

CAN THE RULE OF LAW SURVIVE JUDICIAL POLITICS?

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INTRODUCTION

According to legends dating back to the Renaissance, the ermine would rather die than soil its pristine white coat.¹ The ermine so came to symbolize purity, and English judges adopted this symbol by adorning their robes with ermine fur.² For their part, American judges took a more ermine-friendly approach, dispensing with the fur but retaining the ermine as a symbol. Wearing the “judicial ermine” thus reflected a commitment to “purity and justice,”³ and “the abandonment of all party bias and personal prejudice.”⁴ The Tennessee Supreme Court captured the essence of the myth nicely in 1872, when it wrote:

We are told that the little creature called the ermine is so acutely sensitive as to its own cleanliness, that it becomes paralyzed and powerless at the slightest touch of defilement upon its snow-white fur. . . . And a like sensibility should belong to him who comes to exercise the august functions of a judge. . . . But when once this great office becomes corrupted, when its judgments come to reflect the passions or the interest of the magistrate rather than the mandates of the law, the courts have ceased to be the conservators of the common weal, and the law itself is debauched into a prostrate and nerveless mockery.⁵

Although reference to the judicial ermine has fallen from common usage, the assumption it embodies—that when they don their robes, independent judges set aside their passions, prejudices, and interests and follow the law—remains integral to the legal establish-

¹ Christopher Gregg, *The Ermine*, MINERVA BRITANNA PROJECT, <http://f01.middlebury.edu/FS010A/STUDENTS/n075.htm> (last visited Oct. 18, 2011).

² 1 THE WORLD BOOK DICTIONARY 720 (2003).

³ *In re McMillan*, 797 So. 2d 560, 571 (Fla. 2001) (per curiam) (“The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice.”).

⁴ Claire Martin, *Biography of Judge John K. Alexander*, CAL. GENWEB PROJECT, <http://www.cagenweb.com/monterey/bios/alexanderjk.shtml> (last visited Oct. 18, 2011) (“To assume the judicial ermine and wear it worthily requires the abandonment of all party bias and personal prejudice, a possession of educational qualifications, clean hands, and a pure heart.”).

⁵ *Harrison v. Wisdom*, 54 Tenn. (7 Heisk.) 99, 112 (1872).

ment's traditional conception of the role that the judiciary plays in American government.⁶ That assumption has come under sustained attack by scholars and policymakers,⁷ leading to the question of whether there is enough truth to this "ermine myth" to make it one still worth defending, or whether the time has come to demythologize our understanding of what judges do and to acknowledge that, truth be told, the ermine is just a glorified weasel. Put another way, can the rule of law survive judicial politics?

In the academic realm, law professors long operated on the assumption that judges decide cases by bracketing out extraneous influences and following the relevant facts and law.⁸ Doctrinal scholarship, which all but monopolized the pages of law reviews for generations, proceeds from the premise that legal doctrine matters above all else when it comes to understanding why judges do what they do—that the decisions judges make must be understood and critiqued with reference to applicable law.⁹ Meanwhile, many political scientists long posited that judges decide cases by following their ideological predilections.¹⁰ In light of findings generated by studies of Supreme Court decision making, these scholars relegated the so-called legal model to the status of a total fabrication.¹¹ More recently, however, a cadre of interdisciplinary scholars has bridged this divide with a flurry of empirical projects demonstrating that judicial decision making is subject to a complex array of influences, including law, ideology, and others.¹²

⁶ See sources cited *supra* notes 3–5.

⁷ See, e.g., William P. Marshall, Keynote Address, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 1–3 (2011) (discussing judges' policy preferences); Ruth Marcus, *Booting the Bench: There's New Ferocity in Talk of Firing Activist Judges*, WASH. POST, Apr. 11, 2005, at A19 (quoting Pennsylvania Senator Rick Santorum, who characterized judges as ignoring the law and instead following their own policy preferences).

⁸ See Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 389 (1998) (discussing how scholars traditionally assumed that legal factors sufficiently explained unanimity); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1733 (2003) (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002)) ("Law professors believe the Constitution and other laws constrain the Court, while most political scientists do not.").

⁹ See Hensley & Johnson, *supra* note 8.

¹⁰ See Gerhardt, *supra* note 8; Marshall, *supra* note 7, at 8–9 (discussing the judicial political realist belief that judges follow their ideological preferences).

¹¹ See Marshall, *supra* note 7, at 3 (discussing two Supreme Court cases tending to prove that judges are political actors); Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1157–58 (2004) (discussing the attitudinal model of Supreme Court behavior).

¹² See, e.g., Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 779–83 (2005).

This slowly emerging interdisciplinary consensus among scholars has no analog in the policymaking realm. Court critics and defenders have squared off in shrill, dichotomous debates.¹³ Critics assert that judges whose decisions they excoriate are “activists” who disregard the law, live to satiate their ideological appetites, and must be held accountable and controlled.¹⁴ Defenders characterize judges as the heroic progeny of Solomon whose sole devotion is to the rule of law and whose independence from the rabble must be preserved.¹⁵ In this Article, I explore the implications of the emerging interdisciplinary consensus on what judges do for the ongoing public policy debate on how the judiciary should be regulated. To date, it is a largely unstudied issue. Scholars devoted to the empirical study of judicial decision making have focused on developing positive theories of judicial decision-making behavior with only passing regard to the policy implications of such theories,¹⁶ while scholars who have written about judicial independence and accountability as a matter of public policy have developed normative theories largely divorced from the empirical data.¹⁷

Part I of this Article describes the progress of the scholarly debate over what judges do, from the legal realism movement to the present day. I do so in some detail, for two reasons. First, the story of this emerging integrated, eclectic, multidisciplinary understanding of judicial decision making is recent enough that to date it has been told only in piecemeal fashion.¹⁸ Second, empiricists leading this multidisciplinary movement may be familiar with the story, but many others in the academic and legal realms are not. In discussing recent developments in this debate, the objective is to focus on the emerging common ground rather than on the differences that remain. In so doing, my ultimate point is a simple one: dichotomous arguments to the effect that judges categorically disregard the law and follow their policy preferences (or something else), or categorically disregard their pol-

¹³ Compare Marcus, *supra* note 7 (detailing criticism on judges' perceived use of personal preferences in rendering judicial decisions), with Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 103, 120 (Stephen B. Burbank & Barry Friedman eds., 2002) (surveying scholars' claims that judicial independence is important).

¹⁴ See Marcus, *supra* note 7; Ken Connor, *Activist Judges Undermine Government by the People*, CENTER JUST SOC'Y (May 22, 2008), <http://www.centerforajustsociety.org//2008/05/22/13445/ideas-in-action/activist-judges-undermine-government-by-the-people/>.

¹⁵ See, e.g., Peretti, *supra* note 13.

¹⁶ See *infra* Part I.D.

¹⁷ See *infra* Part II.

¹⁸ Judge Richard Posner explodes the ongoing, multidisciplinary study of judicial decision making into nine competing schools of thought, but my goal here is the reverse: to synthesize hitherto “competing” theories in a manner consistent with the more collaborative ethos of recent work. See RICHARD A. POSNER, *HOW JUDGES THINK* 19–56 (2008).

icy preferences (and everything else) to follow the law, have been debunked.

In stark contrast to this emerging interdisciplinary, scholarly consensus on a more eclectic, positive theory of judicial decision making is the public policy debate over judicial independence, accountability, and selection, where the underlying assumptions about what judges do remain stubbornly binary. The legal establishment maintains that judges who are buffered from political pressure will abide by their oaths of office and follow the law—hence the need for an independent judiciary that is insulated from popular and political control.¹⁹ Court critics posit that when left to their own devices, judges disregard the law and decide cases in a manner consistent with their policy preferences, strategic objectives, or personal feelings—hence the need for an accountable judiciary that is subject to popular and political control.²⁰ Part II will review the public policy arguments of court defenders and critics, to the end of contrasting how simplistically dichotomous they are, relative to the more nuanced findings of recent empirical scholarship.

In Part III, I seek to explain why, when it comes to describing the influences on judicial decision making, the public policy debate has remained stubbornly dichotomous while the scholarly debate has moved toward eclecticism and greater consensus. By their nature, public policy debates are aimed at capturing the hearts and minds of the general public. Survey data reveal that the public thinks judges are influenced by legal and extralegal factors—meaning that the public’s impressions of what influences judicial decision making is consistent with the findings of recent research detailed in Part I. Surveys further show that the public retains considerable confidence in its judges. Taken together, these results imply that it may be foolish and unnecessary for the legal establishment to cultivate the pretense that judges are influenced by facts and law alone. Those same surveys, however, show that the ermine myth continues to hold sway, as sizable majorities believe that judges should be influenced only by the facts and law and disapprove of the extralegal influences that they think occur. For the legal establishment to openly concede the inevitability of extralegal influence would be to undermine the myth and with it potentially the public’s confidence in the courts.

In Part IV, I move from the descriptive to the predictive. One possibility is that the dichotomous public policy debate detailed in

¹⁹ See AM. BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 70 (2003) (suggesting that “the administration of justice should not turn on the outcome of popularity contests” and proposing a preferred system of judicial appointment that reduces money’s corrosive effect on judicial selection).

²⁰ See Marcus, *supra* note 7; Connor, *supra* note 14.

Part III will persist into the foreseeable future without further consequence: judges will continue to say that they are slaves to the rule of law; critics will attack “activist” judges as symptomatic of a judiciary run amok; and the public will look askance at judges who deviate, but will retain its faith in the ermine myth. Without disputing the impressive force of inertia, I argue that a series of developments years in the making renders this outcome unlikely. The latest campaign against “liberal judicial activism,” media coverage of an ideologically divided Supreme Court, partisan battles over nominee ideology in Senate judicial-confirmation proceedings, publicized accounts of judges declining to disqualify themselves from cases in which the risk of extralegal influence seems obvious, and the advent of expensive, highly politicized state court election campaigns cast doubt on assumptions that we are in a business-as-usual scenario, in which the public’s continued faith in its judges and the rule of law is a foregone conclusion. A second possibility is that the events just described have put us on a path to crisis, but polling data showing continued public confidence in the courts belie the imminence of such a development. A third possibility—and the most likely—is that we will witness a gradual erosion of rule-of-law values as the public internalizes the lessons of recent developments and becomes increasingly jaded about judges and their need for independence.

In Part V, I turn from the predictive to the prescriptive. The key for the legal establishment, I argue, is to reorient the ermine myth itself. For myths to galvanize a community, there must be a perceived truth at their core. Although there is truth to the “myth” that independent judges follow the law, that kernel of truth is diminished because “law,” for purposes of the myth, has been characterized so rigidly, in terms more compatible with nineteenth-century formalism than more flexible, contemporary understandings. If the primary justification for an independent judiciary is to bracket out extralegal influences and enable judges to apply the law as a kind of formula, then deepening skepticism over the rule of law and the value of judicial independence is inevitable.

It is possible, however, to step back and reaffirm the instrumental value of an independent judiciary in other terms, which underscore the role judicial independence plays in promoting three discrete objectives: a more capacious rule of law (one that acknowledges the inevitability of judicial discretion and the role that different influences play in informing that discretion), due process, and just outcomes informed by a ubiquitous form of pragmatism that most judges employ. The claim that judicial independence promotes a more flexible rule of law, due or fair process, and just outcomes is still “mythological” insofar as excessive independence can liberate judges to act upon

other interests that interfere with these goals. That, however, is where mechanisms for judicial accountability must operate to backstop independence by pursuing the very same objectives.

Reorienting the ermine myth to say that independent judges uphold a flexible rule of law, preserve due process, and seek just outcomes will force the legal establishment to rethink its reform agenda. For generations, the mantra of reformers within the legal establishment has been to “depoliticize” or “take the politics out” of the judiciary. That view may be compatible with crumbling formalism but is ill-suited to coexist with a new construct positing that judges are properly subject to a range of extralegal influences, including “political” ones, insofar as such influences concern the art of governing fairly and sensibly. The better approach, I contend, is to move toward an era of “managed politics,” in which the goal is to regulate, rather than exterminate, extralegal influences on judicial decision making to the end of promoting the three objectives of judicial independence and accountability. In many ways, that era is already upon us, but acknowledging it more explicitly should better inform the legal establishment’s reform agenda. I conclude by illustrating the point with a brief discussion of possible reforms in the arenas of legal education, judicial selection, and judicial oversight. In the end, the rule of law can survive judicial politics, not by disavowing the existence of extralegal influences, but by managing them.

I

THE SCHOLARLY DEBATE ON WHAT JUDGES DO: INCHING TOWARD CONSENSUS

Recent developments have reconciled, to an extent greater than ever before, the competing views of scholars across academic disciplines of what influences judicial decision making. To appreciate the significance of those developments, however, it is necessary to embed them in a historical context. A logical starting point is the advent of formalism in the nineteenth century, which gradually gave way to conflicting and, more recently, unifying approaches to understanding judicial decision making.

A. The Ascendance of Formalism

In the United States, the first half of the nineteenth century was a time of geographical and economic expansion. To accommodate that expansion, merchants and entrepreneurs were keen to modernize the common law by “forg[ing] an alliance with the legal profession to advance their own interests through a transformation of the legal sys-

tem.”²¹ To facilitate this transformation to a more business-friendly common law, courts often resolved close cases with reference to public policy and conceptions of economic justice.²²

By the mid-nineteenth century, however, this transformation was close to complete.²³ To shore up the gains of the previous half-century, the simple solution was to lock those gains in place with a new, more formalistic way of looking at the law, which “gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making ‘legal reasoning seem like mathematics,’ conveyed ‘an air . . . of . . . inevitability’ about legal decisions.”²⁴

In the latter third of the nineteenth century, when populists and progressives challenged economic elites and the legal order they had cultivated, mainstream judges of the era found refuge in the new formalism. “For these judges,” Lawrence Friedman writes, “formalism was a protective device. They were middle-of-the-road conservatives, holding off the vulgar rich on one hand, the revolutionary masses on the other. The legal tradition represented balance, sound values, a commitment to orderly process.”²⁵

Meanwhile, Harvard Dean Christopher Columbus Langdell revolutionized legal education in the last quarter of the nineteenth century by reorienting the focus of the law school classroom away from lectures on legal principles toward questions and answers that divined legal principles from cases.²⁶ Implicit in the case method was the notion that legal principles could be deduced from scientific analysis of cases and legal scholarship should be devoted to isolating and classifying those principles in exhaustive articles and treatises.²⁷ The net effect was to inculcate new generations of lawyers with the values of formalism or, more neutrally, “classical legal thought.”²⁸

²¹ MORTON J. HORWITZ, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 251 (1975).

²² WILLIAM W. FISHER III, MORTON J. HORWITZ & THOMAS A. REED, *Introduction*, in AMERICAN LEGAL REALISM, at xi, xii (William W. Fisher III et al. eds., 1993).

²³ HORWITZ, *supra* note 21, at 251.

²⁴ *Id.* at 252 (quoting Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894)).

²⁵ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 288 (3d ed. 2005).

²⁶ JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 25–26 (1995).

²⁷ *Id.* at 27 (quoting James Barr Ames’s recommendation that law professors should create “a high order of treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based on scientific analysis”); *see also*, FISHER et al., *supra* note 22 (noting that “[p]roperly organized, law was like geometry” to classical educators); THOMAS C. GREY, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (“Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts . . .”).

²⁸ GREY, *supra* note 27, at 16.

B. The Rise and Fall of Legal Realism

During the progressive era, the dictates of classical legal thought were challenged from various quarters. Justice Oliver Wendell Holmes opined that:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.²⁹

Dean Roscoe Pound, in turn, complained about the prevailing “mechanical jurisprudence,” in which “premises are no longer to be examined,” and “[e]verything is reduced to simple deduction from them” to the point where “social progress” is “barred by barricades of dead precedents.”³⁰

In the 1920s, academic lawyers at Columbia and Yale, persuaded by the critiques of Holmes, Pound, and others, renounced formalism, proposed a more “functional” curriculum that deemphasized technical legal doctrine, and argued that law was better studied empirically as a social science—a series of activities that Columbia law professor Karl Llewellyn collectively denominated “realism.”³¹ The realist critique of formalism could be scathing, as illustrated by the following excerpt from Jerome Frank’s *Law and the Modern Mind*:

Myth-making and fatherly lies must be abandoned—the Santa Claus story of complete legal certainty; the fairy tale of a pot of golden law which is already in existence and which the good lawyer can find, if only he is sufficiently diligent; the phantasy of an aesthetically satisfactory system and harmony, consistent and uniform, which will spring up when we find the magic wand of rationalizing principle.³²

For this new realist, then, law was not transcendental; rather, law was what law did. To understand how judges decided cases, the realist deemphasized parsing the abstract legal principles upon which judges purported to rely and devoted more time to studying what judges really did—balance the competing policies at stake in the cases that came before them.³³

²⁹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897).

³⁰ Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462 (1909).

³¹ See generally, SCHLEGEL, *supra* note 26, at 15–18.

³² JEROME FRANK, *LAW AND THE MODERN MIND* 260 (Anchor Books ed. 1963) (1930).

³³ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), reprinted in *AMERICAN LEGAL REALISM*, *supra* note 22, at 172, 176–77 (describing the judicial process as one involving balancing interests); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 842 (1935) (“[The judge] will frankly assess the

Legal realism's campaign to reorient the study of law away from a body of rules and toward empirical, social science analysis of judicial behavior never gained traction in American law schools and by the end of the 1930s had run its course.³⁴ John Henry Schlegel explains why realism was menacing to the legal academy, in terms that apply equally to judges:

Science was too threatening. It suggested that the words of law might not be too important, that the special preserve of the law professor might not be too special and that, since law was not just rules, the rule of law might not be just a matter of following rules either. That threat was simply too much for the professional identity of the law professor; it could only be attacked mercilessly or distanced with derisive laughter.³⁵

I have told the traditional story of formalism and its confrontation with realism in stark terms to highlight the origins of differences in approach to judicial decision making that persist to this day. The traditional story, however, arguably exaggerates the extent of the "formalist-realist divide."³⁶ In a close study of the period, Brian Tamanaha found that "many of the most prominent lawyers, judges and academics of the day . . . described judging in consummately realistic terms,"³⁷ while many legal realists "believed in the law,"³⁸ sought to "increase the certainty and predictability of law,"³⁹ and "did not assert that judges routinely manipulate the law to produce desired outcomes."⁴⁰ Tamanaha's insights add symmetry to the thrust of this Article: While I argue that the time has come to end unjustifiably dichotomous public policy debates over what judges do, Tamanaha shows that the historical origins of those debates have themselves been portrayed in terms that are unjustifiably dichotomous.

C. The Rebirth of Realism and the Rise of the "Attitudinal Model"

The demise of the legal realism movement signaled an end to widespread agitation within the legal academy for teaching, writing,

conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals . . .").

³⁴ Charles K. Rowley, *An Intellectual History of Law and Economics: 1739–2003*, in *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS* 3, 11 (Francesco Parisi & Charles K. Rowley eds., 2005) ("By the late 1930s, [legal realism] had faded from the scene.").

³⁵ SCHLEGEL, *supra* note 26, at 255.

³⁶ BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 3 (2010) ("[T]he formalist-realist divide is wrong in essential respects.").

³⁷ *Id.* at 4.

³⁸ *Id.* at 94.

³⁹ *Id.*

⁴⁰ *Id.* at 6–7, 94.

and thinking about law as a social science rather than a system of rules. Legal realism did, however, influence some academic lawyers to explore the ways in which related disciplines illuminated the analysis of law—disciplines that gradually worked their way into law schools as “law and . . .” subfields.⁴¹ Thus, legal realism is credited with catalyzing the law and economics movement, partly because legal realism paved the way by challenging formalism’s monopoly on legal analysis and partly because realism was vulnerable to the critique that it lacked a well-defined methodology, which economic analysis sought to supply.⁴² Law and psychology is more clearly rooted in the realist tradition and came into its own in the early 1950s, when the University of Chicago Law School initiated a Law and Behavioral Science Program that undertook pathbreaking research into the psychology of jury behavior.⁴³ And devotees of law and sociology—a subfield that made its first real splash in the 1960s with law school projects at the University of California at Berkeley and the University of Wisconsin⁴⁴—likewise trace their empirical tradition and interest in the interrelationship between law and society back to the realists.⁴⁵

In law schools, consigning a discipline to “law and” status can operate as a means of marginalization that keeps it at a distance from the study of “real” law, which has remained focused on the rules that judges interpret and apply.⁴⁶ Such was not the fate of political sci-

⁴¹ Rowley, *supra* note 34, at 11 (“The real significance of legal realism is to be found . . . in the avenue that it opened up for a future marriage between law and certain social sciences . . .”).

⁴² *Id.* at 12 (“The path towards law and economics undoubtedly was smoothed by the legal realist challenge to formalism that opened up American legal education to the study of the social sciences.”); see also Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2 (1986) (“Law and economics [is] a continuation of the social scientific tradition in the law that began with Roscoe Pound and the realists.”); Edmund W. Kitch, *The Intellectual Foundations of “Law and Economics,”* 33 J. LEGAL EDUC. 184, 184 (1983) (“[W]hen the serious scholar of the law wishes to turn from the preliminaries and get on with intensive investigation of law and legal institutions, he can find tools and insights in the law-and-economics tradition that advance his work.”). This is not to suggest, however, that law and economics scholars share intellectual roots with legal realism in the same way that political scientists and psychologists do. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 3 (1995) (“The law and economics movement owes little to legal realism.”).

⁴³ See generally SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 12–14 (1988) (describing the University of Chicago Jury Project).

⁴⁴ LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 7 (2d ed. 1977) (discussing the collaboration between legal scholars and social scientists more formally structured in the mid-1960s at U.C. Berkeley, the University of Wisconsin, and other schools); SCHLEGEL, *supra* note 26 at 248–50 (describing the successful Russell Sage programs at U.C., Berkeley and the University of Wisconsin).

⁴⁵ FRIEDMAN & MACAULAY, *supra* note 44, at 2 (tracing the law and behavioral science movement to legal realism in the 1920s and 1930s).

⁴⁶ SCHLEGEL, *supra* note 26, at 254 (discussing “the second-class citizenship that was implied by ‘law and’”). Law and economics has fared somewhat better, in part because its approach is more compatible with a rules-based analysis. Rowley, *supra* note 34, at 12

ence, however, where interest in law as a social science was sufficient to ensconce the study of judicial behavior within a political science subfield (courts and constitutional law, or public law), wholly independent of legal education.⁴⁷ While many academic lawyers were uncomfortable with the implications of legal realism, political scientists of the realist era were not. So-called “old-institutionalist” political scientists of the day, such as Edward Corwin, Robert Cushman, and Charles Grove Haines, were realists of a moderate stripe who “believed that politics entered the judicial process in subtle and complex ways.”⁴⁸ In other words, they did not think that “policy preferences or individual ‘interests’ determined how judges decided cases,” even though “they recognized such preferences could affect judicial decisions.”⁴⁹ In the 1940s, however, C. Herman Pritchett introduced a more aggressive “behavioral” strain of legal realism to the study of courts, grounded in a social psychology paradigm.⁵⁰ Pritchett and his successors set out to demonstrate, through empirical research, that judges were “motivated by their own preferences.”⁵¹ Exhibit A in Pritchett’s analysis was the tendency of majority and dissenting Supreme Court opinions to reach divergent conclusions from the same facts and law—a divergence that he explained with reference to the policy preferences of the individual Justices.⁵²

Unencumbered by the norms of a legal culture that proceeded from the premise that law operates as a constraint on judicial behavior, political scientists who followed in Pritchett’s footsteps devoted themselves to describing what judges do in terms that marginalized law as a variable in the judicial decision-making equation.⁵³ In the

(“[T]he relationship [between legal realism and law and economics] should not be exaggerated,” in part because law and economics “turned out to be a movement that incorporated some of the formalism of the Langdellian era, albeit a formalism which was based on the notion that laws should be economically efficient, rather than that they should rest on *stare decisis* and precedent.”).

⁴⁷ FRIEDMAN & MACAULAY, *supra* note 44, at 7 (“[I]t is fair to note that a social science interest in law is outside the mainstream of scholarship in law, and in all social sciences, except perhaps political science.”).

⁴⁸ Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 15, 20 (Cornell W. Clayton & Howard Gillman eds., 1999).

⁴⁹ *Id.*

⁵⁰ Lee Epstein, Jack Knight & Andrew Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 786 (2003) (discussing Pritchett’s role in moving legal realism into the political science department and adopting quantitative empirical methods); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 384 (2007) (discussing the extent to which a social psychological paradigm dominates the study of court decision making by political scientists).

⁵¹ C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947*, at xii–xiii (1948).

⁵² *See id.*

⁵³ *See* Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 263 (2006).

1960s, Glendon Schubert coined the term “attitudinal” to describe a model that explained how Supreme Court Justices voted with reference to their attitudes or ideological preferences.⁵⁴ And in the 1990s, Harold Spaeth and Jeffrey Segal summarized the current state of political science research on Supreme Court decision making in an influential book that pitted the “attitudinal model” against the “legal model;” they declared the former victorious, characterizing the legal model as “meaningless.”⁵⁵ Against this backdrop of what many political scientists regarded as overwhelming evidence in support of the attitudinal model, the persistent view perpetuated by lawyers, judges, and law schools that the Supreme Court decides cases in light of applicable law was relegated to the status of myth.⁵⁶

In light of data generated by proponents of the attitudinal model, by the 1990s few political scientists would dispute that votes on the U.S. Supreme Court were influenced by the policy preferences of the individual Justices.⁵⁷ But in the minds of some, “studying the Supreme Court . . . as little more than a collection of individuals who were pursuing their personal policy preferences” failed to take adequate account of other influences on judicial behavior.⁵⁸ In two important books, Howard Gillman and Cornell Clayton collected and promoted the recent work of “neoinstitutional” scholars (a label they applied to link these scholars in spirit to “old institutionalists” of the realist age), who argued that that judicial decision making is more

⁵⁴ GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963*, at 22 (1965).

⁵⁵ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 17, 62–65 (1993).

⁵⁶ *Id.*; John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 *SOC. SCI. Q.* 928, 937 (2000) (“[O]nly a minority of citizens subscribe to the myth of legality in terms of what they perceive to actually determine Court decisions. . . . In particular, there is widespread recognition of the effect of the justices’ ideologies on their decisions.”)

⁵⁷ Peretti, *supra* note 13, at 109–10 (2002) (“This ‘attitudinal model’ is widely accepted by social scientists who study the courts. As Professor Segal asserts, ‘[n]o serious scholar of the judiciary denies that the decisions of judges, especially at the Supreme Court level, are at least partially influenced by the judges’ ideology.’” (quoting Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES*, *supra* note 48, at 237, 237)).

⁵⁸ Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES*, *supra* note 48, at 1, 1–3 (“[T]here are good reasons to think that there may be much to be gained by focusing less on the policy preferences of particular justices and more on the distinctive characteristics of the Court as an institution, its relationship to other institutions in the political system, and how both of these might shape judicial values and attitudes.”).

fully understood against the backdrop of the political, legal, social, and cultural institutions of which judges are a part.⁵⁹

Thus, for example, neoinstitutionalists such as Lee Epstein and Jack Knight, who advanced a quasi-economic “rational-choice” theory of judicial decision making, argued that while judges are indeed “seekers of legal policy,” as attitudinal scholars posit, their “ability to achieve their goals [primarily policy goals] depends on a consideration of the preferences of others.”⁶⁰ In other words, from a rational-choice perspective, judges do not vote reflexively in accord with their personal policy preferences, but think strategically about how Congress, the President, and others may react to given case outcomes and adjust their decision making accordingly to better effectuate preferred policy outcomes.

In contrast, other neoinstitutional scholars advocated a “historical interpretive” approach to understanding judicial decision making, which argues that historical accounts of institutional development are critical to understanding the values of decision makers within those institutions.⁶¹ Thus, the judiciary’s institutional setting helps to create and frame the values that judges seek to implement when they make decisions—values that can include, among others, a commitment to the rule of law. For their part, ardent proponents of the attitudinal model often responded less by trying to accommodate the neoinstitutional critique than by conducting new studies that set out to prove the neoinstitutionalists wrong.⁶²

Meanwhile, back at the law schools, the lessons of legal realism enjoyed a brief renaissance in the 1970s with the critical legal studies movement, which posited that elite judges perpetuate the domination of their class by exploiting the fiction of the law’s rationality and evenhandedness—thereby entrenching preexisting inequalities.⁶³ By the 1980s, however, the critical legal studies movement had collapsed

⁵⁹ SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES, *supra* note 48; THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999).

⁶⁰ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE*, at xiii (1998).

⁶¹ Gillman & Clayton, *supra* note 58, at 6 (describing one neoinstitutional camp as comprised of those whose work “seeks to provide historical accounts of institutional development or interpretive characterizations of the actions of judges,” and noting that “historical institutional studies tend to assume that judicial behavior is not merely *structured* by institutions but is also *constituted* by them in the sense that goals and values associated with particular political arrangements give energy and direction to political actors”); *see also* Clayton, *supra* note 48, at 31 (attributing the “historical-interpretive variant” of new institutionalism to Rogers Smith and others).

⁶² Friedman, *supra* note 53, at 263 (“Today, attitudinalists devote too much effort to . . . fending off claims that something other than attitudes matter.”).

⁶³ *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 259 (1997) (“However, most advocates of CLS go further and claim that the indeterminacy is manipulated in the interests of capital-

under the weight of its inability to verify its intuitions through empirical research and its failure to propose a more satisfactory alternative to the status quo it berated.⁶⁴

As the attitudinal model came into its own in the latter half of the twentieth century, one might suppose that the deluge of data attitudinal studies generated, purportedly demonstrating the irrelevance of law to judicial decision making, would be of acute interest and concern to law professors, judges, and lawyers. But as the twentieth century drew to a close, the sweeping conclusions of attitudinal studies that were causing a cacophonous din in political science circles were being greeted in the legal profession by the sound of crickets.

Professor Frank Cross, writing in 1997, was among the first to decry this “unfortunate interdisciplinary ignorance” in a law review article.⁶⁵ “The political science research and the attitudinal model are significant in that they could potentially obliterate the foundations of much current and past legal scholarship,” Cross noted, but “[t]o date, legal scholarship has been remarkably oblivious to this large and mounting body of political science scholarship on courts.”⁶⁶ Professor Michael Gerhardt attributed the obliviousness to a fundamental difference in world view: “Law professors believe the Constitution and other laws constrain the Court, while most political scientists do not. These different perspectives on justices’ fidelity to the law ensure that legal scholars and political scientists have little to say about the Court that is of interest to each other.”⁶⁷

Judge Patricia Wald went further, suggesting that the legal community was not oblivious, but dismissive: “I register something of a ho-hum reaction to the notion that judges’ personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another.”⁶⁸ In other words, to the extent that the attitudinal model stood for the softer proposition that judges are influenced by their policy preferences, the model told the legal profession nothing it did not know already;⁶⁹ and to the extent that it stood for the harder proposition that law does not operate as a constraint on judges, the attitudinal model reflected a difference in perspective so fundamental as to foreclose a productive exchange of ideas.⁷⁰

ist elites. Precedent has been a ‘mask’ for rules of oppression perpetuated by concentrations of power, especially that of capital.”).

⁶⁴ *Id.* at 257–58, 260 n.41.

⁶⁵ *Id.*

⁶⁶ *Id.* at 252–53.

⁶⁷ Gerhardt, *supra* note 8, at 1733.

⁶⁸ Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

⁶⁹ *Id.*

⁷⁰ See *supra* notes 66–68 and accompanying text.

D. The New Empiricists

Law professors and political scientists had thus developed contradictory, dichotomous conceptions of judicial decision making that they happily cultivated in relative isolation. Persistent calls for more serious interdisciplinary engagement, however, gradually intruded upon their solitude.⁷¹ Some law professors and judges argued that political scientists were not taking law seriously enough.⁷² Others critiqued attitudinal studies, arguing that such studies delineated the scope of “law” so narrowly and rigidly as to render its irrelevance to judicial decision making a *fait accompli*.⁷³ Still other legal scholars embarked on empirical research agendas of their own, eliciting criticism, if not potshots from some political scientists as to their methodology, but simultaneously giving rise to a renaissance of interest among academic lawyers in the empirical study of judicial behavior.⁷⁴ This “‘Quantitative Moment’ in the legal academy”⁷⁵ has, in a very short time, all but obliterated the study of judicial decision making as an either-or enterprise, in which one must choose sides and explain judicial behavior with reference to law or policy preferences as if they were mutually exclusive alternatives.⁷⁶

1. *Studies in Law and Politics: The Supreme Court*

By the time the quantitative moment arrived, political scientists had already established an all-but-irrefutable empirical case for the

⁷¹ Epstein et al., *supra* note 50, at 783 (“It has been in only the last few years that law professors have shown much interest in political science approaches to judging . . .”); Friedman, *supra* note 53, at 262 (“[L]egal scholars now are pursuing the same sort of empirical inquiries as positive scholars, creating exciting opportunities for true interdisciplinary collaboration.”).

⁷² Friedman, *supra* note 53, at 262 (“Yet, reflecting an almost pathological skepticism that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously.”); see also Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998) (denouncing two studies as “the heedless observations of academic scholars who misconstrue and misunderstand the work of . . . judges”).

⁷³ Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 13, at 9, 25 (discussing the problems attitudinal studies have had by “operationalizing” law); Cross, *supra* note 63, at 264 (“This particular criticism may seem unpersuasive to lawyers as excessively reductionist—the ability to make colorable arguments for two different sides does not mean that those arguments are necessarily of equal validity.”).

⁷⁴ Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 11 (2002) (criticizing legal scholars for giving insufficient attention to methodology in empirical analysis); see also Sisk & Heise, *supra* note 12, at 779–83 (discussing the “Great Empirical Method Debate of 2002” provoked by the Epstein and King article).

⁷⁵ Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 876 (2008) (reviewing FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007)).

⁷⁶ *Id.* at 877 (discussing the indispensability of both empirical studies and doctrinal studies).

proposition that a Justice's policy preferences influence his or her votes on the U.S. Supreme Court. Segal and Spaeth reported that they could predict 74% of individual Justices' decisions on the basis of their attitudinal predispositions;⁷⁷ another study by Segal and Albert Cover found that in civil liberties cases, the correlation between the attitudes of individual Justices and their voting behavior was 80% or higher.⁷⁸

Subsequent interdisciplinary work has, however, yielded important nuances. In 2003, two law professors and two political scientists published the results of a "Supreme Court Forecasting Project" in which man squared off against machine in what can best be described as a twenty-first-century remake of the "Ballad of John Henry."⁷⁹ Overall, the "machine"—a statistical model—outperformed the predictions of legal experts by correctly forecasting case outcomes 75% of the time, as compared to 59.1% for the experts.⁸⁰

While this project would seem to have pitted political scientists against lawyers in a kind of celebrity death match, in reality, it went a long way toward demonstrating that the longstanding law-versus-attitude debate presented a false dichotomy. For the machine to work, the computer model could not base its predictions on naïve "attitudinal assumptions," which the authors found "insufficient to generate specific forecasts prospectively."⁸¹ Rather, to maximize its predictive capabilities, the model employed classification trees that forecast a Justice's future decisions in light of how that Justice had previously decided cases that were similar in six semispecific respects.⁸² At the same time, to maximize their predictive capabilities, the experts were not confined to naïve doctrinal analysis of pending cases, but were free to take attitudinal factors into account when making their predictions.⁸³

Insofar as "legal experts" appreciate that a Justice's policy preferences influence how he or she analyzes the law in close cases, they cannot be surprised to learn that sophisticated statistical models aimed at isolating the Justices' policy predilections can often predict Supreme Court decisions—particularly since the experts likely tried to

⁷⁷ SEGAL & SPAETH, *supra* note 55, at 229.

⁷⁸ Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561–62 (1989).

⁷⁹ Ruger et al., *supra* note 11, at 1151.

⁸⁰ *Id.* at 1152.

⁸¹ *Id.* at 1164.

⁸² *Id.* at 1163. The six factors that the study employed were: the circuit of origin for the case, the issue area of the case, the type of petitioner, the type of respondent, the ideological direction of the lower-court ruling, and whether the petitioner argued that a law or practice was unconstitutional.

⁸³ *See id.* at 1185 ("The prediction results suggest that the experts relied on highly general attitudinal assumptions to supplement their assessment of legal factors . . .").

identify those same predilections when making their own predictions.⁸⁴ Consistent with this latter supposition,⁸⁴ the researchers found that the experts performed comparably to the model (indeed, slightly better) in predicting the votes of individual Justices overall, but that the model did much better at predicting “swing votes,” where the researchers fairly suspected that the complex and idiosyncratic preferences of Court moderates were too difficult for the experts to divine without the benefit of a computer model.⁸⁵ Rather than thinking about this study as another data point in a dichotomous debate over the primacy of law or attitude in Supreme Court decision making, the authors suggested that the complex interplay between law and attitude the study revealed may warrant a reconceptualization of law itself: “[U]nder any theoretical conception that regards law as consisting at least in part of what judges do, proxies that reliably predict what they will do in the future are worth considering as baselines or guideposts of ‘law,’ whether or not we can imagine them as ‘law’ themselves.”⁸⁶

Recent studies of related issues have further underscored the need for an increasingly hybridized and eclectic understanding of Supreme Court decision making. Academic lawyers have begun to explore the correlation between a judge’s policy preferences and legal preferences.⁸⁷ Thus, for example, conservative Justices typically favor methods of constitutional or statutory interpretation—such as originalism or textualism—that yield conservative policy outcomes.⁸⁸ The net effect of this insight is twofold: first, it shortens the analytical distance between law and attitude; and second, it suggests the possibility that on those infrequent occasions when legal and policy preferences diverge, institutional rule of law norms could lead Justices to opt for the former—which may explain at least some case outcomes that statistical models do not predict.⁸⁹

In a related vein, studies of precedent conducted in the 1990s by attitudinal scholars confirmed what lawyers had long suspected—that

⁸⁴ See *id.*

⁸⁵ *Id.* at 1184–85 (“[T]he experts’ accuracy rate by individual Justice was markedly higher at the ends of the Court’s ideological spectrum than it was in the middle That the legal experts have difficulty with Justices O’Connor and Kennedy is hardly surprising. . . . What is needed is a more systematic and nuanced recognition of the voting patterns . . . and this is difficult for human experts to discern from case-by-case analysis.”).

⁸⁶ *Id.* at 1191 (emphasis omitted).

⁸⁷ See Kim, *supra* note 50, at 404–05 (arguing that judges have legal preferences in addition to policy preferences); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 786 (2008) (arguing that the interpretive theories a Justice adopts affects case outcomes).

⁸⁸ See Volokh, *supra* note 87, at 784–85 (discussing how judges may use a method of interpretation to yield a preferred outcome).

⁸⁹ Professor Volokh, in contrast, speculates that the opposite may also be true—that Justices will change their legal preferences to achieve preferred policy outcomes. *Id.*

there is typically precedent on both sides of close cases, and that a Justice will usually rely on precedent that supports a result consistent with his ideological preferences.⁹⁰ More recent work, however, has added important qualifications by exploring the role that respect for precedent plays in preserving the Court's institutional legitimacy and by differentiating between run-of-the-mill precedent, which is often manipulated in the service of implementing policy objectives, and more enduring "super" precedent that constrains Court decision making in identifiable ways.⁹¹ Finally, two studies with overlapping authorship found that the ideological preferences of most Justices "drift" over time.⁹² Apart from complicating the task of correlating a Justice's votes to her political predilections at a particular moment in time, the incidence of ideological drift begs the questions of why it occurs, whether changing policy preferences correlate to changing legal preferences, and, if so, which is the chicken and which the egg? Such questions take on added relevance in light of other research finding that the Court is most likely to render "consequential" decisions, that is, decisions with a greater impact on the law, when the preferences of the majority are homogeneous, which liberates the opinion writer to speak more stridently without fear of losing his or her majority.⁹³

2. *Studies in Law and Politics: The Lower Courts*

Early attitudinal studies focused on the U.S. Supreme Court, which made sense. To show that a judge's view of what the law (or public policy) *should be* influences her view of what the law *is*, the Supreme Court—which decides close cases where the law is unclear and has declared itself "supreme in the exposition of the law of the Consti-

⁹⁰ SEGAL & SPAETH, *supra* note 55, at 44–49 (arguing that the validity of precedents turns on the preference of the majority of the court); HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 16–17 (1999) (discussing how judges selectively use facts and law to support a result they had already reached).

⁹¹ MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 177–78 (2008) (discussing super precedents as those so deeply embedded in law that they are immune to being overturned); THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 19–23 (2006) (discussing that the Court cites precedents to legitimize its decisions).

⁹² Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1504 (2007) (finding drift among twenty-two of twenty-six Justices, with twelve becoming more liberal, seven more conservative, and three drifting "in more exotic ways"); Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the US Supreme Court*, 23 J.L. ECON. & ORG. 365, 365 (2007) (finding drift among fourteen of sixteen Justices who served on the Court for more than ten years).

⁹³ Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 381 (2008).

tution”⁹⁴—is an obvious place to start. But it was generally understood that the findings of Supreme Court studies did not necessarily extend to district and circuit courts, where judges are subject both to appellate review and possibly to a different set of norms that respect the constraints of controlling precedent.⁹⁵

In the 1990s, attitudinal scholars posited that lower-court judges acted as agents for the Supreme Court by implementing the latter’s policy preferences, on pain of reversal.⁹⁶ To explain how the Supreme Court controlled the lower courts despite low rates of reversal, some political scientists theorized that the Supreme Court establishes “doctrinal intervals” within which circuit courts may deviate from the Supreme Court’s preferred policy outcomes without reversal and that circuit judges act on their own policy preferences strategically, by implementing them to the extent they come within the confines of those intervals.⁹⁷ Consistent with core tenets of the attitudinal and strategic choice models, neither approach acknowledged law or legal norms as meaningful constraints on lower-court decision making.

More recent work, however, has added to the factors influencing lower-court decision making. In his groundbreaking studies of circuit courts, Cross found that “[j]udicial decision making clearly involves a mix that includes some ideological influence, considerable legal influence, and undoubtedly other factors.”⁹⁸ As to ideology, he found that while it “appears to be a factor in judicial decision making, . . . the available evidence can demonstrate only that it is a relatively small factor.”⁹⁹ Cross found across studies of standards of deference in appellate review,¹⁰⁰ “procedural thresholds” (e.g., justiciability requirements),¹⁰¹ and adherence to precedent¹⁰² that “[f]or every legal variable amenable to quantitative study, there was consistently a statis-

⁹⁴ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁹⁵ See Kim, *supra* note 50, at 387–88 (noting that the lower courts’ relationship to law is quite different from the Supreme Court’s because the Supreme Court is not strictly bound by precedents of any kind).

⁹⁶ E.g., Donald R. Songer, Jeffery A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 675 (1994).

⁹⁷ McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1639 (1995).

⁹⁸ FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 177 (2007).

⁹⁹ *Id.* at 28.

¹⁰⁰ *Id.* at 51, 228 (finding results “generally consistent with what the legal model would dictate” and concluding that “just one legal standard, affirmative deference to the lower court decision, is consistently significant statistically and by far the most important single variable substantively in explaining circuit court outcomes”).

¹⁰¹ *Id.* at 228–29 (“[The] interposition of a legal threshold requirement obviously had a significant effect on judicial decisions”).

¹⁰² *Id.* at 122 (arguing that the extent of circuit court compliance with Supreme Court precedent “might be considered evidence of remarkable power for the legal model”).

tically significant association that was robust to different samples and control variables.”¹⁰³

Consistent with Cross’s research on circuit courts, studies of district courts have likewise concluded that legal norms help to explain compliance with the decisions of higher courts.¹⁰⁴ In situations where the risk of reversal is high, it may be difficult to tell whether a district court’s compliance with higher court precedent is animated by fear of reversal or respect for the rule of law,¹⁰⁵ but as Pauline Kim argues in a powerful essay, where lower-court discretion is broader, respect for legal norms may better explain the continued allegiance of district courts to higher-court precedent.¹⁰⁶ Similarly, in their study of religious-liberty cases, Professors Gregory Sisk and Michael Heise acknowledge that “political ideology may play a role at the margins in deciding certain types of controversial court cases,” but conclude: “[T]o suggest that partisan or ideological preferences are prevalent influences in deciding most cases or are invariably powerful variables in deciding even the most controversial and open-ended of legal issues is a dubious extrapolation from the empirical evidence.”¹⁰⁷ It would miss the point, however, to employ such statements in support of an argument that law is “winning” its competition with ideological preferences for control of lower-court decision making; rather, the critical conclusion is one drawn by Sisk, Heise, and Andrew Morriss in an earlier study of district-court decision making, that “as is often the case with empirical research, our study provides both comfort and challenges to all camps, again reminding us that judicial behavior is too complex for easy conclusions about influences and patterns.”¹⁰⁸

¹⁰³ *Id.* at 228–29.

¹⁰⁴ See, e.g., Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 683 (2004) (finding that lower-court standing decisions are “above politics when lower federal courts are subject to clear and unambiguous standing rules and when effective judicial monitoring exists”).

¹⁰⁵ See Kim, *supra* note 50, at 427 (discussing the difficulty of distinguishing whether lower courts follow Supreme Court precedent “because of legal norms” or because “they fear reversal”).

¹⁰⁶ *Id.* at 390 (challenging the principal–agent model’s “assumption that lower federal courts have a duty to follow the preferences—not merely the precedents—of the Supreme Court”); see also David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC’Y REV. 579, 602 (2003) (“Another possibility strikes us as especially likely—that congruence flows from lower-court judges’ attempts to reach legally sound decisions.”).

¹⁰⁷ Sisk & Heise, *supra* note 12, at 746.

¹⁰⁸ Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1498 (1998).

3. *Studies in Law and Economics, Social Psychology, and Cognitive Psychology*

The number of “camps” highlighting different influences on judicial decision making is proliferating. Within the economics camp (separate and distinct from the rational-choice cohort in political science, discussed earlier) scholars have struggled to overcome the “embarrassment” of “explain[ing] judicial behavior in economic terms, when almost the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives . . . that determine human action in an economic model.”¹⁰⁹ To overcome this problem, they have defined self-interest more broadly and posited that judicial decision making is variously influenced by desires to maximize popularity, power, prestige, public interest, affirmance, reputation, and voting as a source of judicial utility.¹¹⁰ Consistent with this broader definition, recent empirical work has sought to show how self-interested judges may adjust their decision making to increase their chances for appointment to a higher court.¹¹¹ By defining self-interest to include the desire to win approval from different audiences, law and economics encroaches on the neighboring camp of social psychology. In *Judges and their Audiences*, for example, Lawrence Baum argues that judges can be influenced not only by the rule of law, their political preferences, or the strategic means to implement those preferences, but by personal considerations too, such as the aspiration to be well-regarded by fellow judges, the legal community, the media, and the general public.¹¹² One empirical study, for example, found that circuit courts are more likely to adopt as precedent the rulings of prestigious judges.¹¹³

Notwithstanding an emerging scholarly consensus that law, policy preferences, and other factors combine to influence judicial decision making, one gleans none of that from reading judicial opinions,

¹⁰⁹ Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

¹¹⁰ *Id.* at 13–23 (reviewing the factors that contribute to judges’ utility and arguing that voting as a source of judicial utility is the most important); see also Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 619–36 (2000) (identifying limitations in Posner’s approach and extending it to reputational motivators affecting Supreme Court Justices specifically).

¹¹¹ Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 96 (2005); see also Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT’L REV. L. & ECON. 13, 26–27 (1992) (“An examination of all federal antitrust sentences from 1955 to 1981 finds that promotion potential does explain a significant portion of the variance in corporate criminal antitrust penalties.”).

¹¹² LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 50, 60, 97, 135 (2006).

¹¹³ David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 391 (1999).

which convey the impression that law alone drives the opinion writer inexorably to the conclusion reached. Are judges dissembling, delusional, or something else? While attitudinal scholars borrow heavily from behavioral psychology in positing that judges' political attitudes cause judges to vote consistently with their attitudes, they have been largely indifferent to why¹¹⁴—a question of cognitive psychology that a cadre of psychologists, law professors, and political scientists began to explore in earnest as another component of the new quantitative moment at the turn of the twenty-first century.¹¹⁵

Recent, multidisciplinary study of what judges do is most interested in “hard” cases, “when facts give rise to legal indeterminacy,”¹¹⁶ that is, when specific outcomes are not clearly dictated by applicable law. As Lawrence Wrightsman explains, in such cases, a judge's pre-existing attitudes “can affect the forming of impressions, the evaluating of evidence, and the making of decisions.”¹¹⁷ Judges may thus engage in “motivated reasoning” in which their analysis of applicable law can be influenced by their political or other predilections.¹¹⁸ When judges are confronted by credible arguments for a conclusion contrary to the one that they are motivated to make, Dan Simon adds that the “cognitive system imposes coherence on the arguments so that the subset of arguments that supports one outcome becomes more appealing to the judge and the opposite subset, including arguments that previously seemed appropriate, turns less favorable.”¹¹⁹ As a consequence, the “factual patterns, the authoritative texts, and the resulting propositions are restructured,” which “spreads apart the opposing arguments” and enables one decision to become “dominant over the other.”¹²⁰

Cognitive psychology therefore suggests that judges may not be motivated by a desire to implement their ideological or other predi-

¹¹⁴ SEGAL & SPAETH, *supra* note 8, at 433 (“The attitudinal position on motivated reasoning is one of agnosticism. What matters is that the justices' ideology directly influences their decisions. Whether the justices do so with self-awareness . . . doesn't matter.”).

¹¹⁵ See *infra* notes 116–23 and accompanying text.

¹¹⁶ Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1030 (2002).

¹¹⁷ LAWRENCE S. WRIGHTSMAN, *JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT?* 55 (1999).

¹¹⁸ *Id.* at 55–56; see also EILEEN BRAMAN, *LAW, POLITICS & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* 13–40 (2009) (outlining a theory of motivated reasoning and exploring potential weaknesses); Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 3, 5 (David Klein & Gregory Mitchell eds., 2010); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 541–42 (2004) (exploring motivational reasoning in several contexts where people distorted facts to ensure a desired outcome).

¹¹⁹ Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 20 (1998) (emphasis omitted).

¹²⁰ *Id.* (emphasis omitted).

lections and may sincerely believe that their rulings are grounded in an analysis of law alone, even though their predilections influence their rulings.¹²¹ In the separate but related subfield of heuristics, several scholars have studied the ways in which judicial reasoning can be unwittingly influenced and distorted by cognitive biases or illusions that can occur when the mind takes shortcuts in the reasoning process.¹²²

Much remains to be done in the ongoing, multidisciplinary empirical movement to analyze influences on judicial behavior—particularly in understudied state courts, which adjudicate 98% of the nation’s caseload.¹²³ Nevertheless, there is an emerging consensus that judges are subject to an array of factors that influence their interpretations of law, including but not limited to applicable legal text. More fundamental, perhaps, is the idea that this empirical work informs and deepens conceptions of law itself—conceptions transcending antiquated notions of law as mathematical formulas that dictate invariable outcomes and embracing law as elastic vessels that constrain available choices while accommodating, if not incorporating, a variety of extralegal influences.

II

THE PUBLIC POLICY DEBATE ON WHAT JUDGES DO: SIMPLISTIC AND DICHOTOMOUS

While the new empiricists have inched toward an emerging consensus as they strive to capture the complexity and nuance of judicial decision making, the disputants in public policy debates have kept it divisive and simple. The most intense of such debates are cyclical affairs, triggered by political realignments, in the aftermath of which

¹²¹ See BRAMAN, *supra* note 118, at 4–5 (“[P]sychological research indicates that decision makers may not always be aware of how alternative motives influence their reasoning processes”); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 158 (1996) (proposing a conceptual model that “rejects . . . the axiomatic assumption of attitudinal models . . . that judicial judgment is motivated by the judge’s personal policy preferences”).

¹²² See generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (discussing the role and implications of intuitive “snap judgments” in judicial decision making); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing anchoring, framing, hindsight, representative heuristic, and egocentric biases); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (arguing that, in many cases, the law understands and adapts to ameliorate hindsight biases); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (identifying areas in which the legal system has succeeded or failed in adapting to common human cognitive biases); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (reporting experimental results that suggest judges generally are influenced by relevant but inadmissible evidence).

¹²³ AM. BAR ASS’N, *supra* note 19, at viii.

leaders of the new regime criticize and threaten unpopular, holdover judges of the old regime, eliciting a counterstrike from court supporters.¹²⁴

At the federal level, the most recent of these cycles began after the Republican Party retook control of the Senate and House of Representatives in 1994.¹²⁵ It was then that conservative Republican leaders (and like-minded organizations and commentators) embarked on a campaign to thwart liberal “activist” judges, proposing to impeach and remove targeted jurists, eliminate federal-court jurisdiction over issues that had yielded controversial decisions, disestablish miscreant courts, cut judicial budgets, and prevent the appointment of “liberal” Clinton nominees.¹²⁶ After the election of George W. Bush in 2000, Senate Democrats responded in kind, exploiting a range of procedural devices to stall or reject Bush nominees deemed too conservative.¹²⁷ In response, public officials (including judges), organizations, pundits, and others sympathetic to the plight of the courts criticized the critics and called for an end to the attacks.¹²⁸ In 2006, Democrats regained control of Congress, conservative court critics fell from power, and the cycle wound down.¹²⁹

The point for purposes here, however, is that the two sides in this debate were animated by polarized visions of how judges decide cases. In one corner are court critics, whose views of judicial decision making (at least the decisions that concern them) reflect a dark, naïve hybrid of the attitudinal model, and in the other corner are the legal establishment and its defenders, whose views of what judges do are driven by a hopeful, equally naïve version of the legal model.

A. Court Critics and Their Vision of Judicial Decision Making

“Court critics,” as I use the term here, do not encompass all who are critical of isolated decisions rendered by a given court (which

¹²⁴ Charles Geyh, *The Choreography of Courts-Congress Conflicts*, in *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 19, 19–20 (Bruce Peabody ed., 2010).

¹²⁵ For a more elaborate discussion of the events summarized in this paragraph, see CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 3–5, 260–82 (2006).

¹²⁶ See *id.* at 3–6.

¹²⁷ *Id.* at 5–6.

¹²⁸ Sandra Day O’Connor, *Foreward* to GEYH, *supra* note 125, at vii, x (“The best defense against these threats is the maintenance and expansion of our precious legacy: a political culture in which such threats are simply unacceptable”); William S. Sessions & Charles Gardner Geyh, *Save the Judges!: This Time Partisan Attacks on the Judicial Branch Have Gone Too Far*, *LEGAL TIMES*, July 24, 2006, at 59 (“[E]arlier attacks did not succeed, in no small part, because those who wanted to preserve an independent judiciary . . . countered the attacks. If we are to preserve fair and impartial courts, we must be prepared to defend them again.”).

¹²⁹ Geyh, *supra* note 124, at 41.

would include nearly everyone). Rather, the term refers to those who are critical of the courts generally, including those whose general disquietude is a response to court decisions in isolated cases.

In the latest cycle of anticourt sentiment, court critics have expressed outrage at judicial decisions—most often those that invalidate popularly enacted legislation—and have argued that in those cases, the decision makers have disregarded the law and implemented their personal preferences. Former Judge Robert Bork, for example, complained that the nation is “increasingly governed not by law or elected representatives, but by unelected, unrepresentative, unaccountable committees of lawyers applying no law other than their own will.”¹³⁰ Pennsylvania Senator Rick Santorum characterized the problem as one in which “judges have decided to go off on their own tangent and disobey the statutes of the United States of America.”¹³¹ And the Center for a Just Society opined that “[t]here is nothing wrong with our existing federal and state constitutions. What is wrong is that judges are wrongly misrepresenting the requirements of these documents. Indeed, they are rewriting the documents by misconstruing them in order to satisfy their own social and political agendas.”¹³²

Proceeding from the assumption that too often judges disregard the law and implement their ideological preferences, court critics have argued that only by curbing the freedom of “activist” judges can the rule of law be preserved. “If we’re going to preserve our Constitution,” declared Congressman Steve King, “we must get them in line.”¹³³ Similarly, in proposing legislation calling on federal judges to report their deviations from federal sentencing guidelines to Congress, Representative Tom Feeney opined that his amendment followed from the “simple precept” that “judges should follow, not make the laws,” and that “if insisting upon that precept ‘intimidates’ federal judges, then perhaps that is a good thing.”¹³⁴ The critics have thus often looked favorably on methods of court control, such as impeachment, jurisdiction stripping, or budget cutting—methods condemned by court defenders—as means to promote judicial accountability.¹³⁵ Their stated goal is for judges to exercise “judicial restraint,” as exemplified (in their view) by the decisions of Supreme Court conserva-

¹³⁰ ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 9 (2003).

¹³¹ Marcus, *supra* note 7 (quoting Santorum).

¹³² Connor, *supra* note 14.

¹³³ Marcus, *supra* note 7 (quoting King).

¹³⁴ Tom Feeney, Letter to the Editor, *Rep. Feeney Defends Measure to Thwart Sentencing by Whim*, PALM BEACH DAILY BUS. REV., Apr. 28, 2003, at A7.

¹³⁵ See GEYH, *supra* note 125, at 3–4, 273 (citing examples).

tives, such as Justices Clarence Thomas and Antonin Scalia.¹³⁶ At the state level, they often oppose appointive systems and favor the selection of judges by means of contested elections, which enables voters to hold judges accountable for their decisions (and purge the judiciary of “activists”).¹³⁷

The notion that independent judges disregard the law and implement their policy preferences sounds a lot like the attitudinal model. But court critics do not claim that all judges do that—just the bad ones.¹³⁸ In that respect, their position is at odds with the attitudinal model, which posits that judges generally act on their policy preferences and is indifferent to whether such action is undesirable.¹³⁹ The relevant point here, however, is that the critics’ conception of judicial decision making is dichotomous: the world is divided between “good” judges who follow the law (practitioners of judicial restraint), and “bad” judges who follow their preferences (practitioners of judicial activism).

B. The Legal Establishment and Its Vision of Judicial Decision Making

Judges and court defenders proceed from the categorical premise that judges do not make but follow the law. Iowa Chief Justice Louis Lavorato’s comments are illustrative: “In our system of government, we expect judges to rule according to the law regardless of their personal views.”¹⁴⁰

Proceeding from the premise that judges follow the law, court defenders argue that judicial independence is essential, because it insulates judges from external interference with their impartial judgment that could corrupt the rule of law. For example, Justice Stephen Breyer has opined, “[J]udicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government.”¹⁴¹ The remarks of numerous other judges

¹³⁶ *Id.* at 3–4, 206 (“President George W. Bush was on record as saying that he supported the appointment of justices like Clarence Thomas and Antonin Scalia—two of the Court’s most predictable conservatives . . .”).

¹³⁷ Symposium, *The Debate over Judicial Elections and State Court Judicial Selection*, 21 GEO. J. LEGAL ETHICS 1347, 1379–80 (2008); Editorial, *The ABA Plots a Judicial Coup*, WALL ST. J., Aug. 14, 2008, at A12.

¹³⁸ See *supra* notes 132–35 and accompanying text.

¹³⁹ See *supra* notes 54–56 and accompanying text.

¹⁴⁰ Press Release, Iowa Judicial Branch, Chief Justice Reacts to Judicial Questionnaire (Aug. 9, 2006), http://www.iowacourts.gov/news_service/news_releases/NewsItem221/index.asp.

¹⁴¹ Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996).

echo Justice Breyer's sentiments.¹⁴² Similarly, the Constitution Project declares that "[j]udges are supposed to be responsive only to the rule of law and the Constitution, not to majority will or public, political, or media pressure,"¹⁴³ while a report of the Defense Research Institute adds that "[f]or our system to work, a judge must be free to make decisions based on the facts and law without undue influence or interference."¹⁴⁴

Accordingly, court defenders oppose proposals to control judicial decision making—for example, by cutting court budgets, trimming court jurisdiction, impeaching errant judges, disestablishing unpopular courts, or withholding judicial pay raises—as an effort to intimidate judges that threatens judicial independence and the rule of law.¹⁴⁵ They are dismissive of critics' complaints of "activism," which they relegate to the status of a label signifying little more than disagreement with court decisions.¹⁴⁶ They often condemn judicial selection in partisan elections, because, in the words of an American Bar Association (ABA) report, "the administration of justice should not turn on the outcome of popularity contests," and a "good judge" should be "independent enough to uphold the law impartially, without regard to whether the results will be politically popular with voters."¹⁴⁷

To protect judicial independence and the rule of law from incursion, court defenders consistently advocate some variation on the theme that courts and judicial systems must be depoliticized. The ABA's Commission on the 21st Century Judiciary declared categorically that its mission was to "defuse the escalating partisan battle over American courts."¹⁴⁸ In the realm of state judicial selection, some reformers propose to "take politics out of the system by setting up non-partisan elections;"¹⁴⁹ others advocate for public funding of judicial

¹⁴² Charles Gardner Geyh, Panel, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 435, 444–45 (2008) (quoting Judges Samuel L. Bufford, Julie A. Robinson, and Louraine C. Arkfeld).

¹⁴³ THE CONSTITUTION PROJECT, THE NEWSROOM GUIDE TO JUDICIAL INDEPENDENCE 7 (2006), <http://www.constitutionproject.org/pdf/37.pdf>.

¹⁴⁴ DEFENSE RESEARCH INST., WITHOUT FEAR OR FAVOR: A REPORT BY DRI'S JUDICIAL TASK FORCE 11 (2007).

¹⁴⁵ O'Connor, *supra* note 128, at x.

¹⁴⁶ AM. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, at vi (1997) ("'[A]ctivism' has become a code word for a personal, political or ideological difference with a particular decision.")

¹⁴⁷ AM. BAR ASS'N, *supra* note 19, at 70.

¹⁴⁸ *Id.* at 4 (quoting ABA President Alfred P. Carlton Jr.).

¹⁴⁹ Michael Dayton, *Chief Justice Lake Defends Latest Changes in Judicial Code in N.C.*, N.C. LAW. WKLY., Oct. 20, 2003 (quoting Judge James A. Wynn Jr.).

elections to “take politics out of judicial races;”¹⁵⁰ and still others would replace judicial elections with an appointive system to “depoliticize the judicial process.”¹⁵¹ With respect to federal judicial selection, the ABA has advocated the use of nominating commissions for federal judges to “alleviate excesses” of the “polarized combat that fosters the view that judges are in office simply to carry out ideological agendas of those involved in putting them there.”¹⁵² Similarly, we hear calls to “take politics out of the debate over judicial salaries”¹⁵³ and to depoliticize the rhetoric of judicial criticism generally, because “if this current, often politically motivated drumbeat against judges continues unchallenged, more and more people . . . will lose faith not just in the courts but in the rule of law itself.”¹⁵⁴

Despite the often one-dimensional rhetoric that independent judges follow the law and nothing else, it would be a mistake to assume that court defenders are members of law’s answer to the flat-earth society, who truly believe that divining the law is a mechanical process divorced from other influences. To the contrary, court defenders acknowledge the role of policy preferences in judicial decision making.¹⁵⁵ Thus, for example, in discussing the “enduring principle[]” that “[j]udges should uphold the rule of law,” the ABA’s Commission on the 21st Century Judiciary concedes that “the notion that constitutional or statutory law is sufficiently fixed and clear that judges can invariably define its meaning uninfluenced by their personal or political experience is increasingly unrealistic.”¹⁵⁶ Notwithstanding such concessions, however, court defenders doggedly adhere to the simplistic premise that independent judges follow the law—period, which begs the question of why.

¹⁵⁰ David Haynes, *Sales Tax Case—Reform the System*, MILWAUKEE J. SENTINEL, July 17, 2008, at 10A.

¹⁵¹ Barbara Hoberock, *Report Cites Need for Reform in Sentencing*, TULSA WORLD, Nov. 1, 2008, at A13.

¹⁵² STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, AM. BAR ASS’N, REPORT 118, at 1 (Aug. 2008), http://www2.americanbar.org/sdl/Documents/2008_AM_118.pdf.

¹⁵³ *Gov. Paterson Commends Former Mayor Rudy Giuliani for Ideas on State Constitutional Convention*, U.S. FED. NEWS SERVICE, June 26, 2009, available at 2009 WLNR 12213475 (Westlaw) (quoting Governor Paterson).

¹⁵⁴ Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 497 (2007) (quoting Judge Paul Friedman).

¹⁵⁵ Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1715 (2007) (“We judges must resist the temptation to assume that we are beyond the reach of the forces that shape the mindsets and beliefs of our non-jurist peers.”).

¹⁵⁶ AM. BAR ASS’N, *supra* note 19, at 6–8.

III

IMPEDIMENTS TO CONSENSUS IN THE PUBLIC POLICY DEBATE

Against the backdrop of the emerging consensus among scholars that judges are subject to an array of influences, the stubbornly binary public policy debate is puzzling. The notion that judges are complicated creatures whose decisions are variously influenced by law, ideology, strategic objectives, self-interest, and the audiences they address is neither counterintuitive nor ground shaking. To understand why disputants in the policy debate have kept it simplistic and dichotomous, a good starting place is with public opinion, which is, after all, what the public policy debate seeks to sway.

A. Public Opinion and Its Role in the Policy Debate

Making sense of public perception is enormously complicated. Some people care about what courts do more than others. Some know more about what courts do than others. Some have more experience with the courts (as jurors, witnesses, or litigants) than others. And because courts are not monolithic, it is possible that differences between court systems engender differences in public perception of judges and courts. Finally, survey data are subject to the vagaries of ill-phrased questions, competing interpretations, and researcher bias. In short, any discussion of survey data must be accompanied by an asterisk.

That said, it would seem that the public thinks judges are subject to an eclectic array of influences, consistent with the emerging scholarly consensus. First, the public thinks judges are fair and impartial arbiters of law. In a survey conducted by Greenberg Quinlan Rosner Research Inc. in 2001, 79% of the respondents thought that “dedicated to facts and law” described judges well or very well, 76% thought the same of the term “fair,” and 63% of “impartial.”¹⁵⁷ And 58% agreed with the statement that judges “make decisions based more on facts and law” than “on politics and pressure from special interests.”¹⁵⁸

Second, the public thinks judges are influenced by their ideologies. The same 2001 survey found that 76% of respondents thought that “political” described judges “well” or very well.¹⁵⁹ In 2005, another national poll found that 85.5% of those surveyed thought that judges’ partisan backgrounds influenced their decision making some

¹⁵⁷ GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE: FREQUENCY QUESTIONNAIRE 5 (2001), <http://faircourts.org/files/JASNationalSurveyResults.pdf>.

¹⁵⁸ *Id.* at 6.

¹⁵⁹ *Id.* at 5.

or a lot.¹⁶⁰ That 2005 survey found that 57.9% agreed with the statement that “judges always say that their decisions are based on the law and the constitution but in many cases judges are really basing their decisions on their own personal beliefs.”¹⁶¹ And in 2006, yet another survey found that 75% of respondents thought that judges were influenced by their personal political views to a great or moderate extent.¹⁶²

Third, several polls reveal that around 80% of the public thinks that elected judges are influenced by contributions they receive to their campaigns.¹⁶³ Such a view is compatible with the strategic-choice, economic, and social psychology models. Devotees of strategic choice would presumably theorize that to further their long-term interest in influencing public policy, judges strategically align their votes with their contributors’ preferences to the extent necessary to win reelection;¹⁶⁴ proponents of an economic model would argue that self-interested judges intent on retaining office and political power may make decisions necessary to perpetuate their tenure; and advocates of a social psychology approach would identify contributors as an attentive audience to whom judges may be responsive.¹⁶⁵

In addition, the public’s understanding of “law” is merged with politics in ways consistent with a broader and more flexible construction of law proposed by interdisciplinary scholars. One major study, based on interviews with over 400 people, found that the public simultaneously regards law as disinterested, objective, and operating by “fixed rules,” and as “a game, a terrain for tactical encounters.”¹⁶⁶ Consistent with this two-sided conception of law, one recent Kentucky survey found that 62% of survey respondents think it is “very” or “somewhat” important for judicial candidates to “state how they stand on important legal and political issues as part of their campaign-

¹⁶⁰ CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., LAW AND COURTS QUESTIONS FROM 2005 POLL (2005), http://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf.

¹⁶¹ *Id.*

¹⁶² THE ANNENBERG PUB. POLICY CTR., UNIV. OF PA., FAIR AND INDEPENDENT COURTS: A CONFERENCE ON THE STATE OF THE JUDICIARY: SUMMARY OF SURVEY RESULTS/THE PUBLIC AND THE COURTS 3 (2006), http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_Courts20060928/Courts_Summary_20060928.pdf.

¹⁶³ See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54–55 & nn.56–58 (2003) (citing polls from Texas, Ohio, and Pennsylvania).

¹⁶⁴ Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992) (“To appease their constituencies, state supreme court justices who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the court majority instead of dissenting on politically volatile issues.”).

¹⁶⁵ See *supra* notes 109–13 and accompany text.

¹⁶⁶ PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 28 (1998).

ing.”¹⁶⁷ In other words, the public sees law and politics as interrelated and favors holding judges accountable to the electorate for the political and legal views that animate their decision making.

At the same time, the public has retained considerable confidence in courts peopled with judges whose motives it regards as mixed and favors insulating judges from external controls. A 2006 survey revealed that 64% of the public trusts the Supreme Court a “great deal” or a “fair amount.”¹⁶⁸ In another survey, 76% expressed “some” or a “great deal” of confidence in the U.S. Supreme Court, followed by 74% for federal courts and 71% for state courts.¹⁶⁹ Moreover, in one survey, 71.9% thought that judges should be shielded from outside pressure,¹⁷⁰ while in another survey, 83% thought judges should be shielded from congressional interference.¹⁷¹

In short, the public has internalized what recent scholarship demonstrates—that judges are subject to legal and political influences—but the public nonetheless continues to express considerable confidence in the courts. In that light, the pretense of the legal establishment’s argument in the public policy debate, that judges are moved by law and facts alone, seems otherworldly, unnecessary, and a bit silly. The public-perception landscape is, however, more complicated.¹⁷² Citizens may think that judges are influenced by extralegal considerations, but that does not mean citizens like it. As Professor Keith Bybee reports, “Polls show that large majorities of Americans expect federal judges to apply the law impartially and distrust judges who advance narrow ideological interests.”¹⁷³ Similarly, Professor James Gibson found that nearly 72% of respondents in his Kentucky survey thought it was “very important” for a good state supreme court judge to

¹⁶⁷ JAMES L. GIBSON, *THE POLITICIZATION OF STATE JUDICIAL ELECTIONS: THE EFFECTS OF NEW-STYLE CAMPAIGNS ON STATE COURT LEGITIMACY IN KENTUCKY, 2006: CODEBOOK 79* (2011), http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=31041&ds=1&file_id=1062502.

¹⁶⁸ THE ANNENBERG PUB. POLICY CTR., *supra* note 162, at 2.

¹⁶⁹ Belden Russonello & Stewart, *Access to Justice and Constitutional Rights Versus Political Pressure: Defining the Battle for the Courts* (Sept. 2005), in *JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS* app. at 17 (2006), http://www.georgiacourts.org/aoc/r_p_docs/speaktoamericasvalues2.pdf.

¹⁷⁰ CAMPBELL PUB. AFFAIRS INST., *supra* note 160.

¹⁷¹ Belden Russonello & Stewart, *supra* note 169.

¹⁷² See generally JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009) (examining public attitudes toward the Supreme Court during Justice Samuel Alito’s confirmation process).

¹⁷³ Keith J. Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in *WHAT’S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 306, 312 (Charles Gardner Geyh ed., 2011).

“strictly follow the law no matter what the people in the country may want.”¹⁷⁴

As a consequence, judges are well advised to stick to the rule-of-law script. The 2005 confirmation of Chief Justice John Roberts offers a useful illustration. Roberts’ conservative political bent was widely reported, and Senate Democrats did their best to portray him as an ideological extremist.¹⁷⁵ The Democrats had succeeded with a similar strategy in defeating the Supreme Court nomination of Robert Bork two decades earlier.¹⁷⁶ One critical difference, however, was the extent to which the two nominees hewed to the rule-of-law rhetoric. Bork was quite willing to elucidate his judicial philosophy with the Senate Judiciary Committee.¹⁷⁷ From his vantage point, he was merely elaborating on his understanding of the law. In so doing, however, he made plain the influence that his ideology was likely to have on the decisions he would be making as a Justice, which helped enable Senate Democrats and interest groups to sour the public—and ultimately the Senate—on his candidacy.¹⁷⁸ Roberts, in contrast, like every Supreme Court nominee to testify after Bork, was less forthcoming, declined entreaties to discuss his views on any legal issues, and repeatedly sounded the theme that he would follow the law.¹⁷⁹ “Judges are like umpires,” he testified. “Umpires don’t make the rules; they apply them.”¹⁸⁰ Against the backdrop of social science learning detailed in Part I, the claim that the Supreme Court “applies,” but does not “make,” rules of constitutional law when it decides hotly contested questions of first impression that have split the lower courts is something of a whopper. And given the public’s readiness to

¹⁷⁴ James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT’S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE*, *supra* note 173, at 281, 289.

¹⁷⁵ See, e.g., David D. Kirkpatrick, *Senate Democrats Increase Resistance to Roberts*, N.Y. TIMES, Aug. 17, 2005, at A16 (noting prominent Senate Democrats’ criticisms of Roberts’ ideology); David E. Rosenbaum, *An Advocate for the Right: Bush Court Candidate Usually Picked More Conservative Path*, N.Y. TIMES, July 28, 2005, at A16 (describing Roberts’ conservative leanings).

¹⁷⁶ See *Obama Pick for Bench Blocked by GOP for First Time*, ASSOCIATED PRESS, May 19, 2011, available at <http://abcnews.go.com/US/wireStory?id=13636206> (“The politics were reversed in 1987, when Democrats defeated Republican Supreme Court nominee Robert Bork by citing his conservative writings. Liberals said Bork was a conservative extremist Bork’s nomination was defeated in an up-or-down vote 58-42.”); see also Don Irwin, *Reagan Asks Public to Back Bork Nomination*, L.A. TIMES, Oct. 4, 1987, at 1; Editorial, *Against Robert Bork: His Bill of Rights Is Different*, N.Y. TIMES, Oct. 5, 1987, at A22.

¹⁷⁷ Linda Greenhouse, *Bork Sets Forth Spirited Defense of His Integrity*, N.Y. TIMES, Sept. 19, 1987, at A1 (“Judge Bork rejected suggestions from some senators that he had deliberately modified long-held views in his testimony to enhance his chances of confirmation.”).

¹⁷⁸ David Lauter, *Senate Rejects Bork for Supreme Court, 58-42*, L.A. TIMES, Oct. 24, 1987, at 1.

¹⁷⁹ Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents: Light Moments Amid Sharp Exchanges*, N.Y. TIMES, Sept. 14, 2005, at A1.

¹⁸⁰ David G. Savage, *Roberts Sees Role as Judicial ‘Umpire,’* L.A. TIMES, Sept. 13, 2005 at 1.

believe that judges are influenced by their personal views,¹⁸¹ it seems unlikely that the public was so fatuous as to assume that Roberts' widely publicized conservative ideology would have no bearing on his decision making. Nevertheless, the ease with which Chief Justice Roberts was confirmed was widely attributed to the appeal of his simple and consistent rule-of-law message.¹⁸²

Most recently, in 2009, President Barack Obama indicated his intention to replace retiring Justice David Souter with someone who possessed—among other qualities—“empathy.”¹⁸³ The comment drew a sharp rebuke from critics who claimed that empathy was “code” for activism and had no place on a Supreme Court that should decide cases with reference to applicable law alone.¹⁸⁴ When President Obama later announced the nomination of Sonia Sotomayor, gone was any reference to empathy and in its stead was a statement that stressed the nominee's commitment to the rule of law.¹⁸⁵ What controversy surrounded her nomination was limited almost exclusively to prior statements she had made implying that judges are subject to extralegal influences (e.g., that a Latina judge might decide matters differently—and better—than a white male, and that circuit courts make policy).¹⁸⁶

In short, while the public is well aware of extralegal influences on judicial decision making, it does not approve of them.¹⁸⁷ That helps to explain the continuing appeal of rule-of-law rhetoric and the resonance of policy arguments aimed at discouraging ideological and other influences. For their part, judges are acutely aware of the rela-

¹⁸¹ See *supra* notes 160–62 and accompanying text.

¹⁸² Sheryl Gay Stolberg, *Panel Approves Roberts, 13-5, As 3 of 8 Democrats Back Him: Senate to Vote Next Week; Confirmation Likely*, N.Y. TIMES, Sept. 23, 2005, at A1 (noting how Russell D. Feingold, a Democrat on the Senate Judiciary Committee voting in favor of Roberts' nomination, “said Judge Roberts had persuaded him that ‘he will not bring an ideological agenda’ to the court”). For other explanations for the outcomes, see Steven Lubet, *The Alito Confirmation: How Democrats Lost the Political Battle*, SAN DIEGO UNION-TRIB., Feb. 1, 2006, available at http://www.signonsandiego.com/uniontrib/20060201/news_lz1e1lubet.html (suggesting that Chief Justice Roberts' nomination succeeded “primarily because he was succeeding the equally conservative Chief Justice William Rehnquist”).

¹⁸³ President Barack Obama, Remarks on the Resignation of Justice David H. Souter (May 1, 2009), in *Obama's Remarks on the Resignation of Justice Souter*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/01/us/politics/01souter.text.html>.

¹⁸⁴ Charlie Savage, *Scouring Obama's Past for Clues on Judiciary: Speeches and Voting Records Are Studied*, N.Y. TIMES, May 10, 2009, at A17.

¹⁸⁵ Press Release, The White House, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/.

¹⁸⁶ See Peter Baker & Jeff Zeleny, *Start of a Battle: New Yorker Would Be the Third Woman to Serve as a Justice*, N.Y. TIMES, May 27, 2009, at A1 (“Judge Sotomayor's past comments about how her sex and ethnicity shaped her decisions, and the role of appeals courts in making policy, generated instant conservative complaints that she is a judicial activist.”).

¹⁸⁷ See *supra* note 172–74 and accompanying text.

tionship between public perception and the judiciary's institutional legitimacy, and to the extent the public wants judges whose commitment to the rule of law is unwavering, it behooves judges and the legal establishment to profess such a commitment.¹⁸⁸

B. Getting to the Bottom of the Ermine Myth

Waxing eloquent on the virtues of following the law and nothing else, as the legal establishment is apt to do, is easy enough. Actually striving to eliminate extralegal influences on judicial decision making, however, is arguably a fool's errand because judges must inevitably exercise discretion whenever applicable law provides no clear answers, and such discretion is informed by extralegal influences.¹⁸⁹ To the extent that the legal establishment perpetuates the view that judges are moved by rules of law alone, they are indeed propagating a myth.

Scholars who describe the rule of law as myth or fiction often do so in pejorative terms, arguing that the myth is an empty husk and proposing that it be exploded or abandoned.¹⁹⁰ Such a myth-blasting exercise would expose as exaggerated, if not fraudulent, a rule of law that the legal establishment has long defended as the sole influence on judicial decision making. That, in turn, would presumably render the policy debate less dichotomous and more closely aligned with scholarly understandings of what judges do. The ermine myth offers two countervailing benefits, however, that must not be ignored—one external and one internal.

The external benefit relates to the contribution the myth makes to the judiciary's institutional legitimacy vis-à-vis the outside world: public confidence in the judiciary is preserved by maintaining the public's faith in the rule of law.¹⁹¹ One might argue that undermining the ermine myth by conceding a political court would not shake

¹⁸⁸ The *Model Code of Judicial Conduct* directs judges to “avoid . . . the appearance of impropriety,” with the accompanying comment explaining that “[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.” MODEL CODE OF JUD. CONDUCT R. 1.2 (2007). Rule 2.2, in turn, states that judges “shall uphold and apply the law;” insofar as failing to uphold and apply the law is thus improper, creating the perception that judges do not uphold and apply the law (by openly acknowledging that judges base their decisions on extralegal factors instead) gives rise to an appearance of impropriety. *Id.* at R. 2.2.

¹⁸⁹ One can define law flexibly enough to merge law with politics and characterize these “extralegal” influences as legal ones. See Ruger et al., *supra* note 11; *supra* text accompanying note 11. In the context of a discussion of the public policy debate, however, I am preserving the law-politics divide that animates the debate.

¹⁹⁰ John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 202 (“[T]he establishment of a truly free society requires the abandonment of the myth of the rule of law.”).

¹⁹¹ See Bybee, *supra* note 173, at 312 (The fact that “[p]olls show that large majorities of Americans expect federal judges to apply the law impartially and distrust federal judges who advance narrow ideological interests” demonstrates the correlation between the public's perceived notion of the rule of law and their trust in the judiciary).

public confidence in the courts because survey data discussed earlier show that the public retains considerable confidence in the courts despite believing that judicial decision making is subject to ideological and other influences.¹⁹² But such an argument underestimates how central public faith in the rule of law is to our political culture. As Paul Kahn has written: “The rule of law may be our deepest political myth. It is the foundation of our beliefs about our community as a single people with a unique history, as well as our view of our individual obligations to the state.”¹⁹³ Entertaining doubts about the rule of law may be essential to preserving the myth’s continuing vitality, but abandoning faith altogether would come at a considerably greater cost.¹⁹⁴ Gibson, for example, theorizes that in the absence of electoral accountability, judges derive their legitimacy with the public from their expertise.¹⁹⁵ To the extent that the public attributes a judge’s expertise to his or her experience and training in interpreting legal texts, marginalizing the rule of law as a fiction could well undermine the legitimacy of judges and the judiciary.

To this argument, skeptics may answer that preserving the legitimacy of the judiciary with a lie is cynical and wrong—but that assumes, incorrectly, that the rule-of-law myth is categorically untrue. Myths fall on a continuum. At one end are total fabrications, for example, yarns of the unicorn or the fountain of youth. At the other end are embellishments on stories the public generally embraces as true, for example, exaggerated anecdotes from the battles of Troy or the Alamo. To the extent that myths retain power over and above their entertainment value, it is because they lie on the latter end of the continuum. Few are galvanized by fantastic tales of leprechauns to search for pots of gold at the base of rainbows, but stories exaggerating the virtue and wisdom of the founding fathers continue to engender patriotic commitment to the Declaration of Independence and the U.S. Constitution as almost holy documents. When it comes to the rule of law, there is a sizable kernel of truth at the core of the ermine myth: law does influence judicial decision making, even if the exclusivity of its influence is overstated.¹⁹⁶

The internal benefit, in contrast, concerns the impact of the rule-of-law “myth” on judges themselves. Insofar as judges are influenced by the rule of law, preserving the “myth” that judges can be, are, and

¹⁹² See *supra* note 157–62 and accompanying text.

¹⁹³ PAUL W. KAHN, *THE REIGN OF LAW: Marbury v. Madison and the Construction of America*, at xi (2002).

¹⁹⁴ Marc O. DeGirolami, *Faith in the Rule of Law*, 82 ST. JOHN’S L. REV. 573, 605 (2008) (arguing that faith in the rule of law is most effective when tempered by doubt, which is “crucial for maintaining a vital faith”).

¹⁹⁵ Gibson, *supra* note 174, at 284.

¹⁹⁶ See *supra* Part I.

should be influenced by law alone perpetuates norms within the judiciary that foster a rule-of-law culture and, ultimately, greater allegiance to the rule of law itself.¹⁹⁷ The judiciary's internal commitment to the rule of law is most readily apparent in court-promulgated codes of conduct, virtually all of which are based, to varying degrees, on the ABA's *Model Code of Judicial Conduct*.¹⁹⁸ Such codes serve both to advise judges of their ethical obligations and (in state systems, at least) to articulate rules of conduct that judges disregard on pain of discipline or removal.¹⁹⁹ The preamble to the *Model Code of Judicial Conduct* begins: "The United States legal system is based upon the principle that an independent, impartial, and competent judiciary . . . will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law."²⁰⁰

Model Code rule 2.2 directs that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."²⁰¹ A comment accompanying this rule adds that "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."²⁰² Similarly, rule 2.4(B) states that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."²⁰³ The comment to rule 2.4 emphasizes that "[c]onfidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences."²⁰⁴

The cumulative effect of these rules and principles is to create an institutional culture in which the rule of law is a first principle that the legal establishment accepts as an article of faith and reflexively defends against challenge. As Judge Richard Posner observes: "Any amount of political judging challenges orthodox conceptions of the judicial process . . . and the attitudinalists have shown that there is plenty at all levels of the American judiciary (though more, the higher

197 As one commentator recognized, "The word myth is used here to suggest more than just a false story, but rather a story of real power that, even if not fully true, is capable of impacting the real world by affecting the motivations and aspirations of real people." Blake K. Puckett, "We're Very Apolitical": Examining the Role of the International Legal Assistance Expert, 16 *IND. J. GLOBAL LEGAL STUD.* 293, 295 (2009).

198 Marie McManus Degan, Note, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 *TEMP. L. REV.* 225, 227 (2010).

199 MODEL CODE OF JUD. CONDUCT pmb. (2007).

200 *Id.*

201 *Id.* at R. 2.2.

202 *Id.* at R. 2.2 cmt. [2].

203 *Id.* at R. 2.4.

204 *Id.* at R. 2.4 cmt. [1].

the level),” which is “heresy to the legal establishment.”²⁰⁵ Although such orthodoxy may seem divorced from reality, there is an inescapable logic to the assumption that judges who embrace the rule of law as an article of faith are likely to take the rule of law more seriously than those who are agnostic.

In light of the foregoing discussion, it should be clear that the continued vitality of the ermine myth, for the public and judges alike, turns on the perceived truth that lies at its center. Myths can move on their continuum, however, and to the extent that embellished truths come to be viewed as fabrications, the power of a myth to unify the faithful is compromised: witness the Catholic Church’s struggle to restore the confidence of Catholics in the piety of their priests after publicized reports of sexual misconduct among their ranks.²⁰⁶ The peril for the ermine myth, as discussed in Part IV, is that it could go the way of the Yeti: whatever truth may have given rise to the myth in the first place could ultimately be eclipsed by doubts that threaten to consign it to the status of a bedtime story.

IV

THE FUTURE OF THE ERMINE MYTH: THREE SCENARIOS

In short, there is logic to the dichotomous character of the public policy debate over what judges do and what to do about it. The public, like the academic community, understands that judges are influenced by legal and nonlegal factors in their decision making, but seeks to discourage the latter. By preferring judicial aspirants who profess an unwavering commitment to the rule of law, the public hopes to select judges for whom the rule of law exerts greater gravitational pull, to reduce the likelihood that extralegal influences will cause judges to deviate as markedly from their orbit.²⁰⁷ The legal establishment, in turn, is well aware that the exercise of discretion requires judges to bring extralegal considerations to bear in their decision making,²⁰⁸ but is mindful of public perception and is acculturated to rule-of-law norms.²⁰⁹ While judges and lawyers may thus acknowledge multivariate influences on judicial decision making privately or even in stage whispers, they do so openly at the peril of undermining the ermine myth, a core premise of which is that independent, impartial judges set extraneous influences to one side

²⁰⁵ POSNER, *supra* note 18, at 28.

²⁰⁶ See generally *The Catholic Church and Sexual Abuse by Priests Archive*, AMERICAN-CATHOLIC.ORG, <http://www.americancatholic.org/news/clergysexabuse/> (last visited Sept. 3, 2011) (explaining that the sex scandals have shaken the public).

²⁰⁷ See *supra* notes 157–58 and accompanying text.

²⁰⁸ See *supra* notes 155–56 and accompanying text.

²⁰⁹ See *supra* Part II.B.

and follow the facts and law.²¹⁰ To openly embrace the recent findings of social science research summarized in Part I is to concede the rightness of critics' claims that judicial independence does liberate judges to do more and less than follow the law. That concession effectively undercuts the longstanding justification for an independent judiciary and leaves court defenders ill-equipped to counter arguments that judicial decision making should be subject to greater political and popular control. And so, defenders have stuck to their story.

The critical question becomes: What happens next? There are at least three possibilities. At one extreme is nothing: independent judges will continue to be influenced by law and extralegal factors, but will say that they are influenced by law alone, and will do so with the public's continued support—the ermine myth will remain intact and unscathed. At the other extreme is a constitutional crisis: the judicial establishment has already lost the public policy debate, and the public is poised to lose its faith in an independent judiciary that it regards as overtly politicized, indifferent to the rule of law, and unaccountable to the public it serves—the ermine myth will die. In the middle (and where I suspect we are most likely headed) is a gradual erosion of rule-of-law norms: an increasingly cynical public will become less receptive to claims that judges are influenced by law alone and more receptive to imposing greater popular and political controls on the judiciary's independence—the power of the ermine myth will fade.

A. The Possibility that the Dichotomous Public Policy Debate Will Persist Without Consequence

There is a real possibility that academic and public policy debates will continue on a parallel course without intersecting and without meaningful consequence: the legal establishment and court critics will continue their dichotomous wrangle, scholars will continue down a different path toward nuance and consensus, and that will be that. In defense of this prediction, one should not underestimate the awesome power of inertia. If nearly a century's worth of social science research on what judges do has yet to influence what the legal establishment and court critics say judges do,²¹¹ one may legitimately doubt whether that is likely to change anytime soon. Moreover, it is important to understand that the exclusivity of the legal establishment's commitment to the rule of law and its failure to embrace social science learning is not simply a matter of ignorance or stupidity. Rather, it is attributable to a rule-of-law culture that the legal establishment seeks to perpetuate internally and with the general public, to the end

²¹⁰ See *supra* notes 1–5 and accompanying text.

²¹¹ See *supra* Parts II.A–B, notes 42–44 and accompanying text.

of preserving its institutional legitimacy.²¹² And the rule-of-law mantra continues to work: public confidence in the courts remains high.²¹³ As long as the public embraces the rule-of-law myth as an aspirational goal, is untroubled that the myth does not mirror reality, and keeps its faith in the courts, court defenders may prefer to perpetuate that myth, in lieu of embracing the complexity and nuance of social science research. Court critics, for their part, will persist in cyclical attacks on judges and the courts, to limited or no effect.

The prediction that the ermine myth is likely to persist unmolested into the foreseeable future, however, may extrapolate too much from a snapshot. While at this moment in time the public retains confidence in judges who it thinks should be dedicated to the rule of law alone, even as the public acknowledges that those same judges are subject to extralegal influences, it is far from clear that that confluence of views is in a steady state. While the notions that laws are malleable and judges corruptible have long been with us, the pervasive sense that political ideology routinely influences judicial decision making is a more recent phenomenon, traceable to the legal realist movement and its aftermath.²¹⁴ Even more recently, there have been a range of widely reported developments that challenge the rule of law and undermine its core premise that the facts and law are all that matter to judges, in ways too obvious to ignore.

First, the conservative campaign against “judicial activism” has received national attention for over a decade. As discussed in Part II, beginning in the mid-1990s, court critics pervasively decried liberal activist judges, whom they identified (implicitly and explicitly) as judges who disregard the law and implement their own policy preferences.²¹⁵ There is some evidence that the campaign gained ground with the public. In a 2005 survey, 56% of respondents agreed that “[j]udicial activism . . . seems to have reached a crisis” because “[j]udges routinely overrule the will of the people, invent new rights and ignore traditional morality.”²¹⁶ Liberal criticism of conservative judges was more isolated, but the Supreme Court’s decision in *Bush v. Gore*²¹⁷ created a teaching moment of unparalleled proportions for liberals determined to show that conservative judges too are subject to

²¹² See Scheb & Lyons, *supra* note 56, at 938 (explaining that the myth serves a purpose and “provide[s] a reservoir of support for the Court”).

²¹³ See *supra* notes 157–58 and accompanying text.

²¹⁴ See *supra* notes 98–107 and accompanying text.

²¹⁵ See *supra* notes 130–32 and accompanying text.

²¹⁶ Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis”*: ABA Journal Survey Results Surprise Some Legal Experts, ABA J. E-REP. 1 (Sept. 30, 2005), <http://www.abanet.org/journal/redesign/s30survey.html>; see also James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 556 (2003).

²¹⁷ 531 U.S. 98 (2000).

ideological influences.²¹⁸ Polling data reveal that the *Bush v. Gore* case did not result in a net diminution of public confidence in the Supreme Court.²¹⁹ Tellingly, however, confidence levels among Democrats declined as they increased among Republicans, suggesting that the Court's performance was being evaluated in decidedly partisan terms.²²⁰

Second, when the media report on decisions of the U.S. Supreme Court, they routinely group the votes of the Justices into ideological blocs—liberal, conservative, or moderate (swing) votes. Press coverage of three recent cases is illustrative. In describing the Supreme Court's 2008 five-to-four decision in *District of Columbia v. Heller*²²¹—which invalidated a D.C. gun-control law on Second Amendment grounds—the press explained the outcome with explicit reference to the Court's "liberal" and "conservative" Justices.²²² Similarly, in the 2009 case of *Caperton v. A.T. Massey Coal Co.*²²³—a due process challenge to a state supreme court justice's failure to disqualify himself from a case in which the CEO of a litigant had spent \$3 million in support of the justice's election while the litigant's case was pending—the press reported on the majority's opinion as a product of its "liberal bloc."²²⁴ And referring to *Ricci v. DeStefano*,²²⁵ a reverse-discrimination case brought by Caucasian and Hispanic firefighters who had been denied promotions, the *New York Times* reported on Justice Anthony Kennedy "writing for himself and the four members of the [C]ourt's conservative wing."²²⁶ The message is clear to all but the hopelessly obtuse: to understand why Justices vote as they do, it is not enough to understand their legal reasoning as reflected in the opinions they write; one needs to know their ideological orientations. Indeed, it is common for press reports to precede any discussion of the Court's reasoning with a reference to the ideological alignment of the Justices' votes, which implicitly underscores the primacy of ideology relative to the rule of law.

²¹⁸ ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 5 (2001) (attacking the decision as "lawless" and highly political).

²¹⁹ See Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 *JUDICATURE* 32, 36 (2001) (explaining that "the net effect [of the election] on the public's evaluation of the Court was essentially nil").

²²⁰ *Id.* at 58–59 (presenting data showing shifts in both Democratic and Republican approval of the Court).

²²¹ *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

²²² See, e.g., Adam Liptak, *Justices' Ruling on Guns Elicits Rebuke, from the Right*, *N.Y. TIMES*, Oct. 20, 2008, at A15.

²²³ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

²²⁴ David G. Savage, *Judges Can't Be on Cases Involving Own Big Donors*, *High Court Rules*, *L.A. TIMES*, June 9, 2009, at A10.

²²⁵ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

²²⁶ Adam Liptak, *Supreme Court Finds Bias Against White Firefighters: 5–4 Ruling that Sets New Employment Standards*, *N.Y. TIMES*, June 30, 2009, at A1.

Third, beginning in the aftermath of Robert Bork's confirmation proceedings, widely reported partisan battles over the appointment of federal judges have underscored the proposition that ideology is of critical importance in judicial decision making. Senate Republicans resisted the confirmation of "liberal activist" judges nominated by President Bill Clinton,²²⁷ while Senate Democrats struggled to reject "conservative extremists" nominated by President George W. Bush.²²⁸ On the one hand, both political parties have putatively perpetuated rule-of-law principles by arguing that their respective campaigns are motivated by a desire to ensure that the President of the opposing party does not appoint judges whose ideological bent is so extreme as to interfere with their capacity to follow the law.²²⁹ On the other hand, the composite picture the confirmation battles paint is of a judiciary staffed with left- and right-wing ideologues.

Fourth, there have been widely publicized episodes in which judges have been criticized for failing to disqualify themselves from hearing cases in which they had a personal interest that arguably impaired their capacity to follow the law. In 2004, Justice Scalia accepted an invitation to join Vice President Dick Cheney for a weekend of duck hunting in Louisiana, while a lawsuit against the Vice President was pending before the Supreme Court.²³⁰ Scalia subsequently declined to disqualify himself from hearing the case, and ultimately cast his vote in the Vice President's favor.²³¹ Editorial writers reacted critically. One asked incredulously: "Would a rational person doubt that, all things being equal, the judge just might tilt toward the man with whom he is so 'well acquainted?'"²³² Another added that "[t]he appearance of conflict is obvious and Scalia should recuse himself from the case immediately in order to protect the credibility of the court's eventual decision."²³³

In a West Virginia Supreme Court race, judicial candidate Brent Benjamin defeated incumbent Chief Justice Warren McGraw with the support of over \$3 million in independent expenditures from the

²²⁷ See Neil A. Lewis, *Conservatives Set for Fight on Judicial Nominees*, N.Y. TIMES, Nov. 13, 1992, at B16 (chronicling conservatives' preparations to combat judicial nominations made by President Clinton).

²²⁸ Peter Baker, *Parties Gear Up for High Court Battle*, WASH. POST, June 27, 2005, at A2 (noting that administration opponents set up a "war room" to devise a strategy in anticipation of the retirement of Supreme Court Chief Justice William Rehnquist).

²²⁹ *Sen. Kennedy Supports Filibuster on Nomination of Judge Alito*, U.S. FED. NEWS SERVICE, Jan. 26, 2006, available at ProQuest, Doc. No. 982178891; *Cochran Will Not Support Kagan Confirmation to Supreme Court*, FED. INFO. & NEWS DISPATCH, INC., Aug. 4, 2010, available at ProQuest, Doc. No. 2289437471.

²³⁰ Editorial, *Justice Scalia and Mr. Cheney*, N.Y. TIMES, Feb. 28, 2004, at A14.

²³¹ *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 371 (2004).

²³² E.J. Dione, *Justice Scalia Is in the Wrong Line of Work*, SEATTLE TIMES, Mar. 23, 2004, <http://community.seattletimes.nwsourc.com/archive/?date=20040323&slug=dionne23>.

²³³ Editorial, *Do the Right Thing—Again*, DENVER POST, Apr. 13, 2004, at B6.

CEO of a coal company that was then poised to appeal a \$50 million verdict against it.²³⁴ Justice Benjamin subsequently declined to disqualify himself from hearing the coal company's case and later cast the deciding vote in the company's favor.²³⁵ One editorial writer observed that "the West Virginia case, while extreme, points to an alarming trend. It comes at a moment when judicial neutrality—and the appearance of neutrality—basic to due process are under a growing threat from big-money state judicial campaigns."²³⁶ A second asked, "If citizens believe that judicial office is for sale to the highest bidder, why should they respect the rule of law?"²³⁷

While these disqualification imbroglios do not bear on the role of ideology in judicial decision making (and in the case of Justice Benjamin, his refusal to recuse was ultimately reversed by the U.S. Supreme Court),²³⁸ they fuel the public's suspicion that extralegal factors, such as friendship and financial dependence, influence judicial decision making. And implicitly, at least, the public does not approve.²³⁹ Despite the prevailing rule that a judge is to decide his or her own disqualification motions, a rule grounded in the view that judges are presumptively impartial and will follow the law, 81% of the public thinks that a different judge should make such decisions, a view grounded on a different presumption—that in such situations, extralegal influences risk subverting the rule of law.²⁴⁰ In a similar vein, roughly 80% of the public thinks that elected judges are influenced by the campaign contributions they receive,²⁴¹ which, in turn, has adversely affected public perception of the courts' legitimacy.²⁴²

Fifth, and illustrated by the facts underlying the West Virginia disqualification case discussed above, the recent politicization of judicial election campaigns has undermined the view that judges are simply impartial arbiters of facts and law.²⁴³ Multimillion dollar judicial cam-

²³⁴ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2254 (2009).

²³⁵ *Id.*

²³⁶ Editorial, *Justice Not for Sale*, N.Y. TIMES, Mar. 3, 2009, at A26.

²³⁷ David Merritt, Op-Ed., *Judicial Credibility Is at Stake in Case*, WICHITA EAGLE, Mar. 6, 2009, at 9A.

²³⁸ *Caperton*, 129 S. Ct. at 2254.

²³⁹ See sources cited *supra* notes 230, 232, 236, and 237.

²⁴⁰ See Press Release, Justice at Stake Campaign, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677.

²⁴¹ See Geyh, *supra* note 163, at 52 & n.47 (referring to the "Axiom of 80" and acknowledging that the percentages vary between jurisdictions and elections).

²⁴² James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC'Y REV. 899, 902 (2008) ("Contributions to candidates for judicial office imply for many a conflict of interest, even a quid pro quo relationship between the donor and the judge, which undermines perceived impartiality and legitimacy.")

²⁴³ See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 72 (2008) (arguing that

paings are now commonplace, in which state-wide television advertising dwells on which supreme court candidate will support or oppose the death penalty, victim's rights, abortion, etc.²⁴⁴ In 2002, the U.S. Supreme Court held that judicial candidates have a First Amendment right to announce their views on issues likely to come before them later as judges on the purported grounds that such issues are what judicial elections are about.²⁴⁵ Implicit in these developments is the assumption that the hot-button issues judges decide present questions of public policy that the electorate has a right to influence or control, not just questions of law for legal experts (i.e., judges) to resolve without interference. Knowing the policy predilections of judicial candidates has become increasingly relevant in judicial campaigns:²⁴⁶ witness the 2010 retention-election defeat of three Iowa Supreme Court justices who previously ruled that the right of gay people to marry was protected by the Iowa Constitution.²⁴⁷

B. The Possibility that the Legal Establishment Will Lose the Dichotomous Public Policy Debate and Provoke a Crisis

The five developments detailed above have led many within the legal establishment to warn of impending crises. Generally stated, their concern is that the courts have been politicized to such an extent that the public is poised to lose faith in the rule of law and an impartial judiciary. In a Law Day speech in 2005, a North Carolina trial judge declared that "our democracy is at risk" and that "the very separation of powers that has kept our democracy alive and vigorous is in jeopardy" because "the constant, degrading and sometimes personal attacks on judges and the judiciary by political and other leaders are slowly eroding the credibility of the judiciary and will ultimately, I

politicized judicial campaigning corrodes the legitimacy of state courts); *see also* Geyh, *supra* note 163, at 54–55 (noting that multiple polls find that over 80% of the public believes that campaign contributions buy influence with judges).

²⁴⁴ *See* JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK* 16 fig.9 (Jesse Rutledge ed., 2007) (finding that in 2005–06, candidates collectively raised more than a million dollars in supreme court election campaigns in Georgia, Kentucky, Michigan, North Carolina, Nevada, Ohio, Oregon, Texas, and Washington); *id.* at 4 fig. 3, 13 fig. 8, 35 fig. 21 (showing an ad that highlighted an opponent's vote to set aside the death penalty for a juvenile, one that claimed the candidate was for "victims and their families," and another that touted a candidate's pro-life stance).

²⁴⁵ *See* *Republican Party of Minn. v. White*, 536 U.S. 765, 787–88 (2002).

²⁴⁶ *See* Gibson, *supra* note 174, at 289 (citing polling research indicating that the public thinks it is important for judges to express their views on major political and social issues).

²⁴⁷ A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

fear, undermine the rule of law.”²⁴⁸ More recently, Massachusetts Chief Justice Margaret Marshall declared that “state courts are in crisis,” due in part to the “politicization of state judiciaries.”²⁴⁹ As she explained:

In the now hostile environment, every judicial decision can be turned into a message of allegiance to—or failure to align with—partisan constituents, much like a legislator’s voting record. . . . Fair and neutral judges, knowing that each written opinion may be scrutinized as statement of political partisanship by interest groups, may feel tremendous pressure to look over their shoulders, to abandon the principles of judicial neutrality, when deciding cases.²⁵⁰

In 2008, one respected academic commentator added that “the institution of the elected judiciary is in trouble, perhaps in crisis,” due to the “intensity of electioneering,”²⁵¹ and that same year, the Minnesota Chief Justice echoed that “[p]erceptions of fairness, equity, and access will be dramatically undermined if the public’s confidence in the courts erodes, and it takes only one big, nasty election campaign to seriously damage the hard-won public confidence that our judiciary currently enjoys.”²⁵² Of the federal appointments process, another commentator has declared that “[p]ast ideological scrutiny . . . has embittered many nominees, threatened judicial independence, discouraged individuals from enduring the confirmation process, and contributed to the vacancy crisis in the federal judiciary.”²⁵³ On a related front, yet another commentator has observed more generally that “the judiciary is currently in crisis,” because “the political process has increased the role of partisanship in the selection of judges at all levels,” which has resulted in a “highly factionalized judiciary” that is “less cordial in its internal relations and less likely to respect its independent institutional role as a professional community charged with responsibility for enforcing the law in an equal, uniform and predictable manner.”²⁵⁴

Proclamations of an impending crisis of confidence in the courts, however, are difficult to square with survey data revealing that public

²⁴⁸ *Law Day Speech by N.C. Superior Court Judge Thomas W. Ross*, N.C. LAW. WKLY., May 16, 2005, available at Academic OneFile, Doc. No. GALE A134519374.

²⁴⁹ Edward H. Pappas, *Judicial Independence in Crisis (Part I)*, MICH. BAR J., May 2009, at 18, 18 (quoting Massachusetts Chief Justice Margaret Marshall).

²⁵⁰ Margaret H. Marshall, *The Promise of Neutrality: Reflections on Judicial Independence*, 36 HUM. RTS. 3, 4 (2009).

²⁵¹ George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1546 (2008).

²⁵² Eric J. Magnuson, *The State of the Judiciary*, BENCH & BAR MINN., Aug. 2008, at 20, 23.

²⁵³ Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 516–17 (2003).

²⁵⁴ Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 627 (2005).

support for federal and state courts remains high.²⁵⁵ While recent developments engender doubts as to the long-term stability of the public's faith in courts and the rule of law, they lend little support to dire predictions of imminent catastrophe.

C. The Possibility that Public Confidence in the Rule of Law and Judicial Independence Will Gradually Erode

There is a third possibility between the two extremes of inertia and catastrophe: as the public continues to internalize the lessons of legal realism, it will gradually grow more skeptical of claims that independent judges are committed to the rule of law and become more receptive to arguments that judges should be subject to greater popular control. The sky will not fall; it will merely begin to sag—but that development has nonetheless significant implications for the long-term future of the public policy debate over what judges do and how they should be regulated.

Elsewhere, I have chronicled the emergence of judicial independence norms that evolved over the course of the nineteenth and twentieth centuries.²⁵⁶ Those norms embrace judicial independence as an instrumental value that enables judges to uphold the rule of law by buffering them from threats or controls that could interfere with their impartial application of the law to the facts of cases before them.²⁵⁷ As those norms became entrenched in the nineteenth century, they tempered Congress's impulse to exploit the full range of its powers to bend the judiciary to its will during cycles of intense, anticourt sentiment.²⁵⁸

The bench and bar remain committed to perpetuating judicial independence norms, and because those norms are so deeply entrenched, they are unlikely to yield quickly to evidence challenging the rule-of-law premises upon which those norms rest.²⁵⁹ Across a range of contexts, the public has now been exposed to a way of looking at what judges do that proceeds from the fundamentally different premise (corroborated by interdisciplinary research) that independent judges make decisions subject to a host of influences including, but not limited to, the law.²⁶⁰ If the legal establishment persists in its one-dimensional defense of an independent judiciary that proceeds from a premise the public increasingly regards as counterfactual, it is

²⁵⁵ See *supra* notes 168–69 and accompanying text.

²⁵⁶ See GEYH, *supra* note 125.

²⁵⁷ *Id.* at 279.

²⁵⁸ See *id.* at 52 (arguing that during the nineteenth century there was increasing congressional reluctance to use devices at Congress's disposal to retaliate against the judiciary for its decision making).

²⁵⁹ See *supra* notes 141–54 and accompanying text.

²⁶⁰ See *supra* notes 141, 160–67 and accompanying text.

only a matter of time before the public and its elected representatives reassess the value of an independent judiciary. Why give judges the latitude to implement their personal, partisan, strategic, or ideological preferences when we do not do the same for officials in the so-called “political” branches of government?

The capacity of the human mind to live with cognitive conflict is considerable, and it is quite possible for the public to abide a seemingly contradictory state of affairs in which judges uphold and disregard the rule of law—where the legal and the political struggle for primacy.²⁶¹ There are, however, limits, and we have begun to see hints of them. Perhaps most notable is that after fifty years in which nearly half of the states changed their method of selecting judges from contested elections to “merit selection” systems, the movement toward appointive systems has stalled and begun to reverse.²⁶² Appointive systems derive their legitimacy from the expertise and rule-of-law values they cultivate among judges so selected: judges appointed on the basis of merit, the argument goes, can interpret the law expertly and impartially, insulated from fleeting majorities of the electorate intent on punishing judges for unpopular rulings.²⁶³ But that presupposes a public so confident of its judges’ commitment to the rule of law that it is prepared to relinquish its power to keep judges in check through meaningful electoral accountability. The end of the merit-selection movement, coupled with more recent efforts in merit-selection states to revert to contested elections, is certainly suggestive of a public that is gradually growing more skeptical of its judges’ motives.

Corroborative of this gathering skepticism is that, while the public’s confidence levels in state and federal judiciaries generally remain high, recent polling data reveal significant spasms of disquietude. As previously noted, in a survey conducted in 2005, a majority agreed with the statement that judicial activism had reached a “crisis point.”²⁶⁴ Moreover, although significant majorities may be averse to

²⁶¹ See Bybee, *supra* note 173 (concluding that such a contradiction is useful in determining the actual role of political and legal factors in judicial decision making); see also JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS*, at x (1986) (observing that insistence on a strictly legal model of judicial decision making “may seem ridiculous” because “most thoughtful citizens know that the courts act decisively in creating rules that promote political ends”).

²⁶² See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 *GEO. J. LEGAL ETHICS* 1259, 1262 (2008).

²⁶³ See Geyh, *supra* note 163, at 54–55; see also Gibson, *supra* note 174, at 284 (arguing that the legitimacy of elected judges is connected to “the extent that judges are deemed to be experts in law who ably apply their legal training to decisions within the context of the rule of law”).

²⁶⁴ See *supra* note 216 and accompanying text.

the “congressional interference” with judges,²⁶⁵ a majority nonetheless agrees that judges whose decisions are repeatedly at odds with voter values should be impeached.²⁶⁶ In yet another survey question posed in 2005, 46% agreed with the statement that judges were “arrogant, out-of-control and unaccountable,” as compared to only 38% who disagreed.²⁶⁷ Finally, in 2006, Princeton Survey Research Associates International reported that 64% of respondents agreed with the proposition that “the courts in your state can usually be trusted to make rulings that are right for the state as a whole;” when it asked the nearly identical question in 2009, the percentage in agreement had dropped to 42%.²⁶⁸

V

REORIENTING THE ERMINE MYTH

In short, the legal establishment appears to be between a rock and a hard place. It can stick with the increasingly implausible story that independent judges are influenced by facts and law alone, and gradually lose its audience to court critics who will expose and decry ideological influences on judicial decision making and clamor for more popular and political controls. Or it can openly concede that extralegal factors influence judicial decision making and gut the *raison d'être* for the judiciary's independence in one fell swoop. Either way, the ermine myth is a goner.

A. The Ermine Myth and the Goals of an Independent Judiciary

There is, however, another way, which is to consider retooling the ermine myth itself, in a way that renders it more compatible with what modern judges do (thereby restoring the kernel of truth necessary for the myth to retain its vitality), while preserving the essential norms that underlie the myth's commitment to an independent judiciary. The starting point is to think about whether and why modern judges deserve a measure of independence: What instrumental values are furthered by an independent judiciary peopled with judges whose deci-

²⁶⁵ See *supra* note 172 and accompanying text.

²⁶⁶ See Neil, *supra* note 216 (finding 56% of respondents agreed with this assertion).

²⁶⁷ *Id.*

²⁶⁸ THE ANNENBERG PUB. POLICY CTR., *supra* note 162, at 2; PRINCETON SURVEY RESEARCH ASSOCS. INT'L, SEPARATE BRANCHES, SHARED RESPONSIBILITIES: A NATIONAL SURVEY OF PUBLIC EXPECTATIONS ON SOLVING JUSTICE ISSUES 21, 50 (2009), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=118>. In the 2009 survey, the question asked about “the state courts” instead of “the courts in your state.” See *Question Wording*, ANNENBERG PUB. POL'Y CTR. U. PA. 4 (Sept. 28, 2006), http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_Courts20060928/Courts_Questions_20060928.pdf; PRINCETON SURVEY RESEARCH ASSOCS. INT'L, *supra*.

sions are subject to a range of influences, including but not limited to applicable facts and law? There are at least three.

The Rule of Law Revisited. One justification for an independent judiciary resurrects the rule of law in a modified form, and does so in two different ways. First, insofar as law continues to influence judicial decision making, judicial independence promotes the rule of law by insulating judges who are predisposed to follow the law from public officials or others who would coerce judges to reach preferred policy outcomes. Such an argument is weakened by data showing that independence simultaneously liberates judges to disregard the law when they are so inclined.²⁶⁹ That counterpoint is a “winner,” though, only to the extent that the costs of autonomy, expressed in terms of the unwelcome extralegal influences that judicial independence tolerates, exceed the rule-of-law benefits that independence promotes. Moreover, the concern that judges may be more independent than necessary to advance rule-of-law goals is less an indictment of independence per se than a recognition of the need to temper independence with accountability.

Second, one can define “law” more broadly to accommodate ideological and other influences. Few lawyers would argue that there is but one “correct” answer to disputed legal questions; most would freely acknowledge that the “rule of law” tolerates a range of acceptable answers in close cases. While conservatives and liberals may answer such questions differently, the answers nonetheless fall within the ambit of law, broadly construed. While such a construction may infuriate social scientists intent on defining law precisely enough to differentiate its impact from other influences, a more capacious definition of law better captures its meaning for the legal establishment. As Professor Stephen Burbank has wisely written, “I prefer the messiness of lived experience to the tidiness of unrealistically parsimonious models.”²⁷⁰ In this way, “law” does not dictate outcomes so much as circumscribe the range of acceptable outcomes.

Restructured, the rule-of-law justification for judicial independence is less ambitious than that touted by traditionalists. It makes no claim that law dictates outcomes in close cases—only that law, broadly understood, is a relevant influence on judicial decision making that independence helps to preserve. The rule-of-law rationale for judicial independence may be strongest in easy or routine cases, where the impact of law on judicial decision making, when uncorrupted by dependence, is arguably the most pronounced. Although academics

²⁶⁹ See *supra* notes 54–56 and accompanying text.

²⁷⁰ Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE*, *supra* note 173, at 41.

dwell on hard cases, Judge Posner notes that “most cases are routine . . . rather than residing in that uncomfortable open region in which judges are at large,” and that “[t]he routine case is dispatched with the least fuss by legalist methods.”²⁷¹ Even in hard cases, independence from external interference with their decision making enables judges to offer their best judgment of what the law—flexibly understood—requires.

Due Process. A second justification for an independent judiciary is process oriented. Judicial proceedings include myriad safeguards that regulate how information is gathered and decisions are made. Parties are entitled to notice and a hearing—where they are afforded access to counsel and given an opportunity to question witnesses subject to rules of evidence—and they are guaranteed the right to an impartial judge who must disqualify himself for bias and must not discuss the case with others *ex parte*.²⁷² Such procedural safeguards assume that judges will make decisions on the basis of information so obtained and constrained, which in turn assumes that the judge is independent enough to do so—meaning that the judge can resist pressure from outsiders who would make a nullity of procedural safeguards by bending the judge to their will. Thus, as Martin Redish and Lawrence Marshall have written, “[n]one of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator.”²⁷³

To say that judicial independence promotes due process by enabling judges to conform their decision making to a process that follows procedural safeguards, however, is not to say that the decisions judges make are or should be impervious to extralegal influences. Judges who are insulated enough from external pressure to respect litigants’ due process rights still exercise discretion when evaluating the information they receive and make decisions subject to a range of influences, as Edward Rubin has explained: “[D]ue process does not

²⁷¹ POSNER, *supra* note 18, at 46; *see also* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) (“When the relevant legal materials are uncomplicated, the issues are uncontroversial, and precedent is clear, judges’ deliberations are straightforward and judgments are easily reached.”)

²⁷² U.S. CONST. amends. V, VI, XIV, § 1; FED. R. EVID. 601–15; *In re Stuhl*, 233 S.E.2d 562, 568 (N.C. 1977) (“A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.”); MODEL CODE OF JUD. CONDUCT R. 2.9, 2.11(A)(1) (2007); JAMES J. ALFINI, STEVEN LUBET, JEFFREY SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS 2-23 (4th ed. 2007) (“Litigants have a right to expect . . . that their case will be heard in a public forum before an impartial judge or jury with representatives of both sides present.”).

²⁷³ Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986).

demand that decisions exclude public policy considerations or that they flow logically or definitively from the applicable rules. But it does demand a certain type of decision making, specifically decision making that is constrained by the established procedural protections.”²⁷⁴

Moreover, judicial independence not only enables judges to adhere to established procedural safeguards but is itself a procedural safeguard that promotes public confidence in the administration of justice and the legitimacy of government. Tom Tyler and others have shown, across a range of contexts, that litigants who “fare poorly at trial will not denigrate the judge or the system as long as they believe their outcomes are fair ones reached by fair procedures.”²⁷⁵ A report of the National Center for State Courts echoes that “perceptions that courts use fair procedures and treat groups equally are the strongest predictors of favorable evaluations of court performance.”²⁷⁶ Judicial independence, by ensuring that interested observers intent on intimidating judges into reaching desired outcomes do not dictate the choices judges make, may thus be viewed as a procedural protection that enhances due process and governmental legitimacy—even if the decisions that independent judges make are influenced by legal and extralegal considerations.²⁷⁷

Excessive judicial independence can liberate judges to disregard due process rights to the detriment of the judiciary’s legitimacy, just as it can liberate them to disregard the rule of law. Again, however, such a point does not refute the role independence plays in promoting due process, so much as highlight the need to curb excessive independence with appropriate accountability. Thus, judges who disregard

²⁷⁴ Edward L. Rubin, *Independence as a Governing Mechanism*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 13, at 70.

²⁷⁵ Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluation of Their Courtroom Experience*, 18 LAW & SOC’Y REV. 51, 69–70 (1984); *see also* TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY 82–83 (1997) (discussing how litigants will more often accept judgments resulting from what they perceive to be fair procedures).

²⁷⁶ DAVID B. ROTTMAN, RANDALL HANSEN, NICOLE MOTT & LYNN GRIMES, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY: FINAL REPORT 60 (2003).

²⁷⁷ Tyler does not identify judicial independence per se as a factor contributing to public confidence in court procedure, but it is implicit in several of the factors he does identify, including the judge’s efforts to be fair, the judge’s honesty, the ethics of the judge’s conduct, and the judge’s bias. Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 121 (1988). If, for example, a judge present himself as neutral and fair, but is thought to be under the thumb of an energized legislature or interest group, the adverse impact on the judge’s perceived fairness, honesty, ethics, and bias seems plain.

due process rights are subject to reversal, mandamus, and in extreme cases (in state systems, at least) discipline and removal.²⁷⁸

Justice. Even those who argue that judges are politicians in robes must acknowledge an elemental difference between judges and legislators. Without disputing that judges, like legislators, can be “policy-makers” in some sense of the term, judges, unlike legislators, adjudicate cases between parties. In adjudicating cases, judges find facts and reach conclusions of law to the ultimate end of administering justice. As a practical matter, when applicable law is clear and binding on a court, the judicial role is so circumscribed by the rule-of-law ideal that judges are expected to follow the law—philosophical disquisitions on unjust laws notwithstanding—and are subject to discipline if they deliberately do otherwise.²⁷⁹ When, however, applicable law is ambiguous, justice, of necessity, requires judges to bring other considerations to bear in interpreting the law to reach results that are “just” to the parties in that case.

“Justice” is a polymorphous term that means different things to different people, and now is not the time to develop and defend a preferred theory of justice. As a purely descriptive matter, however, it is enough to say that judges make decisions they regard as best, and Part II tells us that when doing so, they are influenced by a range of factors, including legal texts, their conceptions of good public policy, the strategic consequences of their decisions, the audiences they are seeking to reach, and self-interest. In this regard, judges are “pragmatists” in the most banal sense of the term.²⁸⁰ By its nature, pragmatism takes an eclectic approach to the appropriate influences on judicial decision making that is compatible with scholarly understanding of what judges do. As Thomas Grey has written, “[T]he pragmatist tendency is to promote trade rather than warfare between normative and descriptive theorists, storytellers and model-builders, interpreters and causal explainers.”²⁸¹ Writing in 1991, Richard Rorty observed that “[p]ragmatism was reasonably shocking seventy years

²⁷⁸ MODEL CODE OF JUD. CONDUCT R. 2.2 (2007). For an extensive account of cases involving judges being disciplined for interfering with the adversary process, see ALFINI ET AL., *supra* note 272, at 2-23 to 2-27.

²⁷⁹ MODEL CODE OF JUD. CONDUCT R. 2.2; *see, e.g.*, *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) (“Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them . . . so district judges must follow the decision of this court whether or not they agree.”); *In re Feinberg*, 833 N.E.2d 1204, 1209 (N.Y. 2005) (“Petitioner’s consistent disregard for fundamental statutory requirements of office demonstrates an unacceptable incompetence in the law.”).

²⁸⁰ Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 424 (1990) (“The conclusion that legal pragmatism is irresistible might seem, at least for self-proclaimed pragmatists, too good to be true. In fact, the conclusion is too true to be good. Pragmatism in the sense discussed above is irresistible because it is platitudinous.”).

²⁸¹ Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 791 (1989).

ago, but in the ensuing decades it has gradually been absorbed into American common sense.”²⁸² Judge Posner and others are thus probably not exaggerating when they conclude that the term “pragmatist”—as embodied in a penchant for deciding difficult cases with reference to public policy, the purposes underlying applicable rules, and the social and institutional consequences of their rulings against the backdrop of applicable law, “best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior.”²⁸³ Judge Posner sometimes pits the “legalist” in opposition to his conception of pragmatic justice (although “justice” is not the term Posner uses),²⁸⁴ but that seems largely unnecessary. The enlightened legalist embraces the ermine myth and its rule-of-law ideal, but recognizes the role of discretion in divining applicable law, and the need to exercise that discretion with recourse to the tools of the pragmatist. To that extent, pragmatism truly is ubiquitous.

Pragmatism in this all-encompassing form is susceptible to the criticism that it is “too true to be good,” because it characterizes what judges do in terms so broad as to lose descriptive, predictive, and prescriptive force.²⁸⁵ That critique might be fatal were I to bring universal pragmatism to bear for the purpose analyzing how pragmatists collectively would or should resolve particular legal problems. My point here, however, is more limited: insofar as pragmatism writ large describes the justice that most judges administer, judicial independence is an essential ingredient for the effective administration of pragmatic justice in all its variations. Ascertaining how the law should be applied in a given context to yield the best, fairest, or most reasonable or just results (pick your preferred adjective) necessarily requires a familiarity with and an appreciation for the details of the case at hand. A judge is uniquely situated to acquire the detailed information needed to make pragmatic choices in the cases over which he or she presides. Rendering that judge subservient to the wishes of interested observers who lack access to (or concern for) context-specific facts undermines the ability of the judge to arrive at just or fair outcomes.

Repackaging the justifications for an independent judiciary in this way enables the legal establishment to defend the judiciary’s autonomy without recourse to otherworldly claims that judges are apolitical or that law, formalistically defined, is all that matters in judicial decision making. More fundamentally, it does so while preserving

²⁸² Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 90 (Michael Brint & William Weaver eds., 1991).

²⁸³ POSNER, *supra* note 18, at 230; *see also* sources cited *supra* note 2.

²⁸⁴ *See* POSNER, *supra* note 18, at 41–56 (discussing and critiquing legalism in relation to pragmatism).

²⁸⁵ Smith, *supra* note 280, at 423–24.

and indeed strengthening the ermine myth that has protected and promoted the judiciary's institutional legitimacy for centuries, by offering a threefold justification for the judiciary's continuing independence.

B. Reorienting the Legal Establishment's Reform Agenda

As the foregoing subpart argues, the legal establishment can and should more openly acknowledge that there are spaces in the law that independent judges fill through the exercise of discretion informed by legal and extralegal considerations. These extralegal influences are "political" in the broader sense of the term, insofar as they embrace the ideological, strategic, sociological, psychological, and economic factors that comprise the art of governing.²⁸⁶ The legal establishment can nevertheless be more candid in conceding their existence without fear of undermining judicial independence, if the justifications for an independent judiciary are reoriented to focus on the role independent judges play in upholding a more flexible rule of law, in promoting due process, and in seeking just outcomes.

Conceding the impact of political influences has a Jekyll-and-Hyde quality: On the one hand, it is mild mannered to any thoughtful student of the courts—including reflective lawyers and judges. On the other hand, it would seem to do considerable violence to the idealized mythology of the judicial role that the legal establishment has perpetuated in the public policy debate.

To reiterate, it is not only possible to reorient the legal establishment's position in the public policy debate to accommodate a more "political" court while preserving the beneficial properties of the ermine myth, but necessary too if those who care about the courts desire preserving the judiciary's independence and legitimacy in the long term. Reorienting the legal establishment's perspective in this way, however, comes at the cost of forcing it to rethink its reform agenda. For over a century, the mantra of the legal establishment has been to "depoliticize" or "take the politics out of" the courts.²⁸⁷ If, however, we concede the inevitability—and indeed the desirability—of courts that are subject to certain kinds of "political" influences, then the time has come for the legal establishment to abandon its crusade to exter-

²⁸⁶ Professor Stephen Burbank writes of legal and extralegal influences as complementary:

[K]nown and established (but not necessarily determinate) law and the pursuit of a judge's preferences on matters of policy relevant in litigation are complements in the sense that, like judicial independence and accountability, they need (or at least must rely on) each other.

Burbank, *supra* note 270, at 54.

²⁸⁷ See *supra* notes 148–54 and accompanying text.

minate “politics” from the judiciary and to seek instead to manage judicial politics.

To a significant extent, the era of managing judicial politics is already upon us, if ever there was a time when it was not. For the legal establishment there is much to be gained and little to be lost by more openly acknowledging this reality, which will enable it to structure its policy agenda more coherently. The point is this: we want judges who take the law seriously, and who are committed to due process and just outcomes. On the one hand, as elaborated upon above, all three of these objectives can be achieved by judges who are subject to extralegal influences and arguably cannot be achieved without such influences, given the need for judges to exercise discretion that extralegal considerations inform. On the other hand, extralegal influences can also thwart those objectives from within and without. From within, a judge’s ideological zeal, strategic scheming, naked self-interest, and other influences can sometimes eclipse the judge’s commitment to law, due process, and just outcomes; from without, excessive external interference with judicial decision making can intimidate or frustrate the judge who would otherwise pursue desired objectives. The reform agenda, then, must logically be directed at striking an appropriate balance between affording judges the independence necessary to perform their quasi-legal, quasi-political functions to achieve systemic objectives without external interference, and subjecting judges to accountability-promoting measures that discourage internal interference with those same systemic objectives. It is beyond the scope of this Article to fully develop a revised policy agenda that manages judicial politics in this way, but a few examples may illuminate how the proposed approach could work.

Legal Education. Developing an approach to managing judicial politics logically begins in law schools, where future lawyers, judges, and (many) lawmakers are first exposed to the way judges think. Policy analysis—analyzing how judges decide difficult legal questions with reference to competing policy concerns—is already a fixture of legal education.²⁸⁸ No thoughtful law professor or student thinks that judges can or do decide close questions of law with exclusive recourse to legal texts, unaided by reference to legal policy. It is only a short jump from there to identifying the factors that can influence individual judges to choose one policy over another.

Exposing law students to social science data detailing the legal and extralegal influences on judicial decision making, as a smaller part of the policy-analysis training that law students receive every day,

²⁸⁸ See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 74 (2007) (illustrating the use of policy analysis in the law school setting).

would be a modest but important reform. From a purely practical standpoint, it would equip students more systematically with information that good litigators gain haphazardly from experience. Recall the Supreme Court forecasting project, discussed earlier.²⁸⁹ The authors there reported that experienced Supreme Court litigators bested academics and the computer model in predicting case outcomes, which suggests that the litigators involved had become quite adept at identifying the legal and extralegal factors likely to influence the Justices' decisions.²⁹⁰ The sampling of litigators was too small for the researchers to draw firm conclusions as to their performance vis-à-vis other forecasters in the study, but it is at least suggestive.²⁹¹

From a broader policy perspective, incorporating a modest social science component into the law school curriculum provides the next generation of the legal establishment with a way of looking at what judges do that better equips it to manage judicial politics effectively. And it begins with a more open recognition that the choices judges make are subject to extralegal influences.

Judicial Selection. As documented in Part II, the mainstream legal establishment opposes those who would “politicize” judicial selection,²⁹² and organizations such as the ABA and the American Judicature Society have long campaigned to “take the politics out” of the selection process by, for example, ending state judicial elections and limiting federal confirmation proceedings to an evaluation of nominee “qualifications.”²⁹³ These campaigns have, in a word, failed—a majority of Americans continue to favor state judicial elections, and federal confirmation proceedings remain an ideological battleground.²⁹⁴ Quietly, the mainstream establishment has shifted tacks: proposals to eliminate judicial elections altogether are taking a backseat to more modest proposals to reduce the putatively harmful effects of elections (e.g., publicly funding judicial campaigns, replacing partisan with nonpartisan elections, and lengthening judicial terms to reduce election frequency),²⁹⁵ while calls to end Senate inquiries into a

²⁸⁹ See *supra* notes 77–85 and accompanying text.

²⁹⁰ See *supra* notes 77–85 and accompanying text.

²⁹¹ Ruger et al., *supra* note 11, at 1178 (detailing that the sample size consisted of only twelve attorneys from a pool of eighty-three experts).

²⁹² See *supra* notes 148–54 and accompanying text.

²⁹³ See, e.g., AM. BAR ASS'N, *supra* note 19, at 70 (recommending that judicial appointments be based on merit and asserting that “the administration of justice should not turn on the outcome of popularity contests”).

²⁹⁴ See, e.g., Richard Brust, *No More Kabuki Confirmations: Better Ways to Vet Supreme Court Nominees*, A.B.A. J., Oct. 2009, at 39, 39 (describing the contentious nature of federal judicial confirmation hearings).

²⁹⁵ See, e.g., Call to Action: *Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. REV. 1353, 1354 (2001) (briefly describing the threat that judicial elections pose and stating that “[t]oo little attention has been given to incremental changes in the election process to address some of the most serious threats to judicial independence and

nominee's ideology are being replaced by a struggle to delineate the appropriate scope of such inquiries.²⁹⁶ In other words, the movement within the legal establishment away from eliminating and toward managing judicial politics is well underway.

Even so, the establishment's orientation remains essentially unchanged: compromise measures may be a practical necessity, but in a perfect world, the judiciary would be devoid of political influences.²⁹⁷ More openly acknowledging the inherently quasi-legal, quasi-political character of judging, however, may lead the legal establishment to entertain the possibility that managing rather than eliminating judicial politics in the selection process is not just the best it can do but the most it *should* do.

Thinking about state judicial selection reform in terms of striking an optimal independence–accountability balance leads to three related conclusions. First, it means that interstate variations are desirable and inevitable: if, in the jurisdiction at issue, the greater impediment to judges implementing law/fairness/common-sense objectives is posed by external threats to judicial independence (from the electorate or others), an independence-enhancing appointive system may be preferable; if, on the other hand, the primary concern is that overly independent judges will supplant systemic objectives with personal ones, an accountability-promoting elective system may be the better means to preserve public confidence in the courts.²⁹⁸ Second, and following from the first, it means that selection systems will be in a perpetual state of flux, as circumstances affecting the independence–accountability calculations within given jurisdictions change over time. Third, it suggests the possibility that states are right to “fine tune” their selection systems. States interested in tempering the independence-threatening effects of elective systems should explore such

impartiality”); *see also* AM. BAR ASS'N, *supra* note 19, at 74 (“It is to those states [in which judicial elections remain entrenched] that the Commission now directs its attention, with recommendations aimed at ameliorating some of the deleterious effects of elections on the enduring principles of a good judicial system”); James Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 302 (2010) (arguing for incremental reforms because “repeated calls for fundamental changes prove to be of scant pragmatic value”).

²⁹⁶ *See* Brust, *supra* note 294 (touching upon some of the proposed suggestions aimed at limiting the scope of ideological inquiry in federal judicial confirmation hearings).

²⁹⁷ *See, e.g.*, AM. BAR ASS'N, *supra* note 19, at 74 (explaining that “The Commission opposes the use of judicial elections as a means of initial selection,” and “[o]ver the long term . . . believes that this view will win widespread acceptance. Over the short term, however, the Commission acknowledges that support for judicial elections remains entrenched in many states” and that making a series of secondary proposals “aimed at ameliorating some of the deleterious effects of elections” in states that retain them, is warranted).

²⁹⁸ Burbank & Friedman, *supra* note 73, at 9, 17 (“Even if one is predisposed for normative reasons to the federal model, an instrumental view of judicial independence (and accountability) requires attention to what it is that we seek from courts and to possible differences in that regard between the various court systems in the United States and between courts within the same system.”).

options as moving from partisan to nonpartisan races, publicly funding appellate campaigns, or lengthening judicial terms; conversely, states seeking to enhance the accountability of appointive systems should think about implementing judicial evaluation programs to accompany their retention elections, consider ways to improve the performance of judicial nominating commissions, and explore means outside of the selection process to render judges answerable for their conduct in office, for example, by strengthening disciplinary regimes and disqualification processes (elaborated upon next).

With respect to the federal appointments process, it means recognizing the inevitability and desirability of Senate inquiries into the range of legal and extralegal factors that can influence a nominee's judicial decision making as a way to promote prospective accountability by satisfying the public's elected representatives that nominees will take the law seriously, are committed to due process, and will pursue pragmatic justice. It means acknowledging the need to draw lines that protect against independence-threatening inquiries aimed at extracting promises or commitments from nominees to decide future cases in specific ways. And it means abandoning the naïve hope that the appointments process can be purged of its acrimonious, partisan, and strategic character; at the same time it means managing the politics of judicial appointments sufficiently to guard against attacks on nominees so excessive and unrestrained that they threaten to destabilize the process itself and undermine the judiciary's institutional legitimacy.²⁹⁹

Oversight of Judges and the Judiciary. As recounted in Part II, the politics of judicial oversight has been polarized to such an extent as to assume an almost cartoonish quality. Court critics, animated by the view that judges are shameless policymakers run amok, have proposed draconian court-curbing measures (such as impeachment, jurisdiction stripping, and budget cuts) to hold judges accountable.³⁰⁰ The legal establishment, animated by the view that judges are incorruptible bastions of the rule of law, has opposed such measures as threats to judicial independence.³⁰¹

When it comes to blunderbuss proposals such as these, which have been cyclically proposed and rejected for generations,³⁰² it should be possible, indeed easy, for the legal establishment to defend the judiciary against them without resort to a one-dimensional conception of the judicial role. Without disputing that judges are subject

²⁹⁹ See GIBSON & CALDEIRA, *supra* note 172, at 124–25.

³⁰⁰ See *supra* Part II.A.

³⁰¹ See *supra* Part II.B.

³⁰² See generally GEYH, *supra* note 125 (discussing historical efforts by American legislatures to exercise control over the courts).

to extralegal influences, ham-handed tactics aimed at rendering judges subservient to the legislature do not seek to ensure that judges are process-minded, justice-seeking guardians of law; rather, they seek to ensure that judges do what legislators tell them to, to the detriment of those very same values.

Fixation on these incendiary and almost inevitably doomed proposals to curb the courts, however, tends to perpetuate the misconception that keeping politics (or politicians) away from the courts is and ought to be the legal establishment's lodestar. Obscured is the routine give and take between the branches that typifies their normal working relationship in a host of contexts, where managing judicial politics has long been a familiar part of the process.³⁰³ For example, in 2006, Congress, dissatisfied with the judiciary's failure to discipline judges in high-profile cases, proposed to create an office of inspector general within the federal judiciary and initiated an impeachment inquiry into the conduct of a judge whose disciplinary proceeding was pending.³⁰⁴ The Judicial Conference objected to the inspector-general proposal as a threat to its independence³⁰⁵ but revamped its disciplinary process,³⁰⁶ and the bill was never adopted.³⁰⁷ In the past decade, bills were introduced in Congress to prohibit judges from participating in educational seminars sponsored by corporations with business before the courts.³⁰⁸ Federal judges and the Judicial Conference opposed such legislation as an affront to the separation of pow-

³⁰³ Geyh, *supra* note 124, at 23 ("Over time, Congress and the courts have exploited a variety of mechanisms for making their views known, communicating the depth of their disaffection, achieving compromises, enabling face-saving acquiescence, and trumping each other without provoking crises.").

³⁰⁴ Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong., sec. 2(a), § 1021 (2006) (proposing the creation of an inspector general for the judiciary to investigate judicial misconduct); *Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H.R. Res. 916 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 2-4 (2006); *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 1-4 (2006) [hereinafter *Hearing on H.R. 5219*]; see also Geyh, *supra* note 124, at 27 (discussing the inspector-general proposal as an example of Congress seeking to encourage judicial self-regulation).

³⁰⁵ See *Hearing on H.R. 5219, supra* note 304, at 61.

³⁰⁶ See Tony Mauro, *Binding National Rules Adopted for Handling Judicial Misconduct Complaints*, LAW.COM (Mar. 12, 2008), <http://www.law.com/jsp/article.jsp?id=1205232267963&slreturn=1&hbx>; see also RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf.

³⁰⁷ *Bill Summary & Status 109th Congress (2005-2006) H.R. 5219*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.109hr5219> (last visited Sept. 6, 2011).

³⁰⁸ Press Release, Admin. Office of the U.S. Courts, Judicial Conference Opposes Sweeping Restrictions on Educational Programs (Sept. 19, 2000), http://www.uscourts.gov/News/NewsView/00-09-19/Judicial_Conference_Opposes_Sweeping_Restrictions_on_Educational_Programs.aspx.

ers, their freedom of speech, and their independence—but ultimately revised an ethical ruling to impose significant restrictions on judicial attendance at expense-paid seminars.³⁰⁹

Evaluating mainstream proposals for court governance and the independence–accountability arguments they provoke, with more explicit reference to the three-fold objectives that independence and accountability serve, should help to structure and moderate the legal establishment’s response to such proposals. Judicial disqualification reform is a useful example to illustrate the point and conclude this Article because its regulation reflects the push and pull of the same currents that have shaped the larger debate over what judges do.

“Impartiality” has been a defining feature of the judicial role for centuries, and at common law, the presumption of impartiality was irrebuttable: judges could not be disqualified for bias.³¹⁰ In the twentieth century, however, scholars and policymakers began to challenge this formalist proposition, and in the 1970s, federal and state laws were revised to require disqualification whenever a judge was biased or his “impartiality might reasonably be questioned.”³¹¹

While these changes would seem to reflect a concession by the legal establishment that judges are subject to extralegal influences— influences that need to be managed—many judges have been loath to embrace the new world order embodied in the reforms.³¹² Illustrative of the continuing schism within the judicial community is the split decision of the Supreme Court in *Caperton v. A.T. Massey Coal Co.*³¹³ There, the Court ruled that a litigant’s due process rights were vio-

³⁰⁹ *Id.* Compare U.S. Judicial Conference Comm. on Codes of Conduct, Advisory Opinion No. 67: Attendance at Independent Educational Seminars (revised June 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf> (setting forth the factors a judge must consider when deciding whether to attend an expense-paid seminar), with Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 *FORDHAM URB. L.J.* 941, 954–60 (2002) (quoting extensively from the 1998 version of Advisory Opinion No. 67).

³¹⁰ 3 WILLIAM BLACKSTONE, *COMMENTARIES* *361 (“[J]udges or justices cannot be challenged . . . for the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”).

³¹¹ John P. Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605 (1947) (questioning the absence of a rule requiring disqualification for bias). In 1972, the ABA promulgated a *Model Code of Judicial Conduct* that required judges to disqualify themselves when their “impartiality might reasonably be questioned,” and in 1974, Congress amended the federal judicial disqualification statute to include that same language. 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUD. CONDUCT Canon 3C (1972).

³¹² One multistate study conducted in the 1990s showed ambivalence among judges about whether disqualification is appropriate in a range of circumstances. JEFFREY SHAMAN & JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* (1995).

³¹³ 129 S. Ct. 2252 (2009).

lated by a state supreme court justice who declined to disqualify himself from hearing an appeal after receiving over \$3 million in support (via independent expenditures) for his election campaign from a CEO for one of the parties while the appeal was pending.³¹⁴ The five-member majority proceeded from the assumption that judges are subject to extralegal influences and concluded that due process required the imposition of an objective rule, without which, “there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case.”³¹⁵ The resulting rule that the majority invoked was “whether, ‘under a realistic appraisal of psychological tendencies and human weaknesses,’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”³¹⁶ The four dissenters, in contrast, hewed to rule of law rhetoric and ancient presumptions: “There is a ‘presumption of honesty and integrity in those serving as adjudicators,’” they declared.³¹⁷ “All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”³¹⁸

The majority in *Caperton* made clear that regulating disqualification via due process analysis was limited to extreme cases in which egregious failures to disqualify were not prevented by the application of state disqualification rules, which appeared to signal that Supreme Court interventions could be obviated by rigorous application of state disqualification standards.³¹⁹ In the immediate aftermath of *Caperton*, however, ambivalence prevails: for example, while the Michigan Supreme Court adopted meaningful disqualification reform, the Wisconsin Supreme Court all but flouted the message of *Caperton*’s majority.³²⁰

The divisions within the legal establishment over judicial disqualification are put in boldest relief when it comes to the reform of disqualification procedure. The norm in the federal courts and most states is that judges decide their own disqualification motions.³²¹ Disqualification determinations are subject to review via appeal or mandamus, but such review is highly deferential, with the majority view

³¹⁴ *Id.* at 2257–59.

³¹⁵ *Id.* at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

³¹⁶ *Id.* (quoting *Withrow*, 421 U.S. at 47).

³¹⁷ *Id.* at 2267 (Roberts, C.J., dissenting) (quoting *Withrow*, 421 U.S. at 47).

³¹⁸ *Id.*

³¹⁹ *Id.* at 2265–67.

³²⁰ For a fine summary of developments in Michigan and Wisconsin, see James Sample, *Court Reform Enters the Post-Caperton Era*, 58 *DRAKE L. REV.* 787, 793–810 (2010).

³²¹ CHARLES GARDNER GEYH, *FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW* 78–79 (Kris Markarian ed., 2d ed. 2010); Judicial Disqualification Project, Am. Bar Ass’n, *Taking Disqualification Seriously*, 92 *JUDICATURE* 12, 16 (2008).

being that a judge's decision not to disqualify himself is reversible only upon a showing of abuse of discretion.³²² These rules sit well with traditionalists, who adhere to the presumption of impartiality and its premise that judges can bracket out extralegal influences and apply the law; the rules sit badly with reformers who are skeptical of the proposition that judges can step back from themselves and accurately assess the extent of their own bias, real or perceived.³²³

The approach I have advocated in this Article would call upon the legal establishment to rethink its traditional view. If we acknowledge a range of extralegal influences on judicial decision making, and propose to manage those influences to the end of maximizing the rule of law; procedural fairness; and sound, pragmatic decision making, then several conclusions follow naturally.

First, the rule of law is initially better served if disqualification rules are interpreted and applied by someone other than the targeted judge who is predisposed to think himself qualified to sit, and subsequently better served if biased judges, who would not disqualify themselves, are thereby excluded. Second, due process is better served if the judge *qua* fox is not called upon to guard his own henhouse. Third, the perspective that comes from being apart from rather than a part of the problem in the context of deciding disqualification motions improves the prospects for pragmatic, justice-seeking decision making. Conversely, the consequences of the legal establishment adhering to the otherworldly premise that judges are impervious to the very bias of which they stand accused when called upon to decide motions to disqualify themselves may transcend bad recusal policy. While *Caperton* was pending, a survey found that 81% of respondents thought that disqualification decisions should be made by a different judge—an unsurprising result, given the pervasive view that judges are subject to extralegal influences.³²⁴ For judges to dismiss the approach that the public prefers by so overwhelming a margin as a “solution in search of a problem”³²⁵ risks contributing to the gradual erosion of public confidence in the courts that I have predicted.

CONCLUSION

The institutional legitimacy of the government depends on the consent and support of the governed. The stability of such consent and support is aided by a deep and abiding public faith in the system

³²² GEYH, *supra* note 321, at 99–102.

³²³ See *supra* Parts II.A–B.

³²⁴ See *supra* note 240.

³²⁵ David Ingram, *Congress Examines Judge Recusals: House Panel Considers Changing Disqualification Rules for Federal Judiciary*, NAT'L L.J., Nov. 2, 2009, at 1 (quoting Chief Judge Edith Jones).

of government, which in turn is promoted by a shared belief in stories that illustrate and aggrandize the principles upon which the government was founded. The nation's youth is inculcated with stories that underscore the greatness of the "founding fathers"—their wisdom, their virtue, and their heroism—and, by necessary implication, the greatness of the government they established. Discussion of their roles as white, male, slave-holding, propertied elites are correspondingly deemphasized, relegated to asides and more rarified forums.

For a myth to succeed in galvanizing the public over the long term, however, there must be some "there" there. In that regard, the achievements of the founding generation were in fact remarkable, and the capacity of those achievements—even if embellished and selectively edited—to sustain a nation's faith for well over two centuries is understandable. The same may be said for the ermine myth that independent judges uphold and apply the law. The peril is that the myth is gradually becoming antiquated to the point of losing its power as a unifying principle in support of an independent judiciary, owing to an emerging recognition that judges are influenced by more than "law" traditionally understood. The burden of this Article has been to show that by updating the ermine myth to embrace at its core a more realistic vision of the judicial role, it should be possible to preserve the myth as a unifying principle to sustain the judiciary's institutional legitimacy for future generations. The stories that the legal establishment tells of the judicial role will retain a mythical quality, insofar as they embellish or exaggerate the truth by downplaying the extent to which judges can and do abuse their independence to the detriment of the rule of law; due process; and sound, pragmatic decision making. But the essence of the revised myth—that independent judges seek to follow the law, adhere to due process, and bring their common sense to bear to the end of seeking just outcomes—retains the sizable kernel of truth needed to preserve public support for the myth and the continued independence of the courts. And if one thinks of judicial accountability in terms of managing extrajudicial influences on judicial decision making to reduce the abuses of judicial independence, it will enable that kernel of truth to grow.

