

DEMOCRACY'S DISTRUST

Contested Values and the Decline of Expertise

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Professor Dan Kahan's rich Foreword gets some things exactly right. As he documents, there is pervasive mistrust of the Supreme Court's impartiality or neutrality. And, as he also suggests, most contemporary scholarship is incorrect in its identification of the source of that mistrust. If he persuades readers that we need a new explanation for the neutrality crisis, and new suggestions for combating it, he will have done constitutional scholarship a great service. I also agree with many of his suggestions for going forward. Like Kahan, I believe that hiding behind grand theories of constitutional interpretation does not constitute neutrality.¹ And I wholeheartedly agree that we would be better off with more judicial humility. As Judge Learned Hand said many years ago, "the spirit of liberty is the spirit which is not too sure that it is right."²

Nevertheless, Kahan's own explanation of the source of the problem — that psychological mechanisms keep people from dispassionately achieving their shared goals — is ultimately unsatisfying. He suggests that motivated reasoning and an identity-driven desire for government affirmation of their own worldview lead people to doubt the Court's reliance on such seemingly objective evidence as empirical facts and expert testimony. For this reason, Kahan argues, judicial opinions should rely less on traditional methods and sources, and instead use communication techniques that affirm culturally diverse values. Unfortunately, Kahan mistakes the causes of popular dissatisfaction with the Court, an error that leads him both to understate the problem and to place responsibility for a remedy on the wrong parties.

I make three related arguments in this Essay. First, Kahan is mistaken when he suggests that disagreement about Supreme Court decisions stems from disagreement about facts rather than about values. Second, the source of the problem is significantly broader than Kahan recognizes: Americans increasingly reject not just Supreme Court reli-

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¹ See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY* (2002).

² LEARNED HAND, *The Spirit of Liberty* (1944), in *THE SPIRIT OF LIBERTY* 189, 190 (Irving Dilliard ed., 3d ed. 1960).

ance on objective facts or expert evidence but the very idea of expertise. Finally, popular dissatisfaction with the Court's decisions is fostered and exacerbated by academic insistence that Justices are not legal experts but are simply policymakers hiding behind a mask of judicial neutrality.

Kahan goes astray at the very beginning, with his basic assumptions about consensus and dissensus. He suggests that citizens with diverse cultural values "actually agree about policy ends" but "disagree about . . . empirical facts"³ and that "Americans are indeed fighting a 'culture war,' but one over *facts*, not values."⁴ And what are these values and policy ends on which most Americans agree? Why, they are the ones that all right-thinking (and left-leaning) academics endorse: a "genuinely liberal civic and political culture" in which "there is effective consensus that the state should refrain from imposing a moral orthodoxy."⁵ The "great mass of citizens" — except for "those few who have not renounced zealotry" — "harbor no particular ambition to impose their cultural values on others."⁶

Tell that to those who believe that abortion is murder, or that homosexuality is a sin that undermines heterosexual marriage, or — a belief shared by two-thirds of Americans⁷ — that the United States is a Christian nation. Do these citizens want to impose their values on others? Of course they do: they believe that what their opponents believe, say, and do is *immoral*. The dispute between these citizens and the ones who support abortion, gay rights, and religious diversity or religious neutrality is about values, not about facts. And the same can be said of moral advocates on the left: those who oppose the death penalty as murder or support affirmative action as necessary justice are equally eager to impose those values on the nation. If this is zealotry, most Americans have not renounced it.

And these controversial topics are only the most obvious examples of differing cultural values. The vast majority of the Supreme Court cases that cause a public uproar are about values. Whether a corporate right of free speech should exist at all — much less whether allowing corporate speech in the form of campaign contributions outweighs any detrimental effect on elections⁸ — turns primarily on one's view of

³ Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011).

⁴ *Id.* at 24.

⁵ *Id.* at 24–25.

⁶ *Id.* at 28.

⁷ THE PEW FORUM ON RELIGION AND PUB. LIFE & THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS 5 (2006), available at <http://pewforum.org/Politics-and-Elections/Many-Americans-Uneasy-with-Mix-of-Religion-and-Politics.aspx>.

⁸ See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

the appropriate role of corporations in our polity, and depends only tangentially on the actual effect of corporate contributions. Whether the government should be allowed to take land for urban renewal purposes⁹ depends on how we value personal property rights and community development, and whether we trust local government to get things right. One's view of affirmative action¹⁰ does not depend solely on whether one believes that the effects of Jim Crow still linger but also on whether it is fair or just to spread the burdens of segregation to other citizens (some but not all of whom might be descendants of its perpetrators).

Even cases that seem to be about facts are often merely vehicles by which competing factions try to enact and protect as many of their policy preferences as the legal doctrines allow. The public dispute about prohibiting the intact dilation and evacuation abortion procedure¹¹ is less about whether it is safe or necessary and more about prohibiting or allowing as many abortions as possible. Similarly, most people's view of whether juveniles should be subject to the death penalty¹² turns not on adolescent brain chemistry but on the morality of capital punishment: there are probably few, if any, Americans who support the death penalty in general but oppose it for those who commit heinous homicides a few weeks short of their eighteenth birthdays.

Finally, in some controversial cases the facts that actually drive the decision are not the ones in dispute in the case, but are instead unstated foundational facts about the world in general. Examples include the ratio of frivolous to meritorious cases (which might influence a judge's determination of the appropriate standard for dismissing a case) or the prevalence of intentional discrimination in our society (which might influence the burden of proof in discrimination cases).¹³ If the cause of the neutrality crisis is, as Kahan argues, that explicit judicial reliance on empirical facts is perceived through the distorting lens of motivated cognition, these cases in which the most important facts are not even discussed seem to be outside that explanation.

Kahan's starting premise — that Americans are not divided about cultural values — thus does not ring true, at least with respect to many of the cases that reach the Supreme Court. Because he starts from the wrong place, his solution neglects the enduring role that contested values play in our constitutional democracy. Motivated cogni-

⁹ See *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁰ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹¹ See *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹² See *Roper v. Simmons*, 543 U.S. 551 (2005).

¹³ For elaboration, see Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145.

tion is an interesting new tool of analysis, but it does not change the underlying cultural differences.

Kahan's focus on motivated cognition also blinds him to a more serious and broad-reaching cause of popular resistance to the Court's reliance on empirical facts or expert testimony, a cause that judges can do little to overcome.

Kahan argues that the psychological mechanisms he describes as interfering with judgment are exacerbated by reasoned and apparently neutral arguments, such as those traditionally associated with good judicial craftsmanship. Empirical facts and expert or scientific evidence fall into that category. People are therefore suspicious when the Court portrays its decisions as resting on such facts or evidence.

But the main culprit in encouraging resistance to expert knowledge is not motivated cognition. It is the democratization of the creation and authoritativeness of knowledge. Everyone is now an expert — from the user-created content of Wikipedia to self-diagnosis of medical conditions to a website that provides do-it-yourself legal documents,¹⁴ we have created a society that finds experts unnecessary and even faintly suspect. Despite Kahan's protest to the contrary,¹⁵ science is in disrepute: More people believe in angels than in evolution, and belief in evolution only narrowly surpasses belief in UFOs.¹⁶ Elected officials and candidates publicly deny the validity of facts on which there is scientific consensus. Educators are not trusted to educate: growing numbers of people homeschool their children or demand inclusion of their favorite theories in the school curriculum regardless of the soundness of those theories. (And it does not help the reputation of expertise that so-called experts in the financial arena have completely discredited themselves.) An educated citizenry and wide dissemination of knowledge is beneficial, even necessary, in a democracy, but resting the validity or authoritativeness of knowledge on its popular acceptance rather than on its acceptance by experts in the relevant field does not serve that goal.

This deprecation of expertise is reminiscent of — and may be partially derived from — the now outdated academic fascination with postmodern social constructionism. The linkage between academic postmodernism and popular rejection of expertise is indirect and not subject to proof, but I would suggest that to the extent that academic currents are “in the air” — almost literally, on the airwaves and in the ether — they exert a subtle influence on the worldviews of the Ameri-

¹⁴ See LEGALZOOM.COM, <http://www.legalzoom.com/index1m.html> (last visited Nov. 3, 2011).

¹⁵ Kahan, *supra* note 3, at 75.

¹⁶ See Harris Poll, *What People Do and Do Not Believe In* (Dec. 15, 2009), available at http://www.harrisinteractive.com/vault/Harris_Poll_2009_12_15.pdf.

can public at large. One influential academic takes an idea that is popular in academic circles and puts it into an op-ed piece, and some pundit picks it up and spreads it on a blog or a radio talk-show, and pretty soon everyone believes it even if they have no idea where it came from. Social constructionism may be just such a pervasive idea. Some two or three decades ago, academics across disciplines, including law, rejected the possibility of objective knowledge. They argued instead that knowledge and reality were socially constructed by those in power.¹⁷ Segments of the American public seem to have domesticated this postmodern skepticism by combining it with democratic anti-elitism, ultimately trusting only knowledge that is created by democratic means.¹⁸

The Supreme Court's neutrality crisis is a manifestation of this same rejection of expertise. But the mistrust is even broader than Kahan recognizes, not only because it stems from a generalized rejection of experts, but also because many people no longer see judges as possessing *legal* expertise. And for that we should blame not the Justices but the politicians, pundits, and legal academics who have for years been denigrating the concept of legal expertise.

Even on "pure" questions of law, judges are not seen as neutral experts. The reason for doubting judges is not, as Kahan suggests, that no judge *can ever* decide cases impartially because neutrality itself is a chimera. I am not persuaded that such epistemic "neutrality skepticism" is widespread among contemporary legal academics, much less among politicians and the public at large. Today one does not see many arguments in either the law reviews or the op-ed pages denying that judicial neutrality is possible.

Instead, we see a narrower form of skepticism: that whether or not judges *can* be neutral, in fact they *do not* decide cases impartially. According to scholars taking this approach, a judge's political and policy preferences determine his or her votes in individual cases. Constitutional adjudication is just politics by another name, and judges are merely legislators in black robes. We might label this view "practical neutrality skepticism" to distinguish it from the epistemic skepticism that Kahan describes. It originated, in a much more sophisticated and nuanced form, with the Legal Realists, who believed that judges were

¹⁷ For an elaboration and critique of this movement in law, see generally DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* (1997).

¹⁸ For elaboration, see Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053 (2007). This democratic anti-elitism is the most recent form of the longstanding American anti-intellectualism. See generally RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1963); SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON* (2008).

inevitably influenced by many things including their worldview.¹⁹ The “attitudinalist” movement in political science flattened and coarsened the idea into two binary oppositions — one between law and politics and another between liberals and conservatives — and used statistical analyses to claim politics as almost the sole predictor of legal outcomes.²⁰ It is this cruder practical skepticism that has recently gained currency among legal academics as well as the general public. Critics on the left and the right lambaste judges for legislating from the bench; a shared understanding of adjudication as political motivates both the politicians who block judicial nominations and the academic popular constitutionalists who call for taking the Constitution away from the courts.

Unlike epistemic skepticism, practical skepticism does undermine trust in the judiciary and thus contributes to the neutrality crisis. Advocates of practical skepticism stoke the fires of mistrust in the same way that Justice Scalia did in his *Plata* dissent²¹: by explicitly accusing the Justices of twisting the law to serve their own biased political goals. If even legal academics now regularly conflate law and politics, it is unsurprising that the same cynicism has spread to the general public. And the connection is even more direct than the connection between postmodernism and popular beliefs, because many legal academics who criticize the Court deliberately write for a larger audience, seeking out venues other than the law reviews.

If we are looking to place blame for the crisis, then, it should be on those who substitute crass political accusations for real legal analysis. While, as Kahan notes, some Justices occasionally make such accusations, they are not the primary culprits.

As Kahan recognizes, “mediating institutions” play a critical role in “bridging the work of the Court and public consciousness of it,” because “[m]ost citizens don’t read Supreme Court opinions.”²² Legal academics — as teachers of future leaders and as knowledgeable public commentators — constitute one such important mediating institution. The mainstream media often ask legal academics to clarify and explain constitutional decisions, and many academics also contribute to blogs read by journalists and the general public. To the extent that the professoriate labels opinions we disagree with as “activist” or “po-

¹⁹ Jerome Frank was perhaps the most radical advocate of the idea that judges were subject to political influence, and even he recognized many other influences. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930) (republished in many subsequent editions).

²⁰ The seminal work is JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

²¹ *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting). Kahan makes this point about Scalia’s dissent. See Kahan, *supra* note 3, at 3, 32–33, 37–38.

²² Kahan, *supra* note 3, at 29.

litical” rather than explaining why they are wrong on the merits, we foster exactly the futility and cynicism that Kahan laments. And unlike politicians and pundits, who commit the same sins, we should know better. In short, Kahan thinks that Justices should rely less on traditional reason-giving; I think that academics should rely on it more. When queried by journalists, or when writing for a mass audience, we should criticize (or praise) cases on their merits rather than blithely attribute the outcomes to the judges’ politics. Legal academics who blame politics for judicial rulings have abdicated their obligation to take law seriously.

Kahan relies too heavily on psychological mechanisms and thus fails to see the more banal effects of various forms of academic and political punditry. As a result, he expects the solution to come from the Justices themselves. But Kahan’s own examples confound his expectation: the cases to which Kahan points as examples of his favored approaches of “aporia” and “affirmation” — *Kennedy v. Louisiana*²³ and *District of Columbia v. Heller*²⁴ — were not significantly less divisive than any others on controversial topics. That should not be surprising. While I applaud Kahan’s effort in encouraging the Justices to exhibit less certitude and to recognize more complexity, the Justices cannot regain trust by relinquishing certitude but only by reclaiming expertise. And their expertise will be suspect in cases involving contested values as long as we (and occasionally they) continue the drumbeat against purportedly activist, political, and illegitimate judicial lawmaking. The fault lies not in our cognition but in our accusations.

²³ 128 S. Ct. 2641 (2008) (invalidating death penalty for rape of a child).

²⁴ 128 S. Ct. 2783 (2008) (invalidating ban on handgun possession).