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THE SEVERAL MEANINGS OF “POLITICS” IN JUDICIAL POLITICS STUDIES: WHY “IDEOLOGICAL INFLUENCE” IS NOT “PARTISANSHIP”

Brian Z. Tamanaha*

INTRODUCTION

Talk about judicial politics is ubiquitous in the press and academia today. Discussions of this topic, unfortunately, are often vague or inconsistent about the precise meaning of politics in judging. This Essay explores several core meanings of judicial politics to help identify what is, and what is not, inappropriate about politics in the context of judging. The failure to mark differences between these meanings and their implications, I argue, distorts matters and has the potential to undermine our judicial system.

The *New York Times* recently ran an editorial titled *Politics and the Court* sharply criticizing Justices Antonin Scalia and Clarence Thomas for trampling the line between law and politics.¹ The Justices effaced this line, according to the editorial, when they took part in a political gathering sponsored by Charles Koch—“the conservative corporate money-raiser”²—while *Citizens United v. FEC*³ was pending before the Court.⁴ The *Times* also castigated Scalia for issuing “a rambling, sarcastic political tirade” in a recent dissent.⁵ Quoting Professor Lucas Powe’s view that Scalia “is taking political partisanship to levels not seen in over half a century,” the editorial added that “Justice Thomas is not far behind.”⁶

The editorial equivocates about the role of politics in Supreme Court decisions, asserting, “Constitutional law is political. It results from choices about concerns of government that political philosophers ponder, like liberty

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¹ Editorial, *Politics and the Court*, N.Y. TIMES, Feb. 5, 2011, at A16.

² *Id.*

³ 130 S. Ct. 876 (2010) (provoking controversy by holding that corporations have a constitutionally protected First Amendment right to participate in the electoral process through campaign contributions).

⁴ See Editorial, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

and property. When the court deals with major issues of social policy, the law it shapes is the most inescapably political.”⁷

The editorial then seemingly does a U-turn:

To buffer justices from the demands of everyday politics, however, they receive tenure for life. The framers of our Constitution envisioned law gaining authority apart from politics. They wanted justices to exercise their judgment independently—to be free from worrying about upsetting the powerful and certainly not to be cultivating powerful political interests.⁸

The *Times* editorial implicitly gestures at a distinction between the high politics of principle and grand social policy, and the low politics of crass, left-right, Republican–Democrat partisanship.⁹ A century ago, Felix Frankfurter pointed to the same distinction, positing, “[C]onstitutional law, in its relation to social legislation, is not at all a science, but applied politics, using the word in its noble sense.”¹⁰ Another political scientist further asserts that high politics can be understood as “consistent ideological policymaking,” a positive feature that keeps law responsive to evolving extralegal views and circumstances.¹¹ “Problems emerge only when judges appear to decide on the basis of petty partisanship, forsaking high politics for low.”¹²

Making no distinction between high and low politics, a *Washington Post* article (published a few days after the *Times* editorial) described judging in bluntly political terms: “Party affiliation is not a perfect predictor of a judge’s behavior, but studies have shown that Democratic and Republican nominees vote differently on some ideologically charged issues, such as abortion, gay rights and capital punishment.”¹³ The point of the article is that President Obama has a major opportunity to reshape the political orientation of the federal courts through his judicial appointments:

⁷ *Id.*

⁸ *Id.*

⁹ *See id.*

¹⁰ Felix Frankfurter, Law Officer, Bureau of Insular Affairs, The Zeitgeist and the Judiciary, Address at the Twenty-fifth Anniversary Dinner of the Harvard Law Review (1912), in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938*, at 3, 6 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939).

¹¹ *See* KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* 27–28 (Austin Sarat ed., 2010).

¹² *Id.* at 27 (describing the position of Terri Peretti).

¹³ Jerry Markon & Shailagh Murray, *Vacancies on Federal Bench Hit Crisis Point*, WASH. POST, Feb. 8, 2011, at A01.

When he took office, Democratic appointees had small majorities on two appeals courts—the New York-based 2nd Circuit and the 9th Circuit. Obama’s nominees have also given Democrats control of the 4th Circuit and the 3rd Circuit, which covers Pennsylvania, New Jersey and Delaware.

The 4th Circuit is an influential voice on national security and one of the appellate courts expected to hear challenges to the health-care overhaul law. It has a 9 to 5 Democratic majority, because of four Obama appointees.¹⁴

Political scientists who do empirical research on courts in a field known as “judicial politics”¹⁵ and conduct “studies” like those alluded to by the *Post*¹⁶ also frequently describe judging in political terms. In *Advice and Consent*, two leading researchers, Lee Epstein and Jeffrey Segal, assert:

Presidents, senators, and interest groups alike realize that the judges themselves are political. Candidates for the federal bench receive their nominations precisely because through their political work or interests they came to the attention of some politician, most likely a U.S. senator or a member of the president’s staff. Judges retain these partisan and ideological attachments when they ascend to the bench. When Socrates was on trial for his life, he may have refused to appeal to the “emotions” of judges out of the belief that the judge “has sworn that he will judge according to the laws and not according to his own good pleasure.” But the late great political scientist C. Herman Pritchett was far closer to the mark when he wrote that judges “are influenced by their own biases and philosophies, which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.”

That is why senators and presidents care so deeply about who sits on the federal bench—and so should we. If the decisions of federal judges reflected only the law or other “neutral” principles, then neither senators nor presidents would be able to fulfill their policy goals through appointments. But, as Pritchett so astutely observed, this “principled approach” does not always or even usually hold. In fact, with scattered exceptions here and there, the decisions of judges, and especially the decisions of Supreme Court justices, tend to reflect their own political values. More indirectly, these decisions also

¹⁴ *Id.*

¹⁵ See Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR 1, 2–3 (Nancy Maveety ed., 2003) (referring to the study of courts as both the study of “law and courts” and the study of “judicial politics,” and seemingly favoring “the study of judicial politics” as the preferred label).

¹⁶ See Markon & Murray, *supra* note 13.

reflect the judges' partisan affiliation, which just so happens to coincide often with that of their appointing president.¹⁷

While the authors acknowledge that judges below the Supreme Court are subject to greater legal restraints, they insist that “[j]udges are political, and their politics seep[] into their decisions.”¹⁸ This was “always” (or at least since 1800) true, according to Epstein and Segal, and will remain so “for a very long time.”¹⁹

Although judges may sincerely believe that their decisions are governed by the law, their political views subtly color their legal decisions—either knowingly or via cognitive biases, motivated reasoning, or some other mechanism—according to political scientists.²⁰ However it comes about, the bottom line of these analyses is that judicial decisions reflect politics. As one overview of research in the field put it, “Democratic appointees cast liberal votes more often than Republican appointees.”²¹

The same message is relentlessly hammered home by bestselling author Mark Smith in *Disrobed: The New Battle Plan to Break the Left's Stranglehold on the Courts*.²² We must disabuse ourselves of myths about the rule of law and apolitical judging, urges Smith.²³ “Judges don’t—and can’t—check their ideology at the courtroom door; they often, by necessity, function as politicians wearing black robes.”²⁴ Smith further contends:

No doubt about it, judges are political actors. They regularly deal with complex, politically charged cases, and sometimes they are required (or choose) to *make* law rather than merely “interpret” it. In any given case, judges must somehow make sense of all the conflicting claims in order to reach a decision; that decision will inevitably be informed by the judges’ own ideology, priorities, and, yes, biases.²⁵

¹⁷ LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 3 (2005) (footnotes omitted).

¹⁸ *Id.* at 143.

¹⁹ *Id.* at 143–45.

²⁰ See JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 33–35 (2005).

²¹ Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 838 (2008).

²² MARK W. SMITH, *DISROBED: THE NEW BATTLE PLAN TO BREAK THE LEFT'S STRANGLEHOLD ON THE COURTS* (2006).

²³ See *id.* at 10–13.

²⁴ *Id.* at 11.

²⁵ *Id.* at 48.

Smith aims to persuade conservatives to do their utmost to stock the federal and state judiciary with judges who are willing to engage in judicial activism to overturn liberal precedents and entrench conservative values and policies in the law.²⁶ This is merely a turnabout in fair play, Smith argues, for that is precisely what liberal judges have done before.²⁷ (Smith conveniently ignores that Republican presidents have long applied a conservative litmus test to select judicial appointees²⁸ and have appointed a majority of judges currently sitting on the federal bench—fifty-six percent by the time George W. Bush left office.²⁹)

Conservatives who decry judicial activism and insist upon judicial adherence to the rule of law are fools pining for a myth, he implies. “Judicial activism *is* the rule of law,” Smith declares, “[because] judges themselves are the ones who define what the rule of law is.”³⁰ Justices Scalia and Thomas are “moderates,” unnecessarily tying themselves down by their fealty to textualism and originalism;³¹ these theories of legal interpretation do not provide sufficiently determinate answers to many questions, he insists.³²

“We need *results-oriented* judges,”³³ Smith advocates. Additionally, Smith explains:

[D]on’t forget that a judgeship is anything but apolitical. . . .

Thus we need judges who have the right values and beliefs, just as we want legislators and presidents who champion our values and beliefs. And we should learn about prospective judges’ values and beliefs *before* they don black robes and are given almost unlimited power to direct the law. Our priority cannot be confirming judges who buy into mostly meaningless platitudes about “respecting the rule of law” and “abiding by the Constitution”; it should be confirming judges who recognize the importance of advancing the conservative cause, which naturally encompasses the nation’s fundamental ideals and freedoms, and the American way of life. When we select legislators and presidents, we demand to know

²⁶ See *id.* at 4–15, 102–03.

²⁷ See *id.* at 14, 102–03.

²⁸ See BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 175–85 (2006).

²⁹ See Markon & Murray, *supra* note 13.

³⁰ SMITH, *supra* note 22, at 13; see also *id.* at 76 (describing a case in which judicial activism played a significant role in abandoning precedent).

³¹ *Id.* at 117.

³² See *id.* at 60–67.

³³ *Id.* at 115.

where they stand on major issues; we should expect nothing less of judges, who also profoundly affect virtually every major policy dispute in contemporary America. . . .

Following the Reagan model, conservative judges must aim to *win*. Just as President Reagan challenged the status quo and reversed the country's path toward socialism, recession, and failed foreign policies, we need judges with the backbone to aggressively challenge the status quo and attack many of the current assumptions that characterize our legal system. A Judicial Reagan would not be content merely to thwart ongoing liberal legal machinations but would also work to undo "well-established" liberal precedents, pushing the law back to the right.³⁴

Smith cannot be dismissed as an uninformed extremist. As noted above, judicial politics scholars also insist that judging is essentially political and dismiss textual and originalist theories of interpretation.³⁵ And it would be foolhardy to underestimate Smith's potential impact. A member of the bar, Smith engages in litigation on behalf of conservative causes, writes bestselling books, and is a frequent commentator on various television and print media outlets.³⁶

Reaching a wide audience, Smith argues that, because judging is political, conservatives must abjure weak-kneed squeamishness and get on with the politicization of the judiciary.³⁷ Liberals who hear his message might take the same advice to heart, albeit in the opposite political direction. Smith's polemical tract is the latest manifestation of the widespread notion that the law is an instrument to be seized by groups to advance their goals (in the name of the common good)—utilizing every aspect of the legal apparatus, including judges, to entrench their own views in the law.³⁸

Constant reinforcements of the view that judging is political are found in news reports that highlight evidently political splits between Justices in high-profile cases,³⁹ like *Bush v. Gore*⁴⁰ and *Citizens United*,⁴¹ in increasingly

³⁴ *Id.* at 102–03.

³⁵ SEGAL ET AL., *supra* note 20, at 25–30.

³⁶ Biography of Mark W. Smith, SMITH VALLIERE PLLC, <http://www.marksmithlawgroup.com/partners.html> (last visited July 5, 2012).

³⁷ SMITH, *supra* note 22, at 56–57.

³⁸ See TAMANAHA, *supra* note 28, at 1.

³⁹ See, e.g., Jeffrey Toobin, *Supreme Court Riven by Partisan Politics*, CNN (Mar. 15, 2010), http://articles.cnn.com/2010-03-15/opinion/toobin.court.partisan_1_supreme-court-roberts-chief-justice?_s=PM:OPINION (discussing the political effects of *Citizens United* and arguing that “the events of the last few weeks show that the Supreme Court is riven by the same partisan divisions as the rest of Washington”); *Will U.S.*

expensive and harsh political campaigns for state judicial elections,⁴² and in seemingly political court decisions about matters like gay marriage (and the successful electoral efforts to unseat the Iowa Supreme Court justices who rendered such a decision).⁴³ Prominent political scientists and law professors write books, articles, and op-eds in leading newspapers announcing that judging is political.⁴⁴ One of the most influential public intellectuals and legal figures in the country, Judge Richard Posner, flatly declares in a book on judging, “So judging is political.”⁴⁵

The message has gotten through. Several polls show that a substantial proportion of Americans believe that political ideology influences judging.⁴⁶ A 2005 Maxwell Poll conducted by Syracuse University found that

82 percent of the American public thought that the partisan background of judges influenced court decisionmaking either some or a lot. This political perception was widely held. The poll found that an overwhelming majority of liberals (88 percent), conservatives (83 percent), people who attend religious services several times a week (84 percent), and people who never attend religious services (88 percent) all agreed that partisanship did not switch off when judicial robes were put on.⁴⁷

There is more to this picture, however. The same poll found that “[s]eventy-three percent of those surveyed agreed that judges should continue to be shielded from outside pressure and allowed to make decisions based on their own independent reading of the law.”⁴⁸ Hence, people appear to believe that judicial decisions are, and should be, determined by the law while

Supreme Court Justices Get Along in Bush v. Gore Aftermath?, CNN (Dec. 13, 2000), http://articles.cnn.com/2000-12-13/justice/scotus.relations_1_supreme-court-clerks-current-justices-justices-antonin-scalia?_s=PM:

LAW (“The justices were accused of political partisanship.”).

⁴⁰ 531 U.S. 98 (2000) (per curiam).

⁴¹ 130 S. Ct. 876 (2010).

⁴² See, e.g., Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges’ Big Donors*, N.Y. TIMES, June 9, 2009, at A1 (“Thirty-nine states, including New York, elect at least some of their judges, and election campaigns, particularly for state supreme courts, have in recent years grown increasingly expensive and nasty.”).

⁴³ See Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG. (Nov. 3, 2010, 5:26 AM), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

⁴⁴ See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

⁴⁵ RICHARD A. POSNER, HOW JUDGES THINK 369 (2008).

⁴⁶ See BYBEE, *supra* note 11, at 6–25.

⁴⁷ *Id.* at 16 (endnote omitted).

⁴⁸ *Id.* at 17.

simultaneously accepting that the personal views of judges influence their decisions.

This seeming ambivalence is also prevalent in accounts by political scientists and legal scholars. After declaring that judging is political, Judge Posner tacks in the opposite direction: “But judging is not just personal and political. It is also impersonal and nonpolitical in the sense that many, indeed most, judicial decisions really are the product of neutral application of rules not made up for the occasion to facts fairly found.”⁴⁹

Although quantitative studies find that ideology has an influence on judicial decisions, the effect is usually small.⁵⁰ “In most domains, the division between Republican and Democratic appointees, while [statistically] significant, is far from huge; the law, as such, seems to be having a constraining effect.”⁵¹ This must be true, at least for federal appellate courts, where 97% of decisions are issued without a dissent;⁵² regardless of their differences in political viewpoints, Republican and Democratic judges concur in their legal judgment an overwhelming majority of the time. On the Supreme Court, “33% of the cases were decided 9–0 in the October 2008 term and another 18% were decided by lopsided 8–1 or 7–2 margins.”⁵³ In the latest expression of this apparent ambivalence, Linda Greenhouse, the dean of Supreme Court reporters, expressed surprise and puzzlement that the votes of Justices in the current term have (thus far) not fallen along expected political lines.⁵⁴

These views raise a question that returns us to the *Times* editorial quoted at the outset of this Essay⁵⁵: Can judging be understood as distinctively legal in a way that does not deny its political elements? Or does a realistic view of the political influences on judging—the self-proclaimed stance of judicial politics scholars—necessarily lead to Mark Smith’s argument that savvy conservative

⁴⁹ POSNER, *supra* note 45, at 370.

⁵⁰ See BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 132–52 (2010).

⁵¹ Miles & Sunstein, *supra* note 21, at 844. I have inserted the word “statistically” to modify the term “significant,” because the failure to include this creates a misleading impression of the results as statistical significance is about the reliability of a finding, not about the size of the actual impact found. See *id.* at 145.

⁵² See Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 862 (2010). Sutton is a federal judge on the Sixth Circuit.

⁵³ *Id.*

⁵⁴ See Linda Greenhouse, *A Surprising Snapshot*, N.Y. TIMES OPINIONATOR BLOG (Mar. 23, 2011, 9:54 PM), <http://opinionator.blogs.nytimes.com/2011/03/23/a-surprising-snapshot/>.

⁵⁵ See *supra* note 1 and accompanying text.

political activists would seek to appoint judges who will aggressively advance their political preferences in their legal decisions?

The answer lies not in the difference between high and low politics—which is a blurry distinction at best and ultimately the wrong axis on which to measure judicial politics—but in distinguishing “ideological influence” from “partisanship.” The distinction can be best understood by examining the various ways one may understand the relationship between politics and judging.

I. THE FIVE MEANINGS OF “POLITICS” IN JUDGING

Some forms of politics are inherent to judging, some are beneficial, and some are contrary to the judicial role and corrosive of the law. While the five meanings of “politics” in judging below are not exhaustive, they frequently recur in the literature about judging and politics. This brief discussion will clarify their implications.

A. *Law as a Subspecies of Politics*

Political science takes as its domain all institutions of government. From this standpoint, legal institutions are an integral element of the political apparatus of the state. “The political scientists,” explains leading judicial-politics scholar Martin Shapiro, “said that the Court was part of politics even though it was a court of law, because all law, including constitutional law, was a part of politics.”⁵⁶ When politics is understood in Aristotelian terms to involve the creation and pursuit of a moral community, “[l]aw, being an instrument and a product of this pursuit, is indeed a subspecies of politics.”⁵⁷ Viewed as cogs in the political apparatus of government, judges are political actors. When political scientists say judges are political, they often mean it in this sense, Shapiro claims.⁵⁸ When legal professionals see the term “political” appended to judges, according to Shapiro, their resulting “distress is caused by a rather simple-minded confusion about the word politics and what it means.”⁵⁹

⁵⁶ Martin Shapiro, *Morality and the Politics of Judging*, 63 TUL. L. REV. 1555, 1555–56 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, & LAW* (1988)).

⁵⁷ *Id.* at 1558.

⁵⁸ *Id.* at 1555–58.

⁵⁹ *Id.* at 1556.

B. *Politics as Producing Public Policy*

Politics can also be commonly understood as a process (any process) that produces public-policy decisions.⁶⁰ Through the declaration, construction, interpretation, and application of the law, judges play a role in the creation and implementation of public policy. For well over a century, lawyers and judges have explicitly recognized that judges make law.⁶¹ The common law—contracts, property, and torts—literally is a domain of judge-made law. Prominent Anglo-American jurists have repeatedly acknowledged that judges make public-policy decisions in the course of deciding cases, not just on common law subjects but also in the interpretation and application of statutes and the Constitution.⁶²

In 1903, First Circuit Judge LeBaron Colt asserted that it has always been the special role of lawyers and courts “to keep the law in harmony with social progress, to make it more reasonable as social necessities and public sentiment have demanded.”⁶³ He further stated:

Ever recognizing that “the matter changeth, the custom, the contracts, the commerce, the dispositions, educations, and tempers of men and societies,” they have conceived theories, invoked doctrines, and inaugurated instrumentalities to relieve the situation. They have carried on judicial legislation from the infancy of the law in order that it might advance with society. By the adoption of broad and elastic rules of interpretation, they have maintained, in large measure, the supreme law of the land in harmony with national growth⁶⁴

Colt acknowledged that judges invoke the “doctrine of reasonableness” and “liberally” construe statutory and constitutional provisions to modify the law to accommodate social changes.⁶⁵

Another high-profile federal circuit judge at the time, Charles F. Amidon, remarked that “[t]he fact that the Supreme Court in constitutional cases so frequently stands five to four, each division assigning weighty reasons for diametrically opposite views, shows plainly how much the Constitution in

⁶⁰ *Id.* at 1557–58.

⁶¹ See TAMANAHA, *supra* note 50, at 17–21.

⁶² See, e.g., Charles F. Amidon, *The Nation and the Constitution*, 19 GREEN BAG 594, 598 (1907); LeBaron B. Colt, *Law and Reasonableness*, 37 AM. L. REV. 657, 674 (1903).

⁶³ Colt, *supra* note 62, at 674.

⁶⁴ *Id.*

⁶⁵ *Id.* at 670, 673.

actual application is a matter of interpretation.”⁶⁶ He added that “[c]onstitutional cases are . . . frequently decided not upon the language of the Constitution, but upon conflicting notions of life.”⁶⁷ Like Colt, Amidon was not saying anything radical, for what he said was beyond dispute. Five-to-four rulings speak for themselves.

Public-policy decisions by judges are unavoidable because the law does not definitively answer every question; judges must fill in gaps and deal with unanticipated situations, and they must adjust the law to new circumstances. The legal system would be dysfunctional if judges were prohibited from issuing a decision each time the law failed to dictate a clear answer, and portions of the law would be obsolete if judges did not adjust it to keep up with social change.⁶⁸ Political views are reflected in these decisions because policy decisions in contested matters necessarily will line up with some positions but not others (prompting accusations of political judging from opponents). This aspect of judging is an elaboration of the point made above: judges are a key component of the political apparatus of government. Their task is to tend the legal garden—common law, statutes, the Constitution, and legal principles—maintaining the functional utility of law through a multitude of day-to-day judicial decisions.⁶⁹

This aspect of judging is well recognized. A 2006 follow-up to the Maxwell Poll⁷⁰ asked respondents whether they agreed with the statement, “Since the Constitution must be updated to reflect society’s values as they exist today, Supreme Court judges have a great deal of leeway in decisions, even when they claim to be ‘interpreting’ the Constitution.”⁷¹ The study found that “[o]ver 70 percent of respondents agreed.”⁷² The question is framed in a loaded fashion (assuming that the Constitution must be updated), but the high affirmative response implies general acceptance of the proposition that judging involves flexibility.

⁶⁶ Amidon, *supra* note 62, at 598.

⁶⁷ *Id.* at 599.

⁶⁸ See Brian Z. Tamanaha, Review Essay, *A Vision of Social–Legal Change: Rescuing Ehrlich from “Living Law,”* 36 LAW & SOC. INQUIRY 297, 316 (2011).

⁶⁹ This view of the law is supported in TAMANAHA, *supra* note 50.

⁷⁰ See *supra* notes 50–52 and accompanying text.

⁷¹ BYBEE, *supra* note 11, at 21 (internal quotation marks omitted).

⁷² *Id.*

C. *Politics as Ideology*

“Politics” is also often used as synonymous with “ideology”—an opaque term that encompasses the totality of a judge’s views about politics, morality, economics, society, religion, and life.⁷³ At the broadest level, this includes political and moral principles; at the mundane level, this contains beliefs on important matters. Ideology-tinged influences seep into judges’ decisions in various subtle ways: shaping and reflecting the content of beliefs, and affecting the way facts are perceived (through perceptual framing and cognitive biases) and how a judge reasons (motivated reasoning to support preferred outcomes).⁷⁴

Judges are influenced by these background views when dealing with open-ended legal standards like the balancing test, fairness, reasonableness, and the best interest of the child, as well as the contexts in which the law accords discretion to a judge.⁷⁵ These influences affect the policy choices judges make in the course of interpretation, as described above. They also shape a judge’s sense of justice. The theory of interpretation a judge adopts—Posner’s pragmatism⁷⁶ or Easterbrook’s textualism⁷⁷—in hard cases or when dealing with broad constitutional provisions is a product of the judge’s views about law, language, rules, and the proper judicial role in a democratic government. When the law runs out, when equally plausible alternative interpretations of a set of legal provisions point to different outcomes, or when applicable legal provisions conflict, a judge must draw from background ideological views if any answer is to be given.⁷⁸

Ideological influences operate in two qualitatively distinct ways—the first relating to human decision making and the second to legal factors—neither of which can be entirely eliminated. In the former respect, human perception,

⁷³ See Bryan D. Lammon, *What We Talk About when We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN’S L. REV. 231, 235–38 (2009).

⁷⁴ See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 887–902 (2009).

⁷⁵ See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 430 (2007) (“Because legal norms by definition have less force where discretion exists, other motivations will likely play a stronger role. To the extent that those motivations include policy preferences, the variation that is observed will correlate with the judges’ ideology.”).

⁷⁶ See TAMANAHA, *supra* note 28, at 127–30.

⁷⁷ See TAMANAHA, *supra* note 50, at 178, 183.

⁷⁸ See Eric J. Miller, *Judicial Preference*, 44 HOUS. L. REV. 1275, 1321–34 (2008) (arguing that “pragmatic permissions” enable a judge to exercise personal choice in selecting among legally valid alternatives).

judgment, and reasoning are always subject to cognitive influences—ideology—and judging is no exception. Much of the influence is subconscious; judges can sometimes become aware of such influences and strive to overcome them, but these influences are a normal aspect of human cognition. Any legal system with human judges must accept a certain level of ideological influence in this form—to insist otherwise is to demand the impossible.

The latter respect, relating to legal factors, is also, to some extent, inevitable. Sometimes the applicable law requires the judge to determine matters that involve judgment (as with fairness or reasonableness standards), or sometimes no decision can be issued without such resort (as when no clear legal answer exists). A duty is imposed on judges to render a decision regardless of gaps, ambiguities, inconsistencies, or uncertainties in the law.⁷⁹

Although the inherent limitations of human reasoning, legal rules and standards, and law allow ideological influences to seep into judicial decisions, these factors are not so pervasive or vicious that they defeat rule-bound decision making. To the contrary, most of the time, the implications of most legal rules are clear, and judges understand and apply them in a similar fashion regardless of ideological influences. Ideology matters, albeit relatively little, as many quantitative studies of judging have found.⁸⁰

D. Politics in Controversial Issues

Another common occurrence involving politics and courts is when judges step into the middle of major contested political issues of the day—issues that many people believe elected representatives should decide, rather than unelected judges. On health care reform, gay marriage, campaign finance restrictions, affirmative action, environmental regulation, and many other subjects, courts have a major say in what our polity can and cannot do. The rise of cause litigation since the 1970s has brought to courts a constant supply of legal actions to advance controversial causes.⁸¹ Virtually every notable piece of

⁷⁹ See MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007) (“A judge shall hear and decide matters assigned to the judge . . .”).

⁸⁰ See TAMANAHA, *supra* note 50, at 132–55 (finding that, although some cases are influenced by politics or subconscious biases, the assumption that judging is pervasively political is erroneous).

⁸¹ See TAMANAHA, *supra* note 28, at 156–71.

legislation (and administrative action) must run a gauntlet of legal challenges brought by those who oppose it.⁸²

When the populace is closely divided on an issue with emotions running hot, any outcome will provoke a backlash in which the losing side charges the court with playing politics because both parties are convinced that the law stands firmly with them. When the issues at stake are widely seen as a political matter, then almost by definition, the decision is political. For many observers, the legal justification supplied by the judge for the decision is largely beside the point. Even people pleased with a decision might still object to the fact that judges have a decisive say over issues that, in a democracy, ought to be determined by politically accountable officials.

E. Politics in Judicial Appointments

The fifth form of judicial politics is the prominent role ideological considerations play in federal and state judicial appointments. For most of the history of the nation, federal judicial appointments were a matter of patronage.⁸³ Not anymore.

Starting with Ronald Reagan, presidents have screened judicial appointees for their ideological views.⁸⁴ Democratic and Republican senators also carefully vet nominees, using filibusters and lengthy delays to derail candidates who are politically unpalatable.⁸⁵ Similarly, in the past two decades, state judicial elections, once sleepy affairs, have become highly political and costly, with millions of dollars spent on state supreme court judges—the money flowing in from political opponents and supporters.⁸⁶ The politicization of judicial appointments is in full swing and getting worse.

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When one adds up the preceding five senses of politics in judging, it seems sensible to pay close attention to the political views of judicial appointees.

⁸² See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 13–14 (2001) (discussing how, in the American legal system, all major policy issues eventually become judicial issues litigated by competing interests).

⁸³ Evan A. Evans, *Political Influences in the Selection of Federal Judges*, 1948 WIS. L. REV. 330, 330.

⁸⁴ Sheldon Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 315 (1985).

⁸⁵ See TAMANAHA, *supra* note 28, at 172–85 (discussing modern efforts by political coalitions to prevent the dominance of one ideological viewpoint).

⁸⁶ *Id.* at 185–89.

First, judges are a part of the political apparatus of government. Second, judges make public policy in the course of developing the common law and when interpreting statutes and the Constitution. Third, the background ideological views of judges influence how they perceive the facts, interpret the law, apply standards, fill in gaps and resolve contradictions, choose an answer from among equally plausible decisions, pick a theory of interpretation, think about justice, and decide policy questions. Fourth, judges sometimes render decisions that affect the shape and outcome of major political issues of the day. Fifth, screening judges for their political views almost necessarily follows from the above.

All five senses of politics, furthermore, are magnified at the level of the Supreme Court. It is the titular head of the legal-political apparatus of government, it makes public-policy judgments (though fewer in volume than appellate courts), it has the highest relative proportion of open-ended cases in the federal judicial hierarchy, and it takes up many highly salient political issues.⁸⁷ For all these reasons, Supreme Court appointees are subjected to careful ideological screening and extremely political confirmation proceedings.

II. WHY SMITH IS WRONG AND HIS VIEW DESTRUCTIVE

A hard-nosed view of matters seemingly pushes us in the direction of Smith, the polemicist who argues that the rule of law is a myth and that the smart move is to appoint judges who have no qualms about achieving desired conservative outcomes, exploiting legal indeterminacy or twisting the law, if necessary, to get there.⁸⁸ It's not clear what judicial-politics scholars would say in response to Smith, because their descriptive accounts of judging match his, though they stop short of advocating aggressive judicial activism.⁸⁹

A. *Differentiating Between Good-Faith and Bad-Faith Judging*

The response to Smith lies in drawing out the implications of the difference between good-faith and bad-faith judging. When ideology has an influence in the two ways set forth above (coloring human cognition and filling in open legal questions), judges deciding in good faith are not aggressively seeking to implement their political views in the law, as Smith advocates, but rather are

⁸⁷ See TAMANAHA, *supra* note 50, at 197–99.

⁸⁸ See SMITH, *supra* note 22, at 102–03.

⁸⁹ See *supra* notes 17–19 and accompanying text (discussing Epstein and Segal's contention that judicial decisions reflect political values).

striving to satisfy their judicial duty to decide cases in a neutral fashion as required by the law.⁹⁰ Their orientation is to produce the correct legal answer; ideological influences on the judges' decisions are screened through, and thus constrained by, this legal orientation. Ideology comes through, owing to limitations in human reasoning and openness in the law, while judges do the best they can to deliver rule-bound decisions despite these limitations.

Things would be very different if judges dropped the effort to be bound by the law and purposefully twisted the law whenever necessary to achieve preferred political outcomes. That is bad-faith judging. If all judges did this, there would be greater uncertainty and variation in legal decisions, reducing predictability in the law. A world of difference—the fundamental line that separates law and politics—exists between ideological influences that subconsciously shape decision making and inform open-ended legal judgments, and conscious manipulation of legal rules for political ends.

This distinction helps avoid a major source of potential confusion in the literature. Partisanship, in the judicial context, means improperly favoring one side over the other in a given action. When the law does not point to a single correct answer or when judges are required to exercise discretion or judgment, and the judge's decision is colored by her ideological views, the charge of partisanship—a rebuke of the judge for violating the obligation of neutrality—is inapt (assuming the judge decides in good faith). Because the decision must align with one side or the other in a politically charged dispute, whatever a judge decides comes across as “partisan.” If this is what partisanship means, it would be impossible for judges to render a *nonpartisan* decision in open-ended cases. But that is absurd and empties the word of meaning.

Continuing with this analysis, because all human decision making, judging included, is subject to cognitive influences, it makes no sense to charge that an ideologically colored decision is partisan on that basis alone, for that would apply a standard nigh impossible to meet. Cognitive influences cannot be entirely eradicated (although a judge can sometimes be made aware of them and can, through a conscious effort, shake free of some of their influence). But a truly *partisan* judge is one who decides in bad faith.

In sum, ideological influence does not equal partisanship. Political scientists cloud this vital distinction when they loosely assert, as Epstein and Segal do, that “[j]udges retain these partisan and ideological attachments when

⁹⁰ See SMITH, *supra* note 22, at 102–03.

they ascend to the bench.”⁹¹ Judges do not ascend to the bench *tabula rasa*, wiped free of their moral, political, and economic views (blank slates would be incapable of rendering judgments of any kind). In this sense, they indeed retain their ideological attachments. But that is not partisanship. Partisanship is what Smith proposes: that judges decide cases with a conscious conservative or liberal agenda driving their legal analyses.

B. Reanalyzing the Five Meanings of “Politics” in Judging

Now, we can reexamine the five senses of politics from a more nuanced perspective. They all share a common quality: judges themselves are not primarily responsible for each of the ways politics make their way into judging. First, judges cannot be condemned for the fact that the court is part of the political apparatus of government. Second, judges make public-policy decisions because the legal tasks they handle call for it. Third, ideology colors all human perception and decision making, and the law regularly presents uncertain or open questions that must be answered. Fourth, judges decide politically charged issues because such cases are brought to them by others. Fifth, it is others, not the judges themselves, who insist upon using ideological litmus tests to screen judicial candidates.

With respect to the first and second senses of politics, judges should be commended for the essential services they provide to the political/legal system. As for the third sense, we cannot berate judges or accuse them of violating their legal role because they suffer from human limitations and make decisions that the law does not answer on its own. On the fourth sense, we can be troubled by the outsized role judges have come to play in political affairs, yet recognize that these cases are put upon them (although judges should be careful to restrict the extent to which their decisions impinge upon political questions). On the fifth sense, candidates for judicial office deserve our sympathy for being subjected to personal scrutiny and distortion to an extent that few people in public employment must endure.

Every discussion of politics in judging must start with an awareness that none of the five senses of politics are routine or pervasive aspects of judging. They are most present at the highest level of judging but far less so at lower court levels. The failure of the *Post* article to note this when discussing the make up of federal appellate courts made it more misleading than

⁹¹ EPSTEIN & SEGAL, *supra* note 17, at 3.

informative.⁹² The meaning and application of legal rules are clear most of the time; public-policy decisions are infrequent; judges come to the same legal conclusion a substantial portion of the time regardless of differences in their political ideology; and after the glare of appointments and elections, they work in relative obscurity, mostly dealing with mundane or technical legal issues, except for the occasional burst of media attention that accompanies a controversial decision.

Judging is a structured practice that takes place within legal institutions through the medium of legal materials. All political influences on judging—all public-policy products of judging—are subject to and filtered by this legal milieu. The decision-making output of judges is distinctively legal, notwithstanding these five aspects of politics, and this legal quality makes the legal results generally predictable by lawyers. This is not to deny that some legal decisions, by some judges, some of the time, are thoroughly political, but examples of bad-faith judging are infrequent and atypical. Even on supreme courts, where political factors have the greatest play, judges render decisions in contexts thickly structured by the law.

Doubters of law and judging—those who harp on legal indeterminacy and scoff at assertions of the high degree of legal efficacy⁹³—should contemplate the many ways their own affairs depend upon a background framework of legal rules. Whoever has an employment contract, rents or buys an apartment, takes out a loan or uses a credit card, purchases medical insurance, contributes to a pension fund, gets a divorce, makes a will, gets into an automobile accident, or robs a bank, will quickly learn, when things go badly, that a great deal of the law is relatively straightforward and will be applied by judges as written. (This predictability, combined with the expense of legal proceedings, explains why the vast majority of situations are resolved without ever going to trial.) It's easy to say judging is politics in the abstract, but these political elements do not loom large in the bulk of routine legal work.

CONCLUSION

Politics do matter in judging, as political scientists and Mark Smith insist, so the question remains how the role of politics in judging should be understood. All five political aspects are *givens* of contemporary judging: the

⁹² See Markon & Murray, *supra* note 13.

⁹³ See, e.g., EPSTEIN & SEGAL, *supra* note 17.

first, second, and third are, for different reasons, inherent to judging; the fourth and fifth have become entrenched in our system and are unlikely to diminish. Judges cannot be entirely free of politics in any of these senses.

What judges can do is decide cases in good faith according to the law in a nonpartisan fashion. This is embodied in the judicial code of conduct: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”⁹⁴ Under this standard, a judge whose decision is subject to background political influences can still be an impartial, nonpartisan judge, as long as the judge does her best to render a decision based upon the law without consciously favoring one side or pursuing a particular objective.⁹⁵

This explains what might appear to be a contradictory set of beliefs about judging:

[J]udges at every level routinely present their decisions as being objective and fair, and a large majority of the public accepts the judicial displays of evenhandedness as true. This belief in impartiality is supported by scholarship that shows the judicial process to be infused with legal principle. Clearly, judicial impartiality is a central component of judicial legitimacy.

And yet, in addition to believing that judges are impartial arbiters, a large majority of the public also believes that judicial decisionmaking across the board is influenced by political preference. This belief is supported by scholarship that shows the judicial process to be permeated by political claims and commitments.⁹⁶

There is nothing mysterious or inconsistent about this juxtaposition of beliefs and research findings about judging.

A judge who consciously strives to be impartial and to issue the correct legal decision satisfies her judicial obligation to decide in accordance with the law in the only way this can be humanly achieved, regardless of whether political views color the opinion. Justices Scalia and Thomas are not necessarily being improperly political just because their decisions align with their political views a substantial proportion of the time. Their political

⁹⁴ MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).

⁹⁵ *See id.* R. 2.2 cmt. 2 (“Although 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.”).

⁹⁶ BYBEE, *supra* note 11, at 84.

activities outside the court also do not make them partisan judges (although it fuels this suspicion among critics). They would be truly political if their legal reasoning were not genuinely oriented toward coming to the correct legal answer—if they were to decide in bad faith, consciously seeking to implement their political views in the law.

This understanding provides the basis for a response to Smith. He is wrong to infer from the undeniable fact of ideological influence that the rule of law is a fraud and that, therefore, judges should disregard precedent and aggressively engage in results-oriented reasoning. That kind of judicial decision making would breach the obligation of impartiality—it would be partisan. The rule of law works despite ideological influences precisely because judges do their utmost to fulfill their duty to abide by the law. If what Smith suggests becomes widely practiced by judges, the system will change from the current one, in which the law is overwhelmingly dominant in judicial decision making (leavened with political influences), to one that is consummately political. That would spell the demise of the law.