
The Supreme Court’s Noble Lie

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Is it ever acceptable for judges to lie to the American public? The Supreme Court believes that it is. In fact, for the better part of a century, the Justices have been propagating a lie that cuts to the very heart of judicial decision making. In public, the Justices profess strict adherence to legal formalism, but in private, they acknowledge that realist considerations influence many of their rulings.

In this Article, I highlight this inconsistency and examine the Supreme Court’s reasons for perpetuating its public lie. I argue that the Justices are pursuing a strategy that has been in use since the time of Ancient Greece. Specifically, they are telling a “noble lie” to cultivate judicial legitimacy. Drawing upon work in democratic and legal theory, I maintain that this strategy is incompatible with the U.S. constitutional system. If the Justices are truly concerned with preserving judicial legitimacy, they should abandon the noble lie and begin an honest dialogue with the American people.

TABLE OF CONTENTS

INTRODUCTION	913
I. FORMALISM AND REALISM.....	919
A. <i>The Public Lie</i>	920
1. Extreme Legal Formalism	921
2. Extreme Legal Realism	936
B. <i>The Private Truth</i>	942
1. Moderate Legal Formalism.....	943
2. Moderate Legal Realism	947
II. THE COURT’S REASON FOR LYING	957
A. <i>Plato’s Noble Lie</i>	958
B. <i>Judicial Legitimacy</i>	960

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III. THE DANGERS OF THE NOBLE LIE	964
A. <i>The Lie Is Believed</i>	965
B. <i>The Lie Is Disbelieved</i>	969
IV. A SOLUTION	972
CONCLUSION.....	976

INTRODUCTION

"I can't imagine what this place would be — I can't imagine what the country would be — with Donald Trump as our president."¹ When Justice Ruth Bader Ginsburg made this comment, she knew it would prove controversial. What she did not expect, however, was the magnitude of the firestorm that would ensue.

Within days, scores of politicians and legal scholars had weighed in on the Justice's remarks.² Almost to a one, they criticized Ginsburg for injecting her personal opinion into the 2016 presidential election.³ The standard refrain among these commentators was that, by speaking her mind, Ginsburg had breached her judicial duty to remain impartial in the political sphere.⁴ Such a lapse by a sitting Justice, critics feared, would both tarnish the Supreme Court's reputation as a neutral decision maker and diminish its legitimacy in the eyes of the public.⁵ This position seemed so obviously true that even many of the Justice's staunchest supporters declined to defend her actions.⁶ In light of this

¹ Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html>. Previously, when asked about a Donald Trump presidency, Ginsburg responded, "I don't want to think about that possibility, but if it should be, then everything is up for grabs." Mark Sherman, *Ginsburg Reflects on Big Cases, Scalia's Death*, ASSOCIATED PRESS (July 8, 2016), <http://bigstory.ap.org/article/0da3a641190742669cc0d01b90cd57fa/ap-interview-ginsburg-reflects-big-cases-scalias-death>.

² See, for example, Manu Raju & Theodore Schleifer, *Top Republicans Criticize Ruth Bader Ginsburg but Don't Back Trump's Call for Her to Resign*, CNN POL. (July 13, 2016, 7:10 PM), <http://www.cnn.com/2016/07/12/politics/ruth-bader-ginsburg-reaction>, quoting Paul Ryan as saying, "I find [the comment] very peculiar, and I think it's out of place."

³ *Id.* (Senators Orrin Hatch and Ted Cruz — to name just two of the many individuals who opined on the matter — declared Ginsburg's comments "inappropriate.").

⁴ See, e.g., Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html> (paraphrasing New York University law professor Barry Friedman as describing Justice Ginsburg's comments as "a stark example of a breach in the neutrality that justices must adhere to").

⁵ For instance, as Senator John Cornyn opined, "I think [Justice Ginsburg] should reconsider and change her course of conduct because I think she's got into an area that is out of her control. And that I think will reflect poorly not only on her but on the objectivity that we request and demand out of our federal judiciary." See Raju & Schleifer, *supra* note 2.

⁶ For example, Howard Wolfson, a former top aide to Hillary Clinton and Michael Bloomberg tweeted, "I ♥️RBG but I don't think our Supreme Court justices should be publicly offering their opinions about POTUS candidates." Howard Wolfson (@howiewolf), TWITTER (July 11, 2016, 5:54 AM), <https://twitter.com/howiewolf/>

reaction, it was all the more surprising when, three days after her initial comment, Ginsburg doubled down and called Donald Trump a “faker . . . [who] says whatever comes into his head at the moment.”⁷

Not one to avoid a public dispute, Trump fired off a series of tweets in which he demanded Ginsburg’s resignation and described her as “an incompetent judge”⁸ whose “mind is shot.”⁹ Although few joined Trump in calling for Ginsburg to resign, many expressed a belief that she should apologize for her comments.¹⁰ Finally, four days after the controversy started — and under intense pressure from individuals across the political spectrum — that is precisely what she did.

In her apology, Justice Ginsburg stated that her “recent remarks in response to press inquiries were ill-advised and [that she] regret[s] making them.”¹¹ Through this concession, Ginsburg reaffirmed the dominant view of the judiciary’s proper role — or, more accurately,

status/752486150393200640. See also Dahlia Lithwick, *Deciphering Justice*, SLATE (July 13, 2016, 6:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/ruth_bader_ginsburg_s_improper_attacks_on_donald_trump.html (noting that “few on the left have found much to cheer about in Ginsburg’s gloves-off candor”). For two notable exceptions, see Paul Butler, *Ginsburg Knows, If Trump Wins, the Rule of Law Is at Risk*, N.Y. TIMES (Jan. 17, 2017, 5:44 PM), <http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/ginsburg-knows-if-trump-wins-the-rule-of-law-is-at-risk>, stating that “[n]ormally Supreme Court justices should refrain from commenting on partisan politics,” but arguing that Donald Trump’s candidacy represents such an existential threat to the nation that Justice Ginsburg was justified in speaking out, and Erwin Chemerinsky, *Justices Have Free Speech Rights Too*, N.Y. TIMES (July 12, 2016, 3:22 AM), <http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/justices-have-free-speech-rights-too>, arguing it is preferable to “know what justices and judges think rather than have enforced silence and pretend they have no views.”

⁷ Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign*, CNN POL. (July 13, 2016, 7:45 AM), <http://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker>.

⁸ Donald J. Trump (@realDonaldTrump), TWITTER (July 13, 2016, 3:26 PM), <https://twitter.com/realdonaldtrump/status/753354905897668608> (“Is Supreme Court Justice Ruth Bader Ginsburg going to apologize to me for her misconduct? Big mistake by an incompetent judge!”).

⁹ Donald J. Trump (@realDonaldTrump), TWITTER (July 12, 2016, 9:54 PM), <https://twitter.com/realdonaldtrump/status/753090242203283457> (“Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot — resign!”).

¹⁰ See, for instance, Raju & Schleifer, *supra* note 2, quoting Senator Chuck Grassley as saying, “I think that it was the wrong statement, she ought to apologize for it, she ought to withdraw it”

¹¹ Ariane de Vogue, *Ruth Bader Ginsburg: ‘I Regret Making’ Donald Trump Remarks*, CNN POL. (July 14, 2016, 7:18 PM), <http://www.cnn.com/2016/07/14/politics/ruth-bader-ginsburg-i-regret-making-donald-trump-remarks>.

lack of role — in the political process.¹² The lesson from this transgression was clear: judges should act as if they are beyond the sway of politics and avoid commenting on matters of public concern. Anything short of full compliance with this rule would reveal the judiciary as a partisan institution and undermine its legitimacy.

In this Article, I challenge the propriety of such a standard. As Justice Ginsburg's ordeal illustrates, my position is not a favored one. Today, nearly all who are part of the legal system believe that judges should abstain from political activity. This principle has even been codified in both the Code of Conduct for United States Judges¹³ and the ABA Model Code of Judicial Conduct.¹⁴ Despite widespread support for the standard, however, there is a compelling reason to doubt its appropriateness. Quite simply, the idea that Justices are — or ever could be — apolitical, neutral decision makers is naïve. It conflicts with everything political science has taught us about the judiciary,¹⁵ and to pretend otherwise is to perpetuate a fiction. Ultimately, lies of this sort, when presented to the public, run counter to America's democratic ideals.¹⁶

Nonetheless, lying is exactly what legal elites demand from federal judges. What could possibly justify this position? Why, when all evidence points to the contrary, do legal elites publicly assert not only that judges should be apolitical but that they actually are? Why, when John Roberts likened his judicial philosophy to that of an umpire calling balls and strikes, was he lauded for promoting this unrealistic

¹² In her brief statement, Justice Ginsburg advised that “[j]udges should avoid commenting on a candidate for public office.” *Id.*

¹³ JUDICIAL CONFERENCE, U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5(A)(2) (2014), http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf (“A judge should not . . . publicly endorse or oppose a candidate for public office.”).

¹⁴ MODEL CODE OF JUDICIAL CONDUCT Canon 4.1(A)(3) (AM. BAR ASS'N 2011), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_4/rule4_1political_andcampaignactivitiesofjudgesandjudicial.html (last visited Sept. 23, 2017) (“[A] judge or a judicial candidate shall not . . . publicly endorse or oppose a candidate for public office.”).

¹⁵ See, e.g., Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 240-43 (1999) (conducting a meta-analysis of eighty-four empirical studies on judicial decision making and finding a relationship between “judges’ political-party affiliation and their ideology”).

¹⁶ See JAMES BOVARD, ATTENTION DEFICIT DEMOCRACY 104 (2005) (“Lies subvert democracy by crippling citizens’ ability to rein in government.”).

conception of judging?¹⁷ In short, why does the judicial system work so hard to reinforce this myth of the apolitical judge?

The answer is that the judiciary has staked its legitimacy on its impartiality.¹⁸ Amidst the deeply political and increasingly polarized legislative and executive branches,¹⁹ judges hold themselves out as unbiased arbiters.²⁰ Of all the governmental officials, the argument goes, only they are capable of setting politics aside and making decisions based upon reason and law.²¹ To bolster this narrative, judges — and Supreme Court Justices most of all — have a strong incentive to present themselves as little more than automatons who mechanically apply the law to the facts at hand. In cultivating this perception, however, the Supreme Court is propagating a falsehood to promote its own legitimacy. In the parlance of political philosophy, the Supreme Court is telling a “noble lie.”²²

Like so many ideas in political philosophy, the concept of a noble lie originated with Plato.²³ In Book III of *The Republic*, Plato defends the

¹⁷ See, e.g., Scott Shane, *In Capital and at the Court, Baseball Rules*, N.Y. TIMES (Nov. 5, 2005), http://www.nytimes.com/2005/11/05/politics/politicsspecial1/in-capital-and-at-the-court-baseball-rules.html?_r=0 (noting that “John G. Roberts Jr. talk[ed] his way to confirmation as chief justice of the United States with the insight that ‘judges are like umpires’”). For a discussion of the ways in which Chief Justice Roberts’s analogy is problematic, see Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 704-12 (2007).

¹⁸ See, e.g., Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 26 (1979) (describing “impartiality” as “so important a predicate for judicial legitimacy”); James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC’Y REV. 899, 900 (2008) (observing that “popular perceptions of impartiality [are] a supposed bedrock of judicial legitimacy”); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53, 56 (2005) (noting that “[i]mpartiality” is said to be the defining feature of the judge”).

¹⁹ See, e.g., Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10 PLOS ONE 1, 4-6 (2015), <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0123507&type=printable> (documenting the increasing polarization in the House of Representatives).

²⁰ See Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1710 (2007) (discussing one individual who “referred to being transformed upon becoming a judge”). This individual maintained that “ascending to the bench both required and enabled judges to decide cases without being swayed by bias or personal, ideological, or political leanings.” *Id.*

²¹ See Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 254 (1975) (noting that the legal system “has been the only plausible claimant to the role of objectivity and political neutrality”).

²² See SISSELL BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 174-76 (1978) (discussing the concept and origin of the “noble lie”).

²³ As Alfred North Whitehead famously said, “The safest general characterization

idea that political legitimacy is not possible when rulers are wholly honest with their subjects.²⁴ His proposed solution to this problem is the noble lie — a falsehood that the ruling class disseminates to convince the populace to dedicate themselves to the regime.²⁵ In the absence of a noble lie, Plato maintains, people will value their own interests more highly than the interests of society and will, in turn, begin to question the authority of the rulers.²⁶ This questioning undermines the rulers' proscriptions and leads to political instability. According to Plato, a noble lie is a necessary falsehood told for the benefit of all of society's inhabitants.²⁷ It is, in short, an untruth that advances a valued political goal.

When the Supreme Court holds itself out as an impartial institution, it is telling a noble lie. The falsehood of political neutrality is advanced for an important goal — namely, the preservation of the Court's legitimacy and, with that, the stability of the U.S. constitutional system. Similar to Plato, legal elites fear that, if the public were to discover the truth, the legitimacy of the existing regime would deteriorate, and ultimately, all Americans would suffer the ill effects of political instability.²⁸ In order to avoid this outcome, the Supreme Court believes it has no choice but to perpetuate its noble lie.

In this Article, I dispute the necessity of the Court's noble lie. I argue that, by maintaining the truthfulness of the noble lie, the Justices are actually undermining the judiciary's legitimacy. In building this case, I draw upon the work of legal and political theorists — a group of scholars who have long maintained that Plato's noble lie is both incompatible with democratic ideals and harmful to democratic stability.²⁹ There is nothing special about the U.S. political

of the European philosophical tradition is that it consists of a series of footnotes to Plato." ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 39 (1978).

²⁴ See Allan Bloom, *Interpretive Essay*, in *THE REPUBLIC OF PLATO* 305, 366-68 (Alan Bloom trans., 2d ed. 1968) (discussing the necessity of a noble lie).

²⁵ See *id.* at 366 ("[The noble lie] conceal[s] the unjust origin of this regime . . . by [presenting] a just account of its origin. On the basis of the lie, the citizens can in all good faith and conscience take pride in the justice of their regime, and malcontents have no justification for rebellion.").

²⁶ See *id.* at 367 ("The lie . . . [gives] the hierarchy solidity while at the same time presenting men with a rationale designed to overcome their primitive inclination to value themselves at least as highly as their neighbors.").

²⁷ See *id.* at 366-68.

²⁸ See *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

²⁹ See *infra* Part III.

system that exempts it from these critiques or renders it immune to the untoward consequences of the noble lie. To the contrary, the deleterious effects are already apparent.³⁰

At this juncture, the Supreme Court has two options. It can either continue on its current course and hope the noble lie sustains itself in the face of increasing polarization, or it can tear down the façade and be honest with the American people. In a democracy such as ours, the right answer is clear: the judiciary must engage in a candid dialogue with the public. With the recent rise of “alternative facts”³¹ and the emergence of “post-truth” politics,³² it is more important than ever for the Supreme Court to stand as a bulwark against government deception.

The remainder of this Article proceeds as follows. In Part I, I contrast the way legal elites present judicial decision making in public with the way they discuss the topic in private. Two theories of judicial decision making — legal formalism and legal realism — form the core of my investigation. Through my analysis, I show that each of these theories has a distinctly public and a distinctly private formulation. Whereas the public variants are extreme and unrealistic, the private variants are moderate and nuanced. As I will argue, legal elites — led by the Supreme Court — endorse theoretical positions in public that they disavow in private. In Part II, I explore why this disconnect exists. The answer, I maintain, lies in the strong parallels between the judiciary’s actions and Plato’s noble lie. Specifically, legal elites present a public façade of formalism because they think doing so is necessary to preserve judicial legitimacy and, with that, the existing political order. In Part III, I argue that the strength of this analogy is reason for concern. It suggests that — just as Plato’s noble lie undermines democratic government — the Supreme Court’s noble lie undermines the U.S. constitutional system. Finally, in Part IV, I offer a solution: the Supreme Court must stop pretending to be an apolitical institution and, instead, be truthful with the American people. In the end, honesty will provide a better foundation on which the judiciary can stake its claim to legitimacy.

³⁰ See *infra* Section III.B.

³¹ See Jim Rutenberg, *The Costs of Trump’s Brand of Reality*, N.Y. TIMES, Jan. 23, 2017, at B1 (discussing the emergence of “alternative facts” and arguing that a political strategy based on falsehoods of this sort will harm the president’s credibility).

³² See William Davies, *The Age of Post-Truth Politics*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html> (declaring that America has “entered an age of post-truth politics”).

I. FORMALISM AND REALISM

There are two foundational theories of judicial decision making: legal formalism and legal realism.³³ Every other description of judicial adjudication is an offshoot of one — or, on occasion, both — of these theories.³⁴ Originalism and purposivism, eclecticism and interpretivism, even pragmatism and critical legal studies: all trace their lineage back to legal formalism³⁵ or legal realism.³⁶

Given the centrality of these two theories to academic discourse, it is only natural that legal formalism and legal realism are also at the core of public debate on judicial decision making.³⁷ What is alarming, however, is the stark contrast between the way these theories are presented in popular culture and the way they are discussed in the private, or academic, domain.³⁸ In public, legal formalism and legal realism are depicted in extreme, simplified terms that barely resemble the nuanced treatment they receive in legal scholarship. The differences, in fact, are so vast that they are more easily thought of as

³³ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24-25 (1990) (observing that “for more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups”).

³⁴ See *id.* at 24 (noting that “[e]conomic analysis of law is a formalist edifice erected on a realist base”).

³⁵ See, e.g., Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1146 (1999) (reviewing ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)) (calling Ronald Dworkin, the originator of interpretivism, a “sophisticated formalist . . . [who] remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion”); Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1271 (2009) (noting that originalism is “one version of” legal formalism).

³⁶ See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 15 GEO. L.J. 1765, 1794 (1997) (describing eclecticism in legal realist terms by noting that eclecticism holds that “[o]ur constitutional practices require interpreters to look to text, structure, history, precedent, and morality”); George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 349 (2001) (observing that “[i]n its skeptical aspects, Legal Realism has been identified as the predecessor of Critical Legal Studies”).

³⁷ See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 5-7 (2007) (critiquing the unsophisticated public discussion of judicial decision making in the context of Supreme Court nominations).

³⁸ By describing academic writings as “private,” I do not mean that they are hidden from the public but rather that they are not part of the popular discourse. The scholarship I discuss in this Article is written by legal elites for legal elites and is not consumed by the public, at least in any nuanced manner.

distinct theories necessitating distinct labels.³⁹ Accordingly, in this Article, I refer to the public variants as “Extreme Legal Formalism” and “Extreme Legal Realism.”⁴⁰ By contrast, I refer to the milder, refined variants that jurists actually endorse as “Moderate Legal Formalism” and “Moderate Legal Realism.”⁴¹

A. *The Public Lie*

Legal formalism and legal realism are central to the public debate over judicial decision making. Unfortunately, in popular culture, these theories exist only in extreme forms. As the legal theorist Christopher Eisgruber observed:

Public debates about recent Supreme Court nominations have revolved around two manifestly unsatisfactory [theories of judging]. One view regards Supreme Court justices as neutral umpires who never invoke anything other than their apolitical, technical expertise about legal rules, while a second view treats them as ideologues who decide cases on the basis of a political agenda. Neither of these blunt models provides an adequate account of what justices do⁴²

Eisgruber is correct in his assessment but, perhaps, too mild in his criticism. The truth is that no modern jurist⁴³ — and perhaps no jurist from any era — has embraced either of these extreme accounts.⁴⁴ These depictions of legal formalism and legal realism that dominate public discourse are, in short, nothing more than grotesque caricatures of legitimate, refined perspectives. In this section, I detail the misrepresentations and distortions that have captured the popular discourse — first looking at Extreme Legal Formalism and then turning to Extreme Legal Realism.

³⁹ See Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* 111, 111-12 (2010) (distinguishing between “Vulgar Formalism” that occupies popular discourse and “Sophisticated Formalism” that occupies serious scholarship).

⁴⁰ For a discussion of these theories, see *infra* Section I.A.

⁴¹ For a discussion of these theories, see *infra* Section I.B.

⁴² EISGRUBER, *supra* note 37, at 6.

⁴³ See Leiter, *supra* note 39, at 111 (noting that extreme legal formalism “is not a view to which anyone today cares to subscribe”).

⁴⁴ See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 13-63 (2009) (arguing that jurists never endorsed legal formalism in its strong form).

1. Extreme Legal Formalism

Legal formalism, in its extreme version, advances three principal claims about judicial adjudication: (1) judges find — not make — law;⁴⁵ (2) judging is mechanical;⁴⁶ and (3) non-legal reasons play no role in the decision-making process.⁴⁷ The common theme among these criteria is the denial of choice.⁴⁸ According to Extreme Legal Formalism, judges lack all discretion. They are wholly constrained by legal rules and can do nothing more than mechanically apply the law to deduce a case's single correct answer.⁴⁹

The idea of judicial adjudication as an act of discovery traces back to 1642 with Sir Edward Coke's statement that, "It is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."⁵⁰

⁴⁵ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 56 (2d ed. 2014) (describing the formalist idea that "[j]udges do not make law: they merely declare the law which, in some Platonic sense, already exists"). In his foundational work on legal realism, Jerome Frank described this aspect of legal formalism in the following way: "Law is a complete body of rules existing from time immemorial and unchangeable except to the limited extent that legislatures have changed the rules by enacted statutes But the judges are not to make or change the law but to apply it. The law, ready-made, preexists the judicial decisions." JEROME FRANK, *LAW AND THE MODERN MIND* 32 (1930).

⁴⁶ See RAYMOND A. BELLIOU, *JUSTIFYING LAW* 4 (1992) (noting that formalists believed that judicial decision making was "a scientific, deductive process by which preexisting legal materials subsume particular legal cases under their domain, thus allowing judges to infer the antecedently existing right answer to the case at bar"); TAMANAHA, *supra* note 44, at 1 (noting that extreme legal formalists see "law as autonomous, comprehensive, logically ordered, and determinate and believe[] that judges engage[] in pure mechanical deduction from this body of law to produce single correct outcomes").

⁴⁷ Leiter, *supra* note 35, at 1145-46 (defining formalism "as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required").

⁴⁸ See Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 511-20 (1988).

⁴⁹ See *id.*; see also Walter Wheeler Cook, *Scientific Method and the Law*, 13 *A.B.A.J.* 303, 307 (1927) (quoting John M. Zane, *German Legal Philosophy*, 16 *MICH. L. REV.* 287, 338 (1918) ("Every judicial act resulting in a judgment consists of a pure deduction.")).

⁵⁰ 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* *51 (1642). Modern courts continue to profess adherence to this idea. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir. 2000). For a discussion of the distinction between "discovering" and "making" law, see Zechariah Chafee, Jr., *Do Judges Make or Discover Law?*, 91 *PROC. AM. PHIL. SOC'Y* 405, 406 (1947), describing judges who discover law as mapmakers exploring uncharted territories and judges who make law as builders

More than anyone else, however, William Blackstone is responsible for advancing this conception of law.⁵¹ In his famous Commentaries on the Laws of England, Blackstone wrote that judges are “not delegated to pronounce a new law, but to maintain and expound the old one.”⁵² Even when judges overturn precedent, Blackstone maintained, they “do not pretend to make a new law, but to vindicate the old one from misrepresentation.”⁵³ As one scholar recently noted, Extreme Legal Formalism of this kind holds that “judges d[o] not make law (even when declaring new rules) but merely discover[] and appl[y] preexisting law.”⁵⁴

This declaratory theory — as it is known today — was taken up by the founding fathers and soon became a prominent theme in early Supreme Court decisions.⁵⁵ In *The Federalist No. 81*, Alexander Hamilton discusses the term “jurisdiction” and finds that “[t]his word is composed of *JUS* and *DICTIO*, *juris dictio*, or a speaking and pronouncing of the law.”⁵⁶ James Wilson, a signer of the Declaration of Independence, and one of the original Justices of the Supreme Court, wrote that “every prudent and cautious judge will appreciate . . . his duty and his business is, not to make the law, but to interpret and apply it.”⁵⁷ Likewise, when Chief Justice John Marshall famously announced, “It is emphatically the province and duty of the judicial department to say what the law is,”⁵⁸ he was expressing support for the declaratory theory of judging. More than two decades later in *Osborn v. Bank of United States*, Marshall reaffirmed his position, writing, “Judicial power, as contradistinguished from the

constructing a massive skyscraper.

⁵¹ See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 18 & n.105 (1996) (“Blackstone has been treated by the Supreme Court and by others as history’s ‘foremost exponent of the declaratory theory’ that judges find law and never make it.” (quoting *Linkletter v. Walker*, 381 U.S. 618, 623 n.7 (1965))).

⁵² 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

⁵³ *Id.* at *70.

⁵⁴ TAMANAHA, *supra* note 44, at 13.

⁵⁵ See *Anastasoff*, 223 F.3d at 901-02 (noting that “[t]he Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it”).

⁵⁶ THE FEDERALIST NO. 81, n.3 (Alexander Hamilton).

⁵⁷ 2 JAMES WILSON, *Of the Constituent Parts of Courts.—Of the Judges.*, in COLLECTED WORKS OF JAMES WILSON 144 (Kermit L. Hall & Mark David Hall eds., 2007), http://oll.s3.amazonaws.com/titles/2074/Wilson_4141_EBk_v6.0.pdf.

⁵⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.”⁵⁹

Regardless of whether Marshall and other early jurists sincerely believed that judges do not make law, it is safe to say that no serious modern jurist endorses this position.⁶⁰ Scholars, in fact, began repudiating this conception of judging while Marshall still sat as Chief Justice. In a lecture from the 1830s, John Austin wrote on the implausible nature of the declaratory theory, describing it as a “childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges.”⁶¹ Several decades later, Sir Henry Maine identified the tension between the declaratory theory and actual legal practice:

[During] adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment had been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use the very

⁵⁹ 22 U.S. 738, 866 (1824).

⁶⁰ Even Justice Scalia has offered a qualified acknowledgement that judges make law. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law. But they make it as *judges make it*, which is to say *as though* they were ‘finding’ it”); see also Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 253 (1999) (“Courts ‘make law’ as a consequence of the operation of a system of precedent.”).

⁶¹ 1 JOHN AUSTIN, *Statute and Judiciary Law*, in LECTURES ON JURISPRUDENCE: THE PHILOSOPHY OF POSITIVE LAW 314, 321 (Robert Campbell ed., 1875); see also *Linkletter v. Walker*, 381 U.S. 618, 623-24 (1965) (describing Austin as maintaining “that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law”).

inaccurate expression sometimes employed, become more elastic. In fact they have been changed.⁶²

In 1886, Thomas Cooley — one of the preeminent constitutional scholars and judges of the nineteenth century⁶³ — cast a direct challenge upon the declaratory theory of judging when he observed that “decisions continue to accumulate as causes arise which present aspects differing at all from any which preceded; and a great body of laws being made under the statute which is and can be nothing but ‘judge-made law.’”⁶⁴ A year later, the jurist and historian Munroe Smith noted that “[j]udicial legislation is hampered by the fiction that the courts do not make law, but only find it. Nobody really believes in the fiction, but few judges have been bold enough to defy it openly.”⁶⁵

Even though more than a hundred years have passed, Smith’s statement remains an accurate description of today’s judiciary.⁶⁶ Judges know the declaratory theory is false but nonetheless invoke its language in their opinions.⁶⁷ As the Supreme Court wrote, “the declaratory theory of law according to which the courts are understood only to find the law, not to make it . . . comports with our received notions of the judicial role.”⁶⁸

⁶² SIR HENRY SUMNER MAINE, *ANCIENT LAW* 28-29 (cheap ed. 1908).

⁶³ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 973 (1995) (calling Thomas Cooley “the most celebrated constitutional scholar and judge of the last half of the nineteenth century”).

⁶⁴ Thomas M. Cooley, *Another View of Codification*, 2 COLUM. JURIST 464, 465 (1886).

⁶⁵ Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887).

⁶⁶ Despite the declaratory theory’s persistence in modern court opinions, there was a period in the early twentieth century where many judges rejected the legal fiction. See, e.g., Note, *The Effect of an Overruling Decision Upon Acts Done in Reliance on the Decision Overruled*, 29 HARV. L. REV. 80, 82-83 (1915) (noting that judges were “more and more coming to acknowledge that they do make law and to act on that principle”).

⁶⁷ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 6 (2002) (noting that “judges are reluctant to admit” that they make law). Notably, in their academic writings, judges sometimes drop this pretense. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 92 (1982) (noting that it “is by now an accepted fact” that judges “make law in a democracy”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989) (discussing “the narrow context of law that is made by the courts” (emphasis omitted)).

⁶⁸ *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-36 (1991) (citations omitted); see, e.g., *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (arguing that when courts “amend[] statute[s] by judicial interpretation,” they “intrude upon the lawmaking powers of Congress”).

The commitment to this idea is so strong that courts even maintain its veracity in the face of changing judicial interpretations.⁶⁹ In line with this, a federal district judge recently quoted Blackstone approvingly when he noted, “Judicial declaration of law is merely a statement of what the law has always been. ‘For if it be found that [a] former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law.’”⁷⁰ Because “[e]very citizen is . . . a member of the audience to whom opinions are addressed,” sitting judges have their reasons for presenting this picture of adjudication in their opinions.⁷¹

Legal scholars and former judges, however, have no such incentives — at least with respect to their academic writing — to obscure the truth. Perhaps this is why, in 1980, after retiring as Chief Justice of the California Supreme Court, Roger Traynor acknowledged, “The fiction that a court does not make law is now about as hallowed as a decayed and fallen tree [A] modern judge is quite aware that his customary language indeed makes law.”⁷² Similarly, Stanford law professor Lawrence Friedman wrote, “No serious scholar treats the lawmaking power of judges as anything but an established fact The judges themselves are not entirely candid. Some of the most blatant lawmaking . . . gets covered by the fig leaf of ‘interpretation.’”⁷³ Countless other scholars have made near-identical points regarding the unwillingness of judges to publicly admit what they privately accept.⁷⁴

⁶⁹ *E.g.*, *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1108 & n.10 (N.D. Cal. 1992) (noting that “judges find the law” and endorsing a view of the declaratory theory that “is not incompatible with the idea of change”). Judges even read this requirement into statutes. *See, e.g.*, *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 27 (2006) (concluding that section 1606 of the Foreign Sovereign Immunities Act “instructs [courts] to find the law, not to make it” (internal quotation marks omitted)).

⁷⁰ *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 698 F. Supp. 2d 1259, 1265 (D. Colo. 2010) (quoting *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980) (quoting 1 BLACKSTONE, COMMENTARIES *70)).

⁷¹ Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1040-41 (2007).

⁷² Roger J. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 UTAH L. REV. 255, 258-59 (1980).

⁷³ LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 21 (1990). As far back as the 1940s, scholars saw the end of the declaratory theory in sight. *See, e.g.*, Chafee, *supra* note 50, at 406 (“This theory that judges make law as well as legislators, although in a somewhat different way, has been steadily gaining ground and bids fair to become the orthodox view of our time just as Blackstone’s theory was orthodox in nineteenth-century America.”).

⁷⁴ *See, e.g.*, Robert C. Berring, *Collapse of the Structure of the Legal Research*

Let me add just one final note on this matter. It comes from a mid-twentieth century Harvard law professor and highlights one of the more colorful objections to Extreme Legal Formalism's absurdity: a strict understanding of the declaratory theory asks us to believe that, "when the Wrights launched their airplane at Kittyhawk, there was already in existence a law relating to airplanes and the aviator's right to fly over another man's land. The judge before whom the action of trespass came would merely have to discover what this law was."⁷⁵ Clearly, no reasonable person would accept this view of adjudication;⁷⁶ nevertheless, a strong declaratory theory remains a key part of the popular discourse.⁷⁷

I now turn to the second component of Extreme Legal Formalism — the claim that judicial decision making is a mechanical process by which judges apply fixed rules to deduce a case's single correct outcome.⁷⁸ Like the declaratory theory, this conception of judges as "automatons" traces back to William Blackstone.⁷⁹ Following Blackstone's lead, subsequent jurists have employed similar analogies.

Universe: The Imperative of Digital Information, 69 WASH. L. REV. 9, 15 (1994) ("The system does not wish to admit that judges make law on their own, but clearly the judges have no reservoir from which to draw the law."); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) ("[A]lthough every court makes law in a few of its cases, judges must always deny that they make law.").

⁷⁵ Chafee, *supra* note 50, at 405.

⁷⁶ See Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 4 (1960) ("No sophisticated legal scholar today would fail to agree that 'the fiction of mere law-finding by courts is being relegated to the shelf of forgotten things by both judges and jurists.'" (italics omitted) (quoting 2 SIDNEY POST SIMPSON & JULIUS STONE, *LAW AND SOCIETY* 705 (1949))).

⁷⁷ For a discussion of this point, see *infra* text accompanying notes 106–31.

⁷⁸ See Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. L. REV. 1437, 1439 (2001) ("When called upon to resolve a case, legal-model judges identify the facts of the case and then simply 'apply' the law, which directs a particular outcome."); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007) (explaining that formalists believe that "judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way"); 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, 87 (1995) (noting that a "formalistic approach view[s] the judge as one who objectively and impersonally decides cases by logically deducing the correct resolution from a definite and consistent body of legal rules").

⁷⁹ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 609-10 (1958) (observing that Blackstone is "responsible" for the idea that judging is mechanical); Levy, *supra* note 76, at 4 (noting that Blackstone is associated with the belief that "the judge should be an automaton" and pointing out that Blackstone viewed the common law as the "perfection of reason").

Thomas Jefferson, for instance, called judges “mere machine[s],”⁸⁰ and Roscoe Pound pejoratively referred to the practice as “mechanical jurisprudence.”⁸¹ Despite the differing locutions, each term represents the idea that “the judicial system is a ‘giant syllogism machine,’ and the judge acts like a ‘highly skilled mechanic.’”⁸² As the legal historian Edward A. Purcell stated, Extreme Legal Formalism

claimed that reasoning proceeded syllogistically from rules and precedents that had been clearly defined historically and logically, through the particular facts of a case, to a clear decision. The function of the judge was to discover analytically the proper rules and precedents involved and to apply them to the case as first premises. Once he had done that, the judge could decide the case with certainty and uniformity.⁸³

Like a straightforward arithmetic problem, each case has a unique correct answer, and any competent judge adhering to the appropriate mechanical procedures will deduce that answer.⁸⁴ It follows, therefore, that errors are caused by judges’ failure to apply the correct legal principles and would not occur if the judiciary were composed of sufficiently skilled individuals.⁸⁵

If there were ever a time when jurists believed that this mechanistic view accurately described judicial practice, that time is long past. By 1900, it was clear to scholars and legal practitioners alike that judges were not juridical automatons. Writing in the *Harvard Law Review*,

⁸⁰ Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON, 1760–1776, at 503, 505 (Julian P. Boyd ed., 1950).

⁸¹ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-08 (1908) (describing the concept of “mechanical jurisprudence”).

⁸² Guthrie et al., *supra* note 78, at 2; *see also* Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355-59 (1973) (discussing the mechanical nature of legal formalism).

⁸³ EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 74-75 (1973).

⁸⁴ *See* Cross & Nelson, *supra* note 78, at 1439 (noting that “[t]he decisions are to be the same regardless of the individual judge hearing a case”); David Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 2-3 (David Kairys ed., 3d ed. 1998) (noting that as a part of this “idealized decision-making process,” it is understood that, “except for the occasional bad judge, any reasonably competent and fair judge will reach the ‘correct’ decision”).

⁸⁵ *See* Cross & Nelson, *supra* note 78, at 1440 (“When a decision is said to be wrong, the error is attributed to misanalysis of legal standards.”); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 21 (1980) (“[Legal formalists maintain that] an abstraction dictates, objectively, apolitically, in a non-discretionary fashion, a particular result.”).

James Bradley Thayer emphasized that “our courts are not engaged in reaching ‘mathematical conclusions,’ or in merely logical, abstract, or academic discussions.”⁸⁶ In that same issue, another theorist observed the widespread rejection of the mechanistic view: “If you ask a lawyer whether he really believes that judicial decisions are mathematical deductions, he will say that the notion is absurd.”⁸⁷

That said, knowing the mechanistic conception is wrong and admitting as much publicly are two very different things. Most judges have never done the latter and instead, desiring to give their opinions the illusion of scientific validity,⁸⁸ work to preserve the façade of mechanical jurisprudence.⁸⁹ This inconsistency led one scholar to remark that it was nothing short of “incredible” that “eminent members of the bar [continued] to assert that all a court does in deciding doubtful cases is to deduce conclusions from fixed premises, the law.”⁹⁰ Unfortunately, this dishonest presentation of judicial decision making has persisted, and even today “[t]he explicit or implicit theme of almost every judicial opinion is ‘the law made me do it.’”⁹¹

Despite the rhetoric of judicial opinions, “[n]o one thinks that law is autonomous and judging is mechanical deduction.”⁹² In fact, in their moments of academic reflection, judges often admit that correct outcomes are not uniquely determined.⁹³ Even strict formalists like Frank Easterbrook have stated that “[h]ard questions have no right

⁸⁶ James Bradley Thayer, *Law and Logic*, 14 HARV. L. REV. 139, 141-42 (1900).

⁸⁷ Jabez Fox, *Law and Logic*, 14 HARV. L. REV. 39, 42 (1900).

⁸⁸ See Pound, *supra* note 81, at 605-08 (discussing the legal-formalist desire to transform law into a “scientific” field of study).

⁸⁹ The most famous statement against this Blackstonian view of the law comes from Oliver Wendell Holmes, Jr., who wrote, “The life of the law has not been logic; it has been experience. . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

⁹⁰ Cook, *supra* note 49, at 307.

⁹¹ Kairys, *supra* note 84, at 3. Richard Posner similarly observes that judges have a “desire . . . to hide behind the ‘law’ — ‘the law made me do it’ might be a judicial motto.” Richard A. Posner, *Comment on Professor Gluck’s “Imperfect Statutes, Imperfect Courts,”* 129 HARV. L. REV. 11, 13 (2015); see also David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 322 (2003) (arguing that “the common theme of legal opinions — the law made me do it — is wrong and misleading”).

⁹² TAMANAHA, *supra* note 44, at 197.

⁹³ See, e.g., Justice James Lawton Robertson, Tribute, *Judge William C. Keady and the Bill of Rights*, 68 MISS. L.J. 3, 9 (1998) (“There are times when the district judge cannot pronounce judgment and in candor say, ‘The law made me do it,’ when he is not sure that his head will not be chopped off by the court of appeals or the Supreme Court.”).

answers.”⁹⁴ By making these concessions, such jurists do not reveal themselves to be Extreme Legal Realists. Instead, they evince a more sophisticated understanding of legal formalism — one that, although common in academic circles, has failed to find traction in the popular discourse. I will return to this issue later,⁹⁵ but for now, I turn to the third, and final, principle of Extreme Legal Formalism.

This last part of the doctrine holds that non-legal reasons play no role in the decision-making process.⁹⁶ Under this conception, “[j]udges are ciphers (or perhaps saints) who rise above their personal prejudices or political inclinations to resolve disputes based upon an external standard beyond their own control.”⁹⁷ Normative considerations such as morality, ideology, and public policy have no place in judicial adjudication.⁹⁸ The law, quite simply, is “objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics.”⁹⁹ Judges in this mold are “protected from political pressures . . . impartial and dispassionate.”¹⁰⁰ They are, in other words, superhuman.¹⁰¹

Just as the declaratory theory and the concept of mechanical jurisprudence have lost favor in modern times, so too has the view that judges are apolitical decision makers influenced only by legal arguments.¹⁰² Admittedly, some commenters continue to posit this

⁹⁴ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (italics omitted); see also Lyrisa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 821 (1995) (“Most modern formalists do not assert that all cases are easy cases that produce a single correct answer through the mechanical exercise of syllogistic reasoning.”).

⁹⁵ See *infra* Section I.B.2.

⁹⁶ See Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 21 (1995) (“The legal formalist believes that . . . judicial opinions about policy and fairness have no proper place in the decisional process if the Rule of Law is to be respected.”).

⁹⁷ Cross & Nelson, *supra* note 78, at 1439-40.

⁹⁸ See MATHIEU DEFLEM, *SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION* 98 (2008) (“[To formalists,] the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions.”).

⁹⁹ WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988).

¹⁰⁰ TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 15 (1999).

¹⁰¹ See RICHARD A. POSNER, *HOW JUDGES THINK* 249 (2008) (arguing that legal formalism “place[s] unrealistic demands on judges”).

¹⁰² See, e.g., Daniel P. Tokaji, Symposium, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 125 (2010) (noting that “it would be naive to believe that judges are apolitical”); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 594 (2002) (asserting that it is a “myth that courts are apolitical and do not

principle as an ideal, but even they do not defend it is an accurate description of judicial decision making in the present day. All serious scholars acknowledge that, at least in some circumstances, judges make decisions based upon non-legal factors.¹⁰³ As Larry Solum wrote, denying this reality would be “just plain silly.”¹⁰⁴ Perhaps that is why actual proponents of Extreme Legal Formalism “have been notoriously difficult to locate.”¹⁰⁵

This lack of support in the academy has not, however, dissuaded judges from presenting themselves as Extreme Legal Formalists to the public.¹⁰⁶ In their written opinions, for instance, judges declare that their decisions are predetermined by what “the law requires”¹⁰⁷ and claim to only be influenced by legal reasons.¹⁰⁸ When engaging with the public, the judiciary works hard to maintain this formalist illusion.¹⁰⁹ As one scholar noted, there is extensive “public rhetoric suggesting that judicial discretion plays no role in properly adjudicating constitutional disputes.”¹¹⁰ Likewise, Richard Posner has

make policy. The Legal Realists exploded that myth and showed that judges do make policy”).

¹⁰³ See, e.g., TAMANAHA, *supra* note 44, at 177-80 (arguing that modern legal formalists embrace some aspects of realism); Cross & Nelson, *supra* note 78, at 1445-50 (discussing institutional factors that influence judicial decision making).

¹⁰⁴ Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 170 (2006).

¹⁰⁵ Hasnas, *supra* note 78, at 87 n.11; see also Brian Z. Tamanaha, *The Mounting Evidence Against the “Formalist Age,”* 92 TEX. L. REV. 1667, 1671 (2014) (arguing that this strong version of legal formalism never had support in the U.S. legal academy).

¹⁰⁶ See, e.g., Cross & Nelson, *supra* note 78, at 1441-42; Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 993 (describing the idea that judges “engraft their own political philosophy onto the decision-making process and use their power to change the way our society works” as “horse manure”). For a notable exception, see *Republican Party of Minn. v. White*, 416 F.3d 738, 747 (8th Cir. 2005), stating that “the reality is that the policymaking nature of appellate courts is clear” (internal quotations omitted).

¹⁰⁷ See, e.g., *Lewin v. Shalala*, 887 F. Supp. 74, 77 (S.D.N.Y. 1995) (“There is no doubt that this is a decision which is unfortunate to the claimant. In light of our sense of justice, one might be left with the impression that the result is somewhat ‘unfair.’ But the law requires this decision.”).

¹⁰⁸ See Cross & Nelson, *supra* note 78, at 1440-41 (“The basis of the legal model can be seen in written judicial opinions themselves, which explain outcomes according to a ‘reasoned elaboration’ of generally accepted legal materials.”).

¹⁰⁹ ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, *JUDICIAL PROCESS IN AMERICA* 295 (7th ed. 2007) (writing that the formalist “values of the legal subculture are maintained by the state and national bar associations and by a variety of professional-social groups whose members are from both bench and bar”).

¹¹⁰ Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123,

observed that “most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is) . . . though it does not describe their actual practices.”¹¹¹

Even more than judicial opinions, Supreme Court confirmation hearings offer the most prominent opportunity for legal elites to ingrain certain theories of judicial decision making into the public consciousness.¹¹² The most notable example occurred during John Roberts’s 2005 confirmation hearing. When discussing his approach to judging, Roberts delivered his now-famous umpire analogy:

Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire

I have no agenda, but I do have a commitment. If I am confirmed . . . I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.¹¹³

In this brief statement, Roberts captured the three pillars of Extreme Legal Formalism. Judges “don’t make the rules”; judges mechanically “call balls and strikes” based on a predetermined strike zone;¹¹⁴ and judges “decide . . . according to the rule of law.” By presenting himself as a neutral umpire, Roberts “tapped into powerful myths about the

128 (2011).

¹¹¹ POSNER, *supra* note 101, at 2.

¹¹² See, e.g., President George W. Bush, *Address to the Nation Announcing the Nomination of John G. Roberts, Jr., to Be an Associate Justice of the United States Supreme Court*, 41 WEEKLY COMP. PRES. DOC. 1192, 1192 (July 19, 2005) (stating that John Roberts “will strictly apply the Constitution and laws, not legislate from the bench”).

¹¹³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr., nominee).

¹¹⁴ At a later point in the hearing, Roberts emphasized that the law has correct answers: “they are balls and strikes regardless, and if I call them one and they are the other, that doesn’t change what they are. It just means that I got it wrong I believe that there are right answers, and judges, if they work hard enough, are likely to come up with them.” *Id.* at 267 (remarks of John G. Roberts, Jr., nominee).

judiciary.”¹¹⁵ In particular, he reinforced the public’s belief “that judges can and should decide even the most momentous constitutional cases according to ‘the law’ . . . [and] that ‘the law’ is autonomous of contested social values, fixed in advance, politically neutral, and susceptible of relatively uncontroversial application.”¹¹⁶ The public wants its judges to be impartial, apolitical decision makers,¹¹⁷ and the umpire analogy appealed to that desire.¹¹⁸

On day two of the confirmation hearing, Roberts doubled down on this theory of adjudication, arguing that judges must decide cases “not as a legislator would based on any view of what’s the best policy, but as a judge would based on the law.”¹¹⁹ This adherence to the rule of law was central to Roberts’s professed judicial philosophy. At several points, he returned to the idea that judges have an “obligation” to make decisions “according to the rule of law, not their own social preferences, not their policy views, not their personal preferences, according to the rule of law.”¹²⁰

Although Roberts’s formalist presentation of judges as umpires played well with the public¹²¹ and most members of the U.S. Senate,¹²²

¹¹⁵ Siegel, *supra* note 17, at 703.

¹¹⁶ *Id.*

¹¹⁷ Kairys, *supra* note 84, at 1 (“Basic to the popular perception of the judicial process is the notion of government by law, not people. Law is, in this conception, separate from — and ‘above’ — politics, economics, culture, or the values or preferences of judges or any person. In this separation resides the law’s ability to be objective, principled, and fair.”).

¹¹⁸ See Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1280 (2013) (noting that the umpire analogy “was the conception of a judge that Roberts thought would appeal to the public; the amount of press that the analogy received suggests that the strategy worked”); see also Pettys, *supra* note 110, at 128 (discussing the analogy’s “popular appeal”).

¹¹⁹ *Roberts Confirmation Hearing*, *supra* note 113, at 161 (statement of John G. Roberts, Jr.).

¹²⁰ *Id.*

¹²¹ See Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 617 (2007) (noting that the umpire analogy “resonated with the American public partly because he utilized ‘terms all Americans could understand’” (quoting Alberto R. Gonzales, Prepared Remarks of Attorney General Alberto R. Gonzales at the American Enterprise Institute (Jan. 17, 2007), https://www.justice.gov/archive/ag/speeches/2007/ag_speech_070117.html)).

¹²² See, e.g., *Roberts Confirmation Hearing*, *supra* note 113, at 266 (remarks of Sen. John Cornyn) (speaking to Roberts: “[Y]ou were quite eloquent in saying that you wanted to be an umpire, you did not want to bat or pitch, and I think it was a very succinct and appropriate way to describe exactly the role that you thought judges ought to play, not as partisans, but as impartial and disinterested in the outcome, but nevertheless, interested in providing access to justice.”); *id.* at 237 (remarks of Sen.

it was widely denounced in the academic literature. The constitutional scholar Erwin Chemerinsky wrote that “it is hard to think of a less apt analogy.”¹²³ Richard Posner called Roberts’s description “crude[]” and noted that “[n]o serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.”¹²⁴ Ronald Dworkin found little merit in a similar analogy,¹²⁵ and other scholars have variously described Roberts’s analogy as “absurd,”¹²⁶ a “pontification,”¹²⁷ and “misleading — . . . totalizing and false.”¹²⁸

Despite being the object of near-universal criticism in legal scholarship, the umpire analogy has dominated the popular discourse.¹²⁹ As several commenters observed, “[a]lthough [this] account of the Court’s work is so oversimplified that it would be dismissed as a straw man in academic circles . . . the umpire analogy has real currency in the public debate.”¹³⁰ Likewise, as Todd Pettys wrote, “Popular constitutional discourse is filled with rhetoric suggesting that properly behaving judges place their discretion wholly to the side when adjudicating constitutional disputes and simply apply

Jeff Sessions) (“What we need is what you said, an umpire, fair and objective, that calls it like they see it based on the discrete case that comes before the judge.”); *id.* at 10 (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary) (arguing that, when evaluating judicial nominees, “that standard must be based upon the fundamental principle that judges interpret and apply, but do not make the law”). *But see id.* at 185 (remarks of Sen. Joseph R. Biden, Jr., Member, S. Comm. on the Judiciary) (describing the umpire analogy as “not very apt because [each judge] get[s] to determine the strike zone”); *id.* at 203 (Sen. Kohl, Member, S. Comm. on the Judiciary) (similarly pushing back on John Roberts’s analogy by observing that “no two umpires . . . have the same strike zone”).

¹²³ Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006).

¹²⁴ Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006).

¹²⁵ See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25-27 (1967) (discussing, forty years prior to Roberts’s confirmation hearing, how legal principles differ from the rules of baseball).

¹²⁶ L.A. Powe, Jr., *Judges Struck by Lightning: Some Observations on the Politics of Recent Supreme Court Appointments*, 39 ARIZ. ST. L.J. 875, 882 (2007).

¹²⁷ Roberts, *supra* note 121, at 617.

¹²⁸ Siegel, *supra* note 17, at 711.

¹²⁹ See, e.g., EISGRUBER, *supra* note 37, at 6-8.

¹³⁰ David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1879 (2008); see also EISGRUBER, *supra* note 37, at 6-7.

the policy judgments that the sovereign people have enshrined in the Constitution.”¹³¹

Given this, it should not be surprising that the umpire analogy has become a recurring theme in Supreme Court confirmation hearings. During Samuel Alito’s confirmation hearing, for example, Senator Chuck Grassley praised Alito for “tr[ying] to act like an umpire, calling the balls and strikes, rather than advocating a particular outcome.”¹³² Alito reinforced this idea of the formalist judge when he said, “what the judge has to do is make sure that the judge is being true to the principle that is expressed in the Constitution and not to the judge’s principle, not to some idea that the judge has.”¹³³

In her confirmation hearing, Sonia Sotomayor made a more direct appeal to the analogy, asserting that good judges are “like umpires” because they are “impartial and bring an open mind to every case before them.”¹³⁴ She went on to summarize her “philosophy of judging” as “appl[y] the law as the law commands.”¹³⁵ Seeking to burnish Sotomayor’s credentials, Senator Chuck Schumer reaffirmed her status as a neutral umpire: “any objective review of Judge Sotomayor’s record on the Second Circuit leaves no doubt that she has simply called balls and strikes for 17 years.”¹³⁶

Just as evidence of conformance to the umpire ideal bolsters a nominee, evidence of nonconformance undermines a nominee. Challenging Sotomayor’s qualifications for the Supreme Court, then-Senator Jeff Sessions stated that her “approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other In truth, [her approach] is more akin to politics, and politics has no place in the courtroom.”¹³⁷

Even more recently, at her confirmation hearing, Elena Kagan defended Extreme Legal Formalism, arguing that “judges are always constrained by law and that the only sources that judges can

¹³¹ Pettys, *supra* note 110, at 131.

¹³² *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2006) [hereinafter *Alito Confirmation Hearing*] (remarks of Sen. Chuck Grassley).

¹³³ *Id.* at 379 (remarks of Samuel A. Alito, Jr., nominee).

¹³⁴ *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 79 (2009) (remarks of Sonia Sotomayor, nominee).

¹³⁵ *Id.*

¹³⁶ *Id.* at 25 (remarks of Sen. Chuck Schumer).

¹³⁷ *Id.* at 7 (remarks of Sen. Jeff Sessions).

appropriately look to are legal sources, that judges can't import their own personal preferences or their political preferences or their moral values, that it would be inappropriate to do so. The role of a judge is to determine . . . what the law requires and then to do that thing."¹³⁸

That Kagan praised Extreme Legal Formalism and failed to reveal her actual judicial philosophy is not surprising. This strategy has been the one employed by all successful nominees since Robert Bork's contentious hearing. In fact, a number of years prior to her nomination, Justice Kagan herself bemoaned the lack of honesty in Supreme Court confirmation hearings, writing that they have become nothing more than "a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis."¹³⁹

Kagan's observation regarding the vapidness of this process is apt. Useful information is concealed behind a façade of formalism.¹⁴⁰ Neither Kagan, nor Sotomayor, nor Roberts are Extreme Legal Formalists.¹⁴¹ Yet, they all professed to be. This duplicity is especially striking given that one need not look far to find evidence of the Justices' true judicial philosophies. For instance, prior to her nomination, Justice Kagan wrote that "judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends" and concluded that "[s]uch activity is not necessarily wrong or invalid."¹⁴² Justice Sotomayor similarly expressed anti-formalist views when, in a speech at Berkeley, she said, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white

¹³⁸ *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong.* 172 (2010) [hereinafter *Kagan Confirmation Hearing*] (remarks of Elena Kagan, nominee); see *id.* at 103 (arguing that "[i]t's law all the way down").

¹³⁹ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995).

¹⁴⁰ See, e.g., Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS (Sep. 24, 2009), <http://www.nybooks.com/articles/2009/09/24/justice-sotomayor-the-unjust-hearings> (commenting on this phenomenon and calling Justice Sotomayor's confirmation hearing a "farce").

¹⁴¹ See, e.g., James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 196 (2011) (noting that Justice Sotomayor's stated commitment to formalism during her confirmation hearing was at odds with her true beliefs and "most likely reflect[ed] a strategic decision . . . to advance the image of discretionless judging and judges who merely 'implement' the law").

¹⁴² *Kagan Confirmation Hearing*, *supra* note 138, at 128.

male who hasn't lived that life."¹⁴³ Although Chief Justice Roberts was more careful to cultivate a formalist image prior to his nomination, his decisions on the Court have revealed that he, too, fails to act as a neutral umpire.¹⁴⁴

As these examples show, the pattern is clear: in popular discourse, Extreme Legal Formalism is presented as the ideal to which all judges should adhere.¹⁴⁵ Although no legal elite believes that judges actually decide cases in this manner,¹⁴⁶ there is nonetheless a widespread effort — led by the Supreme Court — to convince the public that the judiciary abides by this model. Ultimately, however, this theory is nothing more than a façade.¹⁴⁷ As the legal historian Lawrence Friedman observed, Extreme Legal Formalism is “less a habit of mind than a habit of style, less a way of thinking than a way of disguising thought.”¹⁴⁸

2. Extreme Legal Realism

If Extreme Legal Formalism is the ideal to which judges profess complete faith, then Extreme Legal Realism is the apostasy that judges condemn. Where Extreme Legal Formalism maintains that judges only discover preexisting laws, Extreme Legal Realism maintains that judges only make law.¹⁴⁹ Where Extreme Legal Formalism holds that

¹⁴³ Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

¹⁴⁴ See Albert W. Alschuler, Term Paper, *Herring v. United States: A Minnow or a Shark*, 7 OHIO ST. J. CRIM. L. 463, 476 (2009) (“John Roberts, who once declared that as Chief Justice he would be merely an umpire, is evidently an operator instead.”); Gene Nichol, *Citizens United and the Roberts Court's War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1009 (2011) (describing Roberts's decisions on the Court as “grotesque hypocrisy” in light of his promise to behave like an umpire); Geoffrey R. Stone, *Selective Judicial Activism*, 89 TEX. L. REV. 1423, 1428 (2011) (book review) (arguing that Roberts “employ[s] a form of selective judicial activism” (emphasis omitted)).

¹⁴⁵ See Kairys, *supra* note 84, at 3 (“The underlying [public] conception envisions a legal process that, if not perverted by bias, corruption, or stupidity, will produce distinctly legal, fair rules and results untainted by politics or anyone's social values.”).

¹⁴⁶ See, e.g., EISGRUBER, *supra* note 37, at 18 (“Nobody should have been surprised that Roberts turned out to be something different from a neutral umpire. Conventional wisdom recognizes that Supreme Court justices vote along ideological lines [N]obody is confused about which justices are conservatives, which are liberals, and which are moderates or swing votes.”).

¹⁴⁷ See TAMANAHA, *supra* note 44, at 124 (observing that Extreme Legal Formalism is so “patently implausible [that] judges evidently were either deluded or lying for (purportedly) asserting them” (emphasis omitted)).

¹⁴⁸ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 288 (3d rev. ed. 2005).

¹⁴⁹ See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1060 (2005) (noting “that judges make law” is one of the two core

judges engage in mechanical deduction to reach the single correct conclusion, Extreme Legal Realism holds that both the law itself and the procedures for identifying it are wholly indeterminate.¹⁵⁰ And finally, where Extreme Legal Formalism claims that non-legal reasons do not influence judicial outcomes, Extreme Legal Realism claims that extra-legal factors explain every decision.¹⁵¹ If one were to consolidate these characteristics of Extreme Legal Realism into a single phrase, that phrase would be “law is politics.”¹⁵²

Although these two theories of adjudication are opposites along all these dimensions, there is one way in which they are similar: neither is taken seriously by legal scholars or judges.¹⁵³ Admittedly, the Critical Legal Studies movement is sometimes described in Extreme Legal Realist terms,¹⁵⁴ but as many scholars have pointed out, this depiction is more a “caricature” than a fair interpretation of the movement’s claims.¹⁵⁵ As is clear from the canonical works in Critical Legal

“premises of legal realism”).

¹⁵⁰ See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 17-25 (1987) (discussing the indeterminate nature of law); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987) (equating the indeterminacy thesis with the idea that “the existing body of legal doctrines — statutes, administrative regulations, and court decisions — permits a judge to justify any result she desires in any particular case”).

¹⁵¹ See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267-68 (1997) (calling the idea that “judges exercise unfettered discretion, in order . . . to reach results based on their personal tastes and values” an “inaccurate” but common view of realism).

¹⁵² See, e.g., Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 977 (2011) (observing that “the more extreme versions of realism or later critical legal studies writing” adopt “the view that all law is politics”).

¹⁵³ See, e.g., Cross & Nelson, *supra* note 78, at 1444 (“[Extreme Legal Realism] is naïve [because] it assumes that judges are unconstrained and have single-peaked utility functions. In this model, judges decide so as to advance their ideological policy ends, without regard for the formal requirements of law (e.g., constraining precedents and text) and without concern for the reaction of external entities.”); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 640 (1999) (observing that “[n]o antiformalist thinks that judges interpreting statutes should engage in ad hoc balancing of all relevant considerations”).

¹⁵⁴ See, e.g., William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (accusing “the critical legal realists [of] argu[ing] that all law is politics”); Owen M. Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413, 424 (1994) (describing “[c]ritical legal studies scholars [as] claim[ing] that ‘law is politics’”).

¹⁵⁵ See Motoaki Funakoshi, *Taking Duncan Kennedy Seriously: Ironic Liberal Legalism*, 15 WIDENER L. REV. 231, 286 (2009) (arguing that “Critical Legal Studies [is] caricatured as advocating the slogan ‘law is politics’”); see also Lama Abu-Odeh,

Studies, the movement's project — unlike that of Extreme Legal Realism — was not to prove that law is wholly irrelevant to judicial decision making, but rather to show that it constrains judicial actors in a manner that is very different from the traditional formalist conception.¹⁵⁶

Although the legal community has thoroughly rejected Extreme Legal Realism,¹⁵⁷ some researchers in the broader academy do support it. Most notably, the theory has gained traction in political science departments, where a number of scholars have argued that it is an accurate description of judicial decision making.¹⁵⁸ These individuals base their claims on the substantial body of empirical work showing that judges' political ideologies are correlated with their judicial

The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere, 59 AM. J. COMP. L. 985, 1004 (2011) (“Critical Legal Scholars have often insisted, against the grain of popular fiction, that their claim is not that Law is Politics . . . but rather that ideological influences insert themselves in the interpretive work of the judge especially when the judicial experience of textual constraint is at its weakest.”).

¹⁵⁶ See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 526 (1986) (“[L]aw constrains as a physical medium constrains — you can't do absolutely anything you want with a pile of bricks, and what you can do depends on how many you have, as well as on your other circumstances.”); see also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984) (writing that Critical Legal Realists “don't mean — although sometimes they sound as if they do — that there are never any predictable causal relations between legal forms and anything else The Critical claim of indeterminacy is simply that none of these regularities are necessary consequences of the adoption of a given regime of rules. The rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time” (emphasis omitted)).

¹⁵⁷ See Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2473-74 (2014) (book review) (writing that “the claim that judging is politics all the way down seems absurd” and pointing out that “legal scholars as diverse as Professor Ronald Dworkin . . . and Professor Duncan Kennedy” have rejected Extreme Legal Realism).

¹⁵⁸ See Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001) (book review) (“This research has been so completely internalized by many political scientists that it is considered the common sense of the discipline that Supreme Court justices . . . should be viewed as promoters of their personal policy preferences rather than as interpreters of law.”); Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 102-03 (2010) (observing that “many hard-core political scientists are satisfied to describe judges as nothing more than politicians in robes who do nothing more than maximize their policy preferences”).

decisions.¹⁵⁹ Two of the most prominent political scientists who support this position have compared legal analysis to “creative writing, necromancy, [and] finger painting”¹⁶⁰ and have even been “willing to assert that Supreme Court decision making reflected the personal policy preferences of the justices and almost nothing else.”¹⁶¹ This position, however, vastly overstates the strength of the findings.¹⁶² Although the empirical research supports the claim that politics matters, it does not support the far stronger claim that politics is *all* that matters. This is an important distinction. Whereas every serious jurist endorses the former claim,¹⁶³ no one in the legal community believes the latter.¹⁶⁴

Nonetheless, it is this latter claim that has captured the public’s attention.¹⁶⁵ And today, in the popular discourse, Extreme Legal

¹⁵⁹ For an historical overview of this research, see generally Gillman, *supra* note 158, at 465-76; Solum, *supra* note 157, at 2473, noting that “it was common for proponents of the attitudinal model to claim that the law and legal reasoning had no influence on judicial behavior.”

¹⁶⁰ HAROLD J. SPAETH, *SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION* 64 (1979).

¹⁶¹ Gillman, *supra* note 158, at 474; see also Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992) (observing that many political scientists view Supreme Court Justices as “single-minded seekers of legal policy . . . who wish to etch into law their personal views”).

¹⁶² See Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008) (book review) (discussing political science research and concluding that “[e]mpirical study has yet to demonstrate that any extralegal factor — ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of appellate panels — explains more than a very small part of the variation in outcomes”); see also Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006) (“[R]eflecting an almost pathological skepticism that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously.”); Gillman, *supra* note 158, at 465-76; Solum, *supra* note 157, at 2476 (explaining that the “Supreme Court’s docket is likely to consist almost entirely of the cases in which the degree of legal uncertainty is the highest,” and thus “the failure of legal variables to explain the outcomes . . . would be perfectly consistent with the hypothesis that the law clearly determines the proper legal characterization of almost all of the events and occurrences that make up our social world”).

¹⁶³ Solum, *supra* note 157, at 2473 (“[A]lmost every lawyer in the United States would agree that ideology is correlated with the way Supreme Court Justices vote.”).

¹⁶⁴ See TAMANAHA, *supra* note 44, at 197 (“[R]are is the informed jurist who thinks that judges are engaged in the single-minded pursuit of their personal preferences.”).

¹⁶⁵ See, e.g., Kairys, *supra* note 84, at 3 (criticizing the simplicity of popular discourse and lamenting that “[p]ublic debate over judicial decisions usually focuses on whether courts have deviated from the idealized [formalist] decision-making process rather than on the substance of decisions or the nature and social significance of judicial power”).

Realism stands as the dominant alternative to Extreme Legal Formalism. In this domain, however, the theory is used only to delegitimize one's opponents. Partisans accuse Justices with whom they disagree of being Extreme Legal Realists or — in more colloquial terms — of being “judicial activists,”¹⁶⁶ “politicians in robes,”¹⁶⁷ and “unelected lawmakers.”¹⁶⁸ By contrast, partisans present their favored Justices as Extreme Legal Formalists or, more colloquially, as “faithful to the Constitution.”¹⁶⁹ Again, we need look no further than Supreme Court confirmation hearings to see how such accusations and defenses play out on the public stage.

For example, during Justice Kagan's confirmation hearing, a number of Democratic Senators derided the conservative members of the Supreme Court for engaging in judicial activism. Discussing the *Citizens United* decision, Senator Chuck Schumer denounced the “conservative bloc” for taking a “step backward . . . to the era of conservative Supreme Court activism” and “bend[ing] the Constitution to an ideology.”¹⁷⁰ Senator Russ Feingold similarly accused the majority of deciding that case “on the basis of an ideological or partisan political agenda” and worried that, “[b]y acting in such an extreme and unjustified manner, the Court badly damaged

¹⁶⁶ See, e.g., Erwin Chemerinsky, *The Broad Reach of the Narrow Hobby Lobby Ruling*, L.A. TIMES (June 30, 2014, 6:41 PM), <http://www.latimes.com/nation/la-oe-chemerinsky-hobby-lobby-supreme-court-20140701-story.html> (discussing *Hobby Lobby v. Burwell* and denouncing “the court's conservative majority [for] engag[ing] in stunning judicial activism in striking down a federal law based on its own conservative beliefs”).

¹⁶⁷ See, e.g., The Honorable Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 33 (2015) (arguing that judges who fail to “rel[y] on the Constitution's text, structure, and history as constraining forces . . . are nothing more than politicians in robes, free to tackle the social problems of the day based on *avant-garde* constitutional theory or, worse yet, their own personal preferences”).

¹⁶⁸ See, e.g., COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* 136 (2011) (calling judges who “consult their own morals or their own interpretations of the country's morals . . . unelected lawmakers”).

¹⁶⁹ Compare Evan Bernik, *Size Doesn't Matter: Why Shrinking the Supreme Court Won't Promote Constitutionally Limited Government*, FEDERALIST SOC'Y (Oct. 26, 2016), <http://www.fed-soc.org/blog/detail/size-doesnt-matter-why-shrinking-the-supreme-court-wont-promote-constitutionally-limited-government> (defending conservative Supreme Court Justices and originalism as being “faithful to the Constitution”), with Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 307 (2007) (describing living constitutionalism as “faithful to the Constitution”).

¹⁷⁰ *Kagan Confirmation Hearing*, *supra* note 138, at 27 (statement of Sen. Charles Schumer).

its own integrity.”¹⁷¹ Later in the hearing, Senator Ted Kaufman reinforced this critique that conservative Justices are Extreme Legal Realists by calling *Citizens United* a “highly activist decision” that was decided “based on personal policy preferences rather than law.”¹⁷² Unsurprisingly, Republican Senators had a very different view of the Supreme Court’s decision. They framed the conservative Justices as strict formalists who faithfully applied the law independent of their ideological preferences.¹⁷³

Ultimately, this debate was nothing more than a choreographed thrust and parry put on for public spectacle.¹⁷⁴ Partisans on one side accused the other of engaging in judicial activism, and the partisans on the accused side deflected the attack by appealing to formalist ideals.¹⁷⁵ The frequency with which this ruse plays out belies the fact that the legal community thoroughly rejects the descriptive accuracy of both Extreme Legal Formalism and Extreme Legal Realism. As I will show in the next section, lawyers, judges, and academics alike hold far more nuanced understandings of judicial decision making.¹⁷⁶

¹⁷¹ *Id.* at 17 (statement of Sen. Russ Feingold).

¹⁷² *Id.* at 47 (statement of Sen. Ted Kaufman).

¹⁷³ *Id.* at 94 (remarks of Sen. Orrin Hatch) (asserting that the Court’s decision in *Citizens United* was required by the First Amendment and seventy-five years of precedent).

¹⁷⁴ See Dworkin, *supra* note 140 (describing the process as a “choreographed” “minuet”); Pettys, *supra* note 110, at 131-32 (noting that “senators on both sides of the aisle spend more time accusing their political opponents or the nominee of favoring unconstitutional judicial activism than asking questions calculated to illuminate what kind of justice the nominee will be”); Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You’re an Activist Judge, Too*, N.Y. TIMES (Apr. 19, 2005), <http://www.nytimes.com/2005/04/19/opinion/psst-justice-scalia-you-know-youre-an-activist-judge-too.html?mcubz=0> (commenting on the disingenuous nature of these exchanges by noting that partisans “do not want to get rid of judicial activists” but instead “want to rid the courts of judges who disagree with them”).

¹⁷⁵ See Pettys, *supra* note 110, at 125 (“[T]hose who find the ruling objectionable will insist that the justices in the majority allowed their own personal preferences to trump the demands of the law, while those who are pleased with the ruling will claim that the Court simply followed the Constitution’s plain dictates.”). For an example of the kind of discussions that recur, consider the following exchange between two Senators: Democratic Senator Patrick Leahy criticized the Supreme Court, which at the time had a conservative majority, as a “very, very activist court, the most activist court in my lifetime,” and Republican Senator Jeff Sessions responded by defending the conservative Justices for “faithfully follow[ing] the law” and affirming that “the court should interpret the law, not make the law, and should interpret it in a way that’s faithful to the Constitution.” Meet the Press, *Clinton, Gates, Leahy and Sessions on “Meet the Press,”* REAL CLEAR POL. (Apr. 11, 2010), http://www.realclearpolitics.com/articles/2010/04/11/clinton_gates_leahy_and_sessions_on_meet_the_press_105136.html.

¹⁷⁶ See, e.g., Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of*

B. *The Private Truth*

When the public spotlight is dimmed, legal elites express markedly different views of judicial adjudication. Gone is the extreme, sweeping rhetoric, and in its place are moderate, nuanced theories. In this academic domain, scholars, lawyers, and even Supreme Court Justices readily admit that the truth is far more complex than the popular discourse suggests.¹⁷⁷ No one continues to profess adherence to Extreme Legal Formalism, nor do they prop up Extreme Legal Realism as an unfortunate straw man. Instead, there is a shared understanding that, today, everyone is both a formalist and a realist.¹⁷⁸

This is not to say that there exists a single hybrid account of judicial decision making. To the contrary, a wide variety of theories claim adherents. Rather than occupying discrete categories, however, these theories lie on a formalist-realist continuum.¹⁷⁹ As Cass Sunstein has observed, “The real question is ‘what degree of formalism?’ rather than ‘formalist or not?’”¹⁸⁰

In this section, I explore how the ideas of formalism and realism are framed in academic discourse. As I will show, there is a stark contrast between the type of theories that thrive in this private, reflective domain and those that dominate the public debate. Quite simply, once the desire to influence the political dogfight gives way to the desire to uncover the truth, legal elites discard the extreme theories in favor of moderate ones.

the Supreme Court in the U.S. Constitutional Democracy, 86 TUL. L. REV. 181, 192 (2011) (observing that Extreme Legal Realism “reduces legal decision making to pure politics, leaving no reason to study law as a distinct discipline”).

¹⁷⁷ Christopher Eisgruber captured this sentiment when he stated, “Judges are neither umpires nor ideologues; their role is more complex.” EISGRUBER, *supra* note 37, at 8.

¹⁷⁸ See Sunstein, *supra* note 153, at 640 (“It is hard to find anyone who believes that canons of construction have no legitimate place in interpretation, or who thinks that literal language should always be followed no matter how absurd and palpably unintended the outcome.”).

¹⁷⁹ *Id.* (“The real division [between the formalism and realism] is along a continuum. One pole is represented by those who aspire to textually driven, rule-bound, rule-announcing judgments; the other is represented by those who are quite willing to reject the text when it would produce an unreasonable outcome, or when it is inconsistent with the legislative history, or when it conflicts with policy judgments of certain kinds or substantive canons of construction.”).

¹⁸⁰ *Id.*

1. Moderate Legal Formalism

As I use the term, Moderate Legal Formalism does not denote a single theory.¹⁸¹ Instead, it signifies the common threads that run through the wide range of modern formalist theories.¹⁸² In detailing these shared characteristics, I seek not to offer a comprehensive account of formalism but rather, to illustrate the vast distance between the academic and public discussions of the topic. With this goal in mind, I begin by highlighting seven misconceptions regarding Moderate Legal Formalism:

1. Formalism entails conceptualism.
2. Formalism entails mechanical jurisprudence.
3. Formalism entails the Right Answer Thesis.
4. Formalism requires perfect compliance.
5. Formalism excludes consideration of purpose.
6. Formalism precludes equity.
7. Formalism excludes the exercise of practical judgment.

Larry Solum has discussed these misconceptions at length.¹⁸³ For present purposes, however, I focus on how these seven map onto the three principle claims of Extreme Legal Formalism. Starting with the first misconception (that formalism entails conceptualism), it is clear that this proposition is merely a restatement of the claim that judges find — not make — law. As Solum points out, unlike extreme formalists, moderate formalists do not pretend to “deduce [legal rules] from the heaven of legal concepts.”¹⁸⁴

Further down the list, the second, third, and fourth misconceptions are all versions of the idea that judging is mechanical and, if done appropriately, will lead to a case's single correct outcome. Moderate Legal Formalism thoroughly rejects this idea, instead acknowledging

¹⁸¹ Indeed, there are many variants of modern formalism. See Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607 (1999) (discussing three types of moderate formalism: “(1) formalism as anticonsequential morality in law; (2) formalism as apurposive rule-following; and (3) formalism as a regulatory tool for producing optimally efficient mixes of law and norms in contract enforcement regimes”).

¹⁸² There are a vast number of related theories that fall under its label. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991) (advancing a moderate version of formalism); Solum, *supra* note 104, at 176-84 (defending “neoformalism”); Sunstein, *supra* note 153, at 644 (describing “the new formalism”).

¹⁸³ Solum, *supra* note 104, at 171-76.

¹⁸⁴ *Id.* at 173 (rejecting “the idea that legal rules can be deduced from the heaven of legal concepts” (internal quotation marks omitted)).

that a case can have more than one correct answer and that there is often more than one way to arrive at those answers.¹⁸⁵

Finally, the fifth, sixth, and seventh misconceptions parallel the extreme formalist mandate that non-legal reasons play no role in the decision-making process. In Moderate Legal Formalism, this idea simply has no place.¹⁸⁶ As Solum writes, “The application of rules to particular situations necessarily involves practical judgment.”¹⁸⁷ At times, these practical judgments will even require one to look beyond the mere rules. Although extreme formalists are committed to “follow[ing] the rules no matter where they lead, even if the results are absurd or disastrous,” moderate formalists are not.¹⁸⁸ A judge in this latter mold has the ability to consider non-legal factors to avert a sufficiently bad outcome.

As we have seen, none of the extreme formalist principles apply to Moderate Legal Formalism. If that is the case, though, how can these two theories of adjudication be related? The answer is one of degree. Like extreme formalism, moderate formalism holds that law is a constraining force. It does not, however, assert that law is a wholly constraining force.¹⁸⁹ Moderate formalists believe that, although law narrows the set of possibilities, in many cases, judges have discretion to select from a range of correct answers. In short, to a moderate formalist, law remains the dominant force, but it is no longer the only force.¹⁹⁰ Randy Barnett, a noted originalist, explains this concept well.

After emphasizing the centrality of textual meaning, Barnett acknowledged that “[d]ue either to ambiguity or vagueness, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy Indeed, because the framers frequently used abstract language, this will often be the case.”¹⁹¹ Keith Whittington, another prominent originalist, has

¹⁸⁵ *Id.* at 174 (“Formalism can and should accept the proposition that more than one outcome in a case can be legally correct.”).

¹⁸⁶ See Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 340 (2012) (voicing the moderate formalist idea that “[w]hile ideology plays a role in judging, so does law”).

¹⁸⁷ Solum, *supra* note 104, at 175.

¹⁸⁸ *Id.* at 172.

¹⁸⁹ *Id.* at 170 (“The core idea of legal formalism is that constraining law is a real possibility. Courts *could* follow the text of the Constitution, *could* follow the plain meaning of statutes, and *could* follow precedent.” (emphasis added)).

¹⁹⁰ See *id.* (noting that “[n]o contemporary formalist is likely to believe that legal formalism is inevitable”).

¹⁹¹ Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L.

likewise highlighted the indeterminate nature of constitutional interpretation and the need to consult non-legal factors in certain situations. As he writes,

Constitutional interpretation is essentially legalistic, but constitutional construction is essentially political. Its precondition is that parts of the constitutional text have no discoverable meaning. Although the clauses and structures that make up the text cannot be simply empty of meaning, for they are clearly recognizable as language, the meaning that they do convey may be so broad and underdetermined as to be incapable of faithful reduction to legal rules Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation.¹⁹²

As these statements suggest, Moderate Legal Formalism is far more sophisticated than Extreme Legal Formalism.¹⁹³ Although it underscores the constraining effect of both legal rules and text, it also acknowledges that non-legal factors occasionally can and do play a role in judicial decision making.¹⁹⁴ Commenting on this willingness to look beyond the law when necessary, John Manning observed that, “aside [from] occasional moments of bravado, modern formalists do not rely much on the-law-is-the-law styles of argument. Modern formalists invoke political science, the philosophy of language, economics, and more. They talk about incentives and make predictions about political, judicial, and private behavior.”¹⁹⁵ In a

REV. 101, 108 (2001).

¹⁹² KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 7 (1999).

¹⁹³ See, e.g., Leiter, *supra* note 39, at 111-12 (describing modern formalists as “sophisticated”).

¹⁹⁴ See Cross & Nelson, *supra* note 78, at 1443 (noting that “the strictly legal model is no longer completely accepted, even in the legal academy. Most accept that judges are influenced, to a degree at least, by extralegal factors such as their backgrounds”).

¹⁹⁵ John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 685-86 (1999).

similar vein, Cass Sunstein has described moderate formalism as “an intriguing blend of realist and formalist arguments.”¹⁹⁶

Although these statements are indicative of the distance between Moderate Legal Formalism and Extreme Legal Formalism, they should not be taken to mean that the former theory reduces to a simple balancing test.¹⁹⁷ Even the least stringent formalists place the weight of authority on the side of the law.¹⁹⁸ That principle is, indeed, the defining feature of formalism.¹⁹⁹ In practice, this means, except in rare circumstances, that lawfulness supersedes justice²⁰⁰ and that judges must follow rules when they generate determinate outcomes even when those outcomes conflict with their all-things-considered best judgments.²⁰¹ In other words, law is supreme but non-legal factors can influence decisions in certain situations. This position is so widely held among modern formalists that even Justice Scalia, the most ardent formalist to sit on the Court in recent times,²⁰² endorsed it.²⁰³

¹⁹⁶ Sunstein, *supra* note 153, at 644.

¹⁹⁷ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 646 (1990) (“Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened.”).

¹⁹⁸ See Sunstein, *supra* note 153, at 650 (noting that “a central formalist goal is to reduce the burdens of on-the-spot decisions, above all by eliminating the need for the exercise of discretion in particular cases, and by making sure that law is as rule-like as possible, in a way that promotes predictability for parties and lawmakers alike”).

¹⁹⁹ This commitment has led those individuals who are supportive of the formalist framework to coalesce around a number of distinctive interpretative approaches, such as originalism, textualism, and fidelity to the common law. See Daniel A. Farber, *The Ages of American Formalism*, 90 Nw. U. L. Rev. 89, 95 (1995) (“The new formalists advocate originalism in constitutional interpretation, textualism in statutory interpretation, and adherence to settled rules in the common law.”).

²⁰⁰ See Solum, *supra* note 104, at 176-79 (presenting the formalist case for why being lawful is more important than being just).

²⁰¹ See *Justice Antonin Scalia: In His Own Words*, BBC NEWS (Feb. 14, 2016), <http://www.bbc.com/news/world-us-canada-35571825>, quoting Justice Scalia as saying, “If you’re going to be a good and faithful judge, you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.” See also Schauer, *supra* note 48, at 531 (“[Moderate Legal Formalism holds that], as a descriptive and conceptual matter, rules can generate determinate outcomes; that those outcomes may diverge from what some decisionmakers think ought to be done; and that some decisionmakers will follow such external mandates rather than their own best particularistic judgment.”).

²⁰² See Sunstein, *supra* note 153, at 639 (commenting that, of recent Supreme Court Justices, Justice Scalia is the “most enthusiastic proponent” of formalism).

²⁰³ See Scalia, *supra* note 67, at 1186-87 (“I have not said that legal determinations that do not reflect a general rule can be entirely avoided All I urge is that those

While discussing the potential indeterminacy of law, Scalia granted that there is a “narrow context of law that is made by the courts.”²⁰⁴ As he went on to emphasize, even “[i]n a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court, courts have the capacity to ‘make’ law.”²⁰⁵ Scalia recognized that, despite the numerous constraints limiting the range of acceptable decisions, judges retain some discretion. Judicial decision making is not, contrary to Extreme Legal Formalism, a mechanical, determinate enterprise.

2. Moderate Legal Realism

Like its formalist counterpart, Moderate Legal Realism does not denote a single theory. Instead, it captures a set of theories that share certain characteristics. In fact, of the four categories I discuss in this Article, Moderate Legal Realism encompasses the broadest array of accounts. It includes the old realism²⁰⁶ of Jerome Frank,²⁰⁷ Karl Llewellyn,²⁰⁸ and Oliver Wendell Holmes,²⁰⁹ the many varieties of new realism²¹⁰ — such as those espoused by Daniel Farber,²¹¹ Elizabeth

modes of analysis be avoided where possible.”).

²⁰⁴ *Id.* at 1176 (emphasis omitted).

²⁰⁵ *Id.* at 1176-77.

²⁰⁶ Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 72 (2009) (identifying three main branches of “old realism”: “(1) the realism that aimed to redefine law in terms of the centrality of facts and empirical evidence; (2) the realism that aimed to inform law through social science . . . ; and (3) the realism that aimed to construct a theory of judging that refused to accept doctrine’s determinacy and sufficiency”).

²⁰⁷ See FRANK, *supra* note 45, at 3-12 (developing a legal realist framework and arguing that “society would be strait-jacketed were not the courts . . . constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions”).

²⁰⁸ See Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 447-49 (1930) (distinguishing between “real rules” which account for the behavior of courts and “paper rules” which are “what the books there say ‘the law’ is”).

²⁰⁹ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) (challenging the formalist “fallacy . . . that the only force at work in the development of the law is logic”).

²¹⁰ Nourse & Shaffer, *supra* note 206, at 71-90 (identifying and discussing six distinct varieties of new legal realism).

²¹¹ See Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 302-03 (2001) (book review) (conceiving of behavioral law and economics as “a

Mertz,²¹² and Martha Fineman²¹³ — and even the legal process school developed by Henry Hart and Albert Sacks.²¹⁴ Given the sheer number of theories, a comprehensive discussion of Moderate Legal Realism would be beyond the scope of any single article, much less this brief section.²¹⁵ Accordingly, my goal is more modest: to highlight the primary characteristics that these theories share.²¹⁶ In doing so, I hope to show that Moderate Legal Realism occupies a unique space on the formalist-realist continuum and that, unlike the extreme realism I discussed earlier, it is an object of serious scholarly inquiry.

The core idea of Moderate Legal Realism can be stated as follows: in hard cases, non-legal reasons are the dominant factor behind judicial decisions. There are three points to unpack in this claim. First, although realists endorse legal indeterminacy, they do so only with regard to “hard cases.”²¹⁷ These are cases for which the law has “run out” and no legal standard has any obvious connection to the facts of the case.²¹⁸ By contrast, for easy cases — which constitute the vast

revitalized form of legal realism”).

²¹² See Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory — ‘Real’ Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 911 (2000) (arguing for “a new legal realism grounded in empirical research”).

²¹³ See Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory’s Role in New Legal Realism*, 2005 WIS. L. REV. 405, 405 (using “feminist research as a model for . . . formulating a new legal realist paradigm”).

²¹⁴ See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 162-71 (1958). For other canonical legal process works, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

²¹⁵ Even before the wave of new legal realism, H.L.A. Hart found it “very difficult to [give a single definition of realism] because this active group of jurists differed from as much as they resembled each other.” H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 977 (1977).

²¹⁶ Guadalupe T. Luna, *Legal Realism and the Treaty of Guadalupe Hidalgo: A Fractionalized Legal Template*, 2005 WIS. L. REV. 519, 520 (observing that “legal realism . . . has sustained various transformations that render imprecise definitions . . . [but that] several common themes of ‘legal realism’ nonetheless emerge”).

²¹⁷ See Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1271 (1942) (“Decisions will consequently be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact that makes the entire body of legal judgments seem less stable than it really is.”); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1207 (1981) (“Most generally, Realism was a simple and unproblematic attack on the idea that the body of legal doctrine provided an objective basis for decisions in specific instances.”).

²¹⁸ See Michael S. Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 867, 871 (1997). See generally Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

majority of potential disputes — realists believe that legal rules determine the outcome and, thereby, foreclose judicial discretion.²¹⁹

Second, the term “non-legal reasons” is not a euphemism for political considerations. Instead, it refers to the broader realist position that there exist “conflicting, but equally legitimate, interpretive methods.”²²⁰ In his article on canons of statutory construction, Karl Llewellyn famously defends this idea.²²¹ According to Llewellyn, in hard cases, judges are forced to choose between two opposing, but equally reasonable, canons of construction.²²² Because the law has run out, any reason for choosing one canon over the other must come from non-legal considerations.²²³ Llewellyn argues that the most important non-legal consideration is the statute’s underlying purpose. With this in mind, he advises judges first to determine the purpose of the statute and then to decide in accordance with the canon that best fulfills that purpose.²²⁴ Although Llewellyn’s account has proven highly influential, other realists have discussed a wider variety of non-legal reasons that influence judicial decisions. Economic, psychological, sociological, moral, and even policy considerations have been identified as important factors.²²⁵

²¹⁹ Leiter, *supra* note 151, at 273 (“Realists were mainly concerned to point out the indeterminacy that exists in those cases that are actually litigated, especially those that make it to the stage of appellate review — a far smaller class of cases, and one where indeterminacy in law is far less surprising.”).

²²⁰ *Id.*

²²¹ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) (beginning the article by noting that “[o]ne does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases”).

²²² See *id.* at 401-06 (identifying twenty-eight pairs of opposing canons of construction that support his argument).

²²³ See *id.* at 401 (“Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language.” (emphasis omitted)).

²²⁴ See *id.* at 400 (arguing that “[i]f a statute is to make sense, it must be read in the light of some assumed purpose”).

²²⁵ See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009) (“Realism refers to an awareness of the flaws, limitations, and openness of law — an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases”); see also David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 248 (1984) (arguing that “it is a function of values and judgments based on social, political, ideological, moral, religious, and a variety of

This broad set of considerations leads to the third point I want to highlight regarding moderate realism's core idea. Specifically, realists maintain that non-legal reasons play a primary, and not simply ancillary, role in hard cases.²²⁶ This claim represents the key break from Moderate Legal Formalism.²²⁷ As Brian Leiter writes, "The real dispute between the Formalist and the Realist then concerns whether the reasons that determine judicial decision are primarily legal reasons or nonlegal reasons."²²⁸

Importantly, these three facets of Moderate Legal Realism do not suggest that the law is reducible to politics.²²⁹ To the contrary, realists are strong believers in the rule of law.²³⁰ They acknowledge the importance of legal rules and maintain that such rules are dispositive in most cases.²³¹ They are not, as some have claimed, radical skeptics about judging.²³² They do, however, maintain that judges would be better served by confronting the reality that extra-legal considerations weigh on hard decisions.²³³ This is in contrast to the moderate

other factors, that determines the outcomes of cases").

²²⁶ See Leiter, *supra* note 151, at 275 (arguing that the "Core Claim of Legal Realism consists of the following descriptive thesis about judicial decision-making: judges respond primarily to the stimulus of facts"); see also Hart, *supra* note 215, at 977 (arguing that one of the two "main effect[s]" of legal realism "was to convince many judges and lawyers, practical and academic . . . that they should always suspect, although *not* always in the end reject, any claim that existing legal rules or precedents were constraints strong and complete enough to determine what a court's decision should be without other extra-legal considerations").

²²⁷ See Leiter, *supra* note 151, at 278 ("What the descriptive Formalist really claims is that judges are (primarily) responsive to legal reasons, while the Realist claims that judges are (primarily) responsive to nonlegal reasons.").

²²⁸ *Id.*

²²⁹ Cf. Amnon Lehavi, *Concepts of Power: Majority Control and Accountability in Private Legal Organizations*, 8 VA. L. & BUS. REV. 1, 51 (2014) (noting that "legal realism hardly suggests that the tension between power and reason reduces legal policy to pure politics").

²³⁰ See LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 231 (G. Edward White ed., 1986) ("The realists pointed to the role of idiosyncrasy in law, but they believed in a rule of law — hence they attempted to make it more efficient and more certain.").

²³¹ See TAMANAHA, *supra* note 44, at 68-69 (arguing that realists "adhered to a balanced realism They recognized the limitations of human judges and the openness and flaws of law, yet they believed that judicial decisions could be determined by rules").

²³² *Id.* at 68 ("Another common misapprehension about the realists — a popular image that most legal historians know to be incorrect — is that they were radical skeptics about judging."); see Leiter, *supra* note 151, at 268-69 (noting that the false perception of realists as radical skeptics "has contributed in no small measure to the frequent reduction of Realism to a whipping boy for legal common sense").

²³³ See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 35-36 (rev. ed.

formalists who, although recognizing the influence of extra-legal factors, deem open discussion of such factors inappropriate. As H.L.A. Hart observed, a central contribution of legal realism was to show “that judges should not seek to bootleg silently into the law their own conceptions of the law’s aims or justice or social policy or other extra-legal elements required for decision, but should openly identify and discuss them.”²³⁴

To understand the realist framework, it is useful to consider that the movement’s goals include descriptive and predictive accuracy.²³⁵ Addressing this topic, one scholar of jurisprudence observed that a “realist is one who, no matter what his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and try to describe as honestly and clearly as possible what is to be seen.”²³⁶ In line with its emphasis on describing how judges decide, legal realism desires “to explain and improve the predictability of law and judging, not to argue that judging [is] a fraud.”²³⁷ Accordingly, when judges reach differing opinions in a single case, realists do not view this result as evidence that one judge has made a mistake or disregarded the law to further his own political preferences.²³⁸ Instead, they understand it to mean “simply that the different judges have given different weights to divers[e] competing considerations which cannot be balanced on any measured scale.”²³⁹ In short, legal realism does not inherently advance a normative claim. It is a descriptive enterprise that seeks to improve the predictability of judicial decisions.²⁴⁰ To accomplish this objective, realism highlights the influence of non-legal factors on judicial

1990) (noting that realists want to make judges aware of “the social consequences of their decisions, so that they can, where allowed discretion by the undetermined nature of the rules, make these decisions wisely for the general good”).

²³⁴ Hart, *supra* note 215, at 978.

²³⁵ See Leiter, *supra* note 151, at 280, 295 (noting that “one of the most familiar themes in the writings of the Realists is their interest in predicting judicial decisions” and that “justifying one legal outcome on the basis of the applicable legal reasons with a descriptive and explanatory account” is at the core of Realism).

²³⁶ WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 74 (Robert Stevens & William Twining eds., 1973).

²³⁷ TAMANAHA, *supra* note 44, at 68.

²³⁸ See Fox, *supra* note 87, at 42 (arguing that if a lawyer were asked whether judicial decisions are mathematical conclusions, he would state “that when four judges vote one way and three another, it does not mean that the three or the four have made a mistake”).

²³⁹ See *id.*

²⁴⁰ See Leiter, *supra* note 151, at 280.

decisions and encourages judges and scholars to consciously grapple with these considerations.²⁴¹

Unfortunately, this nuance is entirely absent in the popular discourse.²⁴² In that domain, those who dare to recognize the importance of non-legal factors are denounced as judicial activists and accused of trying to impose their political will on the American people. As a consequence, proponents of moderate realism restrict their engagement in the public debate lest they be misrepresented as extremists. Ultimately, this threat of distortion serves to suppress reasonable discussion and further reinforces the public's belief that Extreme Legal Formalism and Extreme Legal Realism are the only options.

The absence of the moderate realist viewpoint in public discourse is especially regrettable given that it captures the process by which many judges decide cases. The judicial opinions themselves, of course, do not offer direct evidence of their realist foundations.²⁴³ As I discussed, judges have strong incentives to write opinions couched in formalist language even when their decisions are influenced by realist concerns.²⁴⁴ And the strength of this pressure ensures that “[t]he very judge who makes the law is . . . the one who [is] most under constraint to cover up what he is doing.”²⁴⁵

²⁴¹ See Richard A. Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 326 (1988) (defining realism as “the use of policy analysis in legal reasoning”).

²⁴² In the academic domain, scholars have pointed out the disconnect between what realism actually claims and what popular discourse perceives it to have claimed. See, e.g., TAMANAHA, *supra* note 44, at 68 (“The goal here is to rescue the realists from the distortions perpetuated by their popular image as extremists or radicals about judging.”); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 692 (1985) (describing realists as that “[m]uch misunderstood group of legal scholars who are remembered as having made vulgar conspiracy-theory charges about bias in the judiciary but who actually did something much more important. The realists started off by pointing to the vacuity, circularity, and medieval silliness of legal reasoning and by stressing the role of policy rather than rules in judicial decisions”).

²⁴³ See Levy, *supra* note 76, at 2 (“Blackstone’s jurisprudence . . . remains to this day a formidable impediment to honest and searching examination of the ways in which an appellate court inevitably makes new law. Appellate law-making itself is still typically covert and indirective, still half-apologetic and guilt-laden.”).

²⁴⁴ See *id.* at 4 (observing that “when a judge invents his own law and concocts his version of the facts, he will not fail to profess obedience to the accepted tradition” (quoting EDMUND CAHN, *THE SENSE OF INJUSTICE* 143 (1949))).

²⁴⁵ See *id.* at 3; see also Peggy C. Davis, “There is a Book out . . .”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1600 (1987) (conducting an empirical analysis and concluding that “[t]o a striking extent, courts

In light of this incentive for deception, one must look beyond the analysis in judicial opinions to ascertain how judges actually decide cases.²⁴⁶ Two avenues of inquiry prove fruitful. The first involves empirical examination of case outcomes. This research begins with the idea that case holdings reveal something important about how judges reached their decisions. The thought is that, although judges can hide their realist motivations behind formalist language at the reason-giving stage, they cannot do the same at the actual decision stage. This insight is important. Because Moderate Legal Realism predicts certain patterns that Extreme Legal Formalism does not, this separation between reasons and outcomes allows scholars to indirectly test the extent to which non-legal considerations influence judicial decisions.

The most prominent difference in prediction relates to the connection between a judge's political party and her judicial decisions. Specifically, extreme formalism posits that judges with different political ideologies decide cases similarly.²⁴⁷ Moderate realism, by contrast, predicts that judges from the same political party are more likely to reach the same conclusion than are judges from different political parties.²⁴⁸ This latter view finds considerable support in the empirical literature.²⁴⁹ Quite simply, a judge's political party affiliation

that were clearly engaged in changing law insisted that they were merely applying established law, and courts confronted with social facts bearing upon choices among competing legal theories insisted that those facts were irrelevant to the 'legal' issue at hand").

²⁴⁶ See TAMANAHA, *supra* note 44, at 125 (observing that "[t]o know what judges think about judging, one cannot draw inferences from the style of written decisions, which are not offered as accounts of judicial decision making"). For an early account of this position, see William G. Hammond, *American Law Schools, Past and Future*, 7 S. L. REV. 400, 412 (1881), writing that "the most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court — perhaps have only been looked up after that decision was reached upon the general equities of the case."

²⁴⁷ Frank Carrigan, *A Blast from the Past: The Resurgence of Legal Formalism*, 27 MELB. U. L. REV. 163, 182 (2003) ("Formalism states that values, choices, policy, social determinants and political ideology are not part of judicial adjudication.").

²⁴⁸ See Michael L. Wells & Jeffrey M. Netter, *Article II and the Florida Election Case: A Public Choice Perspective*, 61 MD. L. REV. 711, 726 (2002) (asserting that "realism obliges one to explicitly acknowledge that judges may put partisan considerations ahead of neutral decision-making").

²⁴⁹ See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 38 (2007) (conducting an analysis of courts of appeals decisions and finding a statistically significant relationship between ideology and outcome but emphasizing that "the measured effect size for ideology is always a fairly small one"); see also EISGRUBER, *supra* note 37, at 19 ("[W]ithout exception, empirical research on American judges has found that their ideological values affect their votes in many cases."); Frank B.

is highly predictive of her decisions.²⁵⁰ This finding persists at all levels of the judiciary, but it is especially robust at the Supreme Court, where a far greater percentage of cases are politically contentious.²⁵¹

Another notable difference relates to the connection between a judge's demographic profile and her judicial decisions. Whereas extreme formalism posits that judges from different demographic backgrounds do not systematically decide cases in different ways, moderate realism predicts that demographic differences correlate with decisional differences in certain areas of law. Such correlations, realism holds, are likely to be most pronounced in cases where demographic factors are salient. Indeed, this result is precisely what empirical research has shown.²⁵² When demographic factors are primed — such as in cases involving gender discrimination,²⁵³ racial

Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 277 (1997) (observing that a “pattern of [partisan] judicial decisionmaking . . . appears among most justices”) [hereinafter Cross, *Political Science*]; William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 818-19 (2009) (finding that a judge's vote depends on the ideological makeup of other judges on the court). See generally SEGAL & SPAETH, *supra* note 67 (discussing how judges function as policymakers and how their political ideologies affect their decisions); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (conducting an empirical analysis and concluding that a judge's political ideology influences the application of *Chevron* deference).

²⁵⁰ See, e.g., CARP, STIDHAM & MANNING, *supra* note 109, at 362 (writing that the attitudinal model has been successful “on more than 9 out of 10 predictions of judicial behavior”); see also Cross, *Political Science*, *supra* note 249, at 275 (noting that the “key test of any model is its ability to predict accurately, and the attitudinal model does well here”).

²⁵¹ See Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1217-18 (2010) (finding that judges' policy preferences exert greater influence on their decisions as one moves up the judicial hierarchy).

²⁵² See, e.g., Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 LAW & SOC'Y REV. 761, 761-62 (2011) (finding that “the inclusion of black and women judges on panels may affect how other judges decide cases”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (“[A] judge's vote (not just the panel outcome) is greatly affected by the identity of the other judges sitting on the panel.”).

²⁵³ See Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 324-28 (2004) (finding that the presence of a woman on three-person Court of Appeals panels was a strong predictor of rulings on sexual discrimination cases); Laura P. Moyer & Susan B. Haire, *Trailblazers and Those that Followed: Personal Experiences, Gender, and Judicial Empathy*, 49 LAW & SOC'Y REV. 665, 665 (2015) (finding that female judges who attended law school during a time of “severe gender

harassment,²⁵⁴ and drug-related offenses²⁵⁵ — judges from different backgrounds are more likely to reach different conclusions than in cases where such factors are absent.

A second way to uncover judges' decision-making process involves looking beyond judicial opinions entirely. When the formalist bonds of judicial writing are removed, judges are occasionally willing to discuss their legal philosophies. It is telling that, in these moments, the hardline public-facing façade of Extreme Legal Formalism disappears. Given the freedom to speak their mind, judges adopt measured tones, acknowledge the influence of non-legal considerations, and endorse certain core aspects of moderate realism. Through decades of speeches and writings, judges have revealed their true sentiments — showing that judicial opinions offer only an incomplete account of the decision-making process.²⁵⁶

Back in 1921, Justice Benjamin Cardozo expressed realist sympathies in his work *The Nature of the Judicial Process*.²⁵⁷ In that book, Cardozo emphasized that, although “adherence to precedent” is foremost, there will be times when judges must account for “the accepted standards of the community, the *mores* of the times.”²⁵⁸ In

inequality” are more likely to side with female plaintiffs in sex discrimination cases and concluding that the “effect of gender as a trait is tied to the role of formative experiences with discrimination”); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005) (finding “that in Title VII sexual harassment and sex discrimination cases . . . a judge’s gender and the gender composition of the panel mattered to a judge’s decision”).

²⁵⁴ See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1141 (2009) (finding that plaintiffs in racial harassment cases who appear before African American judges had a 45.8% chance of success, more than twice the 20.6% success rate of those who appeared before white judges).

²⁵⁵ See Darrell Steffensmeier & Chester L. Britt, *Judges’ Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 762 (2001) (finding that black judges were more likely to sentence both black and white defendants to prison and concluding that black judges display a greater sensitivity to “the social and personal costs of serious crimes and drug-related crimes, especially within black communities”).

²⁵⁶ As a judge on New York’s highest court said to the state bar association in a 1922 speech, “[L]awyers and judges too often fail to recognize that the decision consists in what is done, not in what is said by the court in doing it.” Hon. Cuthbert W. Pound, *Defective Law — Its Cause and Remedy*, 1 N.Y. ST. B.A. BULL. 279, 282 (1929).

²⁵⁷ See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

²⁵⁸ *Id.* at 108, 112.

performing this duty, judges will often find it difficult to separate their own moral judgments from those of the community, especially in cases “where the judge is not limited by established rules.”²⁵⁹

Cardozo was not alone in this view. Many of his contemporaries similarly acknowledged that decisions are affected by the “policy and viewpoint of a court”²⁶⁰ and that when law and policy conflict, the former is “not infrequently reasoned away to the vanishing point.”²⁶¹ One New York state judge of the time, likewise, asserted that it was “inevitable that a judge . . . will to some extent be influenced by his personal views.”²⁶² Going even further, a Pennsylvania Supreme Court Justice wrote in the *Harvard Law Review* that “courts controlled by a ‘conservative’ personnel and those dominated by a ‘liberal’ membership are more than likely to decide constitutional questions from different angles and with different results.”²⁶³

More recently, in the *Wisconsin Law Review*, D.C. Circuit Judge Harry Edwards wrote that easy cases are clear but “[h]ard” cases . . . provide considerably more space for ideological maneuvering.”²⁶⁴ Similarly, speaking fondly of realism during a speech at Suffolk University Law School, Justice Sotomayor stated that “[t]he law that lawyers practice and judges declare is not a definitive, capital ‘L’ law [Courts are] ‘constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions.’”²⁶⁵ In their official capacities, no judge would dare advance these realist positions,²⁶⁶ but when addressing academic audiences, many are willing to pull back the judicial curtain.²⁶⁷

²⁵⁹ *Id.* at 110.

²⁶⁰ Frank Harris Hiscock, *Progressiveness of New York Law*, 9 CORNELL L.Q. 371, 374 (1924).

²⁶¹ Pound, *supra* note 256, at 281.

²⁶² Irving Lehman, *The Influence of the Universities on Judicial Decision*, 10 CORNELL L.Q. 1, 12 (1924).

²⁶³ Horace Stern, Book Review, 51 HARV. L. REV. 178, 179 (1937).

²⁶⁴ Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 858.

²⁶⁵ Jess Bravin, *Legal Realism Informs Judge’s Views*, WALL ST. J. (May 28, 2009), <http://www.wsj.com/articles/SB124346735555660341> (quoting Justice Sotomayor).

²⁶⁶ Even Judge Richard Posner, who has authored numerous articles and books detailing the realist underpinnings of judicial decisions, has never openly declared in an opinion that he decided that case because of his political ideology.

²⁶⁷ Lest these statements be taken as unrepresentative, it is worth noting that in surveys a large proportion of judges describe their decision-making process in realist terms. See, e.g., J. Woodford Howard, Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916, 919-20 (1977) (finding that approximately seventy percent of judges surveyed described themselves as “Realists” or “Innovators” (a label

II. THE COURT'S REASON FOR LYING

Thus far, I have argued that there is a substantial disconnect between the theories of judicial decision making that judges defend in public and those that they endorse in private. In this Part, I explore why that disconnect exists. Why do the very people who profess faithful adherence to Extreme Legal Formalism in their interactions with the American people denounce the absurdity of that theory in their academic discussions? Why do judges, when speaking in their official capacities, claim to revile all aspects of realism but, when speaking outside those capacities, embrace the validity of many realist insights? Why, in short, is there a public lie and a private truth?

Although far removed from our time, Plato offers an illuminating answer to these questions. While discussing the foundations of government authority, he observed that the perception of legitimacy is the key to a stable political system. As Plato recognized, however, such perceptions are difficult to cultivate among the public. The best and most secure way to solve this problem, he believed, is for rulers to promulgate a “noble lie.”²⁶⁸ This type of lie is a falsehood that tricks the public into perceiving the current order as legitimate and, in doing so, reveals a hidden truth that the people would otherwise not learn. According to Plato, such deception is acceptable because it is done in furtherance of a valuable goal — namely, the stability of the political order, and along with that, the wellbeing of society.²⁶⁹

The Supreme Court's actions suggest that they have heeded Plato's advice. Fearing that the public will withdraw support if the judiciary acknowledges its realist foundations, the Justices have worked hard to cultivate an image of judging that is grounded in Extreme Legal Formalism. The Justices know this theory is a lie but endorse it anyway. They do so in the belief that their actions are necessary for the preservation of judicial authority. The Supreme Court has, in other words, staked its legitimacy upon a noble lie.

that Howard defines as more extreme than “Realist”) and that fewer than one-third of judges described themselves in formalist terms); Kenneth M. Dolbeare, *The Federal District Courts and Urban Public Policy*, in *FRONTIERS OF JUDICIAL RESEARCH* 373, 380-83 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

²⁶⁸ See Plato, *Republic*, in *THE REPUBLIC OF PLATO* 93-96 (Allan Bloom trans., 2d ed. 1991).

²⁶⁹ See *id.*

A. *Plato's Noble Lie*

Plato believed that society should be governed by the wisest members of the polity.²⁷⁰ Given their knowledge of the deepest moral truths, such individuals would be well-equipped to enact laws that are most beneficial to the citizenry. Although Plato thought highly of these “philosopher kings,” he had a more pessimistic view of the rest of the populace.²⁷¹ Of particular concern to Plato was that the common people would question the rulers’ legitimacy and seek to obtain power for themselves. To avoid a rebellion that could undermine the stability of the entire system and diminish the wellbeing of all members of society, Plato argued that the philosopher kings needed a strategy to maintain their authority. Simply appealing to the citizens through truth and logic would not work. Instead, the rulers would have to trick the people into perceiving the system as legitimate.²⁷² This act of deception is what Plato called The Noble Lie.²⁷³

After defending the need for such a lie, Plato described how one might proceed. Specifically, he proposed that the rulers construct a myth designed to convince the ordinary people that opposing the philosopher kings would be to oppose the will of the gods themselves.²⁷⁴ Offering one possible myth, Plato tells a story in which the gods mixed metals into the souls of all of the citizens.²⁷⁵ Some people had gold mixed into their souls and were, thus, imbued with the skills to be wise rulers.²⁷⁶ Other people had silver in their souls, making them fit to be warriors.²⁷⁷ Still others had iron or bronze in their souls and, accordingly, were destined to be part of the working class, possessing the skills of craftsmen, merchants, or farmers.²⁷⁸

Plato believed that, upon being told this myth, the people would come to accept their social class and view the rulers’ claim to authority

²⁷⁰ See *id.* at 153 (“Unless . . . the philosophers rule as kings or those now called kings and chiefs genuinely and adequately philosophize, and political power and philosophy coincide in the same place . . . there is no rest from ills for the cities.”).

²⁷¹ See *id.* at 234-49 (arguing that the common people cannot be trusted to rule because democracy inevitably leads to tyranny).

²⁷² See Bloom, *supra* note 24, at 369 (“According to Socrates, a noble lie is the only way to insure that men who love the truth will exist and rule in a society.”).

²⁷³ See *id.*

²⁷⁴ See Plato, *supra* note 268, at 93-94.

²⁷⁵ See *id.*

²⁷⁶ *Id.* at 94 (“[T]he god, in fashioning those of you who are competent to rule, mixed gold in at their birth; this is why they are most honored; in auxiliaries, silver; and iron and bronze in the farmers and the other craftsmen.”).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

as legitimate. Because the gods had carefully selected the philosopher kings and given them the talents to lead, the other classes would not question the justness of the political order.²⁷⁹ Such acceptance by the masses would stabilize the system of governance and enable the rulers to enact laws that promote the welfare of society.²⁸⁰

Although stability and legitimacy were important factors, they were not Plato's only justifications for the noble lie. He also believed that the lie was necessary because it captured a deep philosophical truth that ordinary people would not otherwise understand²⁸¹ — namely, that different individuals have different innate abilities that suit them to particular roles in society. Plato thought that if people were left to search for this literal truth on their own, they would be led astray by their ignorance and selfishness.²⁸² Through these flaws, the common people would become convinced that they, and not the philosopher kings, were equipped to rule.²⁸³ Plato argued that this belief — being entirely false — is far worse than belief in the noble lie, given that the latter is only false when taken literally but is true when understood metaphorically.²⁸⁴ For this reason, the lie — unlike the literal truth — benefits both the minds of individuals who believe it and the welfare of the society that embraces it.²⁸⁵

Before proceeding, it is important to note that Plato does not use the term “noble” to suggest that the lie is admirable, praiseworthy, or impressive. The noble lie is, in fact, a product of elite disdain for the common people. Accordingly, the term is used only to indicate that the lie is propagated by the nobility — in Plato's case, the philosopher kings.²⁸⁶

²⁷⁹ See Bloom, *supra* note 24, at 366 (“This tale . . . conceal[s] the unjust origin of this regime . . . by [presenting] a just account of its origin. On the basis of the lie, the citizens can in all good faith and conscience take pride in the justice of their regime, and malcontents have no justification for rebellion.”).

²⁸⁰ See *id.* at 369 (“The noble lie was intended to make both warriors and artisans love the city, to assure that the ruled would be obedient to the rulers, and, particularly, to prevent the rulers from abusing their charge.”).

²⁸¹ See D. Dombrowski, *Plato's 'Noble' Lie*, 18 *HIST. POL. THOUGHT* 565, 569 (1997) (observing that noble lies rest on truths that not everyone can understand).

²⁸² See Plato, *supra* note 268, at 93-94.

²⁸³ See Bloom, *supra* note 24, at 367 (observing that the noble lie “giv[es] the hierarchy solidity while at the same time presenting men with a rationale designed to overcome their primitive inclination to value themselves at least as highly as their neighbors”).

²⁸⁴ See Plato, *supra* note 268, at 93-94 (stating that the appointment of rulers is appropriately described “by way of a model”).

²⁸⁵ See *id.* at 93-94.

²⁸⁶ It is for this reason that some scholars have translated the term as “lordly lie.”

B. Judicial Legitimacy

Although the Supreme Court's defense of Extreme Legal Formalism is far less grand than Plato's myth of the metals, it is guided by the same ambition. Specifically, it is a falsehood promulgated by elites who fear that the truth would lead the public astray. Like Plato's proposed act of deception, the Supreme Court's noble lie is designed to promote a stable political order by tricking the public into perceiving the judiciary as legitimate.²⁸⁷

Despite being directed toward the same goal, the contours of Plato's myth and the Supreme Court's lie are different. Most notably, because the American political system is founded on the principle of equality, legitimacy must come from the system itself rather than from the special qualities of those who govern. This means that, unlike the philosopher kings in Plato's story, the Justices cannot appeal to their own superiority in order to justify judicial authority. Instead, they must rest their claim to power on the legitimacy of the decision-making process.²⁸⁸

This focus explains why Extreme Legal Formalism is central to the Court's branding. By professing adherence to Extreme Legal Formalism, the Justices provide a legitimating justification for their rulings. In particular, that theory allows the Justices to present themselves to the public as neutral, unbiased decision makers.²⁸⁹ Appearing to be above the political fray enables them to maintain that

See, e.g., 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 270 (4th ed. rev. 1963) ("The literal translation of the word 'genmaios' which I now translate by 'lordly' is 'high born' or 'of noble descent'. Thus 'lordly lie' is at least as literal as 'noble lie', but it avoids the associations which the term 'noble lie' might suggest, and which are in no way warranted by the situation, viz. a lie by which a man nobly takes something upon himself which endangers him . . .").

²⁸⁷ See Dombrowski, *supra* note 281, at 567 (noting that Plato believes "that the rulers can tell a *pseudos* [lie] in order to inculcate obedience in the subject citizens for . . . the sake of the stability of the society" (internal quotation marks omitted)); Scott Shapiro & Alison Mackeen, *Oh, God: Does Denying a Belief in a Deity's Influence over the Law Muck up Legal Thought?*, 58 *LEGAL AFF.*, May/June 2005, https://www.legalaffairs.org/issues/May-June-2005/review_shapiro_mayjun05.msp ("In a democracy, as many observers have noted, it is unwise for unelected judges to admit that they make law, since their legitimacy depends on the perception that they find it.").

²⁸⁸ See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 *BROOK. L. REV.* 589, 666 (1987) ("As many commentators have noted, the Supreme Court derives its legitimacy and respect because its decisions are viewed as reasonable, principled, and consistent.").

²⁸⁹ See KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL — EXCEPT WHEN THEY ARE NOT* 84 (2010) (calling judicial impartiality "a central component of judicial legitimacy").

their decisions are driven by the law.²⁹⁰ The Justices can plausibly claim that they lack discretion and do nothing more than mechanically implement pre-existing constitutional rules. Ultimately, this strategy provides reason for the entire judiciary to deny the existence of any discretion and, in turn, gives the public a strong reason to defer to judicial decisions.²⁹¹ After all, if judges lack discretion, they cannot be blamed for reaching disagreeable conclusions. Any judge reviewing the same case, the theory goes, would have issued the same ruling, so no judge can be held blameworthy for merely articulating what the law has preordained.

As many scholars have observed, this popular perception of judicial impartiality is “the lifeblood of judicial legitimacy.”²⁹² The emphasis here is, of course, on *popular perception*.²⁹³ For purposes of legitimacy, the key requirement is that the public views the judiciary as impartial.²⁹⁴ Actual impartiality, however, is irrelevant — at least insofar as its absence does not affect popular perceptions.

Given the focus on appearing impartial, it is clear why legal elites consider realism to be a threat to judicial legitimacy.²⁹⁵ If the public believes that judges have discretion, they may be less supportive of the judiciary.²⁹⁶ This is especially likely to be true if people come to view

²⁹⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

²⁹¹ See Gibson & Caldeira, *supra* note 141, at 197 (“Denying judicial discretion pre-empts the need for direct political accountability and enhances judicial legitimacy.”).

²⁹² Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 638 (2009); see *Republican Party of Minn. v. White*, 536 U.S. 765, 802 (2002) (Stevens, J., dissenting) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”).

²⁹³ See Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 14 (2004) (“[J]udicial legitimacy depends on an appearance of neutrality that goes beyond the actuality of neutrality on the bench.”); Gibson, *supra* note 18, at 900 (noting that “popular perceptions of impartiality [are] a supposed bedrock of judicial legitimacy”).

²⁹⁴ See Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1987 (2016) (observing “the importance of *perceived* impartiality for judicial legitimacy” (emphasis added)).

²⁹⁵ See Gibson & Caldeira, *supra* note 141, at 197 (discussing this issue and noting that “the realist view of judging is in some sense a danger to judicial legitimacy, especially the legitimacy of the federal courts”).

²⁹⁶ See Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on*

the Court as a collection of extreme legal realists who let political considerations dominate their decisions. To avoid this outcome and preserve their own power, the Justices present a unified front in which they publicly extoll the virtues of Extreme Legal Formalism. The Justices feel compelled to lie for the benefit of society. To reveal the truth, they believe, would be to invite political instability and undermine judicial authority. In their view, the U.S. constitutional system needs a noble lie.

Once one understands this line of thinking, it becomes easy to explain the swift and severe backlash against Justice Ginsburg.²⁹⁷ By inserting herself into the political arena, Justice Ginsburg did far more than challenge Donald Trump's fitness to be President; she took a sledge hammer to the façade of Extreme Legal Formalism and undermined the very foundation on which the Supreme Court has staked its legitimacy. By daring to tell the truth, Justice Ginsburg exposed the Supreme Court's noble lie.

As discussed earlier, Ginsburg's transgression did not go unpunished. Politicians and journalists coalesced around the narrative that she had dishonored the Court by failing to remain an unbiased, impartial observer of the political process.²⁹⁸ Invoking Chief Justice Roberts's umpire analogy, Paul Ryan commented that "[f]or someone on the Supreme Court who is going to be calling balls and strikes in the future based upon whatever the next president and Congress does, [Justice Ginsburg's comment] strikes me as inherently biased and out of the realm."²⁹⁹

Some individuals went even further, questioning whether it would be appropriate for Ginsburg to adjudicate future cases involving Donald Trump or his legislative agenda.³⁰⁰ Senator Marco Rubio, for

Current Practice in Federal Appellate Adjudication, 32 CLEV. ST. L. REV. 385, 388 (1984) (observing that a "large number of people, both within and without the legal community, question [the] legitimacy [of judicial discretion] in any form").

²⁹⁷ See *supra* notes 1–12 and accompanying text.

²⁹⁸ See Editorial Board, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html (criticizing Ginsburg's comments and arguing that "[p]oliticization, real or perceived, undermines public faith in the impartiality of the courts"); Scott Wong, *Ryan Scolds Ginsburg over Trump Criticism*, HILL (July 12, 2016, 9:41 PM), <http://thehill.com/blogs/ballot-box/presidential-races/287497-ryan-scolds-ginsburg-over-trump-criticism> ("I think that's something she should not have done because I think it shows she does not intend to be impartial in the future.").

²⁹⁹ Biskupic, *supra* note 7.

³⁰⁰ See David G. Savage, *Justice Ruth Bader Ginsburg Apologizes for 'Ill-Advised' Criticism of Donald Trump*, L.A. TIMES (July 14, 2016, 2:12 PM), <http://www.latimes.com/nation/la->

instance, asked, “How can a #SCOTUS justice involved in partisan attacks during campaign be impartial in any cases involving a Trump administration?”³⁰¹ Similarly, University of Pittsburgh law professor Arthur Hellman stated that he “find[s] it baffling actually that she says these things” and worries that her comments “would cast doubt on her impartiality” if litigation involving Trump were to come before the Court.³⁰² Another law professor Louis Virelli opined that Justice Ginsburg’s comments “could invite challenges to her impartiality” and “could be seen as grounds for her to recuse herself from cases involving [the] Trump administration.”³⁰³

This idea that Justice Ginsburg’s comments somehow reveal her impartiality is nothing short of absurd. As Richard Posner — and countless others — have observed, the political ideology of the Justices is already widely known:

It is well-understood that there are now, with Scalia’s death, three very conservative Catholic justices (Samuel A. Alito Jr., John G. Roberts Jr. and Clarence Thomas), four liberal justices (Stephen G. Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor) and a swing justice (Anthony M. Kennedy) who is generally conservative but liberal in several important areas (such as gay rights and capital punishment of minors).³⁰⁴

By expressing her political opinion, Ginsburg did not divulge any new information. Long before she put her thoughts on the record, anyone who had given even a moment’s thought to the Court could tell you that Ginsburg is no fan of Donald Trump. Despite what the intense backlash may suggest, her comments were not akin to a surprise twist at the end of a mystery novel. They were, instead, mere

na-ginsburg-trump-apology-20160714-snap-story.html, quoting New York University law professor Stephen Gillers as saying, “If there is a case whose outcome decides the presidency, there will be a motion to recuse her. I fear it will be correct, not because she can’t decide fairly — I think she would — but because the public won’t believe she can.”

³⁰¹ Marco Rubio (@marcorubio), TWITTER (July 13, 2016, 4:39 AM), <https://twitter.com/marcorubio/status/753192014427152388>.

³⁰² Aaron Blake, *In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line*, WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line>.

³⁰³ *Id.*

³⁰⁴ Richard A. Posner, *The Supreme Court Is a Political Court. Republicans’ Actions Are Proof*, WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html?tid=a_inl&trum_term=.186a97565c66.

affirmations of a position that everyone already knew to be true. As *The Washington Post* editorial board wrote, “Nothing Supreme Court Justice Ruth Bader Ginsburg has said in recent interviews about the presidential election should surprise anyone familiar with her biography and her career on the court.”³⁰⁵

Oddly, however, after pointing out the predictable nature of Ginsburg’s opinion, the editors at the *Post* went on to criticize her remarks, arguing that “[h]owever valid her comments may have been, though, and however in keeping with her known political bent, they were still much, much better left unsaid by a member of the Supreme Court.”³⁰⁶ The editors acknowledged that meeting this standard would require the Justices to deceive the public but, incredibly, endorsed the position nonetheless: “No doubt this restriction requires judges, and justices . . . to *pretend* they either do or do not think various things that they obviously do or do not believe.”³⁰⁷

It seems that the argument against Justice Ginsburg’s statements amounts to the following: it is obvious that Supreme Court Justices have intense political preferences and make rulings according to these preferences. Despite this reality, it is vital that the Justices trick the American people into believing they are neutral arbiters who sit beyond the realm of politics. Therefore, for the sake of advancing this goal and of preserving the legitimacy of the Supreme Court, the Justices should refrain from doing anything that would shatter this illusion. The message that legal elites wish to convey is clear: the Supreme Court’s noble lie is sacrosanct and any judge who gives evidence of its falsity is unfit to serve.

III. THE DANGERS OF THE NOBLE LIE

The perception of legitimacy is critical to the Supreme Court’s ability to function — more so even than to the functioning of the other branches of government. Because the Justices control neither sword nor purse, their power must come from without.³⁰⁸ This means

³⁰⁵ Editorial Board, *supra* note 298.

³⁰⁶ *Id.*

³⁰⁷ *Id.* (emphasis added); see also Jeffrey Toobin, *Ruth Bader Ginsburg’s Slam of Trump*, CNN (July 13, 2016, 5:32 AM), <http://www.cnn.com/2016/07/12/opinions/ruth-bader-ginsburg-trump-toobin> (“It’s folly to pretend that judges and justices have no political views, or that their legal views are entirely separate from their judicial philosophies. But there is value in at least formal neutrality in these most partisan battles. Any smart lawyer — or smart citizen — can see that.”).

³⁰⁸ THE FEDERALIST NO. 78 (Alexander Hamilton) (noting that the judiciary “has no influence over either the sword or the purse”).

that, despite having life tenure, the Justices operate at the grace of the people. In the absence of broad public support, the Court is powerless to compel the President or Congress to abide by its rulings.

The noble lie promises the Justices an easy way to cultivate the necessary popular support and thereby retain their authority and legitimacy: all they must do is publicly endorse Extreme Legal Formalism. In this simple lie, the Justices see an opportunity to both garner the support of the people and continue adjudicating cases on realist grounds. This path provides a strong temptation, and it is understandable why the Justices were enticed to follow it.³⁰⁹ That choice, however, was a mistake. As scholars have long known, there are unavoidable perils to resting political power upon a noble lie.³¹⁰

When the government endorses a lie, there are only two possible outcomes. Either the people believe the lie or they disbelieve the lie. In the former case, the lie's very success becomes its undoing. Rulers find themselves emboldened to tell further lies, and the people soon lose their ability to participate in the democratic process in an informed manner. If, however, the lie is disbelieved, a different set of problems arises. The public learns to distrust the rulers and refuses even to believe the truthful statements of government officials. Ultimately, no matter which outcome prevails, the legitimacy of the entire constitutional system is diminished.

A. *The Lie Is Believed*

Widespread public belief in the Supreme Court's lie poses two significant problems. First, it undermines a core democratic principle which holds that political legitimacy derives from the consent of the governed. Second, it encourages political elites to contrive additional lies and further circumvent the will of the people. In this section, I examine these problems.

A bedrock principle of democracy is that state power is justified only when consented to by the people over whom that power is exercised.³¹¹ This ideal is central to the American political system.³¹²

³⁰⁹ See Gerald L. Neuman, *Variations for Mixed Voices*, 137 U. PA. L. REV. 1851, 1854 (1989) (book review) (maintaining that “[j]udges are not apolitical creatures, but are motivated to preserve the power of their roles”).

³¹⁰ See, e.g., POPPER, *supra* note 286, at 130-47 (arguing that the noble lie leads to totalitarian government).

³¹¹ See, e.g., Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 664 (2010) (“For democracy, legitimacy flows neither from natural law nor moral truth but only from the freely given consent of the governed.”).

³¹² See Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56

As Thomas Jefferson penned in the *Declaration of Independence*, “to secure the[] rights [of Life, Liberty, and the pursuit of Happiness], Governments are instituted among Men, deriving their just powers from the consent of the governed.”³¹³

Since the nation’s founding, countless legal theorists have echoed this view. One prominent example is Alexander Meiklejohn who, in his influential book *Political Freedom*, argued that “[g]overnments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.”³¹⁴ Likewise, in his seminal work *The Least Dangerous Branch*, Alexander Bickel wrote that “democracies do live by the idea, central to the process of gaining the consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy.”³¹⁵

These authors and many others emphasize that consent is much more than mere approval.³¹⁶ It requires that the people knowingly and freely submit to the authority of their government.³¹⁷ A necessary component of this process is that the people be supplied with the relevant information.³¹⁸ Given that the noble lie represents an attempt to deceive, it is antithetical to the notion of consent.³¹⁹

WAYNE L. REV. 609, 666 (2010) (asserting that no one disputes that “our country is based squarely on the principle of government by the consent of the governed”); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 541 (1971) (calling “the consent of the governed . . . the mark of democracy”).

³¹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³¹⁴ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE* 9 (1960).

³¹⁵ ALEXANDER M. BICKEL, *LEAST DANGEROUS BRANCH* 27 (2d ed. 1986).

³¹⁶ See David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (“The ‘consent of the governed’ implies that those subject to a set of laws must have a role in their formulation.”).

³¹⁷ See THOMAS PAINE, *THE RIGHTS OF MAN* 25 (1795) (arguing that consent of the governed requires that “individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist” (emphasis omitted)).

³¹⁸ See Maureen Ramsay, *Democratic Dirty Hands*, in *THE POLITICS OF LYING: IMPLICATIONS FOR DEMOCRACY* 27, 36 (Lionel Cliffe, Maureen Ramsay & Dave Bartlett eds., 2000) (“Without accurate information it is not possible to hold public officials to account.”).

³¹⁹ *Id.* at 35 (“The use of concealment, deceit, secrecy and manipulation even to achieve good political ends has serious implications for the vitality of democracy. This is because these means contradict the basic principles of democratic society based on accountability, participation, consent and representation.”).

One may object that perhaps the people have given the government consent to deceive them. If this is the case, then wouldn't it be acceptable for the Supreme Court to endorse its noble lie? Scholars have long debated whether the governed may consent to be deceived.³²⁰ However, because the American public has consistently and thoroughly rejected all forms of government deception — seventy-two percent of people believe it is “never alright for the President to lie to the American public,” and sixty-three percent of people believe “the United States government is never justified in lying to the American public”³²¹ — this objection is unwarranted in the present context.

Given Americans' overwhelming disapproval of government deception, it is clear that the Supreme Court's noble lie lacks popular support. Therefore, in perpetuating their lie, the Justices are transgressing the limits of their authority and substituting their own will for the will of the people. Importantly, it does not matter that the Justices have good intentions behind their deception;³²² it is only the subversion of the public will that is relevant. As the philosopher Sisella Bok has argued, “[d]eceiving the people for the sake of the people is a self-contradictory notion in a democracy.”³²³

The second consequence that follows from public belief in a government lie is the erosion of political integrity. After observing the Justices' success in deceiving the public, other government officials will seek to implement the Court's methods. At first, politicians will restrict their lies to those occasions in which they believe the public will misunderstand the truth and thereby bring about great injury to society. Although derived from good intentions, these acts are nonetheless troubling.³²⁴ Because politicians — like all people — are

³²⁰ Compare SHELDON S. WOLIN, *DEMOCRACY INCORPORATED* 263 (2008) (arguing that it is “paradoxical to say that democracy should deliberately deceive itself”), with BOK, *supra* note 22, at 173 (allowing for the possibility of “genuine consent to deceit”).

³²¹ MIROSLAV NINCIC, *DEMOCRACY AND FOREIGN POLICY: THE FALLACY OF POLITICAL REALISM* 142 (1992).

³²² See BOK, *supra* note 22, at 169 (“We cannot take for granted either the altruism or the good judgment of those who lie to us, no matter how much they intend to benefit us. We have learned that much deceit for private gain masquerades as being in the public interest And we have lived through the consequences of lies told for what were believed to be noble purposes.”).

³²³ *Id.* at 172.

³²⁴ See Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 396 (1997) (book review) (describing a noble lie as “well intentioned insofar as its aim is to promote social stability” but deriding it as “a paternalistic whitewashing of the truth”).

susceptible to bias, they are apt to overestimate the benefits of their lies and underestimate the potential harms.³²⁵

Eventually, however, the problem becomes more dire. As political lies become normalized, officials no longer feel pressure to exercise restraint. Instead, they expound lies whenever doing so is likely to resolve the present controversy and strengthen their hold on power. Although many of these lies will harm the public, that fact will do nothing to slow the expansion of deceit:

As political leaders become accustomed to making such excuses, they grow insensitive to fairness and to veracity. Some come to believe that any lie can be told so long as they can convince themselves that people will be better off in the long run. From there, it is a short step to the conclusion that, even if people will not be better off from a particular lie, they will benefit by all maneuvers to keep the right people in office.³²⁶

Such rationalizations for lying are better suited to promoting an oligarchy than to preserving a democracy. When the public is misled through government deception, its ability to participate meaningfully in the governing process is curtailed.³²⁷ Without relevant and accurate information, the people are unable to fulfill their political role, and any decisions they make will necessarily be antidemocratic.³²⁸ In such a system, the leaders are serving not as chosen representatives but rather as usurpers.

As the political theorist Sheldon Wolin observed, “At bottom, lying is an expression of a will to power. My power is increased if you accept a picture of the world which is a product of my will.”³²⁹ In

³²⁵ See BOK, *supra* note 22, at 173 (arguing that when politicians lie, “[t]hey overestimate the likelihood that the benefit will occur and that the harm will be averted; they underestimate the chances that the deceit will be discovered . . . ; they underrate the comprehension of the deceived citizens, as well as their ability and their right to make a reasoned choice”).

³²⁶ *Id.*

³²⁷ See JOHN J. MEARSHEIMER, *WHY LEADERS LIE* 53 (2011) (“Widespread lying makes it difficult for citizens in a democracy to make informed choices when they vote on issues and candidates, simply because there is a good chance that they are basing their decisions on false information.”).

³²⁸ See Ramsay, *supra* note 318, at 36 (“Government deception and secrecy undermine democracy in that lack of information about the decisions and actions of political leaders hampers public participation, which is an essential and fundamental requirement of democratic politics.”).

³²⁹ WOLIN, *supra* note 320, at 263 (internal quotations omitted).

endorsing its noble lie, the Supreme Court is declaring the superiority of its will and forcing its own vision upon society. When the lie is believed, that vision prevails, and the public loses.

B. The Lie Is Disbelieved

When the people discover government deception, they lose faith in their political leaders.³³⁰ Given this consequence, unsuccessful lies are apt to yield even more intense and immediate negative effects than those that flow from successful lies. When the public believes a lie, political stability continues even though legitimacy is undermined. When the public disbelieves a lie, however, both stability and legitimacy are threatened.

These differing outcomes derive from the fact that people who have been successfully deceived are unaware of the deception, but people who see through the deception are aware. In the former case, given their ignorance, the people do not perceive any reason to distrust their government, whereas in the latter case, given their knowledge, the people identify a powerful justification to upend the existing, illegitimate institutions.

A single lie, admittedly, does not bring society to this precipice. But it does have a deleterious effect on the entire system. When people learn that one institution is distorting the truth, their faith in the whole government is shaken.³³¹ In the long run, this outcome is all but inevitable; no matter how good the government is at deception, its lies will, at some point, unravel.

Often, the unraveling comes about because the lie's success depends on coordination among many people. The Supreme Court's noble lie is a perfect example of this occurrence. When the Justices defend Extreme Legal Formalism as a core judicial principle, they are forced to rely on lower court judges to maintain the lie. Every time these judges take actions that conflict with this understanding, they cause the public to reevaluate the veracity of the lie.

Consider, for instance, the case of Thomas Spargo, a former New York Supreme Court justice. After winning a heavily politicized campaign, Spargo continued his partisan activities. He routinely participated in Republican fundraisers and, more notably, traveled to

³³⁰ Ramsay, *supra* note 318, at 38 (“[D]amaging is the cynicism, disrespect and distrust of politicians once deceptions are uncovered.”).

³³¹ See BYBEE, *supra* note 289, at 5 (“[C]itizens may be led to doubt the authority of government as a whole when they suspect a powerful institution is misrepresenting its manner of operation.”).

Florida to act as an election observer for George W. Bush's campaign and to engage in protests "with the aim of disrupting" the 2000 election recount process.³³² When asked whether his political activities could influence his judicial rulings, Spargo boldly declared that he had never had a political thought in the courtroom:

When people think of Tom Spargo, many would consider my reputation as a kind of partisan hack lawyer or Republican law expert. But when you get on the bench, then that is all behind you. It almost cannot follow you. It does not follow you. None of that follows you into the robing room. That is gone. I don't have to run for re-election and, frankly, I have not had a political thought in any of the work that I've done as a judge.³³³

In his comments, Spargo endorses an obviously untrue position. No one can entirely remove all political bias from their decisions, much less a judge who is so deeply enmeshed in partisan activities. However, in light of the Supreme Court's noble lie, Spargo's remarks are unsurprising. Judges are placed in the unenviable position of having to announce complete adherence to Extreme Legal Formalism regardless of what evidence reality supplies. The tension observed in Spargo's case is simply the natural result of a course the Supreme Court has charted for all judges. It is also a course that has led to growing distrust of the judiciary.

As judicial lies have become increasingly outlandish, the public has become increasingly likely to realize that it is being lied to. Today, despite the forceful rhetoric of legal elites, Americans recognize that the Justices and lower court judges are not apolitical, impartial arbiters. As noted election lawyer James Bopp, Jr. observed, "[T]he secret is out Judges in the United States make law and the people in the United States know that."³³⁴ Although more cautious in tone, the American Bar Association reached a similar conclusion, noting that "the general public . . . shows signs of becoming increasingly skeptical

³³² Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 80 (N.D.N.Y. 2003).

³³³ Al Baker, *Partisan Pit Bull, but Not on the Bench*, N.Y. TIMES (Feb. 22, 2003), <http://www.nytimes.com/2003/02/22/nyregion/partisan-pit-bull-but-not-on-the-bench.html> (quoting Thomas Spargo).

³³⁴ AM. BAR ASS'N COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 17 (2003), <http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf>.

of the view that judges are apolitical decision makers who simply interpret and apply the law.”³³⁵

Public opinion surveys offer strong support for these claims. A 2005 survey conducted by Syracuse University, for instance, found that nearly twice as many people (58% to 34%) agreed than disagreed with the statement “Judges always say that their decisions are based on the law and the Constitution, but in many cases judges are really basing their decisions on their own personal beliefs.”³³⁶ When asked whether “the partisan background of judges influences their court decisions,” forty percent of respondents said it has “a lot” of influence, and forty-five percent said it has “some” influence.³³⁷ Only ten percent of respondents expressed belief that a judge’s partisan background has little or no influence on judicial decisions.³³⁸ And in that same survey, nearly two-thirds of respondents (65%) agreed that the statement “[t]he law is mostly a set of general principles that judges largely interpret at their discretion” described the law in whole or in part.³³⁹

Other surveys have yielded similar results. One found that seventy-six percent of people agreed that the term “political” describes judges “well” or “very well.”³⁴⁰ An even more recent survey from 2015 revealed that majorities of both conservative Republicans (80%) and liberal Democrats (64%) believe that that Supreme Court Justices are “often influenced by their own political attitudes.”³⁴¹ In another nationwide survey, the researchers reported that fifty-six percent of people agreed and only thirty percent disagreed with the statement, “Judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people, invent new rights and ignore

³³⁵ *Id.*

³³⁶ CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., JUDGES AND THE AMERICAN PUBLIC’S VIEW OF THEM: RESULTS OF THE MAXWELL POLL (2005), https://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ See JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE, JUSTICE AT STAKE CAMPAIGN 5 (2002), http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf (memorandum from Greenberg Quinlan Rosner Research Inc. to Geri Palast, Executive Director). The same percentage of respondents (seventy-six percent) agreed that campaign contributions have at least some effect on the decisions of state judges. See *id.* at 4.

³⁴¹ PEW RES. CTR., NEGATIVE VIEWS OF SUPREME COURT AT RECORD HIGH, DRIVEN BY REPUBLICAN DISSATISFACTION 6 (2015), <http://www.people-press.org/files/2015/07/07-29-2015-Supreme-Court-release.pdf>.

traditional morality.”³⁴² Almost half (46%) of respondents went so far as to say that judges are “arrogant, out-of-control and unaccountable,” but only thirty-eight percent of people disagreed with this assessment.³⁴³

These survey results suggest that the Supreme Court’s noble lie has failed. Despite the best efforts of legal elites to convince people that judging is a purely formalist endeavor, an overwhelming majority of the public believes that political ideology plays a substantial role in judicial decision making. Given that the façade has crumbled and the public sees the truth, it is great folly to continue to insist on the veracity of the noble lie. Nonetheless, that is precisely what the Supreme Court is doing. Rather than alter course and admit to any realist influence on judging, the Justices have doubled down on the formalist lie. In light of this strategy, it is perhaps not surprising that the Supreme Court’s favorability rating is at its lowest point since polling organizations began tracking the measure.³⁴⁴

By maintaining its current path, the Supreme Court is unlikely to regain the lost trust and approval of the American people. If anything, staying the course will only bring about a further decline in judicial legitimacy. As the political scientist John Mearsheimer has argued, pervasive political lying is apt to “alienate the public to the point where it loses faith in democratic government and is willing to countenance some form of authoritarian rule. After all, it is hard to see how a democracy can remain viable for long if the people have no respect for their leaders, because they think they are a bunch of liars.”³⁴⁵

IV. A SOLUTION

Lying is the problem, so the solution is straightforward. The Court must tell the truth. Rather than maintain a system in which judges are forced to hide their political beliefs and to pretend that such beliefs play no role in their rulings, the Justices should alter course and acknowledge the realities of the decision-making process. Such a shift

³⁴² Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis,”* AM. B. ASS’N J. (2005).

³⁴³ *Id.*

³⁴⁴ See PEW RES. CTR., *supra* note 341, at 1 (finding that public approval of the Court is at its lowest rate (48%) and public disapproval of the Court is at its highest rate (43%) since Pew began tracking this measure); *Supreme Court*, GALLUP NEWS, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited Nov. 6, 2017) (reporting that, in 2016, the Court saw both its lowest approval rating (42%) and its highest disapproval rating (52%) in Gallup’s history).

³⁴⁵ MEARSHEIMER, *supra* note 327, at 54.

would involve speaking candidly about the role of judges in the constitutional system. It would mean denouncing Extreme Legal Formalism and Extreme Legal Realism as inaccurate depictions of the judicial process. And it would require a thoughtful, yet accessible, presentation of Moderate Legal Formalism and Moderate Legal Realism.

This discussion would, of course, demand cooperation from judges across the political spectrum. If only Democrat or Republican appointees were to deviate from the noble lie, they would open themselves to the charge of being nothing more than political hacks. If, however, both sides were to endorse a realistic portrayal of judging, then such accusations would lack credibility. After all, it is quite hard to accuse the opposing side of not playing by the rules when one's own side admits to engaging in the same actions.

Ultimately, judicial honesty is in the interests of both the judiciary and the public. With regard to the judiciary, honesty would allow judges to derive their authority from transparent discussions with the public. As many political theorists have argued, democratic legitimacy is possible only when the people know the truth and still choose to accept the authority of their leaders.³⁴⁶ By advancing a mythology that seeks to trick the public into viewing the judiciary as a neutral arbiter, the Supreme Court has sought to retain power through illegitimate means. Its noble lie betrays a lack of faith in the people and is born of an unwarranted fear that the constitutional system would crumble under the weight of the truth.

Honesty would also benefit judges by eliminating the need for them to perform judicial contortions to fit the extreme formalist mold. As both moderate formalism and moderate realism acknowledge, judging is not a wholly apolitical endeavor.³⁴⁷ Accordingly, when judges are forced to act as if it is, they are put in a difficult and uncomfortable position.³⁴⁸ Dropping the extreme formalist lie resolves this problem and frees judges to expend more of their limited time on case management rather than on concocting dishonest justifications for their decisions.

³⁴⁶ See WOLIN, *supra* note 320, at 261 (noting that a “crucial need of a self-governing society is that the members and those they elect to office tell the truth”).

³⁴⁷ See *supra* Sections I.B.1–2.

³⁴⁸ See Tara Smith, *Originalism, Vintage or Nouveau: “He Said, She Said” Law*, 82 *FORDHAM L. REV.* 619, 626 (2013) (“An unwarranted insistence on apolitical judicial review encourages judges to try to do something that they cannot: to issue value-neutral decisions.”).

With regard to members of the public, judicial honesty would help them develop a better understanding of the legal framework that drives constitutional debates. As Christopher Eisgruber has argued, the unrealistic descriptions of judging that dominate the public domain come “at the cost of blunting the American people’s ability to engage in constructive constitutional dialogue.”³⁴⁹ A shift to judicial honesty would alleviate this problem by enabling more people to take part in the discourse in an informed manner.³⁵⁰

A second way in which the public would benefit is through improved judicial decision making. In the current state, judges must profess to be something that they are not — apolitical formalists. This requirement, although well-intended, is harmful. It pushes judges to develop a style of adjudication in which they say the appropriate words — much like a sorcerer reciting a magical incantation — but reveal nothing of the actual reasons for the decision.

When judges are forced to abide by these rules, many of them come to believe that their decisions actually are determined by formalist considerations.³⁵¹ Rather than acknowledge and seek to overcome their biases, judges who adopt this role simply deny that such biases exist. These judges would have the public believe that they alone have found a way to cast off the biases that influence everyone else.³⁵²

In a rare moment of candor by a sitting member of the judiciary, Third Circuit Court of Appeals Judge Theodore McKee wrote that the façade of Extreme Legal Formalism “obscures the reality of personal bias. Getting beyond that bias is extremely difficult even for the most introspective and sincere judge.”³⁵³ Judge McKee went on to argue that “we will never get beyond [personal biases] if we do not allow for the certainty that each of us harbors some bias in some degree, and that our bias may be impacting a given decision in ways in which we

³⁴⁹ Pettys, *supra* note 110, at 131.

³⁵⁰ See McKee, *supra* note 20, at 1723 (arguing that “the umpire metaphor has dumbed down the public’s appreciation of the constitutional role of judges”).

³⁵¹ For example, Judge Edward R. Becker claimed to have been transformed into an unbiased decision maker upon ascending to the bench. See *Alito Confirmation Hearing*, *supra* note 132 (statement of Edward R. Becker, Senior Judge, U.S. Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania) (“When you take that judicial oath, you become a different person. You decide cases not to reach the result that you would like, but based on what the facts and the law command.”).

³⁵² See McKee, *supra* note 20, at 1710 (noting that, in the wake of Extreme Legal Formalism, “we have now been saddled with an image of judges who are able to ignore the many kinds of bias that affect everyone else and discharge their duties in a mechanical manner that is removed from the society and its many forces”).

³⁵³ *Id.* at 1712.

are simply not aware.”³⁵⁴ This view of the situation gets at something that should be obvious but has, so far, eluded the judiciary: pretending that biases do not exist does not make them disappear.³⁵⁵ To the contrary, it makes them more insidious and harder to correct.³⁵⁶ If, however, judges embraced honesty, that would initiate a discussion of the problem and allow for the possibility of improvement.

Notably, my argument for candor does not entail openness in all judicial matters. Indeed, with respect to many issues, prudence is often a positive attribute. Courts, for instance, frequently seal records. Although we can debate the scope of this practice, nearly everyone would agree that there are some occasions where this step is warranted. In addition, we all likely agree that it would be inappropriate for judges to deny that those records exist or to fabricate other records and pass them off as unaltered originals. This act, however, is tantamount to what judges do every day when they deny the influence of realist considerations and pass off opinions steeped in formalism that purport to be a complete accounting of the decision-making process.

The Supreme Court is the only institution with the power to end this judicial strategy and chart a course based on honesty. Although this change is simple in principle, it is, as Justice Ginsburg learned, difficult in practice. Nonetheless, it is a change worth making and one

³⁵⁴ *Id.*

³⁵⁵ Since as far back as 1912, legal scholars have commented on this point. See generally Joseph W. Bingham, *What Is The Law?*, 11 MICH. L. REV. 1, 112-13 n.32 (1912) (arguing that

to require judicial reasoning to proceed always within the confines of promulgated rules and principles, will not prevent individual bias from affecting a decision. It could be demonstrated that judges are able to manipulate generalized expressions to suit their preferences as easily as they could plausibly justify the same decision by free reasoning. Indeed previous judicial and legislative expressions may be misused as a plausible mask to conceal the real motives or incapacity of the judge).

³⁵⁶ See McKee, *supra* note 20, at 1711 (observing that the umpire “metaphor may chill honest discussion of the role of judges and thereby move us farther from the principle of objective adjudication rather than closer to it” (emphasis omitted)); Smith, *supra* note 348, at 626-27 (“If . . . judges are not guided by those political values that are in the legal system, they will be compelled to import other values What is decisive under such a practice would not be the law . . . , but subjective additions to the law. And as a result, we would suffer [from increased] politicization”).

that will pay dividends for the judiciary and American democracy for years to come.³⁵⁷

CONCLUSION

In the American system of government, judicial authority derives from the consent of the governed. Unfortunately, the Supreme Court has attempted to circumvent this process. Instead of dealing honestly with the public and cultivating support in a democratically legitimate manner, the Justices falsely present themselves and the broader judiciary as a collection of Extreme Legal Formalists who are beyond the sway of realist or political considerations.

When Justice Ginsburg spoke out against Donald Trump, she undercut this narrative by demonstrating that judges are not constitutional automatons but rather normal people who have opinions and biases. For revealing this truth, Justice Ginsburg was rebuked by legal elites across the political spectrum. These individuals denounced her for failing to live up to an inhuman standard. They criticized her for not abiding by a rule that every lawyer knows fails to track reality. In short, they called Justice Ginsburg out for breaking character in a show whose sole purpose is to deceive the American people.

In perpetuating this façade of Extreme Legal Formalism, the Supreme Court has exhibited a profound disdain for core democratic principles and diminished the ability of the public to engage in informed constitutional debate. Admittedly, the Court believes that telling this noble lie is necessary to maintain political stability. As I have argued, however, that belief is mistaken. For the same reason that Plato's noble lie undermines democratic legitimacy and stability, the Supreme Court's noble lie undermines judicial legitimacy and stability.

Ultimately, a far better option than lying is for the Supreme Court to be honest with the American people. Forging such a path would require the Justices to acknowledge that the public has the right to know how the judiciary operates and to explain how judges actually decide cases. The Justices would have to first concede the falsity of Extreme Legal Formalism and Extreme Legal Realism and then lead the public through a discussion of Moderate Legal Formalism and

³⁵⁷ As the political theorist Sheldon Wolin concluded, "Self-government is, literally, deformed by lying; it cannot function when those in office assume as a matter of course that, when necessary or advantageous, they can mislead the citizenry." See WOLIN, *supra* note 320, at 261.

Moderate Legal Realism. Although this course is more difficult, following it would be an expression of faith in democracy. Only the truth will give the American political system a chance to recover from the negative consequences wrought by the Supreme Court's noble lie.