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A Response to Professor Brian Leiter

Responding to Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

JOSEPH R. GRODIN*

The editors of *Hastings Law Journal* have invited me to comment on Professor Brian Leiter's provocative essay, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*,¹ and I have undertaken to do so, not so much because I disagree with what he says—in fact, I agree with much of his thesis—but because what he says points to questions which deserve further consideration.

That judges at the highest level, and in the adjudication of constitutional issues, often disagree along what appear to be political or ideological lines is no secret, even to the general public. Common parlance often identifies certain judges as “conservative” or “liberal” in their leanings, and while judges tend to resist such labels and seek to explain their differences on other grounds, their explanations tend to be unconvincing. For example, Chief Justice Roberts' insistence in his confirmation hearing that Supreme Court Justices are simply referees calling “balls” and “strikes” appears ludicrous to anyone who has even a minimal understanding of the appellate process.”²

What is perhaps less well understood by the general public (but long accepted by most constitutional scholars) is that the ambiguity or malleability of decisional norms at the highest level makes such variations not only predictable, but also, to some extent, acceptable, or at least unavoidable. As Professor Leiter puts it, the constraints imposed by past

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1. Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

2. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. Hrg. 109-158 Before the Comm. on the Judiciary*, 109th Cong. 203-04 (2005) (statement of Hon. John G. Roberts).

decisions and by constitutional and legislative texts are “underdetermin[ative],” so that the Court in many cases (Leiter would say “most” cases) “essentially makes its final choice among the legally viable options based on the moral and political values of the Justices.”³ It is this aspect of decisionmaking that results in Leiter’s characterization of the Supreme Court as “super-legislature.”⁴

Yet calling the Supreme Court a super-legislature, with the implication that its Justices, in their role as constitutional adjudicators, are nothing but legislators with robes, is deeply disturbing to our common notion of what we want judges to be; and it is, moreover, contrary to how most judges perceive their role. Most judges, and I think most legal scholars, would say that constitutional adjudication lies somewhere in the middle of a continuum between the extremes of judge-as-referee and judge-as-legislator, and that judges believe (and we want them to believe) that while moral and political values undoubtedly play a role in constitutional decisionmaking, judges are constrained, in greater or lesser degree, by a variety of factors, including constitutional text and history, past decisions, their legal training, the opinions of their peers, concern for the integrity of the Court as an institution, concern for the maintenance of a rule of law, and concern for their own place in history. These constraints account for cases in which judges of strong views find themselves committed to results that, as legislators, they would have abhorred, or which, as citizens, they find deeply offensive.

It is possible that judges to some extent deceive themselves and the rest of us when they insist that their decisionmaking is constrained by these factors, when in reality they are simply rationalizing their own value preferences with the assistance of clever law clerks. Indeed, much of modern psychology, from Freud to Kahneman, as well as contemporary neuroscience, teaches that what we believe to be rational decisionmaking may be heavily influenced, if not determined, by nonrational factors. And we know from common experience that people typically act from multiple motivations, some of which may not be fully recognized, and which, in any event, resist independent evaluation. That being true, it is virtually impossible for the judge or an observer to know with any degree of confidence when or to what extent her decisionmaking is the product of “objective” constraints or “subjective” value judgments. These considerations support Professor Leiter’s suggestion that, in the confirmation process for Supreme Court Justices, we should pay attention to what we know or can learn about a nominee’s value systems. They also suggest that the process ought not be reduced to such an inquiry.

3. Leiter, *supra* note 1, at 1601.

4. *See id.*

We are living in a time of considerable cynicism about judges and the judicial process, and some of it is justifiable. At the level of the U.S. Supreme Court, a pattern of 5–4 decisions gives credence to the view that something is going on beyond what is commonly understood as “the law.” At the state level, judicial election campaigns backed by huge amounts of money erode the very idea of an impartial judiciary. If we really believed that high courts are nothing but super-legislatures, we would do away with judicial review as anti-democratic, or at least we would subject Supreme Court Justices to periodic retention elections, as is done in many of the states for their state Supreme Court Justices. That we do not do so (and Professor Leiter does not advocate that we do so) suggests that most of us see value in a judiciary independent of the political branches. But if we are to counter the simplistic pull of the judge-as-referee and judge-as-legislator metaphors that dominate most public discussion at present, we need to find a way of talking about a middle ground that does justice to the complex judicial task.
