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Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy

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ESSAY

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The classical rationale for judicial review of the constitutionality of legislative and executive acts is based on a deterministic assumption about the nature of constitutional legal rules. By the early twentieth century, however, American legal realists persuasively questioned the determinacy of law in general and posited that indeterminate cases were decided by judicial intuitions of fairness. Social science research has discovered that self-identified liberals and conservatives predictably place different relative values on different shared moral intuitions. At the same time, neurological research suggests that humans and primates implement "decisions" before the cognitive parts of the brain are even aware that the subject has made a decision—potentially negating the role of cognitive reason in intuitive human decision making.

Combining these three behavioral insights—that of the realist, the psychologist, and the neurobiologist—seems to undercut the classical justification for judicial review by unelected judges. If intuitive ideology rather than reasoned application of rules controls much judicial decision making, then the Supreme Court has no more authority to issue binding interpretations of the Constitution than those branches of government whose ideological leanings are more directly subject to political controls. Nevertheless, the Supreme Court's structural role as a potential restraint on unconstitutional government action and as the ultimate arbiter of constitutional disputes, together with institutional and political restraints on judicial activism, leaves an essential practical role for judicial review in the U.S. constitutional system.

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I. INTRODUCTION

"It is emphatically the province . . . of the [courts] to say what the law is."[1] So declared Chief Justice Marshall over two hundred years ago in *Marbury v. Madison*, in an affirmative and enduring statement of the structural finality of judicial review in resolving questions of constitutional interpretation in the United States' constitutional democracy. Yet Marshall's use of the definite article—"the law"—reflects a certain deterministic assumption about the nature of law that has not withstood the test of time. While nineteenth-century scholars and jurists may have largely shared this deterministic vision of the law, either as a result of natural law assumptions underlying the common law processes or as a matter of the legal formalism that prevailed by the late nineteenth century, the legal realists of the turn of the twentieth century provided a key insight into the nature of the judicial process: law, it turns out, was not determinate at all. Impeccable legal reasoning could be used to support more than one outcome in a large proportion of the cases decided by the appellate courts. According to the realists, rather than declaring what the law is, courts declare "law,"[2] making policy choices in the process. These policy choices are informed more by each individual jurist's background and sense of fairness than by formal reasoning from legal rules.

While legal realism may never have caught on with academics and philosophers as a coherent theory of jurisprudence, its key insights—that law is indeterminate in many cases and that judges make rulings in those cases based on a visceral sense of fairness and justice as applied to the facts of the case—retain wide acceptance among practicing lawyers and legal academics to this day.[3] The legal

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

2. I use quotation marks around the word "law" here because even the concept of law can, at some level, be indeterminate. Law can mean formal reasoning from rules announced in judicial precedents and statutes, or it can be more broadly defined as the universe of socially accepted sources for discovering principles for deciding cases. *See generally* Liam Murphy, *Better To See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008); Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119 (2002) (reviewing JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001)).

3. *See, e.g.*, Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63 (2008) (advancing a unique method of analytical legal scholarship largely based on the tenets of legal realism); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997) (recognizing the influence of legal realism on legal academia and culture and advocating for greater

realists were largely concerned with the practical, lawyerly problem of predicting how a court would rule when presented with a new fact situation. Yet this approach invites a behavioralist inquiry into whether the resolution of indeterminate legal problems might nevertheless be predictable as a matter of human behavior (judges being human after all). Recent psychological research has posited that a sense of fairness and justice may be innate and evolved in human nature—that certain moral precepts are shared across religions, national boundaries, cultures, and ages. The existence of an innate human sense of fairness might seem to support the long-abandoned notion of natural law as a source of legal principles and predictability. The rub is that this same research shows that while people generally recognize shared principles of fairness, different people place different relative values on some of these shared principles. In particular, these studies have shown that, across cultures, people who self-identify as liberals tend to value the moral precepts of group loyalty and respect for tradition and authority less than people who self-identify as conservatives. Because these different political identifications place different relative values on these principles, an innate sense of justice common to humans generally seems also to be indeterminate and an inadequate predictor of judicial decision making generally.

Moreover, the realists' insight that formal legal reasoning is indeterminate and that judges make policy choices and apply their subjective sense of fairness in resolving the indeterminate cases casts doubt on the fundamental theoretical basis of judicial review in the United States constitutional system. If judges do not declare the law, as Chief Justice Marshall articulated it, but rather choose law out of an indeterminate range of outcomes supportable by legitimate legal reasoning, basing their choices on idiosyncratic notions of policy and fairness, then are not judges making legislative choices that more properly belong with the legislature? If the justification for judicial review is the inherent judicial function of applying the rule of decision

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acceptance of the theory in the realm of jurisprudential philosophy); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 62 (2009) (outlining a "dynamic new realism" and recognizing "that law, politics, and society, not to mention markets and governments, cannot be reduced to one another because they interact simultaneously"); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009) (describing the pervasive nature of realism in jurisprudential analysis and describing the theory as a mainstream, nonradical philosophy); Edmund Ursin, *How* Great *Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267 (2009) (analyzing the self-described decision-making techniques of three preeminent judges and routinely relying on realist theories to support the adequacy of their various methodologies).

required by a superior legal document (the United States Constitution, with its Supremacy Clause) as against an inferior legal document (congressional legislation), does not this theoretical justification fall apart in those cases where accepted constitutional legal reasoning will support more than one outcome, and the judicial choice of outcomes is based on something other than ineluctable legal reasoning? And if this judicial choice of outcomes in those indeterminate cases is based on differing value systems that correlate well with different political alignments, the inherently political nature of this choice of outcomes would also seem to argue strongly that these choices be assigned to the more politically responsive branches of government, and not to unelected judges.

Yet these political arguments against judicial review would ignore the judiciary's (and particularly the United States Supreme Court's) structural role as the final arbiter of constitutional limits on government action. The Constitution, together with accepted modes of constitutional legal reasoning, may fail to provide a determinate answer, and the answer a particular judge or Justice gives in those indeterminate cases may correlate well with her own political proclivities (which may be contrary to those of a duly elected legislative majority). Nevertheless, a constitutional form of government requires some body with final say over the interpretation of the Constitution. The alternative—leaving the legislature as the final judge of its own powers—risks rendering constitutional limits on government unenforceable. While the Framers may not have been legal realists, they anticipated judicial review and understood the value of leaving the final interpretation of the Constitution to judges with life tenure, who would not have to run for reelection, thus removing immediate political advantages from consideration in resolving questions of constitutional interpretation. In doing so, they served a deeply felt social need for neutrality and finality in resolving the inevitable political disputes that would arise from conflicts between sovereign states in a federal system, competing branches of government at the federal level, and an empowered citizenry.

In Part II, this Essay explores the competing jurisprudential theories of formalism and realism, the problems posed by the frequent indeterminacy of law, and the synthesis represented by legal process theory. Part III of this Essay explores possible nonformalist determinants of the judicial decision-making process, specifically the role of moral intuition and the freedom of will of judges. Part IV of this Essay then seeks to reconcile the institution of constitutional

judicial review with a moral intuitionist understanding of legal realism, based on the structural role of the Supreme Court as the ultimate check and final arbiter of those disputes not entrusted to the political branches. Political acceptance of the Supreme Court's resolution of the 2000 election in its *Bush v. Gore* decision exemplifies political acceptance of this structural role of the Court even when it acts without a firm formalist basis.[4] Finally, Part V of this Essay draws some conclusions about the relationship between a moral intuitionist's understanding of legal realism, accusations of "judicial activism," and the judicial selection process. The Essay then concludes with the suggestion that the Supreme Court's ultimate resolution of the same-sex marriage controversy may provide an appropriate test of the relative strengths of legal formalism and moral intuitionism as competing descriptions of the Supreme Court's decision-making process.

II. FORMALISM, REALISM, AND THE PROBLEM OF INDETERMINACY

The idealized popular conception of law is a formalist one. In this view, law is a set of rules that define enforceable rights and impermissible conduct and establish consequences for the breach of rights and standards of conduct. Application of the law to a given case is an exercise in pure logic: the law is the major premise of a logical syllogism, while the facts of a given case fit (or do not fit) the law's syllogistic rule. Thus, in a negligence case, the law states a major premise: a party who suffers legal damage proximately caused by another party who has failed to exercise reasonable care is entitled to recover his damages. The facts provide the minor premise: Jim Jones ran a red light (breaching his duty of reasonable care) and ran into Sam Smith, breaking his leg (proximately causing injury to Smith). The legal conclusion follows ineluctably: Jones must pay damages to Smith.

Under this view of the law, law and logic dictate one correct, determinate answer to every legal problem. A judge's sympathies, prejudices, policy preferences, and ideology play no part in determining the result in any case: a judge must reach the conclusion demanded by law's "rules" even if the judge considers the result unfair. This idealized conception of the nature of law is embodied in the aphorism that the United States is a "[nation] of laws and not of

4. *See* 531 U.S. 98 (2000).

men"[5]—that is, our nation is governed by a set of legal rules, not by the arbitrary whim of individual decision makers.

These determinist assumptions about the nature of law have deep roots in American jurisprudence. Blackstone's *Commentaries on the Law of England*, which would have been an essential part of the education of those of the Framers with legal training, did not admit that application of law could result in more than one correct result. In expounding on the imperative that judges adhere to precedent, Blackstone admits of an exception where the prior precedent is incorrect in terms that make clear that law can provide only one "correct" result:

> [T]his rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*. . . .[6]

The deterministic assumption underlying this passage is clear: if law permitted more than one correct result, then the overruling of precedent would constitute a change in the law (a change from one possible correct result to another possible correct result). By rejecting the notion that law can change, Blackstone's description of the common law endorses determinacy. The law always provided one correct result; it just took a later jurist to recognize that an earlier jurist's resolution was "incorrect." Blackstone also recounts a formalist formulation of the concept of law: "lawyers . . . tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law."[7]

To be sure, eighteenth-century determinism had natural law underpinnings as much as it was based on legal formalism. Blackstone's commentaries explicitly rely on a theistic natural law as "foundational" law, which common law and legislative acts may not countermand.[8] Much has been written about the American Founders'

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5. MASS. CONST. pt. 1, art. XXX.

6. 1 WILLIAM BLACKSTONE, COMMENTARIES *69-70 (1800) (footnote omitted).

7. *Id.* Note that it is not clear whether Blackstone himself accepted this characterization.

8. According to Blackstone:

> This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this;

reliance on natural law concepts, particularly in the Declaration of Independence, which explicitly relies on natural law to justify a rejection of the colonies' legal obligations to Britain.[9] Chief Justice John Marshall's constitutional jurisprudence has likewise been described as "conclusions from deterministic natural law principles embedded in either the text or spirit of the constitutional document when it was framed."[10]

Natural law is premised on the idea that certain notions of appropriate conduct and interrelationships are universally shared by human beings. These notions are seen as appropriate foundational principles for legal rules governing punishment and compensation. Natural law precepts are often perceived as God-given; thus Blackstone considers the Ten Commandments to be revealed divine law. But natural law need not be theistic; many natural law thinkers perceive natural law to be intrinsic to the human condition and universally shared even without divine inspiration.[11]

> and such of them as are valid derive all their force, and all their authority . . . from this original.
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> . . . [I]t is still necessary to have recourse to reason: whose office it is to discover . . . what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. . . .
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> . . . .
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> Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.

BLACKSTONE, *supra* note 6, at *41-42 (footnote omitted).

9. In addition to the recitation that all men "are endowed by their Creator with certain unalienable rights," the Declaration of Independence refers to the colonists' right to assume "the separate and equal station to which the laws of nature and of nature's God entitle them." THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776). For analysis of the Founders' reliance on natural law principles, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 77-79, 185-88 (1967); MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 142-84 (1978); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991); *The Role of Natural Law in the American Revolution*, 108 HARV. L. REV. 1202 (1995) (reviewing JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW (1993)).

10. Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1225 (1987).

11. *E.g.*, STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY 19 (1991) ("The basic requirements of an organized social life are the basic principles of the natural law."), *quoted in* Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 657 (1997); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171, 172 (2008) ("[P]eople possess [rights] simply by virtue of their humanity . . . which, as a matter of justice, others are bound to respect and governments are bound . . . to protect.").

By the late nineteenth century, this formalist, natural law concept of legal decision making was the dominant mode of legal thought in the United States. Formalism was thought to cabin judicial discretion and eliminate the influence of politics, ideology, and emotion from the law. Rather, pure detached logic based on preexisting rules would provide a neutral answer for every legal question. Christopher Columbus Langdell incorporated this formalism into legal education, developing a curriculum for Harvard Law School that substituted the casebooks and the Socratic method for lectures and treatises such as Blackstone's Commentaries; students were expected to discover the preexisting principles of common law by reading the cases and engaging in Socratic dialogue. The formalists viewed law as a branch of scientific inquiry; pure reason based on scientific evidence would lead to one, and only one, correct result. Although based on pure reason (and not divine revelation), legal formalism continued to incorporate a form of natural law: legal principles were thought to preexist individual factual applications. Judges did not declare the law; rather, they discovered the law. Pragmatism and instrumentalism had no place in formalist legal thought: legal principles, logically applied, necessarily prevailed no matter what the consequences.

Formalists sought to organize legal rules by establishing comprehensive categories of cases. The Supreme Court's antieconomic regulation decision in *Lochner v. New York*[12] can be seen as the high-water mark of the influence of legal formalism. The Court essentially declared that New York's attempt to regulate the hours and working conditions in the baking trade did not fall into the "police power" category, but rather violated substantive rights to "liberty" and "freedom of contract."[13] The Court rejected the New York Legislature's health-based rationale for the regulation, reasoning that the baker's trade was "in and of itself, ... not an unhealthy one" leaving the adjustment of relative economic power between employer and employee as the only plausible purpose of the legislation—a purpose, in the view of the majority, that was not within the preexisting logical category of legitimate state police power. The determinative factor—that the baker's trade was not "intrinsically unhealthy"—was presumably determined based on pure rational deduction from preexisting principles of law.

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12. 198 U.S. 45 (1905).

13. For a discussion of *Lochner* as a representation of formalist, categorical reasoning, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 29-30 (1992).

By the early part of the twentieth century, influential U.S. legal thinkers began to question the premises of legal formalism, thus planting the seeds of legal realism.[14] Justice Oliver Wendell Holmes famously observed in his 1881 book, *The Common Law*, "The life of the law has not been logic: it has been experience."[15] This contradicted formalism's premise that legal decision making was an exercise in pure rational thought. And, in what was to become the legal realists' critical insight, Justice Holmes observed that common law reasoning "decides the case first and determines the principle afterwards."[16]

Justice Holmes ultimately recognized that common law rules reflected value-laden policy choices. He gave the example of common law decisions that allowed no recovery for competitive business injury, while providing injunctive relief against labor boycotts causing business injury.[17] In his later writings, he rejected the determinism of classical legal formalism and acknowledged the legislative character of judicial decision making: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[18] Holmes likewise rejected the notion of determinacy underlying classical legal formalism, and criticized the idea that legal principles "can be worked out like mathematics from some general axioms of conduct."[19]

Justice Holmes carried his evolving skepticism with him while a Justice of the Supreme Court. Recognition that judicial decision making most often reflected political value judgments more appropriately left to the legislature, Justice Holmes was more reluctant than his brethren to disturb legislative judgments. He dissented in

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14. As legal historian Morton Horwitz has pointed out, Holmes was by no means the first legal thinker to question the objectivity and neutrality of natural law-based legal formalism. Indeed, the codification movement of the early nineteenth century—vigorously opposed by the organized bar—was largely a reaction to the popular perception that common law judges indeed "made" the law and that popularly elected legislatures were more appropriate sources of legal rules than judge-made law. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 258 (1977).

15. O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

16. O.W. Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870), *reprinted in* 44 HARV. L. REV. 725 (1931).

17. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), *reprinted in* COLLECTED LEGAL PAPERS 117 (1920).

18. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897), *reprinted in* COLLECTED LEGAL PAPERS, *supra* note 17, at 181. For an analysis of the progression of Justice Holmes's thinking about the nature of law and the underlying policy judgments, see Horwitz, *supra* note 13, at 109-43.

19. Holmes, *supra* note 18, at 465.

Lochner, criticizing the majority for seeking to import a political policy choice into constitutional law, famously arguing that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[20]

Rejecting the absolutism of formalism, Justice Holmes also adopted a more explicitly open-textured, evolutionary approach to constitutional judicial review. In *Missouri v. Holland*, he opined:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.... We must consider what this country has become in deciding what [the 10th] Amendment has reserved.[21]

Justice Holmes's legal writings set the groundwork for the legal realist movement of the 1920s and 1930s. Building on Justice Holmes's key (but understated) insights, the legal realists rejected the idea that law provided objective, determinate resolution to all legal disputes. Rather, the realists posited a substantial class of open, indeterminate cases—particularly those cases reaching the appellate courts—in which more than one result was supportable by accepted legal reasoning. The realists argued that judges responded with idiosyncratic notions of fundamental fairness to the appeal of the facts of individual cases, and came up with legal rationalizations for their opinions after the fact. Professor Karl Llewellyn famously compiled a list of paired, opposing rules of statutory construction, leading to the conclusion that, far from being deterministic, common law legal reasoning could be used to support either outcome in many contested issues of statutory construction.[22]

A leading realist, Judge Joseph Hutcheson frankly described the process of judicial decision making as one of judicial hunch followed by a legalistic "apologia": "[T]he judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination, [such] ratiocination appear[ing] only in the opinion."[23] Leading realist writer Jerome Frank (later a judge on the United States Court of Appeals for

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20. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

21. 252 U.S. 416, 433-34 (1920).

22. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960).

23. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

the Second Circuit) generalized from Judge Hutcheson's observation and posited the following:

> The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.[24]

Judge Benjamin Cardozo similarly confessed that judicial decision making "is not discovery, but creation."[25] To the realists, legal formalism was a pernicious myth and a fairy tale.

Rather than condemning the level of judicial discretion (and judicial policy making) implicit in this view of the judicial process as contrary to democratic governance, however, some legal realists celebrated indeterminacy as an opportunity to bring conscious policy making into the judicial process in pursuit of progressive social change. Jerome Frank argued that a realist acknowledgement of the open-ended nature of judicial decision making should allow more frank and conscious consideration of the social and economic impacts of judicial decisions, that judges should do equity in the cases before them rather than apply law.[26] Karl Llewellyn argued for a "conception of law as a means to social ends and not as an end in itself," and argued "'[l]aw' without effect approaches zero in its meaning."[27] Other realists, however, were less concerned with changing the nature of judicial decision making than with improving the lawyers' skill at predicting judicial responses to idiosyncratic factual scenarios; to them, legal realism meant a realistic approach to advising clients.[28]

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24. JEROME FRANK, LAW AND THE MODERN MIND 100 (1930) (footnote omitted).

25. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

26. *See* FRANK, *supra* note 24, at 157 (arguing judges should be arbitrators doing equity), 167 (endorsing judges who are aware that all legal rules are fictions and seek to do justice in each case).

27. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236, 1249 (1931). *See generally* AMERICAN LEGAL REALISM 167 (William W. Fisher, III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (describing realist program as "purposive adjudication").

28. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV 809, 839-40 (1935); Holmes, *supra* note 18, at 458-59. *See generally* AMERICAN LEGAL REALISM, *supra* note 27, at 166 (stating that to realists, the virtue of "real rules" is to "enable lawyers to advise their clients more [effectively]").

Legal realism never really caught on in the legal academy. This is unsurprising, perhaps, as legal realism undercuts the fundamental formalist premise of the legal academy—that law is a distinct process of reasoned thought that can be learned (and taught) and used to analyze legal problems to a distinct conclusion. As a descriptive theory of adjudication, realism suffered from unprovable assumptions and lack of rigorous social science methodology.[29] As normative legal theory, it suffered from theoretical incoherence. By denying that legal rules developed through legal theory actually determine judicial decisions (at least in close cases), it undercuts the whole relevance of normative legal theory (including any normative elements of realism). Taken at face value, legal realism reduces legal decision making to pure politics, leaving no reason to study law as a distinct discipline. To the extent that realists were concerned with predicting judicial responses, realism was of no use to judges looking for law to apply; it is no help to tell a judge that the law was merely a prediction of how she herself would rule in a given case. To the extent that the realists were suggesting (however accurately) that judicial decision making was the result of idiosyncratic predilections of individual judges (right down to the state of the judge's digestive system), legal realism was of no real use even to lawyers seeking to advise clients about likely legal outcomes—at least until the individual judge was known. Even with respect to an individual judge, legal realists did not satisfactorily explain exactly what factors were determinative in judicial decision making—whether it was enlightened judicial policy making, preexisting ideological leanings, or rank political partisanship.

Nevertheless, legal realism did influence United States legal thought in profound ways. It gave rise to the Critical Legal Theory movement, which embraced realism's indeterminacy premise and argued that judicial lawmaking was no more than an instrumentalist means by which the dominant race, class, and gender maintained its hold on power and wealth.[30]

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29. *See* Leiter, *supra* note 3, at 270-75 (introducing a modified version of legal realism that attempts to mitigate these limitations).

30. For the seminal works of the Critical Legal Studies Movement, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986). For concise analysis of the underlying theories and summaries of these works, see Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 38 (David Kairys ed., rev. ed. 1990) (1982); J.M. Finnis, *On "The Critical Legal Studies Movement,"* 30 AM. J. JURIS. 21 (1985).

Perhaps more profoundly, legal realism (as the antithesis to the prevailing natural law formalism) gave rise to a synthesis of sorts in the legal process school of positivism of H.L.A. Hart, Albert Sacks, and Herbert Wechsler. The legal process school accepted realism's posit of the partial indeterminacy of law, rejected formalism's natural law predicates in favor of a positivist definition of law as a construct of human government institutions, and sought to cabin judicial arbitrariness through its recognition of the institutional roles and limitations of lawmaking institutions (including the courts) and adherence to rules-based precedent based on neutral principles.[31] Hart emphatically rejected what he called the "rules skepticism" of the realists. His process theory thus shares with formalism the idea that legal reasoning (application of rules) is the primary driver of legitimate judicial decision making.[32]

Realism also lives on in the political science academy, where, distinct from their cousins in legal academia, the so-called attitudinalists posit that (especially at the Supreme Court level) individual judicial attitudes and policy preferences are a better predictor of judicial votes than legal reasoning.[33] Indeed, in 1994, one political science writer asserted that he was not "[aware of one] political scientist[] who would take plain meaning, intent of the framers, and precedent as good explanations of what the justices do in making decisions."[34]

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31. For the seminal works on Legal Positivism, see HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958); *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For concise analysis of these theories and their formation, see ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998); David A.J. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069 (1977).

32. As Hart explains:

> [T]hough every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points. . . .
>
> . . . [C]ourts have jurisdiction to settle [cases] by choosing between the alternatives which the statute leaves open, even if they prefer to disguise this choice as a discovery.

H.L.A. HART, THE CONCEPT OF LAW 148-49 (1961).

33. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

34. Gregory A. Caldeira, Book Review, 88 AM. POL. SCI. REV. 485, 485 (1994) (reviewing SEGAL & SPAETH, *supra* note 33).

And while legal academics may avoid the language of realism in their writings, the realist premises of indeterminacy and suspicion that judicial law "declaring" is really judicial policy making continue to pervade the assumptions of lawyers, judges (in moments of candor), and even the very academics who dismiss realism as a valid descriptive theory. It is a cliché among legal academics "that we are all realists now."[35] Certainly, litigators know that the identity of the judge has a profound effect on the odds of winning a case, and will make extraordinary efforts to get their case before an ideologically receptive panel.[36] Judge (now Justice) Sotomayor, speaking candidly before an audience of law students, said, the "court of appeals is where policy is made."[37] Judge Posner of the United States Court of Appeals for the Seventh Circuit recently published a book whose entire premise is frankly realist: that law is indeterminate in many cases, and that in such cases, judges make policy choices or rely on intuitions of fairness to reach results. More importantly, echoing Hutcheson, Frank, and Cardozo, Judge Posner posits that the process of judicial decision making consists first of an initial inclination, followed by testing that inclination against available avenues of formalist legal reasoning. In other words, the decision comes first, and the rationale comes later. Judge Posner concludes that the Supreme Court is a frankly political court, not a court of law, and should be accepted as such.[38]

Intuitive acceptance of the premises of realism persists not only among legal insiders (practitioners, judges, and academics), but among the public as well. A 2001 survey of public attitudes about the

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35. Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005); *see* Eric J. Segall, *The Skeptic's Constitution*, 44 UCLA L. REV. 1467, 1512 (1997) (reviewing LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996)); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 953 (1999). *See generally* BRIAN LEITER, NATURALIZING JURISPRUDENCE 21 (2007) ("Realism is omnipresent in American law schools and legal culture . . . ."). For an essay suggesting reconvergence of legal realism in the legal academy and the political science academy, see Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

36. Lawyers routinely go to great extremes to choose sympathetic judges. Prior to the amendment of 28 U.S.C. § 2112 to provide for assignment by lottery, lawyers seeking to challenge agency rulemaking would post agents with walkie-talkies in the halls of administrative agencies to inform them when rules were adopted so that their petition could be the first one filed in a favorable circuit. *See* 28 U.S.C. § 2112 (2006). Disputes about which petition was filed first would turn on fractions of a second. Marshall J. Breger, *The Race to the Courthouse Is Over*, WASH. POST, Mar. 16, 1988, at A23.

37. Judge Sonia Sotomayor, 2d Circuit, Remarks During a Judicial Clerkship Information Panel at Duke University Law School (Feb. 25, 2005), *available at* http://www.law.duke.edu/webcast/?match=Sonia+Sotomayor.

38. *See* RICHARD A. POSNER, HOW JUDGES THINK (2008).

Supreme Court revealed that, while respondents shared the idealized vision that the Supreme Court *should* decide cases without regard to the ideology or political party of the Justices, substantial majorities believed that individual judicial ideology (85.1%) and individual judicial party affiliation (69.9%) *in fact* had either "some impact" or a "large impact" on Justices' decisions.[39]

But normative resistance to the realist premise is even more persistent. The realist premises may seem true, but they cannot be *right* in a normative sense. Few argue that a judicial branch of government with the power to annul legislation *should* be ruled by individual policy preferences and partisan loyalties. Acceptance of the realist premises of indeterminacy and judicial idiosyncrasy seems at war with one of the foundations of American constitutional law—the principle of judicial review. Indeed, without judicial review constitutional law does not really exist as a legal discipline at all. But if judges make policy choices, then judges are acting in a political capacity and would seem to have no institutional or structural claim to reject the enactments of the more popularly responsive Congress and state legislatures.

Even more unsettling are the unresolved questions laid bare by realism's premise: if legal rules in the form of constitutional text and precedent do not explain judicial behavior, what exactly does? Are judicial decisions truly rank political choices completely unfettered by law? What is the source of the decisive judicial "hunch" that several realist judges have referred to?

The remainder of this Essay will explore the role of moral intuition in explaining judicial decision making, and the implications of this role for the structural efficacy (if not legitimacy) of judicial review in our constitutional system.

III. SEARCHING FOR THE DETERMINANTS OF AN INDETERMINATE SYSTEM OF LAW: THE ROLE OF MORAL INTUITION AND THE CONUNDRUM OF FREE WILL

To legal formalists, the realist vision of the judicial process is something of a nightmare: rather than the rule of law, realist judges would rule based on personal whim—at best, legislating from the bench and at worst, arbitrarily deciding cases based on personal

39. John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 185 (2001).

partisanship and venality. To borrow from Robert Frost, realist adjudication is like "playing tennis with the net down."[40] There seem to be no objective rules for assessing the quality, or even the legitimacy of judicial decision making.[41] Realist judging by life-tenured judges thus appears to be a form of despotism, not a legitimate institution in a constitutional democracy.

But judging in a realist world is not quite the free-for-all that realist premises might seem to imply. Several thoughtful authors have detailed the genuine constraints on freewheeling policy making by judges. These constraints include the expectation that judges will write an opinion justifying their decisions based on formal legal reasoning relying on text and precedent, the possibility of appellate reversal, judges' reputational concerns (including reputation among fellow judges, the public, and academics), the moderating effects of collaborative decision making on appellate panels, and ultimately, the judge's own self-respect and desire to be a good, impartial judge.[42] For the purpose of considering the Supreme Court's role in reviewing the constitutionality of acts by other government institutions, however, most of these constraints are quite weak: Supreme Court Justices in constitutional cases cannot be reversed (apart from the extraordinarily difficult and rare process of constitutional amendment) and are relatively impervious to their reputations among the public, their peers, and particularly among academics.[43] Accounts of the Supreme Court conference process reveal that there is little collaborative decision making in the (usually determinative) initial conference vote.[44] Supreme Court Justices now delegate much of the work of opinion drafting to law clerks, blunting the constraints of the need to articulate conventional legal reasons to support decisions. In any event, the premise of indeterminacy is that cogent legal reasoning will most often support more than one unique conclusion, so that the constraints of cogent opinion writing do not often preclude judicial discretion about the result.

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40. Robert Frost, Address at Milton Academy, Massachusetts (May 17, 1935).

41. See POSNER, *supra* note 38, at 146-52, for a realist perspective and extended discussion of the difficulty of establishing objective measures of judicial job performance.

42. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 87-110 (2009); *see* POSNER, *supra* note 38, at 125-58. Note that the "reasoned elaboration" requirement of the judicial process is a key element of the legal process school's constraints on judicial politicization. *See* FARBER & SHERRY, *supra*, at 44-45; Wechsler, *supra* note 31, at 15-20.

43. POSNER, *supra* note 38, at 205.

44. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 254-55, 258 (2001).

This leaves the Justices' own self-respect and desire for judicial legitimacy as the principle constraint on the raw exercise of judicial power by Supreme Court Justices. Very few judges are avowed instrumentalists, self-consciously exercising judicial power to achieve their personal policy and political preferences. As Judge Posner points out, practically all federal judges are people who see themselves as (and strive to be) "good" judges, that is, judges who decide cases impartially.[45] Most judges, presumably including Supreme Court Justices, will consciously seek to avoid making biased or result-oriented decisions.

This sort of judicial self-restraint, however, does little to mitigate or prevent the effects of preconscious or unconscious result biases on the part of judges. Professor Dan Simon has performed a fascinating analysis of the Gestalt psychology of judicial decision making.[46] Professor Simon posits that the judicial "hunch" is in fact the gelling of a complex series of coherent sets of premises and inferences in which the judge considers multiple competing and related premises, eventually selecting the combination of premises most closely aligned with her core beliefs to form a coherent result (that is, one with minimal cognitive dissonance), in the process rejecting those premises inconsistent with the result reached. At some point, cognitive biases kick in, allowing the judicial mind (like all human minds) to pay more heed to those premises that support the nascent conclusion. Legal reasoning is not irrelevant to this process, but it is not necessarily the determinative factor, as the coherence of the entire factual "story" of the case is also important. Legal premises fall into place along with factual premises in reaching the conclusion. In this way, Professor Simon suggests, a judge can genuinely believe that the result reached is the uniquely correct result and write a formalist opinion that admits of no possible alternative results, even though the result was indeterminate ex ante. One of Professor Simon's key conclusions is

45. POSNER, *supra* note 38, at 61-64, 69, 204.

46. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998). For other cogent analyses of the cognitive psychology of judicial decision making, see Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243 (1999), and Dan M. Kahan, *"Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413 (2009).

that the judge is unaware of this cognitive process and thus unaware of the process by which she reaches her decision.[47]

Professor Simon posits that his analysis is valid for those cases that have "low stakes" for the judicial decision maker—that is, cases in which the decision maker has no ideological or partisan interest in one result or another. But one can question whether there are truly very many cases that are low stakes for the judge—particularly when it comes to constitutional cases in front of the Supreme Court. While judges presumably strive to be good, unbiased judges, judges presumably will also resist reaching results that violate their intuitions of right and wrong. These moral stakes may or may not be conscious, but they undoubtedly affect the receptivity of judges to opposing legal arguments—the unconscious mind will resist accepting coherent sets of premises that contravene the judge's innate sense of right and wrong.[48]

Professor Simon's analysis thus suggests that realist premises are at least partially supported by cognitive psychology. This analysis does not completely reject the role of formalist legal argument and reasoning, however (and neither do the realists). Rather, competing formalist legal premises constitute but one of multiple sets of premises that the judge unconsciously networks, accepts, and rejects in coming to a judicial hunch. The conscious, rational mind realizes that it has reached a decision, and, after the fact, attributes that decision to deliberative, rational decision making based largely on formalist legal arguments. But the rational mind has not made the decision at all; rather, the unconscious mind has reached the decision through a complex process of accepting and rejecting related premises, both factual and legal. This process is remarkably similar to the process described by psychology's moral intuitionists, who similarly assert that moral judgments are formed at an intuitive level based on preexisting receptivity to certain moral principles, while moral reasoning is

47. Professor Simon's description of this cognitive process is remarkably analogous to the decision-making process described by Judge Coffin in his book on judging. *See* FRANK M. COFFIN, ON APPEAL 253-57 (1994).

48. Professor Simon, in a later article, thus notes, "We have also found evidence that supports the proposition that coherence effects interact with the decision-maker's preexisting attitudes, particularly those embedded in the person's enduring value system." Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 542 (2004).

invoked only after the fact to justify a moral response reached at the intuitive level.[49]

Indeed, neurological science questions whether the rational, conscious mind is capable of affecting human action at all. To put it bluntly, the formalist model of legal decision making depends on the existence of human free will: a judge rationally weighs the formal legal arguments, picks the "correct" arguments and rejects the "flawed" or "incorrect" arguments, and through an exercise of rational free will, decides the case. One self-described formalist jurist describes the process as an act of conscious will: "[J]urists make conscious efforts to focus on the facts and the law, ignoring their own internal conceptions of right and wrong."[50] But neurologists question whether the conscious mind ever actually wills human action at all. In a famous set of experiments, Benjamin Libet monitored the brain activity of subjects who were asked to "decide" which button to press. What he found was that, as subjects pushed the buttons, the action-oriented portions of the brain became active *before* the conscious, decision-oriented portions of the brain. In other words, the action came first, and the conscious "decision" to act came later. Nevertheless, the subjects all subjectively believed that they had made the decision first, before commencing the action.

Libet's experiments (together with confirmatory follow-up research by other neurologists) helped reignite the centuries-old debate about the existence of human freedom of choice.[51] In the legal

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49. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

50. Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 5, 11 (1999).

51. The nature and extent of human freedom of will has fascinated Western philosophers across the centuries, particularly in relation to the moral responsibilities of individuals for their actions. St. Augustine, writing in the fourth century, grappled with the conflict between predestination and the individual autonomy necessary for free will and moral responsibility. AUGUSTINE, ON FREE CHOICE OF THE WILL (Thomas Williams trans., 1993). Eighteenth-century moral philosophers Emanuel Kant and David Hume famously disagreed with each other on the nature of human free will. Hume adopted a version of the compatibilist view that human action was subject to predetermined cause and effect like all natural phenomena but that individuals remained responsible for their actions, as human freedom of action allowed for such responsibility, even if such actions were predetermined. *See* David Hume, *Of Liberty and Necessity*, *in* AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 83, 86-87 (1963). Kant, on the other hand, postulated the existence of free will as essential to *a priori* moral reasoning, relegating deterministic views to the standpoint of empirical phenomenology, which he found irrelevant to moral philosophy. *See* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON: AND OTHER WRITINGS IN MORAL PHILOSOPHY (Lewis White Beck trans., 1949); IMMANUEL KANT, CRITIQUE OF PURE REASON (J.M.D. Meiklejohn trans., 1924); IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS

academy, this renewed skepticism about the existence of human freedom of choice has renewed scholarly debate about the ethics of retributive justice—if lawbreakers do not make choices to break the law, then a retributive theory of justice based on the moral culpability of human actors loses its justification. But no one seems to have made a connection between a lack of human free will and the role of the human participants in a system of justice—that is, if lawbreakers lack rational free will to conform their conduct to the legal and ethical norms, why should equally human lawmakers and judges administering a system of justice be any more responsive to ethical arguments against retributive justice? Or, for that matter, to formalist arguments addressed to human reason? Judges, even Justices of the Supreme Court, are human animals. To be sure, there is a world of difference between a decision to take a discrete physical action such as pushing a button and the incremental realization of a dispositive judicial hunch. Libet's startling conclusion—that action precedes consciousness of a decision and that the mind nevertheless believes that the decision occurred first and caused the action—is remarkably analogous to the realist conception of the decision-making process as described by writers from Frank and Cardozo on down to Judge Posner and Professor Simon.

But rejection of human free will is equally inconsistent with the most cynical version of the realist vision of judicial decision making: the notion that judges willfully make decisions consistent with their policy preferences or rank partisan leanings. For if judges lack the free will to implement the rational conclusion of a formalist process of reasoning, they undoubtedly equally lack the free will to decide cases in a way that consciously achieves their personal preferences. That does not mean that personal policy preferences (or result preferences) are irrelevant to the judicial result—it just means that, consistent with Judge Posner's idea that judges strive to be good (impartial) judges, the process by which personal judicial outcome preferences affect decision making is neither conscious nor willful. Determinism thus makes its way back into the lawmaking process, not as the determinism of the

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(H.J. Paton trans., 1948). For a general discussion of Kant's and Hume's nuanced views on free will, see Lara Denis, *Kant and Hume on Morality*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., summer ed. 2009), *available at* http://plato.stanford.edu/archives/sum2009/entries/kant-hume-morality. The debate between Hume, an empiricist who believed that moral judgments followed from passion, and Kant, a theorist, who believed that all moral judgment proceeds rationally from first principles of moral thought, anticipates the ongoing debates between formalists and realists in the legal arena and between rationalists and moral intuitionists in the psychology arena.

legal formalists (who insist that there is one "correct," syllogistic answer to every legal case), but the determinism of the philosophical determinists (now supported by neurological science) that finds all human actions to be deterministic. Under this theory, all human choices are a physical process in the human brain, of which the conscious mind becomes aware only after the choice has already been made.

If judges are thus hardwired to make the choices they do, then perhaps discovery of the nature of that hard wiring might provide a better answer to the realists' question of "what really determines a particular judge's decision in a particular case?" Evolutionary psychologists posit that human moral intuitions are in fact evolved and wired into human beings. An individual's moral sense is thus largely innate. Research on infants as young as six to ten months reveals that children have an innate sense of fairness; they prefer the shape that plays a "helper" role in an animation to the one that plays the "hinderer" role.[52] Rudimentary moral intuitions are also observed in primates, and Darwin himself hypothesized that human moral intuitions were the result of evolutionary processes in a social species.[53] This is not to say that all moral intuition is fixed and innate from birth; rather, psychological anthropologists suggest that human evolution in the context of social, hunter-gatherer groups leads to innate receptivity to certain generalizable moral principles, which are then culturally reinforced or rejected during a child's development in much the same way that human children acquire a native language.[54]

Moral psychologist Jonathan Haidt has explored the manifestations of innate morality in the specific context of the moral disagreements underlying the most contentious Supreme Court cases: those involving the fundamental political conflicts of the so-called "culture war" in the United States.[55] He posits that there are five basic moral intuitions for which human beings have evolved to be receptive: (1) avoidance of harm/care for others, (2) fairness/reciprocity,

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52. Paul Bloom, *The Moral Life of Babies*, N.Y. TIMES, May 9, 2010, (Magazine), at 44(L).

53. *See* Haidt, *supra* note 49, at 826.

54. *Id.* at 827; *see also* John Mikhail, *"Plucking the Mask of Mystery from Its Face": Jurisprudence and H.L.A. Hart*, 95 GEO. L.J. 733, 753-55 n.161 (2007) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)).

55. *See* Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98 (2007).

(3) ingroup/loyalty, (4) authority/respect, and (5) purity/sanctity.[56] Haidt finds that these moral intuitions are shared across cultures, across time, and around the world. And Haidt also suggests, like the legal realists, that moral judgments are most often based on moral intuition—this innate grammar of morality—while moral reasoning (like formalist legal reasoning) is a post hoc rationalization for a judgment made at a preconscious level.[57]

If these five moral principles were truly innate and universal, then natural law philosophy and legal positivism, as well as legal realism, might all be reconciled. Judicial decision making might well be indeterminate as a matter of formalist legal reasoning but determinate as a matter of application of innate moral principles to particular social facts, making these rules both universal and immutable (as natural law holds) as well as a creation of human institutions (which themselves are a product of evolutionary biology). It is, however, not quite so simple. Professor Haidt finds that, although receptivity to each of these five ethics is universally shared, they are not universally equally valued. Rather, Haidt finds, individuals who self-identify as political liberals value the ethics of harm avoidance/care and fairness/ reciprocity more highly than the other three moral intuitions, while self-identified conservatives value all five ethics more or less equally (thus giving greater relative weight to respect for authority, group loyalty, and purity than liberals do).[58]

To Haidt, this difference in weighting explains the intractability of the most contentious issues of the culture wars (including the issues that become constitutional issues before the Supreme Court). Liberals support same-sex marriage on grounds of fairness and reciprocity and do not understand contrary arguments (found compelling by conservatives) based on respect for authority (tradition) and purity (revulsion against nonprocreative sexual acts). To some conservatives, support for affirmative action may offend notions of group loyalty that strike liberals as frankly racist.[59] Punishment for those who disrespect

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56. Jonathan Haidt & Craig Joseph, *The Moral Mind: How Five Sets of Innate Intuitions Guide the Development of Many Culture-Specific Virtues, and Perhaps Even Modules*, *in* 3 THE INNATE MIND: FOUNDATIONS AND THE FUTURE 367 (Peter Carruthers, Stephen Laurence & Stephen Stich eds., 2007); Haidt & Graham, *supra* note 55, at 106-09. Haidt builds on earlier theorists who posited three evolved moral ethics, those of autonomy, community, and divinity. Haidt & Graham, *supra* note 55, at 106-07 (citing Richard A. Shweder, *In Defense of Moral Realism: Reply to Gabennesch*, 61 CHILD DEV. 2060 (1990)).

57. Haidt, *supra* note 49, at 817-18.

58. Haidt & Graham, *supra* note 55, at 108-11.

59. This is not to discount the fact that many conservatives oppose affirmative action on fairness grounds, rather than group loyalty.

authority and reject group symbols, as by burning flags or refusing to say the pledge of allegiance, may strike conservatives as morally appropriate while liberals fail to see any harm that would justify the punishment. Nor are the process school theorists free of these cognitive biases; Herbert Wechsler's famous criticism of *Brown v. Board of Education*[60] might be explained as a preference for the conservative ethic of group loyalty (translated into "freedom of association") as opposed to fairness/reciprocity ethic given more relative weight by social liberals (translated into "equality"). The constitution embodies both principles,[61] and judges resolving controversies will ultimately resolve the conflicting values through cognitive processes that result in the least cognitive dissonance for their own fundamental values.

Haidt's moral foundations theory and Professor Simon's cognitive analysis together have important implications for understanding judicial decision making when clashes of values become constitutional issues. Simon posits that formal legal argument is but one of the many premises sorted out by the unconscious judicial mind in reaching a decision. Haidt's analysis would suggest that people in general share a set of innate moral intuitions; these moral intuitions may themselves be seen as part of the system of interrelated premises that go into the unconscious cognitive process of reaching a decision. Simon's analysis of the cognitive drive towards coherent sets of premises suggests that a judge will be inclined to reject sets of premises (including formalist legal argument) that lead to results inconsistent with any fundamental moral intuitions the judge holds. Haidt similarly posits that the triumph of moral reason over moral intuition, while possible, is rare.[62] But formalist legal reasoning does not thus become inoperative to an intuitionist judicial hunch; after all, precedent and legal texts (like the Constitution) are quite literally forms of authority, and rejection of these cognitive premises would presumably offend Haidt's "authority" precept.

This synthesis is neither purely realist nor purely natural law formalism. The realists are correct that formalist law is often indeterminate and that results in such cases will vary with the outlook

60. 347 U.S. 483 (1954); *see* Wechsler, *supra* note 31, at 22-34.

61. The Fourteenth Amendment, of course, explicitly guarantees equal protection, while a constitutional value in freedom of association has been inferred from the First Amendment guarantees of freedom of speech and the right to petition. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); NAACP v. Alabama, 357 U.S. 449 (1958).

62. Haidt, *supra* note 49, at 819.

and makeup of the judges involved. However, the natural law formalists may have been intuitively correct that judges declaring the law were in fact channeling some innate principles of justice (or morality) but incorrect in assuming that these principles were either God-given or the product of pure reason; rather, they may simply reflect a shared, evolutionary, and cultural moral intuition. Unfortunately for the natural law formalists (and consistent with the realists' key insight), these shared principles of justice (or morality) are themselves indeterminate: the result in a given case will depend on how a particular judge is wired to weigh competing innate ethical principles. As even the most casual students of the Supreme Court have observed, different Justices will reach starkly different conclusions when addressing the most contentious issues of constitutional law (where constitutional values may themselves conflict with each other). These results, as the attitudinalists have shown, are better predicted based on the ideological (read, innate moral) preferences of the individual Justices than by legal argument or reasoning. Supreme Court Justices reaching diametrically opposite conclusions will be honestly convinced of their own impartiality. Intellectually neutral observers will note that these Justices will support their opposing convictions with impeccable logic and arguments based on accepted modes of legal reasoning.

As a descriptive matter, the formal predicate for judicial review—an impartial court applying determinate constitutional law to assess the legitimacy of actions of coequal branches and federalist states—thus seems simply incorrect. At the end of the day, the identity (and ideology) of the judicial decision makers matters—the choice of ideologically conservative or liberal Justices will affect the result. Does this conclusion, patently obvious as it may seem, thus deprive judicial review of its legitimacy in the United States constitutional democracy?

IV. RECONCILING MORAL INTUITIONIST REALISM WITH JUDICIAL REVIEW: THE STRUCTURAL ROLE OF THE SUPREME COURT IN UNITED STATES CONSTITUTIONAL GOVERNMENT

A moral intuitionist brand of realism, then, undermines the classic John Marshall formalist justification for judicial review in the United States constitutional scheme. Constitutional law, in particular, is frequently indeterminate, and the result in any given constitutional controversy will often depend on the identity of the Justices deciding the case. The classic notion that the Supreme Court is a nonpolitical

branch performing the uniquely judicial function of declaring what "the" determinate law is refuted by all objective evidence. If there is nothing uniquely judicial about how the Supreme Court resolves constitutional controversies, then democratic theory seems to require that the democratically elected branches of government make these fundamental choices.

Or not. Perhaps it is no more an indictment of constitutional judicial review as "undemocratic" because judges cannot help making political policy choices in deciding cases than it is to point out (as several political scientists have) that Congress in our evolved democracy is more responsive to the interest of organized lobbying groups than it is to the will of voting constituents. Indeed, some public choice theorists posit that collective decision makers like Congress are structurally incapable of making rational decisions in the public interest.[63] Few would suggest that acceptance of public choice theory undermines the legitimacy of Congress in a constitutional democracy. After all, the theory of the republican form of democracy adopted by the Framers supports the role of Congress as the democratically accountable vehicle for implementing public preferences. The fact that American society, politics, and Congress itself have evolved in ways inconsistent with the Framers' aspirational theories of republican governance does not undercut the legitimacy of Congress as a democratically responsive institution in any fundamental way. The fact that judicial decisions cannot help but reflect the personal moral makeup of Justices similarly does not undercut the classic justification for judicial review in any fundamental way. Just as congressional representatives should strive to serve their constituents and the good of the republic, even when against the interests of organized groups that help finance their campaigns, judges should strive to decide cases according to formalist legal reasoning even when contrary to their ideological and moral preferences. Legal formalism is, after all, an internally consistent theory. As Professor Brian Leiter argues, even the legal realists were not conceptual rule skeptics—they did not question the value of determinate legal rules. Rather, they were empirical rule skeptics; they questioned the practicality of such a system in the real world.[64]

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63. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

64. *See* Leiter, *supra* note 3, at 295-99.

But acceptance of legal formalism even on a theoretical basis requires acceptance of at least the theoretical plausibility of formalist legal determinism. This may be a greater leap of faith than that required to believe that elected representatives will truly represent their constituents. Law may be subject to description in a series of syllogisms, but no legal syllogism satisfactorily explains how to choose among competing syllogisms. It is very hard to find determinist legal theoreticians in the academy anymore; most legal theorists accept that law is indeterminate and search for foundational theories that, they hope, will cabin judicial discretion in applying indeterminate legal principles.

The formalist determinate justification is not the only justification for judicial review, however. There is a structural justification for judicial review in our constitutional system as well—one that is perhaps more compelling than the formalist reasoning. The genius of the Constitution is not that it implemented a form of perfectly representative democracy that precludes judicial policy making. Rather, the Framers invented a system of government with competing elements of monarchy (the executive branch), republican democracy (Congress), and aristocracy (the judiciary), and explicitly relied on the competition between these branches to prevent usurpation of power by any one of them.[65]

Indeed, the very premise of a written constitution is that some questions of governance and even some policy choices are to be taken off the table of the representative institutions and settled more permanently. Societies need a referee to settle their fundamental disputes without resorting to violence. The judiciary has long served this societal function of providing closure. The legal process school itself is premised in major part on the institutional role of the adjudicative process in resolving disputes and making legitimate legal rules.[66] Indeed, Alexis de Tocqueville long ago observed of American political culture, "There is virtually no political question in the United States that does not sooner or later [turn] into a judicial question."[67] The more transitory and more political branches of government cannot provide this sort of closure, as these branches can only settle these

65. *See* THE FEDERALIST NO. 51 (James Madison).

66. *See generally* HART & SACKS, *supra* note 31, at 4 ("[E]very modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others . . . .").

67. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 310 (Arthur Goldhammer trans., 2004).

disputes until the next election. One of the innovations of the Constitution was to constitute a judicial branch that was independent of both the executive and the legislature.[68] Much has been written about the structural role that the judiciary plays in protecting the interests of political minorities from abuse by the majoritarian branches of government;[69] less has been written about the judiciary's structural role in providing closure to fundamental disputes among branches of government or even among factions of society. At least one commentator has suggested that the judiciary is the most appropriate branch to resolve interbranch controversies as "the one institution that is permanent, non-partisan, independent of Congress and the president, explains its conclusions publicly, has fact-finding facilities, [and] a long-range viewpoint."[70] Another commentator notes that Supreme Court decisions enjoy persuasiveness because of the structural place of the Supreme Court at the head of the judicial branch.[71]

This structural legitimacy of constitutional judicial review has support, of course, in the text of the Constitution itself as well as in *Federalist No. 78*. Article III of the Constitution, after all, grants jurisdiction to the judiciary to hear cases "arising under this Constitution."[72] In *Federalist No. 78*, Alexander Hamilton explicitly endorsed judicial review of legislative acts and gave a structural justification for it in the following universally cited passage:

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68. Colonial and British courts of the eighteenth century were adjuncts of either the legislative branch or the Crown. *See* 1 BLACKSTONE, *supra* note 6, at *147 (describing the English government as consisting of two branches: "the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone"); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 920-22 n.82 (1997).

69. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (role of judicial review to protect minorities); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-88 (1980) (representation-reinforcing theory of judicial review); Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

70. James L. Oakes, *Hans Linde's Constitutionalism*, 74 OR. L. REV. 1413, 1415 (1995) (reviewing INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995)).

71. *See* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 104 (2005).

72. U.S. CONST. art. III, § 2, cl. 1.

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[73]

Not only does *Federalist No. 78* reflect an expectation that the judiciary would exercise power to declare acts of Congress void, I would suggest that its author, at least, must have understood that in exercising this power of judicial review, judges would exercise discretion in resolving individual cases of constitutional indeterminacy. For, in a later passage, Hamilton indicates that he understood full well that law can be indeterminate and that judges deciding cases must exercise their discretion:

> It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .[74]

Thus, in the same breath as he endorses constitutional judicial review, Hamilton acknowledges that in the absence of a "voluminous code" setting forth rules "in every particular case" judges will exercise an "arbitrary discretion."[75] *Federalist No. 78* thus endorses judicial review even with a frank acknowledgement that indeterminacy exists in law and that judges exercise discretion to make law in the face of indeterminacy.[76]

Judicial review thus derives legitimacy from constitutional text and the expectations of the Founders even in the absence of formalist assumptions about the determinate nature of judicial decision making. It has become one of the structural assumptions of our system of government. And, judicial and academic predictions to the contrary

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73. THE FEDERALIST NO. 78 (Alexander Hamilton).

74. *Id.*

75. *See id.*

76. *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, 19-27 (2000) (arguing that the Framers had a moderately indeterminate view of the law, which supported the need for an independent judiciary).

notwithstanding,[77] ten years after the Court's most apparently partisan decision in *Bush*, public approval of the Supreme Court remains high and has consistently exceeded public approval of the elected branches of government for decades.[78]

Indeed, *Bush* itself may be the realist example that proves the structuralist role of the Supreme Court. Conservative Justices voted against their ideological leanings to vastly expand equal protection analysis in voting rights cases,[79] apparently motivated by a purely partisan desire to hand the presidency to the candidate of their ingroup (their political party). Confounding formalism and legal process "neutral principles," the per curiam decision suggested that its reasoning would not apply to future cases because of the "complexities" of the case. Academic condemnation of the decision was immediate and nearly unanimous: both for its out-of-character interpretation of the Equal Protection Clause of the Fourteenth Amendment as well as for its activist intrusion into the Article II process of selecting the president where the constitutional text clearly puts the responsibility for resolving disputed elections in Congress, not the Supreme Court.[80] Justice Stevens confidently predicted that the legitimacy of the Court would suffer as a result of the decision, in language hinting at parallels to the Court's infamous *Dred Scott v. Sandford* decision.[81]

At the end of the day, the academic criticism of *Bush* does little more than prove the realists' first point: law, especially constitutional law, is indeterminate. While it is easy to point out the inconsistency of the per curiam's equal protection reasoning with previous positions by the Justices who joined the opinion, it is harder to say that the

77. *See* Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

78. Frank Newport, *Trust in Legislative Branch Falls to Record-Low 36%*, GALLUP (Sept. 24, 2010), http://www.gallup.com/poll/143225/Trust-Legislative-Branch-Falls-Record-Low.aspx; *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 221-33 (2004) (discussing the historically widespread public approval of even the most controversial high court decisions).

79. *See* Geoffrey R. Stone, *Equal Protection? The Supreme Court's Decision in* Bush v. Gore, FATHOM ARCHIVE, http://fathom.lib.uchicago.edu/1/777777122240/ (last visited Oct. 19, 2011).

80. *See, e.g.*, A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY (Ronald Dworkin ed., 2002); VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001); *BUSH V. GORE*: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001).

81. *See* 60 U.S. 393 (1856).

reasoning is facially invalid—a point underscored by the fact that the Court's liberal Justices joined the equal protection reasoning, but disagreed solely on the remedy. The concurrence's literalist reliance on its discovery of the Article II clause providing for designation of electors through means chosen by the legislature is likewise not a facially invalid form of legal reasoning, and the dissent's emphatic rejection of this reliance is equally supported by precedent. And the ultimate alignment of the Justices seems to prove the realists' second point: choices within the range of indeterminate outcomes in contested cases will depend on the ideological outlook of the judges.

But, despite this setup for a realist challenge to the legitimacy of judicial review by an apparently political court, a strange thing happened once the decision was announced. Even with the control of the presidency at stake, and having indisputably won the popular vote, Al Gore conceded the presidency rather than mount a political attack on the legitimacy of judicial review. Gore could easily have done so by challenging the electoral votes from the State of Florida when the votes were presented to Congress, thus seeking to have the House of Representatives determine the election as provided by the Twelfth Amendment. It may well be that a crude political calculation revealed the futility of such an attempt, but with a popular vote victory and the presidency at stake, it is telling that Gore—and the nation—accepted the Supreme Court's verdict on the election as final with barely a whimper.

Indeed, the most compelling defense of the Supreme Court's role in *Bush* is not any neutral principle in the majority's exposition of equal protection analysis of differential means of counting votes, nor in the concurring Justices' discovery of the "legislature clause" in Article II, but rather in the important structural role the Supreme Court played in promptly resolving the election and avoiding a perceived threat of political chaos if the election were dragged out beyond the meeting of the electoral college.[82] This, incidentally, is the principle justification

82. This perceived threat of electoral chaos may be overstated, of course, as there was no actual threat to the security or order of the United States at the time the Supreme Court issued its decision. However, one can hypothesize that in addition to the relatively weak formalist arguments accepted by the Justices who joined the per curiam decision, the cognitive premises working in favor of stopping the recount included a prompt resolution of the election, avoidance of immediate chaos (Haidt's avoidance of harm), and the Justices' party loyalty (Haidt's ingroup/loyalty premise). That the liberal Justices accepted the equal protection arguments as well, but differed only in the matter of the appropriate remedy, is consistent with the high value liberals place on fairness (equal protection and equality of results) as well as the comparatively weaker value these Justices place on ingroup loyalty

argued by Judge Posner in defense of the *Bush* decision in his book, *Breaking the Deadlock*.[83]

V. SOME CONCLUSIONS AND A CHALLENGE

A moral intuitionist understanding of judicial decision making articulates a noncynical version of legal realism, as it accepts legal realism's premise that formal legal reasoning is indeterminate without drawing legal realism's potentially cynical conclusion that judicial decision making in indeterminate cases consists of nothing more than deliberate judicial policy choices. Rather, moral intuitionist legal realism posits that judges act in good faith to make decisions that they honestly believe are supported by determinate legal reasoning, even while the unconscious process resulting in these decisions necessarily reflects the cognitive biases and moral values of individual judges. While the form and language of constitutional adjudication may thus be a "[nation] of laws and not of men,"[84] the substance of constitutional decision making largely depends on the identities and the moral values of the Justices on the Supreme Court at any given time.

It follows then, that the Supreme Court is a political court, at least in the sense that Justices make policy choices in constitutional cases that reflect differential weighing of competing social and moral values. It does not follow, however, that constitutional judicial review is an illegitimate usurpation of the legislative functions of the "more politically responsive" branches. The Framers, by enshrining principles in a written constitution and endorsing judicial review of legislation, intentionally took certain issues off of the legislative—and state—tables, contemplating a judicial check on transient majorities. The Constitution, especially as amended by the Bill of Rights, perhaps contains more indeterminacy than was understood by the Framers, but *Federalist No. 78*, at least, reflects an understanding of indeterminacy in law and the reality that judges would apply discretion in cases of indeterminacy. Acknowledgement of this reality—particularly if the discretion is not completely arbitrary but rather reflective of widely shared but not equally weighted moral values—does nothing to detract from the structural role of the Supreme Court as a check on the political branches and as a penultimate arbiter of divisive social issues.

(party loyalty). A purely partisan Democratic position would be to reject the equal protection arguments and avoid legitimizing any portion of the per curiam decision's reasoning.

83. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

84. MASS. CONST., pt. 1, art. XXX.

It also follows that accusations of judicial activism from either side of the ideological divide are bankrupt. As has been persuasively argued elsewhere,[85] judicial activism seems to mean nothing more than an outcome in a legally indeterminate case in which the Supreme Court overturns action by a legislature or a state and the accuser disagrees with the result. Under this definition, "judicial activism" includes such universally condemned decisions as *Lochner* and *Dred Scott*, but it also includes currently applauded decisions like *Brown*, as well as liberal landmarks such as *Roe v. Wade* and more recent conservative triumphs such as *Printz v. United States*, *New York v. United States*, *District of Columbia v. Heller*, and *Citizens United v. Federal Election Commission*.[86] Judicial activism thus defined also includes such foundational Marshall Court decisions as *Marbury* itself, which struck down portions of the Judiciary Act of 1789; *McCulloch v. Maryland*, which struck down a Maryland-legislated tax on the national bank and established the so-called implied powers interpretation of the necessary and proper clause; and *Gibbons v. Ogden*, which established the foundation for the modern commerce power while voiding a New York-legislated licensing scheme for steamboats.[87]

Indeed, it was the open-textured, purposivist—and ultimately indeterminate—approach to constitutional interpretation of the Marshall Court in these latter cases that opened the door of indeterminacy a little wider than a strict, textual approach might have and ultimately enabled the evolution of a policy-making Supreme Court. Justice Thomas may pine for an eighteenth-century model of federalism—and may even be willing to try to turn back the clock to limit the application of the commerce power to regulating imports and exports among states[88]—but other conservative Justices of the current Supreme Court have all accepted the coevolution of industrial

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85. *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 38-47, 229-36 (2006).

86. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008); Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Roe v. Wade, 410 U.S. 113 (1973); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Lochner v. New York, 198 U.S. 45 (1905); *Dred Scott*, 60 U.S. 393 (1856).

87. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

88. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring); *see also* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349-55 (2007) (Thomas, J., concurring) (rejecting Dormant Commerce Clause doctrine).

technology, a national economy, cultural diversity, and a purposive, values-weighing constitutional law doctrine, at least to some extent.[89]

But to say that the Supreme Court makes policy choices that reflect individual moral values is not to say that Supreme Court Justices enjoy the "arbitrary discretion" of Hamilton's *Federalist No. 78*. The constraints on judicial discretion are real, even if weakened at the Supreme Court level. While the Supreme Court from time to time pushes social change ahead of social consensus (as in *Roe* and *Brown*), and at other times constrains social change even after political consensus is reached (*Lochner*), many commentators have noted that the Supreme Court's value imposition is never drastically far from the emerging social consensus.[90] While the Court may have declared a right to be free from punishment for same-sex consensual intimacy in *Lawrence v. Texas*, this right is not out of the mainstream of American views, and Justice Scalia's dissent to the contrary notwithstanding, the Court is nowhere near to extending that right to incestuous relationships, polygamy, or bestiality.[91]

Moreover, the political branches enjoy some ultimate oversight over the court, curbing judicial adventurism. The constitutional amendment process, though rarely evoked and difficult to implement, discourages decisions that will be universally condemned. The threats of court packing, jurisdiction curbing, impeachment proceedings, and outright disobedience by political actors, though rarely implemented, are also effective constraints on "arbitrary" judicial discretion.[92]

Presidents from Franklin D. Roosevelt on down have learned that the most politically expedient way to effect incremental change in

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89. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Justice Scalia has described himself as a "faint hearted originalist" who would allow originalist principles to yield to stare decisis.

90. It has long since been noted that "th[e] [S]upreme [Cou]rt follows th[e ele]ction returns." FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

91. *See* 539 U.S. 558, 590, 599 (2003) (Scalia, J., dissenting). Haidt uses the example of consensual adult incest as an example of universal moral revulsion at conduct that cannot be shown to have any objective harm. Haidt, *supra* note 49, at 814.

92. *See* Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 984-1000 (2009) (discussing examples of "popular constitutionalism" resistance to Supreme Court decisions, including the impeachment of Justice Chase, President Jackson's refusal to implement the *Cherokee Nation* decision, and President Franklin Roosevelt's court-packing plan); *see also* L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)) (reviewing twentieth-century incidences of popular resistance to Supreme Court decisions, including school desegregation, school prayer, and abortion rights decisions).

constitutional interpretation is through the appointment power. The structure of the Article II Appointments Clause together with the Article III Life Tenure Clause allows for political influence on the general ideological direction of the Supreme Court while ensuring judicial independence. To be sure, growing political acknowledgement of the realist premise that Supreme Court Justices make law has led to politicization of the process, but this politicization together with observance of the sixty-vote cloture rule generally tends to assure that, at least in their publicly stated positions, Supreme Court justices will not be terribly far from the current ideological center.[93] Individual judges' ideologies clearly matter to judicial results, and the ideologies of Supreme Court candidates have quite properly become matters of debate in the appointment process; this is part of the constitutional structure that keeps the center of the Court not too distant from contemporary moral values.

And judicial restraint has become the new rallying cry for the political process of appointing Supreme Court Justices, albeit a self-serving rallying cry given the ideological relativity of the definition of judicial activism. At some level, the choice of Justices who are assertive in their ideology and likely to garner an "activist" label from their ideological opposites is itself a political choice about the kind of Supreme Court the political consensus desires. The premise of this Essay is that it is impossible to eliminate judicial value-imposition in the context of Supreme Court review of constitutional challenges. But if judicial restraint—that is, moderation in judicial value-imposition—is truly to be desired, then a realist, moral-intuitionist understanding of the judicial decision-making process might provide some insights into the kind of personal qualities likely to promote judicial restraint and moderate judicial value-imposition.

Some of these qualities are obvious. The moral intuitionists have observed that high intelligence correlates with an ability to resist moral judgments based on pure intuition and to apply moral reasoning

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93. *But see* Emily Bazelon, *Sorry Now? What Do the Liberal and Moderate Lawyers Who Supported John Roberts' Nomination Say Today?*, SLATE MAG. (June 28, 2007), http://www.slate.com/id/2169344/; Adam Cohen, Editorial, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, at A16; Editorial, *The Court's Aggressive Term*, N.Y. TIMES, July 5, 2010, at A16; Michael Doyle, *Who's Activist Now? In Election Spending Case, Conservatives*, MCCLATCHY WASH. BUREAU (Jan. 21, 2010), http://www.mcclatchydc.com/2010/01/21/82798/whos-activist-now-in-election.html; Edward M. Kennedy, *Roberts and Alito Misled Us*, WASH. POST, July 30, 2006, at B01; Stuart Taylor, Jr., *The End of Restraint: Alito, Roberts, and Judicial Modesty*, NEWSWEEK, Feb. 1, 2010, at 16.

instead.[94] It follows that the more intelligent jurists will also be more able to resist value judgments based on moral intuition and follow formal legal arguments instead. Other qualities associated with likely judicial restraint might be inferred, such as general respect for authority (one of Haidt's conservative moral values), for adherence to precedent and authoritative text is itself a form of respect for authority. This might suggest that, in general, conservative judges should be less activist than ideologically liberal judges (who place less value on respect for authority and tradition), but this characteristic may itself be counterbalanced by conservatives' relative overweighting of ingroup /loyalty values; for a conservative justice may be instinctively more inclined to decide cases in favor of her political party—witness *Bush*—or other group identity. Liberal thinkers' lower valuation of group loyalty may, on the other hand, equate with greater impartiality and open-mindedness in considering the interests of outgroups and political minorities—the structural role of judicial review championed by John Hart Ely, among others. The ideal moderate jurist might then be one who combines a strong sense of respect for authority (receptivity to authority-based arguments) and a weak sense of ingroup loyalty, together with personal qualities of intelligence and the ability to defer gratification—if such a person exists.

The natural tendency of the judicial selection process, however, may unfortunately favor judges with a strong sense of ingroup loyalty, as service and loyalty to political party are important factors in the selection process.[95] The selection process has also recently favored practicing litigators for initial judicial appointments. While this may properly bring real-world pragmatism to the bench,[96] this preference may also promote an activist bench. For, rather than a tendency to defer moral judgment, litigators are conditioned by habit to focus on a desired result first, then to deploy the tools of formalist legal reasoning to achieve that result—the very definition of a more activist judicial approach.[97]

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94. *See* Haidt, *supra* note 49, at 823-24; *cf.* THE FEDERALIST NO. 78, *supra* note 73 (observing that jurists would have to be very smart to know the vast body of codes and precedent necessary to limit arbitrary discretion). Haidt posits that high intelligence may also be associated with the ability to defer gratification. *See* Haidt, *supra* note 49, at 823-24 (citing Yuichi Shoda, Walter Mischel & Philip K. Peake, *Predicting Adolescent Cognitive and Self-Regulatory Competencies from Preschool Delay of Gratification: Identifying Diagnostic Conditions*, 26 DEVELOPMENTAL PSYCHOL. 978 (1990)).

95. *See* FARBER & SHERRY, *supra* note 42, at 116-17.

96. *Id.*

97. Note that Haidt describes the moral judgment process in these terms—one exercising moral judgment is more like a lawyer than a judge. Haidt, *supra* note 49, at 814.

Moral intuitionism may also support the value of diversity in a collegial body such as the Supreme Court. Several commentators have pointed out the value of collegiality as a restraint on judicial decision making;[98] Professor Haidt's article on moral intuitionism also points out that diverse perspectives at the stage in which an issue is framed affects moral reasoning and may limit the tendency of moral intuition to adopt the framing and conclusions of members of the ingroup.[99] Group-think inherent in a body of like-minded individuals reinforces idiosyncratic views. Professor Cass Sunstein performed a fascinating study on the results of ideologically diverse and ideologically conforming courts of appeals panels and concluded that the presence of just one judge with a different ideological makeup dramatically altered and moderated the results as compared to three-judge panels that were ideologically pure.[100] Justice Sotomayor's choice of phrasing may have been unfortunate when she announced (well before her nomination to the Supreme Court), that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life,"[101] but she may properly be intuiting that a diverse panel of judges representing different ethnic and social groups within American society will be more likely to reach decisions in indeterminate cases that reflect the moral mean of American society rather than one extreme or another.

The thesis of this Essay is that individual moral intuition plays a role at least as important as rule-based legal reasoning in the decision-making process of Supreme Court Justices engaged in constitutional judicial review. Like most theses in legal academia, this proposition is endlessly debatable and absolutely unprovable. The cognitive premise of this thesis is that judges themselves are unaware of the exact process by which they reach decisions, so even an interview with a perfectly candid and introspective jurist would not settle the question. No judge is going to allow electrodes to be attached to her brain during the

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98. *See* FARBER & SHERRY, *supra* note 42, at 91; POSNER, *supra* note 38, at 32-33, 143, 256; Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003).

99. Haidt, *supra* note 49, at 823.

100. Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (U. Chi. John M. Olin Law & Econ. Working Paper No. 198, 2003).

101. J. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002), *reprinted in* N.Y. TIMES (May 14, 2009), http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all.

cogitative process to allow scientific examination of the relative activity of the moral intuition neurons and legal reasoning neurons, even if such an experiment were possible.

Nevertheless, some thought experiments are possible to assess the relative weight of moral intuition and formal legal reasoning in a values-fraught constitutional controversy. A district court in California has recently struck down California's Proposition 8, amending the California constitution to forbid the state from recognizing same-sex marriage, as violative of the Fourteenth Amendment's guarantee of Equal Protection, as well as being an unsupported denial of the fundamental right to marry.[102] This issue is likely to make it to the Supreme Court within the coming years. Proponents of a Wechslerian "neutral principles," rules-based approach to equal protection analysis have long read *Brown* to require color blindness in law (absent satisfaction of strict scrutiny), thus rejecting relativist remedial measures such as affirmative action.[103] The gender discrimination corollary, of course, is that law must be gender-blind, or satisfy so-called "heightened" scrutiny.[104] Formalist neutral principles would seem to demand that those who subscribe to color-blindness in race discrimination law must apply heightened scrutiny to the facial gender discrimination of Proposition 8: under Proposition 8 a legal disability turns on the gender of those subject to its prohibition.

The conservative wing of the current Court has accepted and endorsed the color-blindness formulation.[105] Under the gender-blindness corollary, Proposition 8 would be subject to heightened scrutiny regardless of whether one gender or another—or even some other classification entirely—is being benefited or burdened by the discrimination.[106] Without pretending to forecast the results of such a

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102. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

103. *See* Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979); Wechsler, *supra* note 31, at 31-35.

104. *See* United States v. Virginia, 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting) (implicitly applying heightened scrutiny); Johnson v. Transp. Agency, 480 U.S. 616, 656 (1987) (Scalia, J., dissenting) (endorsing gender-blindness standard for Title VII and an analogous equal protection analysis); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973). *But see* Lawrence v. Texas, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (distinguishing *Loving v. Virginia* from same-sex marriage on grounds that antimiscegenation statute was based on white supremacy).

105. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

106. Note that Virginia argued in *Loving* that equal protection did not apply because both blacks and whites were equally disabled by the antimiscegenation law from marrying the

value-laden analysis, neutral principles and formal legal reasoning would demand that these same Justices subject Proposition 8 to heightened scrutiny, searching for an "important governmental purpose" with means "substantially related" to that purpose.

We may eagerly await the results of this thought experiment.

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other race. The Court rejected this argument, supporting a "color-blind" view of equal protection. *See* Loving v. Virginia, 388 U.S. 1, 8-9 (1967). Obviously, more than a glancing exposition of the constitutional issues raised by *Perry v. Schwarzenegger* is beyond the scope of this Essay. For good treatments of the facial, gender-based, equal protection argument, see Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000); Mark Strasser, *Equal Protection at the Crossroads: On* Baker, *Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935 (2000); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303 (2005).