FIGHTERS, CLIMBERS, AND THE WAR FOR THE JUDICIARY

James C. Ho[*]

We're here to celebrate the launch of a new law journal. But as my law clerks have told me, there are over a thousand law reviews in Westlaw's law review database.[1] Why on earth do we need another?

How you answer that question may depend on how you view the legal academy—and how you think much of the academy views our country and our Constitution.

As Americans, we believe that we should be governed by the people—not by lawyers or law professors. We didn't fight a Revolutionary War to replace one king in royal garb with hundreds of kings in judicial robes.

Our legal system should only decide legal disputes—not political ones. Political disagreements should be resolved through elections—and by officials directly accountable to the people.

In sum, our legal system is supposed to be politically neutral.[2]

But would anyone seriously claim that the median academic or most legal elites are in fact politically neutral—and not systemically, institutionally biased against essentially half the country?[3]

---

[*] Circuit Judge, U.S. Court of Appeals for the Fifth Circuit. This article is based on remarks delivered before the inaugural banquet of the Journal of Law & Civil Governance at Texas A&M in Fort Worth, Texas, on March 29, 2025.

[1] *See*, *e.g.*, Nw. Pritzker Sch. of L., *The Bluebook*, PRITZKER LEGAL RSCH. CTR., https://perma.cc/Y2MK-TEM6 ("Westlaw Law Reviews & Journals [p]rovides access to over a thousand law reviews and journals.").

[2] *See*, *e.g.*, James C. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary: Fair-Weather Originalism*, 46 HARV J.L. & PUB. POL'Y 957, 959 (2023) ("Originalism must be principled, not partisan. And principled originalism is neither liberal nor conservative. A principled originalist applies the same faithful approach to the text—no matter whose ox is gored. You apply the same substantive rules and the same jurisdictional doctrines—no matter whose interest is served.").

[3] *See generally* James C. Ho, *Agreeing to Disagree: Restoring America by Resisting Cancel Culture*, 27 TEX. REV. L. & POL. 1 (2022); James C. Ho & Elizabeth L. Branch, *Stop the Chaos: Law Schools Need to Crack Down on Student Disrupters Now*, NAT'L REV. (Mar.

I would submit that therein lies the pitfalls—as well as the potential—for a new law journal.

1.

Three questions come to mind. First: Will this new law journal reinforce the pervasive bias of much of the legal academy—or resist it?

In *FAIR v. Rumsfeld*, a group of law professors and law schools claimed that they had a constitutional right to expel the United States military from all on-campus recruiting.[4] They didn't just lose—they lost unanimously before the U.S. Supreme Court.[5]

Last year, a group of law professors demanded that states disqualify President Trump from the 2024 ballot.[6] Again, they didn't just lose—they lost unanimously before the U.S. Supreme Court.[7]

So you might conclude that an awful number of law professors aren't very good at law.[8]

15, 2023, 6:30 AM), https://perma.cc/RBH6-WQXR; James C. Ho, *Disruption, Discrimination, and Diversity in Legal Education*, 28 TEX. REV. L. & POL. 3 (2023).

4 Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 52 (2006).

5 *Id.* at 50.

6 *See, e.g.*, Adam Liptak, *Scholars Make Case that Constitution Bars Trump from Office*, N.Y. TIMES, Aug. 13, 2023, at A20.

7 In Trump v. Anderson, 601 U.S. 100 (2024), the Supreme Court unanimously rejected the views of numerous law professors that States could disqualify President Trump under section 3 of the Fourteenth Amendment. *Id*. at 117. Moreover, during oral argument, two Justices pointedly noted that Presidents aren't mentioned in section 3 and thus may not be subject to it at all—a legal theory that those same professors had curtly dismissed. *See, e.g.*, Transcript of Oral Argument at 118–22, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719) (questions from Justice Jackson); *see also id.* at 108–12 (questions from Justice Gorsuch); Michael B. Mukasey, *Was Trump 'an Officer of the United States'?*, WALL ST. J. (Sep. 7, 2023, 12:59 PM), https://perma.cc/G5G2-SKXH. *But see* Adam Liptak, *In Reversal, Law Professor Says Former President Can Run After All*, N.Y. TIMES, Sep. 19, 2023, at A18.

8 Would that be a fair statement? Well, it depends on *why* they lost. To begin with, there are times when judges would reach a different outcome simply because the legal landscape has changed. For example, a change in governing precedent could change the outcome. *See, e.g.*, United States v. Rahimi, 117 F.4th 331, 334 (5th Cir. 2024) (Ho, J., concurring) ("It's up to the Court to modify or overrule its own precedents, as it alone

But I think the problem is actually worse than that. What concerns me most is not when they lose—but when they win.

Because the way they win is not just by applying the wrong standards. They win by applying double standards.

Just look at how many elites talk about the judiciary today—and compare it to how they talked about the judiciary in 2024 or 2023 or 2022.

It's obvious what's going on, isn't it? They praise and protect judges who do their bidding—and condemn and cancel those who don't.

And they do it for strategic reasons. Because they know that it's just human nature that most people, including judges, desire approval—and fear rejection—particularly from our nation's elites.[9]

So they vigorously defend district judges against criticism[10]—unless those judges live in Texas or Florida.[11]

They strenuously condemn forum shopping—but not if the courts are in Boston or San Francisco.[12]

---

deems appropriate—and to reverse us when it does.") (citing Jackson Women's Health Org. v. Dobbs, 597 U.S. 215 (2022), *rev'g* 945 F.3d 265 (5th Cir. 2019)). Or a change in party presentation of issues could change the outcome. *See, e.g.*, Alliance for Hippocratic Medicine v. FDA, 117 F.4th 336, 341 (5th Cir. 2024) (Ho, J., concurring) ("the Court reversed because the Government reversed"). And there are still other examples of how one can disagree in good faith with every member of a court. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697 (Scalia, J., dissenting).

9 *See generally* James C. Ho, *Fair-Weather Originalism: Judges, Umpires, and the Fear of Being Booed*, 26 TEX. REV. L. & POL. 335 (2022); James C. Ho, *Pressure is a Privilege: Judges, Umpires, and Ignoring the Booing of the Crowd*, HERITAGE FOUND. (Dec. 6, 2023), https://perma.cc/9QPB-TS54.

10 *See, e.g.*, *ABA Condemns Remarks Questioning Legitimacy of Courts and Judicial Review*, AM. BAR ASS'N (Feb. 11, 2025), https://perma.cc/GSB8-6YB5.

11 *See, e.g.*, James C. Ho, *Forum Shopping, Forum Shaming, and the Fear of Being Booed*, 1 JLCG 31 (2024) [hereinafter Ho, *Forum Shopping*]; Josh Blackman, *Judge James C. Ho's Remarks on Justice Thomas and Judge Kacsmaryk*, VOLOKH CONSPIRACY (Apr. 18, 2023, 1:15 PM), https://perma.cc/FS8K-NELG.

12 *See generally* Ho, *Forum Shopping*, *supra* note 11.

They strongly oppose the impeachment of judges[13]—except when those judges are named Thomas or Alito.[14]

They're happy to impeach a *President* for an alleged abuse of power[15]—but horrified if anyone even *suggests* impeaching a *judge* for an alleged abuse of power.[16]

---

13 *See, e.g.*, *Statement of the American Bar Association: ABA Stands Firmly with Statement of Chief Justice John Roberts in Rejecting Inappropriate Calls for Judicial Impeachment*, AM. BAR ASS'N (Mar. 18, 2025), https://perma.cc/6T3L-Q3B2.

14 *See, e.g.*, H.R. Res. 1353, 118th Cong. (2024) (calling for the impeachment of Justice Thomas), *and* H.R. Res. 1354, 118th Cong. (2024) (calling for the impeachment of Justice Alito). *See also* James Taranto & David B. Rivkin Jr., *Justice Samuel Alito: 'This Made Us Targets of Assassination'*, WALL ST. J. (Apr. 28, 2023), https://perma.cc/LYR5-HESW ("'The idea has always been that judges are not supposed to respond to criticisms, but if the courts are being unfairly attacked, the organized bar will come to their defense.' Instead, 'if anything, they've participated to some degree in these attacks.'") (quoting Justice Alito).

15 *See, e.g.*, H.R. Res. 755, 116th Cong. (2019) (calling for the impeachment of Donald Trump for "abus[ing] the powers of the Presidency").

16 *See, e.g.*, *Statement of the American Bar Association*, *supra* note 13.

Concerns about judicial security have likewise become politicized. Whether cultural elites care about judges' safety appears to depend on which Administration is in power.

Today, unsolicited pizza deliveries at judges' homes are condemned by elites. But during the previous Administration, members of the Supreme Court were protested at their homes—and activists offered $250 to anyone who could confirm the location of certain Justices—with the support of officials in Congress and the White House. *See, e.g.*, Yael Halon, *Progressive Lawmakers Rally Behind Protesters at Justices' Homes, Churches: 'I Welcome It'*, FOX NEWS (May 10, 2022, 10:56 PM), https://perma.cc/KT58-99Y2; Andrew C. McCarthy, *Biden Encourages People to Violate the Law by Protesting at Justices' Homes*, THE HILL (May 11, 2022, 10:00 AM), https://perma.cc/9HW2-PPBQ; Thomas Catenacci, *ShutDownDC Group Offers Bounties on Twitter for Public Sightings of Conservative Supreme Court Justices*, FOX NEWS (July 8, 2022, 4:41 PM), https://perma.cc/82UK-3XJT.

Similarly, some question whether today's Justice Department will protect judges. *See*, *e.g.*, Katherine Long, James Fanelli & C. Ryan Barber, *Judges Weigh Taking Control of Their Own Security Amid Threats*, WALL ST. J. (May 24, 2025, 9:00 PM), https://perma.cc/97FY-Q3RJ. But during the previous Administration, the Justice Department reportedly declined to prosecute open and obvious violations of federal law protecting the judiciary. *See, e.g.*, *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 30–32 (2023) (S. Hrg. 118–32).

2.

And that leads me to my second question. Will this new law journal cater to these double standards—or confront them?

Anyone who believes in the rule of law should be outraged by these double standards. Because you can't defend judicial independence only when it comes to decisions you like. That's not protecting the judiciary—that's politicizing the judiciary.

But it's even worse than that. What kind of message does it send to the American people, that the elites care about judicial independence—but only if they agree with the result?[17]

I think that there are only one of two possibilities—and neither is good. Option one is that they're lying: Judicial independence is in fact not that important to them. Option two is even worse: They're telling the truth. Judicial independence is very important to them. But some people's views are so unacceptable that they are unworthy of protection.

They may think their message is righteous. But to many people, it's sanctimonious.[18]

---

17 *See, e.g.*, In re Westcott, 135 F.4th 243, 251 (5th Cir. 2025) (Ho, J., concurring) ("The American people don't believe in judicial independence so that judges can be imperial—the people believe in judicial independence so that judges will be impartial."); G. Barry Anderson, *Preserving the Independence of the Judiciary*, LITIG. 3 (Winter 2009) ("When told about the importance of judicial independence, the public's first reaction is to ask, 'Independent from what?' The fear is that 'independent' translates into 'unaccountable' and perhaps even 'arrogant.' I have found that focusing on judicial 'impartiality' is far more effective, and perhaps more accurate . . . .").

18 Professor Adrian Vermeule made this point beautifully in response to a letter authored by fellow Harvard Law School faculty: "The central vice of the collective letter, then, is that it is tendentious. It attempts to appropriate a shared ideal and turn it to sectarian ends, implicitly aiming to define anyone who disagrees as an opponent of the rule of law altogether. In doing so, it runs the grave danger of causing or at least licensing anyone who does not agree with those sectarian ends to see all talk of the rule of law as a political sham - a disillusioned and cynical view that I do not share, and that I spend considerable time trying to persuade my students not to share. The collective letter thereby risks discrediting the rule of law itself." Adrian Vermeule, *An Open Letter to My Students*, THE NEW DIG. (Mar. 30, 2025), https://perma.cc/2TT4-9PZ7.

And it's dividing, if not destroying, our country. Because when they announce that some people hold views that are so abhorrent that they don't belong in polite society, those people will want to return the favor.

So let's be very clear about what's going on here: The double standards aren't inadvertent. They're intentional.

Because they don't want neutrality. They want conformity. If you don't conform, they'll call you corrupt, unethical, racist, sexist. They'll say and do whatever it takes to get you to bend the knee.

And even if you still won't conform, they'll attack you anyway—because they know that others will get the message, and comply.

3.

The double standards don't trouble the elites, because to them, this isn't a debate—it's a war.[19]

And that leads me to my third question: Will this new journal flounder—or will it fight for the rule of law?

I often tell my law clerks that there are two kinds of people in the legal profession: fighters and climbers.[20]

If this is indeed a war, and not a debate, then we don't just need lawyers—we need warriors.

And make no mistake: Unfortunately, this is a war.[21] It's a war for the soul of the judiciary. Are we going to be governed by law—or by the will of the elites?

The correct answer should be obvious. Judges should reject the condescension and the bullying of the elites, and follow the law in every case, no matter whose ox is gored. Judges must ignore the booing of the elites.[22]

---

19 *See, e.g.*, James C. Ho, *The Attack on the Courts: A Campaign of Intimidation*, NAT'L REV. (July 25, 2024, 1:20 PM), https://perma.cc/3E6C-PT2E; James C. Ho, *Judicial Independence: Still a Good Idea*, WALL ST. J., Nov. 22, 2024, at A15.

20 *See* Ho, *Forum Shopping*, *supra* note 11, at 52.

21 *See* sources cited *supra* note 19.

22 *See, e.g.*, THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob. E. Cooke ed., 1961) (noting that Founders created an independent judiciary to ensure that judges would have the "fortitude . . . to do their duty as faithful guardians of the Constitution"); *see also* sources cited *supra* note 9.

If we don't, we will lose the trust of the American people. That will be fatal to the rule of law. And it will be entirely our fault.

Because without the trust of the American people, the judiciary has nothing.

It's often said that the judiciary is a "co-equal" branch of government.[23] That's actually wrong.[24]

The judiciary is *not* a co-equal branch of government.[25] We may have an important role. But it's a limited one.

We don't write the laws.[26] We don't execute the laws.[27] We only interpret the law, and apply it to whatever disputes happen to be brought to us.[28]

So we're not an active branch. We're a passive branch.

Moreover, we're the least powerful branch. We have no power to enforce our judgments. We have neither the sword nor the purse. All we have is our voice.[29]

---

23 *See, e.g.*, Collins v. Mnuchin, 938 F.3d 553, 594 (5th Cir. 2019) (en banc).

24 *See, e.g.*, In re Westcott, 135 F.4th 243, 250 (5th Cir. 2025) (Ho, J., concurring).

25 *See, e.g.*, THE FEDERALIST NO. 48, *supra* note 22, at 334 (James Madison) (noting the "superiority" of the legislative branch as compared to the judiciary); Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (same).

26 *See* THE FEDERALIST NO. 78, *supra* note 22, at 522–23 (Alexander Hamilton) ("The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.").

27 *See id.*

28 *See id.*

29 *See id.* at 523.

So we need the other branches of government to respect our judgments.[30] That means that we need to earn their respect. We need to demonstrate that our decisions are based on law, not politics—and that we're exercising not force or will, but merely judgment.[31]

As an appellate litigator for over a decade, both in private practice and at the Texas Solicitor General's office, one of the most important parts of my job was to protect my clients when they believed that they had been wronged by a lower court.

In that job, I had plenty of frustrations with appellate judges. But what most stands out in my mind are actually the district courts.[32]

Appellate courts are multi-member bodies. So appellate judges can't do anything on their own. They have to convince their colleagues before they get to exercise judicial power.

But that's not true in the district courts. District court decisions are made by just one judge. District judges are the only members of the judiciary who can exercise the judicial power of the United States without anyone's consent but their own.[33]

---

[30] *See id.* ("The judiciary on the contrary has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."); Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 818 (1987) (Scalia, J., concurring in the judgment) (same); *see also* Lydia Wheeler, *Trump Defying Court Orders Is 'Stress Test' for the Judiciary*, BLOOMBERG (Apr. 17, 2025), https://perma.cc/FTW2-84JP (noting "how little power the federal judiciary has to enforce its decisions, even those from the nation's highest court").

[31] *See* THE FEDERALIST NO. 78, *supra* note 22, at 523 (Alexander Hamilton) ("[The judiciary] . . . may truly be said to have neither Force nor Will, but merely judgment."); *see also* A.A.R.P. v. Trump, 145 S. Ct. 1034, 1036 (2025) (Alito, J., dissenting) ("Both the Executive and the Judiciary have an obligation to follow the law. . . . [T]his Court should follow established procedures.").

[32] *See, e.g.*, United States ex rel. Harman v. Trinity Industries Inc., 872 F.3d 645, 647 (5th Cir. 2017) (noting that district court sent case to trial "[d]espite . . . a caution from this court that the case ought not proceed"); *see also* In re Westcott, 135 F.4th 243, 250 n.1 (5th Cir. 2025) (Ho, J., concurring) (collecting cases).

[33] *See, e.g.*, *Westcott*, 135 F.4th at 251 (Ho, J., concurring); James Taranto, *The Case of District Judges vs. Trump*, WALL ST. J., May 10–11, 2025, at A11. Justice Alito has made similar observations as well. *See* Transcript of Oral Argument at 97–98, Trump v. CASA, Inc. (2025) (No. 24A884) ("[T]here are 680 district court judges, and . . . sometimes they're wrong, and all Article III judges are vulnerable to an occupational

With unilateral power, there's unique danger that some district courts may get off track. There's a reason why there are jokes about God wishing that he was a federal district judge.[34]

So it's vital that district judges exercise their powers carefully and with integrity. And it's critical that appellate judges be ready and willing to intervene when district courts refuse to stay in their lane.

4.

I will close on a hopeful note. I hope that my presence here today illustrates that I expect big things from this new journal. I am hopeful that this journal will resist the bias that you see in the legal academy. That it will confront the double standards practiced by legal elites. And that it will fight for the rule of law—and for the proper but limited role of the judiciary in our constitutional republic.

So to my friends at the *Journal of Law & Civil Governance at Texas A&M*, I offer my heartfelt congratulations—and my deepest gratitude. We need all of you in this fight. Because we need to win the war for the judiciary. And there is much to do. So let's get started. Thank you.

---

disease, which is the disease of thinking that I am right and I can do whatever I want. Now, on a multi-member appellate court, that is restrained by one's colleagues, but trial judge, the trial judge sitting in the trial judge's courtroom is the monarch of that . . . realm . . . .").

34 *See, e.g.*, The Bar and Grill Singers, *Appointed Forever*, YOUTUBE (Oct. 19, 2015), https://perma.cc/AZ5G-QHU6 ("Imagine me as God. I do. I think about it day and night. It feels so right. To be a federal district judge and know that I'm appointed forever.") (sung to the tune of "Happy Together"). *See also* Transcript of Oral Argument at 97–98, Trump v. CASA, Inc. (2025) (No. 24A884) (questions from Justice Alito) (comparing the federal district judge to a "monarch").