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Has Nihilism Politicized the Supreme Court Nomination Process?

*Bruce Ledewitz**

I. INTRODUCTION

Everyone can see that the Supreme Court nomination process has become destructively politicized. There are two ideologically cohesive blocs on the Supreme Court and the only relevant question has become, in both law and politics, which bloc will dominate. The notion of a rule of law binding on all does not exist. Judicial qualifications and temperament are irrelevant. That is why the Republican-dominated Senate Judiciary Committee refused to consider the nomination of Judge Merrick Garland and why the so-called “nuclear option” was invoked to confirm the nomination of Neil Gorsuch.¹

This is not a phenomenon attributable to only one political party. Undoubtedly, the Democrats would have done the same if they had had the majority in the Senate.²

But what has brought us to this state? Sometime in the 1970s, the American legal profession began to lose its commitment to truth and accepted the view that no binding moral judgments can be made. “Accepted the view” is the proper

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1. On Thursday, April 6, 2017, after Democrats filibustered the nomination of Judge Gorsuch, the Republican majority in the Senate removed the filibuster option for Supreme Court nominations as it had earlier been removed by a Democratic Party majority for lower court nominations and other offices in 2013. See Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (April 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html?_r=0.

2. As indeed they had previously done, in part. See *id.*

term, because it was not a matter of reason or persuasion. It was a turn within the culture itself, one that began on the political left, but has long since migrated to the right as well. I have described this phenomenon—the acceptance that there is no possibility of a binding moral judgment—as “the arrival of nihilism.”³ Admittedly, this is not an exact philosophical reference.⁴ So, let me say it this way: law professors have been teaching value skepticism for years and the result is what we have now in the Supreme Court nomination process.

Describing the context as one in which moral judgments are understood to be purely subjective actually understates the crisis we are in. As the ongoing avalanche of false news in American public life illustrates, once you begin to undermine the objectivity of values, you end up undermining the reliability of facts as well. The death of truth begins with values, but it ends up infecting all discourse.

When realism is surrendered—that is, once it is assumed that moral judgments are merely matters of preference without “anything remotely like . . . objective reality . . . which [could] be ‘discovered’”—then there is nothing but human will upon which to base legal judgment.⁵ At that point, the emergence of ideological blocs, like the two currently encompassing all of the Justices on the Supreme Court, and the presence of partisan support in the Senate Committee on the Judiciary becomes extremely likely, if not inevitable.

If that is so, then only the recovery of some form of realism will rescue the Court, the nomination process, and ultimately, American public life from our current morass. The re-

3. Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 116 (2016).

4. I use the term nihilism to emphasize the root of our skepticism in Nietzsche’s death of God. Some would say I am describing relativism rather than nihilism. For a discussion of the difference, see CARLO INVERNIZZI ACCETTI, RELATIVISM AND RELIGION: WHY DEMOCRATIC SOCIETIES DO NOT NEED MORAL ABSOLUTES 19–20 (2015).

5. CHARLES L. BLACK, JR., THE HUMANE IMAGINATION, 37 (1986).

covery of some form of realism, therefore, is one of the legal profession's most urgent needs.

In this essay, I stay very close to materials in law, even though what I am attempting to show—the need for realism—is actually better argued by numerous thinkers outside law.⁶ The reason for my choice is not just length, or even my own obvious limitations, but rather that I am making a legal point to lawyers. We need not be experts in philosophy to see the error in our current ways of thinking. I am trying to demonstrate that error.

But before I can make a case for change, the depth of the current emergency must be shown. So, we begin below in Part II with the loss of truth.

II. THE DEATH OF TRUTH IN AMERICAN LAW AND PUBLIC LIFE

The question raised here concerning the politicized judicial nomination process assumes that there is something wrong with a politicized Supreme Court. By politicized, I am referring to the two ideologically cohesive blocs on the Supreme Court that include every Justice, establish general approaches to constitutional and statutory interpretation, and lead, most of the time, to predictable voting patterns in cases of importance to the public (e.g., the overturning, or extension, of *Roe*,⁷ *Citizens United*,⁸ *Heller*,⁹ *Obergefell*,¹⁰ and a few other

6. For example, many of the considerations raised here have been presented in HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2002). Aside from not citing philosophical sources, I am skirting important philosophical issues. For example, Andre LeDuc has persuasively challenged what he considers to be the foundationalist premises of originalism, in the name of anti-foundationalism. See Andre LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN ST. L. REV. 131 (2014). But, if my reading of Justice Scalia here is sound, there are important anti-foundationalist premises within originalism as well, specifically the subjective source of value judgments. And, since I am attributing this understanding of values to all the Justices, one could conclude that we are all anti-foundationalists now, which is precisely the problem.

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

politically controversial cases and issues). The question also assumes that it is equally bad that Senators, who belong to parallel ideological blocs in the two major political parties, then create strategies to promote the size and influence of their bloc's representatives on the Court by blocking nominees to the Court or pushing them through. Finally, the question assumes that it is something about the Court and its decisions that has led to this supposedly negative situation.

On one level, it is not obvious what is wrong with the current situation. Why does it matter if the Justices have already made up their minds with regard to basic jurisprudential issues? The Supreme Court, after all, is not a trial court on which one does not want a judge who prejudices the facts of a case. Much of the time, the issues before the Supreme Court are not sensitive to particular contexts. They are often pure issues of law. So what, then, if there are some Justices who would like to overrule *Roe* or *Citizens United* for arguably legitimate, jurisprudential reasons? They are already committed.

And if it is legitimate for the Justices already on the Court to have these fixed positions, why not judicial nominees? For example, Judge Gorsuch's commitment to originalism as a starting point for interpretation of the Constitution is fixed only in the sense that he has thought about the matter and has concluded that this is the best way to interpret the Constitution.¹¹ On the Supreme Court, he will presumably continue to listen to other arguments. He is just not likely to be persuaded by them. What is problematic about that?

And if it is legitimate for a judicial nominee, then why not use such matters as a litmus test for a nominee, both by the

9. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

10. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

11. See, e.g., Nina Totenberg, *Judge Gorsuch's Originalism Contrasts with Mentor's Pragmatism*, NPR, <http://www.npr.org/2017/02/06/513331261/judge-gorsuch-s-originalism-philosophy-contrasts-with-mentors-pragmatism> (last visited Feb. 6, 2017). See also Judge Gorsuch's concurrence in *Cordova v. City of Albuquerque*, *infra* note 109 **Error! Bookmark not defined.**

president in nomination and by the Senate in confirmation? The issues confronting the Court will change over time, but for the moment, why not achieve one's immediate legal goals through the selection of Justices, if those goals are not otherwise illegitimate? Plus, why not embed one's favored method of constitutional interpretation on the Court through a nominee if you can? So, why not select and confirm Judge Gorsuch based on his prior commitments, or instead choose and confirm Judge Garland on the basis of his? That is what happened.

There is something wrong with this picture of judicial decision-making and Senate confirmation, but the problem is not within each ideological bloc. It is in their relationship with each other. Because each bloc has its own starting point for constitutional interpretation and norms for evaluating prior decisions, the whole movement of constitutional law depends on which party wins the presidency and the Senate. That is the sense in which politics dominates the Supreme Court.

Of course, there have been watershed moments in the history of the Supreme Court—the Revolution of 1937, for example—in which political alignment determined the future course of the law.¹² But the current ideological conflict on the Court is set to go on indefinitely. For the foreseeable future, fundamental matters will be decided by closely divided votes and will be subject to overruling with the next turn of the electoral wheel.¹³ We have never had a situation like this before and

12. The Revolution of 1937 refers primarily to changes in constitutional interpretation of the powers of Congress associated with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and the unsuccessful Court-packing plan of President Roosevelt, although there were also changes in the Court's interpretation of government regulatory authority under due process clauses at around the same time. See *Nebbia v. New York*, 291 U.S. 502 (1934) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Of relevance to the politicization of the nomination process, G. Edward White "raises the possibility that the constitutional revolution primarily resulted from actuarially driven fortuities in the appointments process," pointing to the fact that "[b]etween 1937 and 1941 Roosevelt had not merely three, but eight appointments to the Supreme Court." G. Edward White, *Cabining the Constitutional History of the New Deal in Time* 94 MICH. L. REV. 1392, 1408–09 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995)).

13. For example, Lee Strang has recently argued that "state courts are not bound by . . .

it is not consistent with any sense of a rule of law—indeed, there is no law in such ongoing judicial conflict.

We like to suppose that law is not the same as politics or at least not *exactly* the same as politics. Indeed, many regard the distinction of law from politics as the achievement in the West of the rule of law.¹⁴ We assume that judicial decisions on constitutional issues will not just mirror the commitments of the two major political parties. In some sense, the courts are meant to restrain democratic will, not to replicate it. For example, we praise the Supreme Court's decision in *Hamdi v. Rumsfeld* in 2004,¹⁵ checking executive branch overreach in the prosecution of the war on terror. Or, more recently, we applaud the decision of the Eleventh Circuit Court of Appeals in deciding, ten to one, that Florida could not punish doctors for inquiring about their patients' gun practices.¹⁶ In such cases, we expect judges to rule on the law rather than on their political alignments. But this requires that there actually be a shared understanding of law.

As Steven Smith pointed out years ago in his important book, *Law's Quandary*, law faces a "quandary" at this point.¹⁷ For, if our modern or post-modern ontology is one of materialism, then only a kind of legal positivism is possible that does not logically permit criticism of decisions as right or wrong or grant the resources to depart from one's political commitments in the name of law.¹⁸ Materialism does not allow a claim to

nonoriginalist Supreme Court interpretations of the Constitution." Lee J. Strang, *State Court Judges Are Not Bound by Nonoriginalist Supreme Court Interpretations*, 11 FIU L. REV. 327, 328 (2016). But this is just making explicit what is implicit for everyone else. How could one grant legitimacy to any view other than one's own if there are no shared interpretive starting points?

14. This is so even with regard to a critic such as Roberto Unger, who wrote of the emergence in the West of a legal order, "[i]ts rules ought to have a measure of critical independence from politics or custom . . ." ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY*, 80 (1976).

15. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

16. *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (*en banc*).

17. STEVEN D. SMITH, *LAW'S QUANDARY* (2007).

18. "Smith writes that legal elites believe, or imagine they believe, that only material

some form of truth about our legal judgments.¹⁹ With such an ontology, it is not possible to consider a judicial decision with which I disagree as genuinely binding on me.

In other words, everyone is individually acting in good faith when trying to enforce the law independently of politics, but the overall result is purely political. The direction of law is determined altogether by which political coalition prevails in the most recent election, as is the case right now as reflected in the Supreme Court nomination process.

Smith's insight about law links the quandary in the law to the quandary in American public life in general. At the deepest level, the emergency that confronts us in both contexts is about truth, or even the possibility of truth.²⁰

There is a constant assault on truth in American public life today.²¹ The consequence has been the pervasive feeling among the public that "it is all lies."²² On the one hand, President Trump began to refer to the press as the "fake news media" and the "enemy of the American people."²³ Undoubtedly,

things are real—particles and forces from a certain view of science—but speak and act as if something like justice could be real, as in the injustice of *Plessy* the day it was decided. References to what the law 'is' or what 'the Constitution' contains no longer make sense given the ontological commitments of at least our legal elites." Ledewitz, *supra* note 3, at 154.

19. To be fair, Professor Strang would strenuously deny that he is in any sense a legal positivist. See Strang, *supra* note 13. His reason for denying legitimacy to any Supreme Court decisions that do not employ an originalist methodology is that such decisions are not correct interpretations of the Constitution. The positivism in his position, however, is implicit. If cruelty, for example, were in some sense real, then a correct interpretation of the Eighth Amendment would be to ban punishments that are in fact cruel rather than ban punishments that violate the framers' understanding of cruelty.

20. I suppose that once *Time Magazine* put on its April 3, 2017 cover the headline "Is Truth Dead?" it became easier to see that this is the issue. The crisis of truth is now our new conventional wisdom. See TIME, Apr. 3, 2017.

21. On Sunday, March 19, 2017, for example, Charles McGrath argued in the *New York Times* Book Review Section that the Donald Trump Administration treats truth the way that Big Brother did in the novel *Nineteen Eighty-Four*, p. 27, and, on the very next page of the Book Review, The Great Courses Company ran a full-page ad asking whether *Nineteen Eighty-Four* is still fiction? (book review on file with author).

22. For examples, see Bruce Ledewitz, *Is Religion a Non-Negotiable Aspect of Liberal Constitutionalism?*, 2017 MICH. ST. L. REV. 209 (2017).

23. See Michael M. Grynbaum, *Trump Calls the News Media the "Enemy of the People"*, N.Y. TIMES (February 17, 2017), https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html?_r=0.

his supporters believe this. On the other hand, on February 27, 2017, the *New York Times* took out an entire page ad to promote truth, which it claims is under attack, presumably by President Trump.²⁴ Recently, President Trump claimed that the Obama administration tapped his phones during the election.²⁵ I would like to believe that this charge is totally false. But even I, a law professor with access to formidable resources, do not know what to believe anymore.

Perhaps the most recent absurd moment of untruth occurred regarding federal employment numbers. On several occasions during the campaign and afterward, President Trump referred to the monthly jobs report by the Bureau of Labor Statistics as “totally fiction.”²⁶ But, when the same report in February 2017 announced a robust addition of 235,000 jobs to the economy, he touted it as a great number.²⁷ When confronted with this seeming contradiction, Press Secretary Sean Spicer did not deny the difference: “I talked to the president prior to this, and he said to quote him very clearly: ‘They may have been phony in the past, but it’s very real now.’”²⁸

To be fair to the president, in the past he has criticized federal unemployment rate numbers on the reasonable ground that the category of unemployed is defined as one actively looking for work; this definition allows the unemployment rate to go down when people are so discouraged that they drop out of the labor force.²⁹ There is nothing false about that criticism.

24. Ad, N.Y. TIMES, Feb. 27, 2017, at A7.

25. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106>.

26. Christopher Ingraham, *19 Times Trump Called Jobs Numbers ‘Fake’ Before They Made Him Look Good*, THE WASHINGTON POST: WONKBLOG (September 30, 2017, 1:48 PM), https://www.washingtonpost.com/news/wonk/wp/2017/03/10/19-times-trump-called-the-jobs-numbers-fake-before-they-made-him-look-good/?utm_term=.838041198fb0.

27. *See id.*

28. *See id.*

29. For example, President Trump stated on September 7, 2012, “Unemployment rate only dropped because more people are out of labor force & have stopped looking for work. Not a real recovery, phony numbers.” *See id.*

But, in speaking more generally, President Trump has also stated that such government reports are simply deceptions: “It is a phony set of numbers. They cooked the books.”³⁰ The latter statement illustrates the world of lies that we live in.

This world of lies is more than just a reflection of the character of Donald Trump—as alarming as that would be since he is, after all, President of the United States. During the presidential election of 2012, former GE CEO Jack Welch made a similar claim that the “jobs numbers” were false: “these Chicago guys will do anything . . . can’t debate so change numbers.”³¹

To a liberal wanting to deny that the problem of untruth is a societal one, it would be easy to respond that remarks like these are just the rantings of right-wingers.³² But, in the case of the jobs reports, the matter does not rest with Twitter. In November 2013, “*New York Post* columnist John Crudele published an article alleging he had found evidence that the jobs report really was cooked.”³³ He claimed that a past episode of faking results had not been vigorously investigated and that sources claimed that leadership at the Labor Department instructed surveyors to fake results.³⁴

The demonstration of our societal rot is not that these claims were made, but that they were made and never resolved. Peter Ferrara reported on the *Forbes* Website in November 2013, that Republicans in Congress were demanding responses and that the Obama Administration was challenging the reports, but it was all in the context of political attacks on the

30. *See id.*

31. Jordan Weissmann, *Did the Census Bureau Really Fake the Jobs Report*, *THE ATLANTIC* (Nov. 19, 2013), <https://www.theatlantic.com/business/archive/2013/11/did-the-census-bureau-really-fake-the-jobs-report/281648/>.

32. The problem of truth in public life is no longer a matter of one side or the other: “Fraudulent news stories, which used to be largely a right-wing phenomenon, are becoming increasingly popular among those who oppose the President.” Masha Gessen, *The Truth is Not a Toy*, *N.Y. TIMES, SUNDAY REV.*, March 26, 2017, at 4–5.

33. *See* Weissmann, *supra* note 31.

34. *Id.*

Administration: “the lies you were being told during Campaign 2012.”³⁵ Neither did Democrats insist that the matter be fully aired, nor did the Obama Administration worry too much about the truth of the matter; the claims of fraud and deception simply faded away.

That is what happens in a society that has lost interest in truth. This may have left the public with the impression that actual dishonesty is just something that happens, even in official government reports. Such an inference is certainly no longer unthinkable. Given all this, it was understandable that Charles Sykes, former conservative radio talk-show host, wrote in an op-ed on February 5, 2017, that “[t]he battle over truth is now central to our politics.”³⁶

However, in reality, the battle over truth was actually lost years ago, in various contexts. I have noted elsewhere other lies previously told to the American people well before the advent of President Trump.³⁷ There were lies about the Tonkin Gulf Resolution in Vietnam, Watergate, Bill Clinton and Monica Lewinsky, spin in political campaigns in general, big tobacco and health effects, Rachel Carson when she published *Silent Spring*, and on and on.

Perhaps the most prominent lies in politics concern global warming. If scientists tell me there is a vast amount of liquid water beneath the surface of Europa,³⁸ a moon of Jupiter, I just accept it. If I am told there are seven planets circling a

35. Peter Ferrara, Did The BLS Give Obama A Major Election 2012 Gift, FORBES, November 27, 2013 <https://www.forbes.com/sites/peterferrara/2013/11/27/did-the-bls-give-obama-a-major-election-2012-gift/#55ef709e583b>. Peter Ferrara may not be the most reliable source—Forbes Magazine states on its website that “Opinions expressed by Forbes Contributors are their own”—but the willingness of a major news magazine to be associated with shrill invective is itself illustrative of our state today.

36. Charles J. Sykes, *Why Nobody Cares the President is Lying*, N.Y. TIMES, SUNDAY REV., (February 5, 2017), <https://www.nytimes.com/2017/02/04/opinion/sunday/why-nobody-cares-the-president-is-lying.html>.

37. See Ledewitz, *supra* note 22.

38. See NASA Report at https://www.nasa.gov/topics/solarsystem/features/europa_20111116.html.

nearby star,³⁹ I accept it. After all, I am not a scientist. I know that I am merely reacting to a scientific consensus and that there may be dissenters who ultimately may be proven correct. However, none of that affects me because I do not myself know anything about these matters. As a non-scientist, I am in no position to judge.

But Scott Pruitt, the Administrator of the EPA, is also not a scientist. He is a lawyer and a politician. So, when Pruitt says that carbon dioxide has not been proven to cause global warming,⁴⁰ against what looks like a very settled scientific consensus the other way, I assume he is lying in order to further the interests of powerful corporations and wealthy supporters. On the other hand, maybe Pruitt is sincere, and a dishonest cabal of left-wing scientists is duping me. After all, he is a government official. Can he possibly just lie about these things? This paralysis is what it means to live in a context without truth.

Where did this acceptance of unreality come from? Although beyond my scope here, I believe it has roots in the death of God and the resulting practice of ironic post-modernism.⁴¹ As Thomas E. Baker and Jerre S. Williams write in the context of postmodern constitutional jurisprudence, “There are no foundational principles. There is no such thing as knowledge.

39. See Sarah Kaplan, *Scientists Discover 7 “Earthlike” Planets Orbiting a Nearby Star*, THE WASH. POST (February 22, 2017), https://www.washingtonpost.com/news/science/wp/2017/02/22/scientists-discover-seven-earthlike-planets-orbiting-a-nearby-star/?utm_term=.994c568abe8e.

40. Here was the exchange: “Do you believe that it’s been proven that CO₂ is the primary control knob for climate?” CNBC Anchor Joe Kernen asked Pruitt in a March 9 interview. ‘No, I think that measuring with precision human activity on the climate is something very challenging to do and there’s tremendous disagreement about the degree of impact,’ Pruitt responded. ‘So no, I would not agree that it’s a primary contributor to the global warming that we see.’” Lauren Carroll, *EPA Head Scott Pruitt Says Carbon Dioxide is not ‘Primary Contributor’ to Global Warming*, POLITIFACT (March 10, 2017), <http://www.politifact.com/truth-o-meter/statements/2017/mar/10/scott-pruitt/epa-head-scott-pruitt-says-carbon-dioxide-not-prim/>.

41. See Ledewitz, *supra* note 3, at 124.

There is no such thing as truth except for the ‘truth’ that there is no truth.”⁴²

However, as Smith also pointed out in *Law’s Quandary*, the problem is not that lawyers disdain truth.⁴³ We readily understand truth’s intuitive appeal.⁴⁴ For example, I rarely hear people expressly deny the reality of truth. Instead, the problem is that everything else we believe renders truth claims incoherent—a form of nonsense. That means that, no matter what we say, we cannot practice a rule of law.

The problem of truth in post-modernity is not going away. The criticisms of what Hilary Putnam calls metaphysical realism are powerful.⁴⁵ We cannot do away with those criticisms just because we now suspect that the criticisms may have negative consequences.⁴⁶ So, if we now need to distinguish between genuine news and false news, between real facts and alternative facts, and between law and politics, we had better be clear about our beliefs. Some form of realism, however modest, must be recoverable. However, that path will not be easy to traverse. We should attempt neither to minimize the depth of the emergency we face, nor deny that there are valid reasons for this emergency.

How does the emergency concerning truth lead to the politicization of the Supreme Court and the nomination process? Surprisingly, the link is through an error. As I will show

42. THOMAS E. BAKER & JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUTSHELL 352–355 (2d. ed. 2003). Postmodern legal thinkers claim the Supreme Court is influenced by postmodernism and insist “that meaning is not contained in the document, but only in the interpreter,” which leads to a crisis of objectivity. It is the consequence of that crisis that leads to Justice Scalia’s insistence on reliance on objective factors for interpretation, such as text and tradition. See discussion, *infra*.

43. Ledewitz, *supra* note 3, at 155.

44. *Id.* (“[Smith] suggests that most lawyers actually accept the ontology of classical law and more or less mouth the skepticism of postmodernity insincerely.”).

45. See, e.g., HILARY PUTNAM, REALISM WITH A HUMAN FACE 40–41 (1990).

46. *Id.* at 37. (Putnam himself saw the danger that criticisms of metaphysical realism were leading to the abandonment of the objectivity of ethics: “[a]nd if a rebirth of a full-bodied, red-blooded metaphysical realism were the way to get people to accept the objectivity of ethics, then I would almost be willing to pay the price of letting that happen.”).

below, Justice Antonin Scalia—perhaps the most important recent voice in American law—accepted the connection between subjectivity and ideology. He agreed that the Supreme Court, and the nomination process, had become politicized. Justice Scalia concluded that the source of the subjectivity that was undermining the rule of law lay in the non-rationality of value judgments. He thought that a certain method of interpretation could restore objectivity to law.

Until we understand the breadth of Justice Scalia’s error, aspects of which all the Justices and most of us share, we will not be able to set a new course for American law. First, I will show in Parts III and IV below that there is no purely methodological path to objectivity in law. Objectivity will have to be found elsewhere. Then I will argue in Parts V and VI below, that, far from the source of ideological deadlock, values might actually lead us out of our hopeless politicization.

III. JUSTICE SCALIA’S CLAIM THAT VALUE JUDGMENTS LEAD TO POLITICAL CONFLICT

In determining why we are deadlocked in ideological judicial disagreement, we begin with Justice Antonin Scalia’s clear statement. In terms of judicial politicization, Justice Scalia warned in dissent in *Planned Parenthood v. Casey* in 1992, that reliance on value judgments by the Supreme Court would lead, and was leading, to just the kind of politicization, including public protests, that we see in the Garland/Gorsuch affair.⁴⁷ His view is worth quoting at length:

In truth, I am as distressed as the Court is . . . about the “political pressure” directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How up-

47. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting).

setting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition . . . As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better . . . Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to

support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.⁴⁸

Justice Scalia was making two points. First, that reasoned judgment “turns out to be” philosophical predilection and moral intuition. In turn, philosophical predilection and moral intuition amount to nothing more than subjective preference, by which I simply mean that, for Justice Scalia, there cannot be a right or wrong value, even in principle. That is why Justice Scalia contrasts value judgments with “facts to study.” There would undoubtedly be disagreements about facts to study also, but assuming good faith on everyone’s part, there would be no point to a letter-writing campaign or a politicized Senate hearing to determine what the facts genuinely are. I will return in the following sections to this assumption about the subjective nature of value judgments.

Second, Justice Scalia points out that once we are in the realm of value judgments, politics and protest are inevitable because we are engaged in a subjective activity. For Justice Scalia, the activity of making value judgments is not really law at all. That is why Justice Scalia quotes Justice Curtis’s dissent in *Dred Scott*:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to de-

48. *Id.* at 999–1001.

clare what the Constitution is, according to their own views of what it ought to mean.⁴⁹

However, a problem inheres in Justice Scalia's solution to the issue of value judgments. For Justice Scalia, the only way out of politics is for law, in particular constitutional law, to consist of something fixed and objective so that the judgments that are made will not depend on the preferences of the Justice. If that is accomplished, one could almost say it will not matter much who Congress confirms as a Justice. We will simply want someone who is expert in finding out whatever the evidence is of the facts that will determine an outcome. Republicans and Democrats might be able to agree on which persons would be good at such activities. These persons would then be competent judges. Thus, we would have the end of, or at least the reduction of, politicization.

Obviously, there are objections that can be raised here. Perhaps there will still be value judgments in weighing the factual evidence, for example. However, I wish to address a deeper problem. To accomplish the goal of depoliticization, the *method* of interpretation must be accepted as the one right way to interpret the Constitution. Unfortunately, however one feels about textualism, it is obvious that, at this point, the decision of a Justice to interpret the Constitution in accordance with text and tradition is not accepted in that way. Instead, the choice to adopt this method of interpretation is a value judgment. Indeed, the supporters of Judge Gorsuch present the matter of interpretation as precisely a kind of plebiscite as to how judges *should* approach the Constitution. Judge Gorsuch should be confirmed, his supporters say, because he will interpret the Constitution in accordance with text and tradition, while other potential nominees—Judge Garland, for example—cannot be relied on to do that.

49. *Id.* at 984.

Of course, the proponents of text and tradition claim that it is the best method of interpretation, even the only method that really is interpretation, and they give reasons for their choice. And they may be right that this methodology is more democratically faithful and more objectively predictable than any other possibility. Maybe they are even right that there is no other method. But, giving reasons does not distinguish this value judgment from any other. Even if the reasons given are persuasive, the decision is still a value judgment.

My calling textualism a value judgment is not an unfair word play. I simply mean that interpreting the Constitution that way—by text and tradition—is not set forth in the text of the Constitution and is not, or is not wholly, established within the tradition. Indeed, so novel is the idea that it is Justice Scalia’s great accomplishment that we now even think of interpretation in these ways. So, by its own terms, textualism is not the only way to interpret the Constitution. It is simply said to be the best way to achieve the goal of a rule of law. That is practically the definition of a value judgment.

If we now take Justice Scalia’s analysis seriously, it is plainly hopeless to expect an end to the politicization of the judicial confirmation process in the foreseeable future. The Senate will remain an arena in which a Justice with the “wrong” approach to interpretation can be blocked. That is essentially what happened to Judge Garland, and would be happening to Judge Gorsuch if the Democrats in the Senate had the numbers to do it.

Furthermore, as Justice Scalia also points out, these conflicts can never reach a final resolution. Even if one plebiscite is held and text and tradition win out, Congress can raise the matter with the next judicial nomination. And, since the choice of interpretive method can be expected to yield fairly consistent

results that favor one political side or the other,⁵⁰ the choice of method will always be viewed politically, as indeed it is today.⁵¹

The only way one might alter this depressing scenario would be if there were actually something “fixed,” in law, in Justice Curtis’s phrase.⁵² That was Justice Scalia’s hope in adopting textualism in the first place—that it would be something fixed. Unfortunately, even if textualism were understood as the only way to interpret, so that *choosing it* could be regarded as fixed, textualism itself would still involve value judgments because textualism is not really a method of interpretation.

IV. THERE IS NOT LIKELY TO EVER BE AN OBJECTIVE METHOD OF INTERPRETATION IN CONSTITUTIONAL LAW

I commonly see the phrase “we are all textualists now,”⁵³ and there is a similar sentiment around originalism.⁵⁴ For my purposes, there is no need to distinguish these two commitments.⁵⁵ Their acceptance demonstrates a brilliant success for Justice Scalia’s life work in a political and rhetorical sense.

50. See Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM & MARY BILL RTS. J 369, 415 (2010) (“Originalism is not a method of constitutional interpretation that can reliably lend itself to progressive outcomes in all or even most matters.”)

51. Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 3 (2014) (Expressing the view that “both conservative originalism and the notion of a living constitution . . . are merely post-hoc rationalizations for pre-conceived political results.”)

52. See *Planned Parenthood*, 505 U.S. at 999–1001 (Scalia, J., dissenting).

53. See, e.g., Richard Wolf, *Gorsuch Stands in the Shadow of a Giant*, USA TODAY, February 13, 2017, at 1A (In the USA Today story about Justice Scalia on the anniversary of his death, Justice Elena Kagan is described as frequently saying, in light of Justice Scalia’s legacy, “we’re all textualists now.”)

54. See Ho, *supra* note 50.

55. Indeed, the two descriptions are often conflated. See, e.g., Akhil Reed Amar, *Remembering Bork*, SLATE (Dec. 20, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/robert_bork_s_death_learning_from_him_and_proving_him_wrong.html (reprinted in the YALE LAW REPORT, WINTER 2017, Vol. 64, No. 1, at 19). “Thanks in part to Bork, we are all textualists of sorts; we are originalists in part.” *Id.*

These sentiments may even have changed the outer limits of what is possible in constitutional interpretation, which, if so, would please Justice Scalia. But, for all that, this success has nothing to do with a method of constitutional interpretation, as that concept is understood in the *Casey* dissent. And, in Justice Scalia's telling, it is only a method as understood in *Casey* that can depoliticize the Court and the nomination process.

Justice Scalia's point in *Casey* is the need for fixed rules of interpretation that will turn interpretation into lawyers' work that will no longer attract public attention because it will be seen as an objective investigation unaffected, if done honestly, by the values of the investigator. Textualism has gotten nowhere as a method in that sense.

It is not that a method of interpretation along these lines is either alien or unattainable. Science often investigates matters in this way and one can imagine a department of physics selecting a candidate for a tenure position with reference to certain skills and without regard to the value orientation of the candidate. A case like *Heller* demonstrates something like textualism and tradition in action, in which the issue of the personal right of possession of a firearm was resolved largely by reference to historical sources.⁵⁶ By itself, disagreement over historical evidence does not refute textualism's claim to be a method of interpretation.

But to be such a method, textualism would have to be clear and complete in its rules of application. Only in that way could value judgments be purged from its use and law returned to a nonpolitical state. Currently, textualism is neither clear nor

56. Judge Posner's criticism of the quality of the historical work in *Heller*—he stated in a First Amendment discussion that made the Internet that the opinion was “full of historical rubbish”—does not detract from the possibility of establishing the use of the method. Perhaps it does show that historical approaches should not be adopted because they will not yield clear results. *But, see* Tony Mauro, *Judge Posner Slams ‘Stupid’ Decisions Chief Justice Roberts, ‘Silly’ Stances by Scalia*, THE NAT'L L.J. (Nov. 30, 2016) <http://www.nationallawjournal.com/id=1202773466396/Judge-Posner-Slams-Stupid-Decisions-by-Chief-Justice-Roberts-Silly-Stances-by-Scalia?%20November%2030,%202016.&slreturn=20170904192212>.

complete and it is hard to imagine the elimination of its methodological flaws, or the elimination of similar flaws in any other claimed method of interpretation.

Starting just from the terms of the method, the lack of clarity in textualism is obvious. The addition of tradition to textualism is not coherent. Textualism is supposed to have something to do with the original public meaning of some phrase in the Constitution.⁵⁷ That is the matter to be investigated. What do the subsequent practices of the 19th and 20th century have to do with that? Those later practices might, or might not, reflect original public meaning, but tradition has no independent place within textualism. Nor was tradition historically a staple of constitutional reasoning. Tradition was a controversial addition to constitutional interpretation in *Moore v. East Cleveland*,⁵⁸ where Justice White criticized its merits in his dissent.⁵⁹

Tradition's role in *Casey* was not inherent in textual analysis, but was arbitrary—tradition simply allowed Justice Scalia to ward off the claim that, under textualism, the government could order couples to have only one child.⁶⁰ That challenge was absolutely correct, and Scalia's refusal to yield to it and acknowledge that the Constitution does not cure all ills, marks him as not a consistent textualist. That is not a criticism of Justice Scalia, as far as I am concerned, but it demonstrates

57. According to Randy Barnett, the emphasis on original public meaning was Justice Scalia's most significant contribution (although Barnett used the term originalism, textualism could be substituted): [i]n his Taft Lecture, Justice Scalia was perhaps the first defender of originalism to shift the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment." Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 9 (2006).

58. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (White, J., dissenting).

59. "What the deeply rooted traditions of the country are is arguable, which of them deserve the protection of the Due Process Clause is even more debatable." *Id.* at 549.

60. "There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention . . . that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor." *Casey*, 505 U.S. at 980, n.1 (Scalia, J., dissenting).

that values count in interpretation—the value, in this instance, of parental choice—which defeats the whole point of method.

The arbitrary results of tradition can be seen in Justice Scalia’s offhand invocation of 19th century judicial decisions to limit the reach of gun rights in *Heller*,⁶¹ compared to the absence of such references in Justice Scalia’s concurrence in *Citizens United*,⁶² where such decisions likely would have yielded a parallel limit on corporate political speech. For that matter, the tradition of protecting natural rights in judicial decisions is also part of our tradition, going all the way back to *Calder v. Bull*.⁶³ So, tradition is just not a self-limiting method.

Aside from this lack of clarity, textualism is also incomplete. That is, no judge always uses textualism. That need not defeat textualism as a method, except that there are no fixed rules proposed as to when to use textual approaches and when to use something else, such as case law in the common law sense.⁶⁴ To take a simple and recent example, Justice Thomas, probably the Justice most dedicated to textualism and originalism, wrote a majority opinion in *Reed v. Gilbert*,⁶⁵ a case striking down a municipal sign ordinance, which had nothing to do with the original public meaning of free speech. The opinion simply argued from the familiar First Amendment category of content neutrality.

The reason that resorting to precedent is so important is that the purpose of method in *Casey* is to remove value judgments from judicial decision-making. If the Justices are free to

61. “[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” *Heller*, 554 U.S. at 626.

62. *Citizens United*, 558 U.S. at 385.

63. *See* 3 U.S. 386 (1798). Although the actual holding in the case was that the State statute in question was not unconstitutional, the exchange between Justice Chase and Justice Iredell raised the very issues of natural right and legal positivism that we are still debating.

64. Justice Scalia never hid from his acceptance of precedent in general on pragmatic grounds as an exception to his method. *See* Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1409 (2009).

65. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

invoke textualism on an ad hoc basis and sometimes follow case law instead, there are not the fixed rules of interpretation that will depoliticize the nomination process. Hidden values will inevitably determine when case law is accepted and when it is to be overturned.

Now there are originalist theorists who recognize this point and argue that non-originalist prior decisions lack binding authority.⁶⁶ We are far from a consistent form of textualism on this matter.

As I have previously shown, textualism is not normally used in areas where the law is settled, the underlying constitutional values are accepted, or even, as in racial affirmative action cases, conservative judges simply have a value judgment that they prefer to apply over original public meaning.⁶⁷ In theory, a modification to textualism could account for these phenomena, but in practice, the attempt would be hopeless.

Although Neil Gorsuch is known as an originalist,⁶⁸ it was Senator Ted Cruz who succinctly stated at Judge Gorsuch's confirmation hearing⁶⁹ that judges should interpret law as it is, not as it should be.⁷⁰ But this is to repeat the error of the German judges of succumbing to the Nazi slogan, "*Gesetz als Gesetz*"—law as law, as highlighted in the Hart-Fuller debate. The Nazis promoted this slogan to influence the German judges to unreservedly enforce laws that they would likely regard as im-

66. This point about the illegitimate, nonbinding quality of nonoriginalist decisions is what Professor Strang was arguing, *supra* note 13, in terms of State Judges not following such decisions.

67. Ledewitz, *supra* note 3.

68. See text *supra* note 3.

69. At about 24:35 in the video for Day 2 of the Confirmation Hearing, Senator Cruz, talking about the Federalist Society, states, "[I]t is emphatically the province and duty of the judiciary to say what the law is, not what it should be." *Sen. Cruz Questions Judge Neil Gorsuch at Confirmation Hearing – March 21, 2017*, YOUTUBE (Mar. 22, 2017), <https://www.youtube.com/watch?v=WUPmplwZnKE&feature=youtu>. But Judge Gorsuch certainly did not disagree.

70. There is some doubt about whether this is fully Judge Gorsuch's view. Perhaps there was some political posturing at the Confirmation Hearing. See *infra* note 109.

moral.⁷¹ Sometimes we need judges to be a moral backstop—to hold fast to what the law ought to be. Earl Warren did that in *Bolling v. Sharpe*,⁷² essentially making up a constitutional text to prohibit segregation in the D.C. public schools⁷³ because it would be “unthinkable” if the federal government were permitted to practice racial discrimination.⁷⁴ If *Bolling v. Sharpe* was a proper decision—and no one will publicly question it—then, at a minimum, textualism should not always be employed, and thus is not a method in the sense of the *Casey* dissent.

However, if textualism is not really a method, what does the acknowledgment that we are all textualists now mean? Or, for that matter, what is the point of the interminable debates about interpretive methods?

These references do not regard textualism as a method, but textualism as a value. Justice Scalia succeeded in convincing many people that original public meaning is important. That might mean important as a starting point for interpretation, or a limit as to what results may be justifiable, or even as a value in comparing judicial decisions to other values. This is a considerable accomplishment, and I do not denigrate its importance, but it is not a rule. It is not fixed. Different judges will use textual approaches in different ways. Therefore, they will differ in judicial outcomes. Thus, as far as *Casey* is concerned, textualism is just another value judgment that the people and the Senate can use when evaluating judicial candidates. This would probably be true for any other so-called method of interpretation. Therefore, we are stuck making value judgments, and as Justice Scalia foresaw, if value judgments are just preferences,

71. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617 (1958). To be clear, Professor Hart rejected this criticism.

72. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

73. The federal government is not bound by the Equal Protection Clause of the Fourteenth Amendment, which had been the basis of holding State segregation statutes unconstitutional in *Brown. Id.* at 499.

74. *Id.* at 500.

we will remain within a highly politicized confirmation context. Is there anything to be done about this?

V. ARE VALUE JUDGMENTS IN JUDICIAL DECISIONS INHERENTLY DIVISIVE?

Hopefully, at this point I have shown that constitutional interpretation, and therefore the nomination process when evaluating that interpretation, will inevitably involve value judgments. Justice Scalia was wrong about that, but he was certainly right that subjective preferences cannot be ignored, and will forever remain matters of dispute inconsistent with anything like a rule of law. Does it therefore follow that the nomination process must remain in the realm of perpetual political conflict?

No. We *are not* doomed to endless and pointless strife. This is because Justice Scalia was also wrong about something else. Value judgments are inevitable, but they are not necessarily irrational. The certainty expressed by Justice Scalia that value judgments can only reflect subjective preferences, a view that all of the Justices on the Supreme Court have shared,⁷⁵ *is itself the source of the ideological blocs on the Court, the Senate, and also the unresolvable conflicts and division in our political and legal life.*

To see that value judgments are not always divisive, consider two decisions—*Brown* and *Loving*—that, in terms of the *Casey* dissent, represent unjustifiable value judgments. Those decisions were grounded in value judgments because they accepted that the public meaning of the term “equal protection of the laws” when the Fourteenth Amendment was passed did not include a ban on racial separation in matters like education and certainly did not include a ban on anti-miscegenation statutes.

75. See generally, Ledewitz, *supra* note 3.

It is irrelevant that historical arguments can be made on behalf of *Brown*,⁷⁶ and, if it is the case, *Loving*,⁷⁷ because any fair-minded person would have to admit, as noted originalist Robert Bork admitted,⁷⁸ that they were moral decisions and would have been rendered regardless of the historical evidence. Chief Justice Warren did not care that he found the historical evidence inconclusive in *Brown*,⁷⁹ and neither do I, nor do the American people. The fact that later historical research concludes that *Brown* could have been justified on historical grounds does not vindicate originalism or textualism.

Even though *Brown* and *Loving* represent value judgments, they are not controversial today. In fact, quite the opposite is true. Any judicial nominee who casts doubt on these cases by suggesting that they were not correctly decided, even if they should not be reversed, would almost certainly be deemed unfit to sit on the Court by the Senate.

Brown and *Loving* have always been sufficient to discredit textualism even just as a value in constitutional interpretation.⁸⁰ The same point could also be made regarding decisions protecting women against the gender discriminations of the common law.⁸¹ These decisions relied on the current, rather than the framers', understanding of equality.

76. See Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). Professor McConnell does not address *Bolling v. Sharpe*, where historical justification would be harder to find.

77. It is hard to imagine much of a historical case in favor of *Loving*. The Court observed, undoubtedly correctly, in *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (citing *State v. Gibson*, 36 Indiana, 389), that “[l]aws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the State.”

78. In his opening statement at his confirmation hearing, Judge Bork referred to *Brown* as “the greatest moral achievement of our constitutional law.” *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 100th Cong. 104 (1989) (opening statement of Robert H. Bork, United States Circuit Court Judge for the District of Columbia).

79. *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan., et al.*, 347 U.S. 483, 489.

80. *Brown* came up so often in exchanges on constitutional method, that Justice Scalia would joke, “Waving the bloody shirt of Brown again, eh?” Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, Mar. 28, 2005, at 54.

81. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (striking down State law preference for males over females to be administrators of estates).

Despite the claims of textualism to be democratically faithful, the meaning of equal protection in a democratic society must reflect what the people currently judge to be equal and not only what the framers thought was equality.⁸² Thus, the living constitution tradition is really the only possible interpretive stance that American law can take, and conservative jurisprudence only survives because it refuses to engage with inconsistent case results. For example, conservative jurisprudence will never argue that the gender equality cases should be reversed. However, this refusal is incoherent. One cannot seriously propose both that key decisions are currently unassailable and yet should not have been rendered in the first place.

At this point, Justice Scalia might say that at least these decisions all rested on a text—equal protection—whereas the abortion decisions do not.⁸³ However, this is not accurate, since *Roe* also rested on text—the word liberty in the Fourteenth Amendment—in just the same way that these other decisions rested on equal protection.

Nor can one object, even on textualist grounds, to using the Due Process Clause in that substantive way. The notion of substantive protection through a due process clause was already known when the Fourteenth Amendment was adopted.⁸⁴

But there is another decision, quite similar to *Brown*, *Loving*, and *Bolling* in its plainly moral value judgment, that shows how well accepted value judgments can be—*Skinner v.*

82. This is what Barry Friedman meant when he observed, of the failure of the Court to protect women under the Equal Protection Clause, “By the 1960’s, though, the Court’s decisions were running up against reality.” BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 290 (2009). Common words, even in the Constitution, should not be, maybe even cannot be, rendered as if they were terms of art.

83. In fact, Justice Scalia did make an argument along these lines in *Casey*, 505 U.S. at 980, n.1 (Scalia, J., dissenting).

84. There is disagreement about whether the concept of substantive due process influenced the drafting and meaning of the Fourteenth Amendment, but there is certainly an argument to be made that it did. See Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1940–1943 (1998) (book review).

Oklahoma,⁸⁵ which, in 1942, overturned the Habitual Criminal Sterilization Act under the under equal protection doctrine. The Habitual Criminal Sterilization Act had allowed the sterilization of certain convicted criminals. Despite the equal protection invocation, the substantive value judgment underlying the case was Justice Douglas's ringing pronouncement that "[w]e are dealing here with legislation which involves one of the basic civil rights of man."⁸⁶

Skinner was a triumph of the American legal system, coming in the context of WWII while rejecting Nazi-type eugenic claims. The case also repudiated the dark American progressive eugenics program legitimated in *Buck v Bell*.⁸⁷ It is frustrating to imagine a Justice Scalia on the Court in 1942 smugly announcing, "I know the Constitution says nothing about the right of reproduction." *Skinner* rested precisely on "philosophical" rather than "historical . . . premises," in Michael McConnell's phrase, but the case does not "highlight[] the pitfalls of constitutional decision making based on such premises."⁸⁸

But what then does *Skinner* highlight? Professor McConnell condemned the right of assisted suicide and sought to justify his moral/philosophical/religious position in methodological terms. What *Skinner* shows is that method is irrelevant to proper constitutional interpretation. It is not the making of value judgments that is controversial—philosophical premises in McConnell's terms—but the content of those judgments. Therefore, the Court has to be right in its value judgments for

85. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

86. *Id.* at 541.

87. 274 U.S. 200 (1927). See Eric M. Jaegers, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 948 (1992) ("The eugenics movement fueled misconceptions about mentally impaired persons, instilled a desire for social reform and paved the way to Justice Holmes' decision in *Buck v. Bell*").

88. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 685.

those value judgments to become settled law. However, that shows there is such a thing as being right. Which, in turn shows that value judgments can have justifiable content and are not simply subjective preferences.

What is that content? Charles Black and Justice Harlan referred to public acceptance as the measure of successful judicial decision-making.⁸⁹ But, as I think Black's formulation implies—"Constitutional doctrine succeeds if it expresses what turns out to be at last the authentic impulses of the nation"⁹⁰—public acceptance is not a matter of public opinion per se, but public opinion tending to make defensible moral judgments. Thus, the proper test of a judicial value judgment is that it be a good judgment.

I concede that this is hopeless as a *method* of interpretation. Justice Douglas' view in *Skinner* was nothing more than the same kind of moral intuition that Justice Scalia ridiculed in his *Casey* dissent. Nonetheless, *Skinner* will be celebrated in American legal history when all our current disputes about interpretation have fallen into the dust. Moral intuition is binding when it is right.

This point is not just a matter of ancient judicial history. For all the efforts of Chief Justice Rehnquist to reject substantive due process, he was forced to admit in *Washington v. Glucksberg*⁹¹ that the earlier *Cruzan* decision had established the right of a "competent person" to "refuse lifesaving hydration and nutrition"⁹² even though one would have to say that the Constitution says nothing about that matter. No out-of-

89. For Justice Harlan's approach, see Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J.L. & POL. 373, 374 (2004) ("Justice John M. Harlan gave a partial answer to the question of the relationship of law and democracy in his well-known dissent in *Poe v. Ullman*. In a few memorable sentences, Justice Harlan suggested that the courts are subject to a form of democratic correction. Judicial decisions outside the national tradition do not survive. Justice Harlan was conceptualizing democracy in this quotation as an organic, ongoing, informal, and bottom-up phenomenon.").

90. CHARLES BLACK, *THE HUMANE IMAGINATION* 149 (1986).

91. *Wash. v. Glucksberg*, 521 U.S. 702 (1997).

92. *Id.* at 723 (emphasis added).

control pro-life State is going to be permitted to insist that persons remain alive as martyrs to its value judgment about life, not because States cannot make value judgments, but because this value judgment would be wrong in the context of its being imposed on an unwilling person.

Even in the highly contested realm of gay rights, *Lawrence v. Texas*,⁹³ which barred the criminalization of consensual gay sex, was a necessary and good decision, which has since become completely accepted, because it ended the sporadic harassment of gay American citizens. It is very troubling that Justice Scalia's approach to interpretation obscured his moral sense at that point.

Additionally, *Obergefell*—which represented precisely the kind of judicial overreach that supports conservative jurisprudence's commitment to history and tradition—is not particularly controversial in and of itself. I doubt that a judicial nominee who pledged openly to overturn it would be confirmed as a Supreme Court Justice. *Obergefell* is controversial because of its effect on religious liberty. If supporters of same-sex marriage were to acknowledge that they have won, that they will not challenge the tax-exempt status of religious institutions who oppose same-sex unions, and will leave the occasional dissenting florist alone, the remaining deep-seated religious opposition would die out. This opposition would literally die out because even among young religious believers there are many who support gay marriage."⁹⁴ Therefore, the entire controversy over *Obergefell* would simply end. Thus, value judgments made by the Supreme Court do not cause the Court's politicization, the nomination process, or the ideological blocs on the Court. Value judgments are not always divisive.

93. *Lawrence v. Texas*, 539 U.S. 558 (2003).

94. See Ryan Denison, *Why 47% of younger evangelicals support gay marriage*, DENISON FORUM ON TRUTH AND CULTURE (Jun. 27, 2017), <https://www.denisonforum.org/uncategorized/47-younger-evangelicals-support-gay-marriage/>

What then is the cause of the current partisan deadlock? We don't study value judgments, or debate with each other about them, because of our certainty that there is nothing to study and no way to have a real debate about values. Therefore, we feel justified in simply lining up in blocs according to our preexisting values. In other words, the fact/value distinction bewitches us. But our nihilism in this regard is just an assumption. Perhaps it is even false.

VI. CONSIDERING WHETHER VALUE JUDGMENTS CAN BE DETERMINED

I had thought to call this section, "Can Value Judgments be Determined?" but I realized that law is a long way from being able to answer that question. For the moment, it would be sufficient if we recognized that law behaves as if value judgments cannot be determined, and that there are negative consequences following that assumption. That recognition might then spur us to take the determination question of determination.

Justice Scalia began his *Casey* dissent with the value judgment that he rightly concluded to be at the heart of the abortion controversy—the humanity of the unborn child. In criticizing the use of "reasoned judgment" to decide the abortion issue, Justice Scalia pointed out that "'reasoned judgment' does not begin by begging the question, as *Roe* and subsequent cases unquestionably did in assuming that what the State is protecting is the mere 'potentiality of human life.'"⁹⁵ According to Justice Scalia, "the proper criteria [are] text and tradition,"⁹⁶

95. *Casey*, 505 U.S. at 982 (Scalia, J., dissenting).

96. *Id.* at 983.

when interpreting the Constitution, not reasoned judgment. However, reasoned judgment must deal with the fundamental matter to be resolved. In what seems to me the heart of Justice Scalia's legal method in all of his writings, he then both names the issue in the abortion controversy and generally describes the absolute limit of law that his method of interpretation is meant to acknowledge and enforce:

The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.⁹⁷

Because the thinking and commitments contained in this well-known passage⁹⁸ represent the commitment of a large portion of the legal academy, many judges (including Judge Gorsuch), an entire political party, and, increasingly, the dominant view of law in the public, it is worth reminding readers how odd, ridiculous, and immoral this passage is. This is especially important since Justice Scalia thought it was obvious—hence the phrase, "of course"—that law could not determine whether a fetus is a human life. That is, it was so obvious that nothing rational could be said about value judgments that Justice Scalia did not think it necessary to defend this assumption.

97. *Id.* at 982.

98. I performed a Westlaw search for the first five words and found the passage quoted in fourteen law review articles, and, considering its presence in every constitutional law textbook I have ever seen, it can be reasonably assumed that every American law student since 1992 has probably at least read it.

The passage is odd because the Constitution plainly charges courts to protect “life” in the Due Process Clauses of the Fifth⁹⁹ and Fourteenth¹⁰⁰ Amendments. Note that I am not claiming here that the protection of life is supposed to be substantive (despite believing that myself). But even if due process is merely procedural, courts are supposed to protect life from being taken by any government without due process of law. This responsibility is put to the courts in the plainest textual way. It is odd that a supposed textualist like Justice Scalia proposes that law walk away from this responsibility, which necessarily requires deciding whether someone or something is a life. What would Justice Scalia have said if someone had proposed that it is too difficult to decide what “property” is and therefore courts should stop trying to protect that?

The passage is ridiculous because it assumes that just because there is disagreement about a matter, nothing further can be said about it. But, why is it significant that some societies have “considered newborn children not yet human”? Some societies have believed that the world is flat. Does Justice Scalia consider mere disagreement sufficient to remove that matter also from the realm of things that can be determined, even determined by law?

Now it may be that values are different from facts, but that difference cannot reside in the notion that people disagree about values but not about facts. People disagree about both. As Hilary Putnam put it, “[n]o sane person should believe that something is ‘subjective’ merely because it cannot be settled beyond controversy.”¹⁰¹

The passage is immoral for reasons, I hope, everyone can immediately appreciate. The thinking here represents the

99. U.S. CONST. amend. V: “[N]or [shall any person] be deprived of life, liberty, or property, without due process of law. . . .”

100. U.S. CONST. amend. XIV, §1: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

101. HILARY PUTNAM, *THE MANY FACES OF REALISM* 71 (1987).

crudest cultural relativism, which holds that no cross-cultural criticisms can be made because moral judgments in different cultures are incommensurate. Thus, there are no universal, binding moral truths.¹⁰²

We may not know much about value judgments, including what to do about abortion. But surely we know, as well as we know the earth circles the sun, that cultures that exposed unwanted infants to death or killed the incompetent elderly were committing immoral acts. How could anyone, let alone a Justice on the Supreme Court, suggest that since we cannot know whether these practices are wrong, we cannot know whether the fetus is a human being? The argument should have gone the other way. Since we do know that these other practices are wrong, we should be able to determine whether the fetus is human by an extension of moral reasoning.

It is not even clear that the humanity of the fetus is a value judgment, in Justice Scalia's terms. The facts of fetal development are not in dispute. A unique set of chromosome pairs comes into existence in the act of fertilization.¹⁰³ There is not any doubt that a human being's existence can be traced to that point, and not before. Everything after fertilization is development.

A value judgment does arise, but only at the point of deciding the significance of human life in the womb, not whether there is something human there. I do not dispute that this value judgment is very difficult to make for many reasons, not least of

102. We see a cultural relativism similar to that of Justice Scalia in the offhand refusal of Donald Trump to condemn the brutal regime of Vladimir Putin during the 2016 presidential campaign: "It's a very different system, and I don't happen to like the system, but certainly in that system, he's been a leader. Far more than our president has been a leader." Andrew Rosenthal, *What Trump Supporters Want You to Believe*, N.Y. Times (Sept. 13, 2016), <https://nyti.ms/2InJpcQ> (quoting 2016 presidential candidate Donald J. Trump at a campaign town hall meeting). Mr. Rosenthal called Trump's comment "[m]oral relativism in its most base form." *Id.* Since one cannot judge between democracy and autocracy, this kind of relativism undermines the entire constitutional fabric.

103. See Dianne N. Irving, *When Do Human Beings Begin?: Scientific Myths and Scientific Facts*, 19 INT'L J. SOC. & SOC. POL'Y, no. 3/4, 1999, at 22, 22-36.

which is the overwhelming presence of sex discrimination in this society, which places the responsibility for an unwanted baby not only mostly, but for all practical purposes, solely upon the mother and not the father.¹⁰⁴ Nonetheless, why should it follow from this difficulty that law can determine *nothing* about the matter? And even more to the point, why should the difficulty of this judgment infect all reasoned judgment about all values?

In placing his method of interpretation upon an epistemological ground—the impossibility of knowledge about value judgments—rather than upon the difficulty of making correct moral judgments about abortion, Justice Scalia made a fateful, damaging choice in the direction of relativism and nihilism. I do not mean that Justice Scalia's dissent caused the current American descent into untruth that is going on all around us. Justice Scalia's dissent is merely a small part of that overall societal movement, and not its genesis. But, it is a part, and given the role of the Supreme Court in American life, it is hard to say that it was insignificant.

It was certainly not insignificant in law. As Justice Scalia notes, but fails to appreciate, the majority in *Roe* agreed with him that the question of when human life begins could not be decided.¹⁰⁵ What could be decided by the majority was, first, that the Constitution does not define the fetus as a person¹⁰⁶—a purely textual judgment entirely in accordance with Justice Scalia's public-meaning approach to constitutional interpretation. Second, the majority could decide that Texas's claim that

104. The noted feminist thinker Catharine MacKinnon was thinking along similar lines years ago—that “[t]he fetus is a human form of life,” but “[t]he existence of sex inequality in society requires that completed birth mark the personhood line.” Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1316 (1991).

105. “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.” *Roe v. Wade*, 410 U.S. 113, 159 (1973).

106. *Id.* at 157–58.

the fetus was a human being was merely “one theory of life,”¹⁰⁷ which, again, is entirely consistent with Justice Scalia’s understanding of the subjective nature of value judgments.

Using this approach, the only issue for the Court in *Roe* should have been whether the State has unlimited power to forbid a medical operation that a doctor judges to be warranted based on that State’s disputed moral theory. Justice Scalia would argue, I suppose, that the State has that power, but even the *Cruzan* decision seems to challenge that conclusion. Aside from that issue, if value judgments are mere opinions, as Justice Scalia insists, it would seem that *Roe* was correctly decided.

Ultimately, Justice Scalia’s view of value judgments was adopted by the majority in *Lawrence* in a context that Justice Scalia rejected. The majority in *Lawrence* formally adopted the view that the moral judgment of a majority is not a sufficient basis by itself to uphold a law.¹⁰⁸ That is, under the current doctrines, a moral judgment could not serve as a rational basis for a law. Justice Scalia objected to this holding, even though it follows from the position in his *Casey* dissent.

Judge Gorsuch unintentionally demonstrated the futility of Justice Scalia’s position when he observed in a concurrence, in a formulation often repeated in evaluating his fitness for the Supreme Court, that “[the Constitution] isn’t some inkblot.”¹⁰⁹ But the inkblot test in psychotherapy is meant to capture non-rational aspects of human personality. Thus, Judge Gorsuch’s choice of image is entirely in keeping with Justice Scalia’s value skepticism that there can be nothing rational about values.¹¹⁰

107. *Id.* at 162.

108. “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . .” *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting Stevens, J., dissenting in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

109. *Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring): “And that document isn’t some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning.”

110. There is reason to doubt that Judge Gorsuch actually agrees with the value skepti-

But, what if the opposite is the case? What if the Constitution is not an inkblot, not because the Constitution can only be interpreted textually and historically, but because constitutional interpretation is, or could be, something rational even when values are plainly present? What if something can actually be learned about value judgments and reasoned judgment thereby improved? In other words, what would be the implications for law if values are not merely subjective preference?

VII. JUDICIAL POLITICS IN AN AGE OF RATIONAL VALUE JUDGMENTS

I began with an observation and a problem. The observation was that the Supreme Court nomination process has become politicized. The problem is that the understanding of values as preferences, which currently dominates American political and legal life, leads to the formation of ideological blocs on the Court and in the Senate that control evaluation of judicial nominees and remove the necessary foundation for a rule of law.

What would happen if a nominee to the Supreme Court approached the Senate Judiciary Committee with a different kind of message? What if a nominee began with the following statement?

I come before you today wanting to plainly indicate my understanding of how constitutional questions should be approached so that the committee can freely evaluate my fitness to be confirmed as a Justice on the U.S. Supreme Court. The Constitution enacts both a structure

cism demonstrated by Justice Scalia, despite the inkblot reference. Judge Gorsuch contributed a chapter to a book on John Finnis, in which he states that, although not “[m]y daily bread . . . from time to time, Finnis has been kind enough to dine with those of us who subsist on . . . doctrinal fare. . . .” Neil M. Gorsuch, *Intention and the Allocation of Risk*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 413 (John Keown & Robert P. George eds., 2013). Certainly that does not sound like the remark of a genuine legal positivist.

of government and the protection of specified and unspecified rights. All of the Constitution should be interpreted as a unified and rational whole so that structure and rights harmonize. In understanding rights, in particular, attention must be given both to what the framers enacted in the immediate context and in the long run. In the immediate context, their judgment is binding. But in the long run, as they themselves would agree, our judgments must govern. So, for example, if the phrase, “cruel and unusual punishments” was understood to bar the imposition of certain corporal punishments when the Eighth Amendment was adopted, I agree with textualists and originalists that these punishments are forever barred. But, as to the meaning of cruelty itself, that must be approached from a current understanding of cruelty. Otherwise, the Constitution would become a term of art rather than an ongoing source of political legitimacy. Although the application of this approach is very difficult in the context of unenumerated rights, it is plain that the framers understood that such rights exist and have charged the future with their recognition. As to the criticism that my approach will leave the meaning of the Constitution in the hands of judges, I can only respond along the lines of Justice Harlan defending substantive due process in *Griswold v. Connecticut*. Justice Harlan’s respect for history and tradition did not prevent him from recognizing the right of marital privacy as “implicit in the concept of ordered liberty.” I would wish as a Justice to be worthy of the tradition of ordered liberty notwithstanding the particular views of the past, and I would hope that

my judgments would be vindicated by the people. Otherwise, I expect that my judgments would be overturned in time.

We can be pretty sure that the reaction to such a statement would be one of disbelief and suspicion. We can be pretty sure that the nominee would be criticized as having given up the principle of “interpretive fidelity” to the Constitution and wanting to substitute instead “the abstract theorizing of federal judges.”¹¹¹ In addition, the nominee would be accused of already having decided some of the most controversial decisions that will come before the Court, and of trying to obscure that fact by falsely claiming to be practicing an open and rational method.

But, we do not have to speculate. There already has been an example of this type of a reaction to such a claim—the reaction to Justice Clarence Thomas before and during his hearings before the Senate Judiciary Committee in 1991. During those hearings, the controversy over Justice Thomas’s natural law orientation—considered a front for a conservative judicial and political agenda—was so intense that the nominee assuaged concerns by essentially abandoning his previous jurisprudential thinking by saying, “[I] don’t see a role for the use of natural law in constitutional adjudication.”¹¹²

There is a lesson in this thought experiment. There is no immediate way of alleviating the political divisions on the Supreme Court and in the Senate confirmation process. Appeals to reason, appeals to the candidate’s moderation (such as in the case of Judge Garland), and claims to be only following

111. See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1285, 1287 (1997).

112. See generally David Margolick, *The Thomas Hearings; Sizing Up the Talk of ‘Natural Law’: Many Ideologies Discover a Precept*, *N.Y. TIMES* (Sept. 12, 1991), <http://www.nytimes.com/1991/09/12/us/thomas-hearings-sizing-up-talk-natural-law-many-ideologies-discover-precept.html?pagewanted=all>.

the law and not pursuing any agenda (such as in the case of Judge Gorsuch), are not helpful when participants in the hearings think they “know” that only human will, and not judgment, is present.

Essentially, the only thing that matters to the participants is whether cases like *Roe* will be overruled or extended. And the only reason these concerns did not derail the nominations of Justices Sonia Sotomayor and Elena Kagan¹¹³ is that they were felt to be replacing equally liberal Justices, and therefore they would not alter the Court’s basic direction and orientation. However, Judge Garland was nominated to replace a conservative Justice, which would have altered the future direction of the Court. So, at that point, Republicans considered any action against him justified. In fact, it is likely that if Hillary Clinton had been elected president, none of her nominees to the Court would have been confirmed by the Republican Senate.¹¹⁴ The Court would have been allowed to shrink in a kind of reverse court-packing plan.

The same partisan opposition will occur if President Trump attempts to replace Justice Kennedy. It will be understood that anyone so nominated will have made a commitment, if not expressly, then impliedly, to overrule *Roe*. This could lead to the dirtiest nomination fight in memory, if not in history, which, considering the recent Garland and Gorsuch nominations, is saying something.

Certainly this situation is bad for the Supreme Court, bad for law, and bad for American political life. The question is, can anything be done about it? If, at this point, nothing can be done in the courts or in the Senate, does that mean that ultimately nothing can be done at all? Here, there is some potential hope. The reason law is so beset is that law has decided that human will is the fundamental reality in all decision making. All

113. Neither nomination was opposed by filibuster.

114. See Ledewitz, *supra* note 22, at 237 & n.161.

claims currently offered about interpretation are ultimately ways to deal with that conclusion.

On the other hand, if it were possible for law to have a genuine subject matter and not simply reflect a contest for power, then it might be possible to evaluate legal methods and conclusions with criteria beyond whether the outcomes are preferred by various political coalitions. That search would have to begin in law school.

VIII. LAW SCHOOL IN AN AGE OF RATIONAL VALUE JUDGMENTS

What if the good were real? And what if law's contribution to the good could be studied? This idea is not a fantasy, even though it is hard to imagine in the current positivistic context. In other words, how can moral realism, and a kind of expansive and qualitative empiricism, be introduced into the law school curriculum?

The reason to proceed along these lines is that nonpartisanship and reasoned judgment are not character traits. We may wish that people in political life were more civil to each other, but the cause of incivility is not simply that people today are more aggressive or less polite than they used to be. People may indeed be more aggressive and less polite, but it is because of the understanding of values that so influenced Justice Scalia. To put it simply, if reasoned judgment is always a fraudulent cover for human will—that is, if David Hume was right about reason as the slave of the passions¹¹⁵—then there will not be any reasoned judgment because any such pretense of judgment would be a fraud. And law school therefore will not teach reasoned judgment, as indeed it does not today. But, if there were

115. DAVID HUME, *A TREATISE OF HUMAN NATURE* 415 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1888): "Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them."

actually something to reason from and about, then people could engage productively in reason, and law school could then be the place where reasoning about humans flourishing in community would take place.

We have a model for disagreements within a context of reason—namely, the debates over the enactment of the Constitution. Those disagreements were vehement. But they took place within a shared culture of understanding. We have to begin to recreate a culture like that, something that could be done in law school.

But how? I will be the first to admit that I do not know the full answer to that question. That is why this section will be a short one. Nevertheless, we can proceed, both negatively and positively, to at least outline what such a law school of the future might be like.

As to what matters do not need attention, or are at least irrelevant to the emergency of public life, we have skills learning and general improvements in law school teaching. I doubt that there was anything here that needed to be fixed—after all, the downturn in law school applications had to do with macroeconomic conditions rather than a perceived problem with law school instruction. But whatever worth these efforts have, they miss the mark as to today's genuine issue, which is not skills or information, but the crisis in values and meaning.

It is ironic that the authorities who oversee law schools—the AALS and the ABA—have concerns about these irrelevant matters, but no apparent concern over the condition of American public life in general and the rule of law in particular. The ABA touts pedagogical issues, while the AALS tried to remind the public at its 2017 annual meeting *Why Law Matters*.¹¹⁶ There is a crisis in America over the rule of law, but the

116. See generally Bruce Ledewitz, *The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy*, 12 U. MASS. L. REV. 230, 256–59 (2017).

crisis is not in the public; it is within the legal academy and the courts. Physician, heal thyself.

The other matter that is not needed in law schools is relevance to the legal issues of the day. Law school cannot begin with the big controversial cases like *Roe* and how they should be decided. A thorough, nonideological foundation would have to be laid first, or all such conclusions would be dismissed as mere partisanship. That also means that law professors have to be law professors, rather than junior judges arguing for their side in the latest media reported controversies.

There is also already a well-established starting point for loose communities of religious and non-religious people to work together to arrest just the sort of cognitive decline—the bias and social irrationality—that we are now experiencing. Bernard Lonergan, a Jesuit theologian, called such a loose community “Cosmopolis,” which Mark Miller describes as “a redemptive community that would motivate people on a *cultural* level instead of attempting through economics or politics to impose new social structures.”¹¹⁷ That last point about not working programmatically is important, because it would be premature to weigh in on those political matters in law school, which law professors, and I most certainly include myself, love to do.

But then what should be the starting point for legal education? We have to start where the crisis is. So, in terms of the kind of realism that confronts value skepticism, the question is not yet the content of the real, but the presence of the real. That is, do values have any kind of participation in the real—is the good in any sense really there? Or, to put it simply, when I write on the board, “Slavery is wrong,” am I writing nonsense? Is, or is not, the fair response to what I have written, “Well, wrong now for us, but not wrong then for them”? For the sake

117. MARK T. MILLER, *THE QUEST FOR GOD & THE GOOD LIFE: LONERGAN'S THEOLOGICAL ANTHROPOLOGY* 177–78 (2013).

of my students, I have to try to answer that question—not only about slavery, but about any such judgment.¹¹⁸

Internal realism and realism with a human face—forms of at least minimal realism—were the lifelong preoccupation of the American analytic philosopher, Hilary Putnam,¹¹⁹ who passed away in 2016. Putnam was very close to law during his career,¹²⁰ and, even if we law professors cannot read Heidegger and Hegel, there is no excuse for not reading Putnam. Putnam is where I, at least, propose to start. Others will have differing starting points.

But if we cannot be united on starting points, we must be clear about the goal. The goal is to put law on something akin to scientific foundations. We want to study human flourishing in communities, and the sciences can teach us a great deal about that; but so can the humanities. Recently, law has developed an arrogance about looking to outside sources such as these—an arrogance that the legal realists, for example, did not share. They did not hesitate to look to science, in particular psychology, for insights into law.¹²¹

I have to add two warnings here. First, law did begin having debates like these in the 1980s among Judge Richard Posner, Owen Fiss, Stanley Fish, and others.¹²² These debates did not go very far or lead to anything. I think Putnam might say the debates were handicapped by an unreasonable standard

118. Our position, in other words, has to resemble that attributed to C.S. Lewis: rather than offer a “final worked-out ethical theory . . . [h]e offered a defense of moral reality itself.” JUSTIN BUCKLEY DYER & MICAH J. WATSON, *C.S. LEWIS ON POLITICS AND THE NATURAL LAW* 37 (2016).

119. Putnam suggested that he gave up this effort after the 1980s. See Hilary Putnam, *Pragmatism and Realism*, 18 *CARDOZO L. REV.* 153, 162–63 (1996). But it is clear even from the article itself that the effort was not given up, but only one of his approaches to realism—the approach that Putnam called “internal realism.”

120. Putnam even used the metaphor of adjudication for how to engage ethical judgment in general. See PUTNAM, *supra* note 45, at 181.

121. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

122. In the midst of it, Martha Minow called it “the interpretive turn.” Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1861 (1987).

for realism—or objectivity, as it was called.¹²³ I would add that there was also a fear of religion and an unwillingness to truly explore the possibility of truth in the cosmos, a concern that our more environmentally concerned and scientifically sensitive age might not share. Anyway, we have to try again.

But the second warning is a methodological point—the debate was allowed to die off. This time, whatever searching there is will have to be pushed all the way toward what Martin Heidegger characterized as decision.¹²⁴ Since the emergency is so much more obvious now, I doubt that postmodern irony will get in the way.

Finally, we should not minimize the difficulty of our task. There are no shortcuts. To our value-lacking world, Judge Posner offers pragmatism. But in our nihilism, pragmatism fares no better than any other position. Judge Posner can propose that judges “openly premise their decisions largely on common sense, a practical weighing of the relative costs and benefits of alternative decisions, [and] the relevant scientific and academic literature . . . ,”¹²⁵ but what is the relative cost of something like abortion? Thankfully, people can see the cost to a desperate, pregnant woman denied an abortion. But what is the other cost? That depends on whether the unborn child is a human being and on whether we count its interests in our calculus. In other words, one needs a real measure of human flourishing before one can maximize welfare. Our inability to endorse valuations of real worth is our true problem.

IX. CONCLUSION

123. See PUTNAM, *supra* note 45, at 131: “The contemporary tendency to regard interpretation as something second class reflects, I think, not a craving for objectivity but a craving for absolutes and a tendency . . . to think that if the absolute is unobtainable, then ‘anything goes.’”

124. Obviously, this is just a quick reference. See generally Eric Sean Nelson, *History as Decision and Event in Heidegger* (2013), <http://epub.ff.uns.ac.rs/index.php/arhe/article/viewFile/548/567>.

125. Richard A. Posner, *What is Obviously Wrong with the Federal Judiciary, Yet Emi- nently Curable: Part II*, 19 GREEN BAG 2D 257, 261 (2016).

This essay should not be read as a criticism of conservative jurisprudence. On the left, John Hart Ely, presciently, in his 1980 *Democracy and Distrust*, understood our crisis and proposed a solution—to limit value judgments to process issues of political life.¹²⁶ Ely understood that society no longer had the shared foundations to allow for substantive moral reasoning that would be viewed as legitimate. He made this point in setting forth Phillip Roth's story of the bus driver, which ends, "THEN THE OTHER FELLOW IS WRONG, IDIOT!"¹²⁷

Ely's mistake was to accept the lack of shared foundations and not question it. Indeed he praised it, saying that our society "rightly does not accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives."¹²⁸

This conclusion is not obvious. *Brown*, *Loving* and *Skinner* certainly throw it into question. So do cases protecting the equality of women. And *Lawrence* as well, just to begin the process of summing up cases. We now know how dangerous Ely's conclusion is. When disagreement is allowed to limit truth, soon it can begin to undermine even factual claims.

It is no longer 1980 or 1992. We know the world that the value skepticism of John Hart Ely and Antonin Scalia has given us. It is the world of 2017. Ely and Scalia have been judged right by the culture, but the consequence has been disaster. We have to begin again and at least question whether they were right after all. Heidegger teaches that questioning is the piety of thought.¹²⁹ We can't expect piety in politics, but we can hope for it in law.

126. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

127. *Id.* at 48.

128. *Id.* at 54.

129. MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND*

