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THE NATURE OF THE JUDICIAL PROCESS: A COMPLEX SYSTEMS ANALYSIS OF CHECKS & BALANCES & SEPARATION OF POWERS IN THE PRESENT POLITICAL CONTEXT

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ABSTRACT

Justice Cardozo's prescient inquiry in The Nature of the Judicial Process nearly a century ago merits revisiting and analysis in light of the present political climate. Under the new administration, the Executive Branch has characterized a judicial opinion from the U.S. District Court of Hawaii's as emanating from "an island in the Pacific," suggested the 9th Circuit Court of Appeals should be fragmented, and subjected judges who disagree with the constitutionality of the administration's immigration policies to ridicule, vilification, or disparagement. When contemplating the nature of the judicial process, it is time to reassess the courts' systemic policymaking function in the constitutional system via checks and balances and separation of powers. This article, therefore, analyzes the principles of checks and balances, separation of powers, and the policymaking courts through the lens of complex systems analysis.

The complex and systemic interactions between the courts, Congress, and the Executive Branch give rise to an intricate sociopolitical, legal, and economic system. In the present political context, a complex systems analysis reveals that the courts' power to check, balance, and maintain the separation of powers is a legitimate and necessary exercise within the constitutional schema. Here, complex systems analysis is employed to explore how courts are acting properly when reviewing, checking, and balancing the power of the competing branches. Further, this analytical approach re-conceptualizes "judicial activism" as constitutional interpretation explicitly reflecting the policymaking role of the courts and their work to preserve the integrity of the constitutional system. From this perspective, the role of the courts can be viewed as policymaking not from any particular ideological position, but rather from the structural systemic values and norms that bind the constitutional order.

INTRODUCTION

The United States Constitution is complex, because it functions as a text, legal ordering mechanism, expression of an historical moment, repository of ideology, and philosophy of government and governance. In its original and amended form, the Constitution sets out the structure of the federal

government,[1] defines the authority of the federal and state governments,[2] and puts forth sundry constraints on the exercise of federal power.[3] The Constitution also describes the relationship between the federal government, state governments, and all persons subject to their respective jurisdictions.[4] Additionally, the plasticity of the text raises several issues that pave the way for the courts' interpretive enterprise of "finding" constitutional "truths," and applying those truths to the U.S. polity.[5] In 1921, Benjamin Cardozo asked, "Where does the judge find the law which he embodies in his judgment? . . . There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided."[6]

Today, the Executive Branch is impinging upon the Judiciary's complex role of finding the law. Namely, the current Executive has sought to minimize and circumvent the Judiciary's power to check, balance, and uphold separation of powers.[7] Recently, the Executive characterized the U.S. District Court of Hawaii's judicial decree on the President's Executive Order banning immigration from several Muslim-majority countries as emanating from "an island in the Pacific."[8] Further, the Executive called for the fragmentation of the Ninth Circuit Court of Appeals and ridiculed, vilified, and disparaged its judges that disagreed with the Administration's immigration policies.[9] With this in mind, it is timely to revisit the nature of the judicial

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[1] *See* U.S. CONST. art. I, § 1; *see also id*. at art. II § 1, cl. 1; *id*. at art. III, § 1.

[2] *See id*. at pmbl.; *see also id*. at art. IV § 4.

[3] *See id*. at art. I, § 7, cl. 2; *see also id*. at art. II § 3; *id*. § 1.

[4] *See id*. at art. IV, § 1; *see also id*. § 2, cl. 1; *id*. § 4.

[5] *See, e.g*., Marbury v. Madison, 5 U.S. 137, 167 (1803) ("The question whether a right has vested or not, is, in its nature, judicial."); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1921).

[6] CARDOZO, *supra* note 5, at 14.

[7] *E.g*., Evan Perez & Jeremy Diamond, *Trump Fires Acting AG After She Declines to Defend Travel Ban*, CNN (Jan. 31, 2017, 2:37 PM), www.cnn.com/2017/01/30/politics/donald-trump-immigration-order-department-of-justice/ (discussing the blocking of implementation of President Trump's executive order on curbing immigration via a travel ban on targeted countries and then-acting Attorney General being relieved of her position after questioning the constitutionality of the president's immigration executive orders); *see* Ariane de Vogue, *Supreme Court Allows Parts of Travel Ban to Take Effect*, CNN (June 27, 2017, 3:11 AM), http://www.cnn.com/2017/06/26/politics/travel-ban-supreme-court/index.html; *see also* Christian Farias, *Court Temporarily Blocks Parts of Trump's Syrian Refugee and Travel Ban*, HUFFINGTON POST (Jan. 29, 2017, 9:09 PM), http://www.huffingtonpost.com/entry/court-blocks-trump-refugee-ban_us_588d4b53e4b0b065cbbc6a6f.

[8] Charlie Savage, *Jeff Sessions Dismisses Hawaii as 'an Island in the Pacific'*, N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html.

[9] *See* Amber Phillips, *Trump Keeps Throwing Shade on the 9th Circuit. But He Probably Won't Be Able to Break It Up*., WASH. POST (June 13, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/28/can-trump-absolutely-break-up-a-federal-court-thats-standing-in-his-way/?utm_term=.93040a9f30a6; *see also* Andrew Kaczynski, *AG Sessions Says He's 'Amazed' a Judge 'On an Island in the Pacific' Can Block Trump's Immigration Order*, CNN (Apr. 21, 2017, 11:30 AM), http://www.cnn.com/2017/04/20/politics/kfile-sessions-psychoanalyze/index.html; Jose A. DelReal &

process and its policymaking function in the American constitutional system.[10]

Additionally, it is timely to reevaluate the commonly accepted notion that public policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and in the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.[11]

Furthermore, it may no longer behoove federal courts to declare courts can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here.[12]

Because the present Administration has shown a lack of respect for checks and balances and the separation of powers, it is time for honest judicial opinions that embrace rather than eschew the systemic policymaking function of the courts.[13]

In analyzing the role of judicial opinions as policy statements, and the power of the courts to check and balance as well as maintain separation of powers, it is important to appreciate "the role of law as a broker between the past and the future of social orders and the social functions of legal doctrine."[14] Since the Constitution's inception as a meta-signifier (meaning-granting) and signified (meaning-receiving) document, various actors have

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Katie Zezima, *Trump's Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/politics/2016/06/01/437ccae6-280b-11e6-a3c4-0724e8e24f3f_story.html?utm_term=.95110959e31d; Olivia B. Waxman, *The History Behind President Trump's Problem with the Ninth Circuit Court*, TIME (Apr. 27, 2017), http://time.com/4758187/donald-trump-ninth-circuit-history/.

[10] *See* Jeffrey Toobin, *The Courts and President Trump's Words*, NEW YORKER (Mar. 17, 2017), https://www.newyorker.com/news/daily-comment/the-courts-and-president-trumps-words.

[11] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1896).

[12] License Tax Cases, 72 U.S. 462, 469 (1867).

[13] *See* Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976); Chris Cillizza, *Trump's Russia Statement Proves He Doesn't Understand Separation of Powers*, CNN (Aug. 2, 2017, 4:40 PM), http://www.cnn.com/2017/08/02/politics/trump-russia-sanctions/index.html (discussing President Trump's lack of understanding of checks and balances and separation of powers in his tweets stating "the opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" and "just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!").

[14] Paulo Barrozo, *The Great Alliance: History, Reason, and Will in Modern Law*, 78 L. & CONTEMP. PROBS. 235, 242 (2015); *see also* CARDOZO, *supra* note 5, at 81.

put forth competing interpretations of the actual meaning and purpose of the Constitution.[15] The Executive, Legislative, and Judicial branches, as well as State governments have each vied for the power to expound constitutional truth at some point in the Constitution's history.[16] However, the federal courts have predominately produced a distinct constitutional discourse that proffers what has become accepted as the correct interpretation of the Constitution.[17] The evolution of constitutional meaning, the nature of the judicial process, and the role of courts—particularly, the U.S. Supreme Court—in shaping such meaning can be viewed from a systemic perspective. That is, the Constitution lays out a complex system wherein interpretation and meaning are situated and inform the nature of the judicial process. Furthermore, a systems analysis provides overarching coherence for judgment and principles of interpretation that orient the courts' role and power in regard to the other branches of government. What is more, the systemic and structural underpinnings of the order established in the original text of the Constitution and its amendments enshrine public policy prerogatives in the form of checks and balances ("CAB") and the separation of powers ("SOP") that serve to contour the interpretive enterprise.

In light of the impact that the Constitution has on defining political, social, and economic realities in the U.S., this article examines the interpretive enterprise in the present political context using complex systems theory analysis. This analysis reveals the courts' inherent, legitimate, and necessary power to check, balance, and maintain the separation of powers, because complex systems "involve many components that adapt or learn as they interact [and] are at the heart of important contemporary problems."[18] In turn, judicial activism can be re-conceptualized as a form of constitutional interpretation that reflects the policymaking role of the courts. Further, CAB and SOP provide courts with "principles of selection . . . to guide [courts] among all the potential judgments that compete for recognition[,]" because

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[15] *See* Winton U. Solberg, *True Meaning: The Federalist and the Constitution*, 16 REV. IN AM. HIST. 368 (1988).

[16] *See, e.g.*, Brian M. Feldman, Note, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 980 (2003); *see also* Paul E. McGreal, *Ambition's Playground,* 68 FORDHAM L. REV. 1107, 1117–19 (2000).

[17] *See* Feldman, *supra* note 16, at 980–83; *see also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,* 102 COLUM. L. REV. 237, 239–41 (2002).

[18] John H. Holland, *Studying Complex Adaptive Systems*, 19 J. SYS. SCI. & COMPLEXITY 1 (2006); *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961) (ruling that evidence obtained in violation of the Fourth Amendment may not be used in state law criminal prosecutions in state courts or federal criminal law prosecutions in federal courts through selective incorporation of the Fourteenth Amendment's due process clause); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (ruling unanimously that the states are required under the Sixth Amendment to provide counsel in criminal cases for indigent defendants through selective incorporation of the Fifth and Sixth Amendments).

"[e]very judgment has a generative power. It begets in its own image."[19] The courts' power to effectuate "presumably desirable social objectives can . . . be reached through a departure from traditional modes of decision[,] but is not free from difficulty."[20] Because judicial opinions are a form of policymaking, this article asserts that a complex systems analysis addresses this difficulty.

Part I discusses complex systems theory as an analytical tool for examining the Constitution and the role of the Judiciary. Part II then explores judicial policymaking within the Constitution's complex system via checks and balances. Finally, part III explores the Judiciary's role within the system vis-à-vis the other political branches, and ultimately concludes that the Judiciary functions not only to uphold the constitutional order founded on CAB and SOP, but also to actively participate within it.

I. APPLYING THE COMPLEX SYSTEMS APPROACH TO CONSTITUTIONAL INTERPRETATION

A. Constitutional Interpretation as Public Policy

The Constitution and its interpretation by the courts can be viewed as the expression of public policy pronouncements that the Founders believed should form the perpetual basis of the republic.[21] Policy can be defined as government pronouncements backed by the financial and coercive power of the state to effectuate an interpretation of the social welfare.[22] Policy entails a multi-agent generated process wherein the social welfare is conceptualized, defined, and acted upon.[23] Within this process, policy can be viewed as "considerations of what is expedient for the community," according to Justice Holmes.[24] Policy has "consistently, if not always explicitly, found authority in peoples' empirical perspectives about social consequences. Its most important contribution has perhaps been . . . that law is most fruitfully conceived as decision in the sense of sanctioned authoritative choice."[25]

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[19] CARDOZO, *supra* note 5, at 21.

[20] Charles B. Nutting, *Policy Making by the Supreme Court*, 9 U. PITT. L. REV. 59, 72 (1947).

[21] See Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 15–16 (2000).

[22] *See* Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUB. ADMIN. REV. 298 (1972).

[23] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 35–36 (Paulo J.S. Pereira & Diego M. Beltran eds., 2011) (1881).

[24] *Id*. at 35.

[25] Myres S. McDougal & Harold D. Lasswell, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 372 (1971).

Policy is affected within the system and structure of the constitutional order, and the law, as policy, is no exception.[26]

The Constitution embodies a complex system within which public policy and social welfare are articulated and implemented. Philip Kurland writes,

> [The] Constitution itself [is] an expression of public policy. Just as with law . . . public policy may be divided into the two categories of the substantive and the procedural. And when one looks at the text of the Constitution, it is readily apparent that the public policy expressed in it [as originally conceived] is essentially procedural rather than substantive.[27]

Yet the courts have found substance within procedure, and have interpreted the Constitution as policy accordingly, substantively and procedurally.[28] "We reach the land of mystery when constitution and statute are silent,"[29] Cardozo explains. It is in this space that systemic structural policy principles come into play when interpreting the Constitution. As the Court noted early on in its jurisprudence, "It is emphatically the province and duty of the judicial department to say what the law is."[30] Expansively viewing policymaking, the Court's assertion is explicitly policy-based. That is, the federal courts' assumption of the power to participate substantively in the tripartite order established by the Constitution is part of a complex system premised on enduring structural values of order and stability reflected in the cardinal principles of CAB and SOP. The foregoing are key systemic principles that factor into the courts' interpretive calculus.

B. Complex Systems Theory as an Analytical Tool

On its face, systems analysis may seem too overly broad to produce clear conclusions about the nature of judicial interpretation and opinions. Indeed, because it is a natural scientific theory, it may appear as though it does not readily apply to the sociality of human affairs.[31] However, as an analytical

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[26] *See, e.g.*, Toobin, *supra* note 10 (discussing how judges used President Trump's campaign language to create the policy justification for overturning an executive order that would not have been overturned if issued by President Obama).

[27] Philip B. Kurland, *Public Policy, the Constitution, and the Supreme Court*, 12 N. KY. L. REV. 181, 182 (1985).

[28] *Id*. at 183 ("The lion's share of the substantive policy-making function in the national government was assigned to the legislative branch, largely by article I, § 8, although provision was made for recommendations to the legislature by the President in article II. There is no suggestion of a policy-making function for the judicial branch at all."). *But see* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that the Constitution implies a fundamental right to privacy, and, thus, developing a distinct jurisprudence that confers a substantive dimension to the procedural constitution through opinions).

[29] CARDOZO, *supra* note 5, at 18.

[30] *Marbury*, 5 U.S. at 177.

[31] *See*, *e.g.*, Stephen Wolfram, *Complex Systems Theory* (Princeton Inst. for Advanced Stud. 1985),

framework and worldview, complex systems analysis does not necessarily fall into this explanatory quagmire despite no universally accepted definition of what constitutes a complex system.[32] Theorists have generally described complex systems as comprised of "systems that have a large number of components, often called agents, [which] interact and adapt or learn."[33] This basic description of complex systems informs the nature of the judicial process and policymaking in the constitutional order. As a complex system, agents or participants in the system are affected by interpretation of the Constitution's provisions by the Judiciary either within the judicial process or as an effect of judicial policymaking. Thus, it is fruitful to explore the notion that the courts possess policymaking capacity within the complex, constitutional system. For example, constitutional interpretations from the Judiciary inform how the U.S. conducts domestic affairs and implements foreign policy, which in turn affects the domestic polity and foreign policy.[34]

Additionally, systems analysis provides a way of evaluating interpretive outcomes in a constitutional context where "causation is complex."[35] David Byrne observes, "Outcomes are determined not by single causes but by multiple causes, and the causes may, and usually do, interact, in a non-additive fashion. [T]he combined effect is not necessarily the sum of the separate effects."[36] Furthermore, a systems analysis provides insight into constitutional order because

> system boundaries . . . are multiple, fluid and massively entangled, the 'internal interactions' happen at various scales and interlocking patterns emerge at various places across the system and throughout the time period of the self-organizing process. Clusters of agents form micro-patterns continually. The micro-patterns interact to form larger, more comprehensive patterns or disrupt each other during the on-going evolution of the system. At the same time, emergent patterns in a super-system influence the emerging patterns in sub-

http://www.stephenwolfram.com/publications/academic/complex-systems-theory.pdf.

[32] *See* Holland, *supra* note 18, at 6.

[33] *Id*.

[34] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (holding foreign terrorism suspects held at Guantanamo Bay have the constitutional right to challenge their detention in federal courts); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding military commissions set up by the Administration to try detainees at Guantanamo Bay are unconstitutional because they do not afford Geneva Convention and the Uniform Code of Military Justice protections); Rasul v. Bush, 542 U.S. 466 (2004) (holding federal courts have authority to determine if foreign nationals held at Guantanamo Bay were wrongfully imprisoned); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding detainees at Guantanamo Bay that are US citizens must be accorded rights of due process and the ability to challenge their enemy combatant status before an impartial authority).

[35] DAVID BYRNE, COMPLEXITY THEORY AND THE SOCIAL SCIENCES: AN INTRODUCTION 20 (Routledge, 1998).

[36] *Id*.

> systems and in individual agents by either reinforcing or disrupting their local self-organizing process.[37]

As Bela Banathy notes, "system" refers to a configuration of individual parts connected and joined together by a web of interdependent relationships as "elements in standing relationship."[38] In general, a system is thus composed of regularly interacting parts that give rise to systemic concepts and principles that impact the whole system and other individual actors within it.[39] These concepts, whether political, legal, or philosophical, work in tandem within the system of organizational relationships, and develop the system's "capacity to unify and rationalize."[40] As systemic or structural concepts, CAB and SOP facilitate agent engagement within the constitutional order by enhancing the courts' capacity to unify and rationalize constitutional jurisprudence to preserve the integrity of the system as a whole. In this way, as expressions of policy, court opinions serve the system by maintaining the independence and interdependence of the three branches using CAB and SOP.

Further, a systems perspective helps to contextualize complex judicial interpretation as the Judiciary works to maintain the integrity of the overarching constitutional order as a whole despite being one of its key actors. A systems analysis enables clearer examination of cardinal constitutional concepts, as well as their philosophical implications and logical conclusions.[41] A complex systems perspective provides additional insight into the judicial role and power in that systems can be defined in objective and subjective terms:

> Subjectively, complex systems involve 'unfamiliar . . . or unplanned and unexpected sequences, either not visible or not immediately comprehensible'. In this respect, complexity tends to be identified by its relationships rather than by its constituent parts. Such distinction between objective and subjective definitions implies that: (i) complex systems are not uniform—there are relationships of differing strengths between their components (and those with especially tight connections form sub-systems); and (ii) any components in the system can participate in multiple sub-systems—so even 'homogeneous components can support internal diversity through re-alignments of relationships to create non-identical sub-subsystems.'[42]

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[37] Kai E. Lehmann, *Unfinished Transformation: The Three Phases of Complexity's Emergence into International Relations & Foreign Policy*, 47 COOPERATION & CONFLICT 407 (2012).

[38] Bela Banathy, *A Taste of Systemics*, PRIMER PROJECT AT INT'L SOC'Y FOR THE SYS. SCI., http://www.isss.org/taste.html.

[39] *Id*.

[40] CARDOZO, *supra* note 5, at 31.

[41] *Id*. at 37.

[42] Emilian Kavalski, *The Fifth Debate and the Emergence of Complex International Relations Theory: Notes on the Application of Complexity Theory to the Study of International Life*, 20 CAMBRIDGE REV.

Systems analysis posits that individual agents are the collective base elements of the system that interact and adapt to interactions, which allows for innovation and maximization of the potential for the individual parts to evolve.[43] It is important to underscore, as John H. Holland clarifies, that a complex system

> has no single governing equation, or rule, that controls the system. Instead, it has many distributed, interacting parts, with little or nothing in the way of a central control. Each of the parts is governed by its own rules. Each of these rules may participate in influencing an outcome, and each may influence the actions of other parts. The resulting rule-based structure becomes grist for the evolutionary procedures that enable the system to adapt to its surroundings.[44]

Thus, one can conceptualize a complex system as a "learning machine, one made up of semi-independent modules which work together to solve a problem."[45] Howard Bloom continues, "Some complex adaptive systems, like rain forests, are biological. Others, like human economies, are social. . . . Both apply an algorithm—a working rule" that sets the foundation for interaction.[46] In this case, that algorithm includes CAB and SOP.

Accordingly, complex systems are "complex," because they are composites of diverse, interconnected parts, which adapt and learn through interaction with other parts.[47] Agents adapt to the shifting dynamics characteristic of a networked and integrated system.[48] In the same way, judges adapt new ways of administering and interpreting the law within the constitutional system.[49] Thus, the multifarious nature of constitutional interpretation finds footing on algorithms and stabilizing principles such as CAB and SOP.[50]

OF INT'L AFF. 436, 438 (2007).

[43] *Id*.

[44] *See* John H. Holland, *Complex Adaptive Systems*, 121 DAEDALUS 1, 21–22 (1992); *see e.g.*, D&W Auto Supply v. Kentucky Dep't of Revenue, 602 S.W.2d 422 (Ky. 1980) (challenging the constitutionality of the Litter Control Act, and holding that the Act is an appropriation act and, thus, is unconstitutional for failure to have received a vote of majority of all members elected to the House of Representatives); Consumer Party of Pa. v. Pennsylvania, 507 A.2d 323, 331–32 (1986), *overruled by* Pa. Against Gambling Expansion Fund, Inc. v. Pennsylvania, 877 A.2d 383 (2005) (holding that a party challenging the constitutionality of an act of the General Assembly bears a heavy burden of proof, and legislation will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution).

[45] *See e.g.*, HOWARD K. BLOOM, GLOBAL BRAIN: THE EVOLUTION OF THE MASS MIND FROM THE BIG BANG TO THE 21st CENTURY 9 (2000); Holland, *supra* note 44, 17–18.

[46] BLOOM, *supra* note 45, 9–10; Holland, *supra* note 44, 17–18.

[47] BLOOM, *supra* note 45, 9–10; Holland, *supra* note 44, 17–18.

[48] Holland, *supra* note 44, 17–18.

[49] *See* Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 996–97 (1978); *see also* David H. Freedman, *Is Management Still a Science?*, HARVARD BUS. REV. (1999), https://hbr.org/1992/11/is-management-still-a-science.

[50] *See* Carla Crandall, *If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, 43 SETON HALL L. REV. 595, 604 (2013); *see also* Youngstown Sheet & Tube. Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

Consequently, the Constitution, and the Judiciary's interaction with it, reflects a complex system via CAB and SOP.[51]

C. Analyzing Constitutional Interpretation Using Complex Systems Theory

Based on the above analysis, our understanding of the Constitution is helped by identifying the structural factors or principles that inform the interpretive enterprise.[52] In this way, structural principles provide us with a way to analyze further the work of the courts using the complex systems model to observe which factors are at play in the interpretive calculus.[53] For example, we can observe which principles courts choose to apply to facilitate the administration of justice within CAB and SOP.[54] From this perspective, courts use the Constitution to derive law even though the text itself functions as both a meaning-maker and a meaning-receiver.[55]

Here, complexity does not refer to the level of complication that underlies the systems analysis, but rather refers to the idea that "systems are composed of numerous interconnected components, or agents, dynamically interacting with one another, as well as with other external systems."[56] The Judiciary's is just one agent within the constitutional system, but it affects the balance of power among the other Branches and the States.[57] Complexity involves discrete actors interacting within the constitutional order.[58] Meanwhile, reductionism minimizes this complexity by focusing on the components as the primary means of generating an accurate explanation of constitutional meaning.[59] Reductionism distorts the complexity of the system.[60] For example, a reductionist might concentrate exclusively on the Judiciary's discourse, but ignore its role within CAB and SOP more broadly.[61] In that way, system "'behavior cannot be understood by decomposing the system into parts,' because 'the actions of any single part of the system can only be understood with reference to the entire system.'"[62]

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[51] Crandall, *supra* note 50, at 604.
[52] *Id*.
[53] *Id*.; *see also Youngstown Sheet & Tube. Co*., 343 U.S. at 634–55.
[54] *See* Crandall, *supra* note 50; *see also Youngstown Sheet & Tube. Co*., 343 U.S. at 634–55.
[55] *Id*.
[56] *See* Crandall, *supra* note 50, at 609.
[57] *See id*.
[58] *See id*. at 604.
[59] *See id*.
[60] *Id*.
[61] *See* Crandall, *supra* note 50, at 604.
[62] *Id*.; *see* CARDOZO, *supra* note 5, at 42 (observing the role of philosophy and principles in jurisprudence can also be applied to the systemic distribution of power and justifications for a perpetual constitutional order: "in the end, the principle that was thought to be most fundamental [by the courts], to rep-

Additionally, complex systems analysis also adds value to the interpretive enterprise by taking into account adaptability.[63] In their nature, complex systems exhibit discernible patterns of adaptation.[64] An agent within a complex system gathers "information about its surroundings and its own behavior."[65] This process enables agents to learn, evolve, adapt, or reorganize according to the challenges that arise within the system.[66] "Agents within systems, and even the systems themselves, constantly trend toward what theorists term self-organization," Crandall explains.[67] As Lars Skyttner observes, self-organization "may be regarded as a theory about the way chaotic systems organize themselves and attain order. [For example] . . . changing technological development, changing lifestyles and preferences, [and] immigration" law reflect different notions of systemic organization.[68] The courts have therefore developed several adaptive judicial mechanisms, such as balancing tests, adhering to precedent, and relying on first-principles.[69] The Judiciary's ability to self-organize puts forth jurisprudence designed to order, secure, and stabilize the polity within constitutional law.[70]

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resent the larger and deeper social interests, put its competitors to flight.").

[63] Crandall, *supra* note 50, at 606.

[64] *Id*.; *see generally* Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 611 (2001) (The "separation of powers scheme created by the Founders established an institutional interdependence among the branches that allows for the possibility that the Court might be a protector of the rules of the game without producing a substantial counter-majoritarian effect. This institutional structure anticipates the possibility of differences in preferences, thereby producing a check on elected officials, but also creates institutional incentives to diminish the antidemocratic effects of those differences.").

[65] THE MIND, THE BRAIN & COMPLEX ADAPTIVE SYSTEMS 12 (Harold Morowitz & Jerome Singer eds., 1995).

[66] *See* Brian T. Goldman, *The Switch in Time That Saved Nine: A Study of Justice Owen Roberts's Vote in* West Coast Hotel Co. v. Parrish, C. UNDERGRADUATE RES. ELEC. J. (2012), http://repository.upenn.edu/curej/150 (analyzing and illustrating the notion of system agents' adaptive learning).

[67] Crandall, *supra* note 50, at 642; *see* Kai E. Lehmann, *Crisis Foreign Policy as a Process of Self-Organization*, 24 CAMBRIDGE REV. OF INT'L AFF. 27–42 (2011).

[68] LARS SKYTTNER, GENERAL SYSTEMS THEORY: PROBLEMS, PERSPECTIVE, PRACTICE 296, 297–300 (2d ed. 2006).

[69] *See* D.C. v. Heller, 552 U.S. 570, 589–620 (2008) (illustrating the reliance on first-principles of law, here the Second Amendment, to strike down a municipal ban on handguns as violating the second amendment, and therefore interpreting the amendment as the drafters of the Constitution had intended, securing an "individual right to bear arms for defensive purposes."); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (illustrating the use of *stare decisis* to uphold past precedent as still controlling, therefore rejecting to overrule established precedent); Mathews v. Eldridge, 424 U.S. 319 (1976) (illustrating the use of a balancing test as a judicial mechanism to organize a complex judicial standard).

[70] *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (discussing the debate of how to interpret the Constitution through a positivist framework, specifically focusing on originalism); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINNESOTA L. REV. 1173 (2005) (discussing the relationship between the rule of law and the doctrine of stare decisis); Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585 (1988) (discussing the judicial mechanism of balancing tests including its origin, how they work, why they became so popular, and an evaluation of their use); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal*

At the systems level, the Judiciary plays a cardinal role in defining and contextualizing constitutional order.[71] In so doing, the courts both impact and are impacted by multi-dimensional layers of legal, sociopolitical, and economic sub-systems (e.g., commerce, national security, criminal justice, welfare, property, and international law).[72] The courts' adaptability, then, reflects a deep philosophical and historical commitment to CAB and SOP as each provides the foundation for the interpretive enterprise.[73] When considering the systemic nature of CAB and SOP, Justice Holmes' observation in *N.Y. Trust Co. v. Eisner* that, "a page of history is worth a volume of logic," readily applies.[74] The wealth of information that judges employ to adjudicate constitutional issues, such as precedent, balancing tests, and other principles, can be located within the firmament of CAB and SOP, and create a pervasive conceptual "complex bundle" that "loom[s] above all others."[75] The philosophical and historical bases of the Constitution enshrine CAB and SOP, and the Judiciary incorporates these into its meaning-making and policymaking enterprises.[76] The Founders subscribed to the notion that

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Formalism, and the Future of Unenumerated Rights, 9 J. OF CONST. L. 155 (2006) (discussing the role of stare decisis in constitutional adjudication and what it means for originalists and the future of unenumerated rights).

[71] CARDOZO, *supra* note 5, at 48 (On the load-bearing constitutional structures of checks and balances and separation of powers, Cardozo writes, "These fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic.").

[72] *See id*. at 51–66; Crandall, *supra* note 50, 608–611; Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 276–278 (1986); Robert C. Tucker, *Culture, Political Culture, and Communist Society*, 88 POL. SCI. Q. 175–176 (1973).

[73] CARDOZO, *supra* note 5, at 55 (writing that these fundamental provisions "have come to us from without not from within, that they embody the thought, not so much of the present as of the past, that separated from their past their form and meaning are unintelligible and arbitrary, and hence that their development, in order to be truly logical, must be mindful of their origins."); *see also* Tucker, *supra* note 72, at 173–190.

[74] N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[75] *See, e.g.*, Taylor v. United States, 136 S. Ct. 2074, 2076 (2016) ("Under its commerce power, this Court has held, Congress may regulate, among other things, activities that have a substantial aggregate effect on interstate commerce."); Gonzales v. Raich, 545 U.S. 1, 17–22 (2005) (holding so long as those activities are economic in nature, one such "class of activities" is the production, possession, and distribution of controlled substances. Grafting the holding in Raich onto the Hobbs Act's commerce element, it follows that a robber who affects even the intrastate sale of marijuana affects commerce over which the United States has jurisdiction."); United States v. Morrison, 529 U.S. 598, 613 (2000); Wickard v. Filburn, 317 U.S. 111, 124–125 (1942) (including "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce"); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (holding that the National Labor Relations Act of 1935 was constitutional); Hammer v. Dagenhart, 247 U.S. 251, 273–275 (1918) (finding that federal regulation of child labor in purely internal (within a state) manufacturing, the products of which will not enter interstate commerce, to be beyond the power of Congress to regulate); CARDOZO, *supra* note 5, at 65.

[76] CARDOZO, *supra* note 5, at 17–28, 65.

> the best legislators of all ages agree in this, that the absolute power, which originally is in the whole body, is a trust too great to be committed to any man or assembly; and therefore . . . it will be an eternal rule in politics among every free people, that there is a balance of power to be carefully held by every state within itself. . . . [T]he best government is that which consists of three forms, regis [King], optimatium et populi imperitum [nobles, people]. . . . It is manifest that the best form of government is that which is compounded of all three. This is founded not only in reason, but in experience.[77]

The nature of the judicial process and Constitutional interpretation, thus, reflects a systemic policymaking paradigm that encapsulates the systems' agents (i.e., the Judiciary, Legislature, and Executive) and their relationship to the overarching constitutional order.[78]

Because public policy must align with the Constitution, CAB and SOP impact the form and substance of judicial policymaking.[79] For example, constitutional jurisprudence is permeated with generalities (e.g., fundamental rights or due process of law) to ensure broad and uniform application.[80] This application requires the courts to work according to the core principles of the Constitution, like CAB and SOP.[81] As noted in *Green v. Frazier*, "What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise."[82] In *Twining v. New Jersey*, the Court notes that the Judiciary "has never attempted to define with precision the words 'due process of law.' . . . It is

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[77] Gilbert Chinard, *Polybius and the American Constitution*, 1 J. OF THE HISTORY OF IDEAS 42–44 (1940) (observing that the "vice of kingly government is monarchy; that of aristocracy, oligarchy; that of democracy, rage and violence; into which, in process of time, all of them must degenerate. Lycurgus, to avoid these inconveniences, formed his government not of one sort, but united in one all the advantages and properties of the best governments; to the end that no branch of it, by swelling beyond its due bounds, might degenerate into the vice which is congenial to it; and that, while each of them were mutually acted upon by opposite powers, no one part might incline any way, or outweigh the rest; but that the commonwealth being equally poised and balanced, like a ship 'or a wagon,' acted upon by contrary powers, might long remain in the same situation; while the king was restrained from excess by the fear of the people, who had a proper share in the commonwealth; and, on the other side, the people did not dare to disregard the king, from their fear of the senate, who, being all elected for their virtue, would always incline to the justest side; by which means, that branch which happened to be oppressed became always superior, and, by the accessional weight of the senate, outbalanced the other."); *see also* Swidler, *supra* note 72, at 273–286, 276–277; GEORG HENRIK VON WRIGHT, EXPLANATION AND UNDERSTANDING (1971).

[78] *See* CARDOZO, *supra* note 5, at 17, 28, 65; *see also* Chinard, *supra* note 77, at 42–44; Crandall, *supra* note 50, at 608–611.

[79] *Trans-Missouri Freight Ass'n*., 166 U.S. at 340 (holding public policy of the government is found in its statutes, therefore public policy must conform to the Constitution because statutes must also conform to the Constitution).

[80] *See* United States v. Lopez, 514 U.S. 549, 552 (1995).

[81] *See id*.

[82] Green v. Frazier, 253 U.S. 233, 238 (1920).

sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."[83] Fundamentally, CAB and SOP are immutable principles that structure the complex system in which the Constitution operates.[84] Upon this foundation, the courts' role, therefore, serves as a systemic "paramount public policy, one that will prevail over temporary inconvenience or occasional hardship, not lightly to sacrifice certainty and uniformity and order and coherence."[85]

II. JUDICIAL POLICYMAKING & ACTIVISM WITHIN A COMPLEX SYSTEM

A. Judiciary as Policymakers

Federal courts, and the U.S. Supreme Court in particular, continue to bestride the nebulous area between political and apolitical institutions.[86] The Court is

> a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy. As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it is a political institution and not quite capable of denying it; so that frequently we take both positions at once.[87]

Generally speaking, debate has coalesced around two broad views when analyzing the courts as a policymaker.[88] The first view argues that federal courts should have "an important and active role in national policy making," in order to provide "the vindication of the constitutional rights of deprived and downtrodden groups and the representation of the politically weak in the political system as well as the checking of the excesses of the elective branches of government."[89] The second view contends that the courts are "ineffectual in the formulation of national policies and cautions

[83] Twining v. N.J., 211 U.S. 78, 101–02 (1908).

[84] *See* Epstein et al., *supra* note 64.

[85] CARDOZO, *supra* note 5, at 67.

[86] *See* Michael Combs, *The Supreme Court as a National Policy Maker: A Historical-Legal Analysis of School Desegregation*, 8 S. U. L. REV. 197 (1981).

[87] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L. J. 563 (2001); *see also* Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625 (2000).

[88] *See* Combs, *supra* note 86.

[89] *Id*. at 197–198; *see Lopez*, 514 U.S. at 552 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

against the Supreme Court assuming a prominent and active role in national policy-making."[90] Additionally, "When the Court does seek to play a major role in national policy formulation," it is "usurping the prerogatives of the elective branches of government and . . . is outside of its area of competence."[91] The Judiciary's role of maintaining CAB and SOP, thus, merits reexamination in light of the Trump Administration's agenda to dismantle the administrative state and ignore the courts as independent and legitimate actors on the political and policy stages.[92]

As Andrew Siegel notes, "legal academics have done a poor job acknowledging, let alone analyzing, many of the specific practices, arrangements, and habits of thought that shape the content of constitutional law in early twenty-first-century America."[93] Part of the problem is that there remains a persistent aversion to characterizing judicial interpretation and opinions as a form of policymaking.[94] However, "judicial judgments, and certainly those that changed existing rules are, in fact, expressions of public policy."[95] Policymaking functions on several different planes as it reflects values, goals, interests, politics, history, and culture.[96] At the same time, philosophically and conceptually, policy reflects the purpose and meaning of being a member of a political unit and forming a political identity.[97] As such, public policy is not "the rules of governance for our society but [rather it is] the ambience within which those rules are to be made."[98] Here, "ambience" is the complex system upon which the constitutional order is based, within which the courts are situated, and which breathes life into the courts.[99] From this perspective, policymaking is less a question of, for example, whether abortion is "right" or "wrong," or if corporations should be afforded speech rights, or if marijuana should be subject to federal classification and regulation, but more of an affirmation of the courts' power to

[90] Combs, *supra* note 86, at 197.

[91] *Id*. at 197–198.

[92] *See* Otis v. Parker, 187 U.S. 606, 608–09 (1903) ("While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.").

[93] Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 U. PA. J. CONST. L. 1069 (2016).

[94] *See* Kurland, *supra* note 27.

[95] *See id*. at 185.

[96] *See* EUGENE BARDACH & ERIC M. PATASHNIK, A PRACTICAL GUIDE FOR POLICY ANALYSIS 8 (5th ed. 2016).

[97] *See id*. at 9.

[98] Kurland, *supra* note 27, at 190.

[99] *Id*.

ballast the constitutional order. As Justice Frankfurter observed, "A court is confined within the bounds of a particular record. Only fragments of a social problem are seen through the narrow windows of a litigation."[100]

Policymaking embodies identity formation while it preserves, enhances, or augments the power to classify and define legal and political actuality. As the structural ambience that anchors the constitutional order, policymaking also dismantles identity as it reconfigures social functions and redefines social welfare.[101] Some of the Supreme Court's "landmark cases" illustrate this point, such as: *Shelley v. Kraemer*,[102] *Brown v. Board of Education*,[103] *Roe v. Wade*,[104] *Miranda v. Arizona*,[105] *Hernandez v. Texas*,[106] and *Citizens United v. Federal Election Commission*.[107] These cases and others demonstrate how the Court's interpretations constitute policymaking from a systems perspective.[108] Ignoring the systemic policymaking role of the courts treats "constitutional practices as aspects of an underlying constitutional 'structure' . . . [and] makes them appear to be permanent, timeless, inherent features of American constitutionalism."[109] This apolitical, de-contextualized approach to constitutional interpretation feeds the illusion that the courts possess knowledge based on a form of objective legal reasoning that is divorced from the Judiciary's powerful political and pragmatic policy-based reasoning.[110] Subsequently, interpretations avoid being classified as policy,

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[100] Sherrer v. Sherrer, 334 U.S. 344, 365–366 (1948); *see, e.g.*, *Gonzales*, 545 U.S. at 1.

[101] *See* Abbate v. United States, 359 U.S. 187 (1959) (holding that the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution does not prohibit the prosecution of a conspiracy in federal court under federal law when that same conspiracy has already resulted in a conviction in state court under state law); Bartkus v. Illinois, 359 U.S. 121 (1959) (holding that a defendant can be acquitted of a federal crime and convicted of a state crime, even if those crimes share the same evidence, without violating the Due Process Clause of the Fourteenth Amendment, which enabled state and federal prosecutions for substantially similar events).

[102] *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding courts may not enforce restrictive racial covenants for real estate).

[103] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding segregating schools by race violates the Equal Protection Clause of the Fourteenth Amendment).

[104] *See* Roe v. Wade, 410 U.S. 113 (1973) (holding unconstitutional laws that restrict a woman's right to an abortion prior to fetal viability).

[105] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding police must advise criminal suspects of their rights under the Constitution to remain silent, consult an attorney, and have legal representation appointed if indigent).

[106] *See* Hernandez v. Texas, 347 U.S. 475 (1954) (holding that trying a defendant particular race or ethnicity in front of a jury where all persons of his race or ethnicity have been excluded by the state violates of the Equal Protection Clause of the Fourteenth Amendment).

[107] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding political campaign contributions by corporations and labor unions constitute speech protected by the Constitution).

[108] *See* Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793 (1957); *see, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Vegelahn v. Guntner, 44 N.E. 1077, 1079 (Mass. 1896) (Holmes, J., dissenting).

[109] Siegel, *supra* note 93, at 1070.

[110] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103–04 (N.Y. 1928) (discussing how the develop-

which, as this article argues, is what they are when viewed systemically.[111] As Justice Jackson observes, "Nearly every significant decision of the Supreme Court has to do with power—power of government, power of officials—and hence it is always concerned with the social and economic interests involved in the allocation, denial, or recognition of power."[112]

Incidentally, despite its immense policymaking power, the judiciary rarely relies upon public policy as an explicit reason for its constitutional interpretations.[113] It is not enough to say simply that 'public policy' justifies the result. There are a thousand different public policies of variant strengths that might be asserted. The specific policy must be identified and its relevancy made clear. Simply stated, neither precedent nor policy genuinely justifies a result except as its own basis affords the justification.[114] Judicial tools for interpretation, such as textualism, original intent, history, and balancing tests, can be viewed as both products and producers of the complex system that informs the judicial process.[115] Phillip Bobbitt's taxonomy on the "proper" modalities that interpretation, theory, and law can "legitimately" draw upon (i.e., history, text, structure, doctrine, ethos, and prudence) provides a vivid example of how politically, socially, and ideologically based interpretations are part of an overarching system that is greater than the sum of its parts.[116] But these modalities do not function in a vacuum: these modalities are all part of a system.[117]

As a complex system, the Constitution as a blueprint for political order influences judicial interpretation, which creates policies that promote cognitive maps to orientate a legal subject.[118] In turn, this grants the legal subject possibilities of thought and action so that it can develop an identity and be emplaced in legal actuality.[119] The deployment of cognitive maps through constitutional interpretation establishes what Michael Shapiro has termed

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ment of law is innately contextual).

[111] *See* ROBERT JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 315–16 (1941).

[112] *Id*. at xii; *see also* ROBERT J. MCKEEVER, THE UNITED STATES SUPREME COURT: A POLITICAL AND LEGAL ANALYSIS (2d ed. 2016).

[113] *See, e.g.*, Robert A. Leflar, *Honest Judicial Opinions,* 74 Nw. U. L. Rev. 721, 723 (1979).

[114] *Id*.; *see also* Missouri, Kansas, & Texas. Ry. Co. v. May, 194 U.S. 267, 270 (1904) (discussing the importance of administering constitutional provisions with caution); Paul Horwitz, *The Hobby Lobby Movement*, 128 HARV. L. REV. 154, 158-60 (2014); MELANI MCALISTER, EPIC ENCOUNTERS: CULTURE, MEDIA, & U.S. INTERESTS IN THE MIDDLE EAST, 1945-2000 4 (Earl Lewis et. al. eds., 2001).

[115] *See generally* Epstein et al., *supra* note 64, at 592 (discussing how checks and balances and the separation of powers, as systemic variables, embody as well as contour the policymaking capacity of the federal courts, and the Court in particular).

[116] *See* Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 696 (1980).

[117] *See* Vicente Abad Santos, *The Role of the Judiciary in Policy Formulation*, 41 PHIL. L. J. 567, 573 (1966).

[118] *See id*.

[119] *Id*.

"moral geographies."[120] Moral geographies are "cultural and social practices that work together to mark not only states but also regions, cultural groupings, and ethnic or racial territories. Moral geographies shape human understanding of the world. . . . Different moral geographies can coexist and even compete."[121] Constitutional interpretation provides moral geographies in relation to the law. The Court's interpretation of the Constitution—from *Bowers v. Hardwick*[122] to *Obergefell v. Hodges*,[123] for instance—is a manner of concretizing moral geographies for comprehending legal actuality.[124] As policy, interpretations of the Constitution retain high degrees of continuity, but also can accommodate changes.[125] For example, in *Plessy v. Ferguson*, the Court's establishment of "separate but equal" doctrine directly contributed to a national policy of a white-nationalist morality and racial superiority preserved via segregation.[126] However, the Court later rejected this via desegregation as national policy in *Brown v. Board of Education*.[127]

As policy, judicial opinions are part of "an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process disputes, and how we resolve those disputes."[128] The practices identified by Bobbitt above, for instance, inform the cognitive maps that courts employ and policymakers confront when engaging the constitutional text and its interpretations.[129] In light of the forgoing discussion and analysis, complex

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[120] Michael J. Shapiro, *Moral Geographies and the Ethics of Post-Sovereignty*, 6 PUB. CULTURE 479, 482 (1994).

[121] MCALISTER, *supra* note 114.

[122] Bowers v. Hardwick, 478 U.S. 186 (1986); *see also* Romer v. Evans, 517 U.S. 620 (1996) (holding a state constitutional amendment that denies equal protection of the laws to homosexuals is a violation of the Equal Protection Clause of the Fourteenth Amendment); Lawrence v. Texas, 539 U.S. 558 (2003) (holding state law that criminalizes consensual same-sex sexual conduct violates right to privacy under the Due Process Clause of the Fourteenth Amendment); SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) (holding peremptory challenges to strike potential jurors because of sexual orientation violates Equal Protection Clause of the Fourteenth Amendment).

[123] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

[124] Kurland, *supra* note 27, at 197; *see, e.g.*, *Roe*, 410 U.S. at 113; San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); *Miranda*, 384 U.S. at 436; Baker v. Carr, 369 U.S. 186 (1962); *Mapp*, 367 U.S. at 643.

[125] *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453 (1944) (Traynor, J., concurring) ("Even if there is no negligence. . .public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent to defective products that reach the market.").

[126] Plessy v. Ferguson, 163 U.S. 537 (1896); *see also* Gong Lum v. Rice, 275 U.S. 78 (1927); Berea Coll. v. Kentucky, 211 U.S. 45 (1908); Cumming v. Richmond Cty. Bd. of Educ., 175 U.S. 528 (1899).

[127] *Brown*, 347 U.S. at 483.

[128] Siegel, *supra* note 93, at 1107.

[129] *See, e.g.*, Jamal Greene, *Selling Originalism*, 97 GEO. L. J. 657, 678 (2009); Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 546-48 (2006); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195, 1203 (2009); Michael J. Shapiro, *On Pictures, Paintings, Power and the Political Philosophy of International Rights*, THEORY TALKS (2009), https://www.files.ethz.ch/isn/155097/Theory%20Talk36_Shapiro.pdf.

systems analysis, thus, provides a theoretical lens to better explain court power, because it highlights the Judiciary's policymaking power in the context of CAB and SOP while considering the current political climate through adaptability.[130]

Accordingly, the myth of the apolitical Judiciary needs reassessment, especially given the demands being placed on the courts to counter what many commentators feel are direct attacks by the Executive on the integrity of CAB and SOP as envisioned in the Constitution.[131] Plus, this analysis, which counters the myth of the apolitical and reactionary as opposed to proactive policymaker, conceptualizes judicial policymaking as a systemic mandate geared toward preserving the integrity of the constitutional order via CAB and SOP.[132] As Nutting explains, "If we include in the term 'policy' the views of the justices as to the social, political or economic desirability of a given course of action, it is clear that the [C]ourt has always made policy in some types of cases."[133] Justice Holmes acknowledges the Court's policymaking power stating, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[134] In sum, an candid appraisal or declaration of judicial power based on complex systems analysis may help to counter attacks on the integrity of the judiciary from the present Executive's policies that threaten to undermine the integrity of CAB and SOP.[135]

B. Judicial Activism as Policymaking

Judicial activism can be re-conceptualized as a facet of systemic constitutional order that acknowledges the Judiciary as a check and balance in the overarching political system, and not merely a passive bystander.[136] The fear of concentrated power in any one branch of government is an essential theme throughout the Constitution.[137] As James Madison notes, "The accumulation of all powers, legislative, executive and judicia[l] in the same hands, whether of one, a few, or many, and whether hereditary, self-

[130] Greene, *supra* note 129, at 678; *see e.g.*, Holland, *supra* note 18; Wolfram, *supra* note 31.

[131] *See, e.g.*, Jonathan Bernstein, *A Lawless Presidency Isn't Without Its Risks*, BLOOMBERG VIEW (Jul. 26, 2017), https://www.bloomberg.com/view/articles/2017-07-26/a-lawless-presidency-isn-t-without-its-risks.

[132] Holland, *supra* note 18, at 1; Wolfram, *supra* note 31.

[133] Nutting, *supra* note 20, at 60.

[134] S. Pac. Co. v. Jensen, 244 U.S. 2015, 218 (1917) (Holmes, J., dissenting).

[135] Bernstein, *supra* note 131; Holland, *supra* note 18, at 1; Wolfram, *supra* note 31.

[136] CARDOZO, *supra* note 5, at 23 ("The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law.").

[137] U.S. CONST. art. I, § 1; *id.* at art. II, § 1; *id.* at art. III, § 1.

appointed, or elective, may justly be pronounced the very definition of tyranny."[138] However, if policymaking, which the Constitution largely reserves for the Legislative and Executive Branches, is tied directly to the courts acting to preserve CAB and SOP, then the courts may assert their legitimate role in the policymaking process.[139] Judicial review of Executive and Legislative pronouncements and the courts' ability to set and revisit precedent are examples of the judiciary's role in the systemic administration of justice via CAB and SOP.[140] Ultimately, as Spann explains, "the distinction between constitutional law and ordinary politics becomes untenable. Once scrutinized, the Supreme Court's constitutional jurisprudence appears not only to consist largely of political policy preferences but also to consist largely of the political policy preferences that are favored by a majority of the Court."[141]

Despite being constitutional gatekeepers, the Judiciary's policies must still contend with being balanced and checked by the other branches of government.[142] Cardozo observes, "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty and goodness he is to draw his inspiration from consecrated principles."[143] In developing its constitutional jurisprudence, the Court notes the tension between the separation of powers and how it competes with the Court's role as an enforcer checks and balances.[144] Focusing on the overarching system within which the Judiciary functions illuminates its policymaking character by going beyond specific social and ideologically-based polices, and instead highlighting the structural norms, values, and ordering principles that the courts are reifying. "The Founders' formation of coequal branches of government—the executive, legislative, and judicial—equal in their responsibilities under the Constitution and laws of the United States and in their accountability to the American people, is the rock upon which the world's longest-standing democracy rests."[145] Thus, CAB and SOP are intricately woven into the constitutional system and are the principles that contextualize the administration of justice.

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[138] The Federalist Nos. 10, 47, 51 (James Madison).
[139] Kurland, *supra* note 27, at 183–84, 186, 188–89.
[140] Epstein et al., *supra* note 64, at 592.
[141] Girardeau A. Spann, *Constitutionalization*, 49 St. Louis U. L.J. 709, 710 (2005).
[142] Epstein et al., *supra* note 64, at 592.
[143] Cardozo, *supra* note 5, at 141.
[144] *See* Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting) (explaining that when the Court acts as policymaker, "at the expense of the legislature," then the Court exercises "ultimate power over public policy in fields where no specific provision of the constitution limits legislative power.").
[145] Dennis C. Hayes, *Checks and Balances*, 96 Judicature 148 (2013).

When the courts promulgate social welfare policy, such as establishing or undermining abortion rights,[146] or bolstering corporate speech rights,[147] they still rely on the larger constitutional "ambience" to justify and legitimize their enterprise.[148] At the systems level, the process by which the courts infuse the Constitution with social issues—and vice versa—can be viewed as being informed by and reifying CAB and SOP.[149] The courts "choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution. It is in this sense that the Court is a national policy-maker."[150] CAB and SOP inform criteria of acceptable policymaking by the courts, because these principles are vital to the preservation of the constitutional order.[151]

III. JUDICIAL POLICYMAKING WITHIN THE THREE-BRANCH SYSTEM

A. Ordering Principles and the Constitutional Super-Structure

In a complex system, court-constructed standards, tests, principles, culture, and politics play a significant role in how interpretation is conducted and the resultant policy that emerges in the form of opinions.[152] Opinions, as expression of public policy (e.g., gay marriage,[153] corporate personhood,[154] free speech,[155] and religious freedom[156]), are built upon the structural principles that inform the constitutional order. The constitutional system is a product of the three principal agents, Executive, Legislative, and Judicial Branches, and their interaction. Subsequently, each influences the others' perceptions, interests, and conduct within the system.[157] The Judiciary functions within a system that "is not only 'complex' in a descriptive sense but a

[146] Spann, *supra* note 141, at 727–28.

[147] First Nat'l Bank v. Bellotti, 435 U.S. 765, 771 (1978).

[148] *See* Spann, *supra* note 141, at 710.

[149] *See id*. at 715.

[150] Dahl, *supra* note 87, at 565.

[151] *See* Epstein et al., *supra* note 64, at 592.

[152] *See, e.g*., United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (holding that the fact of respondent's forcible abduction by U.S. government agents did not prohibit being put on trial in federal court for violations of U.S. criminal laws). *See also* Ker v. Illinois, 119 U.S. 436, 440 (1886) (finding that a fugitive kidnapped from abroad could not claim any violation of the U.S. Constitution, laws, or treaties).

[153] *See, e.g*., *Obergefell*, 135 S.Ct. at 2584.

[154] *See, e.g*., Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

[155] *See, e.g*., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[156] *See, e.g*., Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010).

[157] *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 9–10 (2002).

'complex adaptive system' . . . defined . . . as 'a collection of semi-autonomous agents with the freedom to act in unpredictable ways and whose interactions over time and space generate system-wide patterns.'"[158] The present constitutional order is the product of complex, integrative conduct that connects the individual agents.[159] The degree of connectivity is based upon the nature and intensity of interaction among the agents based upon overarching ordering principles that guide relations and conduct.[160] Each Branch "learns" from interaction because the degree of sophistication and complexity that supports the constitutional order.[161]

As such, the Judiciary wove CAB and SOP into its jurisprudence and into the structure of constitutional order early on and throughout its history.[162] For example, in McCulloch v. Maryland, the Court expounds upon constitutional meaning using the text and structure of the Constitution while looking beyond the text to clarify more than just the power of Congress to establish a bank and Maryland's inability to tax it.[163] The Court relies on CAB and SOP to find in favor of the federal government and to pursue a pro-federal power agenda, which is a policy that emanates from the bench during Chief Justice Marshall's tenure.[164] The Court's "opinion read the words 'necessary and proper' to mean not required and authorized but only reasonable and relevant, i.e., necessary = reasonable, proper = relevant: a more potent formula than $E=mc^2$."[165] Examples of modern iterations of the Court's policy of bolstering the constitutional order via CAB and SOP include INS v. Chadha,[166] Bowsher v. Synar,[167] and Mistretta v. United States.[168]

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[158] Lehmann, *supra* note 67, at 504.

[159] *Id*.

[160] *Id*.

[161] *See, e.g*., Aziz Z. Huq, *Twelve Steps to Restore Checks and Balances in Democracy & Justice*, *in* COLLECTED WRITINGS 84 (Brennan Ctr. for Just., 2008).

[162] *See, e.g*., Gibbons v. Ogden, 22 U.S 1 (1824); McCulloch v. Maryland, 17 U.S. 316 (1819); *Marbury*, 5 U.S. at 137; *see also* Spann, *supra* note 141, at 719. *See generally* Ashcroft v. ACLU, 542 U.S. 656 (2004) (invalidating the Child Online Protection Act on First Amendment grounds); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (protecting nude dancing under the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (ruling flag burning is protected speech under the First Amendment); Washington v. Davis, 426 U.S. 229, 238–48 (1976) (holding the Equal Protection Clause of the Fourteenth Amendment permits racially disparate impact not directly caused by intentional discrimination); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding constitutionality of capital punishment); Keyes v. Sch. Dist., 413 U.S. 189, 208–09 (1973) (reaffirming prohibition on use of race conscious remedies to eliminate de facto segregation); Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans); Minor v. Happersett, 88 U.S. 162 (1874) (upholding denial of women's right to vote); Scott v. Sanford, 60 U.S. 393 (1856) (reaffirming the constitutionality of slavery); Johnson v. M'Intosh, 21 U.S. 543 (1823) (divesting indigenous Americans of titles to land).

[163] *See* McCulloch, 17 U.S. at 316.

[164] *Id*.

[165] Kurland, *supra* note 27, at 184.

166 Immigr. & Natrualization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (striking down the legislative veto mechanism as a violation of separation of powers).

Though this article establishes that the Judiciary holds policymaking power, it has yet to ask if courts should embrace and exercise that power. The Court has, perhaps unsuccessfully, tried to answer the question:

A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.[169]

In constitutional interpretation, the Judiciary may find itself pondering the fitness of a particular executive order or piece of legislation, and whether or not and/or how to appraise the validity and desirability of said legal pronouncement:

> Policy must inevitably be considered by the court where no other compelling bases of decisions are indicated. Just as laymen, when confronted by a novel problem will, and, indeed, must consider the matter in relation to what 'ought' to be, so judges, unless bound by precedent or subject to clear legislative direction, must take into account the "rightness" of the decision in terms of the social, political or economic ends sought to be advanced. Only to the extent that some external restriction which the judge deems himself bound to recognize exists is his freedom in this particular curtailed.[170]

This formulation provides little in the form of concrete limitations, because a judge is able to exercise a high level of freedom to determine what is constraining, and, thus, engage in policymaking regarding interpretation of what is desirable.[171] Viewing the Judiciary as part of a larger system in which it is countered, balanced, and checked by the Executive and Legislative Branches helps situate the content and character of the courts' power to manipulate CAB and SOP.[172] In this way, systems analysis enhances the aptitude of one "to expand . . . understanding of [the constitutional system's] behavior and properties."[173] Court opinions are interpretations that seek to

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[167] Bowsher v. Synar, 462 U.S. 714, 732–36 (1986) (striking down the Balanced Budget and Emergency Deficit Control Act as an unconstitutional usurpation of executive power by Congress).

[168] Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding the federal sentencing guidelines against several separation of powers challenges).

[169] United States v. Se. Underwriters Ass'n, 322 U.S. 533, 594 (1944).

[170] Nutting, *supra* note 20, at 66.

[171] *See, e.g.*, *Se. Underwriters Ass'n*, 322 U.S. at 533; United States v. Hutcheson, 312 U.S. 219, 235–37 (1941); Phelps-Dodge Corp. v. Nat'l Labor Relations Bd., 313 U.S. 177 (1941); United States v. Local 807, 315 U.S. 521 (1942); Nye v. United States, 313 U.S. 33 (1941).

[172] *See* J. B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885, 904 (2008) ("A system may be stable and predictable over some relevant time frame and scale, but it is never entirely static, and small changes in one condition can lead over time to large changes in another condition.").

[173] *Id.* at 888.

provide answers that are "part of a much larger network or system of questions and answers and further questions instead of being merely discrete self-contained units of information."[174] As mentioned, behavior within any system does not take place in a vacuum, and in the case of constitutional interpretation, systemic factors, like CAB and SOP, arise from the interaction of the individual parts.[175]

For the Judiciary and from a systems perspective, policy not only reflects the values, norms, content and character of the interpreter, but also more importantly reflects the political and legal super-structure that informs policymaking.[176] "The behavior of the system as a whole can never be understood by mechanistically adding together its component parts . . . the economy and society . . . are more than the sum of the individuals who inhabit it."[177] This is especially true when considering the Judiciary's function and the function of its opinions within the system.[178] In *Warth v. Seldin*, the Court states, "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. In both dimensions, it is founded in concern about the proper—and properly limited—role of the courts in a democratic society."[179] By considering the function of the Judiciary within a complex system, we see that it serves the overarching needs and values of the constitutional order as a whole.[180] Thus, by identifying systemic factors and actors, one is better able to study the Constitution and its impact on law and society. In turn, this understanding impacts the form and substance of constitutional interpretation and identifies overarching pat-

[174] DAVID FOSTER WALLACE, OBLIVION: STORIES 131 (2004).

[175] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 448 (1998) (finding the Line Item Veto Act of 1996 unconstitutionally delegated power to the Executive to unilaterally amend or repeal parts of statutes passed by Congress); Plaut v. Spendthrift Farm, 514 U.S. 211, 240 (1995) (finding Congress may not retroactively require the federal courts to reopen final judgments, because it violates separation of powers); Morrison v. Olson, 487 U.S. 654, 696–97 (1988) (upholding the independent counsel statute against separation of powers challenges); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (finding an administrative agency may, in some cases, exert jurisdiction over state law counterclaims).

[176] Spann, *supra* note 145, at 746–47 ("[The] normative values and political preferences are constitutionalized through Supreme Court opinions that purport to demonstrate how the Court's outcomes flow logically from the language, structure, and original intent of the Constitution.").

[177] PAUL ORMEROD, BUTTERLY ECONOMICS: A NEW GENERAL THEORY OF SOCIAL & ECONOMIC BEHAVIOR X (2000).

[178] Leflar, *supra* note 113, at 736–37.

[179] Warth v. Seldin, 422 U.S. 490, 498 (1975) (discussing the issue of standing and the proper role of the courts in hearing cases and controversies).

[180] *See id.* at 517–18 (discussing the "threshold determinants of the propriety of judicial intervention").

terns that emerge when considering the systemic nature of the Constitution.[181]

B. The Impact of the Executive & Legislature on the Judiciary

A systems view also enables one to better assess the many factors that inform constitutional interpretation and how a judicial opinion will be impacted by and impact the systemic realities of the polity. From this perspective, the

> rule of checks and balances inherent in the system of separation of powers provides Justices (and all other governmental actors) with separate actions of the branches of government but from the interaction among them. Thus, it follows that for any set of actors to make authoritative policy be they Justices, legislators, or executives—they must take into account this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices.[182]

What is more, in

> [in] the social world . . . causation is complex. Outcomes are determined not by single causes but by multiple causes, and the causes may, and usually do, interact, in a non-additive fashion . . . the combined effect is not necessarily the sum of the separate effects. . . . complex causes can [thus] easily generate chaotic outcomes.[183]

In this way, judicial interpretation is comprised of manifold layers of networked systems of knowledge and understanding that inform policy formulation and implementation based on the courts' interpretation of the Constitution.

In *Allen v. Wright*, for instance, the plaintiffs, parents of African-American children in seven states where public schools had recently been

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[181] *See, e.g.*, THE FEDERALIST No. 51 (James Madison) ("In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own. . . .It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.").

[182] Epstein et al., *supra* note 64, at 593–94.

[183] BYRNE, *supra* note 35, at 20 (1998); *see also* Fritjof Capra, *Complexity and Life*, EMERGENCE 15, 21–23 (June 1, 2002) (discussing "chaos theory").

desegregated, brought a class action suit against the Internal Revenue Service ("IRS") contending that its guidelines and procedures for determining whether private schools were racially discriminatory, and subsequent denial of tax-exempt status to such schools, were insufficient.[184] Plaintiffs contended that the IRS standards used to determine discrimination were not accurately identifying private school discrimination, and that white parents were able to send their children to private schools and deduct charitable contributions to the institution, thereby perpetuating segregated schools.[185] The Court determined that citizens do not have standing to sue a federal agency based only on the adverse effects that the agency's determinations might have on third parties. The Court stated that,

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. . . . 'Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress, acting through its committees and the 'power of the purse;' it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.'[186]

In *Allen*, the plaintiff's sought to have the courts appreciate and act upon the socially discriminatory effects of IRS tax policy enabling what Justice Stevens alluded to as government policy subsidizing white-flight.[187] He wrote, "In final analysis, the wrong respondents allege that the Government has committed is to subsidize the exodus of white children from schools that would otherwise be racially integrated."[188] The Court chose systemic principles embodied in CAB and SOP over competing, social policy-motivated ones to decide the case at hand.[189]

Within the system, the Judiciary will, generally speaking, uphold CAB and SOP over competing norms, values, and ordering principles.[190] While this may not be something that is embraced explicitly by the Judiciary, it is

[184] Allen v. Wright, 468 U.S. 737 (1984).
[185] *Id*. at 783–84 (Stevens J., dissenting).
[186] *Id*. at 759–60.
[187] *See id*. at 784 (Stevens J., dissenting).
[188] *Id*.
[189] *See Allen*, 468 U.S. at 761 ("We could not recognize respondents' standing in this case without running afoul of that structural principle.").
[190] *See id*. at 760 (1984) (citing O'Shea v. Littleton, 414 U.S. 488 (1974); Rizzo v. Goode, 423 U.S. 362 (1976)) (quoting Los Angeles v. Lyons, 461 U.S. 95 (1983)).

present in the overarching constitutional order.[191] For example,

> When the Constitution fixes the boundaries of the three departments in terms of their basic functions, it inevitably locates in the judiciary the authority to assert itself as the guardian of the principle of the separation of powers. . . . Its judgment affects the balance between the executive and legislative branches and generally defines the conditions under which they must operate in relation to the Constitution as viewed by the court.[192]

Thus, opinions become "discrete, chronological series of moments" that establish a corpus of truth based on knowledge that the courts apply and obtain through the interpretive process.[193] In addition, the power of judicial review functions as a form of policymaking even if that power is specifically premised on cabining the power aspirations of the competing branches.[194] The "power of judicial review specifically to cabin each branch within its constitutional limits, lest each arrogate to itself more than its entitlement" is a form of policy that explicitly encapsulates the Judiciary's systemic policy function to preserve the system's integrity via CAB and SOP.[195] Thus, preserving the integrity of the overarching constitutional system is a cardinal role that the courts assume in constitutional interpretation:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power even to accomplish desirable objectives must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable.[196]

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[191] *See* THE FEDERALIST No. 78 (Alexander Hamilton). ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."); *see also* Alan Dershowitz, *Courts Check and Balance Trump on Immigration*, JERUSALEM POST (Feb. 9, 2017, 10:10 PM), http://www.jpost.com/Opinion/Courts-check-and-balance-Trump-on-immigration-481106.

[192] Santos, *supra* note 117, at 568.

[193] WALLACE, *supra* note 174, at 151.

[194] *See* Malcolm T. Dungan, *The Supreme Court as a Court of Law*, 6 J. PUB. L. 363 (1957).

[195] Kurland, *supra* note 27, at 189.

[196] *Chadha*, 462 U.S. at 951.

This system constitutes a bounded, complex, and rule-based space for the ordering of national political and legal affairs.[197]

Ultimately, a complex systems approach to judicial interpretation inherently involves the interaction of the Judiciary with the Executive and Legislative Branches, as well as State governments and courts.[198] For example, "It is within Congress's power to overturn the interpretations the Court gives to statutory law but, according to the Supreme Court, it is not—at least not by a simple majority—within Congress's power to overturn the Court's constitutional decisions; Congress must propose a constitutional amendment."[199] In *Dickerson v. United States* the Court declared that a constitutional decision of the Court cannot be overruled by an act of Congress.[200] The Court enunciated CAB and SOP while clarifying its role in the constitutional order finding that it

> has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. However, the power to judicially create and enforce non-constitutional 'rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.' Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution. But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.[201]

As such, within the complex constitutional system, the three Branches interact and coevolve.[202] Justice Holmes' observations of the law in the 19th century readily apply in the 21st century. He writes,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[203]

In general, a system is composed of regularly interacting parts that give rise to systemic activities. "The [Judiciary] is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of

[197] *See id*. at 942–44.
[198] Dahl, *supra* note 87, at 580–81.
[199] Epstein et al., *supra* note 64, at 596.
[200] Dickerson v. United States, 530 U.S. 428, 444 (2000).
[201] *Id*. at 437.
[202] Epstein et al., *supra* note 64, at 592.
[203] HOLMES, *supra* note 23, at 1.

the Constitution,"[204] and demonstrates that a set of concepts, whether empirical, metaphysical, or philosophical, works in tandem within an interdependent set of organizational relationships.[205]

As such, four general elements characterize the role of the Judiciary in the larger political, economic, and sociocultural system within which the constitutional order functions:

> First, there are the propositions or principles allegedly derived from constitutional or statutory language; second, judicial precedents which, these days, are more likely to refer to lengthy obiter dicta rather than holdings in previous cases; third, the practicalities of the situation which license or inhibit the scope of judicial adventurism; and finally, and not least, the personal predilections of each of the judges, for it must be understood that, in Hamiltonian terms, the judiciary now exerts WILL as well as JUDGMENT if not yet FORCE. Each of the four elements, separately or in combination, may be subsumed under the rubric of public policy.[206]

Constitutional interpretation is comprised of complex, interactive agents that provide the Judiciary with the potential to adapt and learn from eventuation, because the constitutional order is not a collection of agents and components, but rather a system.[207] The difference between a "collection" and a "system" (whose parts are comprised of multiple sub-systems), as explained by Bertalanffy, is "that in a collection the parts remain individually unchanged whether they are isolated or together . . . whereas in a system the parts necessarily become changed by their mutual association; hence, their whole becomes more than just the sum of the parts."[208] Focusing on fixed structures or aspects of constitutional interpretation, though indispensable to explaining and understanding constitutional law, is too narrow, because it posits a closed system with various laws that apply across the board.[209] A systems analysis approach is better suited to explaining and understanding the judicial power, because it involves "a way of thinking having the proportions of a world view . . . as opposed to singular principles or parts of a structure."[210]

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[204] Dahl, *supra* note 87, at 580.

[205] *See generally* Ervin Laszlo, *A Holistic Vision for Our Time Advances in Systems Theory, Complexity, and the Human Sciences*, *in* THE SYSTEMS OF THE WORLD (Hampton Press 1996); *see also* Ervin Laszlo, *The Natural Philosophy of the New Developments in the Sciences*, *in* THE SYSTEMS OF THE WORLD (George Braziller ed., 1972).

[206] Kurland, *supra* note 27, at 187–88.

[207] *See* Charles McClelland, *General Systems Theory in International Relations*, *in* INTERNATIONAL SECURITY SYSTEMS: CONCEPTS & MODELS OF WORLD ORDER 21–22 (Richard B. Gray ed., 1969).

[208] LUDWIG VON BERTALANFFY, A SYSTEMS VIEW OF MAN ix (Westview Press 1981).

[209] *See* McClelland, *supra* note 207, at 22.

[210] *See id*. at 21.

While constitutional interpretation may seem to take place in a closed system,[211] it is a complex and open system that is in constant flux and comprised of various constituent ideational and material components.[212] Constitutional interpretation founded on CAB and SOP is a complex attribute of a system that networks the Judiciary into the larger policymaking apparatuses of the constitutional order.[213] Fundamentally, processes "of complex organization have to be understood in evolutionary terms: they cannot be atomistically reduced to, or deduced from, their components. The whole is bigger than the sum of the parts, a whole which becomes ever more diversified, qualitatively evolving towards greater complexity."[214]

CONCLUSION

This article highlights the importance of viewing the judicial power from a systems perspective, which directly informs the nature of the judicial process and the structure wherein the administration of justice takes place. In sum, system and structure matter when seeking to explain and understand judicial power, because both have an indelible effect on the nature of the judicial process and on the outcomes of the interpretive enterprise. From a complex systems perspective, judicial power reflects the political and philosophical principle that "there can be no government of laws without a balance, and that there can be no balance without three orders [(Executive, Legislative, and Judicial)]: and that even three orders can never balance each other, unless each in its department is independent and absolute."[215] Thus, the Judiciary plays a key role in the administration of justice as envi-

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[211] *See, e.g.,* Kenneth Waltz, Theory of International Politics (1979).

[212] *See, e.g.*, Leflar, *supra* note 113, at 740 ("There is a traditional distinction, repeated by lawyers and laymen alike, between 'legal reasoning' and 'political reasoning.' The former is somehow supposed to be purer than the latter. Whether that is true depends upon the sense in which the word 'political' is used. In *Palsgraf v. Long Island R.R.*, Judge Andrews, in his famous dissent, said that the legal concept of proximate cause is one of 'practical politics,' by which he meant the realistic reconciliation of claims to justice in our society. He was not talking about backroom venality or the buying of votes, but he did include the arguments, pro and con, that lobbyists might employ in an effort to persuade legislators to vote their way on a proposed law. The same lobbyist arguments have their place in the briefs filed by counsel for the parties and by *amici curiae*, and in their oral arguments, when the new law is being urged upon an appellate court. They have their place there because they are the stuff that convinces the judges, or fails to convince them, in the same manner that lobbyists' arguments influence legislators. If ensuing judicial opinions are to state real reasons for results reached by judicial lawmakers, they must include the reasons of 'practical politics' that induced conviction, or else the opinions will be incomplete and false.").

[213] *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 115 (1984).

[214] Ken Cole, *Globalization: Understanding Complexity*, Dev. Stud. 323, 352 (2003).

[215] Chinard, *supra* note 77, at 45; *see, e.g.*, *Youngstown Sheet & Tube Co.*, 343 U.S. at 579; Humphreys' Executor v. United States, 295 U.S. 602 (1935) (upholding the constitutionality of independent agencies).

sioned by the structural principles embedded in the Constitution, such as the separation of powers and checks and balances. In *Osborn v. Bank of the United States*, the Court declared that the judiciary "has no will."[216] It continued,

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.[217]

By employing a systems analysis, we can observe that this is not exactly the case, because the nature of the judicial process and the overarching constitutional order are both impacted by the norms and values encapsulated in CAB and SOP.[218] For instance, the courts are likely to exert leadership in national policymaking when a dominant coalition is weak or is unstable with respect to key policies. Likewise, the courts may participate in national policymaking within the narrow limits set by the basic policy goals of the dominant coalition, or the may be most effective when they set policy for officials, agencies, state governments, or regions.[219]

Systemically, the constitutional order's prerogative is "to preserve the principle of checks and balances without which no form of government can attain any permanency."[220] CAB and SOP thus play a fundamental role in judicial interpretation, because each signifies or reflects "a body of beliefs that express the fundamental, largely unconscious or assumed political values of a society."[221] The nature of the judicial process leads to the production of knowledge and understanding that legitimates, maintains, enhances, and preserves the integrity of the overarching constitutional order.[222] Systemic analysis is, therefore, germane to constitutional theory building, because, as Gaetano Mosca notes, "a person thinks, judges and believes the way a society in which he lives thinks, judges and believes."[223]

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[216] Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824).

[217] *Id*.

[218] *Id*.

[219] Combs, *supra* note 86, at 198–99.

[220] Chinard, *supra* note 77, at 45.

[221] John Calvert, *The Mythic Foundations of Radical Islam*, 48 ORBIS 29, 31 (2004).

[222] *See* CARDOZO, *supra* note 5, at 179.

[223] GAETANO MOSCA, THE RULING CLASS 26 (Hannah D. Kahn trans., 1939); McDougal & Lasswell, *supra* note 25, at 386 ("[T]he 'public order' decisions of a community may be described as those, emerging in continuous flow from the constitutive process, which shape and maintain the protected features of the community's various value processes. These are the decisions which determine how resources are allocated and developed, and wealth produced and distributed; how human rights are promoted and protected or deprived; how enlightenment is encouraged or retarded; how health is fostered, or neglected; how rectitude and civil responsibility are matured; and so on through the whole gamut of

demanded values.").