

## LEGISLATING FROM THE BENCH: A DEFINITION AND A DEFENSE

by  
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*The past few decades have seen a rise in the frequency, intensity, and prominence of attacks against the courts by politicians, commentators, scholars, and interest groups. This project begins exploring the significance, cogency, and relevant political context of these criticisms by examining the particular claim that judges “legislate from the bench”—somehow acting more like lawmakers than jurists. My research is based on two primary components, the first consisting of an empirical analysis of how the legislating from the bench term is invoked, the second entailing a systematic normative assessment of these various critiques. Ultimately, I claim that traditional political and scholarly judgments about legislating from the bench need to be supplemented with a more thorough and rigorous account of this vilified practice. Given the nature of our separation of powers system and the evolution of the judiciary’s role, some aspects of legislating from the bench are both inevitable and desirable. By appreciating the different forms that legislating from the bench can assume, this practice can be defended against the nearly unanimous negative views of scholars and politicians.*

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## I. INTRODUCTION

The judiciary has been a perennial target of politicians, scholars, and interest groups—drawing fire for controversial decisions and its status as a purportedly counter-majoritarian institution. Notwithstanding some variation, the frequency, intensity, and prominence of these attacks have generally increased since the 1980s.<sup>1</sup> Over the past two decades, legislative and executive

<sup>1</sup> See, e.g., CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006); Bruce G. Peabody,

officials have frequently and vociferously objected to court decisions in areas such as national security, privacy and abortion, religious expression, and federalism, and have supported proposals designed to limit judicial power.<sup>2</sup> Simultaneously, legal commentators have lamented various trends in “judicial policy making,”<sup>3</sup> and championed their own initiatives for curbing the courts.<sup>4</sup>

This contemporary hostility to the judiciary was initially driven, in part, by the political success of the conservative movement beginning with the “Reagan Revolution,” and the opposition of many movement activists to the legacies of the Warren and Burger Courts.<sup>5</sup> But more recently, this opposition has deepened and broadened, brought on by a Congress strongly divided by party,<sup>6</sup> and a Rehnquist Court that invalidated federal legislation (some of it widely popular) at a rate approximately four times greater than the Court’s historical average.<sup>7</sup> The resulting sense amongst political elites of both parties seems to be that the judiciary is “in play” politically—that is, that its ideological character is in some doubt, with the consequence that courts are seen as

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*Congress, the Court, and the “Service Constitution”: Article III Jurisdiction Controls as a Case Study of the Separation of Powers*, 2006 MICH. ST. L. REV. 269 (2006).

<sup>2</sup> See, e.g., RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* (2005); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005); Peabody, *supra* note 1, at 269 (outlining controversies involving the judiciary).

<sup>3</sup> See VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT* (2001); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (2000); DANIEL LAZARE, *THE VELVET COUP: THE CONSTITUTION, THE SUPREME COURT, AND THE DECLINE OF AMERICAN DEMOCRACY* (2001).

<sup>4</sup> See, e.g., JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); TUSHNET, *supra* note 2; *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (Herman Schwartz ed., 2002) (providing a range of scholarly criticisms of the Court); Robert L. Bartley et al., *Has the Supreme Court Gone Too Far? A Symposium*, COMMENTARY, Oct. 2003, available at [http://committeeforjustice.org/contents/news/news100103\\_commentary.shtml](http://committeeforjustice.org/contents/news/news100103_commentary.shtml) (conversation about the Court from commentators with different political orientations). While this Article considers the use of legislating from the bench as a critique of the entire United States judiciary, its focus is primarily on attacks against federal courts.

<sup>5</sup> See generally Peabody, *supra* note 1.

<sup>6</sup> KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (Benjamin I. Page ed., 1991).

<sup>7</sup> THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 988 (2005) (noting that the Rehnquist Court has struck down a historically high number of federal laws per year); Robert Post, *Congress & the Court*, DAEDALUS, Summer 2003, at 5; Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in *CONGRESS AND THE CONSTITUTION* 87 (Neal Devins & Keith E. Whittington eds., 2005).

untrustworthy political allies, and, therefore, as institutions that must be potentially tamed.<sup>8</sup>

What are we to make of the attacks and misgivings that have flowered since the 1980s? On what specific grounds are critics objecting to the courts, and are the terms of their reproach sensible and fair? Do today's criticisms fall within a historical pattern of recrimination, or do they point to a new political environment requiring new metrics for assessment? Do the recent arguments advanced against the judiciary represent a normal, even salutary operation of the separation of powers, or do they threaten, instead, to undermine the authority and functions of our independent judiciary?

This Article begins grappling with these questions by examining a particularly prominent line of contemporary criticism of the courts, the claim that judges "legislate from the bench," somehow acting more like lawmakers than jurists. In parsing some of the most salient terms through which today's battles against the judiciary are being waged, this Article attempts to clarify, systematize, and assess objections to the courts.

This effort is important, in part, because it represents an opportunity to bridge the frequently divergent perspectives and concerns of legal scholars, political scientists, and public officials. Today's politicians who criticize the courts seem to be perturbed about some aspects of judicial behavior, but it is not immediately evident if they are consistent or coherent in their objections. By bringing together legal research (which, on the whole, appears premised on a view that courts should and do engage in decision making that is markedly distinct from legislators and other political officials) and political science scholarship (which tends to presume that courts are "policymakers" much like other political institutions), we can provide a more systematic and clear map of what kinds of judicial behaviors we might find objectionable, and the rationale for condemning these practices. In turn, this taxonomy or typology<sup>9</sup> should assist us in identifying the degree to which different forms of criticism of the courts are well-founded or of dubious merit.

This Article pursues these general objectives through two primary approaches, the first consisting of an effort to define "legislating from the bench," distinguishing various ways in which we might understand what the term means—and identifying specific objections linked with each of the forms of the practice. Having laid out these different potential definitions of legislating from the bench, and the associated criticisms, the Article then engages in a systematic, normative assessment of these various charges, in part by invoking constitutional theory, and, specifically, a somewhat unconventional model of the separation of powers.

This analysis leads to the conclusion that the traditional manner in which politicians (and scholars) discuss and assess legislating from the bench needs to

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<sup>8</sup> See generally Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQ. 127 (2004).

<sup>9</sup> This Article does not seek to make any specific claims about the frequency of behavior associated with "legislating from the bench."

be supplemented and developed. Given the nature of our separation of powers system and the evolution of the judiciary's role, some aspects of legislating from the bench are both inevitable and desirable. In short, this Article makes the case that by appreciating the different forms that legislating from the bench can assume, the practice can be defended and even embraced, notwithstanding widespread political and scholarly disapproval.

## II. LEGISLATING FROM THE BENCH IN POLITICAL AND HISTORICAL CONTEXT

### A. *Why Study the Term?*

As suggested, the American judiciary has been criticized for any number of reasons, ranging from its supposedly deleterious effects on democracy, to who sits on the bench, to how the public gets access to the courts.<sup>10</sup> So what makes the particular charge of legislating from the bench worthy of systematic analysis? Most obviously, "legislating from the bench" seems to be the phrase of choice for many contemporary critics of the court, especially conservative politicians, although the term has also been invoked by ideological liberals and academicians.<sup>11</sup> The prominent and sustained use of the term by these diverse figures suggests that studying it may help in unpacking whatever consensus exists about what constitutes irresponsible behavior by courts. Stated somewhat differently, in order to understand the nature, significance, and credibility of objections to the courts, we ought to investigate the designations used most frequently and vituperatively by the judiciary's detractors.

This objective seems especially important in light of two other observations. First, there is some evidence that concerns about the judiciary acting like a lawmaking institution are resonating with the public. For example, a 2005 survey conducted by the American Bar Association found that 56% of respondents agreed with the statement that "judicial activism" has reached a "crisis" and that judges "routinely overrule the will of the people, invent new rights and ignore traditional morality."<sup>12</sup> A poll conducted in 2006 found, more specifically, that over a third of New Jersey voters claimed to have heard of the phrase "legislating from the bench," and, of these, three-quarters thought of it as a "somewhat" or "very" serious problem.<sup>13</sup>

Second, while prior studies have examined attitudes towards judicial lawmaking or policymaking and suggested different ways in which we might

<sup>10</sup> See, e.g., JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* (2003); Bruce G. Peabody, *Legislating Supreme Court TV*, *CHRISTIAN SCI. MONITOR*, Sept. 28, 2006, at 9.

<sup>11</sup> See, respectively, 151 CONG. REC. 94, S8205 (daily ed. July 13, 2005) (statement of Sen. Kennedy); JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 11 (1984).

<sup>12</sup> Martha Neil, *Half of U.S. Sees 'Judicial Activism Crisis,'* A.B.A. J. EREPORT, Sept. 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html>.

<sup>13</sup> FDU PublicMind, *Criticizing the Courts* (Mar. 15, 2006), <http://publicmind.fdu.edu/fromthebench/>.

conceive of institutional overreach or “activism,” evidently no other research attempts to scrutinize the meaning and significance of “legislating from the bench” specifically.<sup>14</sup> As suggested, this is a potentially significant oversight for anyone interested in examining the character and status of today’s attacks against courts—and the threats they may pose.

*B. A Short History of the “Legislating from the Bench” Critique*

As indicated, scholars and politicians have a long tradition of criticizing the judiciary, particularly on the grounds that it is acting beyond its ken and seizing legislative prerogatives and tools.<sup>15</sup> At the time of the constitutional founding, Anti-Federalists fretted that the federal judiciary would control the legislature and contribute to “an entire subversion of the legislative, executive, and judicial powers of the individual states.”<sup>16</sup> In the early nineteenth century, Jeffersonian Republicans attacked Chief Justice John Marshall and the Supreme Court for operating beyond their designated roles and compromising the powers and authority of Congress.<sup>17</sup> Progressives at the end of the century assailed the judiciary for invalidating labor and other economic legislation, again on the grounds that the courts were inappropriately interfering with core congressional responsibilities.

Initial scholarly discussions of the judiciary’s role as a legislative agent were more explanatory and analytical. As early as 1887, one scholar concluded that “it is no longer anywhere denied . . . that the judges [are] . . . engaged in *legislating*, since they frame the rules which they apply to the transactions in hand, and which constitute the basis of the judgments they pronounce.”<sup>18</sup> The development of legal realism in the 1920s and 1930s bolstered this view that, as a descriptive matter, judges might be thought of as policymakers, motivated by policy goals, constituent pressures, and other political factors that purportedly made them more alike than dissimilar to legislators and other elected officials.<sup>19</sup>

In the context of this greater sensitivity to the courts’ potential contributions to making law and public policy, and in the face of opposition by the Supreme Court to the New Deal, President Franklin Delano Roosevelt eventually confronted the Court and pledged to “appoint Justices who will act

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<sup>14</sup> Some scholarship has suggested that this is an important topic. *See, e.g.*, Henry J. Abraham, *Effectiveness of Governmental Operations*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1976, at 81, 81–97 (calling for renewed attention to the question of “how to confine judges to judging rather than legislating”).

<sup>15</sup> *See generally* Peabody, *supra* note 1.

<sup>16</sup> THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 296 (Ralph Ketcham ed., New Am. Library 1986).

<sup>17</sup> *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001).

<sup>18</sup> John F. Dillon, *Our Legal Chaos*, 2 POL. SCI. Q. 91, 94 (1887) (emphasis in original).

<sup>19</sup> Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005).

as Justices and not as legislators.”<sup>20</sup> Popular criticism of the judiciary on grounds of institutional overreach surged again in the era of the Warren Court, and from this period, the charge that the courts have inappropriately behaved like legislators has been made most consistently by conservatives.<sup>21</sup> In the 1950s and 1960s, Congress considered numerous measures to curb judicial power, as interest groups and elected officials condemned the Court for acting like a “super legislature” in issuing controversial and often broad decisions on civil rights, civil liberties, reapportionment, and other topics.<sup>22</sup> President Richard Nixon continued in this vein, campaigning against “super-legislators with a free hand to impose their social and political viewpoints on the American people” and promising instead to nominate “strict constructionists who [see] their duty as interpreting and not making law.”<sup>23</sup>

As indicated earlier, variations of the “legislating from the bench” critique gained prominence following the GOP electoral victories of the 1980s, including Ronald Reagan’s ascension to the presidency and the end of 25 years of Democratic rule in Congress. Ironically, these charges persisted during a period (1981–1992) when Republicans and conservatives strongly imprinted the composition and ideological cast of the judiciary.<sup>24</sup> Nevertheless, throughout the administrations of Reagan and George H.W. Bush, scholars, public officials, and interest groups repeatedly attempted to tar state and federal judges with the “legislating from the bench” critique, and argued that this

<sup>20</sup> Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL. 599 (2004). See also Barry Friedman, *Attacks on Judges: Why They Fail*, 81 JUDICATURE 150 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 1022–28 (2000).

<sup>21</sup> ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY (1999); CRAIG R. SMITH, TO FORM A MORE PERFECT UNION: THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 1787–1791 (1993).

<sup>22</sup> DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 269–71 (1966); WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957–1960 (Da Capo Press 1973) (1961); THEODORE M. VESTAL, THE EISENHOWER COURT AND CIVIL LIBERTIES (2002); Loren P. Beth, *The Supreme Court and the Future of Judicial Review*, 76 POL. SCI. Q. 11, 12 (1961). According to Erwin Chemerinsky, “between 1953 and 1968, over sixty bills were introduced into Congress to restrict federal court jurisdiction over particular topics.” ERWIN CHERMERINSKY, FEDERAL JURISDICTION 148 (1989). One of the most (in)famous congressional criticisms of the Supreme Court during this time was the so-called “Southern Manifesto,” signed in 1956 by 100 federal legislators. Among other sentiments, the Manifesto indicated that its signatories regarded “the decision of the Supreme Court in the school cases [*Brown*] as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.” 102 CONG. REC. S4459, S4459–60 (1956) (statement of Sen. George).

<sup>23</sup> Whittington, *supra* note 20, at 600–01.

<sup>24</sup> See AGRESTO, *supra* note 11; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1997); ROBERT H. BORK, THE TEMPTING OF AMERICA 16–17, 49 (1990) (discussing how judges subvert democracy by “legislating . . . from the bench”). See generally TUSHNET, *supra* note 2 (discussing conservative critiques of the Court).

behavior eroded the rule of law and democratic ideals.<sup>25</sup> A handful of other scholars spoke more neutrally about the practice, suggesting it had a somewhat inevitable status in a political system committed to an independent judiciary vested with considerable discretion.<sup>26</sup>

In more recent years, the “legislating from the bench” critique has regularly surfaced during presidential and congressional election campaigns and during nomination hearings for prospective federal jurists, especially individuals tapped to serve on the Supreme Court.<sup>27</sup> During the presidency of Bill Clinton, for example, Republicans, including GOP leaders, invoked the phrase to signal their opposition to the President’s nominees to the federal

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<sup>25</sup> See, e.g., Terry Atlas, *Bush Chooses Conservative for Supreme Court: Judge’s Views on Abortion May Hold Key*, CHI. TRIB., July 2, 1991, at C1 (President George H.W. Bush indicating that his main criteria for appointing Clarence Thomas to serve as a Supreme Court justice was “in addition to excellence and qualification . . . this concept of interpreting the Constitution and not legislating from the federal bench”); Ethan Bronner, *Souter Backs Privacy Rights; Is Silent on Abortion Stance*, BOSTON GLOBE, Sept. 14, 1990, at 1 (discussing invocations of the “legislating from the bench” critique by Senators Orrin Hatch and Arlen Specter during hearings before the Senate Judiciary Committee on the nomination of David Souter to serve on the Supreme Court); Beverly Chain, Letter to the Editor, *Legislating from Bench*, N.Y. TIMES, Mar. 20, 1992, at A32 (official with the United Church of Christ, criticizing Justice Clarence Thomas for legislating from the bench); Frank Clifford, *Law Scholar’s View, Cited by Bird Foes, Sees Abuse of Power*, L.A. TIMES, Dec. 17, 1985, at 3 (discussing a law professor’s critique of the California Supreme Court on the grounds that it has been “legislating from the bench and showing a tremendous unwillingness to have its will checked by anyone”); Edwin Meese III, Attorney Gen., Address Before the American Bar Association (July 9, 1985) (criticizing a number of Supreme Court opinions on the grounds that they represent “policy choices” rather than “articulations of constitutional principle”); *Comments by President On His Choice of Justice*, N.Y. TIMES, July 24, 1990, at A18 (President Bush announcing the appointment of David Souter as Associate Justice to the Supreme Court and expressing his confidence that the nominee will “not legislate from the Federal bench”); *Justice Thomas’s Late Hit*, N.Y. TIMES, Feb. 25, 1992, at A20 (discussing the perceived opposition of Presidents Reagan and Bush to Supreme Court nominees who would engage in “legislating from the bench, making law rather than interpreting it, substituting personal policy preferences for those of duly elected legislatures”); *Kevorkian Cleared of Murder Charge*, CHI. TRIB., July 22, 1992, at 3 (state prosecutor accusing a state judge of “legislating from the bench” in dismissing murder charges against Jack Kevorkian); *Reagan’s Thoughts on Arms Talks, ‘Star Wars,’* L.A. TIMES, June 24, 1986, at 18 (President Reagan affirming his support for judges who “will interpret the law and not write the law” and criticizing “courts and judges . . . [that] have been actually legislating by legal decree what they think the law should be”). As noted previously, the “legislating from the bench” critique was also invoked by Robert Bork who vigorously attacked the purportedly liberal federal judiciary in the aftermath of his failed nomination to the United States Supreme Court. BORK, *supra* note 24.

<sup>26</sup> See Henry J. Abraham, *Contemporary Judicial Processes and a Democratic Society*, 101 POL. SCI. Q. 277, 286 (1986) (arguing that it is “obvious that judges *do* ‘legislate’” and conceding that judges must read a “thin line” between “judicial ‘judging’ and judicial ‘legislating’”); Richard Hodder-Williams, *Six Notions of ‘Political’ and the United States Supreme Court*, 22 BRIT. J. POL. SCI. 1 (1992).

<sup>27</sup> The charge was also invoked during the 2000 election controversy, especially by conservative interest groups critical of the Florida judiciary’s involvement in the case. See, e.g., PHYLLIS SCHLAFLY, *THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT* (2004).



bench.<sup>28</sup> Following Clinton, some scholars contend, “legislating from the bench” remained an important referent in these nomination battles, as Republicans attempted to narrow the kinds of issues that could be raised in the confirmation context, focusing on basic professional qualifications, personal character, and judicial philosophy, with this last category largely limited to the question of “whether the nominee will ‘interpret the law rather than make it.’”<sup>29</sup> Throughout the Supreme Court confirmation hearings of John Roberts and Samuel Alito, U.S. Senators frequently referenced “legislating from the bench” as an impermissible practice for jurists.<sup>30</sup>

President George W. Bush invoked the legislating from the bench theme during the 2000 presidential campaign, and early in his presidency. “Every judge I appoint,” said the President, “will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench.”<sup>31</sup> Bush returned to the issue during a presidential debate with John Kerry in 2004, indicating that if reelected, he would select judicial nominees who “would be strict constructionists.”<sup>32</sup> According to the President, the nation had “plenty of lawmakers in Washington, D.C. Legislators make the law; judges interpret the Constitution.”<sup>33</sup> The President repeated his explicit distaste for “legislat[ing] from the bench” during the 2005 and 2006 State of the Union addresses.<sup>34</sup>

<sup>28</sup> Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 558 (2003).

<sup>29</sup> Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 On the Senate’s Role in the Judicial Confirmation Process*, 30 OHIO N.U. L. REV. 235, 237 (2004).

<sup>30</sup> See, e.g., Press Release, Sen. Orrin Hatch, Hatch: Roberts an Outstanding Pick (July 19, 2005), available at [http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=1391](http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1391). Interestingly, in a 2005 television appearance, Republican Senator Tom Coburn tacitly indicated that Supreme Court nominee Samuel Alito was “legislating” rather than judging when the judge invalidated a federal law’s restrictions on machine gun possession (and issued other decisions that expanded state authority at the expense of the federal government). Neil A. Lewis, *In Cases Involving Federal Government, Nominee Is Seen as Favoring Authority of the States*, N.Y. TIMES, Nov. 6, 2005, § 1, at 28; *Meet the Press: Sen. Tom Coburn* (NBC television broadcast Nov. 6, 2005) (transcript available at <http://www.msnbc.msn.com/id/9898884/>). As Coburn put it, “[t]hose aren’t decisions judges should be making. Those are decisions that legislators should be making.” *Meet the Press*, *supra*.

<sup>31</sup> Pres. George W. Bush, Remarks Announcing Nominations for the Federal Judiciary (May 9, 2001), in 37 WEEKLY COMP. PRES. DOC. 724–25 (2001).

<sup>32</sup> Pres. George W. Bush, Remarks at the Second 2004 Presidential Debate (Oct. 9, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/10/20041009-2.html>).

<sup>33</sup> *Id.*

<sup>34</sup> Pres. George W. Bush, State of the Union Address (Feb. 2, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>) (“Because courts must always deliver impartial justice, judges have a duty to faithfully interpret the law, not legislate from the bench.”); Pres. George W. Bush, State of the Union Address (Jan. 31, 2006) (transcript available at <http://www.whitehouse.gov/stateoftheunion/2006/index.html>) (“I will continue to nominate men and women who understand that judges must be servants of the law, and not legislate from the bench.”). See also Scott McClellan, White House Press Sec’y, Press Briefing (Oct. 17, 2005) (transcript available at

In sum, attacks against the judiciary emphasizing the courts' inappropriate use of powers and methods associated with the legislature seem to be longstanding, steady, and generated by a wide spectrum of ideological and party interests.<sup>35</sup> Notwithstanding this broad historical profile, in recent years the specific "legislating from the bench" critique appears to have increased in salience and usage, especially by conservative politicians and interest groups. At the outset of the twenty-first century, the term holds a prominent place in American political discourse.

### III. DEFINING "LEGISLATING FROM THE BENCH"

What is legislating from the bench? What, if anything, does it mean to the individuals who employ this term? Beyond their references, are there other intellectually productive ways to conceive of and deploy the concept? Addressing these questions is not straightforward, in part, because, like other aspects of our judicial politics, the concept has "a teasing imprecision that makes it a coat of many colors."<sup>36</sup> Legislating from the bench appears to be a kind of catchall term,<sup>37</sup> containing many threads of objections to judicial behavior. Judicial critics do not clearly define or consistently use the phrase, and in some cases this may be part of a deliberate strategy of muddling, serving the purpose of allowing the speaker to project different definitions and emphases depending upon the audience addressed.<sup>38</sup>

But these observations augment rather than diminish the importance of systematically unpacking the meaning of "legislating from the bench." As noted, parsing different invocations of the phrase, and fashioning a typology of the various ways in which it is used, will help in developing a vocabulary for talking about one of the most important categories of contemporary judicial criticism—a vocabulary essential for evaluating the seriousness and significance of these attacks.

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<http://www.whitehouse.gov/news/releases/2005/10/20051017-4.html>) (in which Press Secretary McClellan discussed, somewhat elliptically, the definition of "legislating from the bench").

<sup>35</sup> See DONALD GRIER STEPHENSON JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS (Robert Y. Shapiro ed., 1999); Whittington, *supra* note 20, at 601 & n.13 (comparing Nixon's warnings about justices who act as "super-legislators" with Roosevelt's pledge to "appoint Justices who will act as Justices and not as legislators").

<sup>36</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

<sup>37</sup> See, e.g., Ellis Washington, *The Nuremburg Trials: The Death of the Rule of Law (In International Law)*, 49 LOY. L. REV. 471, 495 n.64 (2003) (linking "legislating from the bench" with judicial decisions "based on an arbitrary system of relativism, situation ethics, materialism, individualism, hedonism, paganism, or any secularist ideology"); Christopher H. Lytton, *America's Borders and Civil Liberties in a Post-September 11th World*, 12 J. TRANSNAT'L L. & POL'Y 197 (2003); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003) (linking activism with legislating from the bench, but failing to delineate this connection).

<sup>38</sup> See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2004).

The following discussion of “legislating from the bench” is intended to be a reasonably thorough definition of what the term means—both to those who invoke it, and as a theoretical account of how and when one might regard judges as engaging in behavior somehow distinctively associated with legislative bodies. Thus, the ensuing research is built from both 1) a broad survey of how the term is actually invoked by politicians and scholars,<sup>39</sup> and 2) a supplementary examination of other ways in which judges and justices might sensibly be regarded as acting like lawmakers or exercising legislative authority. I concede that this latter analysis includes accounts of legislating from the bench that would not ordinarily be recognized by most critics of the practice.

Obviously there is the potential for some circularity in these efforts to fill out a definition of “legislating from the bench.” How do we know what should be included in this term without initially defining it? As indicated, part of my solution to this puzzle is to ground my understanding of the phrase on the ways in which it is actually deployed by a range of critics and commentators. And while my “supplemental” definitions are not regularly employed by politicians, scholars, and other critics of legislating from the bench, they seem to be consistent with the general tenor of their concerns—specifically the worry that, at times, judges and justices pursue functions, behaviors, and strategies that we ordinarily link with the legislative branch and individual lawmakers.

A. *Patterns of Usage by Politicians and Scholars: Methodology and Overall Results*

A portion of the categories and definitions that follow are based on different usages of the phrase “legislating from the bench” in the United States Congress. Specifically, I examined all references to “legislating from the bench,” “legislates from the bench,” and “legislate from the bench” in the *Congressional Record* over a period stretching from the 91st through the 109th Congresses (1985–2006).<sup>40</sup>

The overall results, summarized in Table 1, suggest that members of Congress from both parties have somewhat sporadically invoked the phrase over the past decade and a half, although in recent years the term has been used with much greater frequency.<sup>41</sup> While charges of “legislating from the bench”

<sup>39</sup> I consider how the term is invoked because, as noted, one of the central purposes of this Article is to elucidate and assess actual critiques of the judiciary. At the same time, I am cognizant that these criticisms may not be consistent, clear, or complete. Consequently, my consideration of how “legislating from the bench” is referenced is annotated and critical, attempting to isolate and explicate popular criticisms that seem genuinely tethered to worries about legislative behavior in courts, from other and more general concerns.

<sup>40</sup> These results were compiled through the LexisNexis electronic database.

<sup>41</sup> Table 1 does not include references to “legislating from the bench” (or the indicated variants) that were not directly referenced by a member of Congress him or herself. Thus, I excluded from my analysis instances in which the phrase appeared in an extended editorial, newspaper article, statement by an interest group or scholar, or other “exhibit” or “testimonial” reprinted in the *Congressional Record*, on the grounds that these references were not specifically made by lawmakers. Each “reference” included in Table 1 refers to one

have been leveled most often by Republican senators in the context of debates over nominees to the judiciary (and especially to the Supreme Court), the term has also been referenced by Democrats, House members, and in discussions not directly related to judicial confirmation hearings, such as those stemming from controversial court rulings. In 2005, for example, members of the House and Senate from both parties used “legislating from the bench” in disputes about a wide variety of topics, including the detention of prisoners in Guantánamo, Cuba, the nomination of John Roberts to be Chief Justice, and the debate sparked by judicial decisions relating to the Pledge of Allegiance.<sup>42</sup> Having obtained this broad sketch of lawmakers’ references to “legislating from the bench,” I subsequently scrutinized the context and content of this usage, to ascertain how the term was constructively defined and understood.

I supplemented this review of congressional understandings of the concept with an examination of its use by legal scholars and political scientists, based on searches using the JSTOR<sup>43</sup> and LexisNexis databases.<sup>44</sup> I conducted this portion of my research to determine whether academicians and political officials shared common views about the meaning, importance, and normative valence of legislating from the bench. After culling these varied invocations, I organized them into the categories discussed below, identifying six basic (and sometimes overlapping) ways in which politicians and scholars seem to comprehend the term.

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or more statements by a particular member of Congress to “legislating from the bench” or its variants during a specific day’s discussion of a particular topic. Thus, I did not “double count” references made by the same lawmaker during the same debate even if they occurred during different speeches on the same substantive discussion.

<sup>42</sup> As the last column in Table 1 indicates, in 2005, 15 of the 51 references (29 percent) to “legislating from the bench” were made in contexts unrelated to the judicial confirmation process.

<sup>43</sup> JSTOR, <http://www.jstor.org/> (a scholarly journal database).

<sup>44</sup> I conducted the JSTOR search of scholarly references under the broadest terms possible—that is, I simply used a basic search looking at all references in which one or more terms of the phrase “legislating from the bench” appeared. For the supplemental LexisNexis search of scholarly references to the term, I limited my search to invocations of the phrase in all law review journals in the database published from January 1, 1995 through March 25, 2006.

**TABLE 1: References to “Legislating from the Bench” in Congress, 1985–2006**

Year	Total References	References by				References to judicial nomination process (& other topics)
		House	Senate	Democrats	Republicans	
2006	13	1	12	2	11	11 (2)
2005	51	10	41	11	40	36 (15)
2004	14	9	5	2	12	1 (13)
2003	14	1	13	8	6	13 (1)
2002	2	0	2	1	1	2 (0)
2001	3	1	2	1	2	1 (2)
2000	2	0	2	0	2	2 (0)
1999	1	0	1	0	1	0 (1)
1998	0	0	0	0	0	0
1997	6	3	3	0	6	2 (4)
1996	2	0	2	0	2	1 (1)
1995	0	0	0	0	0	0
1994	6	0	6	0	6	6 (0)
1993	4	2	2	0	4	2 (2)
1992	2	1	1	1	1	1 (1)
1991	3	1	2	2	1	1 (2)
1990	4	1	3	3	1	3 (1)
<b>Totals</b>	<b>127</b>	<b>30</b>	<b>97</b>	<b>31</b>	<b>96</b>	<b>82 (45)</b>

Source: These data are taken from LexisNexis and the *Congressional Record*. Note: No references to “legislating from the bench” occurred 1985–1989.

#### B. Common Definitions of “Legislating from the Bench”

##### 1. Policy Interference

One conception of “legislating from the bench” that can be extracted from scholarly and political discussions identifies the practice as consisting of courts’ participation in policy and issue areas perceived to be the province of other institutions, especially legislatures.<sup>45</sup> Stated somewhat differently, some raising the “legislating from the bench” charge object to the substantive areas *where* the courts place their mark. These areas often involve political topics and regions of law in which the judiciary has some tradition of being deferential to other decision makers—either through its own announced rules (such as the so-

<sup>45</sup> See Lewis, *supra* note 30; *Meet the Press*, *supra* note 30.

called “political questions” doctrine<sup>46</sup>) or through the accumulation of precedent and history (such as the Supreme Court’s general reluctance, prior to the 1930s, to overturn laws related to the regulation of civil liberties).<sup>47</sup> To take one example, former Justice Department official John Yoo has decried Supreme Court decisions invalidating aspects of the Bush Administration’s anti-terrorism efforts on the grounds that these opinions represent a form of judicial regulation that is “entirely new in American history.”<sup>48</sup> In other cases, critics contend that some substantive topics should be beyond the regular engagement of the courts, because they demand judgments or information beyond judicial expertise. As discussed below, this is the charge often made when claiming that the courts should refrain from engaging in complex questions of economic or social policy.<sup>49</sup>

Additionally, those raising these general “policy interference”<sup>50</sup> charges often contend that the judiciary’s incursion into some substantive areas may inhibit or otherwise inappropriately affect the legislature’s efforts to engage the relevant policy issues.<sup>51</sup> Some critics of *Roe v. Wade*,<sup>52</sup> for example, argue that the decision preempted a potentially more stable and less controversial legislative approach to abortion and privacy rights.<sup>53</sup> Court decisions over the past few decades on gay marriage, affirmative action, assisted suicide, and

<sup>46</sup> See Gerhardt, *supra* note 7, at 984–5 (describing the political question doctrine and its application); *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (“[T]he question of the efficacy of ratifications by state legislatures . . . should be regarded as a political question . . . with the ultimate authority in the Congress”).

<sup>47</sup> LAWRENCE BAUM, *THE SUPREME COURT* 181 (8th ed. 2004).

<sup>48</sup> JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 238–39 (2006).

<sup>49</sup> See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 604–10 (rev. ed. 2004) (discussing Justice Robert Jackson’s displeasure with *Brown v. Board of Education* on the grounds that the decision was inappropriately based on social policy rather than law); MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 60 (2005) (arguing that the Supreme Court has “usurp[ed] the legislature’s authority to set social policy”).

<sup>50</sup> These definitions and labels are shorthands; I do not claim scholars or politicians actually use these phrases to distinguish their criticisms of legislating from the bench.

<sup>51</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–65 (1999) (discussing the “judicial overhang”); Abraham, *supra* note 26, at 279–80. As Henry Abraham points out, criticism, especially by conservatives, was fueled as courts increased their caseload in the 1970s, leading to the double judgment that the judiciary was both “activist”—serving as a proactive policymaker, attempting to assert a prominent place in the policymaking process—and overwhelmed. Commentators in and out of Congress argued that the judiciary was not equal to the task of responsibly disposing of a swelling caseload caused by a “scandalous” litigation explosion, involving many “frivolous” claims, a development presided over and even encouraged by the judiciary itself. Cf. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

<sup>52</sup> 410 U.S. 113 (1973).

<sup>53</sup> See, e.g., Jeffery Rosen, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION* 170, 170–71 (Jack M. Balkin ed., 2005).

campaign finance have also prompted charges that the issues involved in these cases would have been more appropriately and effectively handled by state and federal legislators, in part because these figures could better foster the consensus, compromise, publicity, and public discussion needed to secure enduring political solutions to these matters.<sup>54</sup>

*a. Policy Encroachment*

Subsumed within the general “policy interference” concern, “policy encroachment” refers more specifically to when the courts purportedly chafe against, preempt, or otherwise act in areas where lawmakers are relatively active and engaged with a policy issue. This may occur, for example, when a judge goes “far beyond what the legislature intended” by falsely imputing intentions to lawmakers.<sup>55</sup>

*b. Policy Entry*

Additionally, one might identify “policy entry” as a form of policy interference in which the courts attempt to settle policy or law in an area of public life in which the legislature has a strong claim to act but is, for whatever reasons, quiescent.<sup>56</sup> In a well known speech, then Associate Justice William Rehnquist captured this concern in criticizing federal judges who “address themselves to a social problem simply because other branches of government have failed or refused to do so.”<sup>57</sup> Senate Judiciary Chairman Orrin Hatch adhered to a similar viewpoint when he expressed concerns about a judicial nominee’s stated sympathy toward intervening when the “political process” has failed, and taking on legal matters “that perhaps ideally and preferably should be resolved through the legislative process.”<sup>58</sup>

*c. Inconsistent Interference*

Another critique along these lines suggests that part of what is objectionable about courts’ incursion into policy areas potentially governed by legislation and lawmakers is their inconsistent pattern of involvement—their apparent interest in some matters of law and public policy at the neglect of others. For example, the Supreme Court became famously active in the area of civil liberties following a series of Court appointments by Franklin Roosevelt and, arguably, culminating with the Warren Court. But what justified the Court’s involvement in this area and not others—such as economic regulation? The judiciary’s supposedly oscillating interest in different topics (such as civil rights, civil liberties, federalism, and others) at different times has sparked charges that its shifting attention resembles the behavior of legislators

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<sup>54</sup> Christian Coalition of America, Washington Weekly Review: As President Bush Considers Replacement for Supreme Court Justice Sandra Day O’Connor, Federal Judicial Tyranny Continues to Increase All Across America (Sept. 30, 2005), <http://www.cc.org/content.cfm?id=273>.

<sup>55</sup> 149 CONG. REC. 56, S4925 (daily ed. Apr. 8, 2003) (statement of Sen. Leahy).

<sup>56</sup> One example might be constitutional war powers. *See generally* LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. rev. 2004).

<sup>57</sup> Rehnquist, *supra* note 36, at 695. *Cf.* TUSHNET, *supra* note 51.

<sup>58</sup> 149 CONG. REC. 43, S3831 (daily ed. Mar. 18, 2003) (statement of Sen. Hatch).

motivated by temporal and political factors, rather than relatively stable legal considerations.<sup>59</sup>

## 2. Approach to Rendering Decisions

Another way in which politicians and scholars talk about legislating from the bench is by focusing on the methods through which some judges supposedly make their decisions. According to this critique of *how* judges render decisions, some jurists adopt distinctively legislative means, methods, or sources of information and expertise in judging the cases before them, and, consequently, implicitly or explicitly claim legislative authority.<sup>60</sup> For example, some commentators have criticized the Supreme Court's willingness to consult public opinion in some of its death penalty cases, such as *Atkins v. Commonwealth of Virginia*,<sup>61</sup> contending that these determinations are better left to legislators and other elected officials. Similarly, U.S. Senator Arlen Specter has criticized the Supreme Court for enhancing its "super-legislature status by invalidating legislation it dislikes, plucking out of the air . . . brand-new doctrine[s]" and ignoring the record and debates created by lawmakers.<sup>62</sup>

### a. "Making" Law

Often, these sorts of critiques present an opposition between traditional judges who validly "interpret" law and those who "make" the law through more expansive and legislative techniques.<sup>63</sup> Judicial interpreters apply the law strictly and somewhat mechanistically to the facts present in a particular case,<sup>64</sup>

<sup>59</sup> See Earl Latham, *The Supreme Court and the Supreme People*, 16 J. POL. 207, 231–32 (1954) (arguing that judges' interest in some substantive areas and not others points to an "ambivalent" approach).

<sup>60</sup> See LEVIN, *supra* note 49, at 60 (arguing that the Supreme Court has "usurp[ed] the legislature's authority to set social policy" and thereby displaced Congress and "seized from the people the power to make such determinations"); Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141, 152 (2001); Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 612 (2005).

<sup>61</sup> 536 U.S. 304 (2002). *Cf.* *Weems v. United States*, 217 U.S. 349, 378 (1910) (arguing that the definition of "cruel and unusual punishment" is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice").

<sup>62</sup> Arlen Specter, *Hidden Justice(s)*, WASH. POST, Apr. 25, 2006, at A23.

<sup>63</sup> 151 CONG. REC. 75, S6204–06 (daily ed. June 8, 2005) (statement of Sen. Feinstein); Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 508 (2004) (discussing how judges could "avoid the criticism that they were usurping the legislative function of Congress and legislating from the bench"); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1320 n.87 (2003) (arguing that "some judgments involve 'legislating' from the bench, as when judges create law in the guise of interpreting it"); Lavoie, *supra* note 60.

<sup>64</sup> SUNSTEIN, *supra* note 4, at 25; 147 CONG. REC. 102, S7991 (daily ed. July 20, 2001) (statement of Sen. Allen); 152 CONG. REC. 67, S5192 (daily ed. May 25, 2006) (statement of Sen. Specter); Charles Wood, *Term Limits for Justices Are Rejected*, MONT. LAW., Feb. 2003, at 9 (the Court "has embarked on an agenda of legislating from the bench, rather than adjudicating the facts and law.").



constrained by widely agreed upon legal canons of construction.<sup>65</sup> These methods and modalities go by various names including formalism, adherence to precedent, textualism,<sup>66</sup> and originalism.<sup>67</sup> Ruling on the basis of these accepted judicial techniques purportedly provides judges and justices with a narrow interpretive approach<sup>68</sup> that binds them down, limiting their discretion and leading to consistent, predictable interpretations of law.<sup>69</sup> As U.S. Senator Orrin Hatch summarized in a press release praising the nomination of eventual Supreme Court Chief Justice John Roberts, “[h]e’s the kind of judge that all of us want—someone committed to applying the law impartially rather than legislating from the bench.”<sup>70</sup>

In contrast, then, judges who legislate from the bench are accused of deriving their decisions from extralegal sources that offer few effective constraints.<sup>71</sup> Instead of grounding their opinions on the accepted rules, standards,<sup>72</sup> and texts of the court system and the legal process, these judges consult their own policy predilection, ideology, preferred philosophy, personal opinion, party interest, or other subjective values. Critics making these arguments seem especially attracted to the charge that legislating from the bench amounts to reading personal preferences into the Constitution.<sup>73</sup>

All of this behavior, critics contend, “smacks of the legislative process,” and cuts courts “loose” from the legal and institutional practices that ordinarily give the courts legitimacy and limitation.<sup>74</sup> This occurs because the character of actions taken by judges involved in this form of legislating from the bench lacks a legal pedigree; to the extent that courts employ legal language and norms, they are simply creating a kind of false, cloaking rationale for their

<sup>65</sup> Lavoie, *supra* note 60, at 616; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–79, 1182–83 (1989) (arguing that judges must apply general rules, formulated from legal texts, to advance legal equality, uniformity, and predictability).

<sup>66</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990).

<sup>67</sup> BORK, *supra* note 24, at 143; Glenn Harlan Reynolds, *Sex Lies, and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

<sup>68</sup> Scalia, *supra* note 65.

<sup>69</sup> *Id.* See also Lavoie, *supra* note 60, at 616.

<sup>70</sup> Press Release, Sen. Orrin Hatch, *supra* note 30.

<sup>71</sup> See BERGER, *supra* note 24; John C. Eastman & Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?*, 6 NEXUS 121, 123 (2001) (arguing that legislating from the bench is exemplified by this form of unrestrained decision making); Rehnquist, *supra* note 36, at 698–99.

<sup>72</sup> See generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the differences between legal rules and standards).

<sup>73</sup> Bush, *supra* note 31; cf. 152 CONG. REC. 6, S162 (daily ed. Jan. 26, 2006) (statement of Sen. Vitter); Jason Jarvis, *Constitutional Constraints on the International Law-Making Power of the Federal Courts*, 13 J. TRANSNAT’L L. & POL’Y 251 (2003).

<sup>74</sup> 149 CONG. REC. 56, S4925–26 (daily ed. Apr. 8, 2003) (statement of Sen. Leahy); Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1571 (2004).

decisions.<sup>75</sup> Judges engaged in this kind of decision making are really making law rather than judging it, because their work is creative, political and personal, rather than constrained, legal, and institutional.<sup>76</sup> At times, the charge that the courts are inappropriately engaged in rendering “substantive due process” closely parallels these sorts of contentions about legislating from the bench.<sup>77</sup>

*b. Using Legislative Techniques and Tools*

A cognate concern is that judges—perhaps well-meaning, and even believing they are employing proper judicial techniques—sometimes use modes of analysis, investigation, and decision making that are best adopted by legislators and applied to the lawmaking process.<sup>78</sup> The fear here is not necessarily that these modes of decision making are inherently subjective and arbitrary. Instead, the claim is that they are often the most suitable tools for creating policy, but only in the context of a relatively transparent, specialized, and electorally accountable lawmaking body, like Congress, which possesses the expertise, information, and incentives to use these methods appropriately.

A number of critics have contended, for example, that the judiciary’s reliance on balancing tests<sup>79</sup> is generally better suited to other institutional actors and forums. According to one view, “[t]he basic methodology of balancing, which runs through the Burger Court’s Fourth Amendment cases, is essentially legislative in form.”<sup>80</sup>

As a related argument, some condemn the judiciary’s employment of legal standards instead of more determinate legal rules, on the grounds that these former guidelines encourage more discretionary, as opposed to mechanistic,

<sup>75</sup> BORK, *supra* note 24, at 69 (discussing the “Yale thesis” that holds that judges choose their results and reason “backward”); Lavoie, *supra* note 60, at 611; Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004); 150 CONG. REC. 103, H6609–10 (daily ed. Jul. 22, 2004) (statement of Rep. Paul).

<sup>76</sup> SUNSTEIN, *supra* note 4; CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986) (discussing a “transitional” period beginning at the end of the nineteenth century in which the Supreme Court purportedly began to use personal preferences and will, in a manner reminiscent of legislators); E. Todd Wilkowsky, *The Defense of Marriage Act: Will It Be the Final Word in the Debate Over Legal Recognition of Same-Sex Unions?* 8 REGENT U. L. REV. 195, 229 (1997). *See also* Justice Antonin Scalia, Comments at the Call for Reckoning Conference Session Three: Religion, Politics and the Death Penalty (Jan. 25, 2002) (transcript available at <http://pewforum.org/deathpenalty/resources/transcript3.php3>) (stating that “my [C]ourt made up that requirement [that mitigating evidence be considered in the sentencing phase of death penalty cases]. . . . I don’t think my Court is authorized to say, oh, it would be a good idea to have every jury be able to consider mitigating evidence and grant mercy. And, oh, it would be a good idea not to have mandatory death penalties.”).

<sup>77</sup> *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 178 (1973) (Rehnquist, J., dissenting) (arguing that the majority has enunciated “substantive constitutional law”).

<sup>78</sup> DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 2–3 (1977).

<sup>79</sup> *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (opinion based on “balancing the need to search [or seize] against the invasions which the search [or seizure] entails”) (alteration in original).

<sup>80</sup> Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L. J. 341, 343 (2004).

judgments.<sup>81</sup> As Justice Scalia admonished in his dissent in *Tennessee v. Lane*,<sup>82</sup> the use of standards as legal tests has “a way of turning into vehicles for the implementation of individual judges’ policy preferences. . . . The ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decision making.”<sup>83</sup>

Similar concerns have been raised periodically over the judiciary’s use of academic and other specialized fields of knowledge such as sociology, statistics, or economics.<sup>84</sup> Thus, scholars have claimed that the Supreme Court’s analysis in *Brown v. Board of Education*<sup>85</sup> turned on the Court’s acceptance of “sociological evidence as presented by the NAACP lawyers, finding that segregation was illegal based not upon case law, but upon modern psychological authority.”<sup>86</sup> Even some supporters of the results in *Brown* have criticized the legislative nature of the opinion as providing a dubious legal foundation.<sup>87</sup>

In addition to these concerns, critics argue that when judges employ techniques supposedly distinctive to lawmakers, they do so at the expense of precedent and other legal values. In abandoning legal techniques that prevent judges from overstepping their proper and narrow institutional roles, courts make law itself uncertain and unfair.<sup>88</sup> The invention of rights by judges who are not directly responsible to the public or other institutions can leave these liberties insecure, dilute the impact of more time-worn and recognized protections, or simply demand too much from the citizens and government institutions that will be called upon to recognize and protect these new rights.<sup>89</sup>

### 3. *Decision Content*

In addition to objecting to how judges render decisions, critics contend that some judicial decisions resemble lawmaking in their content or substance—in other words, they find fault with *what* decisions are. Generally

<sup>81</sup> See Gerhardt, *supra* note 7, at 946–50 (discussing rules and standards).

<sup>82</sup> 541 U.S. 509 (2004).

<sup>83</sup> *Id.* at 556–58 (Scalia, J., dissenting).

<sup>84</sup> HOROWITZ, *supra* note 78; Joseph A. Grundfest, *We Must Never Forget That It Is an Inkblot We Are Expounding: Section 10(b) as Rorschach Test*, 29 LOY. L.A. L. REV. 41, 60 (1995) (discussing Supreme Court securities law as involving cost-benefit analyses).

<sup>85</sup> 347 U.S. 483 (1954).

<sup>86</sup> Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?* 18 HARV. BLACKLETTER L. J. 1, 10 (2002); see also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 1–59 (1996).

<sup>87</sup> JACK M. BALKIN ET AL., *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 4, 50–53, 209 (Jack M. Balkin ed., 2001) (reviewing criticisms of the *Brown* decision, especially those challenging its reliance on arguments derived from social science).

<sup>88</sup> T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* 20–47 (1993); SUNSTEIN, *supra* note 4.

<sup>89</sup> MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 154 (1998).

speaking, this critique includes a judgment that some judicial opinions are too detailed and represent creative acts that stray too far from the words of the interpreted statute or constitution. Thus, Yoo has accused the Supreme Court of “judicial micromanagement”<sup>90</sup> in some of its recent decisions. Others have pointed to legal structures like *Roe*’s complex trimester system as embodying this dimension of judicial legislating.<sup>91</sup>

#### 4. *Scope of Decisions*

Another account of legislating from the bench depicts this practice as a departure from a conventional model of legal decision making in which the judiciary is limited to answering discrete questions arising from specific controversies—a set of restrictions that makes the courts institutionally reactive and constrained, and makes their decisions facts- and case-based, and interstitial in scope.<sup>92</sup> In resolving disputes between two adversaries, judges are supposed to respond to particular, concrete disputes brought before them—they cannot control or alter the cases that are filed, the issues presented, or the claims made by the conflicting parties. In this conception, jurists can claim greatest authority (and contribute most effectively to legal values like stability and unity) when they make changes gradually, using individual rulings to fill in the gaps in existing statutory and constitutional law.<sup>93</sup>

In contrast, legislating from the bench involves “prospective decision making,” in which judges, perhaps in the interest of developing a more general

<sup>90</sup> YOO, *supra* note 48, at 238.

<sup>91</sup> See SUNSTEIN, *supra* note 4, at 106–08 (criticizing *Roe* from the perspective of a judicial “minimalist” on the grounds that the Court “badly overreached” in the decision); Peter Berkowitz, *The Court, the Constitution, and the Culture of Freedom*, POL’Y REV., Aug.–Sept. 2005, at 3, 10 (discussing *Roe*’s division of pregnancy “into three distinct terms” as “a clear-cut case of legislating from the bench”); Paul O. Carrese, *Judicial Statesmanship, the Jurisprudence of Individualism, and Tocqueville’s Common Law Spirit*, 60 REV. POL. 465, 493 (1998) (discussing “judicial statesmanship and judicial legislating” in the context of *Roe*); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 922 (1973); Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67 (1993) (discussing the criticisms of *Roe* by presidents George Bush and Ronald Reagan). One should note, of course, that while these criticisms typically target decisions and judges that are perceived as more liberal, there are certainly “conservative” decisions that have substantive characteristics associated with “legislating from the bench.” For example, in *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), Chief Justice Rehnquist constructed a broad, three-part test for assessing some congressional powers under the commerce clause.

<sup>92</sup> WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 1, 21 (1964); Peabody, *supra* note 8, at 161, 167; Gerhardt, *supra* note 7, at 994 (the judiciary’s “principal institutional concern has been to decide cases or controversies”).

<sup>93</sup> SUNSTEIN, *supra* note 4, at xii–xiii, 27–30 (espousing judicial “minimalism” in which courts take small steps towards change, deciding cases one at a time and eschewing the announcement of broad principles or the taking of large jurisprudential steps). See also David G. Savage, *How Much of an Umpire Is the Chief Justice?*, L.A. TIMES, Sept. 24, 2006, at M3 (“Roberts suggested that modesty, humility and stability in the law were the goals of his umpire credo. Not to make law, like the activist judges he disdained, but merely to interpret existing laws fairly, mindful of legislative intent and the requirements of the Constitution. And during much of his first year, he did just that.”).

policy or political agenda, abandon incremental legal rulings in favor of decisions with a broader scale or target.<sup>94</sup> As Henry Abraham has argued, these kinds of rulings can entail “prescriptive policy making” that shifts from imposing negative limits on what government can do to identifying positive obligations of government—what the state must do—and through what means. This approach, according to critics, is precisely the task of the political branches, not the judiciary.<sup>95</sup>

What problems are potentially associated with this picture of a judiciary that actively develops policy and issue areas by issuing expansive, far-reaching decisions? To begin with, this behavior may encourage a kind of political irresponsibility, passivity, or at least lethargy in legislators (and other political figures) who defer to the courts or at least turn their attention to areas where the judiciary is less involved.<sup>96</sup> Abraham further contends that judges must resolutely shun prescriptive policy making because they are already overburdened with the responsibilities of their more traditional tasks of limited, case-based constitutional and statutory interpretation.<sup>97</sup>

Moreover, as several scholars have claimed, when judges move too far away from the issues embedded in the particular disputes they are called upon to resolve, they run the risk of having to make judgments about information, facts, and claims that are still emerging or that are simply better accessed by other officials, like elected lawmakers.<sup>98</sup> As one scholar notes,

courts are typically not well-suited to consider broad policy matters regarding societal values and decisions. First, the judiciary only considers the issues presented to it. Consequently, a particular court may lack the

<sup>94</sup> Abraham, *supra* note 26, at 279; 151 CONG. REC. 69, S5719 (daily ed. May 23, 2005) (statement of Sen. Bunning) (contending that there is “a crisis in the Federal judiciary. We have too many judges who act like they are in Congress, not on the bench. Those judges are imposing their values on the American people [by promoting an] . . . ultraliberal agenda.”); Zitrin, *supra* note 74, at 1571.

<sup>95</sup> Abraham, *supra* note 26, at 279. *See also* 152 CONG. REC. 8, S267 (daily ed. Jan. 30, 2006) (statement of Sen. Grassley) (“Democrats want the Supreme Court to assume an expansive role well beyond what was originally intended by the Constitution and its writers. They want the Court to take on a role that is closer to the role of the legislative branch, which is to make policy and bring about changes in our society.”).

<sup>96</sup> TUSHNET, *supra* note 51, at 57–58.

<sup>97</sup> Abraham, *supra* note 26, at 279.

<sup>98</sup> HOROWITZ, *supra* note 78, at 23–30; Nathan Glazer, *Should Judges Administer Social Services?*, PUB. INT., Winter 1978, at 64; William Haltom, *Separating Powers: Dialectical Sense and Positive Nonsense*, in JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING 127, 134 (Michael W. McCann & Gerald L. Houseman eds., 1989); Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 40 (2003) (“The judiciary should, to the best of its ability, resist efforts to become embroiled in interbranch disputes while they are still unfolding. In short, separation of powers disputes ought to be allowed ample time to play themselves out through political processes before judicial intervention occurs”); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189, 197 (1998) (associating legislating from the bench with overreaching).

information and access to different viewpoints that would be necessary to reach a sound interpretation.<sup>99</sup>

Finally, when courts make decisions with a wide and forward reaching scope, they face the problems associated with attempting to implement change where there may not be the political will and institutional support behind this effort.<sup>100</sup>

#### 5. *Responsiveness to Interests*

Another form of the legislating from the bench indictment is based on perceiving the judiciary as a responsive political forum for the general public and specific interest groups. While some legal scholars and practitioners may be skeptical of these claims, denying that this is either an appropriate or actual use of the courts, there is substantial evidence from political science that some forms of interest representation and responsiveness occur in judicial forums.<sup>101</sup> For example, several studies have suggested that some interest groups are more effective than others in getting their favored cases reviewed by the Supreme Court on grounds other than strictly legal merit.<sup>102</sup> To the extent that judges take into account the concerns and interests of a pluralist society in either forming their docket or rendering decisions,<sup>103</sup> they are open to the charge that they are ostensibly interfering with representation and consensus building functions better left to elective branches of government.<sup>104</sup>

<sup>99</sup> Lavoie, *supra* note 60, at 621. See also CHRISTOPHER E. SMITH, COURTS AND PUBLIC POLICY 91–92 (1993); but cf. Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 390 (1969) (arguing against the view “that judges are not adapted by their education and training” to resolve complex social and economic matters) (quoting David J. Brewer, *The Nation’s Safeguard*, 16 REP. OF N.Y. STATE BAR ASS’N. 37–47 (1893)).

<sup>100</sup> LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE 21–24 (1992); HOROWITZ, *supra* note 78, at 23–24, 273, 293–95, 298; CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 85, 102, 269 (1984).

<sup>101</sup> RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005) (discussing the role of interest groups and the public in shaping the nomination process for the Supreme Court); KEVIN T. MCGUIRE, UNDERSTANDING THE U.S. SUPREME COURT: CASES AND CONTROVERSIES 142–43 (2002).

<sup>102</sup> See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991) (claiming that highly respected interest groups have better success in getting their certiorari petitions granted by the Supreme Court); TUSHNET, *supra* note 51, at 145 (“The Court’s decision in *Brown* might best be understood as enforcing a national political view against a regionally dominant one that happened to have excessive power in Congress”); Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639 (1993) (examining the effectiveness of interest group litigation).

<sup>103</sup> MCGUIRE, *supra* note 101, at 143; LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 4, 60–72, 118–35 (2006) (discussing judges’ interest in currying the “regard of salient audiences” including the “general public” and particular “policy groups”); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744–45 (2000); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7 (1996) (“*Brown* is better understood as the product of a civil rights movement spawned by World War II than as the principal cause of the 1960s civil rights movement.”).

<sup>104</sup> LEVIN, *supra* note 49, at 60.

Variations of this criticism assert that the courts deviate from their core role when they become “a general haven for reform movements,”<sup>105</sup> and consequently adopt rulings and doctrine that advance the particular concerns and predilections of these interests.<sup>106</sup> More specifically, some have objected to the increase in civil rights litigation in the 1960s and 1970s that sought greater legal protections through court applications of nascent statutes and constitutional doctrine. To these critics, the successes of this litigation movement arguably reflected the judiciary’s greater willingness to participate in interest group representation, a task perhaps better left to the legislative branch.<sup>107</sup>

#### 6. *Judicial Activism?*

Many politicians and scholars who reference “legislating from the bench” equate it with some form of “judicial activism.”<sup>108</sup> It is difficult to assess this link. The concept of judicial activism admits to many different definitions,<sup>109</sup> calling for its own systematic treatment in order to ascertain which conceptions of the term might overlap with the legislating from the bench critique. Such a project is beyond the scope of this piece. Nevertheless, there are initial reasons for thinking that despite the tendency of many to intertwine the charges of judicial activism and legislating from the bench, these terms should not be conflated—and therefore require distinct analysis and evaluation.

Consider, for the purposes of argument, two possible definitions of judicial activism—which admittedly leave aside many others. According to some depictions, activism refers very broadly to 1) appellate courts’ readiness to alter or overturn precedent<sup>110</sup> (we might identify this as “precedent activism”), or 2) the judiciary assuming a high profile in public affairs, especially by issuing far-reaching decisions and being generally reluctant to defer to the decisions and enactments of more overtly “political” decision makers (“institutional activism”).

<sup>105</sup> *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

<sup>106</sup> *Id.*; Abraham, *supra* note 14.

<sup>107</sup> Abraham, *supra* note 14, at 89.

<sup>108</sup> See 152 CONG. REC. 67, H1892 (daily ed. Apr. 27, 2006) (statement of Rep. Foxx); Jipping, *supra* note 60, at 144, 146 (“Legislating from the bench, another name for judicial activism, destroys the proper end of judging and, therefore, is the greatest threat to judicial independence, the means to that proper end.”); Lavoie, *supra* note 60, at 612 (equating legislating from the bench with activism); Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, 56 MERCER L. REV. 971, 1006 (2005); Wilkowsky, *supra* note 76, at 229 (equating judicial activism with “the proverbial ‘legislating from the bench’”).

<sup>109</sup> See, e.g., BORK, *supra* note 24, at 21 (identifying John Marshall as “an activist judge” whose activism consisted mainly in “distorting statutes in order to create occasions for constitutional rulings that preserved the structure of the United States”); JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 16 (2001) (discussing President Nixon’s attacks on judicial activism).

<sup>110</sup> See Orin S. Kerr, *Upholding the Law*, LEGAL AFF., Mar.–Apr. 2003, at 31, 32 (distinguishing between “separation of powers activism” involving overturning other branches, and “precedent activism,” energetically overturning past cases).

Although there are certainly similarities and overlap between these ideas and those contained in some criticisms of legislating from the bench, it is also logical and useful to distinguish the two concepts. Logically, a court could, for example, engage in precedent activism without necessarily engaging in any of the behavior already associated with legislating from the bench. For example, a judge interpreting the Fourteenth Amendment's Due Process Clause, and attempting to ascertain what constitutional protections it affords, might plausibly conclude that the most constraining, stable, and clear judicial rule she should adopt is the doctrine of "total incorporation."<sup>111</sup> Such an interpretation, while arguably consistent with traditional judicial rather than legislative norms, could be labeled as activist in the sense that it would overturn many state laws and judicial precedents (at least it likely would have in 1937, when the incorporation doctrine was being developed).

On the other hand, courts could arguably legislate from the bench without being institutionally activist. The Supreme Court's chosen path of incorporating the Fourteenth Amendment to the states through a process of "selective incorporation" requires it to make judgments about which aspects of the Bill of Rights are "fundamental" liberties of the "very essence of a scheme of ordered liberty."<sup>112</sup> Compared with total incorporation, this approach is not inherently activist in the sense that it has facilitated a gradual, interstitial development of law in this area.<sup>113</sup> But the selective incorporation doctrine does provide an open-ended legal standard allowing for a considerable degree of discretionary judgment that some, at least, might associate with legislative decision making.

### C. *Other Forms of Legislating from the Bench*

The previous discussion covers the primary ways in which politicians and scholars identify and define "legislating from the bench," to the extent they use the term with any degree of specificity and cogency. The following section argues that as a descriptive and analytic matter, we should supplement this list in order to construct a more comprehensive set of definitions, and a more complete typology of the term. Again, the overall goal of this effort is to provide diagnostic thoroughness, in part, to plot a more complete map from which this activity can be assessed.

I provide this expanded account of legislating from the bench by first identifying elements of judicial behavior that resemble political dynamics distinctive to legislative bodies, and then identifying two other sets of court practices that we normally associate with elected or other "political" institutions rather than the bench. The first effort to flesh out the "legislating from the bench" term could be considered strong in the sense that it identifies behavior in the judiciary that is arguably characteristic of what we expect to find specifically in legislatures, rather than courts. The second set of definitions

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<sup>111</sup> See *Adamson v. California*, 332 U.S. 46, 74 (1947).

<sup>112</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>113</sup> Indeed, one should recall that the *Palko* case setting out the selective incorporation doctrine did not extend the protection of the Bill of Rights to the appellant. *Id.* at 328–29.



are somewhat weak in that they refer to political behavior that we certainly locate in legislative bodies, but might also find elsewhere, such as in executive institutions.

1. *A Strong Form: Judicial Logrolling and Other Internal Strategic Behavior*

A long line of scholarship in political science suggests that appellate judges, especially on the United States Supreme Court, engage in a variety of strategic behaviors within the judiciary in attempting to influence which cases are selected and how they are decided. These practices include internal lobbying, exhortation, logrolling, and other forms of bargaining.<sup>114</sup> While these activities are not generally explicitly linked to charges of “legislating from the bench,” given the salience of these strategies in legislative bodies, they seem to constitute a reasonable category to include in this Article.<sup>115</sup> To the extent that the simultaneously competitive, cooperative, individualistic, ends-oriented, and pragmatic deal making that we often think of as typifying legislative politics occurs in the judiciary, we might identify a new form of legislating from the bench that is given short shrift by other commentators.

2. *Weak Forms of Legislating from the Bench*

a. *External Politicking*

As suggested, we might think of “legislating from the bench” as comprising not just political behaviors usually linked with legislatures, but with activities associated with elected officials and representative institutions more generally. The first form of this weaker version of legislating from the bench arguably occurs when jurists lobby groups, individuals, and institutions beyond the courtroom.<sup>116</sup> To take an obvious, but relatively uncontroversial example, justices of the Supreme Court regularly call for Congress to provide pay raises to the judiciary.<sup>117</sup> Judges and justices have made similar appeals in defense of judicial independence and against particular legislation, especially proposed court reforms.<sup>118</sup>

<sup>114</sup> FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 18 (2000); MCGUIRE, *supra* note 101, at 143; MURPHY, *supra* note 92, at 37–90; JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 12, 16 (1995); Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72, 75–80 (1988); Hodder-Williams, *supra* note 26, at 12.

<sup>115</sup> MCGUIRE, *supra* note 101, at 143.

<sup>116</sup> MURPHY, *supra* note 92.

<sup>117</sup> See, e.g., Chief Justice John Roberts, 2006 Year-End Report on the Federal Judiciary (Jan. 1, 2007), available at <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf>.

<sup>118</sup> DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 30 (1988); Blaine Harden, *O'Connor Bemoans Hill Rancor at Judges*, WASH. POST, July 22, 2005, at A15; Tony Mauro, *Inadmissible: All the Rage*, LEGAL TIMES, Nov. 28, 2005, at 4; Chief Justice William H. Rehnquist, Remarks at the American Law Institute’s Annual Meeting (May 14, 2001) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_05-14-01.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_05-14-01.html)) (opposing legislation that “would sharply limit the educational opportunities available to federal judges” by limiting the gifts they could receive).

Judges and justices also regularly appear before interest groups and at other public functions—providing their implicit support to these organizations or speaking directly to issues of public policy.<sup>119</sup> While there are undoubtedly many possible motivations for these appearances, some are likely pursued to influence public debate and lawmaking. Since these discussions and persuasive efforts occur far outside the context of an actual case or controversy<sup>120</sup> it is difficult to regard them as strictly judicial in nature. Instead, they can plausibly be regarded as forms of external politicking more frequently associated with other institutions and figures, like legislatures and legislators.<sup>121</sup>

One might be tempted, in this context, to distinguish external politicking by jurists who are acting in their official capacity, and political activities pursued by judges and justices as strictly private citizens. Until a judge officially retires, however, this division would seem somewhat difficult to sustain. Just as we draw political significance from what a President does beyond the confines of the White House and formal executive decision making, the public behavior of active judges, even outside of their immediate judicial responsibilities, arguably still possesses at least a semi-official character.

#### *b. Judicial Prudence*

Another tradition of legal research argues that judges are most effective when they carefully husband their institutional resources, including their prestige and capacity to imprint and confront salient controversies in public affairs.<sup>122</sup> Jack Balkin and Sanford Levinson have identified these as theories of “judicial prudence.”<sup>123</sup> Prudentialists contend that American courts can and should behave in a manner consistent with their status as political institutions, by rarely straying too far ahead of public sentiment lest they incur the wrath (or, worse, disregard) of the citizenry and political leaders.<sup>124</sup>

As Alexander Bickel famously claimed, the judiciary often avoids damaging controversy by embracing the “[p]assive [v]irtues” including “withholding ultimate constitutional adjudication” and dodging the most

<sup>119</sup> Verena Dobnik, *Scalia Says Religion Infuses U.S. Government and History*, ASSOCIATED PRESS, Nov. 22, 2004; Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, May 2002, at 17.

<sup>120</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>121</sup> MAYHEW, *supra* note 38; BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982).

<sup>122</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 4 (1962); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 13 (Sanford Levinson ed., 3d ed. 2000); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* xiii (2006); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (Benjamin I. Page ed., 1991); SUNSTEIN, *supra* note 4, at 28; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 281 (1957) (cited with approval in Stephen L. Carter, *Do Courts Matter?*, 90 MICH. L. REV. 1216 (1992) (reviewing ROSENBERG, *supra*)); Hodder-Williams, *supra* note 26, at 13.

<sup>123</sup> Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 268 (2003).

<sup>124</sup> *Id.*

volatile of policy issues.<sup>125</sup> The passive virtues can be exercised, among other means, by invoking judicial doctrines such as mootness, through denials of certiorari, or by narrow readings of law that essentially bypass cases or issues that might damage the legitimacy or power of the courts. If the courts fail to eschew divisive conflicts, they threaten to reveal their “vulnerability” as an “electorally irresponsible” institution without an obvious constituent base to draw on.<sup>126</sup> To Bickel, these considerations were largely practical and institutional rather than principled and legal.<sup>127</sup>

While not overtly legislative, the idea that courts should pick their spots and remain sensitive “to such realities as the drift of public opinion and the distribution of power in the American republic”<sup>128</sup> is certainly consistent with the kinds of considerations that lawmakers must engage in order to stay effective. Again, to the extent that a considerable body of scholarly, historical, and anecdotal evidence bolsters the case that courts frequently strive to manage and preserve their institutional capital, conscious of the surrounding milieu of public and political sentiment, we seem to be on solid footing in asserting that this too is a relatively undocumented aspect of legislating from the bench.

#### D. Summary

Obviously, the foregoing discussion suggests considerable complexity, variation, and overlap in the different ways that people do and might invoke the concept of “legislating from the bench.” Given this observation, the term runs the risk of becoming malleable and capacious. But to some degree, this is the point of my efforts to define the term with greater precision. In order to assess whether legislating from the bench is a significant or troubling practice (and critique), we need greater clarity about what it comprises.

### IV. ASSESSING LEGISLATING FROM THE BENCH

As indicated earlier in this Article, the overwhelming number of statements about legislating from the bench by scholars and political officials have a decidedly negative tone. Essentially, no one from the academy or the political arena rises to the explicit defense of this practice. Various critics accuse<sup>129</sup> judges of the charge<sup>130</sup> of making law and acting like lawmakers, and

<sup>125</sup> Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

<sup>126</sup> Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67, 67 (1995).

<sup>127</sup> BICKEL, *supra* note 122, at 132 (“the techniques and allied devices for staying the Court’s hand ... cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled”). Cf. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (discussing how Supreme Court justices indicated that they would have refused to decide *Brown* a decade earlier for essentially prudential reasons).

<sup>128</sup> McCLOSKEY, *supra* note 122, at 230.

<sup>129</sup> R. Stephen Painter, Jr., *O’Sullivan v. Boerckel and the Default of State Prisoners’ Federal Claims: Comity or Tragedy?*, 78 N.C. L. REV. 1604, 1639 n.232 (2000).

identify this behavior as a “judicial obscenity”<sup>131</sup> or “sin.”<sup>132</sup> Legislating from the bench is so obviously detrimental that many opponents dismiss it without elaboration. According to one scholar, “the whole idea [of our political scheme] is for the Court to avoid legislating.”<sup>133</sup>

But these judgments are underdeveloped and non-systematic, in large part because they are based on vague definitions. How can we assess legislating from the bench if we don’t have a more vivid picture of what the alternatives are, and how and why it deviates from our political and legal ideals? Consequently, this Article has attempted to begin clarifying this debate by offering a more thorough and rigorous account of this vilified practice.

In this section, I argue, contrary to the conventional wisdom, that many of the elements of legislating from the bench previously identified are both inevitable and desirable. I first delineate a brief set of arguments for why legislating from the bench seems inextricably tied to our political and constitutional order. Many of the forms of legislating from the bench described in Part III are unavoidable given our commitment to certain aspects of the rule of law and our system of government. To the extent this argument is convincing, it serves as the basis for a kind of positivist<sup>134</sup> defense of legislating from the bench: While we might not like this behavior in theory, it is so tied to what our political and legal order is and has become that we simply can’t discard it without major disruptions to the polity.

But even if we could somehow will away the aspects of U.S. legalism and politics that require judges to engage in some forms of legislating from the bench,<sup>135</sup> I also argue that there are independent reasons for defending this practice. As part of this argument, I set out several competing models of the separation of powers to explain how many critical judgments about legislating from the bench are based on a somewhat contracted and misleading view of our political institutions, their interactions, and their intended purposes. This theoretical discussion sketches a new framework for evaluating legislating from the bench from which the practice can be viewed more sympathetically.

I conclude my normative argument by returning to this Article’s earlier efforts to construct a descriptive and critical typology of different forms of legislating from the bench. Through this move, we can delineate, examine, and challenge in a systematic manner the arguments offered against this practice.

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<sup>130</sup> James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 213 (2003).

<sup>131</sup> 151 CONG. REC. 118, H8136 (daily ed. Sept. 20, 2005) (statement of Rep. Franks).

<sup>132</sup> Adam W. Kiracofe, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz’s Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 577 (2004).

<sup>133</sup> Beth, *supra* note 22, at 19.

<sup>134</sup> See Frank H. Easterbrook, *The Influence of Judicial Review on Constitutional Theory*, in A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS 170, 183 (Burke Marshall ed., 1987) (discussing the positivist argument for judicial supremacy).

<sup>135</sup> Among the unrealistic possibilities of reform would be to adopt a European style civil system, and relatedly, to renounce judicial review in favor of legislative supremacy, such as occurs in the United Kingdom.

Ultimately, I conclude that in the context of our blended system of separated powers, certain aspects of legislating from the bench are desirable and salutary. To the extent this claim is credible, it suggests that critics of the courts often misconstrue the very terms under which we debate and evaluate the judiciary's role in our democratic republic.

A. *The Positivist Defense: Is Legislating from the Bench Inevitable?*

1. *The Indeterminacy of Law, Easy Cases, and Interpretive Modalities*

There are several interconnected ways in which we might regard legislating from the bench as inevitable in our system of governance.<sup>136</sup> To begin with, the very nature of U.S. law (including its constitutional, statutory, regulatory, and other forms) seems to depend upon an active and inventive judiciary, since it is impossible for the original authors of law to foresee and provide for all contingencies.<sup>137</sup>

As suggested earlier, even many critics of judicial policymaking or legislating concede that judges must fill in the “gaps in a statutory [entrepreneurial] framework.”<sup>138</sup> But in constitutional law (and in the context of numerous statutes)<sup>139</sup> this judicial responsibility is not just a matter of filling in gaps or interstices, but of giving texture, definition, and application to a document that is necessarily abstract, open-ended, and set out in “broad outlines” and generalities.<sup>140</sup> Thus, to the extent that our Constitution and much of the rest of our legal landscape is “indeterminate” and open, jurists often need to create rules or glosses on legal texts. In so doing, these judges engage in some of the behaviors associated previously with legislating from the bench—

<sup>136</sup> Barbara K. Bucholtz, *The Interpretive Project and the Problem of Legitimacy*, 11 TEX. WESLEYAN L. REV. 377, 387 (2005); John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239, 240 (1974).

<sup>137</sup> Wold, *supra* note 136, at 240. For an analogous argument, see JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE 144–45 (Gateway Editions 1955) (1690). Cf. Gerhardt, *supra* note 7, at 939 (“[t]he Framers and Ratifiers were not able to anticipate every contingency, they failed to reach consensus on more specific language, and they agreed on general terms for different, often complex reasons”).

<sup>138</sup> Lavoie, *supra* note 60, at 622.

<sup>139</sup> Many statutes seem to give courts “the authority to fill any gaps in order to clarify the broad or ambiguous language within them.” Gerhardt, *supra* note 7, at 944. When courts “fill gaps” in the context of statutes, however, they are less prone to be charged with “legislating from the bench” because lawmakers can much more readily reverse improper or mistaken interpretations by passing a new or clarifying law. *Id.* See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215 (2001).

<sup>140</sup> See KLARMAN, *supra* note 127, at 5 (arguing “that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003); Gerhardt, *supra* note 7, at 938 (arguing that a “written constitution, like other laws reduced to writing, must be abstract”); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (the nature of a constitution requires “that only its great outlines should be marked”).

they assume the role of creative authors,<sup>141</sup> going far beyond what is “already immanent within the existing body of legal materials”<sup>142</sup> and actually creating new law. As Michael Gerhardt argues, the “indeterminacy of the law . . . arguably prevents [it] from being mechanically applied.”<sup>143</sup>

But critics of this perspective might respond that while judges’ responsibilities include addressing oversights and imprecision in law, properly understood, this work is significantly constrained—judges are not free to “roam at large in the trackless field of their own imagination.”<sup>144</sup> Those sitting on the bench are different from legislators precisely because the nature of law and the judicial function causes them to be bound down by legal texts and institutional rules and norms, including widely accepted canons of legal construction.<sup>145</sup>

There is some evidence for this position.<sup>146</sup> There are “easy” cases in American law—those where the overwhelming number of lawyers and judges would agree what the “right” disposition of the case is given existing legal materials and rules of interpretation. Easy cases are typically associated with so-called “inferior” courts—lower appellate and trial judges whose work “is almost exclusively doctrinal.”<sup>147</sup> “They are required to figure out and enforce what the Supreme Court and other higher courts want them to do, regardless of their own views of the justness of higher court precedents.”<sup>148</sup> A considerable body of research bolsters the case that lower courts can and do follow existing legal rules of construction passed down by higher courts.<sup>149</sup>

Moreover, there are widely accepted methods of legitimate legal interpretation that distinguish the work of courts. To take one influential example, Philip Bobbitt has outlined six “modalities” of constitutional argument—six ways of talking about the Constitution that the legal community as a whole employs and recognizes.<sup>150</sup> These modalities include historical, textual, structural, doctrinal, ethical, and prudential methods of interpreting the

<sup>141</sup> BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 57 (1924) (discussing the extent to which judges must be creative in fulfilling the judicial function).

<sup>142</sup> Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 20 (Sanford Levinson ed., 1995).

<sup>143</sup> Gerhardt, *supra* note 7, at 938.

<sup>144</sup> JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 373 (6th ed. 1858).

<sup>145</sup> C. Herman Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* 27, 42 (Joel B. Grossman & Joseph Tanenhaus eds., 1969) (declaring that “judges make choices, but they are not the ‘free’ choices of congressmen”).

<sup>146</sup> Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465, 485–86 (2001).

<sup>147</sup> Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1723 n.50 (1997).

<sup>148</sup> *Id.*; see also Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 *CONN. L. REV.* 843, 845 (1993).

<sup>149</sup> See TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 78, 135–37 (1999) (making an empirical and theoretical case that “political motivation” in the judiciary’s decision making is “legitimate and democratically defensible”).

<sup>150</sup> PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–22 (1991).

Constitution (although these modalities are used in other legal contexts as well).<sup>151</sup> We might recognize that while there are disagreements amongst lawyers and judges about which of these techniques to employ and how to apply them in particular cases, there is little disagreement that they exist; therefore, the use of Bobbitt's modalities might serve to divide "proper" judges who interpret the law using these methods, and those who do not, and who therefore "make" the law or act like legislators by operating outside of these accepted approaches of the legal community.

But these responses to the indeterminacy problem in law only serve to put it off temporarily. Even if one accepts that there are easy cases, this does not remove the difficulty posed by controversial and hard cases that are most likely to induce the charge of "legislating from the bench." This is particularly true for the courts that have been the most frequent targets of these attacks—the highest state courts and, especially, the U.S. Supreme Court. These institutions do not have the same responsibility to defer to prior rulings or other judicial institutions; moreover, the kinds of cases they review are typically those for which easy legal answers are not available.<sup>152</sup>

Moreover, accepting Bobbitt's modality argument,<sup>153</sup> or some variant, still leaves us with good reasons to believe that legislating from the bench is inevitable. As Bobbitt concedes, his argument does not dispose of the difficulties of choosing amongst the various modalities in interpreting law and deciding cases; this choice is left to the individual jurist with little guidance from the law itself.<sup>154</sup> The diversity of modalities and absence of any clear rule for choosing amongst them suggests that, especially at the very highest levels of our judicial system, we are likely to see a recurrence of behaviors associated with legislating from the bench—and resulting criticism. As one scholar explains, since "no law clearly directs the Court on how to choose among these competing understandings, the Justices have difficulty in explaining how the law rather than their own inclinations, leads them to adopt one plausible interpretation rather than another."<sup>155</sup>

Some thinkers try to get out of this puzzle by insisting that only some forms of constitutional interpretation are valid—that is, they attempt to edit Bobbitt's list in a way that constrains judges more vigorously. But given both the range of interpretive modalities that judges and lawyers actually use and the dubious degree to which any one modality constrains a judge and leads to

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<sup>151</sup> *Id.*

<sup>152</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* REVISITED 244 (2002).

<sup>153</sup> There is some debate about whether Bobbitt's modalities actually comprise the universe of accepted legal argument.

<sup>154</sup> BOBBITT, *supra* note 150; *see also* Gerhardt, *supra* note 7, at 939 ("[t]he Constitution provides no guidance on how its terms ought to be interpreted or on which interpretation is superior"); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 727–28 (1993).

<sup>155</sup> Gerhardt, *supra* note 7, at 941.

determinate results,<sup>156</sup> this argument also appears flawed. In short, then, the indeterminacy of law and the nature of the agreed upon conventions of legal interpretation are both factors that seem to make aspects of legislating from the bench unavoidable.

## 2. *America's Common Law Foundations*

Closely related to these observations, the common law foundation of the United States is another factor that makes legislating from the bench somewhat inescapable. Among other features, the common law is distinguished by its reliance on bench-made law.<sup>157</sup> Common law systems authorize courts and judges to speak and even make law where legislatures are silent or don't speak clearly. These decisions can be overruled (or codified) by legislatures, but in the mean time, the judiciary's steady application of what are concededly invented, common law rules is supposed to create stability and reliability in our legal system.<sup>158</sup> In many ways, these creative judicial acts seem to reflect the principles of judicial lawmaking targeted by critics.

One might argue, however, that legislating from the bench arising from common law traditions is only a limited problem in the United States for two reasons. First, legislatures can easily correct judicial behavior that supposedly strays too far, and second, there is, purportedly, no federal common law.<sup>159</sup>

But again, these responses do not really discredit the contention that the common law tradition in the United States necessarily gives rise to legislating from the bench. While in theory, legislatures can "correct" judicial decisions based on common law authority, for whatever reasons, they often will not do so—granting the courts considerable power to fashion the character of the law broadly and independently.

Moreover, the claim that there is no federal common law is a dubious one. While several Supreme Court cases have limited the capacity of federal judges to make common law decisions,<sup>160</sup> the Court itself has acted in a manner consistent with common law principles, and federal common law arguably persists in specialized areas such as admiralty law.<sup>161</sup> More generally, numerous scholars have suggested that the Court's blanket rejection of federal common law is something of an illusion, and that common law reasoning and authority persists throughout the American legal system.<sup>162</sup>

<sup>156</sup> See David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11, 11–17 (David Kairys ed., 1982) (questioning the power of precedent); K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960).

<sup>157</sup> See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 5 (7th ed. 1998) (describing the common law by contrasting "bench-" and "bar-" made law).

<sup>158</sup> See generally EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

<sup>159</sup> See, e.g., *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (holding that there is no federal common law of crimes); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 628–29 (1834) (finding no federal civil common law); *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938) (requiring federal courts to use state law in diversity jurisdiction cases).

<sup>160</sup> See *supra* note 159.

<sup>161</sup> See Gerhardt, *supra* note 7, at 943–44.

<sup>162</sup> See, e.g., CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 4 (2004) (since "the Supreme Court in deciding constitutional cases has



### 3. *Judicial Review*

In addition to these points, American judges seem unable to escape lawmaking because of judicial review—their historic power to consider and invalidate government action on the basis of its supposed incompatibility with the Constitution. Judicial review has been defended as a crucial component of a separation of powers system in which the branches of government are, at various turns, interfering, cooperative, and conflicting.<sup>163</sup> But judicial review also frequently places judges in a position to ratify, undo, or amend the products of legislative and political processes. As one scholar concludes, “[t]he effect of judicial review is thus inevitably to make policy . . . [and the] only way to avoid ‘judicial legislation’ is to banish the power of judicial review . . . .”<sup>164</sup>

### 4. *The Appellate System*

Finally, one might conclude that some degree of legislating from the bench is unavoidable in the United States due to the nature of our appellate system, especially as a result of congressional reforms that have given considerable power to appellate judges, and Supreme Court justices in particular, to control their own dockets and agendas.<sup>165</sup> One effect of this vesting of authority is that the Supreme Court can decide what issues to move to the national spotlight. In sifting through thousands of certiorari petitions in a given term, the Supreme Court must ascertain, given its own rules, which cases present an “important federal question,”<sup>166</sup> a designation that is often synonymous with policy matters of national importance. This capacity and obligation to select a docket of significant issues resembles an agenda and policy-setting function typically associated with a legislative and lawmaking body.

## B. *Assessing Legislating from the Bench through the Separation of Powers*

As already intimated, the almost uniformly negative judgments made about legislating from the bench can be often traced to a somewhat crude underlying understanding of the separation of powers. Many critics implicitly rely upon a rigid, legalistic vision of separated powers in which each branch is

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acted like a common law court developing the law according to its precedents, those five-hundred-odd volumes of Supreme Court Reports are the principal source of constitutional law, of constitutional doctrine”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (“statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law”); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (discussing common law reasoning in constitutional cases); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing for constitutional interpretation based on common law principles).

<sup>163</sup> JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 42–43 (1987); Peabody & Nugent, *supra* note 98.

<sup>164</sup> Beth, *supra* note 22, at 15 (emphasis in original).

<sup>165</sup> See, e.g., Judiciary Act of 1925, ch. 229, 43 Stat. 936. See generally PERRY, *supra* note 102.

<sup>166</sup> SUP. CT. R. 10(a).

assigned a discrete governing function or authority that is walled off from the other branches and powers.<sup>167</sup> This “strict separation” or “parchment” model was prevalent prior to constitutional ratification, and made its way into the constitutions of several states. By clearly dividing core political authority, the governed were supposed to be better able to maintain the accountability of their leaders and prevent a dangerous accumulation of powers.<sup>168</sup> If one treats this model of separated powers as providing the metric for evaluating institutional behavior, legislating from bench is not likely to be well regarded. Indeed, many critics of the practice specifically suggest that it violates separation of powers principles.<sup>169</sup>

But one might come to a different set of judgments about legislating from the bench if this activity is assessed against an alternate paradigm, one based on rethinking the goals and operation of the separation system. This “blended powers” model draws on the work of several scholars, and is arguably much more consonant with the assumptions and logic underlying the Constitution.<sup>170</sup>

The blended powers approach presumes that while the Constitution allocates “primary”<sup>171</sup> governing powers to the three branches, the lines of authority are not cleanly drawn, providing an inducement for the branches to interfere in one another’s business, and exercise powers that constantly threaten to involve the others.<sup>172</sup> “For example, although legislative power is distinctively associated with Congress, the President [shares this governing authority] through the presidential veto and the power to propose legislation.”<sup>173</sup> In this conception, institutional powers are inelegantly divided and blurred in order to advance the traditional negative goal of checking tyranny and arbitrary rule, but also to advance a set of positive objectives, such as promoting legitimacy, facilitating a functional, workable government, and encouraging each branch to advance its distinctive tasks, capacities, and concerns.<sup>174</sup> Thus, including the President and the Judiciary in the lawmaking process not only provides sentinels over the work of Congress, but also helps

<sup>167</sup> TULIS, *supra* note 163, at 41; Peabody & Nugent, *supra* note 98, at 13.

<sup>168</sup> THE FEDERALIST NOS. 47, 48 (James Madison) (Clinton Rossiter ed., 1961).

<sup>169</sup> Jipping, *supra* note 60, at 158.

<sup>170</sup> What follows is only a sketch of this formulation. For more complete accounts see TULIS, *supra* note 163, at 41; Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348–49 (1994) (outlining a theory of “comparative institutional competence”); Peabody, *supra* note 1; Peabody & Nugent, *supra* note 98, at 17.

<sup>171</sup> James W. Ceaser, *In Defense of Separation of Powers*, in SEPARATION OF POWERS—DOES IT STILL WORK? 168, 174 (Robert A. Goldwin & Art Kaufman eds., 1986).

<sup>172</sup> *Id.*

<sup>173</sup> See Peabody & Nugent, *supra* note 98, at 31.

<sup>174</sup> TULIS, *supra* note 163, at 41. Cf. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 16, at 331–32 (“The legislative power should be in one body, the executive in another, and the judicial in one different from either—But still each of these bodies should be accountable for their conduct. Hence it is impracticable, perhaps, to maintain a perfect distinction between these several departments—For it is difficult, if not impossible, to call to account the several officers in government, without in some degree mixing the legislative and judicial.”).

ensure that the distinguishing traits and perspectives of the other institutions will be included. The institutional collision, collaboration, and compromise associated with this picture of constitutional politics promotes the deliberative and representative qualities of Congress; the unity, energy, secrecy, and “dispatch”<sup>175</sup> associated with the Executive Branch; and the judgment, finality, and rights-orientation of the courts.

As suggested, this conception of separated powers does not claim that our constitutional system provides no guidance on or allocation of the core or primary powers of governance. At the federal level, basic legislative, executive, and judicial authority is clearly delineated by the Constitution to the Congress, President, and Supreme Court respectively. But, “[w]hile each of the three federal departments have basic oversight and responsibility for exercising the fundamental powers of government, these responsibilities are also shared with state authorities and amongst the federal departments.”<sup>176</sup> Consequently, each branch must ascertain the deference it owes to another, not simply by determining whether an institution is operating within its allocated field of authority but “by first identifying the purposes served by the Constitution [in a particular area of public life] and then making a judgment about which institutions are best equipped to pursue that purpose.”<sup>177</sup>

From the perspective of this reformulated conception of the separation of powers, one might begin to see how legislating from the bench comports with, rather than deviates from, our highest constitutional aspirations. Just as the central executive and legislative functions necessarily entail utilizing powers and taking actions that blend with those of competing and coordinate institutions, judges may also need to engage in some lawmaking to fulfill their duties and advance the negative and positive goals of the separation of powers.

This basic argument, obviously, needs a greater level of detail and a more systematic presentation. In order to grasp better whether legislating from the bench is not just an anticipated feature of our political landscape, but an actually desirable one, I return to the definitions set out earlier in this Article, and the resulting typology for describing the different ways in which we do and might talk about this practice. In the following section, I use both this taxonomy and my reformulated account of the separation of powers to reconsider possible objections to each of the specific forms legislating from the bench can assume.

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<sup>175</sup> See THE FEDERALIST No. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished”).

<sup>176</sup> Peabody & Nugent, *supra* note 98, at 31.

<sup>177</sup> Eisgruber, *supra* note 170, at 352.

*C. Responding to the Critics**1. The Policy Encroachment and Policy Entry Objections*

“Policy encroachment” refers to the specific circumstances in which the courts threaten to shoulder aside the legislature’s policy judgments through their own decision making. Opponents of this form of legislating from the bench contend that it leads to judges encroaching on the powers of the other branches, an anti-democratic move to the extent that it replaces the will of accountable, elected officials with that of a judicial majority.<sup>178</sup> As one critic puts it, the danger here is that “rogue jurists [will] twist the law in a manner that usurps the role of the legislature and thwarts the popular will in favor of the judges’ personal views.”<sup>179</sup>

But, as suggested earlier, this general sketch of an active, interfering, and even oppositional judiciary seems quite consistent with at least one reading of our constitutional order, including the picture of “ambitious” and countervailing institutions set out in *The Federalist*.<sup>180</sup> If one accepts the proposition that the constitutional division of powers is somewhat inexact and, indeed, deliberately messy, then the exercise by the judiciary of authority that is generally possessed by another branch is not automatically beyond the pale.

Moreover, and again drawing upon the blended separation of powers model discussed previously, we need to understand judicial intervention in the legislative process not simply as an act of interference and displacement, but as a chance for the judiciary to lend its special expertise and concerns to the lawmaking process. Courts’ entanglement in legislative affairs often provides substantive protections for citizens in areas where lawmakers are reluctant to enter.<sup>181</sup> While “lawmaking is not the primary function of the judiciary” it is important to cede some lawmaking authority to courts to supplement an imperfect legislature that sometimes gets “captured” by interest group politics and encumbered by a complex and diffuse policy process.<sup>182</sup>

In contrast with policy encroachment, policy entry occurs when judges enter an issue arena in which elected political officials could act, but are absent or dormant. Critics contend that judicial activity in these areas is an inappropriate form of legislating from the bench because it subverts the intent or priorities of traditional lawmaking bodies and may make them less inclined to reenter the substantive area involved. However, from the perspective of a dynamic model of shared and differentiated institutional powers and responsibilities, the absence of one or more coordinate branches of government from a particular field of public life may justify the very judicial intervention decried by critics. It seems plausible to argue that the courts possess some

<sup>178</sup> Jipping, *supra* note 60; H. Lee Sarokin, *Thwarting the Will of the Majority*, 20 WHITTIER L. REV. 171 (1998).

<sup>179</sup> Lavoie, *supra* note 60, at 611.

<sup>180</sup> See THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961); Peabody & Nugent, *supra* note 98, at 44–45.

<sup>181</sup> Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175 (1995).

<sup>182</sup> Lavoie, *supra* note 60, at 621.

heightened claim to enter in an area of constitutional politics in which one branch has consistently absented itself and abdicated its institutional responsibilities to check and guide the others.<sup>183</sup> Thus, a court confronting a period of sustained apathy or disinterest by Congress with respect to constitutional war powers could have a defensible claim to act in the interests of protecting constitutional values.<sup>184</sup>

As Mark Graber and others have argued, in some policy areas courts can act largely unimpeded because it is politically expedient for other institutions to abdicate their authority over these matters.<sup>185</sup> The courts move in where other institutions fear to tread. With this background in mind, we should not necessarily be surprised or disappointed if the judiciary will sometimes attempt to extend the rule of law, and its capacity to imprint policy, in these partly forsaken spheres of public affairs.<sup>186</sup>

## 2. *Legislating from the Bench and Approaches to Rendering Decisions*

Legislating from the bench has also been attacked as an extra-legal and, therefore, illegitimate form of judicial decision making. In this view, the process through which judges render decisions is compromised if judges rely on what are somehow distinctively legislative means. While individual judges are often tempted to give voice to society's (or their own) values, appropriate judging entails a strict adherence to enforcing carefully delineated and limited legal values, rules, and procedures. Without these constraints, judges will generate law that is illegitimate and inconstant.<sup>187</sup> In essence, this critique sets up a contrast between supposedly unconstrained policy making in legislative

<sup>183</sup> For example, one might justify judicial intervention in the field of civil rights during the 1940s and 1950s on these grounds. Interestingly, this view seems adhered to by some judges. See Wold, *supra* note 136, at 240 ("where the legislature has abdicated its responsibilities, I think we have a right to intervene").

<sup>184</sup> FISHER, *supra* note 56, at 185; Peabody & Nugent, *supra* note 98, at 44–45. Cf. Abraham Lincoln, Special Session Message (July 4, 1861), reprinted in 6 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 20, 24 (James D. Richardson ed., 1898) (defending his early emergency measures as involving powers within "the constitutional competency of Congress").

<sup>185</sup> See Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 44 (1993) (explaining that judicial review can sometimes remove "from the political agenda issues that are disruptive to existing partisan alignments"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 337–40 (1994).

<sup>186</sup> Interestingly, in recent years, the Supreme Court's decisions reviewing some of the Bush administration's anti-terrorism policies may fit the bill of "policy interference." But in the context of a deferential Congress, and rather expansive claims by the Chief Executive to speak for the other branches and assume powers they have historically exercised, the judiciary's "legislating from the bench" is arguably both explicable and defensible. See, e.g., Bob Egelko, *9/11: Five Years Later Bush Continues to Wield Power*, S.F. CHRON., Sept. 10, 2006, at E2 (quoting Glenn Greenwald as saying that "[e]ven conservative judges are offended by the president claiming a very un-American power to act outside of the restraints of the other two branches").

<sup>187</sup> Stefan D. Cassella, *Forfeiture Reform: A View from the Justice Department*, 21 J. LEGIS. 211, 214 (1995).

bodies, and the rule-bound and “mechanical” legal interpretation that occurs in judicial fora.

One might initially object that this characterization simplifies not only the dynamics of courts, but the realities of legislative politics as well. Numerous congressional scholars have demonstrated that the U.S. Congress, and especially the House of Representatives, can tightly constrain individual behaviors through formal rules and informal norms.<sup>188</sup> In contrast, there is a substantial body of literature suggesting courts (especially the Supreme Court) are fairly unfettered in their decision making.<sup>189</sup> Indeed, some scholarship suggests that supposedly restrictive rules themselves can be a source of judicial discretion.<sup>190</sup>

As argued earlier, those who link legislating from the bench with employing inappropriate means to rendering legal decisions can sometimes be understood as criticizing particular interpretive modalities or tools (such as prudential approaches or relying on judicial standards). But these objections hardly end the discussion. Given their prevalence in law, it seems reasonable to explore whether there are some interpretive practices (such as balancing) that have legislative analogues, but are still legitimate and perhaps distinctive in the judicial context.

Even the inconsistent and perhaps opportunistic use of interpretive modalities is not without its arguable utility and necessity. Robert Bork, a seeming paragon of strict constructionism and a self-proclaimed critic of legislating from the bench, has conceded that his commitment to “originalist” principles is contingent. When it comes to interpreting the Fourteenth Amendment, Bork noted, his adherence to the framers’ intentions could be set aside and replaced with a textual approach to constitutional interpretation when the “background assumption[s] [of the Amendment] proved false.”<sup>191</sup>

Moreover, as Terri Jennings Peretti has argued, “public support [for the Court] is determined [in part] by the *political* acceptability of its decisions rather than the presence of persuasive constitutional authority for the Court’s intervention . . . .”<sup>192</sup> The legitimacy of judicial decision making itself may turn, in large measure, on the degree to which the public believes those decisions are compatible with its interests and preferences. Thus, a savvy judge will consider public opinion, and the nation’s political pulse more generally,

<sup>188</sup> See, e.g., GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993); ROHDE, *supra* note 6.

<sup>189</sup> See, e.g., Gerhardt, *supra* note 7, at 938; Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001).

<sup>190</sup> See Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1205 (2005) (discussing the results of their study revealing “that judicial discretion appears to expand with the growth of additional precedents”).

<sup>191</sup> *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong., pt. 1, 284–86 (1987). See generally PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (3d ed. 1992) (discussing the jurisprudence of Bork).

<sup>192</sup> PERETTI, *supra* note 149, at 182 (emphasis in original).

when assessing whether to issue and how to frame a potentially controversial opinion.

A slightly different argument in favor of a “legislative,” value-laden approach to judicial decision making is advanced by Richard Lavoie. According to Lavoie, it is the primary institutional role of the legislature to adapt the law to society’s shifting values.<sup>193</sup> But, as an institutional matter, “the legislature is ill-equipped to bear [this entire burden] alone”<sup>194</sup> and needs the assistance of courts in this regard.<sup>195</sup> We may wish, therefore, to support some forms of legislating from the bench because we want and need judges to be in tune with society’s concerns and values—both to protect these values and to protect the courts themselves.<sup>196</sup>

All of this is not to suggest that it is impossible to identify interpretive techniques that are valid and invalid for courts to use. As argued previously, Bobbitt and others have made substantial progress in suggesting that, indeed, the universe of acceptable legal argument is largely known and quite finite. Presumably, for example, judicial opinions openly based on appeals to hunches or personal values should be dismissed, or at least seriously denigrated. But the more general sense amongst many that the proper processes of judicial interpretation can never resemble the decision making of lawmaking bodies seems, on its own, like a dubious and unhelpful premise.

### 3. *Concerns About Decision Content*

Some who object to legislating from the bench target the results rather than the method of judicial decision making.<sup>197</sup> As indicated, a common form of this complaint associates improper judicial rulings with highly detailed and restrictive opinions that attempt to regulate behavior in a comprehensive and far-reaching manner. The traditional shibboleths here include *Miranda v. Arizona*,<sup>198</sup> *Roe v. Wade*,<sup>199</sup> and other so-called “inventive” decisions.

While there is undoubtedly some power to this objection—scholars and commentators have expressed discomfort with the rationale and legal structures undergirding *Roe*,<sup>200</sup> for example—the critique requires more specific formulation. What are the particular features and contours of judicial decisions that rely on commands, line-drawing, and governing principles that are better

<sup>193</sup> Lavoie, *supra* note 60, at 619.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 621.

<sup>196</sup> Wold, *supra* note 136, at 247.

<sup>197</sup> See 152 CONG. REC. 8, S267–68 (daily ed. Jan. 30, 2006) (statement of Sen. Grassley) (discussing the dangers posed when the Supreme Court assumes “an expansive role well beyond what was originally intended by the Constitution and its writers . . . a role that is closer to the role of the legislative branch, which is to make policy and bring about changes in our society” and also decrying the transformation of the judicial confirmation process into an interrogation about “whether a nominee will implement a desired political outcome, and do it from the bench, regardless of the law and regardless of what the Constitution says”).

<sup>198</sup> 384 U.S. 436 (1966).

<sup>199</sup> 410 U.S. 113 (1973).

<sup>200</sup> See Ely, *supra* note 91, at 922–23.

suited to legislative development and articulation? Some scholars have striven to answer this query,<sup>201</sup> but more work needs to be undertaken before this contention can be fully assessed.

#### 4. *Concerns About Decision Scope*

The legislating from the bench critique can focus on decisions that offer rather detailed regulations of behavior, but it can also be used to attack broadly worded opinions that prescribe behaviors and establish rules extending far beyond the issues of the instigating case.<sup>202</sup> These latter kinds of decisions, critics argue, threaten to take the judiciary outside of its traditional expertise in developing the law gradually by resolving concrete disputes steeped in particular facts and controversies.<sup>203</sup>

But, to some degree, expansive judgments by courts are both unavoidable and necessary, particularly for a Supreme Court that is supposed to provide legal leadership for a far-flung judiciary and nation.<sup>204</sup> Especially for the Court, the limited, interstitial model of rendering decisions, while so often celebrated, often seems institutionally inappropriate.<sup>205</sup> Indeed, some of the judiciary's most important (and not always controversial) decisions involve rather sweeping legal structures that apply far beyond the case at hand. To take just one example, Justice Robert Jackson's famous concurrence in *Youngstown*<sup>206</sup> sets out general parameters for understanding and assessing separation of powers disputes between the President and Congress.<sup>207</sup> The Court's evolved equal protection jurisprudence also depends upon a tiered system of classifications, and a sliding scale of judicial scrutiny, whose very usefulness can be attributed to its breadth of application. There are countless other examples.<sup>208</sup>

<sup>201</sup> HOROWITZ, *supra* note 78, at 15–17; Glazer, *supra* note 98, at 74–75.

<sup>202</sup> Arguably, *Roe* is an example of an opinion that both provides detailed regulations and strives to impact future policy broadly.

<sup>203</sup> SUNSTEIN, *supra* note 4, at xiii; Gerhardt, *supra* note 7, at 994; Horowitz, *supra* note 78, at 273. The Court's primary duty is to decide concrete cases or controversies.

<sup>204</sup> In this sense, the long-held belief that the judiciary does not provide "advisory" opinions is perhaps proven false. Many of the Court's opinions are advisory and cautionary for lower courts and other institutions. This may be especially important in constitutional law in the context of our current commitment to "judicial supremacy," the view that the Supreme Court is the supreme and perhaps exclusive interpreter of the Constitution.

<sup>205</sup> Lavoie, *supra* note 60, at 621 (conceding that the Court shouldn't be limited to an interstitial role and will sometimes need to become a more active lawmaker).

<sup>206</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>207</sup> *Id.* at 635–38.

<sup>208</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (setting out basic criteria for evaluating whether government regulations of advocacy of illegal actions are constitutional); *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (holding that section 5 of the Fourteenth Amendment can only be used as a "remedial" power by Congress after satisfying several conditions, including meeting "a



The alternative to providing the generalized, broad guidance we often associate with Supreme Court decisions is to embrace a more constrained approach, allowing the law to develop in an even more incremental, decentralized, and developmental form. One might conclude that, on the whole, this is a preferable option from an institutional standpoint, since it would reduce the Court's exposure to the political spotlight and to sustained public criticism. But such a decision would, at a minimum, limit the Court's traditional role in providing stability, settlement, and unity to the judiciary and to the laws of the United States.<sup>209</sup>

The challenge offered by the "content" and "scope" critiques of legislating from the bench is to somehow arrive at guidelines that will encourage a balance between court decisions that are sufficiently general enough so as to avoid the charge of legislative micromanagement, but not so broad as to fall under the critique of imposing sweeping judicial mandates.

#### 5. *The Responsiveness Objection*

A number of critics argue against a form of legislating from the bench that entails inviting or at least allowing different groups or constituents to treat the judiciary as another democratic forum for airing and advancing their interests. Members of Congress, presidents, and state and local officials are already in place for representing the public voice; there is no justification for permitting the courts to do their own inferior take on a function that is already being fulfilled.<sup>210</sup>

But, as Peretti has convincingly argued, "political motivation in constitutional decisionmaking [is often] legitimate and democratically defensible."<sup>211</sup> Judicial rulings driven by "partisan or interest group loyalties, or political feasibility" can augment political representation and courts' authority.<sup>212</sup> In our pluralist system, one valid criterion "for determining an institution's legitimacy and value is . . . the degree to which it adds to the number and diversity of arenas in which groups can regularly and effectively

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congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (setting out a three-part test for assessing religious "establishment" under the First Amendment); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (setting out a three-part test for evaluating exercises of Congress's powers under the Commerce Clause).

<sup>209</sup> Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 482 (2000). If one were to decide the judiciary, and the Supreme Court in particular, should issue decisions that are as tightly constrained as possible, there might be other ways to promote legal unity and stability. One might, for example, argue that the Court should decide more cases—each of them should be constrained and "minimal" but more of them should be issued—perhaps expanding the Court's docket even beyond the record numbers associated with the Warren Court. Alternatively, in the context of constitutional law, one might call for greater interpretation by nonjudicial bodies; of course, this strategy might have the opposite effect—inducing greater instability in the law.

<sup>210</sup> LEVIN, *supra* note 49, at 60.

<sup>211</sup> PERETTI, *supra* note 149, at 78.

<sup>212</sup> *Id.* at 77–78.

advance their interests . . . .”<sup>213</sup> In this way, judges legislating from the bench can not only enhance their own perceived legitimacy, but may also support both the general authority of government as well as democratic values.<sup>214</sup>

#### 6. *Activism*

I have already stipulated that defining “judicial activism” is potentially complex and deserves its own careful and sustained treatment. As discussed, there are certainly some initial reasons to question whether judicial activism is synonymous with legislating from the bench. Moreover, “activism” itself seems defensible—at least for some issues and for some courts. For example, the Supreme Court does not owe the same deference to precedent that lower courts do, and, therefore, we should expect it to be more active when it comes to reviewing past decisions than these other bodies.<sup>215</sup>

#### 7. *Internal Strategizing and Politicking*

As discussed, a number of scholars have depicted various strategies employed within courts to accomplish their institutional handiwork and satisfy the individual goals of judges themselves.<sup>216</sup> Many of these techniques resemble those typically associated with lawmakers and legislative bodies.

To the extent these maneuvers build collegiality, consensus, deliberation, and, indirectly, heightened legitimacy for judicial rulings, these forms of legislating from the bench seem quite instrumental to the work of courts. Indeed, given the diversity of views about how to interpret legal materials properly,<sup>217</sup> judicial logrolls and other promises and compromises would often seem essential for creating majority opinions with any sense of coherence, unity, and force.

To take a familiar example, Earl Warren is often celebrated for his success in achieving unanimity in the first *Brown* decision, in part by convincing his reluctant colleagues Robert Jackson and Stanley Reed to withhold separate opinions they were drafting.<sup>218</sup> If Warren’s lobbying is appropriate in this context, we could readily imagine other circumstances in which we would

<sup>213</sup> *Id.* at 216.

<sup>214</sup> See MCGUIRE, *supra* note 101, at 33–34 (discussing representational politics within the Court—that is, debates about whether appointees should reflect gender, racial, or other representative interests); Dahl, *supra* note 122, at 294–95. One might keep in mind that a majority of states evidently accept a democratic connection between the courts and the populace, in the form of judicial elections—with some of this link being justified in terms of achieving greater accountability and representation. If we concede that it is possible in this context to mix judicial and democratic values, it does not seem entirely unreasonable to look for and expect them at the federal level.

<sup>215</sup> See Gerhardt, *supra* note 7, at 913.

<sup>216</sup> See *supra* note 114 and accompanying text.

<sup>217</sup> See BOBBITT, *supra* note 150, at 12–13, 22 (identifying a known set of interpretive modalities, but denying that there is a consensus about which modalities to employ in constitutional law or how to apply them).

<sup>218</sup> See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L. J. 1, 41–43 (1979).

commend comparable coalition and consensus building—of a sort normally linked with explicitly political figures.

#### 8. *External Politicking Reconsidered*

Similarly, we might recognize and endorse a perhaps limited role for jurists who wish to appeal directly or indirectly to different publics or officials.<sup>219</sup> Judges and justices' reading of opinions in open court is one fairly modest example of this practice. Lucas Powe, among others, has detailed more sustained efforts by jurists to influence policy at the national level. As Powe argues, the Warren Court assumed an active and robust political sales job in becoming a "functioning partner in Kennedy-Johnson liberalism" and helping to impose elite values (such as racial integration) on groups (such as white southerners) who were deeply opposed.<sup>220</sup>

The judiciary's limited mechanisms for enforcing its own decrees makes being attuned to and cultivating public support especially important.<sup>221</sup> Some research, especially experimental work, confirms that the courts can be effective in influencing public opinion through their rulings and other mechanisms.<sup>222</sup> To the extent that we value an effective judiciary, for whatever ends, these aspects of legislating from the bench ought not be lightly dismissed.

#### 9. *Judicial Prudence Reconsidered*

While appearing in many forms, judicial prudentialism generally holds that courts operate best when they behave modestly—typically by issuing narrow opinions and staying out of the way of the other branches. Courts' effectiveness will be destroyed if they seek "all the hottest political cauldrons of the moment and dive into the middle of them."<sup>223</sup> Thus, advocates of judicial prudence seem to provide an antidote to critics who identify legislating from the bench with activism or policy interference.

But part of the argument for the guarded behavior of judicial prudentialists is to ensure that when courts do intervene they can do so effectively—in ways likely to be heeded by the public and other institutions.<sup>224</sup> For prudentialists,

an important part of the work of courts is to achieve good consequences through a careful combination of judicial assertion and judicial restraint—through knowing when to intervene and when to stay aloof, when to goad the political branches into action and when to avoid

<sup>219</sup> My account of "external politicking" is exceedingly broad, and could certainly be broken down into significant subcategories; in the interests of space I refrain from this project in this Article.

<sup>220</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 494 (2000).

<sup>221</sup> VALERIE J. HOEKSTRA, *PUBLIC REACTION TO SUPREME COURT DECISIONS* 5 (2003); JOHNSON & CANON, *supra* note 100, at 178.

<sup>222</sup> HOEKSTRA, *supra* note 221, at 5.

<sup>223</sup> MCCLOSKEY, *supra* note 122, at 234.

<sup>224</sup> Some have characterized Chief Justice Roberts as having held this position, at least during his confirmation hearing. See Savage, *supra* note 93 ("Roberts suggested that modesty, humility and stability in the law were the goals of his umpire credo. Not to make law, like the activist judges he disdained, but merely to interpret existing laws fairly, mindful of legislative intent and the requirements of the Constitution.").

creating unnecessary strife that risks backlash and reaction. Thus, for a prudentialist, at least, one cannot know whether [controversial cases are] . . . correctly decided without a cool assessment of how the American political system would respond to the decision.<sup>225</sup>

Therefore, to the extent that one supports prudentialism as a theory of judicial action as well as restraint, it seems to call upon some of the knowledge, skill, and behavior associated with lawmaking bodies.<sup>226</sup> Presumably, to be effective prudentialists, judges should have access to tools and sources of information that would enable them to hand down decisions deemed legitimate by the public and relevant elites. At a minimum, we may wish to remove any stigma associated with judicial references to and reliance upon public opinion and other information about the overall political milieu in which the courts operate.<sup>227</sup>

As Robert McCloskey approvingly noted in his classic work, the Supreme Court's ability to fulfill its institutional functions, including the protection of individual rights, has followed its awareness of how "to be a political institution and to behave accordingly . . . this fact above all accounts for its unique position among the judicial tribunals in the world."<sup>228</sup>

## V. SIGNIFICANCE AND CONCLUSION

As a historical matter, we have seen that despite the recent attention to the legislating from the bench critique, fears about judicial lawmaking and "super-legislators" have long—if not necessarily deeply planted—roots. Descriptively, we have seen that the imprecision of many who invoke these concepts masks a fairly wide range of judicial behavior which we might plausibly associate with conventional lawmakers and lawmaking.

Normatively, this Article has tried to build a case that because of the nature of our separation of powers system, and the complex goals of our constitutionalism, traditional criticism of the legislating from the bench phenomenon is overstated, or at least incomplete. By appreciating the degree to which our constitutional system inexactly divides and shares powers "in order to equip each branch to perform different tasks,"<sup>229</sup> we can conclude that some degree of judicial lawmaking may be necessary to assist the judiciary in

<sup>225</sup> Levinson & Balkin, *supra* note 123, at 268.

<sup>226</sup> Interestingly, many of the same critics who lament the judiciary's "legislating from the bench" also suggest that its decisions are "out of touch" with the mainstream of American public opinion and morality.

<sup>227</sup> Some research already concludes that courts take public opinion into account in making their decisions. *See, e.g.*, William Mishler, Helmut Norpoth, Jeffrey A. Segal & Reginald S. Sheehan, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994).

<sup>228</sup> McCLOSKEY, *supra* note 122, at 231. As part of this behavior, McCloskey contends, the Court must avoid inserting itself into every public controversy of salient profile. *Id.* at 234.

<sup>229</sup> TULIS, *supra* note 163, at 41.

fulfilling its institutional roles and in advancing the broader goals of the political order.<sup>230</sup>

Conceding that our polity allows and even depends upon some mixture of basic or primary governing powers is not to say that it recognizes no boundaries or differences between institutions.<sup>231</sup> On the contrary, the blended separation of powers system sketched in this Article relies upon a kind of specialization of institutional labor in which each department is linked with particular structures, means, characteristics, qualities, and priorities that help it achieve its goals, and improve national politics. As Jeff Tulis argues, “the Court does not simply ‘judge’ dispassionately; it also makes policies and exercises will. But the founders believed that it made no sense to have a Supreme Court if it were intended to be just like a Congress.”<sup>232</sup>

In short, this Article suggests that each branch can act along a continuum of institutional power, operating with greatest confidence and legitimacy at a pole defined by the department’s core powers and responsibilities—as established by the Constitution, by history, and by the nature of the tasks it must regularly confront.<sup>233</sup> At the other extreme, each branch is at the nadir of its claims to rule and command obedience when it attempts to exercise powers and assert authority traditionally associated with another institution. However, and notwithstanding those who insist that ours is a more rigidly divided constitutional order, this scheme leaves considerable room in between these two poles for defensible exercises of legislating from the bench and other exercises of “overlapping” powers.<sup>234</sup>

Much of this Article, then, emphasizes that we can think and speak much more clearly and systematically about legislating from the bench as both a description and a critique of judicial behavior. But why should we? What do we gain from this clarity of discussion and focus?

To begin with, we need a greater intellectual hold on when courts can legitimately claim to use powers and sources of authority generally associated

<sup>230</sup> *Id.*

<sup>231</sup> See generally Howard Gillman & Cornell W. Clayton, *Introduction—Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1* (Cornell W. Clayton & Howard Gillman eds., 1999).

<sup>232</sup> TULIS, *supra* note 163, at 42–43.

<sup>233</sup> See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) (discussing the use of precedent by the Court as a tool “to demonstrate—at least to elites—the continuing legitimacy of judicial review.”). Cf. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970) (“the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.”).

<sup>234</sup> Among other implications, this argument leaves us with the important task of determining the comparative competence of different institutions to fulfill the constitutional functions and the primary tasks of governance.

with other branches, and a stronger sense of when these moves constitute an institutionally dangerous, and politically unhealthful, overreach. Stated somewhat differently, further pursuing the descriptive and normative elements of this project can help us to sort through what forms of legislating from the bench we might wish to allow (and condemn), and under what circumstances. Further delineating the appropriate scope of legislating from the bench, therefore, will help us to sharpen or diminish specific attacks trained at our judiciary. As this Article has attempted to depict, some of the charges leveled against the courts are, at times, less than meets the eye, or at least only the beginning of a more nuanced critique or understanding of (il)legitimate judicial behavior.

For example, this Article implies that some degree of political representation from the judiciary is to be both expected and even applauded, as it will help to advance the overall legitimacy of our governance and allow the courts to complete their work more effectively.<sup>235</sup> But even if one accepts this broad premise in principle, it leaves open essential and defining details about what marks appropriate and effective representation from the bench, especially in comparison with other forms of democratic responsiveness better left to other institutions. Given the ways in which elected officials already represent their national and local constituents, what should distinguish courts' claims to advancing these democratic interests? Should the judiciary's representation function be specifically focused on ensuring "equal participation in the processes of government . . . [and] equal participation in the benefits and costs that process generates"?<sup>236</sup> Should the courts instead strive to enforce a sustained national political view that is thwarted by a "regionally dominant" perspective that is otherwise difficult to dislodge from power?<sup>237</sup> Alternatively, should judges recognize that their distinctive contribution to representation is based on synthesizing or integrating "higher law" created by "We the People" during "constitutional moments"?<sup>238</sup>

Beyond this potential contribution, this Article's specific claims about the validity of some forms of judicial lawmaking could be valuable in thinking through how to question and select appointees to the bench. In order to know what kinds of judges and justices we should nominate and confirm, we need to speak more clearly about what kinds of behavior they should shun.

These questions, in turn, should prompt us to think through what constitutes excellence in judicial leadership. Jack Balkin has suggested that

<sup>235</sup> See PERETTI, *supra* note 149, at 77–78, 135–37 (demonstrating and defending the play of a range of "political" factors in the judiciary's decision making).

<sup>236</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77 (1980).

<sup>237</sup> See, e.g., TUSHNET, *supra* note 51, at 145 ("The Court's decision in *Brown* might best be understood as enforcing a national political view against a regionally dominant one that happened to have excessive power in Congress.").

<sup>238</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993). Cf. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (arguing that through "partisan entrenchment" the executive branch can foment sometimes illegitimate constitutional revolutions through the courts).

Supreme Court Justices seeking greatness should engage in a kind of “constitutional prophecy” based on articulating “a vision of the country and what it means . . . a vision of what America is and what its future and its destiny should be.”<sup>239</sup> A case can be made that this talent for prophecy, and whatever other skills are required for judicial greatness, requires judges to engage in some forms of legislating from the bench.<sup>240</sup>

This Article also reminds us that those attacking the judiciary for its overreach or institutional meddling should consider the role that elected and other political officials contribute to this supposed abuse of power. If some forms of legislating from the bench are a problem, they are a problem arising as much from the compliance, deference, and lack of clarity of presidents and members of Congress as from zealous and ambitious jurists.<sup>241</sup>

Moreover, this research project also implies that the legislating from the bench critique, and the kinds of research necessary to assess this attack, can serve as a kind of heuristic for the public and our political leaders. At a minimum, this argument suggests the importance of a more thoroughgoing discussion and more sophisticated understanding of the purposes of the separation of powers, and of challenging the incomplete picture of strict separation seemingly underlying many attacks on the courts.

We appear to be entering a period in which the judiciary, with the Supreme Court at the center, is in a potentially precarious state. As noted, the volume of attacks on the courts has grown, especially from the right, despite the fact that Republican presidents have overseen federal nominations in seventeen of the past twenty-five years. The increasing criticisms of state and federal judges have often been accompanied by legislation seeking to curtail judicial power through, for example, budget cuts or limiting the kinds of cases judges can hear.<sup>242</sup>

Some of the conservatives’ complaints originate from dissatisfaction that a largely Republican judiciary has not done more to advance their favored causes. The pressure will hardly let up in the years ahead. President Bush has made two high profile appointments to the Supreme Court, and expectations are high among party activists that the Court will now, finally, make politically favored decisions in such areas as abortion, prayer, and criminal rights. Moreover, the Court has recently entered into debates about the limits of executive powers exercised in the name of combating terrorism at home and abroad. These decisions have prompted protests from White House officials

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<sup>239</sup> Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall’s Greatness and Its Lessons for Today’s Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1335–36 (2002).

<sup>240</sup> This raises the more general question of whether constitutional greatness can often be found in leaders who combine or fuse national powers—without, presumably, damaging constitutional values. Some of the potential examples here are John Marshall, Abraham Lincoln, Franklin Roosevelt, and Lyndon Johnson.

<sup>241</sup> Abraham, *supra* note 26, at 287.

<sup>242</sup> See Bruce G. Peabody, *Supreme Court TV: Televising the Least Accountable Branch*, 34 J. LEG. (forthcoming 2007) (discussing ongoing congressional efforts to require the Supreme Court to televise its public sessions).

and commentators outside of government who have argued that the judiciary needs to be more deferential to the executive branch. If the courts continue to review presidential action in this area of public affairs, there is no reason to think this tension or criticism will soon end.<sup>243</sup>

For the Democrats, the courts have long been seen as a bulwark for liberal causes. But this presumption also appears vulnerable. If the courts weaken legal protections related to affirmative action, abortion, and civil liberties, the judiciary's liberal allies may become alienated as well.

In the context of this increased political pressure and scrutiny, being more articulate and clear-thinking about the acceptable contours of judicial power and the judiciary's role, and the terms under which we can fairly criticize judges and justices, seems essential. To the extent we value a neutral, independent, and effective judiciary, further exploration of legislating from the bench can help us to examine the preconditions and limits of this efficacy.

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<sup>243</sup> YOO, *supra* note 48; Savage, *supra* note 93.