

## Artificial Intelligence, Legal Change, and Separation of Powers

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Some contemporary legal academic literature has been arguing, in various forms, that replacing human made law with artificial intelligence will or should happen. This essay disagrees, and examines a number of concerns that are not adequately addressed in the literature. In short, proposals to automate law both underappreciate and undervalue the human aspects of law.

First, this essay will discuss the proper role of courts in legal change, that is, in developing the law and adapting it to a constantly changing society. In our current system, courts do more than simply apply the law, they also in a real sense make law, though they do so in a slower and more measured way than legislatures. That is, they make law as though they were finding it. They must balance respect for precedent and stability against the need for law to adapt through adjudication. How would this work in a system of automated law? Can robots really successfully balance the values of stability and change in the way that judges do?

Second, by claiming that machine decisions would be more consistently “accurate” the argument for robot judges seems inherently formalistic and seems to overlook the teachings of legal realism, specifically the point that not every case has a legally best or right answer. Judges sometimes must choose between incommensurable values. Consistency may be overvalued, as the differences of opinion that arise between judges may help flesh out debates about what is the best law or policy. Once it is fully acknowledged that at least part of judging involves making policy and value judgments, the argument for turning such decisions over to machines becomes a more difficult one to make.

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Third, the literature arguing for artificially intelligent law seems astonishingly shortsighted, overlooking certain possible long term effects. Without human judges, we could eventually lose the community of legal experts paying attention to the law. That is, we will have replaced legal thought with artificial legal thought. This will likely hinder our ability to adjust the law to changing societal circumstances. It would also make society as a whole less aware of the law, simply obeying the authority of the black box law machines. Without a community of people paying attention to and thinking about the law, the law could become more susceptible to being co-opted.

Fourth, this essay will look at the effects of automated law on separation of powers. Would automated courts be able to provide a sufficient check on the other two branches as they are supposed to in our system of separation of powers? Would they run afoul of the Article III case or controversy requirement? Although automation may be more appropriate in agency adjudication or in other aspects of the executive branch, I argue that it is inappropriate in the judiciary.

My argument here is primarily against replacing the actual decision-making of the judicial branch with artificial intelligence. I am not opposing using AI as a tool to aid in research or an AI staff attorney.<sup>1</sup> Nor am I opposed to AI in the private sector, say, for medical purposes,<sup>2</sup> or even some AI lawyers to the extent they are effective with human judges.<sup>3</sup> Nor am I even arguing here against the use of AI for decision-making in administrative agencies of the executive branch.<sup>4</sup> Replacing the judicial branch decision-makers, i.e., Article III judges, with artificial intelligence strikes me as particularly problematic, so that is what I focus on here.

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<sup>1</sup> See Eugene Volokh, *Chief Justice Robots*, 68 DUKE L. J. 1135, 1148 (2019).

<sup>2</sup> Cf. Jason Chung and Amanda Zink, *Hey Watson, Can I Sue You for Malpractice? Examining the Liability of Artificial Intelligence in Medicine*, ASIA-PACIFIC J. HLTH L., POL'Y & ETHICS (2017) (available at: <https://ssrn.com/abstract=3076576>)

<sup>3</sup> Though as long as we have human judges as I argue we should, it seems clear that there will be a need for at least some human lawyers.

<sup>4</sup> See Part V, *infra*.

Part I will briefly introduce the arguments that some contemporary scholars make in favor of replacing law with artificial intelligence and offer some preliminary responses and thoughts. Parts II-V will then track the four major responses set forth above. This essay will then briefly conclude by considering some of the potential benefits of artificial judges or artificial law, and some alternative ways in which such benefits could be achieved.

### I – The Arguments for Artificial Law

In his recent essay, *Chief Justice Robots*, Eugene Volokh argues that if AI technology reaches the point where it can “create persuasive opinions, capable of regularly winning opinion-writing competitions against human judges,” then “we should in principle accept it as a judge.”<sup>5</sup> As Volokh recognizes, this is a “thought experiment,” as AI technology is currently far from this point.<sup>6</sup> Nevertheless, such a thought experiment can provoke important discussions about the proper role of humans versus artificial intelligence in our law. Thus, although I disagree with Volokh’s main conclusions, I am grateful for his posing the thought experiment.

Volokh’s argument that we should replace judges with robots is contingent on the robots passing what he calls the “Modified John Henry Test,” an opinion writing competition wherein “a computer program is arrayed against, say, ten average performers” in the given field, and if “the computer performs at least as well as the average performer,” then it passes the test and is an “adequate substitute for humans.”<sup>7</sup> Whether the program passes the test is determined by “a panel of, say, ten human judges who are known to be experts in the subject,” who must “evaluate everyone’s performance without knowing which participant is a computer and

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<sup>5</sup> Volokh, *supra*, 68 DUKE L. J. at 1135 (aside from creating persuasive opinions, a second condition is that the software must “be adequately protected against hacking and similar attacks”).

<sup>6</sup> *Id.* at 1137.

<sup>7</sup> *Id.* at 1138-39.

which is a human.”<sup>8</sup> This panel of experts will be herein referred to as the “evaluators,” as in Volokh’s essay. One obvious question is how do we choose these evaluators, and why should we be more confident in our choice of a panel of evaluators than we are in our choice of judges?

According to Volokh, “prospective AI Supreme Court Justices should be measured against the quality of average candidates for the job – generally experienced, respected appellate judges.”<sup>9</sup> Volokh’s criterion for evaluation is “persuasiveness,” that is, “if the Henry Test evaluator panelists are persuaded by the argument for” the AI judge’s chosen result. If an AI computer program can consistently pass this test, Volokh argues that we should adopt it, because it is “likely to be much cheaper, quicker, and less subject to certain forms of bias,” thus making the legal system “not only more efficient but also fairer and more accessible to poor and middle-class litigants.”<sup>10</sup>

Others have recently made similar arguments. For example, Aziz Huq, in a forthcoming article called “A Right to a Human Decision,” argues that there is no such right, and that instead all we do or should have is “a right to a well-calibrated machine decision.”<sup>11</sup> But who decides whether the machine decision is well-calibrated? And if one wants to argue that the machine decision is not well-calibrated, who exactly would one make such arguments to?

In the same vein, Anthony Casey and Anthony Niblett have predicted that like self-driving cars, “laws, too, will be self-driving,”<sup>12</sup> and that advances in artificial intelligence and communications technology will “be able to identify the rules applicable to an actual situation and inform the regulated actor exactly how to

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<sup>8</sup> *Id.* at 1139.

<sup>9</sup> *Id.* at 1140.

<sup>10</sup> *Id.*

<sup>11</sup> Aziz Z. Huq, *A Right to a Human Decision*, 105 VA. L. REV. \_ (forthcoming 2020).

<sup>12</sup> Anthony J. Casey & Anthony Niblett, *Self-Driving Laws*, 66 U. TORONTO L. J. 429, 442 (2016).

comply” such that “microdirectives will become the dominant form of law[.]”<sup>13</sup> They predict that “opportunities for statutory interpretation and filling the gaps in vague standards will dry up as citizens are simply instructed to *obey simple directives*.”<sup>14</sup> Casey and Niblett have argued more recently that, in order for this automation and personalization of law “to work, lawmakers must know and precisely state the objective of law upfront in a way that has never before been required.”<sup>15</sup> This seems to ignore or devalue the role that the judiciary necessarily plays in shaping the law and adapting it to unforeseen situations.

The idea of these scholars seems to be that once we develop the machines, we can just enter the objectives then stop thinking about or paying attention to the law. This seems to me to show too much faith in the machines. Just as when one is using GPS navigation they do not learn their way around,<sup>16</sup> once we turn law over to machines we as a society may forget how to think about law. Even if the machines are working initially, there is no guarantee that something won’t eventually go wrong. To the contrary, it seems we can be fairly certain that something eventually will go wrong. But if we have lost our ability to “do law” as a society, then we may have lost our ability to adapt when problems arise. There are some other problems

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<sup>13</sup> Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L. J. 1401, 1404 (2017). Casey and Niblett strangely frame their argument as positive rather than normative, even though they seem to celebrate these changes that they predict, and even though there is no reason that these changes must occur. *See id.* at 1405 (“Our analysis is positive rather than normative.”). I have previously criticized this deterministic aspect of their work and so will not rehash the issue here. *See* Andrew C. Michaels, *Abstract Innovation, Virtual Ideas, and Artificial Legal Thought*, 14 MAR. J. BUS. & TECH. L. 1, 25 (2019).

<sup>14</sup> Casey & Niblett, 92 IND. L. J. at 1435 (emphasis added).

<sup>15</sup> Anthony J. Casey & Anthony Niblett, *A Framework for the New Personalization of Law* (September 2018).

<sup>16</sup> *See, e.g.*, Joseph Stromberg, *Is GPS ruining our ability to navigate for ourselves?*, Vox (Sept. 2, 2015, 11:31 AM), available at <https://www.vox.com/2015/9/2/9242049/gps-maps-navigation> (“we have good reason to believe that when we blindly follow GPS for direction, we’re not exercising crucial navigational skills – and many of the scientists who study how the human brain navigates are concerned”).

with reducing the citizenry to a mass of unthinking lemmings simply obeying machines, which will be explored further below.

## II – Legal Change

One problem with the argument that Volokh and others make is that it inadequately accounts for the role of the judiciary in legal change. Volokh does recognize that “[l]aw development – whether common law development, constitutional law development, or interpretive development about statutes – often requires prediction: Would a proposed legal rule do more good or harm?”<sup>17</sup> But in his view, “we humans don’t set the bar very high,” so “AIs don’t need to have perfect clairvoyance or legal statesmanship” to beat us.<sup>18</sup> According to Volokh, “success in the Henry Test will be the best measure of judicial quality,” that is, “[i]f the evaluators are persuaded by the AI judge’s prediction-based arguments more than by the human judges’ arguments, why should we doubt the AI judge’s abilities more than we doubt the human judges’ abilities?”<sup>19</sup>

Volokh’s argument seems to be that if the AI judge can persuade a particular panel of evaluators at a particular point in time that it is better at writing opinions than humans, we should turn over the reigns of legal change to AI. But what is persuasive at one point in time is not necessarily persuasive later on, as the factual realities and moral values of society shift. Also, no matter how many “test cases” the evaluators look at, they will never adequately encompass the full range of possible fact situations that could and will arise. Volokh’s argument does not adequately consider the collaborative and continuous aspects, of legal change, and the benefits to society of the process itself. To explain, a more in depth discussion of the role of judges in legal change is in order.

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<sup>17</sup> Volokh, 68 DUKE L. J. at 1183.

<sup>18</sup> *Id.* at 1184.

<sup>19</sup> *Id.*

Although written almost a century ago, Benjamin Cardozo's *The Growth of Law* has a good deal of relevance to Volokh's thought experiment. Responding to some agitation for a more rigid conception of stare decisis, then Judge (later Justice) Cardozo set forth a persuasive explication and defense of the judicial role in legal development.<sup>20</sup> According to Judge Cardozo, legislation alone is not a sufficient agency of legal growth, because "[u]nique situations can never have their answers ready made as in the complete letter-writing guides or the manuals of the art of conversation."<sup>21</sup> That is, situations that the legislature (or the prior precedent writing court) did not anticipate ex ante will inevitably arise, and it is the job of the courts to gradually adjust the law ex post on a case-by-case basis.<sup>22</sup> As Judge Friendly has explained, it "is impossible for the legislator to foresee everything," and "a code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge."<sup>23</sup>

This is part of why precedential holdings are not (and should not be) rigidly set in stone, but rather can (and should) be gradually shaped by subsequent decisions, in light of changing circumstances and new information.<sup>24</sup> Even lower courts "narrow ambiguous precedents that have become outdated in light of new

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<sup>20</sup> See BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 132-133 (1924) ("Stare decisis is not in the constitution, but I should be half ready to put it there, and to add thereto the requirement of mechanical and literal reproduction, if only it were true that legislation is a sufficient agency of growth. The centuries, if they have proved anything, have proved the need of something more.").

<sup>21</sup> *Id.* at 133.

<sup>22</sup> *Id.* ("Justice is not to be taken by storm. She is to be wooed by slow advances.").

<sup>23</sup> Henry J. Friendly, *Reactions of a Lawyer – Newly Become Judge*, 71 *YALE L. J.* 218, 220 (1961).

<sup>24</sup> See Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 *ARK. L. REV.* 661, 679 (2017) ("generalizations will not always be perfect; the courts cannot be expected to foresee or fully consider all potential fact situations falling within the generalizations that they necessarily make"); CARDOZO, *supra*, at 138 ("The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen."); ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 161 (1983) ("since precedent is the style of Anglo-Saxon law, the courts define a new technology as a special case of a familiar one").

events or technologies.”<sup>25</sup> As Judge Cardozo put it: “adaption of rule or principle to changing combinations of events demands the creative action of the judge.”<sup>26</sup>

The fact that judges help shape the law supports the notion that we are governing ourselves through rule of law, rather than being commanded by some pure assertion of authority.<sup>27</sup> The primary purpose of legal argument through briefing and oral presentation to a human judge is that it provides the opportunity to persuade the judge, and thus potentially in doing so shape the law, to the extent that the opinion rendered is precedential. As such, it is not only judges that currently shape our law, but also litigants, acting (usually) through lawyers.

Volokh’s argument focuses on the AI robot judge’s ability to write a persuasive opinion,<sup>28</sup> to persuade readers, but it says almost nothing about, and thus seems to overlook the importance of, the ability of the judge to be persuaded. Indeed, Volokh’s conception of an AI judge seems to render persuasive argument by litigants more or less unnecessary.<sup>29</sup> Like Volokh, Huq similarly downplays the possibility of the law being influenced by persuasive argument, seeming to imply that it happens so rarely that it isn’t worth worrying about.<sup>30</sup>

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<sup>25</sup> Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L. J. 921, 925 (2016).

<sup>26</sup> CARDOZO, *supra*, at 135.

<sup>27</sup> *Cf. id.* at 138 (“This power of creation, if it is to be exercised with vision and understanding, exacts a philosophy of law, a theory of its genesis and growth and aim. Only thus shall we be saved from the empiricism which finds in an opinion not a prophecy to inspire, but a command to be obeyed.”); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 636-37 (1995) (“The act of giving a reason is the antithesis of authority. When the voice of authority fails, the voice of reason emerges. Or vice versa.”).

<sup>28</sup> See Volokh, 68 DUKE L. J. at 1140-41.

<sup>29</sup> See *id.* at 1141 (“If we can create an AI brief-writer that can persuade, we can create an AI judge that can (1) construct persuasive arguments that support the various possible results in the case, and then (2) choose from all those arguments the one that is most persuasive, and thus the result that can be most persuasively supported.”).

<sup>30</sup> Huq, *A Right to a Human Decision*, 105 VA. L. REV. at \*42 (“An individual’s opportunity to supply reasons to a human decision-maker is relevant only if those



Volokh recognizes the potentially controversial nature of his focus on “persuasiveness” as the key evaluation metric,<sup>31</sup> but he doesn’t fully address the concern. While persuasiveness may be ideal for a lawyer, it seems to me not exactly what a judge should be striving for. A lawyer writing a brief wants to make the most persuasive argument for one side, but the task of a judge writing an opinion is different. The judge must acknowledge the arguments on both sides and explain why she is choosing one side over the other, (or choosing some middle ground), and then decide how broadly to write the decision with an eye towards both its ex ante effects and consistency with prior precedent. Moreover, when the judge is faced with a difficult decision, the value of candor counsels that the judge should acknowledge the difficulty, even though this may hinder persuasiveness.<sup>32</sup>

Persuasiveness is also inherently subjective, (indeed it is difficult to think of many things that are more quintessentially subjective). Deciding whether one is persuaded by an argument (like judging) often requires a choice between incommensurable values, it is not a matter of mere numerical calculation.<sup>33</sup> To the

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reasons have some likelihood of influencing a process’s outcome. But for many of the decisions for which algorithms might be employed in official hands, such as benefits eligibility or parole revocation, the law delimits a closed set of relevant parameters.”).

<sup>31</sup> Volokh, 68 DUKE L. J. at 1141 (“And if the Henry Test evaluator panelists are persuaded by the argument for that result, that means they have concluded the result is correct. This connection between AI brief-writing and AI judging is likely the most controversial claim in the paper.”).

<sup>32</sup> See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (calling candor “the sine qua non of all other restraints on abuse of judicial power”); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 178-181 (1982) (advocating a “choice for candor” and explaining that the “language of categoricals” is “particularly prone to manipulation”).

<sup>33</sup> See Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 68 (2016) (“Inherent in the very idea of judging is the notion of judgment; courts are frequently delegated regulatory and adjudicative tasks that must choose between valid and important social values.”); Joshua P. Davis, *Law Without Mind: AI, Ethics, and Jurisprudence* 1 (Univ. of S.F. Law Research Paper No. 2018-05, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3187513](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187513) (arguing that the “ultimate bulwark against ceding legal interpretation to computers – from having

extent that lawyers and judges are all trained to think in a certain way,<sup>34</sup> some of the subjectivity is mitigated, but still much of it remains, which is why appellate judges often disagree and write dissents, despite generally being well trained in law.

Volokh's proposal would seem to merely shift these subjective judgments from judges (viewing the law in the context of a concrete case or controversy *ex post*) themselves to the panel of Henry test "evaluators," (evaluating the predicted performance of the robot judges *ex ante*).

To be sure, the ability of the judiciary to make law is moderated and constrained, it is not as drastic and sudden as *ex ante* legislation, which is reserved for the legislative branch.<sup>35</sup> As Judge Cardozo puts it: "Law must be stable, and yet it cannot stand still."<sup>36</sup> One way to see this is through examination of the doctrine of retroactivity, which holds that a legal decision changing the law (e.g., overruling a precedent) must be applied retroactively to other events taking place before the decision was rendered.<sup>37</sup>

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computers usurp the responsibility and authority of attorneys, citizens, and even judges – may be to recognize the role of moral judgment in saying what the law is.”).

<sup>34</sup> See, e.g., FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (2009).

<sup>35</sup> A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 *UCLA L. REV.* 654, 676 (2019) (“The governmental act of prospectively conferring and defining the bundle of obligations and privileges that yield the entitlements described above is a legislative function (at least at the federal level) because such rights reflect basic policy decisions that shape our society.”) (citing *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (“[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.”)).

<sup>36</sup> CARDOZO, *supra*, at 143. See also Charles E. Clark and David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L. J.* 255, 275-76 (1961) (“judicial creation is an inevitable and vital part of our law . . . the process in its highest reaches is not discovery but creation”).

<sup>37</sup> *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”).

One reason for the doctrine of retroactivity is fairness, treating like cases alike.<sup>38</sup> If the rule of the case is applied to the parties in the case, even though the events leading to the suit obviously took place before the ex post judicial decision, then it should also be applied retroactively to other events taking place before the decision was rendered. There is a fairness (or due process) argument on the other side: how can it be fair to retroactively apply a new rule to parties who did not have notice of that rule at the time of the events? One solution that has been proposed is an “actual reliance” exception to the doctrine of retroactivity; that is, if one of the parties can demonstrate that they actually relied on the old (say overruled) law, the new law should not be applied against them retroactively.<sup>39</sup> But that fact that this solution remains hypothetical seems to show that that the due process or fairness problems with retroactivity are more hypothetical than actual.<sup>40</sup>

More pertinently to our present discussion, the doctrine of retroactivity serves as an important check on judicial law creation. If courts are forced to apply changes in the law retroactively, and forced to confront the potential unfairness in that, they may decide to adhere to stare decisis and the prior rule rather than risk the unfairness of retroactive application, even if they would have ruled differently had they been writing on a clean slate.<sup>41</sup> As such, the doctrine of retroactivity

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<sup>38</sup> *Id.* at 95 (“selective application of new rules violates the principle of treating similarly situated parties the same”) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)).

<sup>39</sup> Paul J. Mishkin, *The Supreme Court 1964 Term - Foreword*, 79 HARV. L. REV. 56, 66-67 n.39 (1965) (“this technique of making demonstrated reliance a shield against the impact of newly changed law is one which seems to me to have great potential”).

<sup>40</sup> See CARDOZO, *supra*, at 122 (“The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains.”).

<sup>41</sup> See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 278-79 (1972) (“All this, combined with the flood of litigation that would follow its repudication, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.”).

encourages courts to make only minor and gradual shifts in the law,<sup>42</sup> leaving more drastic prospective changes for the legislative branch.<sup>43</sup>

The doctrine of retroactivity thus furthers the separation of powers and ensures that although the judiciary plays a role in legal development, it is a softer and more measured role than the legislature.<sup>44</sup> As Justice Scalia put it, although judges do “in a real sense ‘make’ law . . . they make it *as judges make it*, which is to say as though they were ‘finding it’ – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.”<sup>45</sup> The legal opinion has “a central forward-looking function which reaches far beyond the cause in hand: the opinion has one if not its major office to show how like cases are properly to be decided in the future,” such that the opinion’s preparation “affords not only a back check an cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead.”<sup>46</sup>

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<sup>42</sup> Mishkin, 79 HARV. L. REV. at 70 (“Ineluctable retroactivity would seem to operate as an ‘inherent restraint’ on judicial lawmaking because it compels the Court to confront in sharpest form possible undesirable consequences of adopting a new rule, as for example, when it appears that application of the newly framed doctrine may result in imposing liability or other burden on someone who acted in justified reliance on the old law.”).

<sup>43</sup> *Id.* at 65-66 (“Prospective lawmaking is generally equated with legislation. Indeed, the conscious confrontation of the question of an effective date – even if only in the form of providing explicit affirmative justification for retroactive operation – smacks of the legislative process; for it is ordinarily taken for granted (particularly under the Blackstonian symbolic conception) that judicial decisions operate with inevitable retroactive effect.”).

<sup>44</sup> James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (explaining that difficulties posed by retroactivity “are one of the understood checks upon judicial lawmaking; to eliminate them is to render courts substantially more free to ‘make new law,’ and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches”).

<sup>45</sup> James B. Beam Distilling Co., 501 U.S. at 549 (Scalia, J., concurring).

<sup>46</sup> KARL LEWELLYN, THE COMMON LAW TRADITION 26 (1960).

Would it be possible for an AI robot judge to strike this delicate balance between the past and the future?<sup>47</sup> A judge writing an opinion is in part explaining her reasoning so that the legal community and society can better understand the decision and thus the law. A legal opinion is thus in part a discourse between society and the legal system, and the fact that the judge is (for now) also a member of society and the legal community would seem beneficial to this discourse.

### III – Formalism and Realism

The teachings of legal realism help to further highlight the fact that courts in a significant fraction of cases do make policy choices in developing the law, working against the notion that law can be reduced to computing.<sup>48</sup> True, the result in most cases is dictated by existing law, but a significant fraction of cases could go either way, and when faced with such forks in the road, judges must make a choice about in which direction the law will proceed.<sup>49</sup> Judge Cardozo also recognized “that every doubtful decision involves a choice between a nicely balanced alternative, and no matter how long we debate or how carefully we ponder, we shall never arrive at certitude.”<sup>50</sup> These days, it is fairly uncontroversial to say that judges at least sometimes do more than simply “call balls and strikes.”<sup>51</sup>

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<sup>47</sup> *Cf.* RONALD DWORKIN, *LAW’S EMPIRE* 413 (1986) (“Law’s attitude is constructive; it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past.”); OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881) (“The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.”).

<sup>48</sup> *See* Mishkin, 79 *HARV. L. REV.* at 68 (“The insights of ‘legal realism,’ developing and spreading at a perhaps accelerating rate since at least the twenties, provided a necessary corrective to an overly rigidified conception of the Court as totally without choice or will, merely carrying out the supposedly preordained dictates of the Constitution.”).

<sup>49</sup> *See id.* at 60 (explaining that “it is certainly true that courts in general handle the vast bulk of cases by application of preexisting law,” and that “informed estimates put the figure at close to 90%”) (citing Friendly, 71 *YALE L. J.* at 222).

<sup>50</sup> CARDOZO, *supra*, at 140. I am speaking here of classical legal realism, rather than what some have called “new legal realism.” *See* Thomas J. Myles & Cass R. Sunstein,

One way to see this is by looking at the doctrine of precedent and notions of holding versus dictum. There is no single accepted test for determining exactly what is holding or not, and in many cases there is no easy way to decide.<sup>52</sup> There will always be some possible distinction from a precedent case, so often whether a judge chooses to follow a case turns on whether the proffered distinction is a meaningful one, or whether it is merely a distinction without a difference, an inherently subjective inquiry.<sup>53</sup> The doctrine of precedent is “two-headed” or “Janus-faced” in that there “is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful.”<sup>54</sup>

The proposition that at least some portion of cases before the courts could reasonably go either way is, these days, fairly well accepted. Indeed, the entire *Chevron* doctrine is based on the idea that for some questions of statutory interpretation, there is a range of reasonable answers, (thus court’s defer to the agency interpretation if it is within that range).<sup>55</sup> As such, “*Chevron* has been seen as a triumph of legal realism.”<sup>56</sup>

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*The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008) (“We are in the midst of a flowering of ‘large-scale quantitative studies of facts and outcome,’ with numerous published results. The relevant studies have produced a New Legal Realism – an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.”).

<sup>51</sup> See William Blake, *Umpires as Legal Realists*, 45 PS: POLITICAL SCIENCE & POLITICS 271, 271 (2012) (“During his confirmation, then-judge John Roberts analogized the role of a judge to the role of a baseball umpire. . . . Legal scholars have criticized Roberts from a legal realist perspective because the analogy misconstrues the nature of judging as formalistic.”).

<sup>52</sup> See generally Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661 (2017). The same could be said for determining whether a case has been “implicitly overruled.” See generally Andrew C. Michaels, *Implicit Overruling and Foreign Lost Profits*, 25 B.U. J. SCI. & TECH. L. 101 (2019).

<sup>53</sup> See Michaels, 70 ARK. L. REV. at 685; Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161, 165 (1930).

<sup>54</sup> KARL LLEWELLYN, *THE BRAMBLE BUSH* 69-70 (1930).

<sup>55</sup> See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) (“if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”);

The idea law can be reduced to computer science seems inherently formalist, indeed it seems to conceive of law as almost a “brooding omnipresence in the sky.”<sup>57</sup> It is reminiscent of Dean Langdell’s “legal science,” which held that “law can be reduced to a set of first principles, on the order of mathematical axioms, and that by the use of deductive method, these principles can yield all necessary consequences.”<sup>58</sup> It is also comports with Pierre Schlag’s description of the Grid Aesthetic, wherein “law is pictured as a two-dimensional area divided into contiguous, well-bounded legal spaces.”<sup>59</sup>

But as Schlag notes, “to even pose the problem of legal change is already to weaken the grid.”<sup>60</sup> Opposing the grid aesthetic is the Energy Aesthetic, which “leaves the stasis of the grid behind,” such that “law and the legal profession are on the move.”<sup>61</sup> As Schlag explains, the opposition of the grid aesthetic and the energy

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*see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (explaining that when Chevron applies, a reviewing court “is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable”).

<sup>56</sup> Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 836 (2010).

<sup>57</sup> Cf. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L. J. 1037, 1037-38 (1961) (“Legal realism may be viewed as an elaborate commentary on an attitude toward law symbolized by the figure of that master of epigram, Justice Holmes. The life of the law, Holmes told us, has not been logic; it has been experience. And again: the common law is not a brooding omnipresence in the sky.”).

<sup>58</sup> See Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1419 (2016) (quoting M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 96 (1986)); EDWARD STEVENS ROBINSON, *LAW AND THE LAWYERS* 67 (1935) (“There is not the slightest doubt that the case-law theory of legal education was a move in the direction of a natural science of the law.”).

<sup>59</sup> Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2005).

<sup>60</sup> *Id.* at 1066. See also, *id.* at 1065 (“It is an old, and apparently persistent, question: if the courts are to find but not create law, then how does law change? For a law cast in the image of the grid, this question is aesthetic trouble. The grid is inert. It does not move.”).

<sup>61</sup> *Id.* at 1070.

aesthetic is well known in terms of the opposition of legal formalism versus legal realism.<sup>62</sup> Legal formalism is associated with the grid, in that it does not take into account legal change to the extent that legal realism does.

Interestingly, while there are formalist aspects to the suggestion of robot judges, there are also aspects that echo what might be called its opposite: Critical Legal Studies. The idea that the legal system is so biased, indeterminate, and inept, as to warrant automating the judiciary,<sup>63</sup> seems an extremely cynical view of the legal system. This is consistent with the legacy of Critical Legal Studies, which was to leave behind a series of corrosive critiques aimed at producing disenchantment with law as narrowly understood.<sup>64</sup> Formalism offers a very narrow and traditional view of law, whereas Critical Legal Studies perhaps supplies the skepticism needed to remove humans from the system. Legal Realism, by contrast, supplies what might be called a middle ground recognizing the human judgment necessary for the legal system to function, but perhaps seeing value in human aspects of the system.

The prominent legal realist Karl Lewellyn has derided the formalist “One Single Right Answer” approach, explaining that it may have the “unhappy effect” of “driving readjustment and creation into the underground, which not only decreases reckonability but seriously hampers reasoned study and thought about the relative values and costs of any competing objectives and of the always various available and devisable measures.”<sup>65</sup> Disagreements amongst judges as explicated via circuit splits and dissents have the opposite and beneficial effect of bringing the various plausible legal choices out into the open.

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<sup>62</sup> *Id.* at 1105.

<sup>63</sup> *See* Volokh, 68 DUKE L. J. at 1184 (“we humans don’t set the bar very high”).

<sup>64</sup> *See* THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 298 (Stanley N. Katz ed.) (2009) (“The Legacy of CLS: CLS [Critical Legal Studies] leaves behind a series of corrosive critiques – all aimed at producing disenchantment and disbelief in law as it is narrowly construed.”).

<sup>65</sup> LEWELLYN, THE COMMON LAW TRADITION, *supra*, at 25 n.17.



When those arguing for artificial robotic law speak of enhancing consistency and accuracy,<sup>66</sup> they seem to be overlooking the fact that not all cases have a right answer, and they may also be overvaluing consistency.<sup>67</sup> The legal disagreements that arise from circuit splits and dissents may actually be beneficial for society, in that they engage the legal community in a protracted thoughtful discussion about various sides of important debates about law and policy.<sup>68</sup> Replacing this community with a machine that instantaneously spits out a right answer upon the press of a button does not seem wise, for additional reasons that will be discussed further in the next part.

#### IV – Legal Community

In our current system, we have many judges applying the law, and although they occasionally disagree, usually they apply the law in more or less the same way. This is a redundancy, but redundancy can be a good thing.<sup>69</sup> In this case, the

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<sup>66</sup> See Huq, 105 VA. L. REV. at \*40 (“Of course, even well-designed algorithmic tools will make mistakes. But the addition of a human backstop on a machine decision will likely increase the overall rate of inaccurate judgments.”); cf. Casey & Niblett, 92 IND. L. J. at 1419-20 (“As predictive technology makes it easier to automate such regulatory advance rulings and ensure their accuracy, they will become a common mechanism for the adoption of machine generated microdirectives.”).

<sup>67</sup> Cf. Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1574 (2008) (“If the lower courts reach varied but reasonable conclusions about the meaning of a federal statute, and the difference do not create significant disruption or inequality, then the Court should decline to resolve the conflict.”).

<sup>68</sup> See JOHN DEWEY, *HOW WE THINK* 12 (1933) (explaining that reflective thinking “involves (1) a state of doubt, hesitation, perplexity, mental difficulty, in which thinking originates, and (2) an act of searching, hunting, inquiring, to find material that will resolve the doubt, settle and dispose of the perplexity.”); see also Donald J. Kochan, *Thinking Like Thinkers: Is the Art and Discipline of an ‘Attitude of Suspended Conclusion’ Lost on Lawyers?*, 35 SEATTLE U. L. REV. 1, 2-3 n.5 (2011).

<sup>69</sup> See John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 629 (2016) (“The pervasiveness of legal redundancy has at least one straightforward explanation. Redundancy has much to offer.”).

redundancy has value in that it fosters a community of people with a strong incentive to pay attention to the law.<sup>70</sup>

The best way to see the value of this community is to imagine what would happen if it didn't exist. That is, imagine a world where all judges were replaced by robots. If all the judges were robots, we wouldn't really need human lawyers, for we could also have robot lawyers. Indeed, in Volokh's argument, robot lawyers come before robot judges.<sup>71</sup> And if we didn't have human judges or lawyers, we probably wouldn't have human law professors or law students either, (or at least we wouldn't have nearly as many).

Robot law might be more efficient, but we would have lost the community of people whose job it is to pay attention to the law, which could become a problem if the law changes, or if someone in power changes the law.<sup>72</sup> What would stop someone in power from changing the law in ways that were not beneficial to society? True, this already happens to some degree, but it could be worse. The legal community is at least paying attention and that provides some degree of a check on those with the power to change the law.

The legal community itself currently plays a role in shaping the law, spreading power and supporting the notion that we as a society govern ourselves. Judges are responsive (to some degree) to lawyers, who are responsive (to some degree) to clients, such that power is spread throughout the legal community and society. The legal community may thus help promote the sense that we as a society

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<sup>70</sup> See Anthony D'Amato, *Can/Should Computers Replace Judges*, 11 Ga. L. Rev. 1277, 1299 (1977) ("A second cost will be to render areas of law uninteresting. . . . At present, many people are immediately interested, whether financially or from a teaching or research point of view, in conflicts of laws.").

<sup>71</sup> Volokh, 68 DUKE L. J. at 1148-1151.

<sup>72</sup> Cf. FRANKLIN FOER, *WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH* 72 (2017) ("The problem is that when we outsource thinking to machines, we are really outsourcing thinking to the organizations that run the machines.").

have some control over the laws that govern us; that we are governing ourselves rather than submitting to (or simply obeying) an outside authority.<sup>73</sup>

It might be difficult to imagine that a person or group of people who are not completely trustworthy could rise to power, but the possibility cannot be completely discounted. The loss of redundancy in switching from human judges to robot judges creates some risks, which may not be worth the potential efficiency gains. Although anything beyond a narrow economic analysis is sometimes derided as “deontological,”<sup>74</sup> these risks potentially create very real negative consequences, such that continuing to guard against them could be seen as utilitarian, as utilitarianism can take into account factors beyond narrow economic efficiency.<sup>75</sup>

To the extent that there is private intellectual property covering the code behind these AI judges, the problems are compounded.<sup>76</sup> It is thus important that, if and to the extent that we do start to turn the law into code, at the very least the code must be public and not owned as intellectual property. At least if the code is public, then lawyers together with computer scientists can examine the code. Just as judges do not own the opinions they write, the judges themselves, or the code behind them,

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<sup>73</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (“ours is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules”).

<sup>74</sup> See Volokh at 1163 n.82 (“This is a form of utilitarianism: I ask what sort of judging gives us the results we want, not what sort of judging is most consistent with some deontological theory of how judges should operate.”).

<sup>75</sup> Cf. Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1490 (2017) (“If consideration of fairness is faith based, then, it is a rational faith, because empirical evidence shows that fairness promotes utilitarian ends.”); Peter Lee, *Toward a Distributive Agenda for U.S. Patent Law*, 55 HOUS. L. REV. 321, 354 (2017) (“At a foundational level, the objective of maximizing social utility can require redistribution of resources, particularly given the principle of diminishing marginal utility.”).

<sup>76</sup> Cf. Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 141 (2019) (“The future of civil rights in an age of AI requires us to explore the limitations within intellectual property and, more specifically, trade secrets.”); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 213 (1979) (“It is one of the important principles of the [rule of law] doctrine that the making of particular laws should be guided by open and relatively stable general rules.”).

must not be owned, as since the law is binding on citizens, it must remain free for all to examine and attempt to understand.<sup>77</sup>

One aspect of law is a shared way of thinking.<sup>78</sup> When we say that the result in ninety percent of cases is determined by law whereas maybe ten percent could go either way, what we mean is that for those ninety percent, no reasonable judge or lawyer would decide the other way, but this only works to the extent that all lawyers think in a similar way. The legal community provides a forum where educated people can debate issues that matter in public in a fairly calm, formal, non-emotional way, (something valuable that seems to be sorely lacking in most areas of our current society). One could think of law then as a formalized system of debate and communication. This at least suggests that if we take the humans that do the communicating out of the picture, we may lose something important to rule of law.

We seem to have some tendency as a society to adopt new technologies before they are entirely ready.<sup>79</sup> In Volokh's argument, a panel of evaluators

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<sup>77</sup> See *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (“Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship as against the public at large, in the fruits of their judicial labor. . . . The question is one of public policy, and there has always been a judicial consensus . . . that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties.”).

<sup>78</sup> Cf. Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L. J. 803, 828 (2009) (“When one thinks of what lawyers must strive to do – which is mainly resolve difficult disputes and control the future through documentary writings – certain things emerge as crucial to their work. One is that they speak and think in a common language. . . . To the extent that ‘all lawyers think alike,’ they can with some certainty predict what other lawyers will do – both in litigation and in transactional contexts. This is arguably socially useful.”); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 35 (1921) (“[T]he judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith.”).

<sup>79</sup> Cf. Daisuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, THE N.Y. TIMES (Mar. 19, 2018); Clark D. Asay, *Artificial Stupidity*, 61 WILLIAM & MARY L. REV. at \*4 (forthcoming 2020) (“despite the incessant hype about and ever growing uses of AI, many AI experts lament a lack of any real progress in

initially select the robot judge or judges. The evaluators are supposedly experts, but once we turn the law over to machines, our community of legal experts will shrink and then eventually vanish. Our law muscles, as a society, will atrophy.<sup>80</sup> In other words, Volokh and those making similar arguments seem to ignore the cost of their proposal in terms of the loss of human expertise.<sup>81</sup> Can we be sure that the law machines, just because they were chosen as competent at an initial point in time, will remain competent with changing society? Once we have lost the community of experts, who will keep an eye on the law machines to make sure?

## V. Separation of Powers

The importance of judicial independence for rule of law was recognized in the Declaration of Delhi, “promulgated in 1959 by an international congress of jurists consisting of 185 judges, practicing lawyers and teachers of law from 53 countries.”<sup>82</sup> The Declaration itself states: “An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercise of the judicial function.”<sup>83</sup> Can AI judges really be said to be independent? Can such robots serve as a significant check on the other two branches? Volokh’s condition for adoption, demonstration (via the Modified Henry test) that the robots can write persuasive opinions, does not seem to provide any reason to answer these questions

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the AI space”); Brian Sheppard, *Incomplete Innovation and the Premature Disruption of Legal Services*, 2015 MICH. ST. L. REV. 1797, 1802 (2015) (“When a disruption occurs before all of the core functions of an industry have been innovated, there is a risk that this Incomplete Innovation will force the un-innovated core functions to become scarce or disappear.”).

<sup>80</sup> Cf. NICHOLAS G. CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* (2010); BRETT FRISCHMAN AND EVAN SELINGER, *RE-ENGINEERING HUMANITY* (2018) (questioning whether artificial intelligence is increasingly encouraging humans to behave like machines).

<sup>81</sup> Cf. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (2010) (Posner, J., concurring) (“judges are experts on law”).

<sup>82</sup> Luke K. Cooperrider, *The Rule of Law and the Judicial Process*, 59 MICH. L. REV. 501, 502 (1960).

<sup>83</sup> See Cooperrider, 59 MICH. L. REV. at 502.

in the affirmative. Just because a machine can write a persuasive opinion, that doesn't mean it is serving as an independent check on the other two branches, as the "Third Branch" is supposed to do in our government of separation of powers.<sup>84</sup>

Article III of the U.S. Constitution, of course, vests with the courts the judicial power, which extends to "cases" and "controversies."<sup>85</sup> As the Supreme Court has explained this requirement "is not just an empty formality," rather, it "preserves the vitality of the adversarial process," such that the legal questions presented "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."<sup>86</sup> This explanation seems to implicitly recognize that courts do exercise an important lawmaking and policymaking function when they interpret the law so as to resolve legal questions, focusing on the importance of such interpretation taking place in the context of concrete factual disputes, as required by the Constitution. The evaluators' choice of AI robot judges could be seen as running afoul of this requirement, as it would not take place in the context of the actual disputes that the robots would later be deciding.

Additionally, it is not clear that decision-making by AI itself would comply with this case or controversy requirement. When exactly is the AI code making its decision? Has it already made it before the case? One could argue that the decision is made when the machine is programmed, in which case, the decision would not be made in the context of an actual case or controversy as required by Article III.

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<sup>84</sup> See *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, J., dissenting) (discussing the "obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring) ("The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching of this Court's role in the history of this country.").

<sup>85</sup> See U.S. CONST. ART. III Sec. 1, 2.

<sup>86</sup> *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)).

Indeed, the computer code programming the AI judges could be seen as an incredibly detailed statute (or “code”),<sup>87</sup> one that pre-answers all possible questions, (albeit – or even worse – in a black box way that no one really understands).<sup>88</sup> This might seem appealing in certain ways, but it is important to recognize that it does in a significant sense eliminate the role of the judiciary as an independent branch.

Although separation of powers is not explicitly in the Constitution, it is considered to be implicit in a number of provisions, including the vesting clauses vesting each of the three branches with certain responsibilities.<sup>89</sup> In *Gregory v. Ashcroft*, the Supreme Court discussed the importance of the “constitutionally mandated balance of power,” to checking “abuses of government power,” by preventing “the accumulation of excessive power in any one branch,” so as to “reduce the risk of tyranny and abuse.”<sup>90</sup>

Indeed, according to Justice Gorsuch, “[o]ne of the abuses of royal power that led to the American Revolution was King George’s attempt to gain influence over

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<sup>87</sup> Cf. Gilmore, 70 YALE L. J. at 1043 (“A ‘code,’ let us say, is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law.”).

<sup>88</sup> Asay, 61 WILLIAM & MARY L. REV. at \*29 (“because of the lack of transparency surrounding AI systems in a number of important industries, some scholars have complained that such AI systems are a ‘black box’”) (citing FRANK PASQUALE, *THE BLACK BOX SOCIETY* (2015)).

<sup>89</sup> See, e.g., Sapna Kumar, *Patent Court Specialization*, 104 IOWA L. REV. 101, 118 (2019) (“The term ‘separation of powers’ does not appear in the Constitution, but is instead inferred from the dividing of legislative, executive, and judicial power into separate Articles.”) (citing *Buckley v. Valeo*, 424 U.S. 1, 124 (1976); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 439-40 (1998)).

<sup>90</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (also discussing the importance of federalism and how the dividing of power between the Federal Government and the States similarly prevents abuse by providing “double security”) (quoting James Madison, *Federalist No. 51* at 323 (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”)).

colonial judges.”<sup>91</sup> Justice Gorsuch has recently explained that “when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws,” there is a risk to rule of law.<sup>92</sup> The founders sought to guard against this risk by providing protections to the judiciary’s independence such as life tenure for judges and a prohibition on reducing judges’ compensation, so that the judiciary could “interpret the laws ‘free from potential domination by other branches of government.’”<sup>93</sup> One could try to argue that robot judges would be independently applying the law, but when such robots can be reprogrammed by the other branches, their independence does not seem particularly robust. And such reprogramming would have to be possible to allow for changes when Congress passes a new law or changes the law.

In *Gregory*, the Court also candidly recognized the important policymaking role that judges play, particularly in the common law context, quoting Justice Holmes’ statement:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views about public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.<sup>94</sup>

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<sup>91</sup> *Kisor v. Wilkie*, 588 U.S. \_\_\_, slip op. at \*22-23 (2019) (Gorsuch, J., dissenting) (citing Declaration of Independence ¶11).

<sup>92</sup> *Id.* at \*23 (quoting *Palmore v. United States*, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting)); see also *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365 (2018) (Gorsuch, J., dissenting).

<sup>93</sup> *Kisor*, 588 U.S. \_\_\_, slip op. at \*24 (Gorsuch, J., dissenting) (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)); see also *The Federalist* No. 81, at 482 (A. Hamilton).

<sup>94</sup> *Gregory*, 501 U.S. at 466 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 35-36 (1881)).



In concurrence, Justice White (joined by Justice Stevens), agreed that the “quotation from Justice Holmes” was “an eloquent description of the policymaking nature of the judicial function,” and also quoted Justice Cardozo’s statement:

Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law . . . Within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.<sup>95</sup>

Although the policymaking choices made by judges are, in Justice Holmes’ own admission, to some extent “instinctive” and “inarticulate,” they do at least arise through the considered legal adversarial process as required by Article III, and are important preventing tyranny through separation of powers. No one policymaker can be expected to be perfect, and our system of spreading power amongst multiple actors with distinct roles is an important aspect of rule of law,<sup>96</sup> which seems to be overlooked by those arguing for a move towards robot judges.<sup>97</sup>

These separation of powers concerns make machine decision-making particularly problematic in the judicial branch. Although some machine decision-making is already being done in the executive branch or the administrative agencies,<sup>98</sup> this does not seem as problematic. One way of thinking about the

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<sup>95</sup> *Gregory*, 501 U.S. at 482 (White, J., concurring) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-115 (1921)).

<sup>96</sup> *Cf.* MASSACHUSETTS CONSTITUTION, Article XXX (“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.*”) (emphasis added).

<sup>97</sup> *Cf.* Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation* at \*48 (2018) (“The legal futurists’ partial vision of economic progress reflects a similarly incomplete normative account of the rule of law – one that asks both too much, and too little, of legal institutions.”).

<sup>98</sup> *See* Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1280 (2018) (“Given its utility, it is not surprising that government decision-makers

executive branch is that it is entirely accountable to the president anyway,<sup>99</sup> so if the president chooses to delegate to machines rather than humans, that is seemingly his or her prerogative, or at least, it doesn't raise separation of powers concerns.

The unitary executive theory is of course disputed,<sup>100</sup> but this is not the place to get into that dispute. My point here is that even assuming *arguendo* that it is ok for executive decision-making to be centralized in artificial intelligence, it is not appropriate for the judicial branch, as it would overlook the policymaking role of that branch and its importance in maintaining separation of powers by serving as an independent check on accumulation of too much power in too few hands.<sup>101</sup>

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seek to harness machine learning's predictive power for public-sector use. These tools already have made significant inroads in the contexts of national security and law enforcement.”).

<sup>99</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 135 (1923) (“The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”).

<sup>100</sup> See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (“But in the case of an office such as the Federal Trade Commission, the nature of which is not political, the function of which is quasi-judicial and quasi-legislative, in order to safeguard its independence of political domination it is necessary and proper to enact legislative standards which the President must follow.”); *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (“Contrary to the implication of some dicta in *Myers*, the President's power to remove Government officials simply was not all-inclusive in respect of civil officers”).

<sup>101</sup> See also Andrew C. Michaels, *Abstract Innovation, Virtual Ideas, and Artificial Legal Thought*, 14 MAR. J. BUS. & TECH. L. 1, 32 (2019) (“it could become a very serious problem if some untrustworthy group of people were to gain control of the law machine, and start changing its commands for their own benefit”). As I have noted before, distributed ledger or blockchain technology may have some potential for mitigating some of the centralization of power concerns. See *id.* at n.134 (citing Michael Abramowicz, *Cryptocurrency-Based Law*, 58 ARIZ. L. REV. 359 (2016)).

## Conclusion

Replacing judges with robots would entail drastic changes to law as we know it, and it is not at all clear that the changes would be for the better. Why then, should we do it? Volokh and others offer three primary benefits. The first is that it would be cheaper.<sup>102</sup> But compared to the amount of money that we spend on the military, or tax breaks for the super rich, the judiciary really isn't that expensive,<sup>103</sup> and it seems like money well spent in preserving the rule of law. Efficiency arguments do not adequately not account for the increased risk due to the loss of redundancy, nor do they answer the related separation of powers concerns.<sup>104</sup> Indeed, efficiency is not always paramount in rule of law, for as Justice Brandeis has explained, the “doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.”<sup>105</sup>

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<sup>102</sup> See Volokh, 68 DUKE L. J. at 1139 n.10 (“In some contexts, of course, automation may be better even if it’s not as effective – for instance, it may be cheaper and thus more cost-effective. But if it’s cheaper and at least as effective, then it would be pretty clearly superior.”); Huq at \*37 (“Right now, the demand for human review in the teeth of its likely costs and available alternative responses, might seem little more than an aesthetic preference about the manner in which one interacts with state actors. I am not sure that is enough to get a right to human decision off the ground.”); Casey & Niblett, 92 IND. L. J. at 1403 (“A new form of law, the microdirective, will emerge to provide all of the benefits of both rules and standards without the costs of either. These microdirectives will provide ex ante behavioral prescriptions finely tailored to every possible scenario.”).

<sup>103</sup> Compare ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2019 CONGRESSIONAL BUDGET SUMMARY at 5 (2018) (“The judiciary’s appropriation request for fiscal year 2019 totals [\$7.863 Billion]”); with OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER), NATIONAL DEFENSE BUDGET ESTIMATES FOR FY 2020 at 1 (2019) (showing \$685 Billion DOD Discretionary Budget Authority for 2019); and JOINT COMMITTEE ON TAXATION, MACROECONOMIC ANALYSIS OF THE “TAX CUT AND JOBS ACT” AS ORDERED REPORTED BY THE SENATE COMMITTEE ON FINANCE ON NOVEMBER 16, 2017 at 7 (2017) (estimating a net loss of over \$1 trillion over fiscal years 2018-2027).

<sup>104</sup> See Part IV, *supra*; cf. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting) (“A judicial hearing before a property interest is stripped away . . . can slow things down. But economy supplies no license for ignoring these – often vitally inefficient – protections”).

<sup>105</sup> *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting).

The second reason proponents of AI offer is a bit more compelling; it is basically that AI would be more consistent and might thus be less biased.<sup>106</sup> Of course, there could also be bias built into the AI, but even assuming that the AI would be better than humans on this score, it still doesn't do anything to address all of the concerns above. The better way to deal with bias would be for human judges to work on becoming more aware of it and compensating for it, or better yet, to diversify the judiciary. Diversifying the judiciary would also have supplementary power spreading benefits, spreading power to a more diverse cohort of judges. Another way to deal with bias might be to reduce judicial discretion in situations (such as perhaps criminal sentencing) where the effects of bias tend to be particularly acute.<sup>107</sup> Bias in the judiciary is a problem, but automating the judiciary is an overbroad and inappropriate solution to that particular problem.

The third reason is that the lower cost of legal services will improve access to justice.<sup>108</sup> To the extent that robots are able to successfully replace some lawyers (without replacing judges), this is more acceptable as it would lower the cost of legal

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<sup>106</sup> See Volokh, 68 DUKE L. J. at 1140 (“And because such a program is also likely to be much cheaper, quicker, and less subject to certain forms of bias, it promises to make the legal system not only more efficient but also fairer and more accessible to poor and middle-class litigants.”); Huq at \*6 (“machine decisions are often capable of classification with a smaller number of false positives and false negatives than humans, and have the potential to act with fewer distorting biases”); Casey & Niblett, 92 IND. L. J. at 1410 (“And the laws will be highly calibrated to policy objectives with no chance of judges introducing bias or incompetence.”); see also Benjamin Alarie, Anthony Niblett, & Albert H. Yoon, *Regulation by Machine* at 4 (2016) (available at: <https://ssrn.com/abstract=2878950>) (“In a world where taxpayers receive instantaneous rulings from regulators, the algorithm is the law. This new form of law is characterized by greater consistency than regulators and courts could previously offer. The biases of regulators, adjudicators, and judges are washed away, further reducing legal uncertainty.”).

<sup>107</sup> Cf. Berman, 98 B.U. L. REV. at 1283 (arguing that “government actors should exploit the benefits of machine learning when they enjoy broad discretion in making decisions, while eschewing the tool for decision-making when government discretion is highly constrained”).

<sup>108</sup> See Volokh, 68 DUKE L. J. at 1147 (“Realistically, the only way we are likely to sharply increase access to expensive services, such as lawyering, is through technology.”); cf. Alarie et. al., *supra*, at \*1 (“machine learning can predict how courts would decide legal disputes more cheaply and accurately than human regulators”).

services. Thus we could receive the access to justice benefits without replacing judges. And as long as we still have human judges, there will still be a need for at least some human lawyers, so the human legal community will still exist.

Thus to the extent there are advantages to robot judges, the advantages are limited and are outweighed by the major disadvantages, such that the advantages can be better achieved in other ways. Why, then, should we replace our Article III judges with AI robots? The answer is simple: we shouldn't.