COLOMBIAN AND UNITED STATES CONSTITUTIONALISM: "ORIGINALISM" VS. "LIVING CONSTITUTION," "INTERPRETIVE METHODS:" POLITICS ELABORATELY DISGUISED?

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INTRODUCTION

Sometimes I have to discipline our precious tabby cat for clawing the furniture. I say, "Misha, stop it." When she ignores me, I repeat my command in a louder voice. She stops. Does she understand? I doubt it. But she stops, only to do the same thing the next day. When she is cuddly, I tell her what a good cat she is. Is there anything to understand except "no" or "yes" depending on what the speaker wants?

Could this be a good analogy for the effect of the aphorisms

"originalism," "living constitutionalism," "rule of law," "judicial activism," and "judicial restraint" when the aphorisms are used in jurisprudential legal discussion? Thus, when they are used, the message may be politics, disguised as interpretation theory or jurisprudence. The speaker is saying STOP IT or DO IT. Whether the official addressed will change his or her conduct is crystal unclear. The use of the shibboleths above and related ones such as separation of powers, and federalism is not very useful, because the decision makers often elaborately disguise their purposes. These terms are used by courts and commentators based mostly on the politics they want to propagate, often liberal or conservative. At least that is the thesis of this article as it explores constitutionalism in the United States and Colombia.

I. BACKGROUND

The current situation is that the Colombian Constitutional Court is accused of making political rather than legal decisions, perhaps creating a mini-crisis. Similarly, the United States Supreme Court stands accused of making political rather than legal decisions, and is therefore violating the rule of law and is guilty of judicial activism.

This article will now review the situation in Colombia that preceded the 1991 Constitution and what it sought to remedy. The United States Constitution was created in part to alleviate the presumed virtual monopoly of political power exercised by the English government

in the executive. The colonists drafted a Declaration of Independence and in 1776, war broke out between the colonists and the British government. The colonists did achieve independence and the United States Constitution was drafted and later ratified by the States in 1789.

The government in Colombia prior to 1991 had a legislative, executive, and supreme court. However, the balance of power had shifted to the executive.[1] The legislature had transferred much of its power to the executive, thus abdicating much of its function and impairing its deliberative function.[2] Moreover, the Supreme Court in Colombia was quiescent in the face of corruption of several legislators.[3] This exemption from criminal law enjoyed by legislators is referred to as inviolability.[4] The Constitutional Court created in the Constitution of 1991 and the revitalized Supreme Court has remedied most of these problems,[5] but critics complain of judicial activism.[6]

"Rule of law" is sometimes used as shorthand for matters concerned with separation of powers violations. Violations may be alleged

1. *See* Manuel José Cepeda Espinosa and David Landau, COLOMBIAN CONSTITUTIONAL LAW, 2-4 (2017) (The executive had clear preeminence, legislative power was often delegated to the president, and the Constitution of 1886 established a Supreme Court.)

2. *Id.* at 304 (excessive delegation to executive interferes with legislative deliberation.)

3. *Id.* at 310.

4. *Id.* at 305-306.

5. *Id.* at 310.

6. *See* Manuel Iturralde, *Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change, in* CONSTITUTIONALISM OF THE GLOBAL SOUTH 361, 397 (Daniel Bonilla Maldonado ed., 2013) (Colombian legal formalists claim that the judiciary should use self-restraint and thereby uphold the rule of law.)

if one of the three branches of government, executive, legislative, or judicial, exceeds the authority or fails to live up to its duties delineated in a constitution document. Thus, the historical Colombian Congress has also been criticized for violating rule of law responsibilities. Part of the Congress was composed of corrupt members who had links to illegal armed groups.[7] They were inviolable, i.e. free from prosecution. The 1991 Constitution sought to remedy this and the problems of excessive delegation from the Legislature to the Executive. The Constitution created an impeachment and investigative mechanism in the Supreme Court of Colombia, thus revoking inviolability, freedom from prosecution.[8] This mechanism was effective, and several legislators were convicted.[9]

It seems that few critics would object to this inviolability reform. However, the 1991 Constitution of Columbia has been interpreted to produce dramatic results in favor of lower socio-economic groups[10] and there is a strong critical counterforce to this development composed mostly of vested interests in power before the 1991 Constitution which relied on conservative formalism.[11] As mentioned above,

7. *See* Espinosa and Landau, *supra* note 1 at 310 (In 2008 a report found that in the term 2006 – 2010, 34 Senators and 25 members of the House were investigated by the Criminal Chamber, many of whom were removed from office, resigned, or were put in jail.)

8. *Id.* at 310 (Legislators are accountable for a range of crimes, corruption, and links to paralegal groups, such as paramilitaries or guerillas.)

9. *Id.* at 303-318.

10. Iturralde, *supra* note 6 at 397, 401-402.

11. *Id.* at 396 (Conservative legal formalism was clearly favored for over a century by the 1886 Constitution).

another problem addressed in the 1991 Constitution was that traditionally, the legislature delegated substantial amounts of political power to the executive. This is referred to as abdication.[12] Excessive delegation interfered with the legislative deliberative function.[13]

A good example of curtailment of executive power in Colombia after the 1991 Constitution is illustrated by the attempt of President Alvaro Uribe to use the amendment of the Constitution to expand his position beyond term limits set by the Constitution. Under the 1991 Constitution, only the Colombian Congress had the power to amend the Constitution. The only check on that power is the Constitutional Court. The first time he sought to extend term limits, the Court approved. When he tried to extend his term a second time, the Court prevented that amendment from becoming law, thus curtailing executive power.[14] The Court used the Unconstitutional Constitutional Amendment doctrine to block the second term extension.

II. COMPARISON OF TERMS "JUDICIAL ACTIVISM" AND "RULE OF LAW" IN COLOMBIA AND THE UNITED STATES

As mentioned above, a complaint sometimes heard about constitutional decisions is, "That is judicial activism." In common with "rule of law" violations, "judicial activism" refers to the courts ignoring the rule of law, and perhaps separation of powers by acting on political

12. *See* Espinosa and Landau, *supra* note 1 at 317 (deliberation discussed).
13. *Id*. at 310-317 (delegation discussed).
14. *See Id*. at 1 (Constitutional amendment that would have allowed President Alvaro Uribe to exercise a third term was negated by the Court.)

views held by the judges.[15] However, defenders of the Constitutional Court argue that it is not inhibiting democracy, it is adding to it. Defenders of the Constitutional Court criticize the pre-1991 Constitutional Dispensation for using "formalism" to enforce a status quo favoring powerful vested interests at the expense of the poor. The current constitutional provision, called the tutela, provides a complaint process that allows citizens to complain of violations of their constitutional rights by a direct petition with no lawyer needed and thus is at the ready and inexpensive.[16] The "state of unconstitutional conditions" is also available as a very powerful constitutional law process used by the Court when it believes an entire public system, such as prisons, is violating constitutional rights. The remedies granted are system wide, thus not limited to the particular complaint of a particular tutela.

III. HAS THE LEGAL PROCESS BEEN POLITICIZED IN BOTH COUNTRIES?

The Constitutional Court in Colombia is under some attack for allegedly politicizing the legal process. The United States Supreme Court as mentioned above, is facing similar complaints of political decision making rather than legal decision making. The Constitutional Court is said to be achieving political results not part of traditional

15. *See* Iturralde, *supra* note 6 at 397 (government of judges (activism) violates rule of law). *See also* Manuel Jose Cepeda Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, at 541 (2004) (discussing faults of the previous formalism and Supreme Court decisions rooted in status quo unresponsive to current needs.)

16. *See* Espinosa and Landau, *supra* note 1 at 11-14.

formalist rule of law parameters.[17] Similarly, the United States Supreme Court is under assault by commentators in the media stating that the Court is violating the rule of law by infusing legal decisions with political judgments.[18]

However, there is a significant difference. The Constitutional Court is predominantly liberal and the United States Supreme Court is largely conservative. In any event, United States Supreme Court Justices, both liberal and conservative, have recently gone public, denying that the Court is just a group of partisan or political actors. For example, even liberal Justice Stephen G. Breyer has recently weighed in on some of these issues, enumerating some arguments he made in his recent book.[19] Justice Breyer argues that it is misleading to refer to justices as liberal or conservative, because judicial differences are based not on politics, but "judicial philosophies and interpretive methods."[20] Justice Breyer did allow that the politicians participating in the Supreme Court nomination proceedings seem to think that political views of the potential Supreme Court Justices are a paramount concern, but points out one of the most "conservative" (his

17. *See* Iturralde *supra* note 6.

18. *See* Adam Liptak, *Justice Barrett Says the Supreme Court's Work is Not Affected by Politics*, N.Y. TIMES (Sept. 13, 2021), https://www.nytimes.com/2021/09/13/us/politics/amy-coney-barrett-politics-supreme-court.html

19. *See* Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html?searchResultPosition=2.

20. *Id.* "A judge's duty is to the rule of law, not the political party that helped secure his or her appointment."

quote) justices, Neil M. Gorsuch, wrote the majority opinion that allows gay and transgender employees to contest workplace discrimination.[21]

Taking off on this platform, Justice Breyer argues in his book that justices actually do not decide based on the political creed of the political party that supported his or her appointment. Justice Breyer states that a judge's loyalty is to the *rule of law* [my emphasis], not politics. Why do we care about the rule of law? Justice Breyer answers: "Because the rule of law is one [of several protections] against tyranny, autocracy, irrationality."[22]

Having settled the controversy to his satisfaction, Justice Breyer is wary of packing the Court. Breyer wants to avoid admittedly politically-motivated actors from getting too much power which he argues is more likely to occur if there are term limits and court packing, since two can play at the game (Republicans and Democrats). This is a reference to legislation now being considered by the Biden administration to impose term limits, which has recommended an 18-year term limit.[23] Recently, Justice Breyer has resigned, perhaps because of a combination of peer pressure and personal convictions. This allowed a Democratic President Biden to appoint a liberal, which he has done.

21. *Id.*
22. *Id.*
23. *Id. See also*, Rosalind Dixon, *Why the Supreme Court Needs (Short) Term Limits*, N.Y. TIMES (Dec. 31, 2021), https://www.nytimes.com/2021/12/31/opinion/supreme-court-term-limits.html. (Presidential Commission preferred 18-year term limits.)

President Biden has appointed, and the Senate has confirmed, Justice Ketanji Brown Jackson, the first African-American woman.[24]

It is understandable that a decision maker may articulate a theory of constitutional interpretation when making a decision. The Court needs to rely on such theories to avoid the allegation that law is taking a backseat to political predisposition of the decision maker. The U.S. Supreme Court is trying to fend off the press and other critics who argue that politics is invasive in the Supreme Court decisions. Not only Justice Breyer, but certain other justices, mostly conservative, have recently participated in public interviews. These justices have found it desirable to deny that they are "political hacks" or motivated by politics in their decisions, but differences are based on the justices' different judicial philosophies and interpretive methods.[25] In what follows, more of these "theories of interpretation" will be elaborated.

IV. A. Enter Theories of Interpretation, Also Known as Jurisprudence: Formalism (Legal Positivism), Principles, Policy Science, Morals (Natural Law), and Religion

As mentioned above, the former beneficiaries of vested interests in Colombia refer to formalism as the appropriate interpretive

24. *See* Annie Karni, *Ketanji Brown Jackson Becomes First Black Female Supreme Court Justice,* N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/us/politics/ketanji-brown-jackson-sworn-in-supreme-court.html.

25. *See* Emily Bazelon, *It's Amy Coney Barrett's Supreme Court Now*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/opinion/amy-coney-barrett-supreme-court-abortion.html. (In September 2021, Justice Barrett gave a public speech stating, "[T]his court is not comprised of a bunch of partisan hacks."). *See also* Liptak, *supra* note 19 and accompanying text. *See also*, Liptak, note 18 (public talk in which Justice Barrett states that "judicial philosophies are not the same as political parties." Thus, the frequent ideological splits are based on conflicting interpretive philosophies, not politics.)

theory.[26] Formalism in Colombian usage translates into legal positivism in the United States. Both formalism in Colombia and legal positivism in the United States focus on the view that law is and should be based on rules previously promulgated. Thus, legal positivists often argue that it is inappropriate to insert policies, or other norms such as morals, principles, or policies other than rules.

B. Policy Science

An opposing interpretive theory in conflict with legal positivism, also known as formalism, is Policy Science, courtesy of Myres S. McDougal and Harold D. Lasswell, Yale Law Professors who originated this view. In short, instead of favoring rules and textualism eliciting those rules, those advocates posit eight policy goals that all political actors should follow. These eight things people want are listed as power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. The ultimate goal is to foster the widest possible sharing of these values in order to enhance human dignity. Further elaboration of these eight policy objectives produces a plethora of rights interestingly fleshing out the understanding of Policy Science. Power includes access, respect includes the claim that all persons are born with free and equal dignity and privacy, wealth includes a standard of living adequate for the well-being of the individual and his family, respect includes rights and freedoms in the society without distinctions of any

26. *See* Iturralde, *supra* note 6, at 397.

kind, well-being includes life, liberty, and security of the person, no cruel or inhuman punishment, skill includes protection from unemployment, and affection includes the right to marry.[27]

C. Comparison of Colombian Constitutional Court to Policy Science

The Constitutional Court uses the generous array of rights in the 1991 Constitution, thus capturing in the 1991 Constitution perhaps even more than the functional equivalent of Policy Science. Thus, the Constitution of Colombia of 1991 enumerates numerous rights: human dignity, life, honor, property, negation of discrimination, family protection including negation of violence in the family, equal protection, protection for the vulnerable including economic, physical and mental, gender equality, privacy, right to employment, due process with respect to legal and administrative enactments, health care, social security, education, etc.[28] The Colombian Constitutional Court relies on these rights present in the Constitution as a reason for their decisions. Thus, Policy Science seems to overlap the Constitutional Court's constitutional dispensation, indicating the relevance of jurisprudence.

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27. *See* Jack Van Doren and Christopher Roederer, *McDougal-Lasswell Policy Science: Death and Transfiguration*, 11 RICH. J. GLOBAL L. & BUS. 125, 133, 135 (2012) (Criticizing Policy Science as containing high level abstractions, such as human dignity and wealth shaping and sharing, which may not solve concrete cases. Also suggesting that Policy Science is dead in the United States, but has some life in the international arena.) *See also* Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 684 note 3 (1975) (elaborating the eight primary values).

28. *See* John W. Van Doren, *Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition*, 2 WIDENER J. OF PUB. LAW 447, 453 (1993) (Suggesting the court processes disguise political choice as there is no separation between law and politics.)

D. Morals and Ethics, Natural Law

Other jurisprudential theories or views further complicate the world of the formalist, aka legal positivist. What if legal decisions are frequently informed by natural law, religious beliefs, or put another way, morals and ethics outside of traditional formalism? Where the United States Supreme Court is concerned, critical commentators point out that more than half of the justices are Catholic.[29] Similarly, there is a strong Catholic Church legacy in Colombian society. The Colombian government agreed to a Concordat, an agreement between a nation and the Vatican, which protects many rights of the Catholic church in the nation. However, the Constitutional Court has declared several provisions of that agreement unconstitutional.[30] The Constitutional Court has recently decriminalized abortion, but bringing this policy predisposition to the decision table may strain the claim that important law is made based on preexisting rules.[31]

V. A. JUDICIAL RESTRAINT VS. JUDICIAL ACTIVISM INTERPRETIVE THEORY AND JURISPRUDENCE: NO FIRM ANCHOR EXCEPT SHIFTING POLITICS?

As stated above, two United States Supreme Court Justices, one liberal, the other conservative, have stated that the sharp conflict

29. *See* Alyssa Murphy, *6 of the 9 Supreme Court Justices are Catholic – Here's a Closer Look,* NATIONAL CATHOLIC REGISTER (October 28, 2020), https://www.ncregister.com/blog/supreme-court-catholics.

30. *See* Espinosa and Landau, *supra* note 1 (Concordat with Vatican revised in 1974 and several provisions held unconstitutional.)

31. *See* Julie Turkewitz, *Columbia Decriminalizes Abortion, Bolstering Trend Across Region*, N.Y. TIMES (Feb. 22, 2022), https://www.nytimes.com/2022/02/22/world/americas/colombia-abortion.html?searchResultPosition=1.

on the Court is not political but instead, due to different philosophies and interpretive methods.[32] At least the term "philosophies" may be inclusive of legal theory or jurisprudence as taught in both countries. Jurisprudence is relevant to this dispute because it is used to support the legitimacy of decisions of a Court. Critics may equate legal positivism with formalism in Colombia. Thus critics argue that the Court in Colombia was formalist.[33] They link formalism with rule orientation and textualism that is the hallmark of legal positivism. This view is often coupled with the "plain meaning" rule of interpretation or textualism.[34] By asserting this view, a proponent can argue that an opponent Court should use judicial restraint and not be activist, because for one reason Courts are not usually elected. Rulemaking legislators and executives are elected and the people are closer to elected officials than distant bureaucrats.

Besides legal positivism, the situation is further complicated by conflicts of other theories of interpretation. Originalism, for example, celebrates the Founders of the Constitution in 1789 and argues that only the intent the Founders had or could have had is relevant.[35] Justice Stephen Breyer champions an opposing theory called living

32. *See* Bazelon, *supra* note 25.

33. *See* Iturralde, *supra* note 6 at 396 (legal formalism, clearly favored for over a century, touted conservatism.)

34. *See* Ruthann Robson, LIBERTY, EQUALITY, AND DUE PROCESS: CASES, CONTROVERSIES, AND CONTEXTS IN CONSTITUTIONAL LAW, 2d. Ed., 73 (2019) (textualism similar to plain meaning interpretation.)

35. *Id.* at 73.

constitutionalism which holds that the meaning of the Constitution evolves thus allowing reinterpretation in each generation according to views held then.[36]

One proponent of judicial restraint in conflict with judicial activism in the United States was a Yale Law Professor, Alexander Bickel. He stressed passive virtues leading to awareness of the counter-majoritarian problem.[37] However, neither advocacy of judicial restraint nor judicial activism have a firm anchor, and usage tends to shift, depending on the politics of the advocate.

B. Interpretive Methods May Clash: Originalism vs. Living Constitutionalism

The same problem of choice that has a political base is found in *Roe v. Wade*. Justice Blackmun affirms allowing abortion as a fundamental right, relying on "living constitutionalism." He stressed the increase of medical knowledge making the procedure safer.[38] The conflict between the interpretive methods of originalism and living constitutionalism also allows the dissent to employ originalism, which considers only what the drafters intended at the time of the enactment of the

36. *See* generally Roe v. Wade, 410 U.S. 113, 153 - 56 (1973) (majority opinion using living constitution and dissent using originalism, discussed in notes 38 and 39 *infra*.)

37. *See* Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 458 - 59 (2020), https://www.californialawreview.org/wp-content/uploads/2020/10/ZofferGrewal_The-Counter-Majoritarian-Difficulty-of-a-Minoritarian-Judiciary_11CalifLRevOnline437.pdf (extensive discussion of the counter-majoritarian theory).

38. *See* Roe v. Wade, 410 U.S. 113, 147-50 (1973)(modern medical remedy is now relatively safe, and abortion until the end of the first trimester is no more dangerous than childbirth).

14th Amendment. Justice Rehnquist's dissent recites that 21 legislatures of the States had criminalized abortion by 1868, the time of the 14th Amendment, to argue against the constitutionality of *Roe*.[39] The authors of the 14th Amendment knew about abortion and could not have intended to include abortion as a "liberty," which prevented states from legislating about it. Therefore, abortion is not a fundamental right.[40]

Recently, the United States Supreme Court has decided an abortion case that overrules *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[41] In short, the Court held that there is no federal right to abortion arising from the Fourteenth Amendment directed to State laws that deprives a person of liberty.[42] Rejected is the substantive due process argument that liberty includes a privacy right for women to choose abortion. Thus, States may pass laws prohibiting or allowing abortion. The Court in *Roe* and *Casey* balanced the right of a State to protect fetal life and the right of women to choose abortion before viability. It is argued that the *Dobbs* Court did not.[43]

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39. Roe v. Wade, 410 U.S. at 175 – 77.

40. *Id*. at 177. (not rooted in traditions and conscience of the people, because the majority of states reflecting majority sentiment have had restrictions on abortion for at least a century, and therefore could not have been intended to stop states from legislating with respect to this matter).

41. *See* generally Dobbs v. Jackson Women's Health Organization, et al., 597 U.S. ___ (2022)

42. *Id*. at 2248.

43. *See Id.* at 2317 "Today, the Court discards that balance."

Comparing the Colombian Constitution, it is replete with rights of citizens to affirm abortion rights.[44] For example, the Colombian Constitution mentions human dignity, life, bodily integrity, equality, free development of personality, reproductive autonomy, including the right to determine the number of children, right to health, and international law. In 2006, the Constitutional Court liberalized the abortion law, allowing it in three cases: rape, where the health or life of the mother is threatened, or the fetus is malformed incompatible with life outside the womb.[45] Recently, the Court went even further, allowing abortion until 24 weeks of pregnancy.[46]

Liberals also rely on living constitutionalism to obtain liberal results. In *Obergefell*, which legalized same sex marriage, Justice Kennedy referred to the living constitution interpretation to support same sex marriage.[47] This is at odds with originalism, which asks what the

44. *See* Espinosa and Landau, *supra* note 1 at 387-397; The Constitution of Colombia (1991) (selected provisions) (for example, free development of personality, freedom of conscience, gender equality, special care during pregnancy).

45. *See* Decision C-355 de 2006, Colombian Constitutional Law 73-82 (English translation).

46. John Otis, *Abortion Laws in Colombia Are Now Among the Most Liberal in the Americas*, NPR, (updated July 13, 2022), https://www.npr.org/sections/goatsandsoda/2022/05/10/1097570784/colombia-legalized-abortions-for-the-first-24-weeks-of-pregnancy-a-backlash-ensu#:~:text=21%2C%20Colombia%27s%20Constitutional%20Court%20legalized,rights%20group%20Women%27s%20Link%20Worldwide.

47. Id. *See* Michael Stramglia, *Constitutional Interpretation: An Overview of Originalism and Living Constitutionalism*, UIC L. REV., (June 9, 2019), https://lawreview.law.uic.edu/constitutional-interpretation-an-overview-of-originalism-and-living-constitutionalism/. Justice Kennedy relied on "change" in marriage over time as a major factor in *Obergefell*, thus supporting a fundamental right status; *Id*. at notes 22-25; West Virginia, et al. v. E.P.A. et al., 597 U.S. ___ (2022).

Constitution founders would have thought. In the *Obergefell* case dissent, Chief Justice Roberts relied on originalism.[48] In sum, jurisprudence, including interpretive methods, seem to be philosophical good covers for politics.[49]

C. Did Judge Learned Hand Embrace Judicial Restraint for Political Reasons?

Judge Learned Hand, liberal in his early career, embraced judicial activism, continuing to the early 1940's. It would be easy for Judge Hand to be a judicial restraint advocate during the 1930's when Roosevelt was battling a conservative court and had a Congress that was liberal.[50] Judge Hand had his eyes on a Supreme Court appointment.[51] Later, unfortunately for Judge Hand, he realized he would not be appointed to the Supreme Court. Then he seemed consistent by stressing judicial restraint.[52] But that may well have been because his politics had changed to conservative, so he needed to rely on judicial restraint since he did not like the decisions of the Warren Court.[53] Politics appear to have influenced his choice.[54]

48. *See* generally Obergefell, 576 U.S. at 686 - 713 (Justice Roberts dissent).

49. *See* Van Doren, *supra* note 28, at 453 (suggesting that jurisprudence, including interpretive methodology, may be laden with political leanings chosen to produce a political result the judge wants.)

50. *See* Jack Van Doren, *Is Jurisprudence Politics by Other Means? The Case of Learned Hand*, 30 NEW ENG. L. REV. 1 at 9 (1998).

51. *Id.* at 12

52. *Id.* at 37-38 (supporting the Judge Hand analysis).

53. *Id.*

54. *Id.*

D. Pandemic Problems – Judicial Activism Based on Politics?

Another example of "judicial restraint" is *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*[55] That case presented to the Court the legality of a moratorium on rents in the United States in certain areas designated by the Centers for Disease Control (CDC).[56] These areas would be populated by tenants who, if evicted for non-payment of rent, would likely move to even lower class neighborhoods where COVID-19 would be spread substantially.[57] The Court held, however, that a previous judgment by a Federal District Court would be held effective to give the relief requested by the Realtors, namely the elimination of the moratorium on rents.[58]

The CDC had argued that it had that power in the grant from Congress to prevent disease.[59] The conservative Supreme Court thus declared the stay (stoppage) of the District Court's decision for the Realtors unlawful, thus allowing the Realtors to win.[60] However, this decision arguably curtails an Act of Congress, thus interfering with an elected federal body. Thus it may be judicial activism, a violation of

55. Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al ,594 U.S. ___ (2021).

56. Alabama Association of Realtors, 594 U.S. at 2486 - 87.

57. *See* Ian Millhiser, *Supreme Court's latest decision could save millions of evictions-but not for long*, VOX (June 30, 2021), https://www.vox.com/2021/6/30/22556498/supreme-court-alabama-association-realtors-hhs-brett-kavanaugh-eviction-moratorium-housing-covid. (CDC issued the moratorium to prevent eviction where the evictees would move to areas of infection which could aggravate the epidemic.)

58. *Id*. Under existing law, there are good legal arguments that the CDC acted within its authority. The CDC could make regulations necessary to "prevent the introduction, transmission, or spread of communicable diseases."

59. *Id.*

60. Id.

separation of powers and the rule of law seemingly motivated by political preferences.[61]

Similarly, the Supreme Court found another reason to nullify Congressional action in *U.S. v. Morrison*.[62] This decision seems also to qualify as judicial activism.[63] In *United States v. Morrison* the conservative United States Supreme Court held that federalism curtails federal congressional protection of women from abuse allowing state law and practice not to punish rape.[64] Federalism is the doctrine that certain powers are reserved to the States and thus, Congress and the President cannot legislate on these matters, another separation of powers problem. As this case shows, politics seems to determine the doctrine chosen to get the political result the decision makers wanted.

VI. THE "SHADOW DOCKET:" POLITICS APPARENT?

The "shadow docket" has recently been brought into the sunshine. The Supreme Court has recently issued rulings on important matters in this "emergency application" procedure, in which conservative justices usually prevail over liberal justices.[65] A New York Times

61. *Id.* (Realtors' lawyers made arguments to appeal to Conservatives.)

62. *See* U.S v. Morrison, 529 U.S. 598 (2000) (U. S. Supreme Court allows an alleged rapist to escape punishment, refusing to enforce the Congressional Law signed by the President, The Violence Against Women Act of 1994).

63. *See* Lauren M. Gambier, *Entrenching Privacy: A Gender-Motivated Violence*, 87 NYU L. REV. 1919, 1949 (2012) (Calling for a change in societal views as paramount and states that the decision reflects a grim picture of the capacity of the legal system to protect women from violence).

64. *See* generally United States v. Morrison, 529 U.S. 598 (2000).

65. *See* Bazelon, *supra* note 25, passim, stating that Justice Barrett has been far bolder when she can operate through the shadow docket where she has signed on to several conservative results without writing a word.

staff writer has observed that Justice Barrett, now very influential, often prefers to obtain her conservative policy results by means of the "shadow docket."[66] This liberal conservative split in the shadow docket cases strongly suggests the presence of political motivation. Justice Breyer, as mentioned above, attributes such differences to interpretive methods and philosophical differences, not politics. However, interpretive methods used by liberal and conservative justices, for example textualism and originalism, are not at all neutral, but may be chosen to produce conservative or liberal political results. The Court stopped the E.P.A. from dealing with air contamination and climate change. Curiously, textualism and legal positivism were used by the dissent in arguing that the Court purported not to understand a Congressional Act.[67]

SUMMARY AND CONCLUSION

In summary, there is judicial use of many interpretive methods and philosophies: judicial activism, judicial restraint, rule of law, formalism, separation of powers between the three branches of federal government, and federalism with its separation of powers between the federal government and the states. The problem is that these norms

66. *Id.* (Without calling attention to herself, Justice Barrett flexed the power of the right).

67. West Virginia, et al. v. E.P.A. et al., 597 U.S. ___ (2022) (where the Kagan dissent of liberals refers to the Congressional act that creates a BSER, Best System of Emission Reduction, which the majority conservatives state is too vague. Thus, reference is made to plain meaning and rules: rarely has a statutory term so clearly applied.)

can produce liberal or conservative results.[68] These interpretive theories come in conflicting pairs, for example, originalism and living constitutionalism. Two main factors can be isolated in the judicial activism vs. restraint coupling. One is the anti-majoritarian claim because the judge's decision is in conflict with public opinion or two, it defeats an elected part of government and therefore demeans democracy.[69] Another conflict with judicial restraint is the thesis of John Hart Ely, in "Democracy and Distrust."[70] Ely argues that a major function of the unelected federal Judiciary should be the preservation of democracy.[71] Democracy can be threatened internally by minorities feeling the tyranny of the majority, which might result in violent uprisings.[72]

Thus, there is a strong correlation between what a judge or commentator favors based on the political situation in the country and the politics of that person.[73] For example, some Colombian commentators tend to be committed to judicial activism.[74] Judicial activism was

68. *See* Robson, *supra* note 34, at 73-74 (activist vs. restraint decisions can lead to liberal or conservative results.)

69. *See* Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty*, 11 INT'L JL. OF CON. L. 13-33, Issue 1 (2013), notes 3, 4, and accompanying text (countermajoritarian difficulty composed of Supreme Court deciding against an elected legislative branch or against polls taken of public opinion).

70. *See* Robson, *supra* note 34 at 72.

71. *Id.*

72. *Id.*

73. *See* David Landau, *Manuel Jose Cepeda and Institution-Building on the Colombian Constitutional Court*. IACL-AIDC BLOG (March 25, 2019) https://blog-iacl-aidc.org/towering-judges/2019/3/25/manuel-jose-cepeda-and-institution-building-on-the-colombian-constitutional-court (Judge Cepada used political skill and pragmatism thus becoming a "towering judge.")

74. *See* Iturralde, *supra* note 6 at 397. The author celebrates the 1991 Constitution, noting the progressive difference in the government. Numerous changes in favor of the lower socio-economic class have occurred through judicial interpretations of that Constitution.

also embraced by a former justice of the Constitutional Court, Justice Cepeda, a highly influential person in the legal world of Colombia.[75] However, activism and restraint may produce liberal or conservative results and no anchor is in sight.[76]

The move by justices to explain the split between conservatives and liberals in the Supreme Court as due to interpretive theories or philosophies is doomed to failure because it is politics that prevail. Thus, the decision makers appear to choose the theory that reflects their political views. Rationalizations in Court opinions are not determined by language used, but by unexpressed political preconceptions. The move to explain the split between conservatives and liberals, as Supreme Court Justices have recently done, based on different theories of interpretation or philosophies, is doomed to failure, because they only produce sophisticated rationalizations for decisions made on grounds dominated by politics.[77]

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75. *See* Landau, *supra* note 73.

76. *See* Robson, *supra* note 34 at 74 (Judicial activism and restraint do not necessarily coincide with liberal or conservative results.) *See* also, W. Michael Reisman and Aaron M. Schreiber, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW: CASES, READINGS, COMMENTARY, 296, 308-9 (1987) (After Roosevelt mentioned court packing, the Supreme Court reversed course without explanation, and upheld Roosevelt legislation to combat the Depression, in effect reversing four cases it had recently decided.)

77. *See* Van Doren, *supra* note 28; Stephen Rohde, '*With Sorrow, We Dissent': The Three Justices Who Rejected Dobbs,* MS. MAG. (July 5, 2022), https://msmagazine.com/2022/07/05/dobbs-v-jackson-dissent-breyer-sotomayor-kagan-opinion-roe-v-wade/ ("The dissent in *Dobbs v. Jackson* blasts the conservative justices for overruling *Roe* and *Casey* for 'one and only one reason: because [they have] always despised them, and now [have] the votes to discard them.'")