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### December 4, 2016: The Supreme Court and Politics

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Title: The Supreme Court and Politics

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"On April 8, 2017, the Pepperdine Law Review will hold its annual symposium on the question of whether the political deadlock over the Merrick Garland nomination provides a stark indication the U.S. Supreme Court has become an unduly political institution, and, if so, what internal and external reforms might address this problem. We invite all interested scholars to submit a relevant proposal to present at the symposium and be considered for publication in a special edition of our law review."

I submitted a proposal for this program, which was selected. So, I will be presenting on April 8, with a paper to be published in the Pepperdine Law Review. Below is the proposal--the reader will see that I reject some of the terms of the issue, as presented by the announcement.

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### Ideological Domination in an Age of Nihilism

To ask whether the U.S. Supreme Court has become "unduly political" is to confuse the partisan with the ideological. In *Bush v. Gore*, all of the Justices voted in a politically partisan manner, jettisoning established legal commitments to promote the goals of the political Parties. Such partisanship is reprehensible, but as *Hamdi v. Rumsfeld* illustrates, thankfully rare.

The refusal of the Republican leadership in the Senate to schedule a nomination vote for Merrick Garland does not reflect a fear of such partisanship from Judge Garland. Instead, this paralysis reflects a realistic appreciation of the ideological cohesion currently present in the highest stratum of American law. It is utterly predictable that any nominee from a Democratic President today will share a laundry list of fully formed commitments—defending *Roe v. Wade* and *Obergefeld v. Hodges* while overturning *Citizens United v. FEC*, for example—just as any nominee from a Republican President will manifest a commitment to textualism and originalism that yields the opposite case outcomes. Since the same ideological commitments control the political Parties, it is reasonable for Republicans to hold out to see whether their side might prevail in the coming Presidential election.

Sanctimonious talk about the rule of law, or the qualifications of a judicial nominee, only hide these political and legal realities. Our situation is not a government of men rather than of law. It is a government of ruling ideologies. The resulting deadlock and political decline is clearly harmful, but a solution is hard to imagine. There are no "specific reform measures."

Certainly no solution can be expected from law professors. Law schools are the engines of this ideological cohesion. Legal commitments touching on political issues are completely predictable there. Legal arguments by law professors are usually fabrications in support of an edifice of ideology.

There is one fundamental commitment that unites law professors and judges. It is that normative commitments are the product of subjectivity—human will. Conservative jurisprudence adapts to this insight by attempting to impose arbitrary rules of interpretation to restrict judicial discretion. Liberal jurisprudence, which is much less developed, tends to adapt by substituting process and equality concerns for normative argument. Everyone agrees that judgment is a

mask for power.

Could this context change? The reason that science largely avoids ideological hardening, despite tendencies in that direction, is that science has a subject matter of study. Despite academic calls for empirical research, the legal profession lacks similar understanding of the subject matter of law. Even worse, our ideological straightjacket blocks appreciation that the lack of a subject matter is the problem and prevents any movement toward its resolution.

There was an earlier tradition in law, represented by figures such as Charles Black and Justice John Harlan, which assumed that something akin to Truth could be sought in law, as it could be sought elsewhere. This normative tradition has now collapsed and cannot simply be reinstated. To that extent, Nietzsche is right.

But this is not the last word. There are new starting points, represented by thinkers such as Bernard Lonergan and Martin Heidegger, promising other ways of investigating human flourishing. Even to begin down that path, however, law professors would have to be willing to learn something new.