SEEING THE EMPEROR’S CLOTHES: RECOGNIZING THE REALITY OF CONSTITUTIONAL DECISION MAKING

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INTRODUCTION

Increasingly, the rhetoric about judicial review is at complete odds with reality. In the summer of 2005, President George W. Bush repeatedly said that he wanted to nominate judges who would “not legislate from the bench.”1 He wanted judges who would apply, not make, the law. It is a nice slogan, but any first year law student knows that judges make law constantly. The first year student’s common law subjects are almost entirely judge-made law. Interpretation of an ambiguous statute or a constitutional provision’s broad, open-textured language is also a judge’s legal product.

At his confirmation hearings for the Chief Justice position, Judge John Roberts began the proceedings by analogizing his future role to that of a baseball umpire.2 Although both make decisions, it is hard to think of a less apt analogy. An umpire applies rules created by others; the Supreme Court, through its decisions, creates rules that others play by. An umpire’s views should not make a difference in how plays are called; a Supreme Court Justice’s views make an enormous difference. Justices John Paul Stevens and Antonin Scalia frequently disagree in important constitutional cases; everyone knows that it is because their views and ideologies are drastically different.

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1 See, e.g., 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) [hereinafter Roberts Nomination] (“[Judge Roberts] will strictly apply the Constitution and laws, not legislate from the bench.”).


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Why did Chief Justice Roberts, who obviously knows better, use such a disingenuous analogy? Undoubtedly, he wanted to begin the confirmation hearings by delivering the message that his views would not matter and, accordingly, there was no reason for the Senators to be concerned about his views or his refusal to discuss them. Chief Justice Roberts is not alone in his pretense. In November, I was present at a conference of federal courts of appeals judges when Justice Scalia said that his views do not affect his decisions. In particular, he said that his views on abortion have nothing to do with his opinions in abortion cases. The federal court of appeals judge sitting next to me rolled her eyes and said, “What nonsense.”

These are statements from the President of the United States, the Chief Justice, and an Associate Justice of the U.S. Supreme Court. I have personally heard them echoed by scholars and commentators. But the statements are indeed nonsense. In deciding whether diversity in the classroom is a compelling government interest,\(^3\) how can a judge’s own views and experience not matter? In deciding whether recounting ballots in the Florida presidential election violated equal protection,\(^4\) does anyone believe that the five-four decision was not composed along ideological lines? More generally, what neutral methodology, free of a judge’s views, exists to help decide what is reasonable? Reasonableness issues arise in countless areas of constitutional law, from the Fourth Amendment to Equal Protection, and as with the preceding issues, require judgment calls that inescapably are influenced by – if not based on – a judge’s own views and experiences.

Why, then, do we keep talking as if the reality were different? This dichotomy is the focus of this Essay. Part I discusses the reasons why the rhetoric of discretion-free judging persists. Part II explains why this persistence is undesirable. Part III offers some tentative thoughts on how to get past the rhetoric and illusion of value-free judging. The conclusion suggests that twenty-first century judging would be better if it were not couched in such misleading rhetoric.

### I. WHY DOES THE MYTH PERSIST?

As I listen to brilliant individuals like Chief Justice Roberts and Justice Scalia express a view of judging at odds with what every first year law student learns, I wonder why they do so. In part, the answer is the false allure of formalism. Formalism promises largely discretion-free judging whereby judges deductively reason from established premises to “inescapable”

\(^3\) See Grutter v. Bollinger, 539 U.S. 306, 324-25 (2003) (holding that universities have a compelling interest in a diverse student body and may use race as one factor in admissions decisions).

conclusions. Theoretically, the judge’s own views and experiences play no role in such mechanical judging. President Bush’s notion of judges applying the law, rather than making it, has a strong ring of formalism: the notion assumes the law is established and needs only be applied to new situations in a discretion-free manner.

There is enormous appeal to formalism, as there is to many myths. The idea that we are a nation of laws, not of men and women, was articulated long ago in Marbury v. Madison. If judges just applied the law in a formalistic way, then results would be a product not of the human beings in the robes, but of the laws themselves. The identity of the judges would have little effect, so long as the individuals on the bench had the intelligence and honesty to faithfully carry out their duties.

But long ago, the legal realists exposed the myth of formalism by demonstrating the inevitability of judicial discretion. Especially in constitutional law, formalism is inadequate. Balancing competing interests is a persistent feature of constitutional decision making. How should the President’s interest in executive privilege and secrecy be balanced against the need for evidence at a criminal trial? How should a defendant’s right to a fair trial be balanced against the freedom of the press? How should legitimate, important, and compelling government interests be distinguished in individual rights and equal protection cases? Levels of scrutiny are, after all, just a tool for arranging the weights in constitutional balancing. How should local interests in public health and safety regulations be balanced against the national interest in unburdened interstate commerce in dormant Commerce Clause cases? Moreover, constitutional law constantly asks, as does so much

5 See Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 181 (1987) (defining legal formalism as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative”).

6 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).


8 See United States v. Nixon, 418 U.S. 683, 713 (1974) (holding that the President has executive privilege, but that such privilege is not absolute and must yield to overriding interests, including a “demonstrated, specific need for evidence in a pending criminal trial”).

9 See Neb. Press Ass’n v. Stuart, 427 U.S. 539, 570 (1976) (limiting the ability of courts to enjoin the press from pretrial reporting in criminal cases).

10 See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) (distinguishing the levels of government interest required to sustain legislation depending on the level of scrutiny applied).

11 See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (explaining that where a state or local government advances a legitimate interest, its regulation “will be upheld unless
of law, what is reasonable. Under the Fourth Amendment, courts routinely focus on whether the actions of police officers are reasonable.\textsuperscript{12} Under the Takings Clause, courts examine whether the government acted out of a reasonable belief that its action would benefit the public.\textsuperscript{13}

Such balancing is not an exclusively liberal exercise. In a recent case, Justice Scalia, writing for the Court, stressed that the application of the exclusionary rule depends on a weighing of its costs and benefits.\textsuperscript{14} Formalism provides no mechanism for balancing incommensurate interests and is likewise of limited utility in deciding reasonableness issues. Because formalism is inadequate in these and similar instances, it is inevitable that judges will enjoy great discretion. How a judge exercises his or her discretion will depend on that judge’s individual values. Formalism cannot explain this type of inherently discretionary judging.

Even originalism, which presents itself as a theory of constitutional interpretation divorced from the values of individual judges,\textsuperscript{15} allows tremendous judicial discretion. The intent behind any constitutional provision can be stated at many different levels of abstraction.\textsuperscript{16} For example, who was the Equal Protection Clause intended to protect? The intent could have been solely to protect African Americans; to protect all racial minorities; to shelter all groups that have been historically discriminated against; or to defend all individuals from arbitrary treatment by the government. Each of these potential answers is a reasonable way of describing the drafters’ intent for the Fourteenth Amendment. Yet a judge must eventually choose among these answers, and a great deal depends on that choice. Whether sex discrimination or affirmative action violates equal protection depends entirely on the choice among levels of abstraction. Here, too, neither formalism nor originalism can provide a discretion-free answer.

Originalism also provides enormous discretion to judges in deciding the original intent. The theory focuses on the Framers, but so many people were involved in drafting and ratifying the Constitution and its amendments that it is possible to find historical quotations supporting either side of almost any

\footnotesize{the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits\textsuperscript{*}).}


\textsuperscript{13} See Kelo v. City of New London, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring) (explaining that in takings cases there is “a presumption that the government’s actions were reasonable and intended to serve a public purpose”).

\textsuperscript{14} Hudson v. Michigan, 126 S. Ct. 2159, 2163 (2006).

\textsuperscript{15} See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989) (“Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).

argument. The debate over the Second Amendment powerfully illustrates this, as both sides make strong arguments based on the original understanding of the provision.\(^\text{17}\)

Justices Antonin Scalia and Clarence Thomas find in the original meaning of the Constitution’s provisions a ban on affirmative action,\(^\text{18}\) permission for prayer in public schools,\(^\text{19}\) no constitutional protection for abortion,\(^\text{20}\) and no limit to religious displays on government property.\(^\text{21}\) The Justices must see a great parallel between the “originalist” Constitution and the 2004 Republican Party platform.\(^\text{22}\) Their constitutional conclusions appear to be based more on exercising discretion consistent with their conservative Republican ideology than vindicating an unascertainable “original intent.” That judicial discretion exists and is so exercised is not the dilemma; rather, the failure to openly address judicial discretion is what this Essay is designed to confront.

In debates over the method of constitutional interpretation, I have heard rhetoric from conservatives saying that originalism provides an interpretive theory, where liberals have no theory of interpretation. This unpersuasive observation is based on originalism’s false allure of formalism. Originalists, like formalists, argue that their theory allows judges to deduce answers without discretion. But, of course, their theory does not do this. No matter which theory one employs, constitutional interpretation inevitably involves value choices: balancing competing interests; deciding what is reasonable; selecting the appropriate amount of abstraction; and choosing among plausible readings of constitutional history, to name a few. It is misleading for originalists to pretend to have a theory that provides discretion-free answers when no such theory is possible.

\(^\text{17}\) Compare Silveira v. Lockyer, 312 F.3d 1052, 1060-61 (9th Cir. 2002) (determining that the original meaning of the Second Amendment was not to create an individual right to own or possess weapons, but to keep Congress from regulating firearms in a manner that would prevent states from protecting themselves through militias), with United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (determining that the original meaning of the Second Amendment was to protect the right of individuals to possess and bear firearms).


\(^\text{21}\) See Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring); id. at 2865 (Thomas, J., concurring).

Throughout American history, the Supreme Court has based its constitutional decisions on considerations of text and Framers’ intent and the Constitution’s structure and precedent and tradition and social policy considerations. The range of bases relied on in Court opinions demonstrates that no one formula controls and enormous discretion exists. Non-originalists can point to over two hundred years of constitutional decision making as the reality that supports their view.

An interrelated reason why the rhetoric of discretion-free judging continues is the false allure of judicial restraint and deference to democracy. The United States sees itself as a democracy where popularly elected officials govern. Invalidation of laws by unelected federal judges, including Supreme Court Justices, seems inconsistent with democratic principles. Almost a half century ago, Professor Alexander Bickel spoke of judicial review being a “deviant institution” in American democracy, and coined the phrase “counter-majoritarian difficulty” to describe the tension he perceived. Limiting judicial review of the Constitution means that more lawmaking is left to the

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23 See, e.g., United States v. Grubbs, 126 S. Ct. 1494, 1500-01 (2006) (finding the text of the Fourth Amendment decisive in determining that the particularity requirement does not include the conditions precedent to execution of an anticipatory search warrant).

24 See, e.g., Marsh v. Chambers, 463 U.S. 783, 790 (1983) (“In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress . . . .”).

25 See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (“In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers . . . .”).

26 See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992) (“Within the bounds of normal stare decisis analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming Roe’s central holding . . . .”).

27 See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (“[T]he Due Process Clause affords only those protections ’so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

28 See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954) (relying on social psychology studies to determine that segregation instills feelings of inferiority and in turn denies equal access to educational opportunities).

29 Indeed, constitutional scholars often define democracy in this way. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4 (1980) (pointing out that in the United States, “most . . . important policy decisions are made by . . . elected representatives”).


31 Id. at 16.
elected political branches.\textsuperscript{32} But the United States is not a pure democracy; it is a constitutional democracy where the acts of all government officers are subordinate to the Constitution. \textit{Any} enforcement of the Constitution is antidemocratic if democracy is defined solely as majority rule.

The argument for increased judicial deference to the elected branches is, traditionally, a conservative position.\textsuperscript{33} Yet the argument is only selectively invoked, even by its principal proponents. This was powerfully illustrated by the rhetoric surrounding two Supreme Court cases decided in the same week of June 2003. In one, \textit{Grutter v. Bollinger},\textsuperscript{34} conservatives urged the Court to declare unconstitutional Michigan’s use of an affirmative action program for the University of Michigan Law School.\textsuperscript{35} In the other, \textit{Lawrence v. Texas},\textsuperscript{36} conservatives called upon the Court to uphold a Texas law prohibiting private, consensual homosexual activity.\textsuperscript{37} In terms of pure democracy, invalidating Michigan’s choice for affirmative action would have been just as “counter-majoritarian” as declaring the Texas sodomy law unconstitutional. Likewise, in arguing for increased limits on public takings after \textit{Kelo v. City of New London},\textsuperscript{38} conservatives displayed little deference to the eminent domain decisions of locally elected representatives.\textsuperscript{39} Similarly, when conservatives want the courts to limit Congress’ powers under the Commerce Clause and other constitutional provisions in the name of federalism,\textsuperscript{40} where is the

\textsuperscript{32} This is central to the originalists’ defense of their theory. \textit{See}, e.g., Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 \textit{Ind. L.J.} 1, 10-11 (1971) (opining that the will of legislative majorities should prevail unless “it clearly runs contrary to a choice made in the framing of the Constitution”).

\textsuperscript{33} \textit{See Republican Nat’l Comm., supra} note 22 (“We believe that the self-proclaimed supremacy of these judicial activists is antithetical to the democratic ideals on which our nation was founded.”).

\textsuperscript{34} 539 U.S. 306 (2003).


\textsuperscript{36} 539 U.S. 558 (2003).


\textsuperscript{38} 125 S. Ct. 2655 (2005).

\textsuperscript{39} \textit{See}, e.g., S. 1313, 109th Cong. § 3 (2005) (seeking to limit state and local exercise of eminent domain by prohibiting the use of federal funds for eminent domain projects except in compliance with the bill’s limited definition of “public use”).

\textsuperscript{40} \textit{See}, e.g., United States v. Morrison, 529 U.S. 598, 613 (2000) (invalidating the civil damages provision of the Violence Against Women Act, because the provision exceeded the scope of authority granted to Congress under the Commerce Clause); \textit{City of Boerne v. Flores}, 521 U.S. 507, 519-20 (1997) (holding the Religious Freedom Restoration Act unconstitutional and limiting congressional power under Section Five of the Fourteenth Amendment to congruent, proportionate acts designed to prevent or remedy widespread,
concern for judicial restraint and deference to democracy? Of course, liberals have also used the Court to accomplish goals not met through traditional majoritarian processes. But liberals do not utter slogans like “judges should apply the law, not legislate from the bench,” or analogize Supreme Court Justices to umpires.

Why then do conservatives who should know better, like Chief Justice Roberts and Justice Scalia, talk in terms that they know are so clearly at odds with what they do as judges? Likely, the Justices believe their rhetoric holds political appeal. They believe the idea of formalism and of judicial deference to democratic decision making resonates with how people want the system to be. They fear that courts would lose legitimacy if people knew that the values of unelected jurists were the basis for decisions with direct, local impact on their lives.

I disagree and think that the rhetoric of discretion-free judging grossly underestimates the public. Even a cursory reading of the Constitution reveals that it does not mention abortion; yet opinion polls show that more than seventy-five percent of Americans “believe that abortion should be legal in varying circumstances.” Furthermore, even if there had once been a popular notion of discretion-free judging, surely the Court’s opinion in Bush v. Gore, and its five-four split along political lines, served to destroy that notion.

In 1987, while Robert Bork’s nomination to the Supreme Court was before the Senate, an opinion poll showed that many Americans were against his confirmation. I disagree with those who blame public opposition to Bork on unfair treatment in the media. More likely, people did not want a Justice who had said that there is no constitutional right to privacy.

Apparently, though, politicians and judges think people believe that judging should be discretion-free. So talk of judging is reduced in popular discourse to judges who apply, not make the law; to analogizing Supreme Court Justices to umpires.

43 Edward Walsh & Richard Morin, Majority Opposes Bork, Poll Shows, WASH. POST, Oct. 16, 1987, at A10 (“Fifty-two percent of the respondents said they disapprove of the nomination, an increase from the 49 percent who opposed Bork’s confirmation in the last Post/ABC News Poll, conducted in mid-September.”).
45 See Bork, supra note 32, at 9 (“Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it.”).
Supreme Court Justices may also be propagating the myth of discretion-free judging out of a sense of modesty; unfortunately, theirs is a false modesty that serves as a means to avoid individual responsibility. Far from modest, statements such as those made by Chief Justice Roberts and Justice Scalia are tremendously arrogant. They speak and write as if there is only a single true answer to every constitutional question and one simply needs be bright enough to discover it. They are not to be held accountable for their decisions; they are just following the law. But they know, as does every law student and the vast majority of the public, that most constitutional issues before the Supreme Court provide the Justices great discretion. The Justices make choices, as do lower court judges every day on countless issues.

II. WHY IS THE MYTH’S PERSISTENCE BAD?

Myths exist, and are even helpful, in many areas. So what is wrong with the myth of discretion-free judging? One harm is that the myth greatly distorts the judicial selection process. At their respective confirmation hearings, Chief Justice Roberts and Justice Alito both refused to answer questions about their views on any issues that might come before them. Their reticence only makes sense, though, if their views don’t matter. But that just isn’t so. In their first year on the Court, in virtually every important case, Chief Justice Roberts and Justice Alito aligned with Justices Scalia and Thomas, at least in the results. It is hard to believe that such consistent agreement is just coincidence, rather than the result of shared values.

The confirmation process is the most important check on the unelected judiciary. The process, however, now largely ignores nominees’ ideologies because of the rhetoric surrounding the myth of discretion-free judging. Given that a nominee’s views will matter significantly in how he or she decides cases, those views should be explored by the Senators responsible for confirming the nominee.

There are several possible reasons why nominees’ ideologies are not explored more thoroughly, but none persuades. One possibility is that nominees simply don’t have views on topics like abortion, affirmative action, separation of church and state, and so on. That, though, is just not credible. Another possibility is that the harm of asking and knowing is greater than the

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46 See generally 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. (2006) [hereinafter Alito Hearing]; Roberts Hearing, supra note 2.

47 The only case that I can identify where either Chief Justice Roberts or Justice Alito did not come to the conclusion that would be regarded as the “conservative result” was Chief Justice Roberts’ majority opinion in Jones v. Flowers, 126 S. Ct. 1708 (2006). Chief Justice Roberts, joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that procedural due process requires effective efforts at notice before a person’s house is sold by the government for unpaid taxes. Id. at 1713.
benefits; that publicly airing future Justices’ views destroys the appearance of judicial impartiality. But judges do not become more impartial by pretending that they don’t have views. There can be little doubt as to how Justice Scalia will rule the next time a party asks the Court to overrule Roe v. Wade. Still, no one would suggest that this disqualifies him. Nor would knowing a nominee’s views create any greater problems. As a lawyer, I would much rather acknowledge the existence of the judge’s views than pretend that the judge is a blank slate.

Instead, though, nominees for the Supreme Court and other federal courts hide behind the illusion that they are, to use Justice Roberts’ words, just umpires. Thus staged, the confirmation process becomes a useless charade. I carefully followed and participated in Justice Alito’s confirmation hearings. My sense was that all of the Senators and their staffs knew that Justice Alito was very conservative. Justice Alito’s rulings as a judge on the United States Court of Appeals for the Third Circuit left no one with doubt about that. Nonetheless, the Republicans spent the week acting as if they did not really know Justice Alito’s views and the Democrats used their time fruitlessly trying to pin his views down with their questions.

Every President in American history, to a greater or lesser extent, has chosen federal judges, in part, based on their ideology. Likewise, since the earliest days of the nation, the Senate also has looked to ideology in the confirmation process. More and more frequently, though, judicial nominees use the language of discretion-free judging to frustrate senatorial efforts in this regard. Because an individual’s beliefs influence how he or she will decide cases, it is appropriate – indeed essential – for the appointing and confirming authorities to consider ideology. Although the confirmation process is flawed in other ways, the myth of value-neutral judging certainly contributes to a confirmation process that offers little in the way of checks and balances.

Just as bad, the myth distorts judicial opinions. Rather than justify and debate their value choices, judges act as if their results are dictated by the Constitution’s text or the tradition surrounding the document. Many cases, though, such as the Supreme Court’s recent decisions greatly expanding

49 Alito Hearing, supra note 46, at 708-09 (statement of Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science, Duke University Law School) (“I believe that at this point in time it is too dangerous to have a person like Samuel Alito, with his writings and records on Executive power, on the U.S. Supreme Court.”).
50 See Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 351 (1997) (observing that over the fifty-six year period from Roosevelt through Reagan, “about nine out of ten appointees were members of the president’s political party”).
sovereign immunity, cannot be justified based on the text of the Constitution or the intent of the Framers. There is no provision concerning whether states can be sued in their own state courts, and it is something that was never discussed by the Framers. The real question is how the costs of potential state liability for money damages should be balanced against the benefits of holding state governments accountable. This balance should be the focus of judicial opinions dealing with sovereign immunity, but it is only briefly treated in the relevant cases.

In another example, Michael H. v. Gerald D., the Court considered whether a state may create an irrebuttable presumption that a married woman’s husband is the father of her child. Justice Scalia’s opinion stressed the need for the Court to avoid making value choices; he rejected the constitutional challenge to the state’s presumption because he claimed that there was no tradition of protecting unmarried fathers’ rights when the mother was married to someone else at the time of the child’s conception and birth. To the extent that the myth of discretion-free judging allows judges to bind the country to the traditions of yesteryear, without even a cursory discussion of the wisdom of those traditions, the myth precludes an essential debate.

Without the myth of discretion-free judging, judges would have to articulate and defend their value choices; they would have to explain in terms of the text, Framers’ intent, traditions, precedent, and policy why their view is the better. Other judges would have to respond in kind. This essential discussion is lost when judges can pretend that they are not making choices at all.

### III. HOW CAN THE DISCOURSE MOVE FORWARD?

How do we get past the simplistic notions of judging that dominate popular discourse? It may seem flippant, but those who share my views need better slogans. “Justices as umpires,” and “judges should apply the law, not legislate from the bench” both sound great. Those who oppose the supposedly discretion-free judging model lack any simple way of capturing their idea about constitutional interpretation.

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53 See, e.g., Fed. Mar. Comm’n, 535 U.S. at 765 (deflecting the argument regarding costs of potential state liability as based on “a fundamental misunderstanding of the purposes of sovereign immunity”).


55 Id. at 130.

56 Id. at 124.
Slogans aside, a rebirth of the legal realist movement is needed to freshly unmask false claims of formalism or judicial neutrality. Scholars must constantly expose the value choices that are made in constitutional law. Both within and outside the academy, it is necessary to constantly remind everyone what the emperor’s clothes really look like.

A more complex and realistic description of judging is also needed. Supporters of originalism present the debate as if there are only two choices: discretion-free judging or judging by whim and caprice. Of course, the reality is neither. Judges always have discretion, but the exercise of that discretion is not about what the judge ate for breakfast. Rather, discretion is about how judges look at multiple sources and decide the meaning of the Constitution. An accurate description of judicial review’s reality is needed to compete with the value-neutral models and the rhetoric supporting them.

Also, there is a need to reinforce the importance of judicial independence. In recent years, judicial independence has been threatened by comments ranging from harsh criticism of judges57 to proposals for an inspector general for the courts.58 After the federal courts refused to order the feeding tube restored to Terri Schiavo, House Majority Leader Tom DeLay promised reprisals against the federal judges involved.59 At around the same time, Senator John Cornyn gave an astounding speech in which he linked recent violence targeting federal judges in Illinois and Georgia to public frustration with judicial activism. Senator Cornyn said that frustration with “political decisions” by judges “builds to the point where some people engage in violence.”60 By ascribing a political motivation to the violence in Chicago and Atlanta, Senator Cornyn’s statements legitimized what should have been universally recognized as two very serious affronts to judicial independence.

The statements by Senator Cornyn and Representative DeLay are the most public examples of recent court bashing. If judges feel vulnerable, then they are more likely to continue with the charade that their decisions are the result of discretion-free judging and formalist application of the law. Getting past simplistic rhetoric requires appreciating why judicial independence exists and why it is so important. Because judges have so much discretion, it is important that they exercise it without worrying about pleasing the public.

57 For an example of such criticism by President George W. Bush, see Remarks on a Proposed Constitutional Amendment To Protect Marriage, 42 WEEKLY COMP. PRES. DOC. 1076, 1076 (June 5, 2006) (“[A]cross the country, [state legislatures] are being thwarted by activist judges who are overturning the expressed will of their people.”).


59 DeLay issued a statement that “the time will come for the men responsible for this to answer for their behavior.” See Mike Allen, DeLay Wants Panel To Review Role of Courts: Democrats Criticize His Attack on Judges, WASH. POST, Apr. 2, 2005, at A9.

CONCLUSION

The focus of this symposium is on judging in the twenty-first century. My argument is a simple one: we should abandon the misleading rhetoric of discretion-free judging and talk about judging as it actually occurs. It is time to talk about the clothes the emperor really is wearing.