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JUDICIAL POLITICS, THE RULE OF LAW AND THE FUTURE OF AN ERMINE MYTH

Charles Gardner Geyh

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# Judicial Politics, the Rule of Law and the Future of an Ermine Myth

*Charles Gardner Geyh*<sup>1</sup>

According to a Renaissance myth, the ermine would rather die than soil its pristine, white coat. English and later American judges would adopt the ermine as a symbol of the judiciary's purity and commitment to the rule of law. This "ermine myth" remains central to the legal establishment's conception of the judicial role: independent judges, the argument goes, disregard extralegal influences and strictly follow the law. In contrast, political scientists had long theorized that judicial independence liberates judges to disregard the law and substitute their extralegal policy preferences. A recent spate of interdisciplinary research, however, has led to an emerging consensus among law professors and political scientists that judges are subject to a complex array of legal and extralegal influences. This emerging scholarly consensus stands in stark contrast to the simplistic and dichotomous public policy debate, where court critics seek to control "activist" judges, whom they accuse of ignoring the law and legislating from the bench, while the legal establishment defends judges and their independence from attack, citing the ermine myth that independent judges are committed solely to upholding the law.

This article explores the future of the ermine myth that has guided the legal establishment for centuries. It argues that as the public gradually internalizes the view it shares with scholars that judges are subject to legal and extralegal influences, the legal establishment's claims that independent judges are influenced by law alone will become increasingly unsustainable. That, in turn, will culminate in an erosion of rule of law values, a decline of public confidence in the courts, and the imposition of greater popular and political controls on judicial decision-making. This fate is not inevitable, however; the judiciary's independence can and should be defended on less antiquated grounds than those embedded in the ermine myth. The solution is to reorient the myth itself to embrace more a contemporary and realistic conception of the judicial role. The judicial role, as reconceptualized, must justify public support for the independence of a judiciary that is subject to legal *and* extralegal influences. That can be done, the article concludes, if we begin from the premise that judges inevitably exercise discretion that is profitably informed by extralegal influences, and defend the independence of such judges on the grounds that it will promote due process, sound, pragmatic decision-making, and a more flexible conception of the rule of law.

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<sup>1</sup> Associate Dean of Research and John F. Kimberling Professor of Law, Indiana University Maurer School of Law. I'd like to thank Steve Burbank, Ajay Mehrotra, and James Sample for their comments on an earlier draft, my research assistants Phillip Olsson and Andy Williams, and my secretary, Rita Eads. Thanks likewise to the Notre Dame Law School and the Indiana University Maurer School of Law for hosting conferences where I first developed some of the ideas I present here.

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

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

Although reference to the judicial ermine has fallen from common usage, the assumption it embodies—that when they don their robes, independent judges set aside their passions, prejudices and interests and follow the law—remains integral to the legal establishment’s traditional conception of the role that the judiciary plays in American

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<sup>2</sup> Christopher Gregg, *The Ermine*, in The Minerva Britannia Project, available at <http://f01.middlebury.edu/FS010A/STUDENTS/n075.htm>

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

<sup>4</sup> Statement of California Judge John K. Alexander, quoted at <http://www.cagenweb.com/monterey/bioalexanderjk.html> (“To assume the judicial ermine and wear it worthily requires the abandonment of all party bias and personal prejudice, a possession of educational qualifications, clean hands and a pure heart”).

<sup>5</sup> *Harrison v. Wisdom*, 54 Tenn. (7 Heisk.) 99 (1872).

government. That assumption has come under sustained attack by scholars and policymakers, leading to the question of whether there is enough truth to this “ermine myth” to make it one still worth defending, or whether the time has come to demythologize our understanding of what judges do and acknowledge that, truth be told, the ermine is just a glorified weasel. At stake is the continued institutional legitimacy of the judiciary itself.

### **Introduction**

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

This slowly emerging interdisciplinary consensus among scholars, however, has no analog in the policy-making realm. Here, court critics and defenders have squared off in shrill, dichotomous debates. Critics assert that judges whose decisions they excoriate are “activists” who disregard the law, live to satiate their ideological appetites, and must

be held accountable and controlled. Defenders characterize judges as the heroic progeny of Solomon whose sole devotion is to the rule of law and whose independence from the rabble must be preserved. In this article, I explore the implications of the emerging interdisciplinary consensus on what judges do for the ongoing public policy debate on how the judiciary should be regulated. To date, it is a largely unstudied issue. Scholars devoted to the empirical study of judicial decision-making have focused on developing positive theories of judicial decision-making behavior with only passing regard to the policy implications of such theories, while scholars who have written about judicial independence and accountability as a matter of public policy have developed normative theories largely divorced from the empirical data.

Part I of this article describes the progress of the scholarly debate over what judges do, from the legal realism movement to the present day. It does so in some detail, for two reasons. First, the story of this emerging integrated, eclectic, multi-disciplinary understanding of judicial decision-making is recent enough that to date it has been told only in piecemeal fashion.<sup>6</sup> Second, empiricists leading this multi-disciplinary movement may be familiar with the story, but many academicians, organizations, judges and lawyers engaged in theoretical, normative and policy analyses of judicial independence, accountability, selection and administration, are not. In discussing recent developments in this debate the objective is to focus on the emerging common ground rather than on the differences that remain. In so doing, my ultimate point is a simple one: dichotomous arguments to the effect that judges categorically disregard the law and follow their policy

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<sup>6</sup> Richard Posner ably (and comprehensively) explodes the ongoing, multi-disciplinary study of judicial decision-making into nine competing schools of thought, but my goal here is the reverse: to synthesize hitherto “competing” theories in a manner consistent with the more collaborative ethos of recent work. *See* RICHARD POSNER, *HOW JUDGES THINK* 19-56 (2008).

preferences (or something else), or categorically disregard their policy preferences (and everything else) to follow the law, have been debunked.

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

In Part III, I seek to explain why, when it comes to describing the influences on judicial decision-making, the public policy debate has remained stubbornly dichotomous while the scholarly debate has moved toward eclecticism and greater consensus. By their nature, public policy debates are aimed at capturing the hearts and minds of the general public. Survey data reveal that the public thinks judges are influenced by legal *and* extralegal factors—meaning that the public’s impressions of what influences judicial decision-making is consistent with the findings of recent research detailed in Part I. Surveys further show that the public retains considerable confidence in its judges. Taken

together, these results imply that it may be foolish and unnecessary for the legal establishment to cultivate the pretense that judges are influenced by facts and law alone. Those same surveys, however, show that the ermine myth continues to hold sway, as sizable majorities believe that judges *should* be influenced only by the facts and law, and disapprove of the extralegal influences that they think occur. For the legal establishment openly to concede the inevitability of the extralegal influences that inform judicial discretion would be to undermine the myth and with it potentially the public's confidence in the courts.

In Part IV, I move from the descriptive to the predictive, with an assessment of what is likely to happen next. One possibility is that the dichotomous public policy debate detailed in Part III will persist into the foreseeable future without further consequence: judges will continue to say that they are slaves to the rule of law; critics will attack “activist” judges as symptomatic of a judiciary run amok; and the public will look askance at judges who deviate, but retain its faith in the ermine myth. Without disputing the impressive force of inertia, I argue that a series of developments years in the making render this assessment unlikely. The latest campaign against “liberal judicial activism,” media coverage of an ideologically divided Supreme Court, partisan battles over nominee ideology in Senate judicial confirmation proceedings, publicized accounts of judges declining to disqualify themselves from cases in which the risk of extralegal influence seemed obvious, and the advent of expensive, highly politicized state court election campaigns, cast doubt on assumptions that we are in a business as usual scenario, in which the public's continued faith in its judges and the rule of law is a foregone conclusion. A second possibility is that the events just described have put us on a path to



crisis, but polling data showing continued public confidence in the courts belie the imminence of such a development. A third possibility—and the most likely—is that we will witness a gradual erosion of rule of law values as the public internalizes the lessons of recent developments and becomes increasingly jaded about judges and their need for independence.

In Part V, I turn from the predictive to the prescriptive. The key for the legal establishment, I argue, is to reorient the ermine myth itself. For myths to galvanize a community, there must be a perceived truth at their core. Although there *is* truth to the “myth” that independent judges follow the law, that kernel of truth is diminished because “law,” for purposes of the myth, has been characterized so rigidly, in terms more compatible with 19<sup>th</sup> century formalism than more flexible, contemporary understandings. If the primary justification for an independent judiciary is to bracket out extralegal influences and enable judges to apply the law as a kind of formula, then deepening skepticism over the rule of law and the value of judicial independence are inevitable.

It is possible, however, to step back and reaffirm the instrumental value of an independent judiciary in other terms, that underscore the role judicial independence plays in promoting a more capacious rule of law (one that acknowledges the inevitability of judicial discretion and the role that different influences play in informing that discretion) as well as due process, and sound, pragmatic decision-making. The claim that judicial independence promotes the rule of law (more broadly construed), fairness (or due process) and common sense (or pragmatism) is still exaggerated, and to that extent “mythological,” insofar as independence can liberate judges to act upon other interests

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

Reorienting the ermine myth to say that independent judges promote a broader rule of law, fairness and common sense, will force the legal establishment to rethink its reform agenda. For generations, the mantra of reformers within the legal establishment has been to “depoliticize” or “take the politics out” of the judiciary. That view may be compatible with crumbling formalism but is ill-suited to coexist with a new construct positing that judges are properly subject to a range of extralegal influences, including “political” ones, insofar as they concern the art of governing fairly and sensibly. The better approach, I contend, is to move toward an era of “managed politics,” in which the goal is to regulate, rather than exterminate extralegal influences on judicial decision-making, to the end of promoting the rule of law, fairness and common sense. In many ways, that era is already upon us, but acknowledging it more explicitly should better inform the legal establishment’s reform agenda. I conclude by illustrating the point with a brief discussion of possible reforms in the arenas of legal education, judicial selection and judicial oversight.

## **I. The Scholarly Debate on What Judges Do: Inching toward Consensus**

Recent developments have reconciled, to an extent greater than ever before, the competing views of scholars across academic disciplines of what influences judicial decision-making. To appreciate the significance of those developments, however, it is necessary to embed them in historical context. A logical starting point is with the advent

of formalism in the nineteenth century, which gradually gave way to conflicting and more recently, unifying approaches to understanding judicial decision-making.

### **A. The Ascendancy of Formalism**

In the United States, the first half of the nineteenth century was a time of geographical and economic expansion. To accommodate that expansion, the mercantile class was keen to modernize the common law, as Morton Horwitz explains:

For seventy or eighty years after the American Revolution the major direction of common law policy reflected the overthrow of eighteenth century pre-commercial and anti-developmental common law values. As political and economic power shifted to merchant and entrepreneurial groups in the post-revolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system.<sup>7</sup>

To facilitate this transformation to a more business-friendly common law, courts often resolved close cases with reference to public policy and conceptions of economic justice.<sup>8</sup> By the mid-nineteenth century, however, this transformation was close to complete.<sup>9</sup> To shore up the gains of the previous half-century, the simple solution was to lock those gains in place with a new, more formalistic way of looking at the law, which “gave common law rules the appearance of being self-contained, apolitical and inexorable, and which, by making ‘legal reasoning seem like mathematics,’ conveyed ‘an air . . . of . . . inevitability about legal decisions.’”<sup>10</sup>

When economic elites and the legal order they had cultivated were challenged by populists and progressives in the latter third of the nineteenth century, mainstream judges of the era found refuge in the new formalism. “For judges of this stamp,” Laurence

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<sup>7</sup> Morton J. Horwitz, *The Rise of Formalism*, 19 AM. J. LEG. HIST. 251, 151 (1975).

<sup>8</sup> WILLIAM FISHER III, MORTON J. HORWITZ & THOMAS REED, EDS AMERICAN LEGAL REALISM xii (1993)

<sup>9</sup> Horwitz, *supra* note 7 at 251.

<sup>10</sup> *Id.* at 252.

Friedman writes, “formalism was a protective device. They were middle-of-the-road conservatives, holding off the vulgar rich on the one hand, and the revolutionary masses on the other. The legal tradition represented balance, sound values, a commitment to orderly process.”<sup>11</sup>

Meanwhile, Christopher Columbus Langdell was revolutionizing legal education during his tenure as dean of the Harvard Law School from 1875 to 1895, by reorienting the focus of the law school classroom away from lectures on legal principles, and toward questions and answers that divined legal principles from cases.<sup>12</sup> Thanks in large part to the zeal of Langdell’s successor, James Barr Ames, the “case method” quickly became the dominant method of legal education in American law schools.<sup>13</sup> Implicit in the case method was the notion that legal principles could be deduced from scientific analysis of cases, and that legal scholarship should be devoted to isolating and classifying those principles in exhaustive articles and treatises.<sup>14</sup> The net effect was to inculcate new generations of lawyers with the values of formalism, or more neutrally, “classical legal thought.”

## **B. The Rise and Fall of Legal Realism**

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

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<sup>11</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 383-84 (2d Ed. 1985).

<sup>12</sup> JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 25-26 (1995).

<sup>13</sup> *Id.* at 25-27.

<sup>14</sup> *Id.* at 27 (quoting Ames that law professors should create “a high order of treatises on all branches of law, exhibiting the historical development of the subject and containing sound conclusions based on scientific analysis”); *see also*, WILLIAM W. FISHER III, MORTON J. HORWITZ, THOMAS A. REED, EDS., *AMERICAN LEGAL REALISM* xii (“Properly organized, law was like geometry” to classical educators); Thomas Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 5 9 (1983) (“Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts”).

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds . . . We do not realize how large a part of our law is open to reconsideration upon a slight change in habit of the public mind.<sup>15</sup>

And Dean Roscoe Pound complained about the prevailing “mechanical jurisprudence,” in which “premises are no longer to be examined”, and “[e]verything is reduced to simple reduction from them,” to the point where “social progress” is “barred by barricades of dead precedents.”<sup>16</sup>

In the 1920s, academic lawyers at Columbia and Yale, persuaded by the critiques of Holmes, Pound and others, renounced formalism, proposed a more “functional” curriculum that deemphasized technical legal doctrine, and argued that law was better studied empirically, as a social science—a series of activities that Columbia law professor Karl Llewellyn collectively denominated “realism.”<sup>17</sup> The Realist critique of formalism could be scathing, as illustrated by the following excerpt from Jerome Frank’s *Law and the Modern Mind*:

Myth-making and fatherly lies must be abandoned – the Santa Claus story of complete legal certainty; the fairy tale of a pot of golden law which is already in existence and which the good lawyer can find, if only he is sufficiently diligent; the phantasy of an aesthetically satisfactory system and harmony, consistent and uniform, which will spring up when we find the magic wand of rationalizing principle. We must stop telling stork fibs about how a law is born and cease even hinting that perhaps there is still some truth in Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes.<sup>18</sup>

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<sup>15</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>16</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909).

<sup>17</sup> See Generally, SCHLEGEL, *supra* note 12 at 16-18.

<sup>18</sup> JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

For the realist, then, law was not transcendental; rather, law was what law did. To understand how judges decided cases, the realist deemphasized parsing the abstract legal principles upon which judges purported to rely and devoted more time to studying what judges really did—which was balance the competing policies at stake in the cases that came before them.<sup>19</sup>

Legal Realism's campaign to reorient the study of law away from divining "black-letter" rules embedded in cases and toward empirical, social science analysis of judicial behavior never gained traction in American law schools and by the end of the 1930s, the movement had run its course. The reasons are many and varied, but at its core, the premises of legal realism were menacing to and ultimately rejected by a legal establishment that had oriented its conception of law to the study and application of rules. John Henry Schlegel makes the point with reference to law professors, in terms that applied equally to judges and lawyers:

Science was too threatening. It suggested that the words of law might not be too important, that the special preserve of the law professor might not be too special and that, since law was not just rules, the rule of law might not be just a matter of following the rules either. That threat was simply too much for the professional identity of the law professor; it could only be attacked mercilessly or distanced with derisive laughter.<sup>20</sup>

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

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<sup>19</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) ("[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which . . . shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. . . . If you ask [the judge] how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). (The realistic judge . . . will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, open the courtroom to all evidence that will bring light to this delicate task of social adjustment").

<sup>20</sup> SCHLEGEL, *supra* note 12 at 255.

The demise of the legal realism movement signaled an end to widespread agitation within the legal academy for teaching, writing and thinking about law as a social science rather than a system of rules. Legal realism did, however, influence some academic lawyers to explore the ways in which related disciplines illuminated the analysis of law—disciplines that gradually worked their way into law schools as “law and . . .” subfields. Thus, legal realism is credited with catalyzing the law and economics movement, partly because legal realism paved the way by challenging formalism’s monopoly on legal analysis, and partly because realism was vulnerable to the critique that it lacked a well-defined methodology, which economic analysis sought to supply.<sup>21</sup> Law and psychology is more clearly rooted in the realist tradition, and came into its own in the early 1950s, when the University of Chicago Law School initiated a Law and Behavioral Science Program that undertook path-breaking research into the psychology of jury behavior.<sup>22</sup> And devotees of law and sociology—a subfield that made its first real splash in the 1960s with law school projects at the University of California at Berkeley and the

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<sup>21</sup> Charles K. Rowley, *An Intellectual history of Law and Economics*, in FRANCESCO PARISI & CHARLES K. ROWLEY, *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS* 11-12 (2005) (“The path towards law and economics undoubtedly was smoothed by the realist challenge to formalism that opened up legal education to the study of the social sciences”); Edmund W. Kitch, *The Intellectual Foundations of ‘Law and Economics’*, 33 J. LEG. EDUC. 184, 184 (1983) (“In the law schools, law and economics evolved out of the agenda of legal realism. Legal realism taught that legal scholars should study the law as it works in practice by making use of the social sciences, and economics was one of the social sciences to which academic lawyers turned”); Owen M. Fiss, *The Death of the Law*, 72 CORN. L. REV. 1, 2 (1986) (“Law and economics has a descriptive dimension and as such might be understood as a continuation of the social scientific tradition in law that began with Roscoe Pound and the realists”). This is not to suggest, however, that law and economic scholars share intellectual roots with legal realism in the same way that political scientists and psychologists do. See, e.g. RICHARD A. POSNER, *OVERCOMING LAW* 3 (1995) (“The law and economics movement owes little to legal realism—perhaps nothing beyond the fact that Donald Turner and Guido Calabresi, pioneering figures in the application of economics to law, graduated from the Yale Law School and may have been influenced by the school’s legal realist tradition to examine law from the perspective of another discipline.”)

<sup>22</sup> See generally SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (Taylor & Francis 1988).

University of Wisconsin—likewise trace their empirical tradition and interest in the interrelationship between law and society back to the realists.<sup>23</sup>

In law schools, consigning a discipline to “law and” status can operate as a means of marginalization that keeps it at a distance from the study of “real” law, which has remained focused on the rules that judges interpret and apply.<sup>24</sup> Such was not the fate of political science, however, where interest in law as a social science was sufficient to ensconce the study of judicial behavior as a political science subfield, wholly independent of legal education.<sup>25</sup> While many academic lawyers were uncomfortable with the implications of legal realism, political scientists of the realist era were not. So-called “old-institutionalist” political scientists of the day, such as Edward Corwin, Robert Cushman and Charles Grove Haines, were realists of a moderate stripe who “believed that politics entered the judicial process in subtle and complex ways.”<sup>26</sup> In other words, they did not think that “policy preferences or individual ‘interests’ determines how judges decided cases,” even though “they recognized such preferences could affect judicial decisions.”<sup>27</sup> In the 1940s, however, C. Herman Pritchett introduced a more aggressive “behavioral” strain of legal realism to the study of courts, grounded in a social-

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<sup>23</sup> LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 1-8 (2d Ed. 1977); SCHLEGEL, *supra* note 12 at 248-250.

<sup>24</sup> SCHLEGEL, *supra* note 12 at 264 (discussing “the second class citizenship that was implied by ‘law and’”). Law and economics has fared somewhat better, in part because its approach is more compatible with a rules-based analysis. Rowley, *supra* note 21 at 12 (“The relationship (between legal realism and law and economics) should not be exaggerated,” in part because law and economics “turned out to be a movement that incorporated some of the formalism of the Langdellian era, albeit a formalism which was based on the notion that laws should be economically efficient, rather than that they should rest on *stare decisis* and precedent”).

<sup>25</sup> FRIEDMAN & MACAULAY, *supra* note 23 at 7 (“it is fair to note that a social science interest in law is outside the mainstream of scholarship in law, and in all social sciences, except perhaps political science”).

<sup>26</sup> Howard Gillman & Cornell Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES* 15, 20 (Howard Gillman & Cornell Clayton Eds 1999).

<sup>27</sup> *Id.*



psychology paradigm.<sup>28</sup> Pritchett and his successors set out to demonstrate, through empirical research, that judges were “motivated by their own preferences.”<sup>29</sup> Exhibit A in Pritchett’s analysis was the tendency of majority and dissenting Supreme Court opinions to reach divergent conclusions from the same facts and law—a divergence that he explained with reference to the policy preferences of the individual justices.

Unencumbered by the norms of a legal culture that proceeded from the premise that law operates as a constraint on judicial behavior, political scientists who followed in Pritchett’s footsteps devoted themselves to describing what judges do in terms that marginalized law as a variable in the judicial decision-making equation.<sup>30</sup> In the 1960s, Glendon Schubert coined the term “attitudinal” to describe a model that explained how Supreme Court justices voted with reference to their attitudes or ideological preferences.<sup>31</sup> And in the 1990s, Harold Spaeth and Jeffrey Segal summarized the current state of political science research on Supreme Court decision-making in an influential book that pitted the “attitudinal model” against the “legal model,” and in no uncertain terms declared the former victorious, characterizing the legal model as “meaningless.”<sup>32</sup> Against this backdrop of what many political scientists regarded as overwhelming evidence in support of the attitudinal model, the persistent view perpetuated by lawyers,

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<sup>28</sup> Lee Epstein, Jack Knight, Andrew Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 786 (2003)(discussing Pritchett); Pauline Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 384 (2007)(discussing linkage to social psychology).

<sup>29</sup> C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at xii-xiii (1948).

<sup>30</sup> See Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 263 (2006).

<sup>31</sup> GLENDON SCHUBERT, *THE JUDICIAL MIND* (1965).

<sup>32</sup> JEFFERY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 17, 62 (1993).

judges and law schools that the Supreme Court decides cases in light of applicable law was relegated to the status of myth.<sup>33</sup>

In light of data generated by proponents of the attitudinal model, by the 1990s few political scientists would dispute that votes on the U.S. Supreme Court were influenced by the policy preferences of the individual justices. But in the minds of some, “studying the Supreme Court . . . as little more than a collection of individuals who were pursuing their personal policy preferences” failed to take adequate account of other influences on judicial behavior.<sup>34</sup> In two important books, Howard Gillman and Cornell Clayton collected and promoted the recent work of “neo-institutional” scholars (a label they applied to link these scholars in spirit to “old-institutionalists” of the realist age), who argued that that judicial decision-making is more fully understood against the backdrop of the political, legal, social and cultural institutions of which judges are a part.<sup>35</sup>

Thus, for example, neo-institutionalists such as Lee Epstein and Jack Knight, who advanced a quasi-economic “rational choice” theory of judicial decision-making, argued that while judges are indeed “seekers of legal policy,” as attitudinal scholars posit, their “ability to achieve their goals (primarily policy goals) depends on a consideration of the preferences of other actors.”<sup>36</sup> In other words, from a rational choice perspective, judges do not vote reflexively in accord with their personal policy preferences, but think strategically about how Congress, the President, and others may react to given case

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<sup>33</sup> John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 936 (2000)

<sup>34</sup> CORNELL W. CLAYTON & HOWARD GILLMAN, EDS., *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 1 (1999).

<sup>35</sup> *Id.*; HOWARD GILLMAN & CORNELL CLAYTON, EDS., *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (1999).

<sup>36</sup> LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* xiii (1998).

outcomes and adjust their decision-making accordingly to better effectuate preferred policy outcomes.

In contrast, Rogers Smith, another neo-institutional scholar who advocated an “historical interpretive” approach to understanding judicial decision-making, argued that historical accounts of institutional development are critical to understanding the values of decision-makers within those institutions.<sup>37</sup> Thus, the judiciary’s institutional setting helps to create and frame the values that judges seek to implement when they make decisions—values that can include, among others, a commitment to the rule of law. For their part, ardent proponents of the attitudinal model often responded less by trying to accommodate the neo-institutional critique, than by conducting new studies that set out to prove the neo-institutionalists wrong.<sup>38</sup>

Meanwhile, back at the law schools, the lessons of legal realism enjoyed a brief renaissance in the 1970s with the critical legal studies movement, which posited that elite judges perpetuate the domination of their class by exploiting the fiction of the law’s rationality and even-handedness—thereby entrenching preexisting inequalities.<sup>39</sup> By the 1980s, however, the critical legal studies movement had collapsed under the weight of its inability to verify its intuitions through empirical research and its failure to propose a more satisfactory alternative to the status quo it berated.<sup>40</sup>

As the attitudinal model came into its own in the latter half of the twentieth century, one might suppose that the deluge of data attitudinal studies generated,

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<sup>37</sup> Rogers Smith, *If Politics Matters: Implications for a “New Institutionalism”*, 6 STUD. IN AM. POLIT. DEVELOPMENT 1 (1992).

<sup>38</sup> Barry Friedman, *Taking Law Seriously*, 4 Persp. on Pol. 261, 263 (2006) (“Today, attitudinalists devote too much time to . . . fending off claims that something other than attitudes matter.”)

<sup>39</sup> See generally, *Critical Legal Studies Symposium*, 36 STANFORD LAW REVIEW 1 (1984).

<sup>40</sup> Frank Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 257-58 (1997).

purportedly demonstrating the irrelevance of law to judicial decision-making, would be of acute interest and concern to law professors, judges and lawyers. But as the twentieth century drew to a close, the sweeping conclusions of attitudinal studies that were causing a cacophonous din in political science circles were being greeted in the legal profession by the sound of crickets.

Professor Frank Cross, writing in 1997, was among the first to decry this “unfortunate interdisciplinary ignorance” in a law review article.<sup>41</sup> “The political science research and the attitudinal model are significant in that they could potentially obliterate the foundations of much current and past legal scholarship,” Cross noted, but “[t]o date, legal scholarship has been remarkably oblivious to this large and mounting body of political science scholarship on the courts.”<sup>42</sup> Professor Michael Gerhardt attributed the obliviousness to a fundamental difference in world view: “Law professors believe the Constitution and other laws constrain the Court, while most political scientists do not. These different perspectives on justices’ fidelity to the law ensure that legal scholars and political scientists have little to say about the Court that is of interest to each other.”<sup>43</sup> Judge Patricia Wald went further, suggesting that the legal community was not oblivious, but dismissive: “I register something of a ho-hum reaction to the notion that judges’ personal philosophies enter into their decision-making when statute or precedent does not

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 252-53. Political Scientist Gerald Rosenberg made a similar point in a backhanded way three years later, when praising a law professor whose paper he was critiquing: “Unlike virtually any other legal academic, he not only cites empirical social science, but he also reads it! And he reads it intelligently!” Gerald Rosenberg, *Incentives, Reputation, and the Glorious Determinants of Judicial Behavior*, U. CIN. L. REV. 637, 638 (2000).

<sup>43</sup> Michael Gerhardt, Book Review: *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1733 (2003) (Reviewing JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2003)).

point their discretion in one direction or constrain it in another.”<sup>44</sup> In other words, to the extent that the attitudinal model stood for the softer proposition that judges are influenced by their policy preferences, it told the legal profession nothing it did not know already;<sup>45</sup> and to the extent that it stood for the harder proposition that law does not operate as a constraint on judges, the attitudinal model reflected a difference in perspective so fundamental as to foreclose a productive exchange of ideas.

#### **D. The New Empiricists**

Law professors and political scientists had thus developed contradictory, dichotomous conceptions of judicial decision-making that they happily cultivated in relative isolation. Persistent calls for more serious interdisciplinary engagement, however, gradually intruded upon their solitude.<sup>46</sup> Some law professors and judges argued that political scientists were not taking law seriously enough.<sup>47</sup> Others critiqued attitudinal studies, arguing that such studies delineated the scope of “law” so narrowly and rigidly as to render its irrelevance to judicial decision-making a self-fulfilling prophecy.<sup>48</sup> Still other legal scholars embarked on empirical research agendas of their own, eliciting criticism, if not pot-shots from some political scientists as to their methodology, but simultaneously giving rise to a renaissance of interest among academic

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<sup>44</sup> Patricia Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

<sup>45</sup> *Id.*

<sup>46</sup> Friedman, *supra* note 38 at 262 (“legal scholars are now pursuing the same sort of empirical inquiries as positive scholars, creating exciting opportunities for true interdisciplinary collaboration”); Epstein, Knight & Martin, *supra* note 28 at 783 (“it has been only in the last few years that law professors have shown much interest in political science approaches to judging”).

<sup>47</sup> Barry Friedman, *supra* note 38; *see also*, Harry T. Edwards, *Collegiality and Decision-Making on the D.C. Circuit Court*, 84 VA. L. REV. 1335, 1335 (denouncing two studies as “the heedless observations of academic scholars who misconstrue and misunderstand the work of judges”).

<sup>48</sup> Cross, *supra* note 40 at 264; Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 25 (Stephen B. Burbank & Barry Friedman eds 2002) (discussing the problems attitudinal studies have had “operationalizing” law).

lawyers in the empirical study of judicial behavior.<sup>49</sup> This “‘Quantitative Moment’ in the legal academy”<sup>50</sup> has, in a very short time, all but obliterated the study of judicial decision-making as an either-or enterprise, in which one must choose sides and explain judicial behavior with reference to law or policy preferences as if they were mutually exclusive alternatives.

### 1. *Supreme Court Studies*

By the time the quantitative moment arrived, political scientists had already established an all but irrefutable empirical case for the proposition that a justice’s policy preferences influence his or her votes on the United States Supreme Court. Segal and Spaeth reported that they could predict 74% of individual justices’ decisions on the basis of their attitudinal predispositions<sup>51</sup>; and another study by Segal and Albert Cover found that in civil liberties cases, the correlation between the attitudes of individual justices and their voting behavior was 80% or higher.<sup>52</sup>

Subsequent interdisciplinary work has, however, yielded important nuances. In 2003, two law professors and two political scientists published the results of a “Supreme Court Forecasting Project” in which man squared off against machine in what can best be described as a 21st century remake of the Ballad of John Henry.<sup>53</sup> Overall, the “machine”—a statistical model—outperformed the predictions of legal experts, by

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<sup>49</sup> Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); *see also*, Gregory Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About statistical Measures*, 99 NW. U. L. REV. 743, 779-83 (2005) (discussing “the great empirical method debate of 2002”, provoked by the Epstein and King article).

<sup>50</sup> Gregory Sisk, Book Review, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision-making*, 93 CORNELL L. REV. 873, 876 (2008) (Reviewing FRANK B. CROSS, *DECISION-MAKING IN THE U.S. COURTS OF APPEALS* (2007)).

<sup>51</sup> Segal & Spaeth, *supra* note \_\_ at 229.

<sup>52</sup> Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices* 93, AM. POL. SCI. REV. 557 (1989).

<sup>53</sup> Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-making*, 104 COLUM. L. REV. 1150 (2004).

correctly forecasting case outcomes 75% of the time, as compared to 59.1% for the experts.<sup>54</sup>

While this project would seem to have pitted political scientists against lawyers in a kind of celebrity death match, in reality, it went a long way toward demonstrating that the longstanding law versus attitude debate presented a false dichotomy. In order for the machine to work, the computer model could not base its predictions on naive “attitudinal assumptions,” which the authors found “insufficient to generate specific forecasts prospectively.” Rather, to maximize its predictive capabilities, the model employed classification trees that forecast a justice’s future decisions in light of how that justice had previously decided cases similar in six semi-specific respects.<sup>55</sup> At the same time, to maximize their predictive capabilities, the experts were not confined to naive doctrinal analysis of pending cases, but were free to take attitudinal factors into account when making their predictions.

Insofar as “legal experts” appreciate that a justice’s policy preferences influence how he or she analyzes the law in close cases (and pretty much all cases have been close cases since 1988, when Congress eliminated virtually all mandatory appeals to the Supreme Court<sup>56</sup>), they cannot be surprised to learn that sophisticated statistical models aimed at isolating the justices’ policy predilections can often predict Supreme Court decisions--particularly since the experts likely tried to identify those same predilections when making their own predictions. Consistent with this latter supposition, the researchers found that the experts performed comparably to the model (indeed, slightly

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1163. The six factors that the study employed, were: the circuit of origin for the case; the issue area of the case; the type of petitioner; the type of respondent, the ideological direction of the lower court ruling; and whether the petitioner argued that a law or practice was unconstitutional.

<sup>56</sup> Pub. L. No. 100-352, 102 Stat. 662 (1988).

better) in predicting the votes of individual justices overall, but that the model did much better at predicting “swing votes,” where the researchers fairly suspect that the complex and idiosyncratic preferences of Court moderates were too difficult for the experts to divine without the benefit of a computer model.<sup>57</sup> Rather than thinking about this study as another data point in a dichotomous debate over the primacy of law or attitude in Supreme Court decision-making, the authors suggested that the complex interplay between law and attitude the study revealed may warrant a re-conceptualization of law itself: “[U]nder any theoretical conception that regards law as consisting at least in part of what judges do, proxies that reliably predict what they will do in the future are worth considering as guideposts of ‘law,’ whether or not we can imagine them as ‘law’ themselves.”<sup>58</sup>

Recent studies of related issues have further underscored the need for an increasingly hybridized and eclectic understanding of Supreme Court decision-making. Academic lawyers have begun to explore the correlation between a judge’s policy preferences and legal preferences.<sup>59</sup> Thus, for example, conservative justices typically favor methods of constitutional or statutory interpretation—such as originalism or textualism—that yield conservative policy outcomes.<sup>60</sup> The net effect of this insight is two-fold: first, it shortens the analytical distance between law and attitude; and second, it suggests the possibility that on those infrequent occasions when legal and policy preferences diverge, institutional rule of law norms could lead justices to opt for the

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<sup>57</sup> *Id.* at 1184-85.

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<sup>59</sup> Pauline Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 404-05; Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008).

<sup>60</sup> Volokh, *supra* note 59.



former—which may explain at least some case outcomes that statistical models do not predict.<sup>61</sup>

In a related vein, precedent studies from the 1990s conducted by attitudinal scholars confirmed what lawyers had long suspected--that there is typically precedent on both sides of close cases, and that a justice will usually rely on precedent that supports a result consistent with his ideological preferences.<sup>62</sup> More recent work, however, has added important qualifications, by exploring the role that respect for precedent plays in preserving the Court's institutional legitimacy, and by differentiating between run of the mill precedent that is often manipulated in the service of implementing policy objectives, and more enduring, "super" precedent that constrains Court decision-making in identifiable ways.<sup>63</sup> Finally, two studies with overlapping authorship found that the ideological preferences of most justices "drift" over time.<sup>64</sup> Apart from complicating the task of correlating a justice's votes to her political predilections at a particular moment in time, the incidence of ideological drift begs the questions of why it occurs, whether changing policy preferences correlate to changing legal preferences, and if so, which is the chicken and which the egg? Such questions take on added relevance in light of other research finding that the Court is likeliest to render "consequential" decisions, i.e. decisions with a greater impact on the law, when the preferences of the majority are

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<sup>61</sup> Professor Volokh, in contrast, speculates that the opposite may also be true—that justices will change their legal preferences to achieve preferred policy outcomes. *Id.*

<sup>62</sup> HAROLD SPAETH & JEFFREY SEGAL, MAJORITY RULE OR MINORITY WILL? ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999)

<sup>63</sup> THOMAS G. HANSFORD (AUTHOR), JAMES F., II SPRIGGS, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); MICHAEL GERHARDT, THE POWER OF PRECEDENT (2008)

<sup>64</sup> Lee Epstein, Andrew Martin, Kevin Quinn, Jeffrey Segal, *Ideological Drift Among Supreme Court Justices: Who, When and How Important?*, 101 NW. U. L. REV. 1483, 1504 (2007) (finding drift among twenty-two of twenty-six justices, with twelve becoming more liberal, seven more conservative, and three drifting "in more exotic ways"); Andrew Martin & Kevin Quinn, *Assessing Preference Change on the U.S. Supreme Court*, 23 J. L. ECON. & ORG. 365, 365 (2007) (finding drift in among fourteen of sixteen justices who served on the Court for more than ten years).

homogeneous, which liberates the opinion-writer to speak more stridently without fear of losing his or her majority.<sup>65</sup>

## 2. *Lower Court Studies*

Early attitudinal studies focused on the U.S. Supreme Court, which made sense. To show that a judge's view of what the law (or public policy) *should be* influences her view of what the law *is*, the Supreme Court—which decides close cases where the law is unclear and has declared itself “supreme in the exposition of the law of the Constitution”<sup>66</sup>—is an obvious place to start. But it was generally understood that the findings of Supreme Court studies did not necessarily extend to district and circuit courts, where judges are subject both to appellate review, and possibly to a different set of norms that respect the constraints of controlling precedent.

In the 1990s, attitudinal scholars posited that lower court judges acted as agents for the Supreme Court by implementing the latter's policy preferences, on pain of reversal.<sup>67</sup> To explain how the Supreme Court controlled the lower courts despite low rates of reversal, some political scientists theorized that the Supreme Court establishes “doctrinal intervals” within which circuit courts may deviate from the Supreme Court's preferred policy outcomes without reversal, and that circuit judges act on their own policy preferences strategically, by implementing them to the extent they can within the confines of those intervals.<sup>68</sup> Consistent with core tenets of the attitudinal and strategic

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<sup>65</sup> Nancy Staudt, Barry Friedman, Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Decisions*, 10 U. PA. J. CONST. L. 361 (2008).

<sup>66</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>67</sup> Donald R. Songer, Jeffery A. Segal & Charles M. Cameron, *The Hierarchy of Justice, Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 675 (1994).

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

choice models, neither approach acknowledged law or legal norms as meaningful constraints on lower court decision-making.

More recent work, however, has added to the factors influencing lower court decision-making. In his groundbreaking studies of circuit courts, Frank Cross found that “judicial decision-making clearly involves a mix that includes some ideological influence, considerable legal influence, and undoubtedly other factors.”<sup>69</sup> As to ideology, he found that while “it appears to be a factor in judicial decision-making . . . the available evidence can demonstrate only that it is a relatively small factor.”<sup>70</sup> Cross found, across studies of standards of deference in appellate review,<sup>71</sup> “procedural thresholds” (e.g. justiciability requirements),<sup>72</sup> and adherence to precedent,<sup>73</sup> that “for every legal variable amenable to quantitative study, there was consistently a statistically significant association that was robust to different samples and control variables.”<sup>74</sup>

Consistent with Cross’s research on circuit courts, studies of district courts have likewise concluded that legal norms help to explain compliance with the decisions of higher courts.<sup>75</sup> In situations where the risk of reversal is high, it may be difficult to tell whether a district court’s compliance with higher court precedent is animated by fear of reversal or respect for the rule of law, but as Pauline Kim argues in a powerful essay,

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<sup>69</sup> FRANK B. CROSS, *DECISION-MAKING IN THE U.S. COURT OF APPEALS* 77 (2007).

<sup>70</sup> *Id.* at 28.

<sup>71</sup> *Id.* at 51, 228 (finding results “generally consistent with what the legal model would dictate”, and concluding that “just one legal standard, affirmance deference to the lower court decision, is consistently significant statistically and by far the most important single variable substantively in explaining circuit court outcomes”)

<sup>72</sup> *Id.* at 228-29 (the “interposition of a legal threshold requirement obviously had a significant effect on judicial decisions.”)

<sup>73</sup> *Id.* at 122 (arguing that the extent of circuit court compliance with Supreme Court precedent “might be considered evidence of remarkable power for the legal model.”)

<sup>74</sup> *Id.* at 228-29.

<sup>75</sup> *See, e.g.,* Nancy Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004) (finding that lower court standing decisions are “above politics” when “lower federal courts are subject to clear and unambiguous standing rules and when effective judicial monitoring exists”).

where lower court discretion is broader, respect for legal norms may better explain the continued allegiance of district courts to higher court precedent.<sup>76</sup> Similarly, in their study of religious liberty cases, Professors Gregory Sisk and Michael Heise acknowledge that “political ideology may play a role at the margins in deciding certain types of controversial court cases,” but conclude that:

[T]o suggest that partisan or ideological preferences are prevalent influences in deciding most cases or are invariably powerful variables in deciding even the most controversial and open-ended of legal issues is a dubious extrapolation from the empirical evidence.<sup>77</sup>

It would miss the point, however, to employ such statements in support of an argument that law is “winning” its competition with ideological preferences for control of lower court decision-making; rather, the critical conclusion is one drawn by Sisk, Heise, and Andrew Morriss in an earlier study of district court decision-making, that “as is often the case with empirical research, our study provides both comfort and challenges to all camps, again reminding us that judicial behavior is too complex for easy conclusions about influences and patterns.”<sup>78</sup>

### 3. *Economics, Social Psychology, and Cognitive Psychology*

The number of “camps” highlighting different influences on judicial decision-making is proliferating. Within the economics camp (separate and distinct from the rational choice cohort in political science, discussed earlier) scholars have struggled to

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<sup>76</sup> Pauline Kim, *supra* note 28; see also, David Klein, Robert Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOCIETY REV. 579 (2003) ( it is “especially likely” that substantial lower court compliance with the decisions of higher courts—even when the threat of reversal is weak—“flows from lower court judges’ attempts to reach legally sound decisions. This is almost certainly the explanation most judges would offer, and there is reason for scholars to take it seriously”).

<sup>77</sup> Gregory Sisk, Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 746 (2005).

<sup>78</sup> Gregory Sisk, Michael Heise, Andrew Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1498 (1998).

overcome the “embarrassment” of “explain[ing] judicial behavior in economic terms, when almost the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives—to take away the carrots and sticks . . . that determine human action in an economic model.”<sup>79</sup> To overcome this problem they have defined self-interest more broadly, and posited that judicial decision-making is variously influenced by desires to maximize popularity, prestige, public interest, affirmance, reputation, and voting as a source of judicial utility.<sup>80</sup> Consistent with this broader definition, recent empirical work has sought to show how self-interested judges may adjust their decision-making to increase their chances for appointment to a higher court.<sup>81</sup> By defining self-interest to include the desire to win approval from different audiences, law and economics encroaches on the neighboring camp of social psychology. In *Judges and their Audiences*, for example, Lawrence Baum argues that judges can be influenced not just by the rule of law, their political preferences, or the strategic means to implement those preferences, but personal considerations too, such as the aspiration to be well regarded by fellow judges, the legal community, the media, and the general public.<sup>82</sup> One empirical study, for example, found that circuit courts are more likely to adopt as precedent the rulings of prestigious judges.<sup>83</sup>

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<sup>79</sup> Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

<sup>80</sup> *Id.* at 13-23 (Reviewing the factors and arguing that voting as a source of judicial utility is the most important); see also Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

<sup>81</sup> Andrew Morris, Michael Heise, Gregory Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005); see also, Mark Cohen, *The Motives of Judges: Empirical Evidence From Antitrust Sentencing*, 12 INT. REV. L. & ECON. 12 (1992).

<sup>82</sup> LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2006).

<sup>83</sup> David Klein, Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Court of Appeals*, 28 J. LEGAL STUD. 371 (1999).

Notwithstanding an emerging scholarly consensus that law, policy preferences, and other factors combine to influence judicial decision-making, one gleans none of that from reading judicial opinions, which convey the impression that law alone drives the opinion writer inexorably to the conclusion reached. Are judges dissembling, delusional or something else? While attitudinal scholars borrow heavily from behavioral psychology in positing that judges' political attitudes cause them to vote consistently with their attitudes, they have been largely indifferent to why<sup>84</sup>—a question of cognitive psychology that a cadre of psychologists, law professors, and political scientists began to explore in earnest as another component of the new empirical moment at the turn of the 21st century.

Recent, multi-disciplinary study of what judges do is most interested in “hard” cases, “when facts give rise to legal indeterminacy,”<sup>85</sup> i.e., when specific outcomes are not clearly dictated by applicable law. As Lawrence Wrightsman explains, in such cases, a judge’s preexisting attitudes “can affect the forming of impressions, the evaluating of evidence, and the making of decisions.”<sup>86</sup> Judges may thus engage in “motivated reasoning” in which their analysis of applicable law can be influenced by their political or other predilections.<sup>87</sup> Confronted by credible arguments for a conclusion contrary to the one that they are motivated to make, Dan Simon adds that the “cognitive system imposes coherence on the arguments so that the subset of arguments that supports one outcome

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<sup>84</sup> C.K. ROWLAND & ROBERT A. CARP, *POLITICS & JUDGMENT IN THE FEDERAL DISTRICT COURTS* 142-45 (1996).

<sup>85</sup> Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002).

<sup>86</sup> LAWRENCE S. WRIGHTSMAN, *JUDICIAL DECISION-MAKING: IS PSYCHOLOGY RELEVANT?* 55 (1999).

<sup>87</sup> *Id.*; see also, Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry* (Marh, 2007) (paper on file with the author); Eileen Braman, *Outlining a Theory of Motivated Cognition in Legal Decision-making*, in *LAW POLITICS AND PERCEPTION: HOW POLICY PREFERENCES SHAPE LEGAL REASONING* (forthcoming) (draft on file with the author); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision-Making*, 71 U. CHI. L. REV. 511, 542 (2004).

becomes more appealing to the judge and the opposite subset, including arguments that previously seemed appropriate, turns less favorable.”<sup>88</sup> As a consequence, the “factual patterns, the authoritative texts, and the resulting propositions are restructured,” which “spreads apart the opposing arguments” and enables one decision to become “dominant over the other.”<sup>89</sup>

Cognitive psychology therefore suggests that judges may not be motivated by a desire to implement their ideological or other predilections and may sincerely believe that their rulings are grounded in an analysis of law alone, even though their predilections influence their rulings.<sup>90</sup> In the separate, but related sub-field of heuristics, several scholars have studied the ways in which judicial reasoning can be unwittingly influenced and distorted by cognitive biases or illusions that can occur when the mind takes short cuts in the reasoning process.<sup>91</sup>

Much remains to be done in the ongoing, multi-disciplinary empirical movement to analyze influences on judicial behavior—particularly in under-studied state courts, which adjudicate 98% of the nation’s caseload.<sup>92</sup> Nevertheless, there is an emerging consensus that judges are subject to an array of factors that influence their interpretations of law, including but not limited to applicable legal text. More fundamentally, perhaps, is that this empirical work informs and deepens conceptions of law itself—conceptions

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<sup>88</sup> Dan Simon, *A Psychological Model of Judicial Decision-Making*, 30 RUTGERS L. J. 1, 20 (1998).

<sup>89</sup> *Id.*

<sup>90</sup> ROWLAND & CARP, *supra* note 84 at 158.

<sup>91</sup> Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORN. L. REV. 1 (2007); Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORN. L. REV. 777 (2001)(discussing anchoring, framing, hindsight, representative heuristic and egocentric biases); Jeffrey Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 70 OR. L. REV. 61 (2000); Jeffrey Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Andrew Wistrich, Chris Guthrie, Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

<sup>92</sup> American Bar Association, *Justice in Jeopardy: Report of the Commission on the 21st Century Judiciary* viii (2003).

transcending antiquated notions of law as mathematical formulas that dictate invariable outcomes, and embracing law as elastic vessels that constrain available choices while accommodating, if not incorporating, a variety of extra-legal influences.

## **II. The Public Policy Debate on what Judges Do: Simplistic and Dichotomous**

While the new empiricists have inched toward an emerging consensus as they strive to capture the complexity and nuance of judicial decision-making, the disputants in public policy debates have kept it divisive and simple. The most intense of such debates are cyclical affairs, triggered by political realignments, in the aftermath of which leaders of the new regime criticize and threaten unpopular, holdover judges of the old regime, eliciting a counterstrike from court supporters.<sup>93</sup>

At the federal level, the most recent of these cycles began after the Republican Party retook control of the Senate and House of Representatives in 1994.<sup>94</sup> It was then that conservative Republican leaders (and like-minded organizations and commentators) embarked on a campaign to thwart liberal “activist” judges, proposing to impeach and remove targeted jurists, eliminate federal court jurisdiction over issues that had yielded controversial decisions, disestablish miscreant courts, cut judicial budgets, and prevent the appointment of “liberal” Clinton nominees. After the election of George W. Bush in 2000, Senate Democrats responded in kind, exploiting a range of procedural devices to stall or reject Bush nominees deemed too conservative. In response, public officials (including judges), organizations, pundits, and others sympathetic to the plight of the courts criticized the critics and called for an end to the attacks. In 2006, Democrats

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<sup>93</sup> Charles Gardner Geyh, *The Choreography of Courts-Congress Conflicts*, in *COURTS UNDER SEIGE: COURTS, POLITICS & THE PUBLIC* (Bruce Peabody, ed. forthcoming 2010, Johns Hopkins University Press).

<sup>94</sup> For a more elaborate discussion of the events summarized in this paragraph, see CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 3-5; 260-82 (2006).



regained control of Congress, conservative court critics fell from power, and the cycle wound down.

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

#### **A. Court Critics and their Vision of Judicial Decision-Making**

“Court critics,” as I use the term here, do not encompass all who are critical of isolated decisions rendered by a given court (which would include nearly everyone). Rather, the term refers to those who are critical of the courts generally, including those whose general disquietude is a response to court decisions in isolated cases.

In the latest cycle of anti-court sentiment, court critics have expressed outrage at judicial decisions—most often those that invalidate popularly enacted legislation—and have argued that in those cases, the decision-makers have disregarded the law and implemented their personal preferences. Former Judge Robert Bork, for example, complained that the nation is “increasingly governed not by law or elected representatives, but by unelected, unrepresentative, unaccountable committees of lawyers applying no laws other than their own will.”<sup>95</sup> Pennsylvania Senator Rick Santorum characterized the problem as one in which “judges have decided to go off on their own

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<sup>95</sup> ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES \_\_ (2003).

tangent and disobey the statutes of the United States of America.”<sup>96</sup> And the Center for a Just Society opined that “[t]here is nothing wrong with our existing federal and state constitutions. What is wrong is that judges are wrongly misrepresenting the requirements of these documents. Indeed, they are rewriting the documents by misconstruing them in order to satisfy their own social and political agendas.”<sup>97</sup>

Proceeding from the assumption that too often judges disregard the law and implement their ideological preferences, court critics have argued that only by curbing the freedom of “activist” judges can the rule of law be preserved. “If we’re going to preserve our Constitution,” declared Congressman Steve King, “we must get them in line.”<sup>98</sup> Similarly, in proposing legislation calling on federal judges to report their deviations from federal sentencing guidelines to Congress, Representative Tom Feeney opined that his amendment followed from the “simple precept” that “judges should follow, not make the laws,” and that “if insisting on that precept ‘intimidates’ federal judges, then perhaps that is a good thing.”<sup>99</sup> The critics have thus often looked favorably on methods of court-control, such as impeachment, jurisdiction-stripping, or budget-cutting—methods condemned by court defenders—as means to promote judicial accountability.<sup>100</sup> Their stated goal is for judges to exercise “judicial restraint,” as exemplified (in their view) by the decisions of Supreme Court conservatives, such as

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<sup>96</sup> Quoted in Ruth Marcus, *There’s New Ferocity in Talk of Firing Activist Judges*, WASHINGTON POST, April 11, 2005, at A19.

<sup>97</sup> Center for a Just Society, *Activist Judges Undermine Government by the People*, May 22, 2008 available online at <http://www.centerforajustsociety.org/press/article.asp?pr=3445>.

<sup>98</sup> Ruth Marcus, *supra* note 96.

<sup>99</sup> Tom Feeney, *Rep. Feeney Defends Measure to Thwart Sentencing by Whim*, PALM BEACH DAILY BUSINESS REVIEW, April 28, 2003, at A7.

<sup>100</sup> See, e.g., examples cited in GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 94 at 3-4, 273.

Clarence Thomas and Antonin Scalia.<sup>101</sup> And at the state level, they often oppose appointive systems and favor the selection of judges by means of contested elections, which enables voters to hold judges accountable for their decisions (and purge the judiciary of “activists.”)<sup>102</sup>

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

## **B. The Legal Establishment and its Vision of Judicial Decision-Making**

Judges and court defenders proceed from the categorical premise that judges do not make but follow the law. Iowa Chief Justice Louis Lavorato’s comments are illustrative: “In our system of government, we expect judges to rule according to the law, regardless of their personal views.”<sup>103</sup>

Proceeding from the premise that judges follow the law, court defenders argue that judicial independence is essential, because it insulates judges from external

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<sup>101</sup> Although the latest round of court-directed animus has been led by conservative politicians and pundits against purportedly liberal activist judges, some progressive politicians and pundits have responded in-kind, by employing the activist label to attack conservative judges and rulings. That effort was most pronounced in the context of judicial confirmation proceedings during the George W. Bush administration, when Senate Democrats agitated to derail Bush nominees the Democrats characterized as too conservative.

<sup>102</sup> *The Debate Over Judicial Elections*, 21 Geo. J. Leg. Eth. 1347, 1379-80; Review and Outlook, *The ABA Plots a Judicial Coup*, Wall Street Journal, August 14, 2008 at A14.

<sup>103</sup> Quoted in Louis Lavorato, *Chief Justice Reacts to Judicial Questionnaire*, Iowa Supreme Court, August 9, 2006.

interference with their impartial judgment that could corrupt the rule of law. Thus, Justice Stephen Breyer has opined, “judicial independence revolves around the theme of how to ensure that judges decide according to law, rather than according to their own whims or the will of the political branches of government.”<sup>104</sup> Justice Breyer’s sentiments are echoed in the remarks of numerous other judges.<sup>105</sup> Similarly, the Constitution Project declares that “Judges are supposed to be responsive only to the rule of law and the Constitution, not to majority will or public, political or media pressure,”<sup>106</sup> while a Report of the Defense Research Institute adds that “for our system to work, a judge must be free to make decisions based on the facts and law without undue influence or interference.”<sup>107</sup>

Accordingly, court defenders oppose proposals to control judicial decision-making—e.g., by cutting court budgets, trimming court jurisdiction, impeaching errant judges, disestablishing unpopular courts, or withholding judicial pay raises—as an effort to intimidate judges that threatens judicial independence and the rule of law.<sup>108</sup> They are dismissive of critics’ complaints of “activism,” which they relegate to the status of a label signifying little more than disagreement with court decisions.<sup>109</sup> They often condemn judicial selection in partisan elections, because, in the words of an American Bar Association Report, “the administration of justice should not turn on the outcome of

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<sup>104</sup> Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS L. J. 989, 989 (1996).

<sup>105</sup> Charles Gardner Geyh, Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision-Making and the Future of Judicial Independence, 22 NOTRE DAME J. OF L., ETHICS & PUB. POL., 435, 444-45 (2008) (quoting judges).

<sup>106</sup> THE CONSTITUTION PROJECT, THE NEWSROOM GUIDE TO JUDICIAL INDEPENDENCE (2006).

<sup>107</sup> Without Fear or Favor: A Report by DRI’s Judicial Task Force 10 (2007).

<sup>108</sup> Sandra Day O’Connor, Forward, CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM (ppb ed. 2009)

<sup>109</sup> American Bar Association, An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence vi (“activism has become a code word for a person, political or ideological difference with a particular decision”).

popularity contests,” and a “good judge” should be “independent enough to uphold the law impartially, without regard to whether the results will be politically popular with the voters.”<sup>110</sup>

To protect judicial independence and the rule of law from incursion, court defenders consistently advocate some variation on the theme that courts and judicial systems must be depoliticized. The ABA’s Commission on the 21st Century Judiciary declared categorically that its mission was to “defuse the escalating partisan battle over American courts.”<sup>111</sup> In the realm of state judicial selection, some reformers propose to “take the politics out of the system by setting up nonpartisan elections”;<sup>112</sup> others advocate public funding of judicial elections to “take politics out of judicial races;”<sup>113</sup> and still others would replace judicial elections with an appointive system to “depoliticize the judicial process.”<sup>114</sup> With respect to federal judicial selection, the American Bar Association has advocated the use of nominating commissions for federal judges to “alleviate excesses” of “polarized combat that fosters the view that judges are in office simply to carry out ideological agendas of those involved in putting them there.”<sup>115</sup> Similarly, we hear calls to “take politics out of the debate over judicial salaries,”<sup>116</sup> and to depoliticize the rhetoric of judicial criticism generally, because “if this current, often

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<sup>110</sup> American Bar Association, *supra* note 92 at 70 (2003).

<sup>111</sup> *Id.* at 4.

<sup>112</sup> Michael Dayton, *Chief Justice Lake Defends Latest Changes in Judicial Code in N.C.*, N. CAR. LAWYERS WEEKLY, October 20, 2003.

<sup>113</sup> Haynes, *Sales Tax Case: Reform the System*, MILWAUKEE JOURNAL SENTINEL, July 17, 2008, Section A.

<sup>114</sup> Barbara Hoberock, *Report Cites Need for Reform in Sentencing*, TULSA WORLD, November 1, 2008 at A13

<sup>115</sup> Report of the American Bar Association, available online at <http://www.abanet.org/scfji/pdf/OneHundredEighteen.pdf>.

<sup>116</sup> Gov. Paterson Commends Former Mayor Rudy Giuliani for Ideas on State Constitutional Convention, U.S. FEDERAL NEWS, June 26, 2009.

politically motivated drumbeat against judges continues unchallenged, more and more people . . . will lose faith not just in the courts but in the rule of law itself.”<sup>117</sup>

Despite the often one-dimensional rhetoric that independent judges follow the law and nothing else, it would be a mistake to assume that court defenders are members of law’s answer to the flat earth society, who truly believe that divining the law is a mechanical process divorced from other influences. To the contrary, court defenders acknowledge the role of policy preferences in judicial decision-making. Thus, for example, in discussing the “enduring principle” that “judges should uphold the rule of law,” the American Bar Association’s Commission on the 21st Century Judiciary makes the concession that “the notion that constitutional or statutory law is sufficiently fixed and clear that judges can invariably define its meaning uninfluenced by their personal or political experience is increasingly unrealistic.”<sup>118</sup> Notwithstanding such concessions, however, court defenders doggedly adhere to the simplistic premise that independent judges follow the law—period, which begs the question of why.

### **III. Impediments to Consensus in the Public Policy Debate**

Part I recounted the nuanced, multi-faceted range of influences on judicial decision-making reflected in recent social science research. Part II, in turn, described the rigid, dichotomous characterization of judicial decision-making in public policy debates. In so doing, it highlights the unenviable position of court defenders, whose longstanding support for judicial autonomy is grounded in factual assumptions that appear to be undermined by empirical research. Court detractors, in contrast, can cherry pick the cases they criticize to emphasize those in which ideology (of a sort that is on a different end of

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<sup>117</sup> U.S. District Judge Paul Friedman, quoted in Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 497 (2007).

<sup>118</sup> *Id.* at 7-8.

the political spectrum from their own) played an apparently decisive role, which makes their task easier.

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

#### **A. Public Opinion and its Role in the Policy Debate**

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

That said, it would seem that the public thinks judges are subject to an eclectic array of influences, consistent with the emerging scholarly consensus. First, the public thinks judges are fair and impartial arbiters of law. In a survey conducted by Beldon, Russonello & Stewart in 2001, 79% thought that “dedicated to facts and law” described

judges well or very well; 76% thought the same of the term “fair,” and 63% of “impartial.”<sup>119</sup> And 58% agreed with the statement that judges “make decisions based more on facts and law” than “on politics and pressure from special interests.”<sup>120</sup>

Second, the public thinks judges are influenced by their ideologies. The same 2001 survey found that 76% of respondents thought that “political” described judges well or very well.<sup>121</sup> In 2005, another national poll found that 82% of those surveyed thought that judges’ partisan backgrounds influenced their decision-making some or a lot.<sup>122</sup> That 2005 survey found that 56% agreed with the statement that “judges always say that their decisions are based on the law and the constitution but in many cases judges are really basing their decisions on their own personal beliefs.”<sup>123</sup> And in 2006, yet another survey found that 75% of respondents thought that judges were influenced by their personal political views to a great or moderate extent.<sup>124</sup>

Third, several polls reveal that around 80% of the public thinks that elected judges are influenced by contributions they receive to their campaigns.<sup>125</sup> Such a view is compatible with the strategic choice, economic and social psychology models. Devotees of strategic choice would presumably theorize that to further their long-term interest in influencing public policy, judges strategically align their votes with their contributors’ preferences to the extent necessary to win reelection; proponents of an economic model

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<sup>119</sup> Reported in AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21<sup>ST</sup> CENTURY JUDICIARY 17 (2003).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., JUDGES AND THE AMERICAN PUBLIC’S VIEW OF THEM: RESULTS OF THE MAXWELL POLL (2005), <http://www.maxwell.syr.edu/news/MaxwellPoll.pdf>

<sup>123</sup> *Id.*

<sup>124</sup> Annenberg Foundation Trust at Sunnylands, 2006 Annenberg Judicial Independence Survey, prepared for the Princeton Survey Research Associates International.

<sup>125</sup> See polls cited in Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Oh. St. L. J. 43, 54-55 (2003).



would argue that self-interested judges intent on retaining office and political power may make decisions necessary to perpetuate their tenure; and advocates of a social psychology approach would identify contributors as an attentive audience to whom judges may be responsive.

In addition, the public's understanding of "law" is merged with politics in ways consistent with a broader and more flexible construction of law proposed by interdisciplinary scholars. One major study, based on interviews with over 400 people, found that the public simultaneously regards law as disinterested, objective, and operating by "fixed rules," and as a "a game, a terrain for tactical encounters."<sup>126</sup> Consistent with this two-sided conception of law, one recent Kentucky survey found that a significant majority of survey respondents think it is "very important" for judicial candidates to "state how they stand on important legal and political issues as part of their campaigning." In other words, the public sees law and politics as interrelated, and favors holding judges accountable to the electorate for the political and legal views that animate their decision-making.

At the same time, the public has retained considerable confidence in courts peopled with judges whose motives it regards as mixed, and favors insulating judges from external controls. A 2006 survey revealed that 64% of the public trusts the Supreme Court a "great deal" or a "fair amount."<sup>127</sup> In another survey, 76% expressed some or a great deal of confidence in the U.S. Supreme Court, followed by 74% for federal courts

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<sup>126</sup> PATRICIA EWICK & SUSAN SIBLEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 28 (1998).

<sup>127</sup> Annenberg Public Policy Center, *Judicial Independence, Final Report* (September 2006), available at <http://www.annenbergpublicpolicycenter.org/>.

and 71% for state courts.<sup>128</sup> Moreover, in one survey, 73% thought that judges should be shielded from outside pressure,<sup>129</sup> while in another survey, 83% thought judges should be shielded from congressional intimidation.<sup>130</sup>

In short, the public has internalized what recent scholarship demonstrates—that judges are subject to legal *and* political influences—but continues to express considerable confidence in the courts. In that light, the pretense of the legal establishment’s argument in the public policy debate, that judges are moved by law and facts alone, seems otherworldly, unnecessary, and a bit silly. The public perception landscape is, however, more complicated. Citizens may think that judges *are* influenced by extra-legal considerations, but that does not mean they *like* it. As Professor Keith Bybee reports, “Polls show that large majorities of Americans expect federal judges to apply the law impartially and distrust judges who advance narrow ideological interests.”<sup>131</sup> Similarly, Professor James Gibson found that nearly 72% of respondents in his Kentucky survey thought it was “very important” for a good state supreme court judge to “strictly follow the law no matter what the people in the country may want.”<sup>132</sup>

As a consequence, judges are well advised to stick to the rule of law script. The 2005 confirmation of Chief Justice John Roberts offers a useful illustration. Roberts’ conservative political bent was widely reported, and Senate Democrats did their best to

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<sup>128</sup> Beldon, Russonello & Stewart, *Access to Justice and Constitutional Rights versus Political Pressure: Defining the Battle for the Courts*, in JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS 13, 17 (2006).

<sup>129</sup> CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV, *supra* note 122.

<sup>130</sup> Beldon, Russonello & Stewart, *supra* note 128.

<sup>131</sup> Keith Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming, Stanford University Press 2011).

<sup>132</sup> James Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming, Stanford University Press)

portray him as an ideological extremist.<sup>133</sup> The Democrats had succeeded with a similar strategy in defeating the Supreme Court nomination of Robert Bork two decades earlier.<sup>134</sup> One critical difference, however, was the extent to which the two nominees hewed to the rule of law rhetoric. Bork was quite willing to elucidate his judicial philosophy with the Senate Judiciary Committee.<sup>135</sup> From his vantage point, he was merely elaborating on his understanding of the law. In so doing, however, he made plain the influence that his ideology was likely to have on the decisions he would be making as a justice, which helped enable Senate Democrats and interest groups to sour the public—and ultimately the Senate—on his candidacy.<sup>136</sup> Roberts, in contrast, like every Supreme Court nominee to testify after Bork, was less forthcoming, declined entreaties to discuss his views on any legal issues and repeatedly sounded the theme that he would follow the law.<sup>137</sup> “Judges are like umpires,” he testified. “Umpires don’t make the rules. They apply them.”<sup>138</sup> Against the backdrop of social science learning detailed in Part I, the claim that the Supreme Court “applies” but does not “make” rules of constitutional law when it decides hotly contested questions of first impression that have split the lower courts, is something of a whopper. And given the public’s readiness to believe that judges are influenced by their personal views, it seems unlikely that the public was so fatuous as to assume that Roberts’ widely publicized conservative ideology would have no bearing on his decision-making. Nevertheless, the ease with which Chief

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<sup>133</sup> David D. Kirkpatrick, *Senate Democrats Increase Resistance to Roberts*, N.Y. TIMES, Aug. 17, 2005, at A16.

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<sup>135</sup> Linda Greenhouse, *Bork Sets Forth Spirited Defense of His Integrity*, N.Y. TIMES, Sept. 19, 1987, at A1.

<sup>136</sup> David Lauter, *Senate Rejects Bork for Supreme Court*, 58-42, L.A. TIMES, Oct. 24, 1987, at 1.

<sup>137</sup> Sheryl G. Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sept. 14, 2005, at A1.

<sup>138</sup> Quoted in David G. Savage, *Roberts sees Role as Judicial “Umpire,”* L.A. TIMES, Sept. 13, 2005 at A1.

Justice Roberts was confirmed was widely attributed to the appeal of his simple and consistent rule of law message.<sup>139</sup>

Most recently, in 2009, President Barack Obama indicated his intention to replace retiring Justice David Souter with someone who possessed—among other qualities—“empathy.”<sup>140</sup> The comment drew a sharp rebuke from critics who claimed that empathy was “code” for activism and had no place on a Supreme Court that should decide cases with reference to applicable law alone.<sup>141</sup> When President Obama later announced the nomination of Sonia Sotomayor, gone was any reference to empathy, and in its stead was a statement that stressed the nominee’s commitment to the rule of law.<sup>142</sup> What controversy surrounded her nomination was limited almost exclusively to prior statements she had made implying that judges are subject to extra-legal influences (e.g. that a Latina judge might decide matters differently—and better—than a white male, and that circuit courts make policy).<sup>143</sup>

In short, while the public is well aware of extra-legal influences on judicial decision-making, it does not approve of them. That helps to explain the continuing appeal of rule of law rhetoric, and the resonance of policy arguments aimed at discouraging ideological and other influences. For their part, judges are acutely aware of the relationship between public perception and the judiciary’s institutional legitimacy,

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<sup>139</sup>Sheryl G. Stolberg, *Senate Approval Likely as Roberts Clears Panel*, 13-5, N.Y. TIMES, Sept. 23, 2005, at A1. Admittedly, there are other explanations for the outcomes: Roberts came across as charming and charismatic; Bork—aloof and condescending. And Bork was the first high-profile judicial nomination that Senate Democrats attacked during the Reagan administration. In contrast, by the time Roberts and Alito was nominated, Senate Democrats had arguably spent their political capital on ideological challenges to many of George W. Bush’s conservative circuit court nominees. Steven Lubet, *The Alito Confirmation: How Democrats Lost the Political Battle*, San Diego Union-Tribune, February 1, 2006.

<sup>140</sup> Quoted in *Obama’s Remarks on the Resignation of Justice Souter*, N.Y. TIMES, May 1, 2009.

<sup>141</sup> Charlie Savage, *Scouring Obama’s Past for Clues on Judiciary*, N.Y. TIMES, May 9, 2009, at A17.

<sup>142</sup> Lynn Sweet, *A ‘Real-Life’ Story*, CHICAGO SUN-TIMES, May 27, 2009, at 13.

<sup>143</sup> Amy Goldstein & Paul Kane, *Democrats Seek Political Gain from Sotomayor Vote*, WASHINGTON POST, Aug. 5, 2009.

and to the extent the public wants judges whose commitment to the rule of law is unwavering, it behooves judges and the legal establishment to profess such a commitment.<sup>144</sup>

### **B. Getting to the Bottom of the Ermine Myth**

Waxing eloquent on the virtues of following the law and nothing else, as the legal establishment is apt to do, is easy enough. Actually striving to eliminate extra-legal influences on judicial decision-making, however, is arguably a fool's errand, because judges must inevitably exercise discretion whenever applicable law provides no clear answers and such discretion is informed by extra-legal influences.<sup>145</sup> To the extent that the legal establishment perpetuates the view that judges are moved by rules of law alone, they are indeed propagating a myth.

Scholars who describe the rule of law as myth or fiction often do so in pejorative terms, arguing that the myth is an empty husk and proposing that it be exploded or abandoned.<sup>146</sup> Such a myth-blasting exercise would expose as exaggerated if not fraudulent a rule of law that the legal establishment has long defended as the sole influence on judicial decision-making. That, in turn, would presumably render the policy debate less dichotomous and more closely aligned with scholarly understandings of what

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<sup>144</sup> The Model Code of Judicial Conduct directs judges to "avoid the appearance of impropriety," with the accompanying comment explaining that "public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety." American Bar Association, Model Code of Judicial Conduct, Rule 1.2 (2007). Rule 2.2, in turn, states that judges "shall uphold and apply the law;" insofar as failing to uphold and apply the law is thus improper, creating the perception that judges do not uphold and apply the law (by openly acknowledging that judges base their decisions on extra-legal factors instead) gives rise to an appearance of impropriety.

<sup>145</sup> One can define law flexibly enough to merge law with politics and characterize these "extra-legal" influences as legal ones. See note 58, *supra*, and accompanying text. In the context of a discussion of the public policy debate, however, I am preserving the law-politics divide that animates the debate.

<sup>146</sup> Professor John Hasnas takes this view, arguing that "the establishment of a truly free society requires the abandonment of the myth of the rule of law." John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 202 (1995).

judges do. The ermine myth offers two countervailing benefits, however, that must not be ignored—one external and one internal.

The external benefit relates to the contribution the myth makes to the judiciary's institutional legitimacy vis a vis the outside world: public confidence in the judiciary is preserved by maintaining the public's faith in the rule of law. One might argue that undermining the ermine myth by conceding a political court would not shake public confidence in the courts, because survey data discussed earlier show that the public retains considerable confidence in the courts despite believing that judicial decision-making is subject to ideological and other influences. But such an argument underestimates how central public faith in the rule of law is to our political culture. As Paul Kahn has written: "[T]he rule of law may be our deepest political myth. It is the foundation of our beliefs about our community as a single people with a unique history, as well as our view of our individual obligations to the state."<sup>147</sup> Entertaining doubts about the rule of law may be essential to preserving the myth's continuing vitality, but abandoning faith altogether would come at a considerably greater cost.<sup>148</sup> Political scientist James Gibson, for example, theorizes that in the absence of electoral accountability, judges derive their legitimacy with the public from their expertise.<sup>149</sup> To the extent that the public attributes a judge's expertise to her experience and training in

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<sup>147</sup> PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (2002).

<sup>148</sup> Marc O. DeGirolami, *Faith in the Rule of Law*, 82 ST. JOHN'S L. REV. 573, 600 (2008) (arguing that faith in the rule of law is most effective when tempered by doubt, which is "crucial for maintaining a vital faith").

<sup>149</sup> James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS* \_\_ (forthcoming Stanford University Press, 2011).

interpreting legal texts, marginalizing the rule of law as a fiction could well undermine the legitimacy of judges and the judiciary.

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

The internal benefit, in contrast, concerns the impact of the rule of law “myth” on judges themselves. Insofar as judges are influenced by the rule of law, preserving the “myth” that judges can be, are, and should be influenced by law alone perpetuates norms within the judiciary that foster a rule of law culture and ultimately, greater allegiance to the rule of law itself.<sup>150</sup> The judiciary’s internal commitment to the rule of law is most readily apparent in court-promulgated codes of conduct, virtually all of which are based,

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<sup>150</sup> As one commentator recognizes, “The word myth is used here to suggest more than just a false story, but rather a story of real power that, even if not fully true, is capable of impacting the real world by affecting the motivations and aspirations of real people.” Blake K. Puckett, “*We’re Very Apolitical*”: *Examining the Role of the International Legal Assistance Expert*, 16 IND. J. GLOBAL LEGAL STUD. 293, 295 (2009).

to varying degrees, on the ABA Model Code of Judicial Conduct. Those Codes serve both to advise judges on their ethical obligations and (in state systems at least) to articulate rules of conduct that judges disregard on pain of discipline or removal. The preamble to the ABA Model Code of Judicial Conduct, begins:

The United States legal system is based upon the principle that an independent, impartial, and competent judiciary . . . will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.<sup>151</sup>

Model Code Rule 2.2 directs that “a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”<sup>152</sup> A comment accompanying this rule adds that “[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”<sup>153</sup> Similarly, Rule 2.4 states that “a judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.”<sup>154</sup> The comment to Rule 2.4 emphasizes that “confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences.”<sup>155</sup>

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

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<sup>151</sup> American Bar Association, Model Code of Judicial Conduct, Preamble (2007)

<sup>152</sup> *Id.* at Rule 2.2.

<sup>153</sup> *Id.* at Comment 2.

<sup>154</sup> *Id.* at Rule 2.4.

<sup>155</sup> *Id.* at comment.



the American judiciary (though more, the higher the level),” which is “heresy to the legal establishment.”<sup>156</sup> Although such orthodoxy may seem divorced from reality, there is an inescapable logic to the assumption that judges who embrace the rule of law as an article of faith are likely to take the rule of law more seriously than those who are agnostic.

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

#### **IV. The Future of the Ermine Myth: Three Scenarios**

In short, there is logic to the dichotomous character of the public policy debate over what judges do and what to do about it. The public, like the academic community, understands that judges are influenced by legal and non-legal factors in their decision-making, but seeks to discourage the latter. By preferencing judicial aspirants who profess an unwavering commitment to the rule of law, the public hopes to select judges for whom the rule of law exerts greater gravitational pull, to reduce the likelihood that extra-legal influences will cause judges to deviate as markedly from their orbit. The legal establishment, in turn, is well aware that the exercise of discretion requires judges to bring extra-legal considerations to bear in their decision-making, but is mindful of public

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<sup>156</sup> Posner, *supra* note 6 at 28.

perception and is acculturated to rule of law norms. While judges and lawyers may thus acknowledge multivariate influences on judicial decision-making privately or even in stage whispers, they do so openly at the peril of undermining the ermine myth, a core premise of which is that independent, impartial judges set extraneous influences to one side and follow the facts and law. To openly embrace the recent findings of social science research summarized in Part I is to concede the rightness of critics' claims that judicial independence *does* liberate judges to do more and less than follow the law. That concession effectively undercuts the longstanding justification for an independent judiciary and leaves court defenders ill-equipped to counter arguments that judicial decision-making should be subject to greater political and popular control. And so, defenders have stuck to their story.

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

political controls on the judiciary's independence—the power of the ermine myth will fade.

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

There is a very real possibility that academic and public policy debates will continue on a parallel course without intersecting and without meaningful consequence: the legal establishment and court critics will continue their dichotomous wrangle; scholars will continue down a different path toward nuance and consensus, and that will be that. In defense of this prediction, one should not underestimate the awesome power of inertia. If nearly a century's worth of social science research on what judges do has yet to influence what the legal establishment and court critics say judges do, one may legitimately doubt whether that is likely to change anytime soon. Moreover, it is important to understand that the exclusivity of the legal establishment's commitment to the rule of law and its failure to embrace social science learning is not simply a matter of ignorance or stupidity. Rather, it is attributable to a rule of law culture that the legal establishment seeks to perpetuate internally and with the general public, to the end of preserving its institutional legitimacy. And the rule of law mantra continues to work: public confidence in the courts remains high. As long as the public embraces the rule of law in its mythological form as an aspirational goal, remains untroubled that the myth does not completely comport with reality, and keeps its faith in the courts, court defenders may stick to their guns, perpetuate the myth, and ignore the complexity and nuance that social science research brings to the table. Court critics, for their part, will persist in their cyclical attacks on judges and the courts, to limited or no effect.

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

First, the conservative campaign against “judicial activism,” has received national attention for over a decade. As discussed in Part II, beginning in the mid-1990s, court critics pervasively decried liberal activist judges, whom they identified (implicitly and explicitly) as judges who disregard the law and implement their own policy preferences. And there is some evidence that the campaign gained ground with the public. In a 2005 survey, 56% of respondents agreed that “activism has reached a crisis” because “judges routinely overrule the will of the people, invent new rights and ignore traditional morality.”<sup>157</sup> Liberal criticism of conservative judges was more isolated, but the Supreme Court’s decision in *Bush v. Gore* created a teaching moment of unparalleled proportions for liberals determined to show that conservative judges too are subject to

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<sup>157</sup> Martha Neil, *Half of U.S. Sees ‘Judicial Activism Crisis’*, A.B.A. J., Sept. 30, 2005, available at <http://www.abanet.org/journal/redesign/s30survey.html>.

ideological influences.<sup>158</sup> Polling data reveal that the *Bush v. Gore* case did not result in a net diminution of public confidence in the Supreme Court.<sup>159</sup> Tellingly, however, confidence levels among Democrats declined as it increased among Republicans, suggesting that the Court's performance was being evaluated in decidedly partisan terms.<sup>160</sup>

Second, when the media report on decisions of the United States Supreme Court, they routinely group the votes of the justices into ideological blocs—liberal, conservative or moderate/swing votes. Press coverage of three recent cases is illustrative. In describing the Supreme Court's 2008 five to four decision in *District of Columbia v. Heller*—which invalidated a D.C. gun control law on second amendment grounds—the press explained the outcome with explicit reference to the Court's "liberal" and "conservative" justices.<sup>161</sup> Similarly, in the 2009 case of *A.T. Massey Coal Co. v. Caperton*—a due process challenge to a state supreme court justice's failure to disqualify himself from a case in which the CEO of a litigant had spent \$3 million in support of the justice's election while the litigant's case was pending—the press reported on the majority's opinion as a product of its "liberal bloc."<sup>162</sup> And in *Ricci v. Destefano*, a reverse discrimination case brought by white and Latino firefighters who had been denied promotions, the New York Times reported on Justice Kennedy "writing for himself and the four members of the Court's conservative wing."<sup>163</sup> The message is clear to all but

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<sup>158</sup> ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001) (attacking the decision as "lawless" and highly political).

<sup>159</sup> See Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001).

<sup>160</sup> *Id.*

<sup>161</sup> Adam Liptak, *Ruling on Guns Elicits Rebuke from Right*, N.Y. TIMES, Oct. 20, 2008 at A15.

<sup>162</sup> David G. Savage, *Supreme Court Says Judges Can't Rule in Cases Involving Own Big Donors*, L.A. TIMES, June 9, 2009 at A1.

<sup>163</sup> Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, June 29, 2009 at A1.

the hopelessly obtuse: to understand why a justice voted as she did, it is not enough to understand her legal reasoning as reflected in the opinion she wrote; one needs to know her ideological orientation. Indeed, it is common for press reports to precede any discussion of the Court's reasoning with a reference to the ideological alignment of the justices' votes, which implicitly underscores the primacy of ideology relative to the rule of law.

Third, beginning in the aftermath of Robert Bork's confirmation proceedings, widely reported partisan battles over the appointment of federal judges have underscored the proposition that ideology is of critical importance in judicial decision-making. Senate Republicans resisted the confirmation of "liberal activist" judges nominated by President Bill Clinton, while Senate Democrats struggled to reject "conservative extremists" nominated by President George W. Bush.<sup>164</sup> On the one hand, both political parties have putatively perpetuated rule of law principles by arguing that their respective campaigns are motivated by a desire to ensure that the President of the opposing party does not appoint judges whose ideological bent is so extreme as to interfere with their capacity to follow the law. On the other hand, the composite picture the confirmation battles paint is of a judiciary staffed with left and right wing ideologues.

Fourth, there have been widely publicized episodes in which judges have been criticized for failing to disqualify themselves from hearing cases in which they had a personal interest that arguably impaired their capacity to follow the law. In 2004, United States Supreme Court Justice Antonin Scalia accepted an invitation to join Vice President Dick Cheney for a weekend of duck hunting in Louisiana, while a lawsuit against the

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<sup>164</sup> Neil Lewis, *Conservatives Set for Fight on Supreme Court Nominees*, N.Y. TIMES, Nov, 13, 1992, at B16; see also Peter Baker, *Parties Gear Up for High Court Battle*, WASHINGTON POST, June 27, 2005.

Vice-President was pending before the Supreme Court. Scalia subsequently declined to disqualify himself from hearing the case, and ultimately cast his vote in the Vice President's favor. Editorial writers reacted critically: one asked incredulously, "Would a rational person doubt that, all things being equal, the judge just might tilt toward the man with whom he is so 'well acquainted?,'" while another added that "the appearance of conflict is obvious and Scalia should recuse himself from the case immediately in order to protect the credibility of the court's eventual decision."<sup>165</sup>

In a West Virginia Supreme Court race, judicial candidate Brent Benjamin defeated incumbent Chief Justice Warren McGraw, with the support of over \$3 million in independent expenditures from the CEO of a coal company that was then poised to appeal a \$50 million verdict against it. Justice Benjamin subsequently declined to disqualify himself from hearing the coal company's case and later cast the deciding vote in the company's favor. One editorial writer observed that "the West Virginia case, while extreme, points to an alarming trend. It comes at a moment when judicial neutrality -- and the appearance of neutrality -- basic to due process are under a growing threat from big-money state judicial campaigns;<sup>166</sup>" while a second asked "If citizens believe that judicial office is for sale to the highest bidder, why should they respect the rule of law?"<sup>167</sup>

While these disqualification imbroglios do not bear on the role of ideology in judicial decision-making (and in the case of Justice Benjamin, his refusal to recuse was ultimately reversed by the United States' Supreme Court),<sup>168</sup> they fuel the public's

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<sup>165</sup> *Do the Right Thing Again*, THE DENVER POST, April 13, 2004 at B1.

<sup>166</sup> *Justice not for Sale*, N.Y. TIMES, March 3, 2009 at A25.

<sup>167</sup> *Judicial Credibility is at Stake in Case*, THE WICHITA EAGLE, March 6, 2009 at A3.

<sup>168</sup> *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009), (holding that Justice Benjamin's failure to recuse after benefitting from \$3 million dollar in supportive independent expenditures from the CEO of a party whose case came before his court was a due process violation).

suspicion that extra-legal factors, such as friendship and financial dependence, influence judicial decision-making. And implicitly, at least, the public does not approve. Despite the prevailing rule that a judge is to decide her own disqualification motions, a rule grounded in the view that judges are presumptively impartial and will follow the law, 81% of the public thinks that a different judge should make such decisions, a view grounded on a different presumption—that in such situations, extra-legal influences risk subverting the rule of law.<sup>169</sup> In a similar vein, roughly 80% of the public thinks that elected judges are influenced by the campaign contributions they receive,<sup>170</sup> which, in turn, has adversely affected public perception of the courts' legitimacy.<sup>171</sup>

Fifth, and illustrated by the facts underlying the West Virginia disqualification case discussed above, the recent politicization of judicial election campaigns has undermined the view that judges are simply impartial arbiters of facts and law.<sup>172</sup> Multi-million dollar, single-issue, judicial campaigns are now commonplace, in which state-wide, television advertising dwells on which supreme court candidate will support or oppose tort reform, the death penalty, victim's rights, abortion, etc.<sup>173</sup> In 2002, the United States Supreme Court held that judicial candidates have a first amendment right to announce their views on issues likely to come before them later as judges on the

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<sup>169</sup> See Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers, (Feb. 22, 2009), available at <http://justiceatstake.org/node/125>.

<sup>170</sup> See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (Referring to the so-called 'Axiom of 80,' and acknowledging that the percentages vary between jurisdictions and elections).

<sup>171</sup> Professor James Gibson identifies the effect of judicial campaign contributions on public confidence in the courts as a negative one: "Contributions to candidates for judicial office imply for many a conflict of interest, even a *quid pro quo* relationship between the donor and the judge, which undermines perceived impartiality and legitimacy." James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, (Social Science Research Network Working Paper Series, 2007), available at <http://ssrn.com/abstract=1079362>.

<sup>172</sup> James Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns* at 17 (Mar. 21, 2007) (unpublished manuscript, on file with the author); see also Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54-55 (2002).

<sup>173</sup> JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 15, 18 (2007).



purported grounds that such issues are what judicial elections are about.<sup>174</sup> Implicit in these developments is the assumption that the hot-button issues judges decide present questions of public policy that the electorate has a right to influence or control, and not just questions of law for legal experts (i.e. judges) to resolve without interference. And so, knowing the policy predilections of judicial candidates has become increasingly relevant in judicial campaigns.<sup>175</sup>

**B. The possibility that the legal establishment will lose the dichotomous public policy debate and provoke a crisis**

The five developments detailed above have led many within the legal establishment to warn of impending crises. Generally stated, their concern is that the courts have been politicized to such an extent that the public is poised to lose faith in the rule of law and an impartial judiciary. In a Law Day speech in 2005, a North Carolina trial judge declared that “our democracy is at risk” and that “the very separation of powers that has kept our democracy alive and vigorous is in jeopardy” because “the constant, degrading and sometimes personal attacks on judges and the judiciary by political and other leaders are slowly eroding the credibility of the judiciary and will ultimately, I fear, undermine the rule of law.”<sup>176</sup> More recently, Massachusetts Chief Justice Margaret Marshall declared that “state courts are in crisis,” due in part to the “politicization of state judiciaries.”<sup>177</sup> As she explained:

In the now hostile environment, every judicial decision can be turned into a message of allegiance to--or failure to align with--partisan constituents, much like a legislator's voting record. Judges who have rendered decisions

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<sup>174</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 787-88 (2002).

<sup>175</sup> See James Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming, Stanford University Press) (citing polling research indicating that the public thinks it is important for judges to express their views on major political and social issues).

<sup>176</sup> *Law Day Speech by N.C. Superior Court Judge Thomas Ross*, N. CAR. WEEKLY, May 16, 2005.

<sup>177</sup> Quoted in Edward Pappas, *Judicial Independence in Crisis (Part 1)*, 88 MICH. BAR J. 12 (May 2009).

that run counter to an interest group's agenda are tarred as "procriminal," "antibusiness," or the like. Fair and neutral judges, knowing that each written opinion may be scrutinized as statement of political partisanship by interest groups, may feel tremendous pressure to look over their shoulders, to abandon the principles of judicial neutrality, when deciding cases. Judges themselves tell us so. They are acutely aware, in the words of one, that "[i]f you don't dance with them that brung you, you may not be there for the next dance." Not surprisingly, public opinion polls also suggest a growing general cynicism about our courts, with a widespread perception that justice is for sale.<sup>178</sup>

In 2008, one respected academic commentator has added that "the institution of the elected judiciary is in trouble, perhaps in crisis," due to the "intensity of electioneering"<sup>179</sup> and that same year, the Minnesota Chief Justice echoed that "[p]erceptions of fairness, equity, and access will be dramatically undermined if the public's confidence in the courts erodes, and it takes only one big, nasty election campaign to seriously damage the hard-won public confidence that our judiciary currently enjoys."<sup>180</sup> Of the federal appointments process, another commentator has declared that "past ideological scrutiny has embittered many nominees, threatened judicial independence, discouraged individuals from enduring the confirmation process, and contributed to the vacancy crisis in the federal judiciary."<sup>181</sup> On a related front, yet another commentator has observed more generally that "the judiciary is currently in crisis," because "the political process has increased the role of partisanship in the selection of judges at all levels," which has resulted in a "highly factionalized judiciary" that is "less cordial in its internal relations and less likely to respect its independent

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<sup>178</sup> Margaret Marshall, *The Promise of Neutrality: Reflections on Judicial Independence*, 36 HUMAN RIGHTS 3 (2009).

<sup>179</sup> George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1546 (2008).

<sup>180</sup> Eric J. Magnuson, *The State of the Judiciary*, 65 BENCH & BAR 20 (August 2008).

<sup>181</sup> Michael Gallagher, *Disarming the Confirmation Process*, 50 CLEVE. ST. L. REV. 513, 516-17 (2002-03).

institutional role as a professional community charged with responsibility for enforcing the law in an equal, uniform and predictable manner.”<sup>182</sup>

Proclamations of an impending crisis of confidence in the courts, however, are difficult to square with survey data revealing that public support for federal and state courts remains high.<sup>183</sup> While recent developments engender doubts as to the long-term stability of the public’s faith in courts and the rule of law, they lend little support to dire predictions of imminent catastrophe.

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

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

Elsewhere, I have chronicled the emergence of judicial independence norms that evolved over the course of the nineteenth and twentieth centuries.<sup>184</sup> Those norms embrace judicial independence as an instrumental value that enables judges to uphold the rule of law by buffering them from threats or controls that could interfere with their impartial application of the law to the facts of cases before them. As those norms became entrenched in the nineteenth century, they tempered Congress’s impulse to exploit the

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<sup>182</sup> Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 627 (2005).

<sup>183</sup> See notes 127-30, *supra*, and accompanying text.

<sup>184</sup> GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 94.

full range of its powers to bend the judiciary to its will during cycles of intense, anti-court sentiment.

The bench and bar remain committed to perpetuating judicial independence norms, and because those norms are so deeply entrenched, they are unlikely to yield quickly to evidence challenging the rule of law premises upon which those norms rest. Across a range of contexts, however, the public has now been exposed to a way of looking at what judges do, that proceeds from the fundamentally different premise (corroborated by interdisciplinary research) that independent judges make decisions subject to a host of influences including but not limited to the law. If the legal establishment persists in its one-dimensional defense of an independent judiciary that proceeds from a premise the public increasingly regards as counterfactual, it is only a matter of time before the public and its elected representatives reassess the value of an independent judiciary. Why give judges the latitude to implement their personal, partisan, strategic, or ideological preferences, when we do not do the same for officials in the so-called “political” branches of government?

The capacity of the human mind to live with cognitive conflict is considerable, and it is quite possible for the public to abide a seemingly contradictory state of affairs in which judges uphold and disregard the rule of law—where the legal and the political struggle for primacy.<sup>185</sup> There are, however, limits, and we have begun to see hints of them. Most notably, perhaps, is that after fifty years in which nearly half of the states

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<sup>185</sup> See Keith J. Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in *WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS* (Charles Gardner Geyh, ed., forthcoming, Stanford University Press 2011 (concluding that such a contradiction is actually useful in determining the actual role of political and legal factors in judicial decision-making); see also JUDITH N. SHAKAL, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS*, (1964) (observing that insistence on a strictly legal model of judicial decision-making “may seem ridiculous” because “most thoughtful citizens know that the courts act decisively in creating rules that promote political ends”).

changed their method of selecting judges from contested elections to “merit selection” systems, the movement toward appointive systems has stalled and begun to reverse.<sup>186</sup> Appointive systems derive their legitimacy from the expertise and rule of law values they cultivate among judges so selected: judges appointed on the basis of merit, the argument goes, can interpret the law expertly and impartially, insulated from fleeting majorities of the electorate intent on punishing judges for unpopular rulings.<sup>187</sup> But that presupposes a public so confident of its judges’ commitment to the rule of law that it is prepared to relinquish its power to keep judges in check through meaningful electoral accountability. The end of the merit selection movement, coupled with more recent efforts in merit-selection states to revert to contested elections, is certainly suggestive of a public that is gradually growing more skeptical of its judges’ motives.

Corroborative of this gathering skepticism, is that while the public’s confidence levels in state and federal judiciaries generally remain high, recent polling data reveal significant spasms of disquietude. As previously noted, in a survey conducted in 2005, a majority agreed with the statement that judicial activism had reached a “crisis point.”<sup>188</sup> Moreover, although significant majorities may be averse to the “intimidation” of judges,<sup>189</sup> a majority nonetheless agrees that judges whose decisions are repeatedly at odds with voter values should be impeached.<sup>190</sup> In yet another survey question posed in

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<sup>186</sup> See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1262 (2008).

<sup>187</sup> See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54-55 (2002); see also James Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming, Stanford University Press 2011) (arguing that the legitimacy of elected judges is connected to “the extent that judges are deemed to be experts in law who ably apply their legal training to decisions within the context of the rule of law”).

<sup>188</sup> See note 157, *supra* and accompanying text.

<sup>189</sup> See note 130, *supra* and accompanying text.

<sup>190</sup> 56% of respondents agreed with this assertion. See Neil, *supra* note 157.

2005, 46% agreed with the statement that judges were “arrogant, unaccountable, and out of control,” as compared to only 38% who disagreed.<sup>191</sup> Finally, in 2006, Princeton Survey Research Associates International reported that 64% of respondents agreed with the proposition that “the courts in your state can usually be trusted to make rulings that are right for the state as a whole;” when it asked the nearly identical question in 2009, the percentage in agreement had dropped to 42%.<sup>192</sup>

## **V. Reorienting the Ermine Myth**

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

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

There is, however, another way, which is to consider retooling the ermine myth itself, in a way that renders it more compatible with what modern judges do (thereby restoring the kernel of truth necessary for the myth to retain its vitality), while preserving the essential norms that underlie the myth’s commitment to an independent judiciary.

The starting point in this undertaking is to think about whether and why modern judges

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<sup>191</sup> *Id.*

<sup>192</sup> Princeton Survey Research Associates International, “Separate Branches, Shared Responsibilities: A National Survey of Public Expectations on Solving Justice Issues,” Conducted on Behalf of the National Center for State Courts,” April 2009; Princeton Survey Research Associates International, “2006 Annenberg Judicial Independence Survey,” Prepared for the Annenberg Foundation Trust at Sunnylands, August 2006. In the 2009 survey, the question asked about “the state courts.” instead of “the courts in your state.”

deserve a measure of independence: what instrumental values are furthered by an independent judiciary peopled with judges whose decisions are subject to a range of influences, including but not limited to applicable facts and law? There are at least three.

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

Second, one can define “law” more broadly to accommodate ideological and other influences. Few lawyers would argue that there is but one “correct” answer to disputed legal questions; most would freely acknowledge that the “rule of law” tolerates a range of acceptable answers in close cases. While conservatives and liberals may answer such questions differently, the answers nonetheless fall within the ambit of law, broadly construed. While such a construction may infuriate social scientists intent on defining

law precisely enough to differentiate its impact from other influences, a more capacious definition of law better captures its meaning for the legal establishment. As Professor Stephen Burbank has wisely written, "I prefer the messiness of lived experience to the tidiness of unrealistically parsimonious models."<sup>193</sup> In this way, "law" does not dictate outcomes so much as circumscribe the range of acceptable outcomes.

As restructured, then, the rule of law justification for judicial independence is less ambitious than that touted by traditionalists. It makes no claim that law dictates outcomes in close cases—only that law, broadly understood, is a relevant influence on judicial decision-making that independence helps to preserve. The rule of law rationale for judicial independence may be strongest in easy or routine cases, where the impact of law on judicial decision-making, when uncorrupted by dependence, is arguably the most pronounced. Although academics dwell on hard cases, Richard Posner notes that "most cases are routine . . . rather than residing in that uncomfortable open region in which judges are at large," and that "the routine case is dispatched with the least fuss by legalist methods."<sup>194</sup> Even in hard cases, though, independence from external interference with their decision-making enables judges to offer their best judgment of what the law—flexibly understood—requires.

*Due Process.* A second justification for an independent judiciary is process oriented. Judicial independence buffers judges from external interference with their

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<sup>193</sup> Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility*, in WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO AND WHY IT MATTERS? at \_\_ (forthcoming, Stanford University Press 2011).

<sup>194</sup> Posner, *supra* note 6 at 46; see also Harry T. Edwards, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decision-making*, 58 DUKE L.J. 1895, 1897 (2009) ("When the relevant legal materials are uncomplicated, the issues are uncontroversial, and precedent is clear, judges' deliberations are straightforward and judgments are easily reached)."



decisions, which increases the likelihood that judicial decisions will be made by the judge alone, without inappropriate meddling from interested observers (such as public officials, interest groups, the media, the general public or the litigants themselves).<sup>195</sup> Unlike interested observers, judges are bound by a judicial process that structures both their access to information about the cases they decide, and the manner in which their decisions are made, to the end of preserving a fundamentally fair decision-making process. In this way, judicial independence promotes due process, even if the judge's decisions are influenced by extralegal considerations. As Edward Rubin has explained:

[D]ue process does not demand that decisions exclude public policy considerations or that they flow logically or definitively from the applicable rules. But it does demand a certain type of decision-making, specifically decision-making that is constrained by the established procedural protections.<sup>196</sup>

*Pragmatism.* A third justification for judicial independence is to promote sound, pragmatic decision-making. To understand why the pursuit of pragmatism justifies judicial independence, a brief digression is in order, to define legal pragmatism as I use the term here, and to underscore its pervasiveness.

Judge and pragmatism enthusiast Richard Posner has written that “[a]ll that pragmatic jurisprudence really connotes . . . is a rejection of the idea that law is something grounded in permanent principles and logical manipulation of those principles,

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<sup>195</sup> Likelihood does not mean certainty. It is possible for a judge to behave as if she is dependent upon another, even if the structure of their relationship does not create such dependence—e.g., a judge may bend her decisions to the will of a governor who exerts no formal control over her. Conversely, a judge whose livelihood depends on the governor's support may nonetheless disregard the governor's preferences (albeit at her peril) and make independent decisions. See Peter H. Russell, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 1, 6-9 (Peter H. Russell & David M. O'Brien eds 2001) (differentiating between relational and behavioral independence).

<sup>196</sup> Edward Rubin, *Independence as a Governing Mechanism*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 56, 70 (Stephen B. Burbank & Barry Friedman, eds. 2002).

and a determination to use law for social ends.”<sup>197</sup> Accordingly, at its core, legal pragmatism exhibits a “heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities.”<sup>198</sup> This is not to suggest that, however, that pragmatism is “a synonym for ad hoc adjudication, in the sense of having regard only for the consequences to the parties of the immediate case” because “sensible legal pragmatism tells the judge to consider systemic, including institutional, consequences as well as consequences of the decision in the case at hand.”<sup>199</sup>

For Posner, law and legal reasoning are among the tools of the sensible pragmatist.<sup>200</sup> That seems especially true in routine cases, where adhering to clear, well established rules of law conserves scarce judicial resources, preserves settled expectations, and promotes the future good by maintaining continuity with past policy judgments embedded in precedent and other sources of law.<sup>201</sup> Even in non-routine cases, Posner acknowledges that:

Moderate legalists are matched by moderate pragmatists—pragmatists who believe that the institutional consequences of judicial decisions argue for a judicial approach heavily seasoned with respect for the language of contracts, statutes and precedents. The two moderate judicial schools may come close enough to enable most cases in the open area to be disposed of with minimum disagreement.<sup>202</sup>

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<sup>197</sup> RICHARD A. POSNER, *OVERCOMING LAW* 405 (1995). Judge Posner may be the best known and most prolific exponent of legal pragmatism, but his brand of pragmatism includes features (not discussed here) that trouble some devotees. See, e.g. Michael Sullivan & Daniel Solove, Book Review: *Can Pragmatism be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L. J. 687 (2003). In this article, however, I am presenting pragmatism in thumbnail, for the limited purpose of underscoring its prevalence and its linkage to the need for an independent judiciary..

<sup>198</sup> Posner, *supra* note 197 at 238.

<sup>199</sup> *Id.*

<sup>200</sup> Posner, *supra* note 197 at 230 (characterizing legalism as “a pragmatic tactic”).

<sup>201</sup> Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L. J. 409, 412-414 (1990) (explaining how legal pragmatism respects the past for instrumental purposes).

<sup>202</sup> Posner, *supra* note 6 at 49.

Even so, “[l]egalist methods fail in many cases that reach appellate courts,” Posner concludes, because legal text alone is simply too indeterminate to dictate outcomes.<sup>203</sup>

When applicable law tolerates different outcomes, the pragmatist will choose between the possibilities by deciding which is likely to produce the best consequences. A judge’s notion of what consequences are “best” in a given case can be influenced by her conception of the law, her ideology, strategic considerations, the audience she is seeking to influence, or judicial self-interest—in short, the factors isolated in recent social science research and summarized in Part I. By its nature, then, pragmatism takes an eclectic approach to the appropriate influences on judicial decision-making that is more compatible with scholarly understanding of what judges do. As one scholar notes, “In social theory generally, and legal theory more particularly, the pragmatist tendency is to promote trade rather than warfare between normative and descriptive theorists, storytellers and model-builders, interpreters and causal explainers.”<sup>204</sup>

In a powerful essay, Steven Smith argues that reduced to its essence, legal pragmatism’s command that judges should promote “continuity with the past” (by, for example, adhering to precedent) only “insofar as it helps to promote good in the future” is so irresistible as to suggest that “everyone is virtually compelled to be, at some level, a pragmatist.”<sup>205</sup> Smith observes that while pragmatists might find this “too good to be true” it is more accurately “too true to be good.”<sup>206</sup> Smith’s logic may render pragmatism’s contribution to philosophy somewhat banal, but it simultaneously

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<sup>203</sup> *Id.* at 47 (“there are too many vague statutes and even vaguer constitutional provisions, statutory gaps and inconsistencies, professedly discretionary domains, obsolete and conflicting precedents, and factual aporias”).

<sup>204</sup> Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 791 (1989).

<sup>205</sup> Smith, *supra* note 201 at 423.

<sup>206</sup> *Id.* at 424.

underscores pragmatism's ubiquity. Writing in 1991, Richard Rorty observed that "[p]ragmatism was reasonably shocking seventy years ago, but in the ensuing decades it has gradually been absorbed into American common sense."<sup>207</sup> Posner and others are therefore probably not exaggerating when they conclude that the term "pragmatist"—as embodied in a penchant for deciding difficult cases with reference to public policy, the purposes underlying applicable rules, and the social and institutional consequences of their rulings (hybridized with rule of law-based analyses)—"best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior."<sup>208</sup>

Having established pragmatism's pedigree as a widely employed approach to judicial decision-making that incorporates legal and extralegal influences, it is comparatively short work to show why judicial independence is essential to sound, pragmatic decision-making. The orientation of legal pragmatism is inherently case-specific, because ascertaining how the law should be applied in a given context to yield the best consequences, necessarily requires an appreciation for the details of the case at hand. The judge is uniquely situated to acquire the information necessary to make pragmatic choices on a case by case basis, and rendering that judge subservient to the wishes of interested observers who lack access to (or concern for) case-specific details, undermines the process by which sensible, pragmatic decisions can be made.

In a world where judges are subject to legal and extralegal influences, then, judicial independence promotes not just the rule of law (albeit in a weaker form), but fairness (due process) and common sense (pragmatism) as well. While these three

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<sup>207</sup> Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 90 (1991).

<sup>208</sup> Posner, *supra* note 197 at 230, and sources cited at n.2

justifications are distinct, they are interrelated. Law is a tool of the pragmatist-judge who prizes continuity, predictability, and institutional stability; pragmatism is a tool of the lawyer-judge who seeks to fill gaps in applicable law; and due process legitimizes the choices judges make, be they grounded in law, pragmatism or both. Moreover, it bears reemphasis that due process, pragmatism, and law each retains flexibility enough to tolerate ideological and other political influences: due process is less concerned with the destination than the journey, so that case outcomes can be influenced by law and politics without adverse consequence as long as the road to reaching such outcomes is seen as fair; pragmatism logically embraces a multiplicity of influences, including the legal and the political, as better informing the pragmatic deliberative process; and “law”—if parsimonious definitions are eschewed in favor of more flexible constructions embraced by the mainstream legal establishment—retains the elasticity to accommodate differing interpretations subject to a variety of influences.

Repackaging the justifications for an independent judiciary in this way enables the legal establishment to defend the judiciary’s autonomy without recourse to otherworldly claims that judges are apolitical or that law, formalistically defined, is all that matters in judicial decision-making. More fundamentally, it does so while preserving and indeed strengthening the ermine myth that has protected and promoted the judiciary’s institutional legitimacy for centuries: If the rule of law can be construed generously enough to allow for gaps of indeterminacy, and in an even broader sense to embrace the roles that due process and pragmatism play in channeling the discretion of judges when deciding cases in those gaps, then judicial independence does indeed promote the rule of law.

## **B. Reorienting the Legal Establishment's Reform Agenda**

By more openly acknowledging that there are spaces in the law that independent judges fill through the exercise of discretion structured by due process and informed by common sense, one effectively concedes the inevitability of extra-legal influences on judicial decision-making. These extra-legal influences are by their very nature “political” in the broader sense of the term, insofar as they embrace the ideological, strategic, sociological, psychological and economic factors that comprise the art of governing.<sup>209</sup> Conceding the impact of political influences has a Jekyll and Hyde quality: On the one hand, it is mild-mannered to any thoughtful student of the courts—including reflective lawyers and judges. On the other hand, it would seem to do considerable violence to the idealized mythology of the judicial role that the legal establishment has perpetuated in the public policy debate.

To reiterate, it is not only possible to reorient the legal establishment's position in the public policy debate to accommodate a more “political” court while preserving the beneficial properties of the ermine myth, but necessary too if those who care about the courts are desirous of preserving the judiciary's independence and legitimacy in the long term. Reorienting the legal establishment's perspective in this way, however, comes at the cost of forcing it to rethink its reform agenda. For over a century, the mantra of the

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<sup>209</sup> Professor Stephen Burbank writes of legal and extralegal influences as complementary: [K]nown and established (but not necessarily determinate) law and the pursuit of a judge's preferences on matters of policy relevant in litigation are complements in the sense that, like judicial independence and accountability, they need (or at least must rely on) each other. To acknowledge that normative views about the proper balance between them as to any particular judge or court may differ . . . or that, even on the same normative view and as to the same judge or court, the proper balance may change over time, is not to deny that, on some courts and in some cases, (1) “law” without “judicial politics” would be weak and feeble, or (2) “judicial politics” without “law” would be dangerous. [footnote omitted] Moreover, it is not to deny that the two in combination can constitute law as it is generally understood. Burbank, *supra* note 193 at \_\_\_\_.

legal establishment has been to “depoliticize” or “take the politics out of” the courts.<sup>210</sup>

If, however, we concede the inevitability—and indeed the desirability—of courts that are subject to certain kinds of “political” influences, then the time has come for the legal establishment to abandon its crusade to exterminate “politics” from the judiciary and to usher in a new era that seeks instead to manage judicial politics.

To a significant extent (as detailed below), the era of managing judicial politics is already upon us, if ever there was a time when it was not. For the legal establishment, however, there is much to be gained and little to be lost by more openly acknowledging this reality, which will enable it to structure its policy agenda more coherently. The point is this: We want judges who take the law seriously, who treat people fairly, and who exhibit common sense in the decisions they make. On the one hand, as elaborated upon above, all three of these objectives can be achieved by judges who are subject to extralegal influences, and arguably cannot be achieved without such influences, given the need for judges to exercise discretion that extralegal considerations inform. On the other hand, extralegal influences can also thwart those objectives from within and without. From within, a judge’s ideological zeal, strategic scheming, naked self-interest and other influences can sometimes eclipse her commitment to law, fairness, and common sense; from without, excessive external interference with judicial decision-making can intimidate or frustrate the judge who would otherwise pursue desired objectives. The reform agenda, then, must logically be directed at striking an appropriate balance between affording judges the independence necessary to perform their quasi-legal, quasi-political functions to achieve systemic objectives without external interference, and subjecting judges to accountability-promoting measures that discourage internal

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<sup>210</sup> See notes 111-117, *supra*, and accompanying text.

interference with those same systemic objectives. It is beyond the scope of this article to fully develop a revised policy agenda that manages judicial politics in this way, but a few examples may illuminate how the proposed approach could work.

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

Exposing law students to social science data detailing the legal and extralegal influences on judicial decision-making, as a smaller part of the policy-analysis training that law students receive every day, would be a modest but important reform. From a purely practical standpoint, it would equip students more systematically with information that good litigators gain haphazardly from experience. Recall the Supreme Court forecasting project, discussed earlier.<sup>211</sup> The authors there reported that experienced Supreme Court litigators bested academics and the computer model in predicting case outcomes, which suggests that the litigators involved had become quite adept at identifying the legal and extralegal factors likely to influence the justices' decisions. The

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<sup>211</sup> See notes 53-58, *supra*, and accompanying text.



sampling of litigators was too small for the researchers to draw firm conclusions as to their performance vis-à-vis other forecasters in the study, but it is at least suggestive.<sup>212</sup> From a broader policy perspective, incorporating a modest social science component into the law school curriculum provides the next generation of the legal establishment with a way of looking at what judges do that better equips it to manage judicial politics effectively. And it begins with a more open recognition that the choices judges make are subject to extralegal influences.

*Judicial Selection:* As documented in Part II, the mainstream legal establishment opposes those who would “politicize” judicial selection, and organizations such as the American Bar Association and the American Judicature Society have long campaigned to “take the politics out” of the selection process by, for example, ending state judicial elections and limiting federal confirmation proceedings to an evaluation of nominee “qualifications.” These campaigns have, in a word, failed—an overwhelming majority of Americans continue to favor state judicial elections, and federal confirmation proceedings remain an ideological battleground. Quietly, almost imperceptibly, the mainstream establishment has shifted tacks: proposals to eliminate judicial elections altogether are taking a backseat to more modest proposals to reduce the putatively harmful effects of elections (by, for example, publicly funding judicial campaigns, replacing partisan with non-partisan elections, and lengthening judicial terms to reduce election frequency),<sup>213</sup> while calls to end Senate inquiries into a nominee’s ideology are

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<sup>212</sup> Ruger et al, *supra* note 53, at 1178

<sup>213</sup> See, e.g. *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 Loy. L.A. L. Rev. 1353, 1354 (“Many observers have concluded that moving to a wholly appointed judiciary is the best answer to these problems. But movement away from systems providing for contested elections of judges has not occurred in most states. Too little attention has been given to incremental changes in the election process to address some of the most serious threats to judicial independence and impartiality”); see also, American Bar Association, *supra* note 110 at 74 (“the Commission acknowledges that support for

being replaced by a struggle to delineate the appropriate scope of such inquiries.<sup>214</sup> In other words, the movement within the legal establishment away from eliminating and toward managing judicial politics is well underway.

Even so, the establishment's orientation remains essentially unchanged: compromise measures may be a practical necessity, but in a perfect world, the judiciary would be devoid of political influences.<sup>215</sup> More openly acknowledging the inherently quasi-legal, quasi-political character of judging, however, may lead the legal establishment to entertain the possibility that managing rather than eliminating judicial politics in the selection process is not just the best it can do but the most it *should* do.

Thinking about state judicial selection reform in terms of striking an optimal independence-accountability balance leads to three related conclusions. First, it means that interstate variations are desirable and inevitable: If, in the jurisdiction at issue, the greater impediment to judges implementing law/fairness/common sense objectives is posed by external threats to judicial independence (from the electorate or others), an independence-enhancing appointive system may be preferable; if, on the other hand, the primary concern is that overly independent judges will supplant systemic objectives with personal ones, an accountability-promoting elective system may be the better means to

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judicial elections remains entrenched in many states,” and that “[i]t is to those states that the Commission now directs its attention, with recommendations aimed at ameliorating some of the deleterious effects of elections”); *see also*, (arguing that more attention be paid to incremental judicial selection reforms because “repeated calls for fundamental changes prove to be of scant pragmatic value”). James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYR. L. REV. 293, 302 (2010).

<sup>214</sup> Richard Brust, *No More Kabuki Confirmations: Better Ways to Vet Supreme Court Nominees*, A.B.A. J. 38 (October 2009).

<sup>215</sup> See, e.g., American Bar Association, *supra* note 110 at 74 (Reporting that “the Commission opposes judicial elections as a means of initial selection,” and “over the long term . . . believes that this view will win widespread acceptance;” “Over the short term, however, the Commission acknowledges that support for judicial elections remains entrenched” and that making a series of secondary proposals “aimed at ameliorating some of the deleterious effects of elections” in states that retain them, is warranted).

preserve public confidence in the courts.<sup>216</sup> Second, and following from the first, it means that selection systems will be in a perpetual state of flux, as circumstances affecting the independence-accountability calculations within given jurisdictions change over time. Third, it suggests the possibility that states are right to “fine tune” their selection systems. States interested in tempering the independence-threatening effects of elective systems should explore such options as moving from partisan to non-partisan races, publicly funding appellate campaigns, or lengthening judicial terms; conversely, states seeking to enhance the accountability of appointive systems should think about implementing judicial evaluation programs to accompany their retention elections, consider ways to improve the performance of judicial nominating commissions, and explore means outside of the selection process to render judges answerable for their conduct in office, e.g. by strengthening disciplinary regimes and disqualification processes (elaborated upon next).

With respect to the federal appointments process, it means recognizing the inevitability and desirability of Senate inquiries into the range of legal and extralegal factors that can influence a nominee’s judicial decision-making as a way to promote prospective accountability by satisfying the public’s elected representatives that nominees will take the law seriously, are committed to due process, and will exercise common sense. It means acknowledging the need to draw lines that protect against independence-threatening inquiries aimed at extracting promises or commitments from nominees to decide future cases in specific ways. And it means abandoning the naïve

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<sup>216</sup> Stephen Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 9, 17 (2002) (“Even if one is predisposed for normative reasons to the federal model, an instrumental view of judicial independence (and accountability) requires attention to what it is that we seek from courts and to possible differences in that regard between the various court systems in the United States and between courts within the same system.”)

hope that the appointments process can be purged of its acrimonious, partisan and strategic character, at the same time as it means managing the politics of judicial appointments sufficiently to guard against attacks on nominees so excessive and unrestrained that they threaten to destabilize the process itself and undermine the judiciary's institutional legitimacy.<sup>217</sup>

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

When it comes to blunderbuss proposals such as these, that have been cyclically proposed and rejected for generations, it should be possible, indeed easy, for the legal establishment to defend the judiciary against them without resort to a one-dimensional conception of the judicial role. Without disputing that judges are subject to extralegal influences, ham-handed tactics aimed at rendering judges subservient to the legislature do not seek to ensure that judges are fair, sensible guardians of law; rather, they seek to ensure that judges do what legislators tell them to, to the detriment of those very same values.

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<sup>217</sup> GREGORY A. CALDEIRA & JAMES L. GIBSON, *CITIZENS, COURTS, AND CONFIRMATIONS* (2009)

Fixation on these incendiary and almost inevitably doomed proposals to curb the courts, however, tends to perpetuate the misconception that keeping politics (or politicians) away from the courts is and ought to be the legal establishment's lodestar. Obscured is the routine give and take between the branches that typifies their normal working relationship in a host of contexts, where managing judicial politics has long been a familiar part of the process.<sup>218</sup> For example, in 2005, Congress, dissatisfied with the judiciary's failure to discipline judges in high-profile cases, proposed to create an office of inspector general within the federal judiciary, and initiated an impeachment inquiry into the conduct of a judge whose disciplinary proceeding was pending.<sup>219</sup> The Judicial Conference objected to the inspector general proposal as a threat to its independence, but revamped its disciplinary process, de-fusing the confrontation.<sup>220</sup> And again, in the past decade, bills were introduced in Congress to prohibit judges from participating in educational seminars sponsored by corporations with business before the courts. Federal judges and the Judicial Conference opposed such legislation as an affront to the separation of powers, their freedom of speech, and their independence—but ultimately

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<sup>218</sup> Charles Gardner Geyh, *The Choreography of Courts-Congress Conflicts*, in JUDGES UNDER SIEGE: COURTS, POLITICS & THE PUBLIC (Bruce Peabody, ed. forthcoming 2010, Johns Hopkins University Press) (“Over time, Congress and the courts have exploited a variety of mechanisms for making their views known to the other, communicating the depth of their disaffection, achieving compromises, enabling face-saving acquiescence, and trumping each other without provoking crises.”)

<sup>219</sup> *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the Subcomm. on Crime Terrorism, and Homeland Security of the H. Comm. On the Judiciary*, 109th Congress (2006) (proposing the creation of an Inspector General for the judiciary to investigate judicial misconduct); *Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H.R. 916 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary*, 109th Cong. 2-4 (2006).

<sup>220</sup> Geyh, *The Choreography of Courts-Congress Conflicts*, supra note 218 at \_\_ (discussing the inspector general proposal as an example of Congress seeking to encourage judicial self-regulation).

revised an ethical ruling to impose significant restrictions on judicial attendance at expense paid seminars.<sup>221</sup>

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

"Impartiality" has been a defining feature of the judicial role for centuries, and at common law, the presumption of impartiality was irrebuttable: Judges could not be disqualified for bias.<sup>222</sup> In the twentieth century, however, scholars and policymakers began to challenge this formalist proposition, and in the 1970s, federal and state laws were revised to require disqualification whenever a judge was biased or his "impartiality might reasonably be questioned."<sup>223</sup>

While these changes would seem to reflect a concession by the legal establishment that judges are subject to extralegal influences—influences that need to be managed—many judges have been loath to embrace the new world order embodied in the

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<sup>221</sup> News Release of the Administrative Office of the U.S. Courts (September 6, 2000), available at [http://www.uscourts.gov/Press\\_Releases/press09192000.html](http://www.uscourts.gov/Press_Releases/press09192000.html). See Revised Advisory Opinion 67 of the Committee on Codes of Conduct of the Judicial Conference of the United States.

<sup>222</sup> WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768) ("it is held that judges or justices cannot be challenged . . . for the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.").

<sup>223</sup> John Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947) (questioning the absence of a rule requiring disqualification for bias). In 1972, the American Bar Association promulgated a Model Code of Judicial Conduct that required judges to disqualify themselves when their "impartiality might reasonably be questioned," and in 1974, Congress amended the federal judicial disqualification statute to include that same language. American Bar Association, MODEL CODE OF JUDICIAL CONDUCT, Canon 3C (1972); 28 U.S.C. 455(a).

reforms.<sup>224</sup> Illustrative of the continuing schism within the judicial community is the split decision of the Supreme Court in *Caperton v. A.T. Massey Coal Company*.<sup>225</sup> There, the Court ruled that a litigant's due process rights were violated by a state supreme court justice who declined to disqualify himself from hearing an appeal after receiving over \$3 million in support (via independent expenditures) for his election campaign from a CEO for one of the parties while the appeal was pending. The five-member majority proceeded from the assumption that judges are subject to extralegal influences, and concluded that due process required the imposition of an objective rule, without which, "there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." The resulting rule that the majority crafted was "whether, 'under a realistic appraisal of psychological tendencies and human weaknesses,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"<sup>226</sup> The four dissenters, in contrast, hewed to rule of law rhetoric and ancient presumptions: "There is a 'presumption of honesty and integrity in those serving as adjudicators'", they declared. "All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."<sup>227</sup>

The majority in *Caperton* made clear that regulating disqualification via due process analysis was limited to extreme cases in which egregious failures to disqualify were not prevented by the application of state disqualification rules, which appeared to

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<sup>224</sup> One multi-state study conducted in the 1990s showed a high degree of ambivalence among judges about disqualification. JEFFREY SHAMAN, JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* (1995).

<sup>225</sup> *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009)

<sup>226</sup> *Id.* at 2255.

<sup>227</sup> *Id.* at 2267 (Roberts dissenting).

signal that Supreme Court interventions could be obviated by rigorous application of state disqualification standards.<sup>228</sup> In the immediate aftermath of Caperton, however, ambivalence prevails: For example, while the Michigan Supreme Court adopted meaningful disqualification reform, the Wisconsin Supreme Court all but flouted the message of Caperton's majority.<sup>229</sup>

The divisions within the legal establishment over judicial disqualification are put in boldest relief when it comes to the reform of disqualification procedure. The norm in the federal courts and most states is that judges decide their own disqualification motions.<sup>230</sup> Disqualification determinations are subject to review via appeal or mandamus, but such review is highly deferential, with the majority view being that a judge's decision not to disqualify himself is reversible only upon a showing of abuse of discretion.<sup>231</sup> These rules sit well with traditionalists, who adhere to the presumption of impartiality and its premise that judges can bracket out extralegal influences and apply the law; and sit badly with reformers who are skeptical of the proposition that judges can step back from themselves and accurately assess the extent of their own bias, real or perceived.

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

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<sup>228</sup> *Id.* at 2265-67.

<sup>229</sup> For a fine summary of developments in Michigan and Wisconsin, see James Sample, "*Mostly Cooperative Federalism: Court Reform Post-Caperton*," 58 DRAKE L. REV. \_\_ (forthcoming 2010).

<sup>230</sup> See AMERICAN BAR ASSOCIATION, DRAFT REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT, n.144 and accompanying text ("The most common approach is for the subject judge review the motion on the merits"); Federal Judicial Center, Recusal: Analysis of Case Law Under 28 USC 455 and 144 44 (2002).

<sup>231</sup> Federal Judicial Center, *supra* note 227 at 65.



making, then several conclusions follow naturally. First, the rule of law is initially better served if disqualification rules are interpreted and applied by someone other than the targeted judge who is predisposed to think himself qualified to sit, and subsequently better served if biased judges, who would not disqualify themselves, are thereby excluded. Second, procedural fairness is better served if the judge qua fox is not called upon to guard his own henhouse. Third, the perspective that comes from being apart from rather than a part of the problem one is seeking to solve in the context of deciding disqualification motions improves the prospects for sensible, pragmatic decision-making. Conversely, the consequences of the legal establishment adhering to the otherworldly premise that judges are impervious to the very bias of which they stand accused when called upon to decide motions to disqualify themselves, may transcend bad recusal policy. While *Caperton* was pending, a survey found that over 80% of respondents thought that disqualification decisions should be made by a different judge—an unsurprising result, given the pervasive view that judges are subject to extralegal influences.<sup>232</sup> For judges to dismiss the approach that the public prefers by so overwhelming a margin as a “solution in search of a problem,” risks contributing to the gradual erosion of public confidence in the courts that I have predicted.<sup>233</sup>

### **Conclusion**

Some speak and write of the rule of law “myth” in pejorative terms, but I do not. The institutional legitimacy of our government depends on the consent and support of the governed. The stability of such consent and support is aided by a deep and abiding faith in our system of government, which, in turn, is promoted by a shared belief in stories that

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<sup>232</sup> See note 169, *supra*.

<sup>233</sup> David Ingram, *Congress Examines Judicial Recusals*, THE NATIONAL LAW JOURNAL, Nov. 2, 2009 at 1 (Quoting Judge Edith Jones).

illustrate and aggrandize the principles upon which the government was founded. Our young are thus inculcated with stories that underscore the greatness of the “founding fathers”—their wisdom, their virtue, and their heroism—and, by necessary implication, the greatness of the government they established. We correspondingly deemphasize discussion of their roles as white, male, slave-holding, propertied elites, by reserving it for asides and more rarified forums.

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

bear—retains the sizable kernel of truth needed to preserve public support for the myth and the continued independence of the courts. And if one thinks of judicial accountability in terms of managing extrajudicial influences on judicial decision-making to reduce the abuses of judicial independence, it will enable that kernel of truth to grow.