the Supreme Court itself has concluded that political decision-making by courts is both acceptable and inevitable. The Court's acceptance of the Judicial Political Realist account, then, counteracts a key incentive for judicial restraint.

Second, and perhaps even more significantly, the Judicial Political Realist critique may actually encourage judges to rule based on their political beliefs. If political preferences are expected to influence judicial decision-making, there is no reason for a judge to try and minimize the role they play in her decisional process. That is, if a judge is already *presumed* to decide cases based on her political preferences, she may as well decide cases based on her political preferences. As Justice Kennedy argued in his *Stop the Beach Renourishment* concurrence, telling courts they have the power to make pure policy decisions may actually encourage them to do so.<sup>149</sup>

Conversely, maintaining the expectation that judges should not act politically can serve to limit the role politics plays in judicial decision-making. A judge faced with the professional norm that she should not decide cases based upon her policy preferences is likely to decide cases differently than if her expected behavior is to insert her political beliefs into her judicial function.<sup>150</sup> Thus, even if the Judicial Political Realist critique is accurate in its account that political views influence judicial decision-making, the extent that a judge will consciously attempt to minimize the role political preferences play in her decision making will depend significantly upon the expectations placed upon her behavior.<sup>151</sup> *White* and *Stop the Beach Renourishment*, however,

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149. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2616 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

150. See Redish, *supra* note 146, at 887; see generally Solum, *The Virtues and Vices of Judging*, *supra* note 8 (illustrating the importance of legal analysis in appellate judging, and how this differs from the idea of a purely political judiciary).

151. Sociologists have studied expectation effects in other fields, particularly in education and management. See, e.g., Nicole M. Kierein & Michael A. Gold, *Pygmalion in Work Organizations: A Meta-Analysis*, 21 J. ORG. BEHAV. 913 (2000); Dov Eden, *Leadership and Expectations: Pygmalion Effects and Other Self-Fulfilling Prophecies in Organizations*, 3 LEADERSHIP Q. 271 (1992). "The Pygmalion Effect," first articulated by Robert Rosenthal and Lenore Jacobsen, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATIONS AND PUPILS' INTELLECTUAL DEVELOPMENT* (1968), is the notion that placing greater expectations on people improves their subsequent performance. See also Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. LIT. (forthcoming 2011) (citing Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009) (demonstrating the effect professional expectations play in influencing

place expectations decidedly on the side of judges issuing politically influenced rulings. They are more problem than solution.

## VI. CONCLUSION

The Judicial Political Realist inquiry provides an invaluable lens into judicial behavior. It may even serve to improve judicial decision-making by making judges aware of predispositions that might unintentionally affect their decisional processes. On the other hand, incorporating the idea that judges are inherently political actors into constitutional jurisprudence damages judicial authority and legitimacy. The Justices in *White* and *Stop the Beach Renourishment* who implicitly adopted this view were no doubt concerned with curbing what they saw as improper political decision-making by some judges. The method they chose, however, does not curb judicial abuse—it encourages it. It does not serve the Rule of Law—it diminishes its authority.