

THE DISTORTING SLANT IN QUANTITATIVE STUDIES OF JUDGING

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Abstract: The study of judicial politics using empirical methods to gain insight into the process of judicial decision making has, until recently, belonged exclusively to political scientists. Now, however, the field of study is quickly gaining traction in the legal academy. Using judicial decisions and data about the judges making them could help expose judges who are overly political and help maintain the integrity of the legal system. Unfortunately, because political scientists bought into a false story about the legal community—that judges and legal scholars believe judicial decision making is a mechanical application of law to facts leading to a necessary result. Consequently, judicial politics studies are aimed at proving politics has *some* affect on judicial decision making, rather than trying to determine *how much* it affects decision making and at what point it becomes problematic. This Article demonstrates that judges have openly acknowledged that politics and personal preferences influence judicial decision making, but only rarely and to a limited extent, something borne out by judicial politics studies once the question becomes *how much*, not *whether*.

INTRODUCTION

Quantitative studies of judging are burgeoning in legal scholarship. This movement is touted as “The New Legal Realism” or “Empirical Legal Studies,” which promises to apply the rigor of social science to expose the truth about the nature of judging.¹ Although political scientists have conducted quantitative studies of judging for more than four decades, until recently, their efforts have received little attention in legal circles.² Now, prominent legal scholars, including Cass Sunstein and

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¹ Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 833 (2008).

² See *id.* at 832–33.

Judge Richard Posner,³ are enthusiastically promoting and conducting these studies, often in collaboration with political scientists, thus raising their profile within the legal academy. Leading law reviews have published a slew of these studies lately.⁴ Two major law schools co-sponsor annual workshops led by political scientists to train law professors in how to conduct these studies.⁵ This Article will attempt to slow the gathering momentum of quantitative studies of judging and redirect their orientation by making two main points. First, a distorting slant—the determination to *prove* that judging is political—pervades the work of judicial politics scholars in this field. Second, although quantitative studies are often pitched as exercises in judicial debunking, the surprising truth—obscured by the aforementioned slant—is that these studies basically confirm what judges have been saying about judging for many decades.

The first generation of political scientists who conducted quantitative studies of judging dubbed the field “Political Jurisprudence.”⁶ An early influential article by Martin Shapiro explained that “[t]he core of political jurisprudence is a vision of courts as political agencies and judges as political actors.”⁷ Today the favored label for the field is “judicial politics.”⁸ These labels openly declare the pre-commitment that governs their work. As Barry Friedman noted in a recent critical essay, “reflecting an almost pathological skepticism that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously.”⁹ This judging-is-more-politics-than-law slant shapes how the studies are designed as well as how the results are interpreted

³ See generally RICHARD POSNER, *HOW JUDGES THINK* (2008) (reporting the findings of several different studies); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (a book length report of a single study and its implications).

⁴ See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

⁵ One such workshop, called “Conducting Empirical Legal Scholarship: The Advanced Course,” was sponsored by Northwestern University School of Law and Washington University School of Law and took place on October 24–26, 2008.

⁶ See COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 2 (Walter F. Murphy & C. Herman Pritchett eds., 3d ed. 1979).

⁷ Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 296 (1964).

⁸ Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR 1, 3 (Nancy Maveety ed., 2003). The more neutral label “law and courts” is also used, though “judicial politics” appears to be favored.

⁹ Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006).

and portrayed, belying the claim that these studies offer "value-free, detached, and objective" evidence about the nature of judging.¹⁰

From the very outset, political scientists bought into the story that formalist views about judging dominated at the turn of the twentieth century.¹¹ A 2006 book on judging by three political scientists lays out this standard account:

Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences. . . . In the 1920s, however, a group of jurists and legal philosophers, known collectively as "legal realists," recognized that judicial discretion was quite broad and that often the law did not mandate a particular result.¹²

A 2008 quantitative study of judging leads with the same contrast:

For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." . . . For the realists, the judge "decides by feeling and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster."¹³

The judicial politics field developed as a reaction to formalist views of judging—as an avowed effort to provide support for the realist position.¹⁴ It turns out, however, that much of this conventional story is false. Most judges and lawyers at the turn of the century did not believe that judging was a mechanistic exercise, and the realists were not radical skeptics about judging.¹⁵ Under the influence of these flawed understandings, political scientists embarked upon a mission that was misdirected from the outset. The judicial politics field was born in a

¹⁰ See Maveety, *supra* note 8, at 10 (describing the type of results that scholars believed quantitative research on judging would achieve).

¹¹ See VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 30 (2006).

¹² *Id.* (emphasis added).

¹³ Guthrie et al., *supra* note 4, at 2.

¹⁴ See *infra* notes 29–57 and accompanying text.

¹⁵ See *infra* notes 38–101 and accompanying text.

congeries of false beliefs, and those false beliefs warped its orientation and development.¹⁶

Even though judges have explicitly acknowledged the potential influence that personal views have on their decision making,¹⁷ they nonetheless insist that the bulk of their decisions are determined by law.¹⁸ In contrast, judicial politics scholars—as the chosen name of the field connotes—repeatedly suggest that politics pervades judging.¹⁹ In their effort to prove that ideology has an influence on judging, scholars have largely failed to focus on what should be the crucial question: *how much* does this matter?²⁰ When this question is properly accorded a central place in the inquiry, the results of these studies are reversed, and instead of discrediting the judiciary, they confirm the legal integrity of the bulk of judging.²¹

It is critically important that quantitative studies of judging internalize the two main points pressed in this Article, that the desire to expose judging as political distorts scholarly work in this area and that empirical studies tend to substantiate, not refute, judges' claims that their predilections seldom impact their decisions. Paradoxically, the tendency to exaggerate the role of politics in judging makes it hard to identify and condemn judges who *truly are* deciding cases in an overly political fashion.²² There is evidence that the influence of politics in judging is on the rise, and the orientation of the field must be adjusted if this development is to be properly recognized and condemned.²³

Part I of this article uncovers the historical origins of this judging-is-more-politics-than-law slant and demonstrates how erroneous understandings of historical views of judging are built into the models of judging utilized by researchers to structure their studies.²⁴ Part I also shows how mistaken views about the formalists and the realists feed the dismissive skepticism that is pervasive among judicial politics scholars about judicial accounts of judging.²⁵ Part II examines the actual views that judges have held of the judicial process over the decades. It demonstrates that judges are realists who acknowledge that, in some cases,

¹⁶ See *infra* notes 29–57 and accompanying text.

¹⁷ See *infra* notes 199–281 and accompanying text.

¹⁸ See *infra* notes 199–281 and accompanying text.

¹⁹ See *infra* notes 88–154 and accompanying text.

²⁰ See *infra* notes 473–539 and accompanying text.

²¹ See *infra* notes 282–472 and accompanying text.

²² See *infra* notes 466–484 and accompanying text.

²³ See *infra* notes 507–524 and accompanying text.

²⁴ See *infra* notes 29–154 and accompanying text.

²⁵ See *infra* notes 155–198 and accompanying text.

they make law and are guided by their personal experience and values, but believe that nevertheless, personal views play little if any role in judicial decision making the vast majority of the time.²⁶ Part III reviews the findings of the most recent quantitative studies of judging and (1) shows that judges have been right all along, and (2) reveals how judicial politics scholars tend to exaggerate the influence of politics in judging.²⁷ Finally, Part IV articulates a realistic understanding of what the rule of law requires of judges and suggests ways in which quantitative studies can be constructed and interpreted to expose any increase in the influence of politics on judging with this understanding in mind.²⁸

I. THE TWISTED GENESIS OF THE FIELD AND ITS DISTORTING CONSEQUENCES

A. *The Entrenchment of a False Narrative About the Formalists and the Realists*

Political scientists who study judging identify Oliver Wendell Holmes, Roscoe Pound, Benjamin Cardozo, and particularly the legal realists as their main sources of inspiration.²⁹ Among their political scientist forbears, Edward Corwin, Robert Eugene Cushman, Charles Grove Haines, and Thomas Reed Powell are most often mentioned.³⁰ As a recent history of the field put it, these early twentieth century forerunners "scorned the mechanistic model of judging embraced by legal formalism, which viewed judges as 'value-free technicians' who do no more than discover 'the law.'"³¹ A 1922 article by Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, has earned special praise in the field.³²

Setting out his target, Haines wrote:

²⁶ See *infra* notes 199–281 and accompanying text.

²⁷ See *infra* notes 282–472 and accompanying text.

²⁸ See *infra* notes 473–539 and accompanying text.

²⁹ See COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS, *supra* note 6, at 6–7 (crediting Roscoe Pound, Oliver Wendell Holmes, and Benjamin Cardozo with developing "sociological jurisprudence," which recognized that "judicial discretion play[s] a major role in 'social engineering'" and led to the legal realist movement).

³⁰ See Maveety, *supra* note 8, at 2 (listing Edward Corwin, Robert Eugene Cushman, Charles Grove Haines, and Thomas Reed Powell as the leading scholars in the early twentieth century who rejected mechanistic models of judging).

³¹ *Id.* (quoting WALTER F. MURPHY & JOSEPH TANENHAUS, *THE STUDY OF PUBLIC LAW* 13 (1st ed. 1972)).

³² *Id.* at 8 ("[T]he work of Charles Grove Haines provided the origins of what was to become behavioralism in public law.").

The mechanical theory which postulates absolute legal principles, existing prior to and independent of all judicial decisions[,] and merely discovered and applied by courts, has been characterized as a theory of a "judicial slot machine." . . . In fact, despite all influences to the contrary, American courts have clung to the belief that justice must be administered in accordance with fixed rules, which can be applied by a rather mechanical process of logical reasoning to a given state of facts and can be made to produce an inevitable result. . . . Due to the general acceptance of this view by the legal fraternity, it has become a habit of those trained in law to bestow little attention upon their individual views or prejudices and to turn attention instead to precedents which are regarded as forming the authoritative basis of the law.³³

This is the conventional story about the formalist age.³⁴ Following Haines and the realists, this purportedly widely believed image of mechanistic judging was set up as the target of political scientists who studied courts.³⁵ Believing that the legal community failed to consider the possibility that there was room for social influences in judicial decision making, social scientists, not surprisingly, aimed to prove otherwise.

The problem is that every major assertion in the above-quoted paragraph, which political scientists have assumed was historically accurate, is false.³⁶ The legal fraternity at the time Haines wrote—including judges, legal academics, and lawyers—did not widely believe that legal rules were merely discovered by judges, that the rules were fixed, or that judging involved mechanical reasoning; and they were not oblivious to the potential influence of personal views on judging.³⁷ Part II will convey a host of statements from judges in the early 1920s, when Haines penned this portrayal, that are directly contrary to his asser-

³³ Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 97–98 (1922) (citations omitted).

³⁴ See *infra* notes 53–57 and accompanying text.

³⁵ See *infra* notes 440–472 and accompanying text.

³⁶ See generally Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (St. John's Legal Research Paper Series, Paper No. 08-0130, 2008) [hereinafter Tamanaha, *Bogus Tale*], available at <http://ssrn.com/abstract=1123498>; Brian Z. Tamanaha, *Understanding Legal Realism* (St. John's Legal Studies Research Paper Series, Paper No. 08-0133, 2008) [hereinafter Tamanaha, *Legal Realism*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1127178.

³⁷ See *infra* notes 199–281 and accompanying text.

tions.³⁸ The full argument and evidence cannot be repeated here, but a few examples will show the speciousness of Haines' assertions. Haines' first two sentences in the paragraph quoted above assert that judges of the era believed that they did not make law but merely "discovered" already existing law and mechanically or deductively applied the law to the facts at hand.³⁹ Haines' primary sources for these observations were articles by Roscoe Pound, including his famous 1908 article *Mechanical Jurisprudence*, along with a collection of works about German legal science.⁴⁰ Notably missing from Haines' account were any quotes from or citations to judges or jurists who actually advocated these purportedly widely held positions.

There is overwhelming evidence that, by the second half of the nineteenth century, members of the legal fraternity did not believe in the formalist account.⁴¹ As early as 1833, one American jurist wrote:

[T]he ancient customs are supposed to furnish a rule of decision for every case that can by possibility occur. . . . The supposition of an ancient and forgotten custom, is, *as every one knows, a mere fiction* And proceeding on the groundwork of this fiction in the administration of justice, the courts in point of fact make the law, performing at the same time the office of legislators and judges.⁴²

³⁸ See *infra* notes 199–281 and accompanying text.

³⁹ Haines, *supra* note 33, at 97–98.

⁴⁰ See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Haines referred mainly to a collection of works by German "free legal decision" thinkers (with a contribution from Pound). See Haines, *supra* note 33, at 97–98 (citing SCIENCE OF THE LEGAL METHOD (Joseph H. Drake et al. eds., Ernest Bruncken & Layton B. Register trans., Boston Book Co. 1917)).

⁴¹ See *infra* notes 42–67 and accompanying text.

⁴² *Written and Unwritten Systems of Laws*, 9 AM. JURIST & L. MAG. 5, 10–11 (1833) (emphasis added). Particular attention should be paid to the phrase "as everyone knows." Words to that effect—which demand audience agreement—are relatively uncommon in speeches and writing, yet they turn up regularly in this context. For example, a lawyer wrote in 1871 that "[t]hough the rules of the judge-made law are enacted for the cases as they occur, the fiction is that they have existed from of old and are not enacted but declared." Edward M. Doe, *Codification*, 5 W. JURIST 289, 289–90 (1871). Columbia law professor Munroe Smith observed in 1887 that "[n]obody really believes in the fiction [that the courts do not make law]." Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887). Another commentator in 1888: "By a singular fiction the courts, from time immemorial, have pretended that they simply declared the law, and did not make the law; yet we all know that this pretense is a mere fiction" *Current Topics*, 29 ALB. L.J. 481, 481 (1884) (quoting C. B. Seymour, *Codification* (pt. 2), 5 KY. L. REP. 870 (1883–1884)). A historical study of the common law written in 1905 called this set of ideas "the baldest of legal fiction." Hannis Taylor, *Legitimate Functions of Judge-Made Law*, 17 GREEN

Statements like this one that denied belief in the ideas posited by Haines were made by leading jurists in leading journals decades before he confidently asserted, without evidence, that they were widely held in legal circles.⁴³ A deductive view of judging was seldom affirmatively asserted or endorsed at the time, and when it was uttered, it was usually by legal *theorists* who advocated that law *should* be viewed as a science.⁴⁴

Many practitioners and judges, however, abjectly dismissed the notions that law was a science and that judging was a matter of deduction.⁴⁵ A law professor wrote in 1895 that assertions by some idealistic jurists that law was a science

provoked no little repugnance among practical lawyers, who [saw] that their whole work [was] really to produce a mental result in the minds of men—judges and jurors—who are influenced by mixed motives, interest, sympathy, antipathy, prejudice, passion; and that scientific accuracy does not cut much figure to . . . the result.⁴⁶

Jabez Fox voiced similar views in 1900:

If you ask a lawyer whether he really believes that judicial decisions are mathematical conclusions, he will say that the notion is absurd; that when four judges vote one way and three another, it does not mean that the three or the four have made a mistake It means simply that the different judges have given different weights to divers competing considerations which cannot be balanced on any measured scale.⁴⁷

Fox added that, although judges must follow precedent that cannot be distinguished on some rational ground, "[b]eyond this the judge has a free hand to decide the case before him according to his view of the general good. . . . [and] no human being can tell how the social standard of justice will work on that judge's mind before the judgment is

BAG 557, 562 (1905). Professor William Hornblower wrote in 1907 that this old story was a "comfortable fiction." William Hornblower, *A Century of "Judge-Made Law,"* 7 COLUM. L. REV. 453, 461 (1907).

⁴³ See *supra* note 33 and accompanying text.

⁴⁴ See Tamanaha, *Bogus Tale*, *supra* note 36, at 23–32.

⁴⁵ See, e.g., Henry C. White, *Three Views of Practice*, 2 YALE L.J. 1, 6 (1892) (stating that law is not an exact science providing clear rules that can always easily be applied to obtain an inevitable result).

⁴⁶ *Is Law a Science?*, 2 UNIV. L. REV. 257, 257 (1895).

⁴⁷ Jabez Fox, *Law and Logic*, 14 HARV. L. REV. 39, 42 (1900).

rendered."⁴⁸ Harvard law professor James Thayer, the target of Fox's critical comments, while rebuffing others aspects of Fox's argument, concurred "entirely with the critic that our courts are not engaged in reaching 'mathematical conclusions,' or in merely logical, abstract, or academic discussions."⁴⁹ Harlan Fiske Stone, then the Dean of Columbia Law School, later appointed to the Supreme Court, asserted that "[i]n an ideal system law should, and perhaps could, be purely scientific and logical; but the fact is, as the law student discovers when he begins his practice, logic oftentimes yields to practical considerations, which with the court outweigh his most logical arguments."⁵⁰ These statements all contradict Haines' assertion that the legal community believed judging was a mechanical process and one that was uninfluenced by other factors.

Additional statements inconsistent with Haines' portrayal were uttered by judges and lawyers, but political scientists might find it more persuasive to hear this from one of their own hallowed authorities. Edward Corwin is a monumental figure in the formative history of political science. In 1909 he wrote:

It was formerly the wont of legal writers to regard court decisions in much the same way as the mathematician regards the x of an algebraic equation: given the facts of the case and the existing law, the outcome was inevitable. *This unhistorical standpoint has now been largely abandoned.* Not only is it admitted that judges in finding the law act not as automata, as mere adding machines, but creatively, but also that the considerations which determine their decisions, far from resting exclusively upon a narrowly syllogistic basis, often repose very immediately upon concrete and vital notions of what is desirable and useful.⁵¹

Thus, a year after Pound claimed in *Mechanical Jurisprudence* that judges reasoned in mechanical terms, Corwin called these ideas obsolete.⁵² Yet, a dozen years later, Haines reverted to Pound's account rather than Corwin's, claiming that judges and lawyers *still* widely believed that

⁴⁸ *Id.* at 43.

⁴⁹ J.B. Thayer, "Law and Logic," 14 HARV. L. REV. 139, 141-42 (1900).

⁵⁰ Harlan Fiske Stone, *The Importance of Actual Experience at the Bar as a Preparation for Teaching Law*, 3 AM. L. SCH. REV. 205, 207 (1912).

⁵¹ Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 643 (1909) (emphasis added).

⁵² See *id.*

judges discovered the law and mechanically decided cases.⁵³ Relayed through Haines, and owing to Pound's prestige as the longtime Dean of Harvard Law School and a preeminent jurisprudence scholar, Pound's account became entrenched within the judicial politics field. Via this chain of ideas, modern political scientists embraced and incorporated the story about the purported dominance of the belief in mechanical jurisprudence at the turn of the century.

In the late 1960s, C. Herman Pritchett, acclaimed as *the* progenitor of modern quantitative studies of judging, repeated this account in his influential history of the field:

Thinking about the role of the judiciary has been stultified by the mechanical jurisprudence of the eighteenth century, which located the judge in a closed, theoretically complete, system of universal and permanent principles. Within the assumptions of the system, his only functions could be discovery and deduction. The only way the system could be extended was by analogy, and the creative role of the judge was exhausted when this task was completed.⁵⁴

This "myth of mechanical jurisprudence," according to Pritchett, persisted "throughout the nineteenth century,"⁵⁵ its spell finally broken through the combined efforts of Holmes, Cardozo, and the legal realists.⁵⁶ Pritchett went so far as to blame the pervasive grip of this myth for stunting the early development of his own field, remarking that "[m]echanical jurisprudence and the myth of the nonpolitical character of the judicial task had rather effectively discouraged most political scientists from thinking about the courts."⁵⁷ This formalist-realist story is taken for granted by judicial politics scholars, providing an essential pillar of the formative self-understanding of the field.

The ample quotes supplied above, with more to follow in Part II, indicate that this often-repeated portrayal of the dominance of the belief in mechanical jurisprudence is wrong.⁵⁸ A final counter-example that bears directly on studies of judging will reinforce the point. A strikingly modern-sounding article was published by Walter Coles in the

⁵³ See Haines, *supra* note 33, at 97-98.

⁵⁴ C. Herman Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* 27, 27 (Joel B. Grossman & Joseph Tannehaus eds., 1969).

⁵⁵ *Id.* at 28.

⁵⁶ *Id.* at 28-29.

⁵⁷ See *id.* at 29.

⁵⁸ See *infra* notes 199-281 and accompanying text.

leading *American Law Review* in 1893, with the blunt title *Politics and the Supreme Court of the United States*.⁵⁹ Coles examined a number of important Supreme Court decisions of the nineteenth century, systematically matching the political background of the justices with their decisions. He criticized several Supreme Court opinions as vague, "weak, incoherent, and uncandid,"⁶⁰ best explained not by the stated legal reasoning but by the political views of the judges.⁶¹ "[T]o say that no political prejudices have swayed the court," noted Coles with consummate realism, "is to maintain that its members have been exempt from the known weaknesses of human nature, and above those influences which operate most powerfully in determining the opinions of other men."⁶² Especially when no clear precedent exists, he asserted, a judge's conclusions "will be largely controlled by the influences, opinions and prejudices to which he happens to have been subjected."⁶³

Cole's argument is especially relevant to this exploration because the core thesis of his article—set forth over a century ago—is precisely what judicial politics scholars have labored for decades to prove.⁶⁴ As two leading contemporary researchers put it recently: Supreme Court "justices . . . vote in ways that reflect the political values of their appointing presidents . . ."⁶⁵ Coles makes it clear that this was already known by the late nineteenth century, when he wrote that the history of the Supreme Court demonstrates that, on constitutional questions, its decisions "have in their general tendencies conformed, in a greater or lesser degree, to the maxims and traditions of the political party whose appointees have, for the time being, dominated the court."⁶⁶ The myth at work here—a myth that *still* cripples the judicial politics field—is the myth that turn-of-the-century jurists widely believed in mechanical jurisprudence.⁶⁷

⁵⁹ Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182 (1893).

⁶⁰ *Id.* at 204–05.

⁶¹ *See id.* at 205–06.

⁶² *Id.* at 182.

⁶³ *Id.* at 190.

⁶⁴ *See* Coles, *supra* note 59, at 190. The most powerful demonstration of this is JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

⁶⁵ *See* LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 135 (2005).

⁶⁶ Coles, *supra* note 59, at 207.

⁶⁷ *See, e.g.*, JEFFREY A. SEGAL, HAROLD J. SPAETH & SARA C. BENESH, *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 16 (2005) (questioning why people continue to believe that judging is mechanical).

Not only were political scientists taken in by a false story about the formalists, but also they tended to adopt an extreme and misleading view about the legal realists.⁶⁸ When discussing the legal realists, Pritchett wrote that "the group was *best* represented by Jerome Frank . . ."⁶⁹ Pritchett and Walter Murphy, another early major contributor, reiterated this view over a span of two decades, asserting in a leading text that, "[i]n 1930 Jerome Frank . . . produced the *clearest statement* of a realist position in his seminal work *Law and the Modern Mind*."⁷⁰

The claim that this sensationalist book best represents legal realism betrays a serious misunderstanding. Frank was an outlier. Other leading realists were decidedly critical of his argument, and Frank himself moved away from the book in his more measured work.⁷¹ In his famous exchange with Pound about legal realism, Karl Llewellyn pointed out (with Frank's input) that Frank *alone* among the realists argued that "the rational element in law is an illusion;"⁷² and only Frank laid a heavy emphasis on the judge's personal preferences in decision making.⁷³ In separate reviews of *Law and the Modern Mind*, both Llewellyn and Felix Cohen criticized Frank for this position.⁷⁴ Llewellyn wrote that Frank's commendable desire to smash illusions produced an unfortunate "skewing" in his account of judging, which is "much more predictable, and hence more certain, than his [Frank's] treatment would indicate."⁷⁵ Llewellyn continued:

For while we may properly proclaim that general propositions do not decide concrete cases, we none the less must recognize that *ways* of deciding, *ways* of thinking, *ways* of sizing up facts "in terms of the their legal relevance" are distinctly enough marked in our courts It is not merely decisions, but deci-

⁶⁸ See COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS, *supra* note 6, at 7; Pritchett, *supra* note 54, at 29.

⁶⁹ Pritchett, *supra* note 54, at 29 (emphasis added).

⁷⁰ COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS, *supra* note 6, at 7 (emphasis added).

⁷¹ See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1230 & n.25 (1931).

⁷² *Id.*

⁷³ See *id.* at 1242–43.

⁷⁴ See Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 248–49 (1950) [hereinafter Cohen, *Field Theory*]; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) [hereinafter Cohen, *Transcendental Nonsense*]; Karl N. Llewellyn, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 87 (1931).

⁷⁵ Llewellyn, *supra* note 74, at 87.

sions in this setting of their semi-regularity, which make up the core of law.⁷⁶

Cohen criticized the "hunch" theory of judging and Frank's emphasis on the personal idiosyncrasies of judges for failing to recognize the "significant, predictable, social determinants that govern the course of judicial decision"⁷⁷—within "social" Cohen included the constraints provided by the legal culture generally and the institutional context of judging.⁷⁸

Llewellyn's views of judging are far more representative of the legal realists than Frank's. Although Llewellyn gleefully exposed the manipulability of precedent and the openness of the rules of statutory interpretation, he consistently retracted the most radical implications of these observations, cautioning:

[W]hile it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly*. And of these few there are some, or there is one, toward which the prior cases definitely press. Already you see the walls closing in around the judge.⁷⁹

A skilled lawyer asked to predict the fate of a case on appeal, Llewellyn conjectured, ought "to average correct prediction of outcome eight times out of ten, and better than that if he knows the appeal counsel on both sides or sees the briefs."⁸⁰ When identifying the sources of this high degree of reckonability, Llewellyn elaborated on several "steadying factors": judges are indoctrinated into the legal tradition such that "[t]hey see things . . . through law-spectacles;"⁸¹ much legal doctrine—including rules, principles, and statutes—is reasonably clear and well developed;⁸² judges follow accepted doctrinal techniques, strive to produce a just result, and strive to come up the right legal answer;⁸³ judges sitting together on an appellate bench interact "to smooth the unevenness of individual temper;"⁸⁴ and judges' desire and commitment to

⁷⁶ *Id.*

⁷⁷ Cohen, *Transcendental Nonsense*, *supra* note 74, at 843.

⁷⁸ *See id.*

⁷⁹ KARL N. LLEWELLYN, *BRAMBLE BUSH* 73 (3d ed. 1960).

⁸⁰ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 45 (1960).

⁸¹ *Id.* 19–20.

⁸² *Id.* at 20–21.

⁸³ *Id.* at 21–25.

⁸⁴ *Id.* at 26.

live up to the obligations of the judicial role—to earn the approval of their legal audience for appropriate judicial behavior—and their desire to avoid reversal by a higher court, prompts judges to engage in a good faith effort to conduct an unbiased search for the correct legal result.⁸⁵

This is a balanced realism about judging, a view shared by many in Llewellyn's generation.⁸⁶ It acknowledges the openness of law and the difficulties of judging while still maintaining that judging generally is consistent with and determined by legal factors. This balanced position stands in stark contrast to the skeptical view of judging that political scientists have incorporated into their field, a view which political scientists wrongly attribute to the legal realists. Llewellyn expressed concern about the potentially corrosive effect of facile skepticism about judging, and in an effort to dispel this skepticism he provided an exhaustive account of the legal factors that generated a high degree of predictability in judging.⁸⁷ Although political scientists routinely cite the legal realists as forerunners and allies, the views they espouse about the central influence of politics in judging were not the views of the legal realists.

B. *The Resultant Slant Built into Alternative Models of Judging*

The distorting consequences that resulted from the birth of the field in this combination of incorrect views about the formalists and the realists might have been limited had judicial politics scholars moved beyond these initial assumptions.⁸⁸ But they have not.⁸⁹ These assumptions continue to inform their views about what members of the legal fraternity believe and to define their models of judging.⁹⁰ A 2005 book by preeminent researchers asked impatiently

why do so many persist in believing that judicial decisions are objective, dispassionate, and impartial? Judges are said not to have discretion; they do not decide their cases; rather it is the law or the Constitution speaking through them that determines the outcome. Judges, in short, are mere mouthpieces of the law.⁹¹

⁸⁵ LLEWELLYN, *supra* note 80, at 45–51.

⁸⁶ See Tamanaha, *Legal Realism*, *supra* note 36, at 51–52.

⁸⁷ LLEWELLYN, *supra* note 80, at 3.

⁸⁸ See *infra* notes 147–152 and accompanying text.

⁸⁹ See, e.g., SEGAL ET AL., *supra* note 67, at 16.

⁹⁰ See *id.*

⁹¹ *Id.*

The old (fictional) legal formalists, by this account, are still alive and well.⁹² "Over the last century," the authors assert, "dominant legal models include mechanical jurisprudence, which posited that legal questions had a single correct answer that judges were to discover."⁹³ "Models formulated by legalists [today] rest in whole or in part on [this] mythology"⁹⁴

Judicial politics scholars thus continue their tireless campaign, exasperated that it is still necessary to slay this deluded yet resilient formalist view of judging. Their perspective is structured in various ways by a formalist-realist antithesis. The formalist side is identified with the "legal model" of judging, denigrated within the field, which "assumes an almost mechanical form of jurisprudence."⁹⁵ The realist side is identified with the "attitudinal model," which has enjoyed decades of primacy.⁹⁶ "The attitudinal model . . . is essentially the political science version of legal realism, where judges 'decide[] disputes in light of the facts of the case vis-à-vis [their] ideological attitudes and values.'⁹⁷

Contemporary judicial politics scholars who recognize that there were differences amongst the legal realists still get their positions tellingly wrong. Lawrence Baum, the author of a leading overview of quantitative studies of judging, distinguished the extreme from moderate realists as follows: "One version of legal realism pretty much read the law out of judges' decisions, ascribing those decisions almost solely to policy preferences. A more moderate version of realism saw judges as following their preferences within the framework and constraints of legal reasoning."⁹⁸ The extreme version Baum describes is a doubtful reading of Jerome Frank's position.⁹⁹ He did not "read the law out" of decisions and he did not ascribe decisions "almost solely to policy positions."¹⁰⁰ Frank asserted, rather, that legal rules and precedents played

⁹² See *id.* at 16, 22.

⁹³ *Id.* at 22.

⁹⁴ SEGAL ET AL., *supra* note 67, at 22.

⁹⁵ See Jason J. Czarnezki & William K. Ford, *The Phantom of Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 848 (2006).

⁹⁶ See *id.* For a detailed account of these competing models, see generally Tracey E. George, *Developing a Positive Theory of Decision Making on the U.S. Court of Appeals*, 58 OHIO ST. L.J. 1635 (1998).

⁹⁷ Czarnezki & Ford, *supra* note 95, at 848.

⁹⁸ Lawrence Baum, *C. Herman Pritchett: Innovator with an Ambiguous Legacy*, in PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 8, at 57, 60.

⁹⁹ See JEROME FRANK, *LAW AND THE MODERN MIND* 131 (1930); Baum, *supra* note 98, at 57, 60.

¹⁰⁰ See *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943); FRANK, *supra* note 99 at 131; Baum, *supra* note 98, at 60.

a significant role in judicial decision making, and he emphasized the personal idiosyncrasies of judges at least as much as their political views.¹⁰¹ "The conscientious judge, having tentatively arrived at a conclusion," Frank wrote, "can check [with the legal rules and principles] to see whether such a conclusion, without unfair distortion of the facts, can be linked with the generalized points of view therefore acceptable."¹⁰² In a 1943 legal opinion, joined by Judge Learned Hand, Judge Jerome Frank acknowledged that personal values can influence a judge's decision, but he nonetheless asserted that "[t]he conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect."¹⁰³

The more misleading characterization of the two alternative versions of legal realism, as posed by Baum, is the purportedly moderate realist position, for, in a crucial respect, it is not moderate or realist at all.¹⁰⁴ The way Baum phrases it, the *active* or driving force behind judicial reasoning are the preferences of the judge, and the only role played by law is to place *constraints* on this motivated reasoning.¹⁰⁵ This characterization conflicts with the "situation type" account of judging that several leading legal realists claimed operated in the large body of routine cases, which did not accord a dominant role to the preferences of judges.¹⁰⁶ Standard fact types, according to their account, invoke an associated set of legal rules which together produce the outcomes in a routine fashion in many cases.¹⁰⁷ In open or problematic cases, according to Llewellyn, judges are oriented toward applying the law—this *legal* orientation is the active force in legal reasoning—in *combination with* trying to do (social or individual) justice, and to formulate a legal precedent or interpretation that advances social welfare.¹⁰⁸ It is true

¹⁰¹ See FRANK, *supra* note 99, at 131; see also *In re J.P. Linahan, Inc.*, 138 F.2d at 652.

¹⁰² FRANK, *supra* note 99, at 131.

¹⁰³ *In re J.P. Linahan, Inc.*, 138 F.2d at 652. Frank wrote the unanimous opinion for a three judge panel, which included Judge Learned Hand, another judge with a realistic view of the law. Frank made the same point in a later publication: "It is well, too, that a judge be himself aware of his own human foibles and prejudices: he will then be the better able to master them." Jerome Frank, *The Cult of the Robe*, SATURDAY REV. OF LITERATURE, Oct. 13, 1945, at 12.

¹⁰⁴ See Baum, *supra* note 98, at 60.

¹⁰⁵ See *id.* I am using Baum's characterization to convey views in the field, although it should be noted that he has reservations about the attitudinal model. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR*, at ix-xi (1997) (stating that scholars "are a long way from achieving explanations of judicial behavior that are fully satisfactory").

¹⁰⁶ See Tamanaha, *Legal Realism*, *supra* note 36, at 30-31 (describing the realists' emphasis on fact situations).

¹⁰⁷ See *id.*

¹⁰⁸ See LLEWELLYN, *supra* note 80, at 5-7, 19, 59.

that several legal realists recognized that subconscious biases had an influence on judicial reasoning.¹⁰⁹ But it is tendentious to read this as the realists asserting that, when deciding cases, judges are "following their preferences."¹¹⁰ No legal realist, not even Frank, made this bald assertion.¹¹¹

Contemporary judicial politics scholars see themselves as keeping faith with the legal realists.¹¹² But their models of judging are their own invention.¹¹³ Both the extreme and moderate realist positions set forth by Baum situate the pursuit of policy preferences by judges at the core of decision making.¹¹⁴ The legal chains are flimsy or robust, under these respective accounts, but ideological views or policy preferences always drive the reasoning process of judges.¹¹⁵ This follows from seeing judges as "politicians in black robes,"¹¹⁶ as "single-minded seekers of policy,"¹¹⁷ which is the standard perception of judges within the field.¹¹⁸

Many judicial politics scholars appear to align the extreme position (flimsy legal chains) to judging on the Supreme Court and the moderate position (more robust but still escapable legal chains) with judging on lower courts.¹¹⁹ By the late 1970s, according to judicial politics scholars, there was "little question that the predominant paradigm of judicial decision making places judges' attitudes at the center of the process."¹²⁰ As recently as 1998 it was affirmed that "the 'attitudinal model' . . . dominates the study of judicial politics."¹²¹

Even variations of this approach that accord a greater role to legal factors still grant center stage to personal attitudes, with law operating as a constraint. Observe the sequence and phrasing of an often cited "more inclusive" model of judging: "judges' decisions are a function of what they prefer to do [policy preferences], tempered by what they

¹⁰⁹ See Tamanaha, *Legal Realism*, *supra* note 36, at 31–32.

¹¹⁰ See Baum, *supra* note 98, at 60 (emphasis added).

¹¹¹ See *supra* notes 99–103 and accompanying text.

¹¹² HETTINGER ET AL., *supra* note 11, at 31 ("The attitudinal model of judicial decision making [within the field] traces its roots to legal realism.").

¹¹³ See *supra* notes 68–110 and accompanying text.

¹¹⁴ See Baum, *supra* note 98, at 60.

¹¹⁵ See *id.*

¹¹⁶ HENRY R. GLICK, *COURTS, POLITICS, AND JUSTICE* 259 (2d ed. 1988).

¹¹⁷ Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 628 (2000) (quoting Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992)).

¹¹⁸ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE*, at xii (1998).

¹¹⁹ See EPSTEIN & SEGAL, *supra* note 65, at 3.

¹²⁰ James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 912 (1978).

¹²¹ EPSTEIN & KNIGHT, *supra* note 118, at xii.

think they ought to do [judicial role obligations], but constrained by what they perceive is feasible to do [institutional constraints]."¹²²

It is useful to momentarily pause the account of the judicial politics field and contemplate whether, had they not been indoctrinated in the false stories about the formalists and the realists, political scientists would have modeled judges as enrobed politicians engaged in the single-minded pursuit of policy preferences. If the goal of the social scientific study of courts was to truly understand the nature of and influences on judging (rather than to prove that judging is political), would the attitudinal model have been so overwhelmingly dominant for so long? Not likely. Personal attitudes would have a place in the model, but not above all else, if only because judges do not see or describe the task this way and the institutional structure of judging is not designed this way.¹²³ This portrayal is a contingent historical product of the misdirected effort to dispel belief in mechanical jurisprudence and a misperception of the realists.¹²⁴

In recent years, scholars have embraced the "strategic model" of judging. As Lee Epstein and Jack Knight noted in 1998, "[t]here is little doubt that the field of judicial politics is undergoing a sea change that has the potential to transform the way we think about law and courts in the United States and elsewhere."¹²⁵ The introduction of the strategic model adds a rational actor dimension to the decades old social-psychological paradigm. The latter identified the determinants of judicial decisions in "social backgrounds or personal attributes, policy-oriented values and attitudes, roles, and small group influences."¹²⁶ The newer strategic approach, in contrast, portrays judges as rendering decisions with conscious attention to, and a calculated anticipation of, how other individuals (judges on same panel), institutional actors (legislatures, executives, higher courts), or potentially influential audiences (legal academics, the bar, interest groups, the public), might react.¹²⁷ The standard version of the strategic model supposes that judges rou-

¹²² James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 9 (1983).

¹²³ See *infra* notes 147-152 and accompanying text.

¹²⁴ Judicial politics scholars might assert that they know the attitudinal model is overly simplified and that judging is more complex. Nonetheless, they would argue, it is still useful for the purposes of testing. My argument here is that, even as a simplified model, it is wrong.

¹²⁵ Epstein & Knight, *supra* note 117, at 652.

¹²⁶ See *id.* at 630.

¹²⁷ See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 6 (2006); EPSTEIN & KNIGHT, *supra* note 118, at 10.

tinely calculate what course of action would best advance their policy goals.¹²⁸ In some cases this might mean rendering a decision that stops short of their true ideological preferences if, for example, going too far risks destroying their credibility or inciting a backlash that would retard their objectives.¹²⁹

Like the attitudinal model, the strategic model as it is usually constructed does not take law seriously on its own terms.¹³⁰ The fundamental assumption remains unchanged: strategic-reasoning judges are always striving to implement their policy goals through their decisions, within legal constraints.¹³¹ This version in effect melds the strategic and attitudinal models, with the latter supplying the dominant judicial goal that is strategically pursued by judges.¹³² This assumed judicial goal is not inherent to the strategic model, which can be applied in conjunction with any goal or collection of goals—personal advancement, improvement of the law, etc.—but the slant within the field makes it seem natural.

Political scientist David Klein asserted in a recent study of appellate judging that the belief, held by many judicial politics scholars, “that legal soundness is better understood as a *constraint*” on what judges can or should do “rest[s] on an assumption that judges’ only genuine desire is to shape public policy.”¹³³ It presupposes that “[t]he strictures of legal correctness may be important to judges, but only so far as obedience furthers the policy goal.”¹³⁴ Seeing the law exclusively in terms of a constraint is captured in this metaphor: “[C]onsider the law to be ropes binding a judicial Houdini. The ropes may be tight or loose, possibly knotted with skill and redundancy. These ropes will strive to bind thousands of judges, each of whom possess different levels of escape skills.”¹³⁵ Many political scientists thus assume judges are trying to escape the law, not to follow it.¹³⁶

¹²⁸ See EPSTEIN & KNIGHT, *supra* note 118, at 12.

¹²⁹ See BAUM, *supra* note 127, at 6; BAUM, *supra* note 105, at 119; EPSTEIN & KNIGHT, *supra* note 118, at 13.

¹³⁰ See BAUM, *supra* note 127, at 6. Baum is critical of the strategic model and notes that it need not be linked in this way to political preferences. See *id.*

¹³¹ See *id.*

¹³² See *id.*; EPSTEIN & KNIGHT, *supra* note 118, at 13.

¹³³ DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURT OF APPEALS 11 (2002) (emphasis added).

¹³⁴ *Id.* at 11–12.

¹³⁵ Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 326 (1997).

¹³⁶ See *id.*

Klein criticizes this perspective for failing to acknowledge the high likelihood that "at least some judges find the search for good answers to legal questions intrinsically rewarding."¹³⁷ It leaves no room for recognizing that judges—whether out of a commitment to the law or to judging, or out of enjoyment of the craft of practice of judging, or out of self-esteem or to earn the accolades that accrue to judges who are seen as living up to their role obligations, or for some other reason—genuinely reason with the *primary* conscious goal of faithfully applying the law. For legally oriented judges, the law is not chains or ropes they are trying to wriggle out of, but rather guideposts that they are actively searching for and following. This is nigh inconceivable within the assumptions that govern the judicial politics field, which dogmatically (and implausibly) posit that judges are obsessed with advancing their political views.¹³⁸

Among judicial politics scholars, the "strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior."¹³⁹ An attractive quality of this theory is that it hands scholars a ready explanation for the frequent occasions when judges render decisions that *do not* align with their ideological views, even when the existing legal constraints do not erect barriers against it. These decisions appear to count against the assumption that politics drives decisions. But the strategic model is enlisted to explain that, although it might appear that judges are deciding in accordance with the law, not their policy preferences, beneath it all they are still maximizing their policy agenda by electing, for strategic reasons, to forgo its pursuit in the immediate case because it will pay off in the long run.¹⁴⁰ The model thus possesses an alchemical (or casuistic) ability to transform an apparently legally based decision into a politically calculating decision, thereby adeptly preserving the governing assumption that judging is politics.¹⁴¹

The strategic model often paints judges as magnificent Machiavelian calculators with hardly any legal integrity and an extraordinary capacity, facilitated by lots of time and information, to envision the likely consequences of their decisions among various possible audiences.¹⁴²

¹³⁷ KLEIN, *supra* note 133, at 11–12.

¹³⁸ See *supra* notes 112–136 and accompanying text.

¹³⁹ BAUM, *supra* note 127, at 7.

¹⁴⁰ See BAUM, *supra* note 105, at 118–19. This is a bizarre way to construe the behavior of judges who otherwise appear to simply be following the law, as their role requires. See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.* at 14–21, 103 (suggesting that this view of judging is unrealistic).

The model also flirts with being impervious to refutation, perhaps running afoul of a basic stricture of scientific inquiry. As Baum notes, there is a "theoretical ambiguity of behavior: patterns of judicial behavior that are consistent with the assumption of policy-oriented strategy typically are consistent with other explanations as well."¹⁴³ Often it may be impossible to disprove alternative explanations for judicial behavior.¹⁴⁴

It must be emphasized that not all scholars in the judicial politics field hold these positions—and not all judicial politics scholars conduct quantitative studies.¹⁴⁵ In recent years there have been indications of a greater openness to alternative perspectives on judging. A hardy band of internal dissenters,¹⁴⁶ called "institutionalists," have insisted for more than a decade that law is far more significant in judicial decisions than the attitudinal and strategic models allow for.¹⁴⁷ This amorphous group lacks any clear or unifying position, however, and many of these scholars engage in qualitative (especially historical) research rather than quantitative studies.¹⁴⁸

The slant within the field is reflected in the belated and begrudging reception that "institutionalist" or "legal model" arguments have received.¹⁴⁹ Political scientist Nancy Maveety wrote in a recent overview:

Contemporary judicial studies are also less exclusionary in their attitudinal world view; they are *willing to admit* that judi-

¹⁴³ See *id.* at 102.

¹⁴⁴ See *id.*

¹⁴⁵ See generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999) (providing a collection of works by various authors critical of the attitudinal model).

¹⁴⁶ Political scientists might respond (as some told me privately) that quantitative scholars of judging are marginalized within the entire field of political science, not just among the institutionalists. The introduction of a recent collection, however, claims that "behavioralism became the dominant paradigm in both political science in general and in the specific study of judicial politics." Marc C. Miller, *Introduction: The Study of Judicial Politics*, in EXPLORING JUDICIAL POLITICS 1, 5 (Mark C. Miller ed., 2009). For an outsider it is hard to know what is correct. What is clear, as their own literature suggests, is that, within the subfield of quantitative researchers, the law has heretofore not been taken seriously. And this is the literature that has recently attained exposure in law reviews.

¹⁴⁷ See generally SUPREME COURT DECISION-MAKING, *supra* note 145. Howard Gillman is a persistent critic of prevailing approaches. See generally Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001).

¹⁴⁸ See Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING, *supra* note 145, at 1, 6 (noting that "there are nearly as many ways to think about institutions as there are practitioners of institutional analyses" and that, of those practitioners, one group "seeks to provide historical accounts of institutional development").

¹⁴⁹ See Maveety, *supra* note 8, at 29.

cial policy preferences *might* not explain all stages of the decision making process. Similarly, an increasing number of contemporary judicial studies are *willing to entertain* (and empirically test) the possibility that legal factors like precedent or legal rules are part of the judicial decision.¹⁵⁰

This statement bears repeating: not until recently, nearly a half century after the field began, were judicial politics scholars finally willing to entertain the possibility that legal rules and precedents might be an important causal factor in judging that goes beyond exclusively serving as a constraint.¹⁵¹

This is a shocking stance for a field that presents itself as a rigorous social scientific inquiry into the process of judicial decision making. Leading judicial politics scholars have asserted that "challenging a theory with the best possible opposing arguments is what makes the strongest case for a theory."¹⁵² Yet it took decades before they made serious attempts to test whether legal rules and precedents determined judicial decisions. A truly open social scientific inquiry into the judicial decision-making process would have placed legal elements into the mix of possibilities to be considered right from the outset.¹⁵³

Quantitative scholars will defend against these criticisms by saying that the attitudinal and strategic models are just simplified constructs for the purposes of testing—that they are well aware that judging is more complicated. Judicial politics scholars, however, routinely describe actual judging in terms of the pursuit of policy preferences, so they do not treat it as a simplified model but as a descriptively accurate account of judging.

Quantitative scholars might argue in response that their rigorous testing of the "attitudinal" and "strategic" models can point in the same direction: findings inconsistent with these models, or evidence that these models explain only a small percentage of judicial decisions below the Supreme Court, can be interpreted as lending support for the legal model (an inference I will rely upon in Part III). Documenting

¹⁵⁰ *Id.* (emphasis added) (internal citations omitted).

¹⁵¹ *See id.* Earlier scholars included legal factors through consideration of the constraining impact of role orientation on attitudes, but they did not systematically test directly for adherence to precedent and other legal factors. *See* Gibson, *supra* note 122, at 13 n.10; *see also* BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 196–228 (1997) (summarizing quantitative studies of judging and showing that only recently have researchers begun to test for the influence of legal factors).

¹⁵² Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 10 (2002).

¹⁵³ *See id.*

the limited explanatory power of these favored models, however, does not in itself provide direct evidence that judicial decisions are determined by legal factors. Owing to the failure of judicial politics scholars to take law seriously on its own terms, studies that test for this are still few and rudimentary.¹⁵⁴ One inhibiting factor is the difficulty of transforming the strength of legal arguments, a qualitative judgment, into quantitative measures. But the daunting challenge of this formidable task is not a legitimate reason for judicial politics scholars—who claim to shed light on how judges make legal decisions—to fail to make a concerted effort to directly test the influence of law. Otherwise they risk falling into an error of scientism: setting aside what cannot be easily measured, seeing only what can be easily measured, forgetting that the gaping holes that result are due to the limitations of their methodology rather than reflections on the psychological or social phenomena they wish to explain. The mission to prove that judging is politics, to dispel the formalist or mechanical view of judging, made the testing of the influence of law a low priority.

C. *The Slippage from the Supreme Court to Other Courts*

Another manifestation of the distorting slant must be identified. Throughout its history, the judicial politics field has disproportionately conducted quantitative studies of judging on the U.S. Supreme Court.¹⁵⁵ This lopsided emphasis was already flagged as a potential problem in the mid-1960s.¹⁵⁶ Things did not change much until the last decade, when, owing to the completion of a large database of coded opinions, a growing number of studies have been conducted on federal appellate court decision making (less so on trial courts).¹⁵⁷ The Supreme Court still hogs most of the attention.¹⁵⁸

This disproportionate focus is not itself what misleads, however. The problem arises when scholars loosely slip from making assertions about judging on the Supreme Court to assertions about judging generally. With respect to judicial decision making, a huge chasm separates the uniquely situated Supreme Court from the lower federal courts.

¹⁵⁴ See, e.g., Paul Brace & Melinda G. Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5 (1995); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. OF POL. SCI. 963 (1992).

¹⁵⁵ See Miller, *supra* note 146, at 5; Shapiro, *supra* note 7, at 318.

¹⁵⁶ See Shapiro, *supra* note 7, at 318.

¹⁵⁷ See Miller, *supra* note 146, at 5.

¹⁵⁸ See *id.*

Political scientists do not always adequately mark the distinction. A prime example can be found in a recent book about federal judicial appointments by Lee Epstein and Jeffrey Segal, two of the most prolific contemporary judicial politics scholars.¹⁵⁹ At the beginning of the book, they make the dramatic assertion that

the late great political scientist C. Herman Pritchett was far closer to the mark when he wrote that judges "are influenced by their own biases and philosophies, which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law."¹⁶⁰

But Pritchett did not quite say that.¹⁶¹ His statement, quoted above, appeared in an essay about divided opinions on the Supreme Court.¹⁶² The language leading up to the assertion that Epstein and Segal selectively quote reads: "justices of the United States Supreme Court, in deciding controversial cases involving important issues of public policy, are influenced by biases and philosophies"¹⁶³ Epstein and Segal gave a much broader scope to Pritchett's carefully circumscribed claim when, just before the crucial words "are influenced by their biases and philosophies," they replaced his reference to "justices"—in "controversial cases"—with the word "judges."¹⁶⁴ A few sentences later, they continue in this vein, asserting that "with scattered exceptions here and there, the decisions of judges, and especially the decisions of Supreme Court justices, tend to reflect their own political values. More indirectly, these decisions also reflect the judges' partisan affiliation, which just so happens to coincide often with that of their appointing president."¹⁶⁵ Their book addresses the politics surrounding appointments at all levels of the federal judiciary, and the above assertions are clearly intended to apply to *all* federal judges.¹⁶⁶

Epstein and Segal's statement is misleading; though there is substantial support for it with respect to Supreme Court justices, it creates a false impression of what quantitative studies have demonstrated about

¹⁵⁹ See EPSTEIN & SEGAL, *supra* note 65, at 3.

¹⁶⁰ *Id.*

¹⁶¹ See C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890, 890 (1941).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ EPSTEIN & SEGAL, *supra* note 65, at 3; Pritchett, *supra* note 162, at 890.

¹⁶⁵ EPSTEIN & SEGAL, *supra* note 65, at 3.

¹⁶⁶ See *id.* As a matter of standard practice, the authors use "justice" when they mean to refer only to judges on the Supreme Court. See *id.*

lower federal courts. After all, about 85 percent of published appellate opinions are decided unanimously, which means that appellate judges concur in their legal decisions an overwhelming proportion of the time, regardless of differences in their ideological views or the party of their appointing president.¹⁶⁷ A recent quantitative study of federal appellate judges declared that “[f]requently the law is clear, and judges should and will simply implement it, no matter who has appointed them. . . . and we shall provide considerable evidence to suggest that they do exactly that.”¹⁶⁸ Epstein and Segal know that studies show this and note accordingly, much later in the text, that “many . . . [federal appellate] decisions are routine applications of existing law.”¹⁶⁹ They acknowledge that “circuit judges are *not as free* as Supreme Court justices” to decide cases in accordance with their political beliefs.¹⁷⁰

This is correct as far as it goes, but it, too, is potentially misleading. “Not as free” as Supreme Court justices, who have a significant degree of freedom, can still imply that circuit judges are substantially free—which is the impression the authors convey with their broad assertions throughout the book about political influences on judging. The more precisely accurate characterization of what recent studies of appellate courts have shown is that judges are “not very free” to reach decisions consistent with their policy preferences (or at least do not exercise their freedom to do so), for the effects of their policy preferences show up in a relatively small proportion of cases.¹⁷¹ Judicial politics scholars who wish to present an accurate account of what their results show should emphasize the sharp disparity in the extent of political influence between the Supreme Court and lower federal courts. Owing to the slant in the field, what one finds instead, as reflected in Epstein’s and Segal’s characterizations, is a blurring of the difference.¹⁷²

¹⁶⁷ HETTINGER ET AL., *supra* note 11, at 47 (examining cases decided between 1960 and 1996 in the United States Courts of Appeals Database along with supplemental data, and finding that approximately 5.5 percent of the cases had concurring opinions and 9.5 percent had dissenting opinions, without distinguishing between concurrences that join in the courts’ opinion and those that merely concur in the result).

¹⁶⁸ SUNSTEIN ET AL., *supra* note 3, at 5. Epstein and Segal cite to an earlier version of this same study in their book. EPSTEIN & SEGAL, *supra* note 65, at 127 n.12.

¹⁶⁹ EPSTEIN & SEGAL, *supra* note 65, at 128.

¹⁷⁰ *Id.* at 129 (emphasis added).

¹⁷¹ See *infra* notes 282–472 and accompanying text.

¹⁷² See EPSTEIN & SEGAL, *supra* note 65, at 3.

D. *The Suspicion That Judges Are Deluded or Deceptive*

A final manifestation of the slant relates to judicial politics scholars' skepticism about the veracity or self-awareness of judges. "Judges as Liars" is the title of a 1994 essay by Martin Shapiro, a major figure in the judicial politics field.¹⁷³ He meant it. He asserted that "courts occasionally make public policy decisions or law," but judges cannot admit that they do this because they are supposed to apply pre-existing law.¹⁷⁴ "Such is the nature of courts. They must always deny their authority to make law, even when they are making law. One may call this justificatory history, but I call it lying. Courts and judges always lie. Lying is the nature of the judicial activity."¹⁷⁵

Shapiro's repeated assertions of judicial deceptiveness is odd considering that, in a footnote, he quotes Justice Antonin Scalia, a proud legalist, for recognizing that "courts have the capacity to 'make' law."¹⁷⁶ Scalia actually declared in a judicial opinion, also cited by Shapiro, that "judges in a real sense 'make' law."¹⁷⁷ Scalia has repeatedly stated that judges "make the law," resolving policy issues in the process.¹⁷⁸ "Indeed, it is probably true that in these [common law] fields judicial lawmaking can be more freewheeling than ever," Scalia writes, "since the doctrine of *stare decisis* has appreciably eroded."¹⁷⁹ Shapiro's support for his claim that judges make law thus contradicts his claim that judges "lie" about it.¹⁸⁰

For more than a century, prominent judges have openly and repeatedly admitted that they make law, from Judge Thomas Cooley and Judge John Dillon in 1886, to Judge Benjamin Cardozo in 1920, to many other judges in between and since.¹⁸¹ Consider just two such statements made in the heart of the so-called formalist age: in a 1903

¹⁷³ Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155 (1994).

¹⁷⁴ *Id.* at 155-56.

¹⁷⁵ *Id.* at 156.

¹⁷⁶ *Id.* at 155 n.3 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989)).

¹⁷⁷ *Id.* at 155 n.4 (quoting *James B. Bean Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment)).

¹⁷⁸ Antonin Scalia, *Common Law Court in a Civil Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6, 9, 12 (Amy Gutmann ed., 1997).

¹⁷⁹ *Id.* at 12.

¹⁸⁰ See *supra* notes 177-179 and accompanying text. It is true that Justice Scalia does suggest that judges hide the fact that they are making law. See *James Bean Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring in the judgment). Nonetheless, Justice Scalia's repeated public statements that judges make law are an example of a judge, here a justice, openly admitting that courts actually do make law. See *id.*

¹⁸¹ See Tamanaha, *Bogus Tale*, *supra* note 36, at 18-19, 22.

article with the "tell all" title "Judge-Made Law," Judge A.M. Mackey wrote that "a large portion of the unwritten or common law is judge-made law."¹⁸² Also in 1903, United States Circuit Judge Le Baron Colt wrote that judges "have carried on judicial legislation from the infancy of the law in order that it might advance with society."¹⁸³ Despite many statements to this effect from judges, critics of courts repeatedly assert that judges deny that they make law, and then proceed to condemn judges for denying it.¹⁸⁴

It is a commonplace belief among judicial politics scholars that judges are deluded or deceptive when they speak about judging. Klein, for example, observed that "[j]udges cannot be expected to understand their own motivations perfectly or to report them with undiluted candor."¹⁸⁵ Baum remarked, "Judges usually speak and write with audiences in mind, and they ordinarily present themselves in a way that they think will be received favorably. Further, they do not always understand their goals fully, and they may mislead themselves as well as their audiences."¹⁸⁶ Political scientists mean more than that everyone speaks and writes with audiences in mind and is self-deluded in various ways; they mean that judges, in particular and characteristically, put up false fronts and labor under self-delusions. Even scholars who more generously credit judges with honesty about judging nonetheless assert that "judicial self-reporting . . . is unreliable."¹⁸⁷

Judicial politics scholars are not alone in having this view of judges. Judge Richard Posner also dismissed accounts of judging offered by his colleagues as unreliable:

I am denying that judicial introspection, and *a fortiori* judges' avowals concerning the nature of judicial decision making, are good explanations for judicial action. It is a mistake to take at face value descriptions of judges as engaged always in a search for 'the' correct answer, rather than exercising discretion under the influence of personal values and preferences determined by temperament and selective life experiences

¹⁸² A.M. Mackey, *Judge-Made Law*, 2 OKLA. L. REV. 193, 197 (1903).

¹⁸³ Le Baron B. Colt, *Law and Reasonableness*, 37 AM. L. REV. 657, 674 (1903).

¹⁸⁴ See *supra* notes 177–183 and accompanying text.

¹⁸⁵ KLEIN, *supra* note 133, at 138.

¹⁸⁶ BAUM, *supra* note 105, at 19.

¹⁸⁷ Frank B. Cross, *Decision Making in the U.S. Courts of Appeals*, 91 CAL. L. REV. 1457, 1465–67, 1477 (2003).

rather than by a considered, somehow self-chosen judicial philosophy.¹⁸⁸

In a recent book, *How Judges Think*, Posner wrote that "most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices."¹⁸⁹

Judges no doubt bear some responsibility for perpetuating the belief that they are deluded or deceptive. They occasionally say things that ring false. Chief Justice John Roberts' claim in his Senate confirmation hearing that judging on the Supreme Court is like calling balls and strikes is an example.¹⁹⁰

Two additional factors have contributed to the belief that judges are deluded or deceptive about judging: the false story about belief in legal formalism and the style of written judicial decisions. According to this false story about belief in legal formalism, judges *denied* that they made law and *believed* that they reasoned in a mechanical, deductive fashion, or at least that they *claimed* to reason in this fashion.¹⁹¹ These views are patently implausible, so judges evidently were either *deluded* or *lying* for (purportedly) asserting them.¹⁹² Once this perception of judges took hold within the legal culture, although false, it stuck.

The second source of skepticism about the veracity of judges is the style of written decisions. Typically they are systematically reasoned, filled with citations to precedent and legal rules, and offered as if legal conclusions necessarily follow. Seldom does an opinion reveal the uncertainties in the analysis.¹⁹³

But it has long been recognized that opinions do not represent a judge's actual reasoning process. As Judge Walter Schaefer noted, "ju-

¹⁸⁸ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 189 (1990).

¹⁸⁹ POSNER, *supra* note 3, at 2.

¹⁹⁰ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

¹⁹¹ See *supra* notes 29-67 and accompanying text.

¹⁹² See *supra* notes 173-189 and accompanying text.

¹⁹³ Justice Walter Schaefer of the Illinois Supreme Court acknowledged in 1955 that this style of writing promotes skepticism in observers:

Some writers have therefore suggested that the ordinary judicial opinion is a fraud, in that it purports to be derived by impeccable and inevitable logic from what has already been decided, and that the judge who wrote it is either a fool for thinking the process so simple or a knave for pretending that it is.

Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 4-5 (1966).

dicial opinions are something less than mirrors of the thinking behind the decision and . . . a judge has more freedom than the mustering of precedents makes it appear."¹⁹⁴ John Dewey wrote in 1924 that "[t]he logic of exposition is different from that of search and inquiry."¹⁹⁵ The style in which the decision is presented is not an indication of how it was reached; rather, it is the best argument a judge can come up with to support the decision.¹⁹⁶ If this distinction was not understood before, it was certainly well understood after Dewey articulated it.¹⁹⁷ The purposes of opinions are to justify the legal decision, provide guidance for later cases, and resolve the legal issues with finality. It makes sense, therefore, that opinions are firmly stated and do not express doubts about the legal conclusions reached. Once the decision is made, Schaefer remarked, the judge writing an opinion "becomes an advocate" on its behalf.¹⁹⁸

To know what judges think about judging, one cannot draw inferences from the style of written decisions, which are not offered as accounts of judicial decision making. Instead, one must pay attention to the very realistic things judges have been saying about judging for many decades.

II. DECADES OF CANDID REALISM ABOUT JUDGING FROM JUDGES

The unsurpassed *locus classicus* of balanced realism about judging is Cardozo's *The Nature of the Judicial Process*.¹⁹⁹ He stated that, in the bulk of cases, the law is clear, and the judge must rule as the law requires—"Therefore in the main there shall be adherence to precedent."²⁰⁰ He also stated, however, that there are gaps in the law, uncertainties in interpretation, unanticipated fact situations, and obsolete rules, all of which work serious injustices or harms to social interests.²⁰¹ In these situations, he advised, the judge must strive to rule in an objec-

¹⁹⁴ *Id.* at 5.

¹⁹⁵ John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924).

¹⁹⁶ *See id.*

¹⁹⁷ *See id.* Another early articulation of this distinction (though not citing Dewey) can be found in Llewellyn, *supra* note 71, at 1238-39 ("[V]iewing them [judicial opinions] no longer as mirroring the process of deciding cases, but rather as trained lawyers' arguments made by the judges (after the decision has been reached), intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable—this was to open up new vision.").

¹⁹⁸ Schaefer, *supra* note 193, at 9.

¹⁹⁹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

²⁰⁰ *Id.* at 112.

²⁰¹ *See id.* at 98-141 (describing times when judges must make law).

tive fashion, consistent with the community's values and interests.²⁰² Community morality provides the "objective" view.²⁰³ The judge is "under a duty to conform to the accepted standards of the community,"²⁰⁴ even when the judge disagrees with those moral standards, Cardozo asserted, except in rare circumstances when the judge's deepest conviction calls for a standard more demanding than conventional morality.²⁰⁵ He recognized, however, that it is difficult for judges to keep this entirely apart.²⁰⁶ Hence, Cardozo concluded, the distinction between the judge's subjective views of the right and the community's general view "is shadowy and evanescent."²⁰⁷ Cardozo was realistic, but not fatalistic, about the ability of judges to rule in an objective fashion: "I do not mean, of course, that this ideal of objective vision is ever perfectly attained. We cannot transcend the limitations of the ego and see anything as it really is. None the less, *the ideal is one to be striven for within the limits of our capacity.*"²⁰⁸

More can be taken from Cardozo's brilliant book, but to continue this focus would merely reinforce a widespread misimpression that he was unusual among judges in expressing such insights. Judges were uniformly enthusiastic about Cardozo's book and not reticent to confirm and extend his insights. Judge Rousseau Burch wrote:

In a sense, there is *nothing new* in the book but its method. Elements of the judicial process have been discussed before; but this account, although brief, is vivid and complete; although daring, is not sensational or exaggerated; although informed by genius and erudition, is lucid enough to be comprehended by law-school students; and the account is rendered with a combination of spirit and restraint, with that "animated moderation," which makes it as brilliant as it is convincing.²⁰⁹

²⁰² See *id.* at 105 ("The standards or patterns of utility and morals will be found by the judge in the life of the community.").

²⁰³ See *id.* at 105-06.

²⁰⁴ CARDOZO, *supra* note 199, at 108.

²⁰⁵ See *id.* at 108-10.

²⁰⁶ "The perception of objective right takes the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs. There is constant and subtle interaction between what is without and what is within." *Id.* at 110-11.

²⁰⁷ *Id.* at 110.

²⁰⁸ *Id.* at 106 (emphasis added).

²⁰⁹ Rousseau A. Burch, *Book Reviews*, 31 YALE L.J. 677, 677 (1922) (emphasis added) (reviewing CARDOZO, *supra* note 199).

After summarizing Cardozo's claims about judging, Judge Burch proclaimed: "It is true" ²¹⁰ Federal Appellate Judge Frances E. Baker applauded Cardozo's declaration that judges make law: "Naturally judges could not confess when they were unconscious of being law-makers. With the first glimmerings of consciousness they were so startled that they hid behind various fictions and pretenses. But now that the fictions are recognized for what they are, why not discard the camouflage?" ²¹¹

Another federal appellate judge, Judge Charles M. Hough, enthusiastically commended the book to readers. ²¹² He confirmed the presence of a "not inconsiderable number of causes wherein precedents are not ruling, where the statute or constitution does not directly and plainly cover, and where the Court has to deal with something previous lawmakers had not thought of, and therefore did not speak of." ²¹³ Hough also affirmed Cardozo's account of the difficulty of maintaining the appropriate separation between "the subjective or individual conscience, and the objective or general conscience; and to indicate how far each can rightly sway judicial decision." ²¹⁴

Even judges on his own court might have been more candid than Cardozo about these matters. ²¹⁵ In a 1924 speech to the New York City Bar, the Chief Judge of the Court of Appeals, Judge Frank Harris Hiscock, reviewed a string of recent decisions and declared that all of them could have come out the other way. ²¹⁶ He told his audience that constitutional questions about rights and liberties that courts are called upon to decide are less questions of law than questions "of policy and state craft." ²¹⁷ Hence, rulings are a function of the "policy and viewpoint of a court," which can change when the membership changes. ²¹⁸

Another judge on the same court, Irving Lehman, delivered a reflective speech at Cornell Law School in 1924, stating that judges are sometimes confronted with conflicting precedents, or erroneous

²¹⁰ *Id.* at 680 ("The first inquiry must be, not do we like it, but is the book true? To this question there seems but one answer. It is true; and the proof is furnished by the American judiciary . . .").

²¹¹ Francis E. Baker, *How a Judge Functions*, 9 A.B.A. J. 34, 34 (1923).

²¹² C.M. Hough, *Book Reviews*, 7 CORNELL L.Q. 287, 288 (1922) (reviewing CARDOZO, *supra* note 199).

²¹³ *Id.*

²¹⁴ *Id.* at 289.

²¹⁵ See Frank Harris Hiscock, *Progressiveness of New York Law*, 9 CORNELL L.Q. 371, 376 (1924).

²¹⁶ *Id.*

²¹⁷ *Id.* at 381.

²¹⁸ *Id.* at 374.

precedents, or indeed no precedents, and that they must sometimes change the law for reasons of public policy.²¹⁹ As a law student, he came to realize that "[l]aw was not an exact science founded upon immutable principles"; upon becoming a judge, he "realized that in many cases there were no premises from which any deductions could be drawn with logical certainty."²²⁰ He added that "no thoughtful judge can fail to note that in conferences of the court, differences of opinion are based at least to some extent upon differences of viewpoint"²²¹ and "it is inevitable that a judge in weighing individual rights as opposed to collective benefit will to some extent be influenced by his personal views."²²²

Judge Cuthbert W. Pound, also on the court, said in a 1922 speech to the bar that "[t]he term 'constitutional right' as applied, in the first instance, to a new problem, is often of a vague and unsubstantial nature, dependent upon the proper balancing of many conflicting interests, social, public and private."²²³ In a subsequent address, he elaborated on the sources of uncertainty in law, observing that legal doctrines are "not infrequently reasoned away to the vanishing point. One may wade through a morass of decisions only to sink into a quicksand of uncertainty."²²⁴ Pound observed that a degree of uncertainty is inevitable because one cannot predict how general principles will be applied in specific cases,²²⁵ and he made the realistic observation that "lawyers and judges too often fail to recognize that the decision consists in what is done, not in what is said by the court in doing it."²²⁶

All of the above statements were uttered by judges in the early 1920s—when Haines portrayed judges as beguiled by mechanical jurisprudence.²²⁷ This was just before the emergence of the legal realists who, according to the conventional story, came on the scene to dis-

²¹⁹ Irving Lehman, *The Influence of the Universities on Judicial Decisions*, 10 CORNELL L.Q. 1, 2-3 (1924).

²²⁰ *Id.*

²²¹ *Id.* at 6.

²²² *Id.* at 12.

²²³ Cuthbert W. Pound, *Constitutional Aspects of American Administrative Law*, 9 A.B.A. J. 409, 411 (1923).

²²⁴ Cuthbert W. Pound, *Defective Law—Its Cause and Remedy*, N.Y. ST. B. ASS'N BULL., Sept. 1929, at 279, 281.

²²⁵ *Id.* at 283.

²²⁶ *Id.* at 282. This statement is reminiscent of Karl Llewellyn's later statement: "What these officials [judges] do about disputes is, to my mind, the law itself." LLEWELLYN, *supra* note 79, at 12.

²²⁷ See *supra* note 33 and accompanying text.

abuse judges of their purportedly unrealistic views about judging. Subsequent judges were even more explicit, as a brief sampling will show.

Associate Justice Horace Stern of the Pennsylvania Supreme Court wrote in 1937:

[H]owever fondly we may like to delude ourselves into the belief that constitutional law is a pure science, the interpretation and evolution of which are wholly independent of political predilections, we must, if realists, recognize that courts controlled by a "conservative" personnel and those dominated by a "liberal" membership are more than likely to decide constitutional questions from different angles and with different results.²²⁸

Consistent with his assertion that political views have an impact on decisions, Stern recommended that, when judges are selected for appointment, they should be measured by two standards: professional fitness (knowledge of the law and ability to engage in legal reasoning); and in terms of "his attitude toward public policies and theories of political, social and economic life."²²⁹ It bears mention that 1937 was the year of President Roosevelt's ill-fated "Court Packing Plan,"²³⁰ which proposed to increase the size of the Supreme Court to get a majority more compliant to his desired legislative agenda—a plan premised on the point made by Stern.²³¹

Justice Bernard L. Shientag delivered the Benjamin Cardozo Lecture to the New York Bar in 1944, with the title *The Personality of the Judge and the Part It Plays in the Administration of Justice*.²³² Shientag emphasized that the personality and beliefs of judges matter, and that judges vary in personalities and attitudes—some are thoughtful and fair, others are tyrannical, impatient, or close-minded.²³³ Although he disliked the term "hunch" because it inaccurately downplays the reasoning aspects of judgment, Shientag admitted that "intuition undoubtedly plays an important part in the deliberations and decisions of the judge."²³⁴

²²⁸ Horace Stern, *Book Review*, 51 HARV. L. REV. 178, 179 (1937) (reviewing HENRY T. LUMMUS, *THE TRIAL JUDGE* (1937)).

²²⁹ *Id.* at 181.

²³⁰ See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132 (1995) (explaining Roosevelt's plan to increase the number of Supreme Court Justices).

²³¹ See *id.*; Stern, *supra* note 228, at 179.

²³² See BERNARD L. SHIENTAG, *THE PERSONALITY OF THE JUDGE* (1944).

²³³ See *id.* (discussing varying personality traits and their implications for judging).

²³⁴ *Id.* at 73.

He made the following observations as if they were both obvious and unavoidable:

Naturally, it is in cases where the creative faculty of the judicial process operates, where there is a choice of competing analogies, that the personality of the judge, the individual tone of his mind, the color of his experience, the character and variety of his interests and his prepossessions, all play an important role. For the judge, in effect, to detach himself from his whole personality, is a difficult, if not an impossible, task. We make progress, therefore, when we recognize this condition as a part of the weakness of human nature.²³⁵

Having said that, Shientag asserted that judges are capable of screening out this influence with an effort at self-awareness, and he argued that it is a grave mistake "to exaggerate its [personal influence] existence, to over-emphasize its significance in the judicial process."²³⁶

By the early 1950s, judges openly expressed a balanced realism about judging. In 1951, Federal Circuit Judge Amistead Dobie observed that, contrary to former "Utopian" dreams, a judge must deal with an imperfect legal order.²³⁷

There never has been, and there never will be, a judge worthy of his salt who can be classified as a cold and clammy thinking machine. No judge, however he may try, can, in his decisions, completely and effectively divorce himself from what he has seen, has heard, has experienced and has been.²³⁸

Clashes of interests are often involved, and the judge must choose.²³⁹ Federal District Judge Charles Wyzanski wrote in 1952 about "A Trial Judge's Freedom and Responsibility."²⁴⁰ He acknowledged that judges have ample freedom in their decision making. "And yet from the day he takes his seat the trial judge is aware that while he has more personal discretion than the books reveal, he too is hemmed in by a developing tradition of impersonal usages, canons and legitimate expectations."²⁴¹

²³⁵ *Id.* at 51.

²³⁶ *Id.* at 56.

²³⁷ Amistead M. Dobie, *A Judge Judges Judges*, 1951 WASH. U. L.Q. 471, 480.

²³⁸ *Id.*

²³⁹ *Id.* at 479.

²⁴⁰ Charles E. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1281 (1952).

²⁴¹ *Id.* at 1282.

Although judges exercise choice, Wyzanski observed, they are also disciplined by norms of judicial behavior and by the prospect of appellate reversal.²⁴²

Another federal trial court judge, Leon Yankwich, wrote *The Art of Being a Judge* in 1957, asserting that "[t]his is not a mechanical craft, but the exercise of a creative art . . ." ²⁴³ He asserted that some "have denied altogether the importance of the personality of the judge in judicial decisions," but added that "such attitude is unrealistic."²⁴⁴ It is the necessary and proper role of courts to develop and change the law to reflect the times, Yankwich asserted, which is where the creative contribution of the judge comes into play.²⁴⁵ He admitted that, although he would not change any of his decisions, some of them could justifiably have had a different outcome.²⁴⁶ Federal Appellate Judge Calvert Magruder made a similar point in 1958: "All too often we have to realize that the case might be written up either way, in a lawyer-like opinion. The judge may not recognize that this is so, or even be conscious of the inner springs that lead him to choose one result rather than the other."²⁴⁷ Magruder also echoed Judge Stern's observation two decades earlier about the Supreme Court: "How far the Court should go . . . involves an exercise of judgment. Over the long years the Supreme Court, because of changes in its membership, has oscillated between the right and the left."²⁴⁸

Federal Circuit Judge Albert Tate published two articles along these lines in 1959, "The Judge as a Person"²⁴⁹ and "'Policy' in Judicial Decisions."²⁵⁰ Tate took it as obvious that judges' views influence their decisions.²⁵¹ "[L]ike all other human beings [judges] have limitations of vision, knowledge, intelligence, or predisposition which sometimes influence their judicial actions, however much they conscientiously try to avoid the occasion of error."²⁵² Tate hastened to add that, in the "vast and overwhelming majority of cases the same result will be reached"

²⁴² See *id.*

²⁴³ Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PA. L. REV. 374, 375 (1957).

²⁴⁴ *Id.* at 377.

²⁴⁵ *Id.* at 377-78.

²⁴⁶ *Id.* at 382.

²⁴⁷ Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 5 (1958).

²⁴⁸ *Id.* at 11.

²⁴⁹ Albert Tate, *Forum Juridicum: The Judge as a Person*, 19 LA. L. REV. 438, 438 (1959).

²⁵⁰ Albert Tate, *Policy in Judicial Decisions*, 20 LA. L. REV. 62, 62 (1959).

²⁵¹ Tate, *supra* note 249, at 439.

²⁵² *Id.*

regardless of who sits on the case,²⁵³ but he also admitted that cases arise in which "several judges may with equal sincerity and equal reason reach different results."²⁵⁴ Tate asserted with consummate realism that, for all practical purposes, "the correct" decision is whatever is decided by the highest appellate court to hear the case.²⁵⁵ In the non-routine cases, Tate wrote, judges must make policy decisions; on these occasions "the judge will naturally tend to exercise what discretion is afforded him in favor of the result deemed by him to be more just or socially sound" although the judge is not completely unrestrained when engaged in this process, which is always carried on within "the framework of their judicial system [including review by higher courts] and subject to the discipline of the judicial craft."²⁵⁶ Through this process, general social and moral values are brought into the law, and the law stays in sync with and serves social needs, but the final product must always fit within and be expressed in "normal legal reasoning."²⁵⁷

By the 1960s, realistic observations by judges about judging were standard fare. In a 1962 Address at the University of Chicago Law School, Justice Roger Traynor of the California Supreme Court, one of the leading common law judges of his generation, had no qualms about acknowledging that judges must make choices in certain situations.²⁵⁸ Though judges should follow precedent for the sake of consistency, Traynor said, when the law is too unsatisfactory, the judge can and should decide to abandon it;²⁵⁹ he admitted that there are cases in which the decision can go either way;²⁶⁰ he accepted that judges have predilections that they must struggle to overcome (and be conscious of);²⁶¹ and he wrote that the judge must "arrive at last at a value judgment as to what the law ought to be and to spell out why."²⁶² Also in 1962, Judge Henry Friendly wrote that "the judge should try to make sure he is interpreting the long term convictions of the community

²⁵³ *Id.* at 440; see also Tate, *supra* note 250, at 62 (estimating that 90 percent or 95 percent of appellate cases are routine).

²⁵⁴ Tate, *supra* note 249, at 440.

²⁵⁵ *Id.*

²⁵⁶ Tate, *supra* note 250, at 68.

²⁵⁷ *Id.* at 69.

²⁵⁸ Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 224 (1962) [hereinafter Traynor, *La Rude Vita*]. Judge Traynor made similar statements in an earlier article. See Roger Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957) [hereinafter Traynor, *Open Questions*].

²⁵⁹ Traynor, *La Rude Vita*, *supra* note 258, at 230-31.

²⁶⁰ *Id.* at 224.

²⁶¹ *Id.* at 234.

²⁶² *Id.*

rather than his own evanescent ones; but we may as well recognize this goal will not always be realized even 'by the best.'"²⁶³ Friendly explained, "Sometimes the judge will fail of this because the community has not true convictions . . . on other occasions because it is asking too much that a judge suppress the basic beliefs by which he lives."²⁶⁴

"The Limits of Judicial Objectivity" was the title of a 1963 Lecture delivered by Federal Circuit Judge Charles Clark, an early legal realist and former Dean of Yale Law School.²⁶⁵ Clark agreed with Cardozo that in a very high percentage of the cases the legal result is clear:

On the appellate level all observers place the number of cases of a predestined outcome at a very high level; Cardozo eventually went so far as to place it at "nine-tenths, perhaps more," of the total. At the trial level the ratio of cases turning upon certain substantive principles is obviously yet higher, though the then open contest as to the facts—the actual events—may well make the outcome less predictable.²⁶⁶

In the small percentage of remaining cases, Clark wrote, the judge (after becoming as prepared and knowledgeable about the applicable law as he can) "is on his own for the ultimate result which must reflect his background, his personality, and his inner conviction."²⁶⁷ In the small proportion of cases that involve genuinely open legal questions, "judicial objectivity" does not get a judge very far, Clark opined, so the judge has no choice but to make a decision "where there is no one and nothing to tell him how or where to go."²⁶⁸

A final example that straddles both the 1950s and 1960s: Justice Walter Schaefer of the Illinois Supreme Court delivered a lecture in 1955 entitled "Precedent and Policy," published in 1966.²⁶⁹ At the outset Schaefer asserted that the "great bulk" of cases are resolved though determining questions of fact in connection with "an established legal principle."²⁷⁰ Only a "minute fraction" of cases make it to appellate review; and only a "small percentage" of these appealed cases raise truly

²⁶³ Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 231 (1961).

²⁶⁴ *Id.*

²⁶⁵ Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 1 (1963).

²⁶⁶ *Id.* at 3–4 (citation omitted).

²⁶⁷ *Id.* at 12.

²⁶⁸ *Id.* at 10.

²⁶⁹ Schaefer, *supra* note 193, at 3.

²⁷⁰ *Id.* at 4.

open and contestable legal questions.²⁷¹ His comments addressed this small subset of cases, wherein judges must grapple with legal uncertainty and close questions.²⁷² According to Schaefer, in certain contexts it is "inevitable" that judges make law:²⁷³ when creating or adjusting the law to accommodate new situations,²⁷⁴ when deciding to abandon precedent,²⁷⁵ and when filling in statutes to resolve unanswered questions. Whether in connection with the common law or with statutes, when dealing with open questions judges are called upon to render policy decisions. Like Cardozo, Schaefer asserted that policy decisions ought to be based upon community views and not the judge's own view,²⁷⁶ but he recognized the difficulty of keeping the two apart. "There is nothing new in the notion that the personality of the judge plays a part in the decision of cases."²⁷⁷

Additional realistic accounts from judges about judging can be recited from succeeding decades, and more will be conveyed later, but to continue here would be redundant. They all say much the same things: a substantial bulk of the cases are routine, governed by clear law, but cases regularly arise in which judges must make hard choices—because there is a gap in the law, an unanticipated situation has arisen, there are inconsistent precedents or the law is ambiguous, or the law is obsolete or produces a result that is deeply unjust or seriously harms the social interest.²⁷⁸ In these situations judges must make choices, often about policy; they should strive to adhere to the community view, but it can be difficult to keep this separate from their own views. There are sometimes contesting views within the community and different judges can and do come to different interpretations and legal decisions. Judges cannot always be aware of or free from the subconscious influence of their biases.²⁷⁹

Stopping this recitation at the outset of the 1960s serves to underline a key point. Quantitative studies of judging got underway in the late 1950s and early 1960s to demonstrate that judges make political decisions. Compare what judges said above with Pritchett's 1969 summary of the views animating the field:

²⁷¹ *Id.*

²⁷² *Id.* at 7.

²⁷³ *Id.* at 4.

²⁷⁴ Schaefer, *supra* note 193, at 6.

²⁷⁵ *Id.* at 12.

²⁷⁶ *Id.* at 14.

²⁷⁷ *Id.* at 22.

²⁷⁸ See *supra* notes 199–277 and accompanying text.

²⁷⁹ See *supra* notes 199–277 and accompanying text.

Political jurisprudence, then, asserts that judges are inevitably participants in the process of public policy formation; that they do in fact "make law"; that in making law they are necessarily guided in part by their personal conceptions of justice and public policy; that written law requires interpretation which involves making choices; that the rule of *stare decisis* is vulnerable because precedents are typically available to support either side in a controversy.²⁸⁰

There are differences in tone and degree, but multiple judges openly acknowledged the heart of what Pritchett set out above, decades before he wrote it.²⁸¹ Political science debunkers arrived on the scene determined to strip away the false formalist pretensions of the judicial robe without knowing that judges had long before discarded such pretensions.

Ironically, as the next Part will show, the results of their own studies tend to be more consistent with the balance expressed by judges than the skepticism expressed by political scientists.

III. WHAT STUDIES OF JUDGING HAVE FOUND

The lion's share of quantitative studies has been conducted on the U.S. Supreme Court. Their findings can be broadly summarized in a sentence: the ideological views of Supreme Court justices have a measurable influence on their legal decisions. This finding does not show in all categories of cases, law still matters in various ways, and the degree of correlation between attitudes (i.e., conservative, liberal) and decisions for individual justices fall along a range,²⁸² but it cannot be denied that the ideological views of justices have an impact.²⁸³ As revealed

²⁸⁰ Pritchett, *supra* note 54, at 31.

²⁸¹ See *supra* notes 199–277 and accompanying text.

²⁸² For an excellent recent study showing the effect of legal factors, see Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008).

²⁸³ See EPSTEIN & KNIGHT, *supra* note 118, at xxii; SEGAL & SPÄETH, *supra* note 64, at 1–3. For the purposes of this argument, I am granting the value and basic point of the findings of studies on the Supreme Court, although it should be mentioned that substantial issues remain with respect to how the ideological values of judges are identified, and how the cases are coded and pegged in political terms. See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* 20 (2007); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 884–85 (2008); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 734, 779–93 (2005). An excellent critical

above, this has been openly recognized for a long time, and few in legal circles deny it today. Judge Richard Posner's 2005 review of the Supreme Court was plainly entitled "A Political Court."²⁸⁴ Quantitative studies have made a major contribution by supplementing this awareness with concrete, rigorously derived information about the voting patterns of individual justices and the Supreme Court as an institution, historically and today.

Nothing further will be said here about quantitative studies of judging on the U.S. Supreme Court. It is a unique court from which little can be gleaned about judging generally. The inordinate attention it now receives, moreover, is out of proportion to its actual impact.²⁸⁵ Although there is no question that the Supreme Court makes important decisions, it must be seen in the broader context of judicial institutions and judging more generally. In recent years the Supreme Court has decided about seventy cases; federal appellate courts have resolved about fifty thousand cases,²⁸⁶ and federal trial courts have resolved over three-hundred thousand cases.²⁸⁷ Because fewer than 15 percent of federal appellate decisions are appealed, and because the Supreme Court accepts fewer than 2 percent of those appeals, the bulk of policy making through legal decisions on the federal level is done by the appeals courts, not the Supreme Court.²⁸⁸ Furthermore, it is misleading to think of the Supreme Court as engaged in a final review or check on the legal correctness of appellate decisions because its jurisdiction is discretionary and the possibility of any given case being reviewed is remote.²⁸⁹ The Supreme Court is more aptly described as a freelance decision making body that takes up legal questions or cases deemed compelling (whether for legal, social, political, or economic significance, or to resolve circuit splits).²⁹⁰

The following summaries do not purport to present a comprehensive overview of quantitative studies—which are too numerous to cover

examination of these studies is Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, *supra* note 147.

²⁸⁴ Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 32 (2005).

²⁸⁵ For a powerful argument suggesting that the Supreme Court has less of an impact than is typically thought, see Frederick Schauer, *Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4 (2006).

²⁸⁶ CROSS, *supra* note 283, at 2.

²⁸⁷ SEGAL ET AL., *supra* note 67, at 196. These numbers pale in comparison to the close to 93 million cases filed in state courts in 2001. *Id.* at 171.

²⁸⁸ See CROSS, *supra* note 283, at 2.

²⁸⁹ See *id.*

²⁹⁰ See *id.*

in a few pages²⁹¹—but rather they attempt to give a representation of their basic findings. The emphasis will be on recent studies of federal appellate courts. Less will be said about federal trial courts and state supreme courts, which, in some respects, are like the U.S. Supreme Court, and, in other respects, like lower appellate courts.²⁹²

A. *Early Studies of Judicial Role Orientation*

In the mid-1960s, Kenneth Vines interviewed judges on four state supreme courts, asking them how they view decision making.²⁹³ He divided their responses into three categories. Just over half—fourteen in all—saw themselves as strictly interpreting the law. Vines labeled these judges “law interpreters.”²⁹⁴ The remaining group divided almost evenly between judges who saw themselves as engaging in policy making, called “law makers,”²⁹⁵ and judges who saw themselves as doing both law interpretation and law making, while focused on achieving just outcomes. The latter group were called “pragmatists.”²⁹⁶ Democratic appointees and Republican appointees were found in all categories, thus suggesting that judges with different political views can share role orientations, and that judges with the same political views can choose different role orientations.²⁹⁷ When examining whether their legal decisions (in non-unanimous cases only) showed any conservative or liberal pattern, Vines found “virtually no differences among law interpreters and law makers, and while pragmatists have a somewhat more liberal position, the difference is not great.”²⁹⁸

A study by John Wold of a different collection of state supreme court judges in the mid-1970s came up with a similar set of categories. Twelve of the judges saw themselves as law interpreters, only three as law makers, and seven identified a combination of both orientations.²⁹⁹

²⁹¹ See Daniel R. Pinello, *Linking Part to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 221 (1999).

²⁹² See LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS* 6–7 (2002).

²⁹³ Kenneth N. Vines, *The Judicial Role in the American States*, in *FRONTIERS OF JUDICIAL RESEARCH*, *supra* note 54, at 461, 462.

²⁹⁴ *Id.* at 474–75.

²⁹⁵ *Id.* at 475.

²⁹⁶ *Id.* at 474–77. Vines studied the high courts in Louisiana, Pennsylvania, Massachusetts, and New Jersey. *Id.* at 462.

²⁹⁷ See *id.* at 478–82.

²⁹⁸ Vines, *supra* note 293, at 481.

²⁹⁹ John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239, 241 (1974). Wold studied the high courts in Delaware, Maryland, New York, and Virginia. See *id.* at 239.

Conservatives fell heavily the law interpreter group.³⁰⁰ Wold found two competing conceptions: "a deferential, precedent-oriented view and an innovative, policy-oriented view."³⁰¹ Nevertheless, he emphasized:

The dissimilarities between the two views of course should not be exaggerated. Regardless of his feelings about judicial creativity, no jurist advocated an unrestrained policy-making role for his court. Even the lawmakers believed that sponsorship of change in public policy was chiefly the prerogative of the legislature, and only secondarily that of the judge [A]nd even some interpreters admitted the necessity of legislating in the "interstices" of the law.³⁰²

All of the judges felt that they should follow the law, and all felt the legislature had primary responsibility for law making, but the law makers were more willing to step in and make law when necessary.³⁰³ Wold did not test for possible correlations between orientations, attitudes, and decisions.³⁰⁴

At about the same time, J. Woodford Howard found a similar set of understandings distributed among judges on three federal appellate courts.³⁰⁵ Translating his labels (interpreter, innovator, realist) to match the other studies: there were nine interpreters, five law makers, and twenty judges with a combination.³⁰⁶ Unlike the two studies of state supreme courts, the combined-orientation group in Howard's study was the largest.³⁰⁷ But the differences among judges were not marked. Avowed law interpreters, he found, recognized that there are lacunae within statutes and cases that courts must sometimes fill in.³⁰⁸ Howard also found a "strong consensus" across all categories about the duty to follow the law set forth by Congress and the Supreme Court.³⁰⁹ The correlations between political values and role orientation were mixed, though many moderates fell in the realist category.³¹⁰

³⁰⁰ *Id.* at 242.

³⁰¹ *Id.*

³⁰² *Id.* at 246-47.

³⁰³ *Id.* at 240.

³⁰⁴ See Wold, *supra* note 299.

³⁰⁵ See J. Woodford Howard, *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916 (1977) (exploring the relationship between role perceptions and voting behavior in three federal courts of appeals).

³⁰⁶ See *id.* at 919.

³⁰⁷ See *id.*

³⁰⁸ See *id.* at 920.

³⁰⁹ *Id.* at 918.

³¹⁰ See Howard, *supra* note 305, at 924.

Howard then studied five thousand votes in several categories of cases, matching the political values of the judges with their decisions. He found *no* statistically significant correlation between their values and their legal decisions in the cases studied (with some difference showing up in civil rights cases).³¹¹ "The data may be too weak to prove the absence of a relationship among political ideologies and voting behavior," Howard asserted, "but they are strong enough to cast doubt on a common interpretation that circuit decisions are dominated by the past political predispositions of the judges."³¹² He also found that the different role orientations showed no strong correlations with decisions.³¹³ Thus, neither personal preferences nor differences in role orientations appeared to have significant impact on decisions.³¹⁴ Howard speculated about three possible explanations: there was a strong shared orientation among the judges to abide by *stare decisis*; the applicable law was interpreted the same way in accordance with its evident meaning in the majority of cases; and perhaps the judges shared policy views notwithstanding their other political differences.³¹⁵

Although early studies of judicial role orientation opened up promising lines of inquiry, this area of judicial research did not develop much further. Systematic research has not been done to test for the impact role orientation might have on judicial decision making. Several studies at the appellate and trial levels suggest that role orientations can effectively dampen the influence of ideological preferences in decisions.³¹⁶ But too few such studies have been conducted to draw any firm conclusions.

These early studies suggest that judges share a common orientation of fidelity to law. Beyond this common core, however, judges splinter in their views about the acceptability of rendering policy decisions. Judges who emphasize that their job is to interpret the law understand that they must sometimes make choices. Judges who emphasize that they make law understand that they must follow the law when it is clear; the differences are a matter of lean and emphasis. It is thus a mistake to assume that judges all adopt the same template: agreement about a

³¹¹ *Id.* at 928.

³¹² *Id.* at 930.

³¹³ *Id.* at 931-34.

³¹⁴ *See id.* at 930-34.

³¹⁵ *See* Howard, *supra* note 305, at 937-38.

³¹⁶ *See* James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 922 (1978); John M. Scheb, Thomas D. Unga & Allison L. Hayes, *Judicial Role Orientations, Attitudes, and Decision Making: A Research Note*, 42 W. POL. Q. 427, 434 (1989).

core orientation to law, with variation beyond that, is normal among judges.

B. *Recent Studies of Lower Federal Courts*

A 2003 study of federal appellate courts by David Klein shifted from role orientation to ask judges what their goals are when deciding cases.³¹⁷ The two inquiries overlap closely but are not the same. Role orientations—the perceived obligation of a judge—shape judicial goals, but goals have a broader scope that draws in more general considerations related to the circumstances of judging and law. Klein interviewed two dozen judges from a number of federal circuits. His questions revolved around four basic goals: 1) producing good or just decisions; 2) producing legally correct decisions; 3) producing coherent, uniform law (within and across circuits); 4) and producing prompt decisions.³¹⁸ The judges were asked to rate the importance of each goal along a spectrum, ranging from very important, important, moderately important, not very important, to not important at all. Above all other alternatives, the judges identified producing legally correct decisions as a core goal. Fifteen said it was very important. Seven said it was important, and no one rated it anything less.³¹⁹ Perhaps surprisingly, producing prompt decisions earned the next strongest rating. Ten judges rated this as very important, six rated it important, and six called it moderately important (with none rating it below that).³²⁰ Arriving at just outcomes and maintaining uniform law were also identified by a majority of the judges as worthy goals, but comparatively fewer rated these as a very important goal.³²¹ Three judges felt that producing just outcomes was *not* very important and another three said it was not important at all.³²²

These results reinforce the point that judges exhibit core agreement, with some variation.³²³ They also provide a reminder that judges, like many people in many jobs, hold several goals that can sometimes conflict, and they can value highly what outsiders might assume to be less significant. Issuing a prompt decision, which drew a stronger response than doing justice, is motivated by concerns about carrying

³¹⁷ KLEIN, *supra* note 133, at 7–9.

³¹⁸ *See id.* at 14–18, 22.

³¹⁹ *Id.* at 22 (tabulating the results).

³²⁰ *Id.*

³²¹ *Id.*

³²² KLEIN, *supra* note 133, at 22.

³²³ *See id.*

their fair share of the weight relative to their colleagues, getting through work loads, and exhibiting sensitivity to litigants.³²⁴ Releasing decisions promptly can be in tension with the other goals, which are (in different ways) about getting things right (however long that might take).³²⁵

Klein then carefully structured the study to look at what judges do in legally uncertain cases that involve issues with politically controversial implications. He looked at antitrust, search and seizure, and environmental law cases decided between 1984 and 1991.³²⁶ To get at legally uncertain situations, he further narrowed these cases to only those in which new legal rules were declared.³²⁷ Klein then systematically examined the resulting sixty-two cases, which announced eighty-one new legal rules, against the deciding judges' respective backgrounds.³²⁸

As expected, Klein found a statistically significant correlation between political preferences and the rules adopted: liberal judges preferred liberal rules, whereas conservative judges preferred conservative rules.³²⁹ His more intriguing finding was that their political preferences, although a substantial factor in these legally open cases, did not alone explain their decisions. The perceived prestige or expertise of judges who authored preexisting opinions was statistically related with other courts following those decisions, suggesting that judges care about getting the correct legal result.³³⁰ The desire to maintain consistency among legal interpretations also had statistical support.³³¹ "In short, while this study reaffirms the view that policy preferences matter, it also provides substantial evidence of the importance of legal goals."³³² The novelty of Klein's study is that, although it confirmed that political influences matter in precisely the situations one would expect, it also demonstrated that, even in these contexts, judges do not care

³²⁴ See *id.* at 25–26.

³²⁵ See *id.* at 26.

³²⁶ *Id.* at 40–41. These subjects were thought to have particular political salience. See *id.* at 40. Klein also included two antitrust cases from 1983 because he found fewer new rules in antitrust than in other fields. *Id.* at 40 n.1.

³²⁷ KLEIN, *supra* note 133, at 40–41.

³²⁸ *Id.* at 46.

³²⁹ *Id.* at 81–85.

³³⁰ See *id.* at 65–69, 75.

³³¹ See *id.* at 84–85. Klein notes that, although his study does find a significant correlation between prior decisions reached by other circuits and decisions by circuits ruling on a legal problem for the first time, this correlation could be caused by a number of different explanations. See *id.*

³³² KLEIN, *supra* note 133, at 141.

only about politics, but continue to be moved by legal considerations.³³³

Another recent study of federal appellate courts looked at courts as collegial institutions.³³⁴ Judges have often emphasized that collegiality matters,³³⁵ both in connection with fellow judges sitting on the same panel, as well as with respect to lower courts. The authors, Virginia Hettinger, Stephanie Lindquist, and Wendy Martinek, attempted to discern the factors that produce dissenting or concurring opinions and reversals, which they characterized as disruptions of collegiality among judges.³³⁶ They examined a comprehensive database of published appellate opinions from 1960 to 1996, finding dissents in 9.5 percent of the cases, and concurrences in 5.5 percent of the cases.³³⁷ As these numbers reflect, federal appellate judges agree on their legal decisions an overwhelming proportion of the time, regardless of differences in political views.³³⁸

The attitudinal model suggests that legal disagreements are ideologically driven.³³⁹ Presumably, therefore, dissents and concurrences should be more likely when a panel is composed of judges with different political preferences. And that is what the authors found.³⁴⁰ They also found, however, that the rate of concurrences and dissents were statistically related to other factors as well, including the perceived significance of the case, the presence of legal ambiguity, and prevailing norms within the circuit about writing separate opinions, in addition to other factors.³⁴¹ The presence of an amicus brief (reflecting salience) and circuit norms about writing separate opinions (whether this is disfavored) had a stronger effect than ideology.³⁴² In another aspect of the study, they found no evidence that circuit courts strategically shape their rules in anticipation of Supreme Court review, throwing doubt on

³³³ See *id.* at 141–42.

³³⁴ See HETTINGER ET AL., *supra* note 11, at 1–4.

³³⁵ See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2002) (former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit arguing that collegiality matters); Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26 (1991) (former Chief Judge on the U.S. Court of Appeals for the Third Circuit arguing that collegiality matters).

³³⁶ See HETTINGER ET AL., *supra* note 11, at 2–4.

³³⁷ *Id.* at 47.

³³⁸ See *id.*

³³⁹ See Czarnecki & Ford, *supra* note 95, at 848.

³⁴⁰ HETTINGER ET AL., *supra* note 11, at 63–64.

³⁴¹ *Id.* at 64. Chief judges, freshman judges, and district court judges sitting on a panel by designation are all less likely to dissent but not less likely to concur. *Id.*

³⁴² *Id.* at 67.

the soundness of the strategic model as an explanation of federal appellate court judging.³⁴³

The most surprising finding came in connection with reversals of lower courts. About 30 percent of the cases they examined between 1960 and 1996 involved reversals (although the rates of reversal differed among circuits and over time).³⁴⁴ The attitudinal model suggests that panels controlled by judges with one set of political preferences will be more likely to overturn trial judges with the opposite political preferences.³⁴⁵ Contrary to their expectations, however, the authors found *no* statistical relation between ideological differences and the rate of reversal.³⁴⁶ The presence of *amicus curiae*, ambiguity of legal issues, and other factors were related to the likelihood of reversal, but “panel decisions to reverse are not shaped by raw ideological disagreement with the lower court.”³⁴⁷

A 2007 book by Frank Cross examined federal appellate court decision making in a database containing more than eighteen thousand cases decided from 1925 to 1992.³⁴⁸ He conducted quantitative analyses from just about every angle that judicial politics scholars have applied to the study of courts. This exhaustive study is too detailed to relate, so its major conclusions will be summarily set forth. Although Cross found a statistically significant association between ideology and decisions, which differed with subject matter and over time, “the measured effect size for

³⁴³ See *id.* at 86. Klein’s study also raised doubts about the applicability of the strategic model. KLEIN, *supra* note 133, at 127.

³⁴⁴ HETTINGER, LINDQUIST & MARTINEK, *supra* note 11, at 97.

³⁴⁵ *Id.* at 91.

³⁴⁶ *Id.* at 98–99, 117–19.

³⁴⁷ *Id.* at 105. This comprehensive 2006 study covered 994 judges from all the federal circuits in cases spanning thirty-seven years, looking at separate opinions and reversals (over seventeen thousand positions). These are the situations with the greatest legal disagreement. Yet their results confounded several central assumptions current within the judicial politics field. They found no evidence of strategic reasoning. They found that ideology was a factor in the writing of separate opinions, but also that other factors showed a greater relation. Most strikingly, they found no relation between ideology and rates of reversal. One of the authors of this study also produced a recent study showing some correlation between ideology and the rate of reversal. The authors here suggest that this different finding is explained by the fact that the other study was limited only to civil rights cases, which perhaps have a greater ideological charge. *Id.* at 118. For the other study, see Susan B. Haire, Stephanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC. REV. 143 (2003). A much less elaborate 1993 study of the D.C. Circuit, widely thought at the time to be a highly political court, also found that rates of reversal *did not* link up with ideology. See Eva M. Rodriguez, *Report Card for Federal Trial Bench*, LEGAL TIMES, Oct. 18, 1993, at 1.

³⁴⁸ CROSS, *supra* note 283, at 3.

ideology is always a fairly small one."³⁴⁹ To test the legal model, Cross examined procedural rules and found that decisions varied systematically in accordance with the required burden, demonstrating that legal rules "matter greatly in determining outcomes."³⁵⁰ Cross found compelling evidence that appellate courts follow precedent set by the Supreme Court.³⁵¹ He tested a variety of personal background factors—prior employment, religion, race, gender, wealth—and concluded that "background variables have very little effect."³⁵² Cross found no statistical support for the "strategic model" of decision making.³⁵³ He also found little evidence that the identity of litigants (government parties, businesses, individuals) drove judicial decision making.³⁵⁴ The ideological composition of panels *did* have measurable effects on decisions, with split panels producing less ideological decisions.³⁵⁵

The dominant finding that runs through the book, Cross concluded, "is the importance of law in determining judicial outcomes."³⁵⁶ "It [was] also noteworthy how very limited the explanatory power of the non-legal variables was."³⁵⁷ The influence of ideology shows up

³⁴⁹ *Id.* at 38.

³⁵⁰ *Id.* at 67.

³⁵¹ *Id.* at 103–08.

³⁵² *Id.* at 92.

³⁵³ CROSS, *supra* note 283, at 122. Cross found a statistically significant *negative* correlation between circuit court decisions and the ideological preferences of Supreme Court as the time of the decision, but a positive correlation between circuit court decisions and the ideological preferences of Supreme Court in the five years preceding the decision. *Id.* at 104. These findings suggest "that circuit court judges do not anticipatorily repudiate old precedents but instead aggressively follow old precedents that are presumptively unattractive to the current Supreme Court." *See id.* The traditional strategic model would have predicted the opposite results—that lower courts factor the preferences of higher courts into their decisions to avoid reversal. *See id.* Cross's study also found that the preferences of full circuits and the legislature did not have a substantial effect on circuit court decision making. *See id.* at 109–11, 115–18.

³⁵⁴ *Id.* at 147. Cross first compared the success rates of different litigants, and finding that the federal government, as an appellant, tended to win more often than other appellants, tested the strategic theory that because the federal government has a continued interest in criminal case law, it would be more likely to appeal adverse rulings to ideologically conservative courts, where it would be more likely to succeed and create desired precedent. *See id.* at 136–40. Cross found, however, that the government pressed appeals before more liberal panels, refuting the traditional strategic theory that litigants act to create favorable case law by appealing decisions before panels that are ideologically more friendly. *See id.* at 140. Cross also looked at the effect of federal litigants in labor decisions and of litigants on opinion length, and concluded that "litigants do not appear to play a major role in driving judicial decisions." *Id.* at 147.

³⁵⁵ *Id.* at 177 (studying the effects of the ideological makeup of panels on decisions).

³⁵⁶ *Id.* at 228.

³⁵⁷ *Id.* at 229.

across the range of areas studied, but "the effect was small."³⁵⁸ Ideology, gender, wealth, the identity of the litigants, the composition of appellate panels, and other factors were found to have statistically significant correlations with decisions in certain categories of cases, but the impact was not substantial in any particular instance or collectively, and all were negligible in comparison to law.³⁵⁹

Cross's core findings about the relative insignificance of ideology and the substantial significance of legal factors in determining judicial decisions is consistent with a growing body of quantitative studies of lower federal courts.³⁶⁰ A recent study of non-unanimous decisions made by the U.S. Court of Appeals for the Seventh Circuit from 1997 through 2003—precisely the subset of cases in which ideology is expected to show—found no statistically significant connection between ideology and dissenting behavior: "The data suggest that ideological differences do not affect judicial disagreement."³⁶¹ Studies have also found that circuit courts adhere to precedent established by the Supreme Court.³⁶²

An ingenious recent study designed to tease out the impact of ideology was conducted by Donald R. Songer, Martha Humphries Ginn, and Tammy A. Sarver, examining federal appellate decisions in tort cases based upon diversity jurisdiction.³⁶³ In diversity jurisdiction cases, state tort law is applied by federal courts.³⁶⁴ This subset of cases provides a natural experiment because the judges are virtually free from any risk of reversal from the Supreme Court or Congress.³⁶⁵ Thus, the judges have unchecked reign to reach decisions based upon their policy preferences, which the attitudinal and strategic models suggest they would eagerly do. The authors, however, found very small differences in the decisions of conservative, moderate, and liberal judges.³⁶⁶ They also found that ruling patterns (for or against plaintiffs and defen-

³⁵⁸ CROSS, *supra* note 283, at 229.

³⁵⁹ See *id.* at 229–30.

³⁶⁰ See *id.*; see also *infra* notes 361–398 and accompanying text.

³⁶¹ Czarnezki & Ford, *supra* note 95, at 883.

³⁶² See, e.g., Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Court of Appeals*, 43 W. POL. Q. 297, 313 (1990) (finding "near universal" compliance among circuit courts with the *Miranda* and *New York Times* decisions).

³⁶³ See Donald R. Songer, Martha Humphries Ginn & Tammy A. Sarver, *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137 (2003).

³⁶⁴ See *id.* at 139.

³⁶⁵ See *id.* at 142. The Supreme Court did not review the determinations of state law in any of the 697 cases covered in the 28-year period examined in the study. See *id.*

³⁶⁶ *Id.* at 148–51.

dants) shifted in conformity with differences in state law, which indicates that judges, whatever their policy preferences, ruled in conformity with prevailing state legal regimes.³⁶⁷ The authors then compared unanimous cases with non-unanimous cases, speculating that the latter would be more open to ideological bias. In the former cases, ideology was not statistically significant (though legal variables were), whereas in the latter it was, a finding that suggests that political views come into play in hard cases with open legal questions.³⁶⁸ This finding holds, it must be remembered, within a total context that shows only very small differences among judges with different political positions.³⁶⁹ Thus, this study found that even judges free from concern about reversal by a higher court did not rule in an ideological fashion in a substantial proportion of cases.³⁷⁰

Studies of federal appellate courts are becoming more plentiful, facilitated by the creation of a large database of coded opinions. There are fewer studies of the decisions of federal trial courts, however, making it harder to draw broad conclusions. What studies of trial courts have found is generally consistent with studies of circuit courts: ideology matters, but in a relatively small proportion of cases clustered in a few specific subject matters.³⁷¹

An exhaustive study by C.K. Rowland and Ronald Carp of almost twenty-eight thousand federal court opinions from 1933 through 1977 in certain categories of cases (civil rights, criminal justice, labor, economic regulation, etc.) found that the decisions of Democratic appointees were about 7 percent more liberal than those of Republican appointees.³⁷² They also found that this number varied over time (ranging from 1 percent to 11 percent), and that decisions varied based on the judges' location in either the northern or southern regions of the country.³⁷³ The authors concluded that most trial court decisions are determined by controlling precedents and the evidence, with other factors coming into play when the law is open or ambiguous and the evidence evenly divided.³⁷⁴ A follow-up study by Rowland and Carp focusing on cases between 1969 and 1986 found an increase in partisan

³⁶⁷ See *id.* at 150-51.

³⁶⁸ See Songer et al., *supra* note 363, at 151-54.

³⁶⁹ See *id.* at 138-39.

³⁷⁰ See *id.* at 155.

³⁷¹ See *infra* notes 372-391 and accompanying text.

³⁷² ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 14 (1983).

³⁷³ *Id.* at 166-68.

³⁷⁴ *Id.* at 165.

polarization, with the difference in decisions between Democratic and Republican appointees increasing to 12 percent.³⁷⁵ The differences on specific issues can rise to shocking levels. Judges appointed by President Carter, a Democrat, upheld minority claims in race discrimination cases 78 percent of the time, whereas Reagan appointees did so in only 18 percent of cases.³⁷⁶ This extreme difference was almost double the next largest disparity.³⁷⁷ Other than this, the differences overall, although notable, were not large.³⁷⁸

Based upon their findings, Rowland and Carp argued that the "attitudinal model" should be abandoned in favor of a theory of cognition.³⁷⁹ What explains the differences in judgment is not that judges are striving to achieve their political preferences. The authors postulate that, on the whole, judges render their decisions in a good faith effort to rule objectively in accordance with the law.³⁸⁰ Judgments must be made with respect to ambiguous legal and factual issues, and judges approach these issues within cognitive frames that shape how the judgments are made.³⁸¹ When rendering judgments about the facts (when assessing the probabilities about which side is correct in factual disputes), they suggested, the differences in cognitive frames account for the differences in decisions, whereas the shared orientation to law accounts for the substantial overlap in decisions notwithstanding ideological differences.³⁸²

Studies have found that district courts duly comply with precedents established by the Supreme Court, even when the outcome is contrary to their policy preferences.³⁸³ A study of over two thousand cases found almost no evidence that the political backgrounds of judges influenced outcomes, concluding that "[i]n the mass of cases that are filed, even civil rights and prisoner cases, the law—not the judge—dominates the

³⁷⁵ C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 31 (1996).

³⁷⁶ *Id.* at 49 tbl.2-10.

³⁷⁷ *Id.* at 49.

³⁷⁸ *See id.* at 56.

³⁷⁹ *See id.* at 150-51.

³⁸⁰ ROWLAND & CARP, *supra* note 375, at 159.

³⁸¹ *Id.* at 169.

³⁸² *Id.* at 152-73.

³⁸³ *See, e.g.,* Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325 (1987) (study demonstrating that the variation in lower federal court responses to Supreme Court decisions is better explained by the legal model than a political model).

outcomes."³⁸⁴ A recent study by Joseph L. Smith of federal district court decisions in the D.C. Circuit involving civil rights claims—selected for study because this subset of cases is thought likely to invoke the policy preferences of judges³⁸⁵—found a limited ideological influence at trial and on appeal.³⁸⁶ Reagan district court appointees were more likely than Clinton appointees to favor defendants, showing a “noticeable, but not overwhelming, partisan tilt”;³⁸⁷ there were only minor differences (“no noticeable bias”) in the decision patterns of Republican and Democratic dominated panels on appeal.³⁸⁸ Smith also found that district judges shifted their decision behavior subsequent to reversals of their decisions to conform to the direction set by the appellate court,³⁸⁹ which suggests that they were abiding by the dictates of their immediate superiors.³⁹⁰

The evidence derived from quantitative studies of federal circuit and district court decision making is beginning to accumulate along the same lines. “The growing body of empirical research on the lower federal courts . . . reveals that ideology explains only a relatively modest part of judicial behavior and emerges on the margins in controversial and ideologically contested cases.”³⁹¹

The picture presented by these studies is not consistent across the board. A few studies have found a degree of ideological influence that is more than modest.³⁹² More dramatic differences tend to show up in areas in which judges have greater discretion and the issues have strong ideological or personal overtones. For example, although a number of studies have found little or no gender effects on judging, a recent study of employment discrimination cases found that the likelihood of finding discrimination decreases by 10 percent for male judges compared to female judges.³⁹³ A recent study of cases involving the voting rights

³⁸⁴ Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995).

³⁸⁵ See Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 29, 34 (2006).

³⁸⁶ See *id.* at 36, 38.

³⁸⁷ *Id.* at 38.

³⁸⁸ *Id.* at 37.

³⁸⁹ *Id.* at 29, 39–43.

³⁹⁰ Smith, *supra* note 385, at 28–29, 39–43.

³⁹¹ Sisk & Heise, *supra* note 283, at 746; see also Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 396 (2007).

³⁹² See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766–69 (1977).

³⁹³ See Christina L. Boyd, Lee Epstein & Andrew D. Marin, *Untangling the Causal Effects of Sex on Judging* 3 (n.d.) (unpublished manuscript), available at <http://ssrn.com/>

act—which tends to evoke ideological divisions—found that Democratic appointees voted for liability 44 percent of the time compared to 22 percent for Republican appointees.³⁹⁴ Nevertheless, it remains unusual to find significant differences in legal decisions owing to ideological differences.

Studies of lower courts are not numerous, and significant methodological issues have yet to be worked out, so the results reported above must be taken as tentative.³⁹⁵ For example, a decades-old study has often been cited for showing political influences in judicial review of administrative agency decisions,³⁹⁶ but a more recent study came to a contrary finding, concluding that political backgrounds did not match decision patterns.³⁹⁷ It is not clear which study is more reliable or whether they can be reconciled.³⁹⁸

Two pivotal aspects of existing studies remain especially problematic.³⁹⁹ The proposition that the judges are pursuing their policy preferences in their legal decisions cannot be tested unless one knows what those preferences are, and knows whether particular legal decisions advance them.⁴⁰⁰ But neither of these is easy to determine, because judges do not announce their policy preferences, and legal decisions revolve around legal issues without an announced or unequivocal political thrust. Political scientists have relied upon proxies to answer both questions. The standard way to identify the ideology of the judge is to use the political party of the appointing president—sometimes supplemented by factoring in the party that controls the Senate or the party of the home-state senators, or by party affiliation of the judge,

abstract=1001748; see also Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POLITICS 425, 436 (1994) (finding no gender effects in obscenity and search and seizure cases, but finding such effects in employment discrimination cases).

³⁹⁴ See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 24 (2008). The authors also found that African American judges voted for liability at about twice the rate of white judges, but the sample of judges and cases was small. *Id.* at 30.

³⁹⁵ Baum suggests the same in BAUM, *supra* note 105, at 8–11.

³⁹⁶ See Revesz, *supra* note 392, at 1766–67.

³⁹⁷ See William S. Jordan, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 98–99 & n.110 (2001).

³⁹⁸ See *id.*; Revesz, *supra* note 392, at 1766–67.

³⁹⁹ See generally Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. (forthcoming 2009) (providing a critical exploration of these issues).

⁴⁰⁰ See generally Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y (forthcoming 2009), available at <http://ssrn.com/abstract=1121228> (providing an excellent elaboration of both problems).

previous employment, or other factors⁴⁰¹—on the assumption that a conservative president will appoint a conservative judge, and vice versa.⁴⁰² There are obvious objections to this, including that judicial appointments are not driven always or purely by ideology, there are different streams within the “conservative” and “liberal” political positions, people hold various combinations of positions, they assign different significances to different issues, and they have different degrees of conviction with respect to issues.⁴⁰³

As for the second issue, the standard way to code the political orientation of judicial votes is to identify the main issue at stake, and to look at the alignment of the litigants in connection with that issue; for example, decisions in favor of environmental groups, criminal defendants, civil rights claimants, and labor unions are typically deemed “liberal,” whereas the opposite decisions are deemed “conservative,” without any consideration of the applicable law.⁴⁰⁴ There are clear problems with this approach, including that cases frequently involve multiple issues (so coding a case involves contestable judgments), and the way a legal issue is framed in a given case can be inconsistent with the assumed liberal/conservative alignments.⁴⁰⁵ How one measures a judge’s ideology and how one identifies the ideological orientation of a decision directly affect the results of the study, as researchers have found: “Our comparisons establish that efforts to estimate the impact of ideology on judicial behavior can yield significantly different results depending upon how one chooses to measure ideology.”⁴⁰⁶

Owing to these problems, it is prudent to be cautious about making too much of the findings of current studies. They provide useful information, however, and have presented a consistent overall picture. After systematically targeting situations of legal disagreement and po-

⁴⁰¹ See, e.g., Ashenfelter et al., *supra* note 384, at 273–74.

⁴⁰² See *id.* For the latest elaboration of this point, see Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306–09 (2007).

⁴⁰³ See Edwards & Livermore, *supra* note 399 (manuscript at 36–39) (elaborating on several of these objections).

⁴⁰⁴ See Anna Harvey, What Makes a Judgment “Liberal”? Coding Bias in the United States Supreme Court Judicial Database 3 (June 15, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1120970>.

⁴⁰⁵ In a recent study, William Landes and Richard Posner recoded a class of cases in the federal appellate court database. See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 3 (Univ. of Chi., John M. Olin Law & Economics Working Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403>. Anna Harvey argues that there is a systematic bias in the Supreme Court database produced by determination of the primary issue of the case. See Harvey, *supra* note 404, at 27–28.

⁴⁰⁶ Fischman & Law, *supra* note 400 (manuscript at 4).

litically salient issues, researchers have found that politics show a relatively limited influence on judging below the Supreme Court. In the early 1990s, quantitative studies already suggested that "ideological values play a less prominent role in the lower federal courts"; recent studies have strengthened this finding.⁴⁰⁷

Quantitative studies arguably were not necessary to demonstrate this, given that federal appellate courts have long issued unanimous opinions about 85 percent of the time.⁴⁰⁸ Judicial politics scholars are quick, and correct, to point out that this high number does not necessarily represent agreement on the legal issues, as judges may, out of collegiality or for some other reason, forego a dissent even when they disagree.⁴⁰⁹ Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit acknowledged twenty years ago that "the percentage of dissenting opinions is not necessarily a true reflection of all the occasions on which one member of a panel disagrees with the panel decision," but he added that this would "not significantly increase" the number of explicit dissents.⁴¹⁰

C. *Balanced Realism of Judges in Light of Quantitative Studies*

A recent critic objected that judicial politics scholars have consistently focused on situations that they expect will show that judging is political.⁴¹¹ But the more compelling point is that *in spite of* this slant, judicial politics scholars have found far less political influence than expected.⁴¹²

As conveyed in the preceding Part, judges have, for many decades, acknowledged that there are open legal questions with no clear answer, that judgments and choices must be made, and that personal biases or political preference sometimes come into play in judicial decisions.⁴¹³ Highly respected contemporary judges have openly and repeatedly made these same points. Judge Newman, for example, wrote that "I am not so naïve as to deny that some judges in some cases permit personal predilections to determine the result. The equities sometimes matter,

⁴⁰⁷ Songer & Haire, *supra* note 154, at 964.

⁴⁰⁸ See HETTINGER ET AL., *supra* note 11, at 47.

⁴⁰⁹ See POSNER, *supra* note 3, at 51; Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 10–11 (1984).

⁴¹⁰ Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 204 n.8 (1984).

⁴¹¹ Friedman, *supra* note 9, at 271.

⁴¹² See *supra* notes 317–410 and accompanying text.

⁴¹³ See *supra* notes 199–281 and accompanying text.

the rule of law is sometimes bent."⁴¹⁴ Judge Alex Kozinski of the Ninth Circuit, a self-proclaimed legalist, declared that "judges do in fact have considerable discretion in certain of their decisions";⁴¹⁵ that with legal principles "there is frequently some room for the exercise of personal judgment";⁴¹⁶ that "[p]recedent . . . frequently leaves room for judgment";⁴¹⁷ that "[w]e all view reality from our own peculiar perspective, we all have biases, interests, leanings, instincts";⁴¹⁸ and that "[i]t is very easy to take sides in a case and subtly shade the decision-making process in favor of the party you favor."⁴¹⁹ Judge Edwards stated that a judicial panel comprised of judges with a shared ideological orientation "might use the occasion to tilt their opinion pursuant to their partisan preferences."⁴²⁰ Edwards also acknowledged that in very hard cases with no clear right legal answer "it may be true that a judge's views are influenced by his or her political or ideological beliefs."⁴²¹

In response to recent quantitative studies, former Chief Judge of the D.C. Circuit, Patricia Wald, sardonically offered "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 In such cases personal philosophy may well play a significant role in judging."⁴²² "But how could it be otherwise?" asked Judge Wald.⁴²³ "[T]he judge's political orientation *will* affect decisionmaking."⁴²⁴ She acknowledged that sometimes conflicting lines of precedent exist, allow-

⁴¹⁴ Newman, *supra* note 410, at 204.

⁴¹⁵ Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994 (1992). Although Judge Kozinski takes a hard line on strictly following the law when it is clear, he admits that, on occasion, his personal views have influenced his decisions. See Emily Bazelon, *The Big Kozinski*, LEGAL AFF., Jan.-Feb. 2004, at 22, 28, available at http://www.legalaffairs.org/issues/January-February-2004/feature_bazelon_jan_feb04.msp.

⁴¹⁶ Kozinski, *supra* note 415, at 996.

⁴¹⁷ *Id.* at 997.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ Edwards, *supra* note 335, at 1648.

⁴²¹ Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 854.

⁴²² Patricia Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999) (emphasis added).

⁴²³ *Id.* at 250.

⁴²⁴ Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 895 (1987).

ing judges to "follow those precedents which they like best."⁴²⁵ She also admitted that judges can ignore or distinguish away precedents that they do not like when the precedents are not precisely on point.⁴²⁶ "I would be naïve to suggest that all judges reason alike," she wrote.⁴²⁷

How could they, given their different backgrounds, experiences, perceptions, and former involvements, all of which are part of the intellectual capital they bring to the bench. The cumulative knowledge, experience, and internal bents that are in us are bound to influence our notions of how a case should be decided.⁴²⁸

Although judges candidly acknowledge these aspects of judging, they nonetheless uniformly insist that "the ordinary business of judges is to apply the law as they understand it, to reach results with which they do not necessarily agree."⁴²⁹ In Judge Newman's view, judges

do this every day. Distasteful statutes are declared constitutional and applied according to the legislators' evident intent; unwise decisions of administrative agencies are enforced; trial court rulings within the trial judge's discretion are upheld even though the reviewing judges would surely have ruled to the contrary; precedents of the local jurisdiction are followed that would be rejected as an initial proposition.⁴³⁰

Judge Kozinski insisted that, notwithstanding the ample room for discretion and judgment, judges are "subject to very significant constraints," and can try to become aware of and attempt to counter the influence of their biases.⁴³¹

Judges routinely admit the presence of ideological influence on decisions, but they also insist that it comes into play in a relatively small proportion of cases. In a consistent string from Benjamin Cardozo to the present, appellate judges have estimated that around 90 percent of the cases have clear legal answers, and judges rule accordingly regard-

⁴²⁵ Patrica M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 481 (1986).

⁴²⁶ *Id.* at 490.

⁴²⁷ Wald, *supra* note 409, at 12.

⁴²⁸ *Id.*

⁴²⁹ Newman, *supra* note 410, at 204.

⁴³⁰ *Id.*

⁴³¹ Kozinski, *supra* note 415, at 994, 997.

less of their political predispositions.⁴³² Judge Wald estimated that difficult judgments must be made in about 15 percent of the cases.⁴³³ Judge Edwards similarly estimated that about 5–15 percent of appellate cases are very hard, with equally strong competing legal arguments.⁴³⁴ “Disposition of this small number of cases, then, requires judges to exercise a measure of discretion, drawing to some degree on their own social and moral beliefs.”⁴³⁵ Even Judge Richard Posner, who revels in emphasizing the presence of legally uncertain cases (and who agrees that the percent of unanimous cases is not a measure of legal certainty because judges sometimes forego dissents even when they disagree⁴³⁶), nonetheless maintains that “[n]o responsible student of the judicial system supposes that ‘politics’ . . . or personal idiosyncrasy drives *most* decisions”⁴³⁷ “[M]ost cases are routine The routine case is dispatched with least fuss by legalist methods.”⁴³⁸

So, the results of quantitative studies are consistent with what judges have been saying all along. If recent trends within the field toward greater (even if begrudging) appreciation of legal factors bear out, the progress of the judicial politics field over the past half century will amount to a slow, twisted path to recover from the distorting slant built into the field.

D. *Emphasis on the Wrong Question: Whether? Or How Much?*

A potentially misleading concept within statistical analysis has subtly conjoined with the false story about the formalists to exacerbate the potential for mischief in the field. Quantitative studies of judging are measured by whether the results meet the standard of “statistical significance.”⁴³⁹ This technical term relates to the confidence one may have in the reliability of the correlation identified, providing assurance that the finding is not likely the product of random sampling.⁴⁴⁰ But this measure says absolutely nothing about magnitude or relevance,

⁴³² See BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 60 (1924) (stating that the outcome of nine-tenths or more of the cases to come before courts is predetermined by clear law).

⁴³³ Wald, *supra* note 422, at 236 n.6.

⁴³⁴ Edwards, *supra* note 421, at 857.

⁴³⁵ *Id.*

⁴³⁶ POSNER, *supra* note 3, at 51.

⁴³⁷ *Id.* at 8.

⁴³⁸ *Id.* at 46.

⁴³⁹ See CROSS, *supra* note 283, at 4 (describing statistical significance and what it means in the context of judicial politics studies).

⁴⁴⁰ See *id.*

nothing at all about the practical or real world significance of the finding.⁴⁴¹ The test of "statistical significance," as economists Stephen Ziliak and Deirdre McCloskey have emphasized, "does not ask *how much*. It asks '*whether*.'"⁴⁴² A finding can meet the "statistically significant" threshold—no greater than a 1 in 20 chance that the relation found is coincidental⁴⁴³—even if the size or impact of the finding is miniscule. Scholars who utilize statistical analysis, including judicial politics scholars, are well aware that "statistical significance" says nothing about actual or substantive significance.⁴⁴⁴ As Zilaik and McCloskey document with high profile examples across a range of fields, however, mistaking the former for the latter is an easy, tempting, and widely committed error in the interpretation of statistical analysis.⁴⁴⁵

A circumstance unique to the judicial politics field facilitates this error. From the outset, the core mission of quantitative studies was to refute the (supposed) "formalist" claim that judging is *purely* a matter of mechanical deduction.⁴⁴⁶ When framed in this way, the crucial point of dispute is *whether* politics matters, not *how much*.⁴⁴⁷ An affirmative showing of *any* statistically significant correlation between political views and legal decisions, however small, counts against the formalists. Even if the effect is tiny, judicial politics scholars can triumphantly say to the formalist: "See, you are wrong. Contrary to your complete denial, the political views of judges influence their decisions." And that is what judi-

⁴⁴¹ See STEPHEN T. ZILIAK & DEIRDER N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE* 5 (2008).

⁴⁴² *Id.*

⁴⁴³ See CROSS, *supra* note 283, at 4; ZILIAK & MCCLOSKEY, *supra* note 441, at 45–46. The identification of the 1 in 20 figure as the threshold is arbitrary, initially proposed by a leading theorist as a "convenient" marking point for confidence in the result, which then became entrenched in statistical analysis. See *id.* at 45–47.

⁴⁴⁴ See, e.g., CROSS, *supra* note 283, at 229 (stressing that although his studies did find that some factors, such as ideology, had a statistically significant association with decisions, none of these variables "explained more than a small fraction of the variance" in court decisions).

⁴⁴⁵ See ZILIAK & MCCLOSKEY, *supra* note 441, at 74–88 (examining studies in the *American Economic Review* during the 1980s and 1990s, finding that the majority of studies failed to distinguish between statistical significance and significance for policy purposes).

⁴⁴⁶ See *supra* notes 29–87 and accompanying text.

⁴⁴⁷ As Ziliak and McCloskey point out, the question of *whether* is rarely at issue in scientific inquiries. ZILIAK & MCCLOSKEY, *supra* note 441, at 50–53. This is one of those rare situations, but only because judicial politics scholars bought into the false story that formalists believe that judging is purely mechanical. When this false story is exposed, "whether" immediately becomes a non-issue, as is almost always the case. See *supra* notes 199–281 and accompanying text.

cial politics scholars declare, again and again.⁴⁴⁸ Under the sway of the false story about the formalists, "statistical significance" is tantamount to real significance because any finding that meets this threshold refutes the formalist target.⁴⁴⁹

This has fundamental implications for how quantitative studies have been constructed and interpreted. If the question is *whether* political preferences influence judicial decision making, it is sensible to concentrate on legally uncertain cases (non-unanimous decisions) that implicate politically salient issues because that is where one is most likely to find supportive evidence.⁴⁵⁰ As Hettinger, Lindquist, and Martinek describe, political scientists use this chain of reasoning to justify the design of their studies:

The empirical dynamics of judicial decision making also reveal that judges do far more than simply mechanically apply law to resolve disputes. In particular, dissensus among judges, whether among members of an appellate panel or between judges at different levels in a judicial hierarchy, often reflects conflict over the values inherent in different policy alternatives and indicates that judges are not always "bound" by existing precedent or other legal rules in determining case outcomes. . . . It is no surprise, then, that most political scientists interested in the policymaking dynamics on the bench have focused their attention on nonunanimous opinions, especially when constructing models of judicial voting behavior.⁴⁵¹

This passage manifests the continuing impact of the false story about the formalists—of purported belief in mechanical jurisprudence—on the design of studies of judging.⁴⁵²

As the preceding Part exhaustively established, however, judges have admitted for decades that personal values can have an influence on their decisions in uncertain or hard cases.⁴⁵³ Accordingly, the issue

⁴⁴⁸ See, e.g., SUNSTEIN ET AL., *supra* note 3, at 11 (suggesting that their study indicates politics has a large impact on judging because they found a statistically significant relationship between ideology and decision making in a subset of cases).

⁴⁴⁹ See *id.* at vii (describing the study as an "attempt to explore . . . the question of whether, and in what sense, appellate judges can be said to be 'political'").

⁴⁵⁰ See, e.g., CARP & ROWLAND, *supra* note 372, at 14 (selecting civil rights, criminal justice, labor, and economic regulation decisions for their study of the impact of politics on judging); HETTINGER ET AL., *supra* note 11, at 16–17.

⁴⁵¹ HETTINGER ET AL., *supra* note 11, at 16.

⁴⁵² See *id.*

⁴⁵³ See *supra* notes 199–281 and accompanying text.

of *whether* politics matters is not disputed by judges.⁴⁵⁴ Under what circumstances, in what ways, to what effect—these are the crucial questions. These are issues of *how much*. If one wants to learn about *how much* politics matters in judicial decision making, it is inappropriate to focus solely on the subclass of cases that are most likely to show political influences; decisions that show a political influence must always be described in the context of the total body of cases.

A brief return to the Hettinger, Lindquist, and Martinek study reveals how a distorted picture can be created by making statements based upon statistical significance without emphasizing *how much*.⁴⁵⁵ As described above, their study found that ideological differences among judges showed a statistically significant relationship with an increased likelihood of a dissent or a concurrence.⁴⁵⁶ The actual impact of this connection on the likelihood of a separate opinion (that is, addressing *how much* ideological differences matter) was *de minimis*. They noted:

Comparing the baseline predicted probabilities of observing, respectively, a concurrence and a dissent when ideological difference is at its maximum observed value . . . gives us a sense of the substantive effects of ideological difference. The difference in absolute terms is rather small, with slightly less than a 0.01 increase in the probability of a concurrence and a 0.02 increase in the probability of a dissent. This means for both concurrences and dissents, the probability increases approximately 50 percent over the baseline. The fact that these changes are small in absolute terms is not at all surprising, given that the likelihood of a concurrence or dissent is quite small to begin with. When we consider the effects in terms of percentage change, however, the effects are quite substantial.⁴⁵⁷

When judges with different ideological views sit on the same panel, the probability of a dissent increased by 2 percent and the probability of a concurrence increased by 1 percent.⁴⁵⁸ This marginal increase in probability was the actual impact of ideological difference in the total body of cases examined.⁴⁵⁹ The authors gloss this by emphasizing that it

⁴⁵⁴ See *supra* notes 199–281 and accompanying text.

⁴⁵⁵ See HETTINGER ET AL., *supra* note 11, at 65–66.

⁴⁵⁶ See *id.* at 63–64.

⁴⁵⁷ *Id.* at 65–66.

⁴⁵⁸ See *id.*

⁴⁵⁹ See *id.*

represents a 50 percent increase over the baseline rate of dissent, but a 50 percent increase over a very small number is still a very small number.⁴⁶⁰

If the bottom line is *how much* significance ideology has in producing separate opinions, the resounding answer provided by this study is: not much, hardly any, relatively little.⁴⁶¹ This conclusion is reinforced when one also considers that other factors tested—the presence of amicus briefs and circuit norms for separate opinions—showed an equal or higher increase in probability than ideological difference.⁴⁶²

To their credit, the authors do not ignore the actual impact of ideological difference, but they mention it once and then play it down, relying upon on the statistical significance of their finding to issue broad assertions that ideology matters—without saying how little it matters.⁴⁶³ Take their summary at the close of the chapter: “The findings presented in this chapter indicate that judicial behavior on appellate courts is *deeply embedded* within, and structured by, judges’ ideology, interpersonal relationships, and institutional context.”⁴⁶⁴ A few sentences later they assert that “both dissents and concurrences are functions of ideological disagreement.”⁴⁶⁵ In view of the exceedingly small (albeit statistically significant) impact of their findings, these are dubious assertions.⁴⁶⁶

Keep in mind, furthermore, that in the second main component of the study, the authors found no statistically significant correlation between ideological differences in the appellate panel and the trial court judge and rates of reversal.⁴⁶⁷ This important finding cuts directly against the prevailing assumption within the field—“that judges are motivated to embody their policy preferences in the law”⁴⁶⁸

When all of the results are taken together, this study can be read as a powerful demonstration of the marginal impact that the political

⁴⁶⁰ See HETTINGER ET AL., *supra* note 11, at 65–66.

⁴⁶¹ *See id.*

⁴⁶² *See id.* at 67.

⁴⁶³ *See id.* at 70.

⁴⁶⁴ *Id.* (emphasis added).

⁴⁶⁵ HETTINGER ET AL., *supra* note 11, at 70.

⁴⁶⁶ *See id.* at 65–66, 70. Stating that “dissents and concurrences are a function of ideological disagreements” is likely to leave a very different impression in the reader’s mind than stating that ideological disagreements increase the probability of a dissent by 2 percent. *See id.*

⁴⁶⁷ *See id.* at 98.

⁴⁶⁸ *Id.* at 33. The authors incorporate this attitudinal model as their baseline and supplement it with other institutional considerations, but the central orientation remains dominant. *See id.*

preferences of judges have in federal appellate decision making.⁴⁶⁹ Succumbing to the slant in the field, however, the authors portray it the opposite way by offering a potentially distorting “balanced” characterization:

Because separate opinions and reversals constitute behavioral manifestations of judges’ discretionary authority, studies of dissensus shed light on critical questions related to the effective functioning and legitimacy of our legal system and the operation of the rule of law Our findings cut both ways. The evidence we have presented . . . demonstrates that judging is both a legal and a political activity and that, in either case, it is an activity that takes place in an institutional context that substantially shapes the enterprise.⁴⁷⁰

To suggest that politics infuses judging, as political scientists often do, is just as misleading as the suggestion that politics has absolutely no impact on judging (which no jurist asserts). Only by ignoring the issue of *how much* can the phrase “judging is both legal and political” be uttered in connection with the findings of this study.⁴⁷¹ Strictly speaking, their statement is accurate—as it would be true even if ideology has a tiny impact—but to phrase it that way nonetheless perpetuates an inaccurate impression.⁴⁷² The legitimacy of judging, the rule of law, depend entirely on questions about how much.

IV. REDRESSING THE SLANT

A. *Measuring the Threat to the Rule of Law*

The final study to be discussed, published in 2006 by Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki, received a great deal of attention both inside and outside of academia. It focused on the consequences of differences in the ideological composition of appellate panels.⁴⁷³ The authors announce in alarmist overtones that

⁴⁶⁹ See *id.* at 65–66, 98.

⁴⁷⁰ HETTINGER ET AL., *supra* note 11, at 110.

⁴⁷¹ See *id.* at 65–66, 110.

⁴⁷² Frank Cross’s study of appellate court decision making is exemplary in addressing the actual significance of his findings in the context of the total body of judicial decisions. See CROSS, *supra* note 283, at 229.

⁴⁷³ See SUNSTEIN ET AL., *supra* note 3 (examining appellate court cases involving politically charged areas of law, such as abortion, commercial speech, gay and lesbian rights, and

"variations in panel composition lead to *dramatically* different outcomes, in a way that creates *serious problems for the rule of law*."⁴⁷⁴ In an editorial in the *New York Times* describing the findings of their study, Sunstein and Schkade wrote: "[H]ow much does ideology matter once judges are on the bench? . . . [I]t matters a lot."⁴⁷⁵

The authors identified three effects of ideology on panel decision making: amplification, dampening, and conformity. Panels comprised of all Democratic appointees were twice as likely than panels with only Republican appointees to vote for the liberal position (amplification).⁴⁷⁶ On mixed panels, the ideological pattern of voting is substantially reduced (dampening).⁴⁷⁷ Finally, Democratic appointees are more likely to vote conservative when sitting with two Republicans (conformity).⁴⁷⁸ The votes of individual judges are thus influenced by whom they sit with.⁴⁷⁹ These results suggest that the fate of litigants turns on the ideological mix of the randomly assigned panel judges.⁴⁸⁰ This is not consistent with the rule of law principle that the law is applied equally to all in an unbiased fashion.

A closer look, however, presents a less worrisome picture. As the authors acknowledge, the subset of cases that are actually appealed following trial are more likely to have "a degree of indeterminacy in the law."⁴⁸¹ Their study, moreover, was limited to decisions published in the federal reporters, which represent only about 20 percent of all opinions.⁴⁸² Appellate courts follow a policy of publishing decisions that

others, to determine the effect of judges' ideology, assumed to be similar to those of the appointing president, on decisions and the effect of the ideological makeup of a panel).

⁴⁷⁴ *Id.* at 11 (emphasis added).

⁴⁷⁵ David A. Schkade & Cass R. Sunstein, Op-Ed., *Judging By Where You Sit*, N.Y. TIMES, June 11, 2003, at A31.

⁴⁷⁶ See SUNSTEIN ET AL., *supra* note 3, at 10–11.

⁴⁷⁷ See *id.* at 10–11, 24.

⁴⁷⁸ See *id.*

⁴⁷⁹ See *id.*

⁴⁸⁰ See *id.*

⁴⁸¹ SUNSTEIN ET AL., *supra* note 3, at 16 n.20.

⁴⁸² See Wendy L. Martinek, *Appellate Workhorses of the Federal Judiciary: The U.S. Courts of Appeals*, in EXPLORING JUDICIAL POLITICS, *supra* note 146, at 125, 134 (providing the percentage of appeals that were not published each year from 1990 to 2003). From 1999 to 2003, about 20 percent of appeals disposed of on the merits were published. See *id.* For the same statistics for years 2003–2008, see ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR 44 tbl.S-3 (2008) (81.8 percent unpublished); ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR 48 tbl.S-3 (2007) (83.5 percent unpublished); ADMIN. OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR 52 tbl.S-3 (2006) (84.1 percent unpublished); ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR 42 tbl.S-3 (2005) (81.6 percent unpublished); ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR 39 tbl.S-3

have value as precedents,⁴⁸³ which suggests that the unpublished bulk of cases is likely to be routine in legal terms.⁴⁸⁴ Thus, as Judge Patricia Wald observed, “[O]mitting unpublished opinions will tend to exaggerate the partisan nature of judicial decisionmaking.”⁴⁸⁵ This observation is supported by the significantly lower rate of dissent when unpublished opinions are counted. In 2000, for example, the D.C. Circuit dissent rate for all cases was 1.6 percent, but rose to 7.8 percent when only published cases were counted. In 2001, the dissent rate for all federal appeals was less than 1 percent, but 4.8 percent when the sample was restricted to only published cases.⁴⁸⁶

Another reason that the findings of the 2006 study are not as worrisome as they seem is that the authors specifically examined issues that they thought were likely to show ideological influences. Notwithstanding this selective focus, no ideological effect was evident in five major areas.⁴⁸⁷ In the areas in which ideological differences did show, the differences were not large.⁴⁸⁸ Overall, Democrat appointees voted for the liberal legal position 52 percent of the time whereas Republican appointees voted for the liberal position only 40 percent of the time.⁴⁸⁹ In other words, the decisions of Republican-appointed judges and Democrat-appointed judges overlap substantially, meaning that the law is often clear, and judges vote the same way no matter who appoints them.⁴⁹⁰ By their own account, their study focuses on the subset of cases in which “the law is unclear or in flux.”⁴⁹¹

(2004) (81 percent unpublished); ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR 36 (b1.S-3 (2003) (79.9 percent unpublished)). The annual reports of the director of the Administrative Office of the U.S. Courts are available at <http://www.uscourts.gov/judbususc/judbus.html> (last visited Mar. 22, 2009).

⁴⁸³ SEGAL ET AL., *supra* note 67, at 223–26; Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 253–57 (2003) (describing the Eleventh Circuit’s official policy regarding the publication of opinion and the considerations that go into deciding whether opinions should be published).

⁴⁸⁴ SUNSTEIN ET AL., *supra* note 3, at 18.

⁴⁸⁵ Wald, *supra* note 422, at 246.

⁴⁸⁶ The data was taken from the Clerk’s Office of the D.C. Circuit, reported in Edwards, *supra* note 335, at 1658.

⁴⁸⁷ SUNSTEIN ET AL., *supra* note 3, at 11.

⁴⁸⁸ *Id.* at 129. Statistically significant ideological voting was mainly clustered in two categories—employment discrimination and disabilities. See Sisk & Heise, *supra* note 283, at 578.

⁴⁸⁹ SUNSTEIN ET AL., *supra* note 3, at 13.

⁴⁹⁰ See *id.* at 12.

⁴⁹¹ *Id.* at 133.

Do these findings reveal "serious problems for the rule of law?" In a separate paper summarizing the findings of recent quantitative studies of judging, Cass Sunstein and Thomas Miles again suggest that these findings have troublesome implications for the rule of law:

Committed realists, emphasizing the importance of political judgments, will want to declare a clear victory. They will stress the evident disagreement, in many domains, between Republican and Democratic appointees—and thus point to the plain impact of political convictions on judicial decisions. But on the data as it stands, judicial policy preferences are only part of the picture. In most domains, the division between Republicans and Democratic appointees, while significant, is far from huge; the law, as such, seems to be having a constraining effect. . . . We are speaking, moreover, of the most contested areas of the law, where political differences are most likely to break out—and also of appellate cases, where the legal materials are likely to have a degree of indeterminacy. For those who believe in the rule of law, and in the discipline imposed by the legal system, the results of the New Legal Realism need not be entirely discouraging. The glass is half-empty, perhaps, but it also half-full.⁴⁹²

It is ironic that self-proclaimed realists would make these observations. Only someone who demands perfection of law and judges—someone who believes in mechanical jurisprudence—would conclude that the rule of law glass is "half empty" merely based upon a showing that political influences come into play in a subset of contested legal issues. Only "a disappointed absolutist" who "has found that rules are not all they would be in a formalist's heaven" would declare based on this finding that the rule of law is not being met.⁴⁹³

That is an unrealistic stance. No judicial system manned by humans can stamp out all possible ideological influence. Federal District Judge Alvin Rubin wrote three decades ago that "[t]he rule of law is not the doctrine of perfect decision. . . . [I]n many cases a conscientious decision is as much as can be expected, and . . . there is no ultimate 'right' answer."⁴⁹⁴ Open questions and hard cases are inevitable in law. Judges are humans, subject to cognitive biases and motivated rea-

⁴⁹² Miles & Sunstein, *supra* note 1, at 844.

⁴⁹³ See H.L.A. HART, *THE CONCEPT OF LAW* 135 (1961).

⁴⁹⁴ Alvin Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 453-54 (1976).

soning, and they perceive their role in various ways. Unless one takes the position that the rule of law is *impossible* owing to these limitations inherent to human reasoning and the law, a realistic construction of the rule of law would take these factors as *given*, *unavoidable* conditions of judging. The starting point or baseline must assume some degree of political influence and openness in legal interpretation.

Just as a full glass of milk is not filled to the brim, a "full glass" of the rule of law, to continue with Miles's and Sunstein's metaphor, would have empty space between the surface of the milk and the lip of the glass.⁴⁹⁵ This space represents the irreducible influence of ideological factors within legal uncertainty. To say that the rule of law is threatened, or that the glass is half-full, requires a showing that the level of milk is significantly below the normal level one would expect of a full glass. To put the point another way: quantitative studies of judging have demonstrated that the glass is not filled to the brim, but that is to be expected.⁴⁹⁶ That is inevitable even in a well-functioning rule of law system. What quantitative studies have not yet demonstrated is that the level is below what one would consider reasonably full given the inherent limitations of human reasoning and law.⁴⁹⁷ For that to be established, judicial politics scholars must first identify what constitutes the reasonably full level—the rule of law baseline. This they have made no attempt to formulate. Only by reference to a standard of this sort can it be asserted that the level of ideological influence identified is indeed worrisome, rather than a manifestation of the irreducible normal consequence of the openness of law and complexity of judging.

The baseline must take into account different types of legal provisions, and different types of issues. Legal standards like reasonableness or fairness, for example, call for judges to make value-based judgments. Some legal decisions, like criminal sentencing, are committed to the discretion or judgment of judges. Presumably, these types of decisions will be susceptible to greater variations as a function of the very nature of the decision.⁴⁹⁸ It also goes in the opposite direction. There are a body of situations for which one would expect very little variation, cases

⁴⁹⁵ See Miles & Sunstein, *supra* note 1, at 844.

⁴⁹⁶ See *supra* notes 413–428 and accompanying text.

⁴⁹⁷ Cf. HETTINGER ET AL., *supra* note 11, at 65–66 (finding that when judges with opposing ideologies sit on the same panel, the probability of a dissent increases by 2 percent, but failing to consider whether this is a flaw in the legal system, and, if so, whether it is an acceptable one).

⁴⁹⁸ See Adam B. Cox & Thomas J. Miles, *Transformation of the Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493 (2009) (providing a study showing that ideological influences have a greater impact on judicial decision making in connection with standards than rules).

where the rules are clear and straightforward and the facts uncomplicated (speed limits, for example). Many legal issues arise that have no ideological overtones, or that turn on technical issues of law.⁴⁹⁹ Judge Patricia Wald objected that it is unrealistic to assume that

judges feel strongly about each of the hundreds or thousands of cases in which they participate each year and that they are constantly on the ready to jump in with their personal preferences at a moment's notice when there is no one around to object—and even when law may exist to the contrary.⁵⁰⁰

"A large proportion of our cases," she wrote, "have no apparent ideology to support or reject at all" ⁵⁰¹

By all accounts, the degree of legal uncertainty is a major factor in the capacity of legal rules to determine legal decisions.⁵⁰² It is also clear that the proportion of legally uncertain cases differs across courts. As Judge Harry Edwards remarked, "the [Supreme] Court considers so many 'very hard' cases," but "[t]he same is not true of courts of appeals," where "a great many are easy."⁵⁰³ Higher court judges typically confront more legal uncertainty and hence must make more choices. Given this essential difference, different level courts would have different baselines.

Finally, any attempt to measure the rule of law must not forget the full range of contexts in which law operates in cases that are invisible to studies of judicial decisions. Fewer than 2 percent of the cases now filed in federal court go through a full trial.⁵⁰⁴ A decision to resolve a case, generally speaking, is based upon an evaluation of the relevant law as it applies to the provable facts in the case (determining the probability of success), measured against the cost of continuing. The overwhelming proportion of cases resolved prior to trial is thus determined by the law

⁴⁹⁹ See Wald, *supra* note 422, at 237.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² See, e.g., Kozinski, *supra* note 415, at 997 (acknowledging that, sometimes, there is no clearly controlling precedent).

⁵⁰³ Edwards, *supra* note 421, at 851.

⁵⁰⁴ See ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT, *supra* note 482, at 140 tbl.C-1, 212 tbl.D-1, 391 tbl.T-2 (percentage calculated by dividing the number of trials resulting in a judgment or verdict by the combined number of civil and criminal actions commenced).

in a concrete sense, even in the absence of a judicial ruling.⁵⁰⁵ The same can be said of outcomes not appealed. As Judge Posner observed:

Most cases are not even appealed, because the outcome of the appeal is a forgone conclusion, usually because the case really is "controlled" by precedent or clear statutory language. For the same reason, many potential cases are never even filed. So legalism has considerable sway, and the lower the level at which a legal dispute is resolved, the greater that sway.⁵⁰⁶

B. Concrete Signs That Judging Is Becoming More Political

The slant within the judicial politics field disables scholars from rendering a critical assessment of judges and judging.⁵⁰⁷ Relative to their similarly situated brethren, certain judges manifest a greater reliance on their ideological views in their legal decisions, whether consciously pursuing political ends or by less effectively checking their subconscious biases. These judges *are* behaving like "politicians in black robes."⁵⁰⁸ Some decisions *are* made on political grounds.⁵⁰⁹ Some courts do appear to render ideologically infused decisions an inordinately high percentage of the time.⁵¹⁰ Even judges have asserted, as District Judge Stanley Sporkin did, that "[i]t's an ideological court up there [the U.S. Court of Appeals for the D.C. Circuit]."⁵¹¹ Judge Harry Edwards, a judge on the D.C. Circuit, confirmed that view in his early days on the court, noting that "judges of similar political persuasions too often sided with one another . . . merely out of partisan loyalty, not

⁵⁰⁵ For a study that looked at these cases, finding no evidence that the political views of judges influenced outcomes, see Ashenfelter et al., *supra* note 384.

⁵⁰⁶ POSNER, *supra* note 3, at 44–45.

⁵⁰⁷ See *supra* notes 473–506 and accompanying text.

⁵⁰⁸ See GLICK, *supra* note 116, at 259.

⁵⁰⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000). As Judge Posner noted, "The five conservative Justices voted for the liberal outcome (the vindication of constitutional voting rights) and the four liberal Justices voted for the conservative outcome." POSNER, *supra* note 3, at 30.

⁵¹⁰ See Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 686 (1999) (reviewing arbitration law decisions by the Alabama Supreme Court between 1995 and 1998 and finding that all but one of the court's nine justices generally opposed arbitration if their campaign was funded by plaintiffs' lawyers and favored arbitration if their campaign was funded primarily by businesses).

⁵¹¹ Rodriguez, *supra* note 347 (quoting Judge Stanley Sporkin). Rodriguez suggests that Judge Sporkin's view is shared by other district judges in the circuit. At the time, the D.C. Circuit was reputed to be the most politically infused federal appellate court.

on the merits of the case.”⁵¹² Because judicial politics scholars constantly repeat the refrain that judging is political, however, it is hard to sound a genuine alarm when judges truly are deciding in a highly political fashion.

It is essential to be able to make such critical judgments because there are indications that judging might indeed be shifting in a more political direction. For most of the nation’s history—until recent decades—presidents (with the exception of Franklin D. Roosevelt) did not engage in close ideological screening for judicial appointments beneath the Supreme Court.⁵¹³ Federal judgeships were awarded mainly as patronage or to shore up local support.⁵¹⁴ Ronald Reagan was the first president to systematically screen lower court appointees based on their ideological views. The practice has continued ever since, pursued especially vigorously by Republican presidents at the urging and under the close scrutiny of interest groups on all sides.⁵¹⁵

Scholars who have compared judicial decision making over time have found that when patronage dominated the appointment process, there were relatively small differences in the decision patterns of federal appellate court judges appointed by presidents from different parties.⁵¹⁶ This began to change with the implementation of systematic ideological screening of judicial appointees. Political cleavages in judicial voting behavior “have grown deeper in the past two decades.”⁵¹⁷ Recent research suggests that the increasing gap is attributable to a growing penchant for conservative judges to rule in an ideologically oriented fashion. Frank Cross found that “[t]he judges appointed by Presidents Reagan and G.H.W. Bush appear to be particularly ideological.”⁵¹⁸

A dramatic increase in ideologically infused judging was exposed in Judge Posner’s recent book on judging.⁵¹⁹ Because judicial appointments are made by the president and approved by the Senate, the

⁵¹² Edwards, *supra* note 335, at 1648.

⁵¹³ See NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 13–19* (2005) (describing the shift away from making appointments for patronage reasons and toward making them for policy reasons as a result of hearing more cases that went beyond property rights).

⁵¹⁴ See *id.* at 17, 29.

⁵¹⁵ See POSNER, *supra* note 3, at 21. For an overview of the literature on judicial appointments, see BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 172–89* (2006).

⁵¹⁶ See SCHERER, *supra* note 513, at 28–34.

⁵¹⁷ *Id.* at 194.

⁵¹⁸ CROSS, *supra* note 283, at 56.

⁵¹⁹ POSNER, *supra* note 3, at 21.

president has the greatest leeway to seat who he wants when his party controls the Senate. Posner constructed one table of judicial votes on the federal courts of appeals from 1925 to 2002, and a second table of judicial votes in the same courts limited to all currently serving judges.⁵²⁰ Judges appointed by Republican presidents and confirmed by Republican-controlled senates in the first table (1925–2002) voted for the conservative position 55.8 percent of the time; judges appointed by Democratic presidents and confirmed by Democratic senates voted for the conservative position 49.6 percent of the time.⁵²¹ The 6.2 percent gap in voting behavior is notable but not large. The votes in these same categories counting only *currently sitting* judges, in contrast, are 66.9 percent and 49.7 percent—a gap of 17.2 percent.⁵²² The sizable expansion of the gap between Republican and Democratic appointees is entirely attributable to a spurt in conservative voting by Republican appointees, as the votes of Democratic appointees have remained constant.⁵²³ Posner surmised that the difference in votes has become more pronounced “consistent with the strong Republican push beginning with Reagan to tilt the ideological balance of the courts rightward.”⁵²⁴

This study and the studies described above simultaneously help illustrate the strengths of quantitative studies of judging as well as the flaws in the currently dominant orientation. The strengths are that these studies can provide information about judicial decision-making patterns covering a vast number of judges and decisions over time, information that cannot be obtained in any other fashion.⁵²⁵ The fundamental flaw comes in how judicial politics scholars view judging. Although judicial politics scholars can make comparative findings of this sort, their assumption that judging is political limits the way these findings can be interpreted and criticized.⁵²⁶ The current cohort of conservative judges cannot be condemned for allowing their political preferences to determine their decisions, for perforce (by judicial politics lights) that is what all judges are doing.⁵²⁷ By way of condemnation, the

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *See id.*

⁵²⁴ POSNER, *supra* note 3, at 21.

⁵²⁵ Although this article is critical of the judicial politics field, it should be clear that I support quantitative studies of judging. They provide important information about judging from a unique angle. The goal of this article is to redirect current views of judging within the field in a more accurate and fruitful direction.

⁵²⁶ *See supra* notes 439–472 and accompanying text.

⁵²⁷ *See HETTINGER ET AL.*, *supra* note 11, at 65–66, 110.

most that can be said is that these judges are less self-restrained (or pay less heed to legal constraints) in the pursuit of the political objectives, but it is not clear why such restraint is laudable if judging is fundamentally political in nature anyway.⁵²⁸ A judicial politics scholar might warn, in strategic terms, that, by abusing their numerical advantage, conservative judges are risking a backlash.⁵²⁹ But this speculative argument about future consequences is hardly persuasive when measured against the immediate gains in entrenching the conservative agenda in law—and this objection is devoid of normative import.⁵³⁰

From a standpoint that views judging as politics, if one objects to the increasing conservative tilt in judicial decisions, the solution is to aggressively fill the bench with liberal judges, who will then be encouraged to vote for liberal outcomes in a higher percentage of their cases. Extrapolating from Judge Posner's statistics for the purposes of illustration, if this strategy were successful, conservative judges would vote conservatively 67 percent and liberally 25 percent of the time (the remaining percentage of cases do not fall in one category or the other), whereas liberal judges would vote conservatively 25 percent and liberally 67 percent of the time.⁵³¹ The gap in voting behavior would be 42 percent.⁵³² This way lies a breakdown of the rule of law, with cases determined a high percentage of the time by the luck of the draw that seats judges on a given panel.

A different approach exists that does not lead down this path. For the purposes of illustration (again using Posner's statistics), assume that *legally* determined decisions fall in the conservative direction 49 percent to 56 percent of the time, consistent with the long-term historical pattern (ignoring for these purposes that the 56 percent figure is

⁵²⁸ See EPSTEIN & SEGAL, *supra* note 65, at 135 (stating, as a matter of fact, that Supreme Court justices vote along the lines of the policy views of their appointing president).

⁵²⁹ See EPSTEIN & KNIGHT, *supra* note 118, at 12–13 (suggesting that judges might make short-term decisions that go against their ideology to advance longer term ideological goals).

⁵³⁰ Political scientists may respond that their focus is scientific rather than normative, but this defense is not available to any political scientist who makes allusions to the relevance of their findings for the legitimacy of judging or for the rule of law because those are normative issues.

⁵³¹ See POSNER, *supra* note 3, at 21 (finding that circuit court judges, serving as of July 2007, who were appointed by a Republican president under a Republican senate cast conservative votes 66.9 percent of the time). This extrapolation is made merely for the purposes of a simple illustration. Liberal judges also vote in a conservative direction more often than a liberal one, so the liberal vote would have to shift a greater amount in the liberal direction to reach as high as the current conservative vote. See *id.* (finding appeals court judges appointed by Democratic presidents under a Democratic senate voted conservatively 49.7 percent of the time and liberally only 39.5 percent of the time).

⁵³² See *id.*

skewed upward by the higher conservative percentage of currently sitting Republican-appointed judges).⁵³³ Assume that the difference between these two numbers represents the irreducible play of ideological factors in good faith judging involving uncertain legal cases, a difference that might fluctuate a bit higher or lower but cannot be eliminated. It is then possible to condemn for being excessively ideological any individual judge or group of judges whose decisions substantially and consistently fall outside this range. This might prove to be an effective check, for this condemnation strikes against the role orientation and self-esteem of judges. In contrast to the previous scenario, the effect would be to generate pressure to keep the run of decisions within a relative narrow range of difference.

This is just an illustration. Too many factors play into the historical numbers Judge Posner produced to make clear assertions about what they represent.⁵³⁴ Many complicated issues must be considered before coming up with rule of law baselines for different kinds of legal issues and different levels of courts. The refusal of judicial politics scholars to take law seriously on its own terms, the slant that plagues the field, has kept them from exploring and developing a realistic understanding of judging that would produce the type of standard that is required to make judgments about the influence of politics in judging. This potentially valuable work is wanting.

These comments have focused on federal circuit courts of appeal, but the selection of state judges, most of whom face an election of some sort, has, in recent years, also become politicized to an unprecedented degree. According to one study, state supreme court candidates in 2003–2004 raised \$46.8 million for their campaigns.⁵³⁵ Special interest groups contributed a great deal of this money, backing judges they expected would rule in favor of their interests, or opposing judges they considered unfriendly.⁵³⁶ The premise that drives the increasing politicization of state judicial elections is that judicial decisions, at least at the

⁵³³ See *id.* The high number would drop if the conservative voting rates of the current generation of judges were taken out. See *id.* (demonstrating that currently serving judges appointed under Republicans vote conservatively a higher percentage of the time than their predecessors).

⁵³⁴ It is not clear, for example, that the historical numbers represent a higher proportion of law-determined decisions, rather than a greater number of moderate judges deciding cases in a pattern that reflects their political moderation. See *id.*

⁵³⁵ See Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 1, 1 (Matthew J. Streb ed., 2007).

⁵³⁶ See TAMANHA, *supra* note 515, at 185–88.

high court levels, are politically infused. Thus, judicial appointments at both federal and state levels are now highly politicized.

There are real reasons to be concerned about the corrosive impact of the increasingly pervasive assumption that judging is political, which is now widespread in the legal culture. Judge Wald and Judge Edwards have engaged in heated debates with political scientists and law professors over quantitative studies of judging, insisting that the studies exaggerate the degree of political influence on decisions.⁵³⁷ Judge Kozinski scorned the "cynical view" "spawned in the halls of academia" that judges reach results based upon their political preferences.⁵³⁸ None of these judges denied that there are political aspects to judging, or that judges have subconscious biases, or that some judges some of the time consciously decide cases in a political fashion. Their argument is that this describes only a small proportion of the cases, and it is a serious error to suggest otherwise.

The thrust of this article is that the judges were basically right. Nonetheless, the erroneous assumption that judging is largely political may yet have deleterious effects. Judge Edwards urged that "we should at least consider the idea that judges, told often enough that their decisionmaking is crucially informed by their politics, will begin to believe what they hear and to respond accordingly."⁵³⁹ In light of the recent indications that judging on the federal level is becoming more political, Judge Edwards' worry might prove prescient. Then judicial politics scholars will finally be vindicated in their assumption that judging is political—and they might even deserve a bit of credit for helping bring this about.

⁵³⁷ See Emerson H. Tiller & Frank B. Cross, *A Modest Reply to Judge Wald*, 99 COLUM. L. REV. 262 (1999); Wald, *supra* note 422; see also Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case in Point*, 80 WASH. U. L.Q. 1275 (2002); Harry Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999).

⁵³⁸ Kozinski, *supra* note 415, at 999.

⁵³⁹ Edwards, *supra* note 421, at 855.