

The
2010
Wriston
Lecture

LET JUDGES BE JUDGES

The Honorable
SAMUEL A. ALITO, JR.
Associate Justice
Supreme Court of the United States

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MANHATTAN INSTITUTE FOR POLICY RESEARCH

The Wriston Lecture

In 1987 the Manhattan Institute initiated a lecture series in honor of Walter B. Wriston (1919–2005), banker, author, government adviser, and member of the Manhattan Institute’s board of trustees. The Wriston Lecture has since been presented annually in New York City with honorees drawn from the worlds of government, academia, religion, business, and the arts. In establishing the lecture, the trustees of the Manhattan Institute—who serve as the selection committee—have sought to inform and enrich intellectual debate surrounding the great public issues of our day, and to recognize individuals whose ideas or accomplishments have left a mark on the world.

Wriston Honoree, 2010

SAMUEL A. ALITO, JR.

Samuel Anthony Alito, Jr. was born on April 1, 1950, in Trenton, New Jersey. He married Martha-Ann Bomgardner in 1985, and has two children—Philip and Laura. He served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976–1977. He was Assistant U.S. Attorney, District of New Jersey, 1977–1981; Assistant to the Solicitor General, U.S. Department of Justice, 1981–1985; Deputy Assistant Attorney General, U.S. Department of Justice, 1985–1987; and U.S. Attorney, District of New Jersey, 1987–1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. President George W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat January 31, 2006.

INTRODUCTION

Paul E. Singer

I'd like to welcome everyone to the twenty-fourth annual Wriston Lecture. The Wriston Lecture is the Manhattan Institute's premier annual event. It has become a gathering through which we recognize some of America's greatest public intellectuals, allowing them to present their thoughts on the challenges that we face and the opportunities that we have to apply timeless principles to the issues of our time. This event is the enemy of the sound bite; it is the anti-Twitter and the bracing antidote to our attention-deficit-disorder culture.

In 1948, Richard Weaver, who taught English at the University of Chicago, wrote a monumental book called *Ideas Have Consequences*. The title itself has made its way into our political lexicon. What is less often remembered is the opening line of Professor Weaver's work: "This is another book about the dissolution of the West." Weaver's thesis was that the West in general, and America in particular, had lost its bearings, had become alienated from fixed truths, and was experiencing the loss of ideals. Professor Weaver's book, in short, was deeply pessimistic—too pessimistic, as it turns out.

America not only did not dissolve; it eventually triumphed over Soviet communism and many other maladies. The reason, as Weaver himself would have understood, is ideas have consequences, and good ideas have good consequences. That, in a single sentence, goes to the core mission and purpose of the Manhattan Institute. We believe that good ideas can make a world of difference in people's lives. We've seen that proved time and time again over the centuries, over the decades, and even over the last year.

Consider just a short list, including the remarkable first few months of Governor Chris Christie's term in neighboring New Jersey; the national discussion on education sparked by the film *Waiting for "Superman"*; and a number of energetic reformers running for federal office and in state capitals across the country preparing to tackle bloated state bureaucracies, unfunded pension liabilities, governments on the cusp of insolvency, and high unemployment and underemployment. Governors, mayors, and lawmakers require intellectual and political policy streams from which to drink, and that is just what the Manhattan Institute preeminently provides.

Just as important, the Manhattan Institute is willing to marshal research and analysis against bad ideas. With that in mind, I want to make a special mention of a new book by Manhattan Institute senior fellow Steven Malanga, *Shakedown: The Continuing Conspiracy Against the American Taxpayer*. Malanga argues, with an abundance of evidence on his side, that we are witnessing a momentous transformation of the fundamental structure of American politics. He shows how public-sector unions and government-financed community organizers are wreaking ruin on our private-sector economy. But Malanga's book is merely illustrative of what the Manhattan Institute does on a yearly basis. It's but a single link in a golden chain. The Manhattan Institute remains what it has been since its founding: a policy institute that is directly engaged in the most important intellectual battles of the day.

It is truly a great privilege for me to be able to introduce Justice Alito. Even before he took his seat on the Supreme Court, Samuel Alito was widely viewed as one of the best legal minds of his generation and one of the most prepared people ever to be named associate justice. He has brought an extraordinary breadth of experience to the high court.

A graduate of Princeton University and Yale Law School, Justice Alito has worked as a federal prosecutor, an assistant to the solicitor general, and in the Justice

Department's Office of Legal Counsel. In 1987, President Reagan named him the United States Attorney for the District of New Jersey. And in 1990, at the age of thirty-nine, he was nominated by President George H. W. Bush for the United States Court of Appeals for the Third Circuit, where he served with distinction for fifteen years. When he was nominated by President George W. Bush in 2005 to serve on the Supreme Court, he had more prior judicial experience than any Supreme Court nominee in more than seventy years.

But Justice Alito brought far more than simple experience to the Court. He also brought enormous integrity to it. Throughout his life, Samuel Alito has shown himself to be a person of grace and humility, of composure and decency, and of fairness and civility. Justice Alito will tell you that he still vividly recalls that day in 1982 when he argued his first case before the Supreme Court. He still remembers the sense of awe that he felt when he stepped up to the lectern. That sense of awe has never left him. It is inspired not simply by the imposing and beautiful building in which the Supreme Court itself is housed but by what the institution stands for: equal justice under the law.

Samuel Alito has shown an unbreakable commitment to those five words. I was a first-year law student in the 1960s, freshly scrubbed and awaiting enlightenment from the immense minds at Harvard Law School. I will never forget the day, only a few weeks into the term, when I sat back in my chair, listening to Professor Paul Freund, and said to myself, "My goodness. They're making it up as they go along."

Samuel Alito does not believe in making it up as he goes along. He and his small band of like-minded justices are a critical and much-appreciated bulwark of our freedom. Samuel Alito is a model Supreme Court justice.

LET JUDGES BE JUDGES

Samuel A. Alito, Jr.

It is a great honor and a privilege for me to be able to speak to you. I must say that I was both flattered and a bit daunted when I saw the list of previous speakers at the Wriston Lecture. They include renowned academics and intellectuals, and I am neither of those things. I have been a judge for the last twenty years, and judging is not an academic pursuit; it is a practical activity.

We practice a craft, and judges learn primarily from experience and from the example of others. So I'm going to try to talk to you from that perspective. The title of my talk is "Let Judges Be Judges." What do I mean by that? For some time, our country has been engaged in a hot debate about the proper role of judges under our Constitution. The debate rages on today, but it is curious that the contending sides in this debate have had great difficulty articulating exactly what they want judges to do.

It is sometimes argued, for example, that judges should be strict "constructionists." That was once a very popular phrase. But my colleague Antonin Scalia has argued—quite correctly—that a law "should not be construed strictly, and it should not be construed leniently; it should be construed reasonably."

Another term that was once prominent was “interpretivist.” There was a time when a number of prominent constitutional scholars identified themselves as non-interpretivists, meaning that they did not think that constitutional decisions should be based on an interpretation of the Constitution in any conventional sense of the term. But the term “non-interpretivist” also appears to have fallen out of favor. Indeed, a law review article published in 2000 proclaimed, “We are all interpretivists now.” So, no more non-interpretivists.

Similarly, there was a time when “originalism,” the theory that the Constitution should be interpreted in accordance with its original meaning, was scorned. Justice Brennan described it as “little more than arrogance clothed as humility.” But about ten years after Justice Brennan’s speech, Ronald Dworkin, who had never previously been identified as an originalist and is certainly not a conservative, said, “We are all originalists now.”

Then there’s the term “judicial activism.” Once upon a time, this was a progressive badge of honor. Now, however, both the Left and the Right seem to agree that this is a term of derision. During the recent confirmation hearings for Justice Kagan, for example, Democratic senators took the opportunity to lambaste recent Supreme Court decisions with which they disagree as “activist.”

And so we have a very strange phenomenon. We have a heated debate about the role of judges but no accepted vocabulary that defines exactly what the fighting is about. This terminological confusion, I submit to you, is not a superficial phenomenon.

Some years ago, a former colleague of mine on the court of appeals, who is one of the smartest judges I have ever known, participated in a panel discussion at our mutual alma mater at a class reunion at Yale Law School. My former colleague’s career path was by no means typical for a Yale Law School graduate. He began his practice in a small community and represented ordinary individual clients, small businesses, local government bodies, and other clients on a wide range of matters. There was a time when even the typical Supreme Court justice began his legal career with a practice of this type, but that day is long past. During this panel discussion at Yale, my former colleague was asked about judicial independence. And this is what he said:

This is going to shock everybody, but I have to tell you something. I am very good at reading wills and telling you whether the trust provisions violate the

rule against perpetuities. I am very good at reading charges to the jury to make sure that the judge charged correctly on proximate cause and whatever else may be. I am very good at reading affidavits to see if there is probable cause for a search warrant.

I am not so good at running institutions. I am not so good at changing things in society. If you are going to talk about judges who want to take over institutions and make far-ranging changes in our society, they are no more entitled to be free of criticism and attacks than is the president of the United States. So if you are going to act like judges and you are going to make decisions like judges, you are entitled to judicial independence.

If judges do not act like judges, their independence will be threatened.

I quote these comments because of the seemingly mundane phrase, “if you are going to act like judges.” My former colleague, with his background as a practitioner who handled the sort of matters that have provided the everyday fare of our courts for generations, assumed that this phrase, “if you are going to act like judges,” would be easily understood by his audience. What should judges do? Well, of course, they should act like judges.

Does this seem simpleminded? If it does, then the framers of our Constitution were simpleminded in the same way. Our Constitution is a very lean document. If I were to read the entire text to you, it would take about thirty minutes. By contrast, if I were to read to you the unratified constitution of Europe, it would take seventeen hours. The brevity of our Constitution is a virtue, which helps account for its longevity. But because the Constitution is so lean, some important things must be inferred. One of these is the framers’ view of the proper role of judges.

Article III of the Constitution creates the federal judicial system. It creates the Supreme Court and authorizes Congress to create lower courts if it so chooses. But Article III does not say much about how any of these new federal judges are to go about their duties. Article III says that federal judges are to decide “cases and controversies,” but it does not define those terms. In some countries, a judge can start a case on his own if he wants. Does our Constitution permit a federal judge to do that? And once a case is begun, what procedures are to be used?

As originally ratified, the Constitution was largely mum on court procedures. Provisions of the Bill of Rights subsequently imposed several procedural

requirements for criminal cases but really only one specific procedural requirement for civil cases.

The way that right is defined is instructive. The Seventh Amendment guarantees the right to a jury trial in certain “suits at common law.” The right is thus defined by reference to proceedings in the courts that preceded the adoption of the Constitution. This is significant. Before there were federal courts, there were state courts. Before there were state courts, there were colonial courts. Before there were colonial courts, there were the courts of England.

American independence plainly required alterations in judicial traditions. Whether the framers fully understood the extent of the modifications that would be necessary is an interesting question. But it is clear that they contemplated that the broad outlines of past practice would be continued. We can see this quite clearly in Federalist 78, the chief paper in that series that is devoted to the federal judiciary. Written by Alexander Hamilton, a very experienced and a very fine practicing attorney, Federalist 78 assumes that the new federal courts will follow the doctrine of *stare decisis*.

This is the distinctively Anglo-American doctrine that each judicial decision creates a precedent that is binding on the court in future cases. This is not some insignificant legal technicality. Think of any of the hot-button questions that the Supreme Court has decided in recent years. It is obviously a matter of considerable importance whether, when future cases arise, the Court’s decisions in those areas are absolutely binding or presumptively binding or not binding at all.

In Federalist 78, Hamilton attempted to allay the fears of those who thought that these new federal courts were going to run amok. He said not to worry—that they would not be able to run amok because they would be “bound down by strict rules and precedents.” Why did he think that they would be bound down by precedents? There is nothing in the Constitution that addresses that issue. Indeed, one can argue that the very concept of a Constitution, which is a supreme law and therefore takes precedence over ordinary legislation, is inconsistent with the application of the doctrine of *stare decisis* in constitutional cases.

The argument to that effect has elegant simplicity. It goes as follows: the Constitution is the supreme law. Whenever there is a conflict between the supreme law and a lesser form of law, the supreme law must prevail. If even a statute must yield when it is inconsistent with the Constitution, how can it be that an incorrect

judicial interpretation of the Constitution can prevail over a correct interpretation of the Constitution? The best textualist answer to that argument, which I accept, is that Article III's grant of "judicial power" to the Supreme Court and the lower federal courts implicitly authorizes them to continue to follow with appropriate modifications the preexisting doctrine of *stare decisis*.

In other words, the framers used the phrase "judicial power" to signal a continuation of past practice. They used it in the same sense in which my former colleague on the court of appeals used the phrase, "if you are going to act like judges." The framers assumed that there was a common understanding of what judges did and that there was no pressing need for further elaboration.

If we want to recapture the prevalent understanding of the judicial role at the time of the founding, a good place to start is with William Blackstone. His *Commentaries on the Laws of England*, published shortly before American independence, was enormously influential in this country. Edmund Burke said on the eve of the Revolution that the book had sold almost as many copies in the North American colonies as had been sold in England. And the distinguished historian Daniel Boorstin has described Blackstone's *Commentaries* as "the Bible of American lawyers." Boorstin sees Blackstone's project as an effort to defend the English common law in terms that would be attractive to an Enlightenment audience. As portrayed by Boorstin, Blackstone was a patriotic Tory who thought that the English common law was the best possible legal system imaginable.

But writing in the late eighteenth century, Blackstone could not defend that system in the romantic terms that would have been acceptable just a few decades later "as happily irrational, an organic growth not to be tampered with by meddling mechanical reason."¹ Instead, "he had to show that the laws of England were just the kind of laws that men trained in scientific reasoning would devise."² Blackstone has been seen as painting the judge as a sort of scientist. A scientist analyzes raw data and thereby identifies preexisting but previously undisclosed laws of nature. Similarly, as seen by Blackstone, a judge analyzes prior judicial decisions and customs and identifies legal rules.

This brings us to the first model of the judicial role that I want to note: the judge as scientist. This was the one identified with Blackstone. It was not long after Blackstone published his *Commentaries* that this model was subjected to withering criticism from Jeremy Bentham and others. And no one today thinks that the old common law judges were simply finding the law.

So as a legal theorist, Blackstone does not get very high marks. But as a practical matter, Blackstone's description of the role of judges had beneficial effects. For Blackstone stressed that judges should not base their decisions on their own predilections but should look outside themselves for guidance. In his introduction to his *Commentaries*, Blackstone states that the judge's job is to determine the law "not according to his own private judgment but according to the known laws and customs of the land." A judge who believes that he is merely finding the law may well end up making the law incrementally. But such a judge is less likely to strike out boldly in a new direction than would be the case if the judge thought that it was legitimate for him to exercise bald lawmaking authority.

Despite Bentham and other critics, Blackstone's influence in this country was profound and lasted for much of the nineteenth century. Abraham Lincoln, for example, recommended that anyone embarking on a study of the law should begin with Blackstone. But the latter decades of the nineteenth century saw marked changes in American legal thought. Before this time, the law was more or less a self-contained craft, with most lawyers obtaining their training essentially as apprentices in the offices of established practitioners.

By the late nineteenth century, training began to shift decisively to law schools. At one time, many of these schools were stand-alone, proprietary institutions much like the technical institutes that today teach students such subjects as information technology and criminal justice. But eventually, almost all the law schools became associated with universities. And in the university-affiliated law schools, the use of Blackstone's *Commentaries* dwindled.

In 1881, another famous book on the common law appeared: Oliver Wendell Holmes's *The Common Law*. Influenced by social Darwinism and pragmatism, Holmes rejected Blackstone's discovery theory of the law—the theory that the common law judge was simply finding the law. As Holmes later put it, his view was that "the common law is not a brooding omnipresence in the sky but is instead a human creation." In other words, the common law judges were not discovering the law. They were, in the words that Paul Singer uttered a few minutes ago, making it up.

The recognition that common law judges were making the law incrementally and perhaps, in many instances, without actually realizing exactly what they were doing does not lead inexorably to the conclusion that the law in general or even constitutional law in particular is fundamentally indeterminate. But some thinkers have slid nearly all the way down that slippery slope.

In political science, for example, the predominant model of judicial decision making is the so-called attitudinal model. This model is predicated on the view that what Supreme Court justices do when they decide cases is simply to attempt to maximize their own policy preferences, nothing more and nothing less. The implications of this model for lawyers and judges are, of course, profound and unsettling. If justices are simply implementing their policy preferences, all the elaborate legal arguments that lawyers make are irrelevant. If the lawyers think that their arguments matter, they are sadly deluded. If they know that their arguments are beside the point but make them anyway, they are co-conspirators in a massive fraud. And what of the judges? What of the justices? They are impresarios of an elaborate and expensive deception.

Not surprisingly, this attitudinal model, which is taken as proved by the great majority of political scientists who study the courts, is less popular in the law schools. For if the model is correct, much of what the law curriculum features is a very expensive fraud. Nevertheless, the idea that the law is radically indeterminate has its adherents among law professors. I'll provide you with an example, which concerns comments made by a judge in an event that was not open to the public, so you're just going to have to take my word that this occurred.

Believe it or not, when a new federal judge is appointed, the judge is sent to something called "baby-judge school." If the judge is appointed to a district court, there is a fairly extensive period of instruction, presumably on the theory that district court judges really have to know how to do a variety of things. If the judge is appointed to a court of appeals, the course of instruction is much shorter, presumably on the theory that court of appeals judges don't really need to know that much. And if someone is appointed to the Supreme Court, there is no instruction whatsoever.

At the end of baby-judge school, the judges go to a dinner at the Supreme Court. At one of these dinners, a newly appointed judge (once upon a time, I was a prosecutor and would make reference to confidential informants, so I'm going to refer to this judge as a sort of a confidential informant because I am not going to disclose his or her identity)—a confidential-informant judge—gave a little talk about what he or she had learned during his or her first few months on the federal bench. This judge had previously been a law professor and said, "The main thing that I've learned is that words matter." Contrary to what some of my former colleagues thought, the words in statutes matter. The words in judicial decisions matter. What a quaint, old-fashioned idea!

Let me return to 1881, the year that Holmes's *Common Law* first appeared. Within a year, two other, better known books appeared. I think that both were influenced by some of the same intellectual currents that found expression in Holmes's work. One of these was Nietzsche's *The Gay Science*, which marked the first appearance of the famous phrase "God is dead." The other was Dostoyevsky's *The Brothers Karamazov*, which gave rise to the perhaps equally famous aphorism, "If there is no God, then everything is permitted." For present purposes, we can paraphrase this aphorism and say that if there really is no such thing as law in the sense of fixed rules that are independent of the philosophical or policy predilections of the judges, then judges are permitted to do whatever they please.

Well, then, what is a judge to do? This brings me to the next conception of the judicial role that I want to discuss: the vision of the judge as a constitutional "rubber stamp." The idea that judges are simply making up the law is obviously very troubling to someone who believes in democracy. We are a fundamentally democratic society, and our laws are made by elected representatives of the people. Federal judges are not elected. If judicial decisions simply represent judge-made law, how can we possibly reconcile the practice of judicial review with our fundamental democratic commitment? A very interesting and important question.

James Bradley Thayer, a Harvard Law School professor from 1873 to 1902, provided an answer to this question: except in the most extreme circumstances, unelected judges should not override legislative decisions. Thayer said that a law should not be held unconstitutional unless no rational argument could be made in favor of its constitutionality. If that really is the standard, is the Supreme Court ever justified in holding that a federal statute or a state statute is unconstitutional if even a single justice thinks that it passes constitutional muster? Or to go a step further, is the Supreme Court justified in striking down a federal law or a state law if even a single judge on any of the lower courts thinks that the law is constitutional? The answer must be no—unless, of course, one is prepared to say that the justice or the judge who defended the statute was not simply wrong or clearly wrong or grievously wrong but utterly irrational.

Since 1937, something like Thayer's approach has carried the day in cases involving much social and economic legislation. But what about cases presenting issues under one of the provisions of the Bill of Rights or the Fourteenth Amendment? What about laws restricting the freedom of speech? What about laws that discriminate on the basis of race? Thayer's argument applied across the board. But before World War II, the major constitutional issues concerned economic and social legislation,

and therefore application of Thayer's hands-off approach produced progressive results. During the 1950s and the 1960s, however, the focus of constitutional litigation shifted to noneconomic rights. Should Thayer's approach be retained in those areas?

Probably the most famous circuit judge of all time said "yes." This judge was Learned Hand, who sat on the federal bench in Manhattan for nearly half a century. When Hand died in 1961, a front-page obituary in the *New York Times* called him "the greatest jurist of his time." Hand was a man of decidedly progressive sentiments. He fervently believed that the pre-1937 Supreme Court had abused its power by striking down economic and social legislation under the due process clause. He agreed with the subsequent decisions holding that such legislation should be sustained if it has any rational basis. And he saw no basis for applying a tougher standard to legislation challenged as violating one of the provisions of the Bill of Rights, which he condemned as a "double standard."

Taking this view, Hand disclosed in private correspondence that he disagreed with the Supreme Court's decision in *Pierce v. Society of Sisters*, which struck down a state statute prohibiting Oregon parents from sending their children to private schools. He disagreed with *Meyer v. Nebraska*, which struck down a state statute that prohibited the teaching of the German language in the public schools. During the famous Scopes Monkey trial, Hand told Walter Lippmann, the *New Republic* editor and a close friend, that while he deplored the Tennessee statute prohibiting the teaching of evolution in the public schools of the state, he thought that the statute was constitutional.

According to Felix Frankfurter, Hand agreed with Frankfurter's opinion in the *Gobitis* case, which held that a state could prohibit students who are Jehovah's Witnesses from refusing to salute the flag, even though doing so violated their religious beliefs. In a famous lecture that he delivered at Harvard Law School in 1958, Hand went so far as to criticize the Supreme Court's reasoning in *Brown v. Board of Education*. This is where the view of the role as a constitutional rubber stamp led Judge Hand.

With the decision in *Brown v. Board of Education*, we are in the Warren Court-era, which brings me to a third view of the role of the judge: the judge as reformer. Two descriptions of the work of Chief Justice Earl Warren illustrate this vision. I offer these portrayals for illustrative purposes and not necessarily because I endorse their accuracy as a picture of what the former chief justice thought.

The first description was provided by Anthony Lewis, who for many years covered the Supreme Court for the *New York Times*. Lewis wrote that Warren “made no attempt in opinions or otherwise to propound a consistent theory of how a judge interpreting the Constitution should approach his task.” Lewis stated that Chief Justice Warren “evidently felt unconfined by precedent or by a particular view of the judicial function and instead sought simply to find the just result.”

The second description is by G. Edward White, a professor at the University of Virginia Law School and author of an excellent and sympathetic biography of Warren. Professor White writes that Warren “conceived of the Constitution as the embodiment of values that he believed in and as the basis for granting him as a judge power to protect those values.... The ethical imperatives that Warren read in the Constitution were so clear to him, and his duty to implement them so apparent, that matters of doctrinal interpretation were made simple, and matters of institutional power became nearly irrelevant.”

When Warren’s personal values actually coincided with the Constitution, as was the case in the *Brown* decision, this approach produced magnificent results. But by the end of the Warren era, scholars who were previously sympathetic questioned whether the Warren Court had gone too far in imposing its values on the Constitution.

Scholarly criticism of the Warren Court prompted an enormous growth in books and articles on constitutional theory, which brings me to the next understanding of the judicial role that I want to note: the judge as theorist. I previously mentioned that the big change in American legal education that occurred in the latter part of the nineteenth century—the shift from what was essentially an apprenticeship system to the growth of the law schools—coincided with a change in thinking about the nature of law and the Constitution. In recent years, American law schools, at least many of them, have changed again.

I’m reminded that at one time, there was a definite hierarchy of genres in painting. I think that this was established by a member of the French Academy in the seventeenth century. History painting occupied the highest rank, followed in order by portraits, scenes from ordinary life, landscapes, and still lifes. Therefore an artist like Turner at the end of the eighteenth and the beginning of the nineteenth century had difficulty obtaining admission to the Royal Academy in England because he was a mere painter of landscapes.

In law schools today, there is a similar hierarchy, and the highest rank clearly belongs to the theorists. When I entered law school back in 1972, constitutional law was viewed as a subject to be studied on its own terms. Constitutional scholarship was seen as carrying on a learned conversation with the courts and, in particular, with the Supreme Court.³ The conversation was conducted in terms that judges and lawyers could understand.⁴ Since then, however, constitutional scholarship—like much current legal scholarship—has become increasingly theoretical and interdisciplinary.

Here's a little fact that I think may be telling. During the forty years from 1930 to 1970, Immanuel Kant was cited in 123 law review articles. During the forty years from 1970 to 2010, he was cited in more than 6,500 articles, an increase of over 5,000 percent. From 1930 to 1970, Hegel was cited in ninety-one articles. During the following forty years, he was cited in more than 3,000 articles. I think it suffices to say that few federal judges select Kant or Hegel as their favorite bedtime reading.

But today's judicial theorists expect judges to perform feats that are truly Herculean. And here is an example. Ronald Dworkin, often identified as a leading legal philosopher of the day, creates an imaginary figure to describe what an ideal judge should do. And what does he call this character? Judge Hercules.

Judge Hercules is immensely wise and extraordinarily learned and has plenty of time to decide every case. In Dworkin's view, there is always one right answer in every case, and Judge Hercules always gets the answer right. Judge Hercules does this by taking into account every relevant aspect of the country's legal system and identifying the decision that best fits the legal system as a whole.

It is an understatement to say that Dworkin expects quite a lot from Judge Hercules. I am afraid that any real judge who tried to emulate Dworkin's model would suffer a fate similar to the one that befell the real—which is to say, the mythological—Hercules, who died after donning a poisoned robe. I'm happy to report, however, that few federal judges are likely to collapse under the strain of trying to live up to the example of Judge Hercules. To a great and unfortunate degree, practicing lawyers and judges have simply tuned out much of what the legal academy produces.

Some of you may be familiar with a publication called *The Green Bag*, which bills itself as “a quarterly journal devoted to short, readable, useful, and sometimes

entertaining legal scholarship.” This tells you a lot about other law reviews, which feature articles that are presumably interminable, unreadable, of no practical use, and never entertaining. A few years ago, *The Green Bag* ran a parody piece written by a professor at New York University Law School called “In Defense of Theory.” This piece takes the form of a fictional memo from a law professor to other members of the faculty. The thrust of the article is that legal theorists should boldly accept the proposition that outsiders, especially judges and practicing lawyers, are simply not worthy to read what they write. The memo urges faculty members to proudly embrace the idea that they are writing solely for themselves. There’s a lot of truth to the parody, and the increasing insularity of law scholarship is something to be lamented.

Today’s judges may not spend very much time reading law reviews, but they cannot entirely shut out what is said about their work in the popular media. This brings me to the next view of the judicial role that I want to discuss: the judge as crowd pleaser.

I rarely read newspaper editorials about the cases that come before our court. But at the end of the term a couple of years ago, as an experiment, I decided to collect all the editorials that had been written about our cases in some of the country’s leading newspapers. I searched those editorials for any that drew a distinction between what the Constitution or a statute requires and what the editorial writer thought was a desirable outcome. I came up almost empty. Virtually every editorial simply commented on whether the outcome met with the editorialist’s approval.

One of the best editorials I found was critical of an opinion that I had written for the court. This editorial said in effect: “We like the result that is produced by Justice Alito’s opinion for the court; but we just don’t think that is what the statute means.” If I were going to give a prize for an outstanding editorial, I would give it to that editorial because it drew a distinction that is critical and is too often forgotten. The Constitution does not always mean what we would like it to mean. The statutes that Congress enacts do not always mean what we would like them to mean. That is exactly what we mean by the rule of law. The popular media, unfortunately, often obscures this fundamental point.

Here’s another example. At the end of this past term, the *New York Times* published a big article about our court under the predictably ominous headline, “Court Under Roberts Is Most Conservative in Decades.” If you read the article online, you could participate—and you can still participate—in an interactive quiz to see

“how your views align with the Supreme Court of Chief Justice John G. Roberts.” Participants are asked questions such as: Would you favor or oppose a ban in your state on abortions performed late in the term of a pregnancy, also called partial-birth abortions?”

If you respond that you would favor such a ban, the screen immediately informs you that “you agree with the Supreme Court and most Americans” —73 percent, to be precise. And the pictures of the five justices who voted in *Gonzales v. Carhart* to uphold the constitutionality of the federal partial-birth abortion statute are highlighted.

On the other hand, if you respond that you would not favor such a ban, you are told that “you disagree with the Supreme Court and most Americans.” Of course, the whole thrust of this question is fundamentally at odds with the traditional understanding of the judicial role. The issue in *Carhart* was not whether the justices personally favored or opposed a ban on late-term or partial-birth abortions. The question was whether the federal statute violated the Constitution. The *New York Times* quiz question obscured this critical point.

While the creator of the *New York Times* quiz may not appreciate the difference between what the Constitution means and what one might like it to mean, ordinary people still do understand this critical distinction. The assault on the traditional idea of the role of judges began more than 100 years ago. But ordinary people stubbornly hold on to some old-fashioned beliefs, one of which is the idea that the Constitution means something. Statutes mean something. And the role of a judge is to interpret and apply the laws as they are written. Asked whether a judge should apply the law as written or do what the judge thinks is fair and just, two-thirds of those polled said: apply the law as written. That’s what we mean when we say that we have the rule of law and not the rule of men.

We need to preserve that idea. Judges are not scientists, and they should not be constitutional rubber stamps. They have no warrant to pursue a reform agenda that is not grounded in the Constitution. And they should not aim to be theorists or crowd pleasers. Let judges be judges. For if they are not, our legal system as we know it will fade away.

ENDNOTES

¹ Crane Brinton, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries*, 55 HARV. L. REV. 703 (1942) (reviewing DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* (1941)).

² *Id.*

³ See Stephen M. Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 496 (1989).

⁴ *Id.*

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