

Getting Substantive: A Response to Posner and Vermeule

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INTRODUCTION

The intellectual historian Professor J.G.A. Pocock once lamented that arguments about scholarly methodology often amounted to little more than telling one's colleagues, "you should not be doing your job; you should be doing mine."¹ In their article, *Inside or Outside the System?*, Professors Eric Posner and Adrian Vermeule at first seem to escape this charge.² Their point is not that you should be doing their job instead of yours; rather, you should just pick a job and do it consistently. Specifically, they argue that a good deal of legal scholarship is premised on inconsistent assumptions about what motivates governmental officials. The targets of their critique are scholars who first adopt the "external" perspective of political scientists by assuming that government officials act rationally so as to maximize their own self-interest, and then offer as a solution to the problem created by such self-interested behavior—now from the "internal" perspective of a normative legal scholar speaking to judges—a remedy whose implementation depends on governmental officials (typically judges) acting in the public's interest rather than their own. According to the Authors, this attempt to adopt two inconsistent perspectives simultaneously results in "methodological schizophrenia."³

The Authors put their finger on a tension that arises when legal scholars make use of political science literature that is based on assumptions about what motivates official behavior, assumptions that seem at odds with those on which the offer of policy or legal advice is premised. But whether the Authors'

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¹ J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* 51 (Cambridge 2009).

² Eric A. Posner and Adrian Vermeule, *Inside or Outside the System?*, 80 U Chi L Rev 1743, 1745 (2013).

³ Id.

critique escapes Professor Pocock's charge is not so clear. By framing the methodological inconsistency they identify as one between two different "perspectives," the Authors at times mischaracterize and overstate the intellectual defects of the arguments they scrutinize. And once that confusing terminology is stripped away, what remains are controversial claims about the nature of law and about how judges decide cases. Thus, despite their repeated insistence that their critique is purely methodological and not "substantive or empirical,"⁴ the Authors' true complaint with the scholars they criticize may be less about those scholars' internal consistency (let alone their "incoherence") than about their failure to adopt the Authors' own skeptical assumptions about law and judicial behavior. In other words, the scholars that the Authors criticize are only methodologically inconsistent because they do not accept the Authors' controversial (and substantive) claims that judges act so as to maximize their own power.

This observation does not in itself condemn the Authors' critique. There is nothing wrong with arguing on behalf of one's own methodological assumptions on the ground that they yield more fruitful explanations of, or are more penetrating insights into, some domain of inquiry than do some other set of assumptions. But because the Authors' critique is cast as one that remains agnostic about the validity or usefulness of such assumptions, it obscures more than it clarifies what really distinguishes their own approach from those of the scholars they criticize. The difference is not the stark one they draw between those who rigorously adopt one methodological "perspective," on the one hand, and those who flip-flop between two perspectives incoherently, on the other. Rather, the difference lies in the degree to which scholars are willing to maintain a set of expectations for judicial conduct even with the knowledge that judges often fail to meet those expectations.

The Essay proceeds in four parts. Part I briefly explains what the Authors mean by the "inside/outside fallacy" and

⁴ See, for example, *id.* ("Our point is not substantive or empirical. It is not to argue for, or against, any particular assumptions about the behavior of judges, other officials, or other legal or political actors."); *id.* at 1762 ("Substantively, the issues are empirical and contingent, and we are (for present purposes) entirely agnostic about the merits."); *id.* at 1778 ("Here too, our concern is not with the substantive merits of views, but with consistency between premises and conclusions."); *id.* at 1796 ("Nothing in our argument is substantive, or empirical; we urge no particular assumptions about the behavior of judges or other actors.").

points to an early ambiguity in the Authors' framing of it. The next three parts then take up three different forms of argument, each of which allegedly contains the fallacy. These argumentative forms, which (following the Authors) I dub the argument for Madisonian Judging, the Responsible Illegality argument, and the Noble Lie argument, respectively, are not the only arguments the Authors criticize, but they are ones to which the Authors devote the most attention. For each of them, I summarize the Authors' critique of the argument, explain why their inside/outside distinction distracts and misleads more than it illuminates, and then show the way in which the Authors' critique depends on controversial empirical or philosophical claims. Throughout, I focus less on defending the particular works the Authors criticize than on examining the structure of their argument and the premises on which it relies. I conclude by revealing how the Authors themselves fall victim to the fallacy they find in others' work, suggesting that the problem they identify may be deeper than they realize.

I. THE INSIDE/OUTSIDE FALLACY (OR THE DETERMINACY PARADOX)

According to the Authors, legal theorists often make arguments of the following sort: "All officials are ambitious, and thus prone to maximize their power. To solve the problem, judges should adopt the following rules of constitutional doctrine . . ."⁵ The problem with such arguments is that they are "pragmatically incoherent," because the remedy prescribed (that is, that judges should craft particular rules or decide cases using a particular method) depends on those judges acting in a public-spirited manner even though the problem allegedly arose in the first place because officials (and therefore judges) do *not* act in a public-spirited way. Instead, like other officials, judges seek to maximize their power or otherwise act in their own self-interest.⁶

The Authors call this inconsistency the "inside/outside fallacy" because it allegedly requires the scholar to adopt two, inconsistent perspectives simultaneously. First, the "external" perspective "attempts to explain the behavior of actors within the constitutional order as an endogenous product of self-interested

⁵ Id at 1744.

⁶ Posner and Vermeule, 80 U Chi L Rev at 1744 (cited in note 2).

aims.”⁷ Second, the “internal” perspective “assumes the standpoint of the judge and asks how the judge ought to behave so as to promote the well-being of the constitutional system and the nation.”⁸ Thus, the inside/outside fallacy is implicated “when the theorist equivocates between the external standpoint of an analyst of the constitutional order, such as a political scientist, and the internal standpoint of an actor within the system, such as a judge.”⁹ Although the Authors acknowledge that the inside/outside fallacy is “analytically coterminous” with a phenomenon labeled the “determinacy paradox” by economists,¹⁰ they invoke the inside/outside terminology throughout their article (and in their title), using it to diagnose the arguments under scrutiny as infected with a “fallacy.”¹¹

Below I argue that the Authors’ use of an internal/external distinction distorts the nature of their critique and exaggerates its depth. But here just note what their initial articulation of the distinction includes and what it does not. As framed above, the distinction appears to be one about the perspective of the *analyst* of institutions. Using the internal perspective entails adopting the point of view of a judge “inside” the system, whereas the “external” perspective is that of a political scientist who attempts to explain the behavior of officials (including that of judges) by reference to their self-interested goals. The incoherence that allegedly results from adopting both of these perspectives simultaneously arises because they supposedly entail inconsistent theories of those officials’ motivations.¹² But only the external perspective has been defined as one committed to a particular theory of human motivation (that is, one that treats the behavior of institutional actors as “an endogenous product of

⁷ Id.

⁸ Id.

⁹ Id at 1745.

¹⁰ Posner and Vermeule, 80 U Chi L Rev at 1789 (cited in note 2). See also, for example, Brendan O’Flaherty and Jagdish Bhagwati, *Will Free Trade with Political Scientists Put Normative Economists out of Work?*, 9 Econ & Polit 207, 208 (1997) (explaining that the paradox arises when a normative economist advises a government on economic policy even though “the grand conditions of political–economic equilibrium (whatever they may be) have already determined what will happen,” so that “[t]elling the government to lower tariffs makes no more sense than telling a monopolist to lower prices or telling the dinosaurs to wear overcoats”).

¹¹ They do so on the ground that the dichotomy between internal and external perspectives has been “traditionally a central issue for legal theory,” which it has indeed been—to its detriment, I would argue. Posner and Vermeule, 80 U Chi L Rev at 1789 (cited in note 2).

¹² Id at 1744.

self-interested aims”).¹³ The internal perspective has been defined only as a perspective that *asks* how the judge ought to behave. The question then becomes, what theory of official motivation does someone “inside” the system have?

The answer is not entirely clear. At times, the Authors suggest that the internal perspective is that of a participant in the system who assumes people act in accordance with the relevant norms of the institution to which she belongs, which in the case of a judge would be those of the American constitutional order. This understanding is indicated by their suggestion that from the internal perspective, one asks “how the judge ought to behave *so as to promote the well-being of the constitutional system*.”¹⁴ That they also cite Professor H.L.A. Hart when drawing the distinction further supports this interpretation.¹⁵ Hart famously introduced the internal-external distinction into legal theory, and, though it remains controversial what exactly Hart meant by the “external” point of view, the internal point of view describes that of a participant in a practice who accepts the rules, norms, and conventions of that practice as genuine reasons for action.¹⁶ Under this view, then, the view from

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

¹⁵ Posner and Vermeule, 80 U Chi L Rev at 1745 n 2 (cited in note 2). See also H.L.A. Hart, *The Concept of Law* 99 (Clarendon 1961). The Authors also cite Richard H. Fallon Jr., *Constitutional Constraints*, 97 Cal L Rev 975, 995–1002 (2009), which also relies on Hart’s understanding of the distinction.

¹⁶ See Hart, *The Concept of Law* at 88 (cited in note 15). Actually, Hart was not the first to use the distinction for the purposes of legal theory. See, for example Paul Vinogradoff, *Common-Sense in Law* 16–17 (H. Holt & Co 1914):

Human thought may take up one of two possible attitudes in regard to facts observed by it: it may either watch their relations from the outside and try to connect them with each other as causes and effects, or else it may consider them in relation to man’s conscious action, and estimate the connection between ends and means.

Vinogradoff also argued that jurisprudence was a social science that required adopting the latter perspective. But Hart developed the distinction more fully and made it famous. For a debate over what Hart meant to include in the “external” point of view, compare Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in Steven J. Burton, ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr* 197, 197–99 (Cambridge 2000), with Stephen R. Perry, *Holmes versus Hart: The Bad Man in Legal Theory* in Burton, ed., *The Path of the Law and Its Influence* 158, 161, 190–91 (debating whether Hart understood Holmes’s “bad man,” who cares about the law only for the purposes of avoiding punishment, to be adopting an “external” point of view with respect to the legal system). On Hart’s understanding of the internal point of view, see Hart, *The Concept of the Law* at 88 (cited in note 15) (explaining that for those who adopt the internal point of view, “the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.”).

the “inside” is that of the judge who, when deciding cases, attempts to apply the law in good faith and according to constitutional norms.

But the Authors do not consistently apply the inside/outside distinction in this way. In fact, they use it in at least two related but distinct ways: They use it to distinguish between actors “inside” a political scientist’s model (who follow their self-interest) and those who stand outside of it (and so may act on “public-spirited” reasons). Then they use it to distinguish between actions taken by officials that create norms for other actors (from the “inside”) and those actions that do not create such norms (from the “outside”). The Authors invoke the first of these distinctions in their analysis of the form of argument that most straightforwardly contains the alleged inside/outside fallacy.

II. MADISONIAN JUDGING

A. The Authors’ Critique

The paradigmatic instance of the inside/outside fallacy involves legal scholarship that makes use of political science literature to diagnose some institutional problem that arises because officials are self-interested and then concludes with advice to judges about how to solve that same problem.

The Authors call this sort of argument, when made in the context of separation-of-powers issues, arguments for “Madisonian” judging.¹⁷ It is a view that envisions judges as capable of acting “as impartial regulators or referees of the competitive system, attempting to promote an ongoing system of checks and balances over time.”¹⁸ Although the Authors take up separately arguments addressing various public-law questions, they see a common structure in all of them: the scholar identifies some defect that is caused by political actors pursuing their self-interest—

¹⁷ Actually, they use it more specifically to refer to the narrower class of cases in which judges are called upon (by scholars) to adjudicate disputes between the executive and the legislative branches. But the Authors explain that the problem is fundamentally the same as in the other areas subsumed within my more general framing. So for purposes of easy labeling, I use this term to refer to all of these arguments. See Posner and Vermeule, 80 U Chi L Rev at 1751 (cited in note 2). In fact, the structure of their critique of these arguments is the same as the one leveled against certain justifications for textualist approaches to statutory interpretation, see *id.* at 1776–78, and as their critique of arguments for welfare-maximizing judges. See *id.* at 1778–80. The response I offer here, however, does not respond directly to their arguments there. See Part I.

¹⁸ Posner and Vermeule, 80 U Chi L Rev at 1751 (cited in note 2).

whether competition between the legislative and executive branches, partisan competition, interest-group pressure, or some other sort of “process failure”—and then the scholar proposes as a solution some legal doctrine that they encourage judges to apply.¹⁹

The problem with all of these is the same. The various diagnoses depend on the assumption that political actors invariably pursue their own self-interest. But the proposed remedies assume that judges will genuinely follow the relevant legal doctrine rather than simply manipulate it to serve their own interests, which is precisely what the model of political behavior underlying the diagnosis assumes. The problem, in other words, is that these scholars fail to recognize that “judges do not stand outside the system; judicial behavior is an endogenous product of the system.”²⁰

B. Some Doubts

The first thing to note about this argument is the new way in which it employs the inside/outside distinction. Recall that it earlier seemed as if, consistent with Hart’s use of the term, the Authors used the “internal” perspective to describe the view of a judge who takes the relevant rules and norms of the legal system as genuine guides for decision making or, more generally, who acts on the basis of “public-spirited” reasons.²¹ Now, though, it seems that those “inside the system” should be understood to be following their own self-interest. The scholars go wrong, they explain, in assuming that the judges can “float outside the political system.”²² Under this framing, it appears that the *external*

¹⁹ Id at 1749–66.

²⁰ Id at 1764. For examples of scholarly works that the Authors allege contain this fallacy, see generally Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2312 (2006); Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv L Rev 411 (2012); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard 1980).

²¹ Although they are not always explicit about what it means to be a “public-spirited” judge, it seems safe to assume that a public-spirited judge is one who applies the law in good faith when it is clear and develops it in a way that is consistent with her understanding of justice and the public good when it is not clear. See Posner and Vermeule, 80 U Chi L Rev at 1777 (cited in note 2) (observing that one might ask “why a justice who is public-spirited enough to adopt a method to prevent himself from implementing his policy preferences would not be public-spirited enough to decide cases neutrally, case by case.”).

²² Id at 1766. See also id at 1765 (criticizing a proposal that depends on judicial doctrine to remedy interest-group politics on the ground that “judicial behavior cannot be treated as exogenous or a *deus ex machina*—a miraculous intervention from outside the system”).

perspective—not the internal one—is the “public-regarding” one. Hence, in a later portion of their paper, the Authors suggest that one way to cure the inside/outside fallacy would be for scholars to assume that “people in the system have the same public-regarding preferences as the outside analyst.”²³

So what happened? How is it that the internal perspective went from one that “assumes public-spirited judging” to one that describes the rational actor who maximizes her self-interest?²⁴ The answer is that, as mentioned above, the Authors employ the internal/external distinction in two different ways without distinguishing clearly between the two. First, they use it to describe a conflict between two different roles of the *analyst*: she simultaneously attempts to play the role of the political scientist (who assumes judges and officials act out of self-interest) and the role of the legal scholar (who offers advice to judges on the assumption that they apply and develop the law in good faith). Second, they use it to describe the motivation of the relevant *actors under study* within the political scientist’s model of political behavior. Here the claim is that the political scientist assumes that those inside the system act out of self-interest but that judges can stand “outside” the system, unaffected by self-interest. The reader may thus be understandably confused as to which “perspective” is implied by the assumption that judges act in a public-spirited way: Is it the perspective of the “internal” legal scholar who accepts the relevant legal norms as guides for action and assumes judges do as well, or is it that of the “outside” political scientist who (wrongly) assumes that judges stand in the same disinterested position as she does?²⁵

Whatever the answer, all of this confusion is unnecessary because the Authors need not rely on the internal/external distinction at all. It is sufficient for their purposes to observe that the scholars they critique seem to maintain two positions in tension with one another: first, that officials act so as to maximize

²³ Id at 1790.

²⁴ Id at 1756–57.

²⁵ Of course, the Authors might respond that the choice hardly matters because, in either case, the assumption is inconsistent with the assumption that officials pursue their self-interest. That may (or may not) be true, but the point is that when the assumption of “public-regarding” judging is ascribed both to the “internal perspective,” Posner and Vermeule, 80 U Chi L Rev at 1756–57 (cited in note 2), and to a perspective that sees judges as “float[ing] outside the political system,” id at 1766, one cannot help but doubt whether the inside/outside distinction is really working in service of methodological clarity.

their own self-interest, and second, that judges will develop or apply in good faith rules that serve the public's interest rather than their own.

So framed, however, the Authors' interlocutors have an obvious response, which is to distinguish judges from other political actors on the ground that they occupy a distinctive institutional role, with its own norms and protections that differ from those of legislators or executive officials. Federal judges, at least, have tenure and salary protections that can to some extent insulate them from the political pressures other officials face. Indeed, this quite traditional justification for trusting judges to act impartially more than other officials has a long pedigree.²⁶ Thus, the Authors succeed in identifying an "inconsistency" only by turning a blind eye to obvious and relevant institutional distinctions that might justify treating judges differently from other political officials. So understood, their charge would be equivalent to claiming that a proposal to discourage the practice of "diving" in soccer by increasing penalties for such intentionally deceptive conduct is one based on "inconsistent" premises insofar as it assumes that (a) people (that is, players) try to abuse the rules to their advantage, while at the same time assuming that (b) people (that is, referees) will apply the stiffer penalties in good faith.²⁷

The Authors foresee this line of argument and insist that it is "no answer" that Article III judges enjoy life tenure.²⁸ First of all, it does not even apply to state judges, who are often subject

²⁶ See, for example, Federalist 78 (Hamilton), in *The Federalist* 521, 527 (Wesleyan 1961) (Jacob E. Cooke, ed) (arguing that Article III's life-tenure protections were necessary because "nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty").

²⁷ The technical term is "simulation," which FIFA's *Laws of the Game* defines as when a player "attempts to deceive the referee by feigning injury or pretending to have been fouled." See *Laws of the Game 2013/2014* *123 (Fédération Internationale de Football Association 2013), online at http://www.fifa.com/mm/document/footballdevelopment/refereeing/81/42/36/log2013en_neutral.pdf (visited Nov 24, 2013). Of course, such a proposal may not be a good one. FIFA's effort to enforce the simulation rule more rigorously has been criticized precisely because giving the penalty requires the referee to make a nearly impossible judgment. See, for example, Paul Wilson, *Why Fifa's War on Diving Is Blighting Referees and the Game*, *The Guardian Sportblog* (Guardian News and Media Limited Jan 2, 2013), online at <http://www.guardian.co.uk/football/blog/2013/jan/02/fifa-diving-gareth-bale> (visited Nov 24, 2013). But that is a substantive argument based on the nature of the rule at issue and about the capacities of referees to enforce it well. As I argue below, the Authors' arguments about judging, too, are better understood as substantive claims about the nature of legal rules and about how judges decide cases.

²⁸ Posner and Vermeule, 80 U Chi L Rev at 1757 (cited in note 2).

to periodic elections.²⁹ Even with respect to federal judges, however, the argument fails because the insulation from political pressure that life tenure affords simply frees judges up to satisfy their own preferences as they wish. Given the highly partisan nature of the judicial selection process, those are likely to be partisan ones—a prediction that the empirical evidence bears out. “Although law also matters,” they explain, the political science literature on judicial behavior demonstrates that “the single best predictor of judicial votes in cases where there is disagreement is generally the political party of the appointing president.”³⁰

That may be right. But note two things about this response. First, it makes a controversial claim about how judges go about deciding cases—one with which scholars have taken issue on both conceptual and empirical grounds.³¹ Second, and more

²⁹ Id at 1779.

³⁰ Id at 1757, citing Cass R. Sunstein, et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 113–22 (Brookings 2006). The Authors also make an argument that the belief in Madisonian Judging—that is, the belief that judges can and should act as “impartial regulators” of the political process—is misguided because it would actually be a *worse* state of affairs for judges to act in a public-spirited manner. The Authors find support for this somewhat counterintuitive claim in Federalist 51’s famous argument that the constitutional structure will protect the public interest because it will make “[a]mbition . . . counteract ambition.” Posner and Vermeule 80 U Chi L Rev at 1749 (cited in note 2). The idea is that the delicate balance of power depends on judges acting in a self-interested, power-maximizing way, so if they instead attempt to look after the public interest when, say, interpreting the scope of executive power, then they may end up granting the executive more power than would be optimal. Doing so would be like a lawyer making an argument on behalf of his opponent, which would subvert, rather than improve, the adversarial process. Thus, insofar as scholars rely on Madison’s theory to justify asking judges to serve as an “impartial referee” between the legislative and executive branches, id at 1752, they misunderstand and misapply Madison’s political theory, which is made from the (external) standpoint of a constitutional designer, not the (internal) standpoint of a judge. Id at 1752–53.

Whether or not this is a plausible theory of separation of powers, or an accurate account of Madison’s views, it does not add anything substantively to the Authors’ core charge of methodological inconsistency. To the contrary, it depends on that original charge (that offering public-spirited advice to judges is futile because their behavior is already determined by their pursuit of self-interest) being false. For there is only a disruption of the separation-of-powers equilibrium if judges can, and at least occasionally do, act in a public-spirited way—which is precisely what the Authors claim that their demand for consistency forecloses their interlocutors from assuming.

³¹ See, for example, Fallon, 97 Cal L Rev at 982 (cited in note 15) (observing that “the evidence of people being motivated by norms, including legal norms, seems too pervasive for the norm-skeptic’s challenge to arouse much concern”); Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 L & Soc Inquiry 465, 478 (2001) (criticizing attitudinalist studies of judicial behavior partly on the ground that they often operate under a crudely formalistic conception of law); Thomas M. Keck, Book Review, *Party, Policy, or Duty: Why Does the*

important, this response contradicts the Authors' promise that their argument "is not substantive or empirical."³² Indeed, it seems that their real complaint with the arguments they identify is that they fail to adopt the political scientist's understanding of judicial behavior.³³

The Authors might respond that they rely on these empirical claims about judicial behavior only because the targets of their critique themselves make the same assumptions. But that is not necessarily true. Their interlocutors draw on political science in suggesting that other political actors seek to maximize their power, but, as noted above, there is a traditional basis for distinguishing judges from other actors in this way. It is surely open to the Authors to deny the plausibility of that distinction, but they cannot do so without making substantive judgments about what kinds of considerations do, or are likely to, affect the behavior of judges.³⁴

III. THE RESPONSIBLE ILLEGALITY ARGUMENT

If the argument described above exhausted the Authors' critique, there would be little with which to quarrel. Those scholars

Supreme Court Invalidate Federal Statutes?, 101 Am Polit Sci Rev 321, 321 (2007) (finding that in a category of cases in which the Supreme Court reviewed federal statutes, "much of the Court's decision making . . . was animated by four concerns that had little resonance in legislative politics during this same period," including, for example, "the Constitution's horizontal and vertical divisions of lawmaking power").

³² See note 4 (collecting instances in which the Authors insist that their argument remains agnostic on various substantive issues).

³³ This is not to say that all political scientists assume judges act as rational maximizers of their own self-interest, at least not as traditionally understood. Recently, scholars associated with the "new institutionalism" or "American Political Development" have emphasized the way in which institutions themselves help constitute the preferences of those who work in them. See generally, for example, Cornell W. Clayton and Howard Gillman, eds, *Supreme Court Decision-Making: New Institutional Approaches* (Chicago 1999); Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge 2004).

³⁴ The Authors are on firmer ground in finding a fallacy in the argument for textualism according to which judges must be constrained by textualist principles so that they do not simply satisfy their own preferences. Posner and Vermeule, 80 U Chi L Rev at 1776 n 92 (cited in note 2). That view *does* seem to presume that judges, in particular, will act in pursuit of a kind of self-interest. So the Authors ask why such a judge would then choose an interpretive method that prevents her from satisfying her policy preferences in that way. They suggest that the implicit premise of the argument must be that judges suffer from some kind of "weakness of will," so that judges act like a "smoker or failed dieter"—a view which strikes them as implausible. *Id* at 1777–78. But it could also be that a judge would adopt this approach because she thinks that her individual decisions will be distorted more easily by her own unconscious bias if she does not adhere to a more mechanical interpretive approach.

who try to play the role of positive political scientist and normative legal scholar at the same time could perhaps remedy the alleged inconsistency by explaining more clearly why they make the assumptions about judges that they do.³⁵ Indeed, the Authors' goal in leveling their critique is in part to elicit precisely such explanations.³⁶ The dispute may thus boil down to a question of which side carries the burden of justifying their empirical assumptions.

But the Authors do not stop there. They seek to show that the inside/outside fallacy is pervasive in legal scholarship and is even latent in arguments where few would suspect its presence. And it is their critique of these allegedly more subtle violations of methodological consistency that the "inside/outside" dichotomy on which they rely causes even greater confusions and distortions. To see why, let us first consider their critique of what they call the argument for Responsible Illegality.

A. The Critique

The Responsible Illegality argument is a strategy that a governmental official might employ in circumstances where she seeks to achieve some near-term result she believes to be in the public interest but does not want to endorse it officially as "legal." The Authors use Justice Robert Jackson's famous dissent in *Korematsu v United States*³⁷ as an example.³⁸ Justice Jackson did not think the judiciary could realistically do anything about the executive order calling for the exclusion of Japanese Americans from certain military areas during the war, and he recognized that the military cared less about what was legal than about what would improve national security.³⁹ Nevertheless, he did not think it followed that the Court should ratify the order as constitutional. His fear was that doing so would create a dangerous constitutional precedent that would lie around "like a

³⁵ Or, more simply, as one colleague suggested to me, they might simply place their normative proposals and their positive analyses into separate articles.

³⁶ Posner and Vermeule, 80 U Chi L Rev at 1765 (cited in note 2) ("[I]t is incumbent on the Elyian theorist to explain why such a result will not hold, given the theorist's assumptions about other actors.").

³⁷ 323 US 214 (1944).

³⁸ Posner and Vermeule, 80 U Chi L Rev at 1769 (cited in note 2), citing *Korematsu*, 323 US 214 (1944).

³⁹ *Korematsu*, 323 US at 244 (Jackson dissenting).

loaded weapon,” which future courts would rely on in giving expansive interpretations of executive power.⁴⁰

The Authors see the same strategy at work in other areas. When the Supreme Court said in *Bush v Gore*⁴¹ that its Equal Protection Clause analysis was “limited to the present circumstances,” for instance, it ignored the way in which its action itself created a precedent irrespective of what it said about the decision’s precedential effect.⁴² As with Jackson’s dissent in *Korematsu*, the Court’s strategy was “pragmatically inconsistent” because it was premised on a fear that future courts would treat the decision as precedential, but then, by deciding the case in the way it did, the Court necessarily allowed future courts to do just that.⁴³

In such cases, the actor’s aim rests on a “conceptual confusion,” for the hope is that her action “will somehow remain outside the system, setting no precedent for the future and maintaining the purity of the law and legal rights.”⁴⁴ Hence, according to the Authors, the Responsible Illegality argument contains the inside/outside fallacy, albeit “[i]n a nonobvious way.”⁴⁵

B. Some Doubts

The Authors’ critique of the Responsible Illegality argument is a bit ambiguous because they suggest that this kind of argument contains the inside/outside fallacy in two different ways. In neither case, however, do the Authors succeed in showing that the argument rests on a “conceptual confusion.” To the contrary, it turns out that in both cases their disagreement with their interlocutors is really one about the underlying jurisprudential or empirical questions at stake.

⁴⁰ Posner and Vermeule, 80 U Chi L Rev at 1770 (cited in note 2), quoting *Korematsu*, 323 US at 246 (Jackson dissenting).

⁴¹ 531 US 98 (2000).

⁴² Posner and Vermeule 80 U Chi L Rev at 1780 (cited in note 2), quoting *Bush*, 531 US at 109.

⁴³ Posner and Vermeule, 80 U Chi L Rev at 1783 (cited in note 2). Two other arguments that the Authors allege contain the fallacy in the same way include the decision of a commission to ratify after the fact the 1999 US-led intervention in Kosovo as “illegal” (because it was not authorized by the UN Security Council) but nonetheless “legitimate” (because it was based on humanitarian grounds), *id* at 1785, and the argument, made by some scholars, that when the president needs to curtail constitutional liberties for the sake of national security, he should candidly acknowledge the illegality of his actions but subject himself to the public’s judgment about its propriety. *Id* at 1767.

⁴⁴ *Id* at 1767.

⁴⁵ *Id* at 1771.

One way of interpreting the Authors' claim that the Responsible Illegality argument contains the inside/outside fallacy is to understand the inside/outside distinction in yet another way. Under this view, it is not a distinction between two different perspectives of the *analyst* (normative legal scholar versus positive political scientist), nor one between different kinds of motivations of *institutional actors* (self-interest maximizers vs. public-spirited decision makers); rather, it is a distinction between two different kinds of official *action*: those that create norms (or reasons for acting) for other actors in the legal system, and those that do not.

Supporting this interpretation is the Authors' suggestion that "Justice Jackson's opinion attempts to square the circle of emergency powers by stepping outside the system from within the system—a conceptual impossibility."⁴⁶ So, too, is their characterization of Responsible Illegality arguments as attempts to make decisions that "will somehow remain outside the system, setting no precedent for the future."⁴⁷ The claim seems to be that such efforts are incoherent because they attempt not to make law despite the fact that such actions necessarily do make law. If sound, this argument promises to make good on the Authors' claim that they have identified a "conceptual confusion" in the Responsible Illegality argument.

However, the argument is not sound because it is missing a premise. The Authors infer from the fact that any official action taken within a legal system has some precedential (that is, legal) effect, irrespective of the decision maker's effort to eliminate such effect, to the conclusion that there is no meaningful conceptual distinction between (a) actions taken without a legal endorsement (or even those with a legal condemnation) by the relevant actor and (b) those same actions but taken *with* a legal endorsement. But it does not follow from the fact that two different actions can both generate a legally binding norm that the two actions have precisely the same legal status. The missing premise is that official endorsements of an action, independent of the actions themselves, are of no legal consequence.

Consider first those actions taken by the executive branch. The Authors are surely right that if the president engages in some arguably unconstitutional course of conduct only to have

⁴⁶ *Id.* at 1769.

⁴⁷ Posner and Vermeule, 80 *U Chi L Rev* at 1767 (cited in note 2).

the public subsequently excuse him for his actions, then a “cycle of illegality-and-ratification may itself become routinized as a part of the constitutional order.”⁴⁸ But the crucial word is “may.” For the conduct may also *not* become so routinized, and if part of the reason it does not is the public perception that the action was formally illegal—perhaps because the Supreme Court issued an opinion condemning it as such—then there would be little basis for denying the intelligibility, let alone importance, of such formal distinctions.⁴⁹

The Authors might happily supply the missing premise. In a footnote, they seem to suggest that law should be interpreted to mean “whatever happens in the legal system.”⁵⁰ Taken literally, this conception of law would be absurd since it would imply that no official—executive, legislative, or judicial—could ever break the law. But if charitably understood and if more narrowly applied to courts, it may be interpreted as claiming that law is not what is “in the books” but is instead better understood as “what courts will do in fact.”⁵¹ Under this view, the Authors are, in effect, saying that the argument for Responsible Illegality is incoherent because the legal formalities that are necessary to distinguish between what is ratified as “legal” by a court and what is actually permitted by courts to occur is so small as to be meaningless. That is, whether that permission is granted *de jure* or *de facto* makes no legal difference.⁵²

Such skepticism about the importance of judicial rhetoric for understanding the law has a long pedigree in American legal thought and is indeed associated with the legal realists.⁵³ But the Authors’ reliance upon it poses two problems for their argument. First, it remains a deeply controversial conception of law

⁴⁸ *Id.* at 1768. See also Fallon, 97 Cal L Rev at 1012 (cited in note 15) (“The Supreme Court has sometimes said that long unchallenged executive practice, if acquiesced in by Congress, can constrain it from making rulings of unconstitutionality that it otherwise might make.”).

⁴⁹ See Fallon, 97 Cal L Rev at 1018 (cited in note 15) (explaining that nonjudicial officials often defer to judicial interpretations of the law in part because “[t]he public expects governmental officials to obey the law, and the public has been socialized to believe that judicial interpretations are legally binding”).

⁵⁰ Posner and Vermeule, 80 U Chi L Rev at 1769 n 68 (cited in note 2).

⁵¹ Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

⁵² Posner and Vermeule, 80 U Chi L Rev at 1767 (cited in note 2).

⁵³ See, for example, Holmes, 10 Harv L Rev at 461 (cited in note 51); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum L Rev 431, 442 (1930).

and so might be inadequate for interpreting the law generally and the practice of precedent specifically.⁵⁴ Second, and more important, it is (once again) very much a *substantive* view about the nature of law. So to succeed in showing that those who make the Responsible Illegality argument are conceptually confused requires not merely pointing out a “methodological inconsistency” in their argument. Instead, it requires showing that they are using a defective conception of law. And the Authors do not even attempt to make such an argument.

The Authors may respond that they have no interest in such jurisprudential debates.⁵⁵ Their point is rather the more practical one that the legal formalities at issue—whether the words of a court opinion or a court’s judgment about executive power—make no actual difference to, or play no causal role in, official decision making. The problem with the argument for Responsible Illegality, then, is that it ignores the brute fact that legal forms play little causal role in how officials make decisions.

Under this interpretation, the inside/outside fallacy is the same one we saw earlier in the context of arguments about Madisonian Judging. It involves making inconsistent assumptions about officials’ motivations. Evidence supporting this interpretation of the Authors’ argument lies in their suggestion that Justice Jackson’s prediction that a constitutional precedent ratifying the internment order would “lie[] about like a loaded weapon” implies that Justice Jackson thinks that future courts will abuse such a decision and endorse future military actions that ought not be endorsed.⁵⁶ According to the Authors, Jackson’s concern is inconsistent with the remedy he proposes because if future courts are inclined to abuse judicial decisions in that way, then they “may also claim that the decision to issue no decision is itself a precedent, one that requires inaction by

⁵⁴ See Hart, *The Concept of Law* at 132–37 (cited in note 15) (criticizing the realist understanding of law as a prediction of what courts do as incoherent); Larry Alexander, *Constrained by Precedent*, 63 S Cal L Rev 1, 34–48 (1989) (criticizing a theory of precedent according to which only the result, and not the reasoning, of a court’s decision is binding on the ground that such a theory does not constitute a truly precedential practice at all).

⁵⁵ Indeed, they seem to acknowledge the conceptual difference legal formalities might make in the context of international law when they describe the consequence of the commission’s ratification of the Kosovo intervention as “illegal but legitimate,” as a “moral if not legal precedent.” Posner and Vermeule, 80 U Chi L Rev at 1785 (cited in note 2).

⁵⁶ *Id.* at 1770, citing *Korematsu*, 323 US at 246 (Jackson dissenting).

subsequent courts.”⁵⁷ That is, they may use it as a justification for not intervening at all when the executive takes arguably unconstitutional actions to resolve a national emergency.

The Authors are right that if some president or judge tries to make a decision while denying the precedential force of her decision her effort risks being self-defeating. The reason is that the conventions of our legal system are such that, no matter what a president or judge may try to say with words, her actions alone may have legal consequences beyond her control.⁵⁸

But the Authors are wrong to insist that such an effort necessarily entails making “inconsistent” assumptions about why officials act. The official who makes the Responsible Illegality argument need not assume that future officials will necessarily *abuse* the law. Since, as the Authors emphasize, official actions can in themselves create valid law (irrespective of what words are given in justifying those actions), those future actors, in relying on the past decision as *precedent*, may well be applying that precedent in good faith. Hence, unlike the argument for Madisonian Judging, the Responsible Illegality argument does not even depend on a *prima facie* inconsistency of assumptions about whether officials act out of genuine concern for the law or instead out of self-interest. Nor does it attempt a “conceptual impossibility.”⁵⁹ All it assumes is that what the official *says* about her own action might make a practical difference as to how future actors treat that action as a matter of precedent.

The Authors may well deny the plausibility of such an assumption. Judges respond to actions, they may insist, not mere words. But once again, that is an empirical claim about the motivational force (for judges) of legal language for which the

⁵⁷ Posner and Vermeule, 80 U Chi L Rev at 1771 (cited in note 2) (emphasis omitted). Note that the Authors’ characterization of Justice Jackson’s view as one that encouraged the Court to “decide nothing” is not quite fair. Justice Jackson said he would have discharged *Korematsu* from custody. *Korematsu*, 323 US at 248. Still, insofar as Jackson acknowledged that the Court could not—and therefore should not try to—prevent the military from executing the order, his opinion can plausibly be interpreted as a kind of decision not to decide.

⁵⁸ For the same reason, her effort to use words to ensure that her actions *do* have legal consequences may also fail. See *United States v Rubin*, 609 F2d 51, 69 n 2 (2d Cir 1979) (Friendly concurring) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”). In recognition of Judge Friendly’s point, the judge for whom I clerked usually insisted that the phrase “we hold” stay out of his opinions, explaining that it was for later courts to discern the holding of the court’s decisions.

⁵⁹ Posner and Vermeule, 80 U Chi L Rev at 1769 (cited in note 2).

Authors offer inadequate support. True, they point to a few appellate courts who have applied the equal protection analysis of *Bush v Gore* in other cases notwithstanding that Court's effort to limit the reach of its holding, which they offer as evidence that "the limiting language of *Bush v Gore* failed to have its intended effect."⁶⁰ But how do we know that is so? Perhaps, if the Court had *not* included the relevant language, many more courts than the handful the Authors cite would have applied the equal protection analysis. And if so, then the Justices in the *Bush v Gore* majority would probably be pleased that they included such language.

In any case, regardless of whether an official's effort to guide future officials' behavior is futile or not, the point is that the dispute has once again devolved into the substantive one over what actually motivates judges to act, and that is a matter on which the Authors insist their argument does not depend.

IV. THE NOBLE LIE ARGUMENT

The Authors discuss a third kind of argument, which they call the "noble lie" argument.⁶¹ This term describes the strategy of defending some practice or decision on grounds that, if revealed publicly, would no longer be effective. An example is Professor Sam Issacharoff and Professor Richard Pildes's analysis of executive power.⁶² According to Issacharoff and Pildes, the Court is far more deferential to the president's efforts to solve national emergencies when the president acts with congressional authorization.⁶³ In other work, the Authors have argued that congressional authorization actually plays little causal role in the Court's decision making and that the Court can easily find congressional "authorization" in some statute whenever it approves of the executive action at issue.⁶⁴ In response, Issacharoff and Pildes argue that even if such congressional authorization is a "fiction," it may nonetheless be a healthy one because it at least

⁶⁰ Id at 1782.

⁶¹ Id at 1773.

⁶² See generally Samuel Issacharoff and Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 *Theoretical Inquiries L* 1 (2004).

⁶³ Id at 25.

⁶⁴ Posner and Vermeule, 80 *U Chi L Rev* at 1772–73 (cited in note 2), citing Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 48–49 (Oxford 2007).

reinforces the idea that Congress has an important role to play in such crises.⁶⁵

Bush v Gore offers another example. According to one interpretation of that case, by limiting its analysis to the particular circumstances in the case, the Court was effectively admitting that it was acting extrajudicially in order to avert a constitutional crisis. It could not do so more explicitly because “people would accept the Court’s resolution of the crisis only if they believed the equal protection rationale.”⁶⁶ As in the executive-power example, the rationale offered is not only different from the one publicly given but is one that, if stated publicly, would undermine the true rationale.

The Authors make two sorts of criticisms of the Noble Lie argument. The first criticism is that if a judge were to make the argument, it would fall victim to the inside/outside fallacy because it is self-defeating in a manner similar to the arguments discussed in earlier Parts. The second criticism is that Noble Lie arguments are normatively problematic because they are in tension with democratic norms of public justification.⁶⁷ Let’s consider each in turn.

The Authors first claim that the Noble Lie argument is “not one that can be offered from *within* the system,” because it would be “pragmatically incoherent, even self-defeating,” for judges to offer as a rationale for a decision that it maintains a beneficial illusion since, once offered, the illusion would be gone.⁶⁸

The first thing to observe is that such an argument—or one pretty close to it—*has* been made “from within the system.” In *Planned Parenthood of Southeastern Pennsylvania v Casey*,⁶⁹ the Supreme Court justified its decision to treat the “central holding” of *Roe v Wade*⁷⁰ as binding precedent in part on the ground that it was necessary, at least when resolving national controversies, to maintain the impression that the Court acts on a principled basis, rather than as a result of political pressure.⁷¹

⁶⁵ Issacharoff and Pildes, 5 *Theoretical Inquiries* L at 40 (cited in note 62).

⁶⁶ Posner and Vermeule, 80 *U Chi L Rev* at 1794 (cited in note 2).

⁶⁷ *Id.* at 1773.

⁶⁸ *Id.*

⁶⁹ 505 US 833 (1992).

⁷⁰ 410 US 113 (1973).

⁷¹ *Casey*, 505 US at 865–66:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in prin-

The reason, the Court explained, was that the Court's legitimacy depends on such principled decision making, so it is important that it maintain the appearance that it does in fact decide cases on a principled basis.⁷²

Now pointing to *Casey* is hardly sufficient to defeat the Authors' criticism. After all, the joint opinion in *Casey* is somewhat unusual and was criticized by the dissent on grounds similar to those suggested by the Authors.⁷³ Furthermore, the Authors may be right that Noble Lie arguments undermine themselves over time and cannot be sustained in the long run.⁷⁴ But then again, they may not be right. Despite literally centuries of criticism of the practice, for instance, courts not only routinely continue to use legal fictions of one variety or another to decide cases, but do so in frank recognition of their fictional status.⁷⁵ And there is a strong current of "prudentialist" legal thought that encourages courts to use formal doctrines and procedures to avoid having to decide cases that would press the limits of their power—an unabashedly "political" consideration.⁷⁶ In short, *Casey* serves as a reminder that what kinds of arguments can and cannot be made from "inside" the legal system is constantly an open and contested question.⁷⁷

Consider another example. In his dissent from the Court's decision in *Seminole Tribe of Florida v Florida*,⁷⁸ Justice Souter cited the work of historians in arguing that the main precedent

principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.

⁷² *Id.* at 866.

⁷³ *Id.* at 998 (Scalia dissenting) (arguing that the joint opinion's concern with the appearance of remaining principled is "not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*—and a wrong one at that.>").

⁷⁴ Posner and Vermeule, 80 *U Chi L Rev* at 1794 n 136 (cited in note 2).

⁷⁵ See, for example, Jeremy Bentham, *A Fragment on Government* in John Bowring, ed., 1 *The Works of Jeremy Bentham* 221, 235 (William Tait 1843) ("[T]he pestilential breath of Fiction poisons the sense of every instrument it comes near."); *Severnoe Securities Corporation v London & Lancashire Insurance Co*, 255 NY 120, 123 (1931) ("The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them.") (Cardozo).

⁷⁶ See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–29 (Bobbs-Merrill 1962) (suggesting that the Court display the "passive virtues" of knowing when not to get involved in politically heated disputes).

⁷⁷ See Deborah Hellman, *The Importance of Appearing Principled*, 37 *Ariz L Rev* 1107, 1125–27 (1995) (offering an explicitly "internal" justification for the Supreme Court's concern with reputation for being principled on the ground that doing so may be necessary to ensure that it can enforce its judgments generally and thus legitimately).

⁷⁸ 517 US 44 (1996).

on which the majority relied, *Hans v Louisiana*,⁷⁹ was a decision whose interpretation of the Eleventh Amendment was best explained as the result of the considerable political and institutional pressures placed on the Court at the time *Hans* was decided.⁸⁰ In so arguing, Justice Souter seemed to commit the inside/outside fallacy in a paradigmatically self-defeating way. He simultaneously claimed that one of the Court's decisions resulted from political pressure while also putting forth his own position as one faithful to the relevant law.⁸¹ Indeed, the majority took him to task for offering what it labeled an "extralegal" ("outside"?) explanation of one of the Court's own decisions.⁸²

But Souter was neither the first person nor the last to make such an "external" argument in a judicial opinion or brief.⁸³ Nor is the argument internally inconsistent. One need only assume that judges generally are motivated by "internal" legal norms but that occasionally they are not—perhaps because the political pressures become too great. In fact, as I have argued elsewhere, if one makes that assumption, along with some other traditional ones about the nature and function of stare decisis, then there may be good reasons for a lawyer or court to impeach a past decision in the way Souter did.⁸⁴ And if a sufficient number of lawyers and judges agree, then what was once a paradigmatically "external" explanatory account may become a perfectly valid form of legal argument from the "internal" perspective.

The same is true of the Noble Lie argument. Whether it is an argument that can be made from the inside is, depending on one's view of the matter, either a sociological question about which interpretive norms American legal culture will tolerate or a normative question about which ones they *should* tolerate.⁸⁵ In

⁷⁹ 134 US 1 (1890).

⁸⁰ *Id.* at 121–23 & nn 16–17 (Souter dissenting).

⁸¹ *Id.* at 102–17 (Souter dissenting).

⁸² *Id.* at 68–69.

⁸³ See generally, for example, Charles Barzun, *Impeaching Precedent*, 80 U Chi L Rev 1625 (2013).

⁸⁴ *Id.* at 1655–66.

⁸⁵ The issue of whether disagreements about the determinants of legal validity are better understood as descriptive or normative disagreements arguably lies at the heart of the so-called Hart-Dworkin debate. Compare Hart, *The Concept of Law* at 107 (cited in note 15) (explaining that the statement that a particular rule of recognition exists in a legal system "can only be an external statement of fact"), with Ronald Dworkin, *Law's Empire* 112 (Belknap 1986) (explaining that any theory about which legal propositions count as true or sound in a legal system "unless it is a deeply skeptical conception [] must be understood as saying what judges should do in principle, unless circumstances are special" and is in that sense "political").

neither case, however, is it a question of conceptual (or “pragmatic”) coherence.

Perhaps because the Authors recognize that the Noble Lie argument does not exactly contain a “fallacy” in the sense they have used that term, they make a second, different criticism of it. They suggest that the inside/outside fallacy latent in the Noble Lie argument may be understood “not so much as a logical conundrum as an illustration of the constraints of public reason.”⁸⁶ That is because its use violates a democratic norm that demands public justification for official coercion. So whether or not such arguments *can* be made from within the system, they *ought* not to be made, because they involve a kind of deceptive “subterfuge.”⁸⁷

This is an argument with which I have considerable sympathy. But notice what kind of argument it is. It is a *normative* claim about how institutional actors should better conform to the ideals of the practice (or “system”) to which they belong. In other words, it seems to be one made from an “internal” perspective. And that seems inconsistent with the Authors’ closing recommendation that the “most coherent and intellectually satisfying response to the inside/outside fallacy is to cut back on the ambitions of the analyst” and offer only advice that advances institutional actors’ own self-interest—a suggestion that implicitly adopts the “external” perspective of the political scientist.⁸⁸ Have the Authors themselves not committed the inside/outside fallacy?

The Authors might respond that, to the contrary, their normative claim is a wholly external argument in two of the senses in which they have used that term: it is made from the perspective of the political scientist who is concerned with understanding and designing (from the outside) a well-functioning democratic system; and it is directed not to institutional actors “inside the system” (whose behavior is assumed to be motivated by self-interest) but rather to other scholars who are (like the Authors) “outside” the system and thus in the position to analyze the system.

But why assume that academics are “outside the system”? After all, they, too, work in institutions in which it would be just as plausible to assume that the relevant actors behave so as to maximize the satisfaction of their preferences, whether that is

⁸⁶ Posner and Vermeule, 80 U Chi L Rev at 1794 (cited in note 2).

⁸⁷ Id at 1773.

⁸⁸ Id at 1794.

the esteem of their colleagues, their public influence, or the size of their salary.⁸⁹ And law professors, in particular, often play active roles “inside” the same political system that is the focus of the Authors’ analysis—a fact they explicitly recognize.⁹⁰ So if the Authors were to practice what they preach, it seems they would have to limit themselves to showing why making arguments consistent with democracy or public reason would facilitate those scholars’ efforts to pursue their own self-interest. Either that or they need to explain why scholars have different motivations than other actors. In fact, the problem is broader still: if one were truly rigorous about adopting an “external” perspective, then there would be little reason to think that the audience for the Authors’ critique would take *any* of their methodological advice unless doing so advances their self-interest.

* * *

Finally, then, we get to what is perhaps most problematic about the Authors’ characterization of these methodological issues as a tension between “internal” and “external” perspectives. It fools us into thinking that we can debate purely methodological questions about how to study law or legal institutions without getting embroiled in the underlying, substantive jurisprudential or empirical debates themselves.⁹¹ In reality, insofar as legal scholars, in their writing and teaching, contribute (even if in small ways) to the development of those same legal norms that they analyze and comment on, they are never able to truly step “outside the system” at all.⁹² Under this view, what divides

⁸⁹ See O’Flaherty and Bhagwati, 9 *Econ & Polit* at 213 (cited in note 10). (“For a social scientist who had constructed a very good model of the Columbia economics department, our actions would be completely endogenous.”).

⁹⁰ Posner and Vermeule, 80 *U Chi L Rev* at 1745 n 2 (cited in note 2) (observing that “[l]aw professors may of course play either the role of the analyst, as when they attempt to explain judicial behavior, or the role of an actor within the system, as when they argue cases or write briefs as *amici curiae*”). For a thoughtful discussion of the ethical issues that law professors sometimes confront when they participate directly in the legal system, see generally Richard H. Fallon Jr., *Scholars’ Briefs and the Vocation of a Law Professor*, 4 *J Legal Analysis* 223 (2012).

⁹¹ A similar point has been repeatedly made in the context of the conceptual analysis of law. See, for example, Ronald Dworkin, *Justice in Robes* 140–86 (Belknap 2006); Gerald J. Postema, *Bentham and the Common Law Tradition* 328–35 (Clarendon 1986); Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in Andrei Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy* 97, 123 (Clarendon 1995); Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 *Am J Juris* 139, 153–57 (2007).

⁹² This is not to say that the problem is necessarily limited to legal theory. A similar one may infect attempts to make claims “about” the nature of morality while denying

legal scholars is not so much the “perspective” they adopt but rather their relative willingness to hold onto a set of expectations for lawyers, politicians, judges, or legal scholars like themselves, even in the face of evidence that those expectations frequently and repeatedly go unmet.

The problem the Authors identify may thus be deeper than they let on. They have done a real service in pointing to a deep and fundamental tension that is latent in legal scholarship today, insofar as legal scholars seek to both (1) draw on social-science methods that assume human behavior can be fully explained as a product of the pursuit of self-interest, and (2) try to shape that same behavior through rational argument and persuasion. But if what scholars write and teach can itself affect the behavior under examination (an admittedly substantive claim—and a speculative one at that), then the problem cannot be solved by simply encouraging scholars to distinguish clearly between their normative and explanatory roles, so that they do not “end up attempting to wear two hats at the same time.”⁹³ Instead, the true lesson of the Authors’ critique may be what a law professor from a few generations ago said was the only “gospel” he sought to impress upon his students in his Jurisprudence class, namely that “there is no gospel that will save us from the pain of deciding at every step.”⁹⁴

that one is taking a substantive moral position. See Ronald Dworkin, *Objectivity and Truth: You Better Believe It*, 25 *Phil & Pub Aff* 87, 88 (1996) (criticizing theories that “purport to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it”). Dworkin’s position, however, is controversial, and I do not mean to suggest that my more limited point about the role that legal scholarship plays in constituting legal norms depends on it.

⁹³ Posner and Vermeule, 80 *U Chi L Rev* at 1797 (cited in note 2).

⁹⁴ Lon L. Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 *J Legal Educ* 495, 507 (1949).