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# The Politics of the Law-Politics Dichotomy

*Stephen M. Feldman\**

## ABSTRACT

*Throughout American history, judges and legal scholars have articulated and maintained a sharp separation between law and politics. This essay asks the question: Why do so many judges and scholars devote so much time and energy to bolstering this law-politics dichotomy? Using William Baude and Stephen E. Sachs’s recent article “The Law of Interpretation as a Springboard,” this essay explores the history and political valence of the dichotomy. From Baude and Sach’s perspective, politics is like a disease: if it infects legal interpretation, then it threatens the health of the judicial process. But the history of the law-politics dichotomy reveals that it empowers legal scholars to articulate and judges to implement their political preferences without acknowledging as much. Politics, it turns out, acts tacitly through legal and judicial processes.*

## I. INTRODUCTION

President Donald Trump’s nomination of Judge Brett Kavanaugh to the Supreme Court and the recent Senate confirmation hearings have thrust the politics of Supreme Court decision-making to the forefront of the national stage.<sup>1</sup> We have been here before. For example, when a Republican-controlled Senate stonewalled Judge Merrick Garland, President Barack Obama’s nominee for the Court, the Republican concern was that the moderate liberal Garland would shift the justices’ political alignment and change the Court’s direction.<sup>2</sup> Yet, during the Senate hearings on Kavanaugh, previously vet-

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1. Adam Liptak, *Brett Kavanaugh, a Conservative Stalwart in Political Fights and on the Bench*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court-trump.html>; Oliver Roeder & Amelia Thomson-DeVeaux, *How Conservative Is Brett Kavanaugh?*, FIVETHIRTYEIGHT (July 17, 2018), <https://fivethirtyeight.com/features/how-conservative-is-brett-kavanaugh/>.

2. Wade Goodwyn & Nina Totenberg, *The Case for Republicans to Consider Merrick*

ted by the conservative Federalist Society, he proclaimed that politics will not influence his judicial positions.<sup>3</sup> He reiterated this claim in his renowned post-hearings *Wall Street Journal* editorial.<sup>4</sup> Every Supreme Court nominee must declare that law and politics are separate and independent (I refer to this separation as the law-politics dichotomy). The nominee must insist that he or she will faithfully follow the rule of law while disregarding any political preferences or values.<sup>5</sup> During John Roberts's confirmation hearings, he famously explained: "Judges are like umpires—umpires don't make the rules; they apply them."<sup>6</sup>

Supreme Court nominations and confirmations thus revolve around an intermingling of political hardball, on the one hand, and declarations about the importance of maintaining a law-politics dichotomy, on the other. Justice Neil Gorsuch epitomized this bizarre juxtaposition when he toured the state of Kentucky with Senate Majority Leader Mitch McConnell, the individual most responsible for refusing to give Garland a Senate hearing (and thus leaving the Court seat open for a subsequent appointee, Gorsuch). While some critics labeled the trip a political "victory lap" for the Republicans, Gorsuch stated during his speeches that "I don't think there are red judges,

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*Garland's Nomination*, NATIONAL PUBLIC RADIO (Oct. 27, 2016, 1:29PM), <https://www.npr.org/2016/10/27/499514065/the-case-for-republicans-to-reconsider-merrick-garlands-nomination>; Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/>.

3. Matt Ford, *The Misleading Chaos of the Kavanaugh Hearing*, NEW REPUBLIC (Sept. 4, 2018), <https://newrepublic.com/article/151051/misleading-chaos-kavanaugh-hearing>; Carolyn Shapiro, *Brett Kavanaugh Said Judges Should Just Follow the Law. Here's Why That's Misleading*, FORTUNE (July 10, 2018), <http://fortune.com/2018/07/10/brett-kavanaugh-supreme-court-political-views-abortion/>.

4. Brett M. Kavanaugh, Opinion, *I Am an Independent, Impartial Judge*, WALL ST. J. (Oct. 4, 2018, 7:30 PM), <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822>.

5. MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 5 (2011) (explaining that during confirmation hearings, Justice Kagan insisted that her political views would not influence her judicial decisions); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC'Y REV. 195, 196–97 (2011) (explaining that during confirmation hearings, Justice Sotomayor suggested judicial decision-making was mechanical).

6. Robert Schwartz, *Like They See 'Em*, N.Y. TIMES, Oct. 6, 2005, at A37.

and I don't think there are blue judges. All judges wear black."<sup>7</sup> Gorsuch apparently was not speaking ironically.

Legal scholars play this game too. A recent and provocative example is William Baude and Stephen E. Sachs's, *The Law of Interpretation*, which describes two opposing views of legal interpretation.<sup>8</sup> A standard view, according to the authors, emphasizes "the ordinary communicative content of . . . legal texts."<sup>9</sup> We discover the determinate meaning of a legal text or document, whether the Constitution or otherwise, by relying on the same linguistic conventions that we would use for any other text.<sup>10</sup> From this standpoint, the legal document itself might have political or normative ramifications, but the process of discovering its meaning is apolitical. Contrary to this standard view, a skeptical view questions the likelihood of legal determinacy.<sup>11</sup> Skeptics therefore maintain that a judge or other interpreter necessarily injects normative or political preferences into the interpretive process.<sup>12</sup>

Baude and Sachs reject both these views and articulate a third way based on *legal* rules of interpretation. They focus on "preexisting rules—rules of law, and not of language—that determine the legal effect of written instruments."<sup>13</sup> As between the standard and skeptical views, however, Baude and Sachs's approach leans far toward the standard side. For the most part, they seek to show how judges and other interpreters can discern a determinate meaning in a legal text.

7. Robert Barnes, *Gorsuch's Speeches Raise Questions of Independence, Critics Say*, WASH. POST (Sept. 27, 2017), [https://www.washingtonpost.com/politics/courts\\_law/gorsuchs-speeches-raise-questions-of-independence-critics-say/2017/09/27/5accdb3c-a230-11e7-b14f-f41773cd5a14\\_story.html?noredirect=on&utm\\_term=.8be148dd47e4](https://www.washingtonpost.com/politics/courts_law/gorsuchs-speeches-raise-questions-of-independence-critics-say/2017/09/27/5accdb3c-a230-11e7-b14f-f41773cd5a14_story.html?noredirect=on&utm_term=.8be148dd47e4); see also Garrett Epps, *America's Red and Blue Judges*, ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/09/americas-red-and-blue-judges/540924/>.

8. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (describing Baude and Sachs's interpretation of multiple types of legal documents, including statutes and the Constitution. In this Essay, they focus primarily on constitutional interpretation).

9. *Id.* at 1086.

10. *Id.*; see also Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39 (Leslie Green & Brian Leiter eds., 2011) (describing how Baude and Sachs draw on Mark Greenberg in articulating the standard view).

11. Baude & Sachs, *supra* note 8, at 1082.

12. *Id.* at 1092–93 (explaining that Baude and Sachs attribute this skeptical view to Richard Fallon and Cass Sunstein). See Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

13. Baude & Sachs, *supra* note 8, at 1084.

For Baude and Sachs, legal interpretation is a specialized field. Thus, judges (and other legal interpreters) draw on interpretive rules of law specific to legal texts rather than invoking interpretive guidelines pertinent to texts in general. Interpreting the Constitution is not the same as interpreting a novel. But the crux of the matter, for Baude and Sachs, is that legal interpretation (pursuant to legal rules) usually uncovers a determinate meaning for a legal text. Consequently, Baude and Sachs are especially concerned with distinguishing their legal-rules approach from the skeptical view of legal interpretation.

Baude and Sachs's article manifests an inveterate form of legal scholarship—emphasizing the separation of law and politics. Politics, from this perspective, is like a disease: if it infects legal interpretation, then it threatens the health of the judicial process. According to Baude and Sachs, something other than politics must govern legal interpretation and adjudication;<sup>14</sup> and that “something else is law.”<sup>15</sup> Judicial decision-making must be grounded on pure law, unadulterated by politics.

This essay asks the crucial question: Why do so many scholars (as well as judges) devote so much time and energy to bolstering the law-politics dichotomy? Regardless of Baude and Sachs's specific intentions, history reveals that this form of scholarship—policing the law-politics dichotomy—has significant political ramifications. The ostensible maintenance of the law-politics dichotomy empowers legal scholars to articulate and judges to implement their political preferences without acknowledging as much. Politics acts tacitly through legal and judicial processes.<sup>16</sup>

Part II underscores the numerous ways in which Baude and Sachs subscribe to the typical law-politics dichotomy. Part III draws on history to explain why many legal scholars, including Baude and Sachs, are driven to maintain the separation between law and politics. This part emphasizes the politics of the law-politics dichotomy. Part IV is a brief conclusion.

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14. Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics into Mayonnaise*, 12 Geo. J.L. & Pub. Pol'y 57 (2014) [hereinafter Feldman, *Supreme Court Alchemy*].

15. *Id.* at 1093.

16. To be clear, I do not mean to suggest that judicial decision-making, even at the Supreme Court, is purely a manifestation of political ideologies (with law merely being a window-dressing). See generally Feldman, *Supreme Court Alchemy*, *supra* note 14 (explaining Supreme Court decision-making as a combination of law and politics).

## II. BAUDE AND SACHS RE-INSCRIBE THE LAW-POLITICS DICHOTOMY

When Baude and Sachs summarize the skeptical view of legal interpretation, they repeatedly emphasize that it requires judges to inject their normative or political values into decision-making. Baude and Sachs explain that, according to the skeptics, legal interpretation “must be defended on normative grounds.”<sup>17</sup> Thus, when legal interpretation is indeterminate, the skeptics maintain that a judge “should choose the best interpretive outcome as measured against [a variety of] normative desiderata . . . .”<sup>18</sup> Moreover, skeptics argue that judges “freely choose” legal interpretations, producing novel or “new meanings” for legal texts based on “normative reasons.”<sup>19</sup>

In criticizing the skeptical view, Baude and Sachs emphasize that the intrusion of political or normative preferences into adjudication is especially problematic. “Even in disputed cases, lawyers and judges needn’t—and usually don’t—make first-best decisions about political democracy, the rule of law, or even cost-benefit analysis.”<sup>20</sup> Legal interpretation should “not simply [be] left to the normative predilections of individual judges or officials.”<sup>21</sup> Once politics infects the adjudicative process, Baude and Sachs fear, it becomes difficult to control. Politics is not merely a disease, it is a particularly virulent strain of virus, spreading and destroying all in its path. “If the courts are allowed to produce new meanings for normative reasons . . . then why can’t they produce other, normatively better meanings using other, normatively better rules?”<sup>22</sup> In other words, once the infection of politics takes hold, then judges become crazed vampires (or zombies, if you prefer). They are likely to go rogue, resisting all constraint, doing whatever they think is normatively best.<sup>23</sup>

Consequently, Baude and Sachs brood about the possibility that “judges are unbound by law.”<sup>24</sup> Judges cannot be allowed to engage in

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17. Baude & Sachs, *supra* note 8, at 1092–93 (quoting Sunstein, *supra* note 12, at 193).

18. *Id.* at 1092 (quoting Fallon, *supra* note 12, at 1305).

19. *Id.* at 1093.

20. *Id.*

21. *Id.* at 1096.

22. *Id.* at 1093.

23. See Jack M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1141 (1991) (discussing the possibility of a rogue judge).

24. Baude & Sachs, *supra* note 8, at 1147.

“deliberate acts of lawmaking.”<sup>25</sup> If judges themselves can “create and apply interpretive rules” rather than being tightly constrained by interpretive *law*,<sup>26</sup> then judges might be “inventing rules of decision out of whole cloth.”<sup>27</sup> Only adherence to law can inoculate judges from the political virus. Law, in most instances, precludes political or normative decision-making by judges. “Law fills gaps that would otherwise be filled by the interpreter’s normative priors.”<sup>28</sup> Thus, when Baude and Sachs observe that, from a “practical” standpoint, textual “indeterminacy is serious,”<sup>29</sup> they do not panic. The problem is “not fatal;”<sup>30</sup> law will protect us. “We think there are good reasons to think that the *law* of interpretation can be found and applied much of the time.”<sup>31</sup>

When it comes to the Constitution, both Baude and Sachs repeatedly emphasize that constitutional interpretation is a legal issue to be resolved in accord with law.<sup>32</sup> Politics is foreign to this process. To illustrate correct constitutional decision-making, Baude and Sachs discuss *United States v. Chambers*.<sup>33</sup> The case arose from an indictment for bootlegging under the National Prohibition Act. Although the government had indicted the defendant during Prohibition, the case had not reached final judgment when the Twenty-First Amendment repealed the Eighteenth Amendment. The issue was whether the Act remained effective despite the end of Prohibition. The Court resolved the case by applying a common law rule of interpretation: “At common law, repealing a criminal statute would abate a pending prosecution.”<sup>34</sup> The Court reasoned that politics could not influence

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25. *Id.* at 1138.

26. *Id.* (quoting Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 779 (2013)).

27. *Id.* (quoting Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 7 (2015)).

28. *Id.* at 1097.

29. *Id.* at 1140.

30. *Id.*

31. *Id.* (emphasis added). Baude and Sachs admit that law sometimes needs improvement or reform. But “that doesn’t mean that judges can and should initiate those reforms according to their own normative lights.” *Id.* at 1097.

32. *Id.* at 1118–20.

33. *United States v. Chambers*, 291 U.S. 217 (1934); see Baude & Sachs, *supra* note 8, at 1118–20 (discussing *Chambers*).

34. Baude & Sachs, *supra* note 8, at 1119 (citing *Chambers*, 291 U.S. at 223).

its decision: “The question is not one of public policy which the courts may be considered free to declare . . . .”<sup>35</sup>

Baude and Sachs applaud the Court. “Our view is that the Court in *Chambers* generally got it right, and for the right reasons.”<sup>36</sup> And while *Chambers* did not involve reference to the original meaning of the constitutional text, both Baude and Sachs unsurprisingly categorize themselves as originalists.<sup>37</sup> Furthermore, they conceptualize originalism in accord with their emphasis on laws of interpretation. In discussing a dispute about different approaches to originalism, they maintain that a resolution lies not in historical or linguistic practices. Rather, the question is “a legal one.”<sup>38</sup> They “want to know who had the better of the argument, based on the higher-order legal rules of the era.”<sup>39</sup> Thus, when historians emphasize that historical research uncovers political complexities during the framing and ratification era, Baude and Sachs maintain that such research problems are, ultimately, beside the point. Despite the historical complexities, Baude and Sachs explain that “the focus on law may help us see past them.”<sup>40</sup> In other words, “[w]hat matters for determining legal content is the particular type of meaning that the law of interpretation chooses. And whatever linguistic answer the legal system chooses, it makes this choice as of the date of adoption . . . .”<sup>41</sup> The law, from this perspective, resolves ambiguity.<sup>42</sup>

### III. HISTORY AND THE LAW-POLITICS DICHOTOMY

Baude and Sachs are not the first legal scholars to assert that judicial decision-making must be based on law and not politics. Langdel-

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35. *Chambers*, 291 U.S. at 226.

36. Baude & Sachs, *supra* note 8, at 1120.

37. *Id.* at 1135–36.

38. *Id.* at 1142.

39. *Id.* at 1141.

40. *Id.*

41. *Id.* at 1134.

42. Baude and Sachs endorse reasonable-person originalism. *Id.* at 1117–18. According to this form of new originalism, judges should ask the following question: How would a reasonable person, when the Constitution was adopted, have understood the text? *E.g.*, Randy E. Barnett, *An Originalism for Non-originalists*, 45 LOY. L. REV. 611, 621 (1999). Baude and Sachs acknowledge that the reasonable person is a legal construct or fiction. Nevertheless, they write: “The fiction is useful because it’s a legal fiction, built by our legal rules.” Baude & Sachs, *supra* note 8, at 1118.



lian legal scientists,<sup>43</sup> in the late-nineteenth century, maintained that the legal system was autonomous from society (including politics).<sup>44</sup> Judges were to decide cases in strict logical accord with legal principles and rules, even if such an approach might lead to injustice.<sup>45</sup> After World War II, legal process scholars argued that courts must decide constitutional cases pursuant to “neutral principles” of law.<sup>46</sup> Legislatures were to make political decisions, but courts were not to do so.<sup>47</sup>

Now, in the early-twenty-first century, numerous scholars struggle furiously to maintain and police the law-politics dichotomy. For example, in *Inside or Outside the System?*, Eric A. Posner and Adrian Vermeule argued that scholars need to distinguish sharply between external and internal analyses of the legal system.<sup>48</sup> If a scholar begins an article or book by using an external view—for instance, by discussing the political ideologies of the Supreme Court justices—then the scholar should not attempt to switch to an internal view—discussing legal principles and rules. The external and internal are incommensurable, so a scholar who switches between the two is likely to slip into incoherence.<sup>49</sup> Law and politics must be kept separate. Constitutional originalists, perhaps more so than any other contemporary scholars, defend and police the law-politics dichotomy. “New originalists” argue that judges must interpret the constitutional text in accord with its original public meaning.<sup>50</sup> Constitutional meaning, from this standpoint, is static, fixed at the time of its ratification.<sup>51</sup>

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43. C.C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS 91–105 (2d ed. 1880).

44. See C.C. LANGDELL, *Preface to the First Edition of* CASES ON CONTRACTS viii–ix (2d ed. 1879) (explaining Langdell’s approach to law).

45. LANGDELL, *supra* note 43, at 21.

46. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–35 (1959); see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 49–59 (1962) (applying Wechsler’s concept of neutral principles).

47. See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 83–136 (2000) (discussing the legal modernist quest for objective foundations of law).

48. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013).

49. Posner and Vermeule call this mistake the “inside/outside fallacy.” *Id.* at 1745–46.

50. On the distinction between “old originalism” and “new originalism.” See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713, 720–24 (2011); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 285–86 (2014).

51. Lawrence B. Solum, *We Are All Originalists Now, in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011) (articulating the “fixation thesis”); see *Minnesota v. Dick-*

Current political interests and values are irrelevant to the fixed and objective meanings embodied in the constitutional text.<sup>52</sup>

Obviously, Baude and Sachs are not the only legal scholars to worry about the boundary between law and politics. This scholarly persistence raises a crucial question: why do so many scholars devote so much time and energy to bolstering the law-politics dichotomy? From a historical standpoint, there are at least two explanations. The first emphasizes a historical drive to articulate and protect a sphere of judicial power. The second emphasizes a twentieth-century transformation of democracy and the courts' subsequent efforts to protect judicial power.

First, since the nation's founding, many Americans, particularly lawyers and judges, have been driven to categorize certain issues as legal, distinct from the political. During the early national years, the separation between law and politics was far fuzzier than it is today. In some states, legislatures performed functions, such as reviewing court decisions, now considered judicial. For instance, the Supreme Court case, *Calder v. Bull*, arose when the Connecticut state legislature overturned a state probate court decision.<sup>53</sup> As Justice Iredell observed, the legislature had been regularly exercising a "superintending power" over the state courts.<sup>54</sup> Meanwhile, judges during this era sometimes overtly voiced their partisan political views from the bench, especially during grand jury charges.<sup>55</sup>

Such overlapping legislative and judicial functions created potential conflicts between legislatures and courts. In the late 1790s and early 1800s, political rancor between the proto-parties of the Federalists and the Jeffersonian Republicans brought these potential conflicts to the forefront.<sup>56</sup> The courts developed the power of judicial review

erson, 508 U.S. 366, 379–80 (1993) (Scalia, J., concurring) (articulating a new originalist approach).

52. "Words have original meanings that are fixed no matter what current majorities may say to the contrary." Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 701 (2009); see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (arguing that only originalism provides an apolitical interpretive method justifying the judicial invalidation of legislation).

53. *Calder v. Bull*, 3 U.S. 386 (1798).

54. *Id.* at 398 (Iredell, J., concurring).

55. GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815*, 222 (1981).

56. See generally STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993) (discussing political conflicts of 1790s); JAMES ROGER SHARP, *AMERICAN POLITICS IN*

partly in response. By designating certain political issues as law, the courts solidified and strengthened judicial power over the designated legal issues.<sup>57</sup> Simultaneously, the courts ostensibly limited that same judicial power by avoiding explicit partisan pronouncements, which were deemed appropriate for legislatures.<sup>58</sup>

Chief Justice John Marshall played a key role in this development of judicial review, particularly with his opinion in *Marbury v. Madison*.<sup>59</sup> As Jennifer Nedelsky explains: “When an issue is designated as law, it is insulated not only from the clashes of politics, but from the attention of public debate.”<sup>60</sup> Going forward, the issue will be discussed in the technical terms of legal rules and rights—think of contract and property rights—while the political values and assumptions underlying the specific right are often obscured.<sup>61</sup> The political implications of the distinction between law and politics remain no less true and important today than they were in 1800.<sup>62</sup> For example, when the Supreme Court holds that corporations have a free-speech right to spend unlimited amounts of money on political campaigns, then Congress is precluded from restricting corporate campaigning. The political issue of campaign-spending restrictions is now a legal (constitutional) issue supposedly closed to further political debate and legislative control.

Second, the form of American democratic government transformed dramatically during the early-twentieth century. From the framing through the 1920s, American government was republican democratic.<sup>63</sup> Republican democracy revolved around two substantive principles: civic virtue and the common good. During the republican democratic era, virtuous citizens and officials supposedly pursued the

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THE EARLY REPUBLIC (1993) (discussing political conflicts of 1790s).

57. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 190 (1990).

58. *Id.*

59. *Marbury v. Madison*, 5 U.S. 137 (1803); see BAILEY & MALTZMAN, *supra* note 5, at 95 (discussing how the Federalist-Republican political conflict led to *Marbury*).

60. NEDELSKY, *supra* note 57, at 198.

61. *Id.* at 188-99.

62. On the developing concept of judicial review, see SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005); and Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999).

63. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 14-290 (2008) [hereinafter FELDMAN, FREE EXPRESSION].

common good rather than their own partial or private interests.<sup>64</sup> Republican democratic theory thus facilitated the exclusion of numerous societal groups from the democratic polity: any ostensibly non-virtuous individuals and groups could be excluded.<sup>65</sup> With this significant limit on political participation, republican democracy flourished within the confines of the rural and agrarian nineteenth-century America.<sup>66</sup>

Around the turn into the twentieth century, industrialization, urbanization, and immigration weakened the republican democratic regime until it was supplanted in the 1930s.<sup>67</sup> The new regime, pluralist democracy, emphasized widespread participation.<sup>68</sup> According to pluralist democratic theory, the government no longer mandated the pursuit of any particular substantive goal—the common good. Instead, the government provided a process or procedural framework that supposedly allowed all individuals and societal groups to press their diverse interests and values in the democratic arena.<sup>69</sup> In our current pluralist democratic regime, fair and open democratic processes are crucial. For instance, the right to vote cannot be denied or diluted.<sup>70</sup>

Under republican democracy, courts typically reviewed government actions to confirm that they promoted the common good rather than partial or private interests. Pluralist democracy, though, no longer revolved around the common good, so what then became of the courts? What useful function could courts play in the new pluralist democratic regime? A judicial role emerged, in part, by invigorating the distinction between law and politics. As pluralist democracy evolved, a key judicial function emerged: policing the democratic process.<sup>71</sup> Courts were to ensure that all individuals and groups were able to assert their respective political interests and values and thus

64. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, 59 (1969).

65. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 318 (1996).

66. FELDMAN, *FREE EXPRESSION*, *supra* note 63, at 14–45; SANDEL, *supra* note 65, at 123–6.

67. FELDMAN, *FREE EXPRESSION*, *supra* note 63, at 166–97.

68. See LIZABETH COHEN, *MAKING A NEW DEAL* 254–57, 362–66 (1990) (discussing the transformation of ethnic urbanites into active participants on the national political stage).

69. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 67–71 (1956); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (50th ed. 1989) [hereinafter DAHL, *DEMOCRACY*]; WILFRED E. BINKLEY & MALCOLM C. MOOS, *A GRAMMAR OF AMERICAN POLITICS* 9 (1949).

70. DAHL, *DEMOCRACY*, *supra* note 69, at 109–11.

71. JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

fully participate in the democratic arena. From this perspective, courts should articulate and uphold legal rights, such as voting and free expression, which constitute the procedural framework for the political battles and compromises that arise among competing interest groups and individuals.<sup>72</sup> Consequently, according to pluralist democratic theory, the judicial function is purely legal. Judges protect the legal framework for political debate but do not themselves enunciate political values and interests.<sup>73</sup> Thus, scholars and judges might brood about the counter-majoritarian difficulty—that courts overturn the decisions of elected representatives of the people—and therefore emphasize the need for judicial restraint, but the courts remain justified in exercising their power.<sup>74</sup>

The two historical explanations for the law-politics dichotomy share a common theme. Namely, political forces drive the maintenance of the law-politics dichotomy: the sharp separation of law and politics has a political payoff. Under both historical explanations, lawyers and judges trace, justify, and protect a realm of power—legal-judicial power—by distinguishing that realm from politics. Supposedly, within the legal-judicial realm, only lawyers and judges are trained and equipped with sufficient knowledge to understand and resolve *legal* issues and disputes. In other words, the lay public might be empowered to debate political issues, vote, and otherwise participate in democracy, but they are ill-equipped to understand, discuss, and resolve legal issues.<sup>75</sup>

The paradox, of course, is that courts justify and increase their political power by denying their political power. Judges are empowered to decide cases in accord with their political views partly because

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72. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); DAHL, *DEMOCRACY*, *supra* note 69, at 169–75.

73. ELY, *supra* note 71, at 105–34; *see generally* JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (articulating the philosophy of political liberalism); SANDEL, *supra* note 65, at 28 (emphasizing demands for government neutrality).

74. *See* BICKEL, *supra* note 46, at 16 (discussing counter-majoritarian difficulty); ELY, *supra* note 71, at 73–179 (arguing for Court exercise of judicial review); LEARNED HAND, *THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION* (1942), *reprinted in* THE *SPIRIT OF LIBERTY* 118 (Irving Dilliard ed., 1959 ed.) (arguing for judicial constraint).

75. Law professors have an additional and overlapping political-professional reason for distinguishing law and politics. Namely, law professors reinscribe and underscore the position of law schools within universities by emphasizing that the discipline of law is distinct from political science and other disciplines. *See* Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 *J. LEGAL EDUC.* 471, 473–80 (2004) (discussing the development of law as an academic discipline).

they maintain that they are rigidly following the law. Given this, judges and legal scholars have strong incentives to present their positions as being apolitical or neutral. Thus, in constitutional jurisprudence, originalists have gained the political upper-hand by insisting that originalism is the only apolitical method of constitutional interpretation.<sup>76</sup> Justice Antonin Scalia, one of the most conservative justices since World War II, persistently decided cases in accord with his political views.<sup>77</sup> Yet, Scalia persuaded numerous scholars, judges, and much of the general public to believe that his subscription to originalism rendered his judicial decisions apolitical (though his judicial opinions often disregarded originalist sources).<sup>78</sup>

#### IV. CONCLUSION

The message from Baude and Sachs is that law and politics must be separate. They fear, though, that legal interpretation can open the door to judicial politics—or at least, the interpretive skeptics argue as much. Therefore, Baude and Sachs seek to avoid open-ended legal interpretation and the correlative interpretive politics. To do so, they invoke the shield of law. Instead of allowing judges (and other interpreters) to become embroiled in the *politics* of interpretation, Baude and Sachs want judges to rely on the *law* of interpretation.

Regardless of their intentions, Baude and Sachs's article fits in a long scholarly tradition: namely, they seek to police the law-politics dichotomy. And as the history of the law-politics dichotomy demonstrates, the maintenance of the dichotomy has significant political valence. The law-politics dichotomy underscores that lawyers and

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76. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006) (arguing that originalism is a conservative political practice); Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *STUD. IN AM. POL. DEV.* 61, 75–78 (2009) (arguing that Edwin Meese's Department of Justice purposefully sought to advocate for originalism as a means of advancing a political agenda).

77. On the politics of Supreme Court justices, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 106–16 (2013) [hereinafter EPSTEIN, BEHAVIOR]; Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 *MINN. L. REV.* 1431 (2013).

78. Stephen M. Feldman, *Justice Scalia and the Originalist Fallacy*, in *THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA* 189 (David A. Schultz & Howard Schweber eds., Lexington Books, forthcoming 2018); Jamal Greene, *The Age of Scalia*, 130 *HARV. L. REV.* 144, 155–57, 183–84 (2016); Benjamin Morris, *How Scalia Became the Most Influential Conservative Jurist Since the New Deal*, *FIVETHIRTYEIGHT* (Feb. 14, 2016, 3:09 PM), <https://fivethirtyeight.com/features/how-scalia-became-the-most-influential-conservative-jurist-since-the-new-deal/>.

judges are professionals educated in an arcane and technical realm that is beyond the understanding of laypersons. Consequently, the public must rely on the legal profession to resolve legal disputes rather than treating such disputes as being open to political debate and democratic resolution.

Baude and Sachs conclude their article with the following message: “We don’t claim to have produced all of the answers here, but we hope that we can lead others to ask the right questions.”<sup>79</sup> Ironically, though, Baude and Sachs point scholars to exactly the wrong questions. Legal scholars should finally stop the hoary practice of bolstering the ostensible law-politics dichotomy. In fact, an increasing number of political scientists and legal scholars now recognize that law and politics intertwine in judicial decision making.<sup>80</sup> Rejection of the law-politics dichotomy does not mean that judicial decision-making is all politics, even at the Supreme Court.<sup>81</sup> Instead, legal interpretation and judicial decision-making intertwine law and politics. Judicial decision-making, we might say, is animated by a law-politics dynamic.<sup>82</sup> For the most part, judges sincerely interpret the law, but legal interpretation is never mechanical; judges’ political values necessarily influence their interpretive conclusions.<sup>83</sup> Thus, even if there are legal rules of interpretation, as Baude and Sachs argue,

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79. Baude & Sachs, *supra* note 8, at 1147.

80. BAILEY & MALTZMAN, *supra* note 5, at 15–16; EPSTEIN, BEHAVIOR, *supra* note 77, at 385 (“[F]ederal judges are not just politicians in robes, though that is part of what they are.”); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000). For more examples of scholars intertwining law and politics, see the following: CASS R. SUNSTEIN, ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006); Frank B. Cross, *Law is Politics*, in *WHAT’S LAW GOT TO DO WITH IT?* 92 (Charles Gardner Geyh ed., 2011); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001); Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 65 (Cornell W. Clayton & Howard Gillman eds., 1999); Mark Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 33, 35 (Ronald Kahn & Ken I. Kersch eds., 2006).

81. *Cf.* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (arguing that justices vote according to their political ideologies).

82. Feldman, *Supreme Court Alchemy*, *supra* note 14, at 84.

83. *Id.* at 78–83 (explaining the combination of law and politics); Howard Gillman, *What’s Law Got to Do With it? Judicial Behaviorists Test the ‘Legal Model’ of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 485–89 (2001) (arguing that law and politics combine in Supreme Court decision-making).

those rules still must be interpreted. Laws of interpretation do not avoid or escape interpretive politics. If anything, we should be directing scholars to devote more resources to exploring the law-politics dynamic at the heart of adjudication. Maybe then we could stop pretending that politically vetted Supreme Court nominees, like Brett Kavanaugh, disregard their political values once they reach the Court.