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THE MANY MEANINGS OF “POLITICS” IN JUDICIAL DECISION MAKING

Bradley W. Joondeph*

I. INTRODUCTION

The role of politics in judicial decision making is a lively topic of conversation these days, as this symposium attests. But what exactly do we mean when we say (or deny) that “politics” shapes judicial behavior? Unsurprisingly, there is no clear answer. Those who study courts in the United States seem to use the term to describe a wide range of phenomena. Some meanings address law’s indeterminacy, while others concern judges’ short-term policy preferences. Some involve electoral politics, while others concern constitutional ideology. Some are historical and interpretive, addressing the long-term patterns of American constitutional development, while others involve the responsiveness of courts to more immediate, external political pressures.

Distinguishing these meanings from each other is important. First, what we know empirically about the various forms of political influence varies considerably. In some respects, there is substantial evidence that judicial behavior is political; in other respects, there is little evidence at all; and in still others, the claims are essentially unfalsifiable. Thus, the degree to which judicial decisions are accurately described as “political” necessarily turns on the sort of politics we mean. Moreover, questions about judicial politics are often interwoven with questions about the role of courts in American government. For instance, does the responsiveness of judicial decisions to various political pressures undermine an essential function of courts, namely to uphold the rule of law? And if judicial decisions are shaped by judges’ personal political views, from where do courts derive the legitimacy to overturn the policy judgments of elected institutions, such as Congress, the President, or state governments?

This essay seeks to untangle the many possible meanings of “politics” in descriptions of judicial behavior. Part I sets out ten possible conceptions of the term, briefly discussing some examples and their empirical foundations. My goal is mostly descriptive (rather than normative), though it is apparent that some conceptions are more useful than others. In all events, claims about the political influences on judicial behavior must be specific about the phenomena they seek to describe. For given the many possible meanings of politics, accounts that lack such specificity are largely vacuous.

Part II builds on this discussion to make two modest interpretive points. First, and rather obviously, embedded in any evaluation of the impact of politics on judicial behavior is a particular understanding of political influence, and one that may be contestable. Hence, in assessing what various studies of judicial behavior actually demonstrate, we must be attentive to the meaning of politics they adopt, as well as how they operationalize that meaning. Second, surveying the various conceptions of politics makes clear that the common view of law and

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politics as distinct, competing influences on judicial behavior is largely misconceived. As determinants of judicial decisions, law and politics are in many respects inextricably intertwined. This is especially clear once we distinguish a judge’s conscious intentions from the objective patterns observable in her decisions. Subjectively, a judge might sincerely pursue her best understandings of the law—acting as an umpire calling balls and strikes, so to speak—and this earnest pursuit will shape the choices she makes. At the same time, objective empirical analysis is apt to reveal the impact of political forces on the judge’s behavior—influences outside her cognition, unrelated to legal doctrine, or external to the judiciary.

In short, the well-worn, law-or-politics dichotomy is highly misleading, if not simply wrong. Sorting through the various conceptions of politics as they apply to American courts nicely illustrates how judicial behavior is both legal and political—simultaneously, constantly, and thoroughly.

II. A TAXONOMY OF “POLITICS” IN JUDICIAL DECISION MAKING

Most students of American courts generally agree that “politics,” broadly defined, plays at least some role in shaping judicial decision making. But this very general consensus masks a broad diversity of theories, views, and conceptions of how (and to what degree) politics influences judicial behavior—that is, the nature of the political forces affecting the courts, and the mechanisms by which those forces are brought to bear. Scholars use the term “politics” to describe a wide variety of phenomena. And these phenomena can operate on different systemic levels, describing everything from judges’ individual choices in specific cases to the overarching construction of the judiciary’s role in American government.

As a matter of usage, none of these meanings seems objectionable. After all, typical definitions of “politics” are quite capacious. Harold Lasswell defined the term as “who gets what, when, [and] how,” and David Easton has described it as “the authoritative allocation of values for a society.” In other words, politics is generally understood as the fight over whose views and values should prevail in the allocation of scarce societal resources, the struggle over who receives various social benefits and who bears the costs. Nonetheless, several conceptions of the term, at least as it affects the courts, differ markedly from one another and thus carry very different implications. Thus, what follows is a rough map of the many possible meanings of politics as applied to judicial behavior, focusing specifically on the federal courts. My hope is that, with a better sense

2 David Easton, A Framework for Political Analysis 50 (1965).
3 I focus on the federal judiciary for three reasons: (1) I am much more familiar with the literature on federal courts than that on state courts; (2) state judicial systems vary substantially in their institutional designs, making generalizations about political influence much more complicated; and (3) because federal judges enjoy life tenure and secured salaries, federal courts are a terrific place in which to examine the degree to which courts can (or cannot) be made immune from the forces of politics.
of this terrain, we can sharpen our understandings of the role—or, more accurately, the roles—of politics in judicial decision making.

A. Politics as Judicial Discretion

Perhaps the broadest conception of "politics" as it applies to courts is as a synonym for judicial discretion. On this reading, judicial decisions are political if they are not strictly dictated by the accepted sources of legal authority, such as the relevant text, history, tradition, or precedent. That is, when a judge exercises personal judgment, she has resorted to criteria outside the law and thus rendered a decision that is necessarily political. For example, Richard Posner has observed that "the Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's."4

As an empirical matter, it seems undeniable that judges enjoy significant discretion in reaching their decisions. By its nature, law is incapable of supplying objectively "correct" answers to many legal disputes. It therefore provides judges a fair measure of open space in which to operate. Moreover, in exercising this discretion, judges are undoubtedly influenced by the cognitive frames and intuitions that make them unique human beings. Though various norms set boundaries of acceptability around the ways judges exercise their judgment, the very idea of discretion entails personal choice. Of course, the level of discretion varies by context. Supreme Court justices typically encounter more expansive open spaces than judges sitting on the courts of appeals, so the factors that shape the way the justices' exercise their discretion are more important to their rulings than the factors affecting circuit court judges are to theirs. But there is no question that all American judges exercise significant discretion in rendering their decisions.

Despite this basic empirical validity, this conception of politics seems too broad to advance our understanding of judicial behavior in meaningful ways. Essentially everyone accepts the proposition that the authoritative sources of law are often (and even typically) indeterminate in litigated cases, at least within a range of plausible outcomes. Judges therefore routinely exercise personal judgment. As we see every day, judges of equal training, intelligence, and commitments to uphold the rule of law reach opposite conclusions in the same case. The interesting questions in judicial politics do not concern whether judges exercise discretion, but how they do so.

B. Politics as Case-by-Case, Fact-Specific Adjudication

A second possible meaning of "politics" involves a common judicial practice that arguably enhances judges' discretion, and is thus political for reasons similar to those discussed above. The basic idea is that judges act

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politically when they fail to decide cases according to clear, bright-line rules, but instead use narrow, case-specific criteria.

Such behavior might be viewed as political for two reasons. First, when courts decline to embrace clear legal principles, it affords them the leeway to reach the outcome they find genial without committing to any particular rule of law. On this view, weighing all the facts and circumstances and rendering a highly contingent judgment is more legislative than judicial in nature. Case-by-case, minimalist decision making inevitably leads to unprincipled, results-oriented, political jurisprudence.

Second, by failing to articulate clear rules, judges preserve (or even expand) the discretion courts will enjoy in future cases. On this understanding, a critical norm of judicial decision making is that courts must publicly justify their rulings with rationales that will bind them in future cases through the force of stare decisis. When courts fail to articulate such principles, they leave the broader legal questions for another day. And this means more judicial discretion—and hence more results-oriented decision making—in the future. Justice Scalia, a strong proponent of bright-line rules, has made the argument this way:

[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, “This is the basis of our decision,” I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.5

Disputes about the legislative nature of minimalist, case-by-case decision making arose frequently during Justice O’Connor’s tenure on the Supreme Court. Critics routinely attacked O’Connor for her failure to commit to clear legal rules, arguing that “[e]ach of her decisions [was] a ticket for one train only.”6 And just this past spring, Chief Justice Roberts criticized Justice Breyer’s dissent in Medellin v. Texas7 for “propos[ing] a multifactor, judgment-by-judgment analysis that would ‘jettiso[n] relative predictability for the open-ended rough-and-tumble of factors.’”8 To Roberts, Breyer’s “approach to deciding which (or, more accurately, when) treaties give rise to directly enforceable federal law [was] arrestingly indeterminate,” and thus would “vest[ ] with the judiciary the power not only to interpret but also to create the law.”9

Though these debates are interesting, their basic factual premise is questionable: case-by-case, fact-specific reasoning may not produce any more discretionary “judicial law-making” than bright-line rules. First, a doctrinal rule might be clear (e.g., all content-based restrictions on speech are presumptively

6 Jeffrey Rosen, A Majority of One, N.Y. TIMES, June 3, 2001, § 6 (Magazine), at 32.
8 Id. at 1362 (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).
9 Id. at 1362–63.
unconstitutional), but what fits within that rule (e.g., what counts as a content-based restriction) is inevitably open to discretionary judgment. The discretion simply moves to a different place. Second and relatedly, even if bright-line rules reduce judicial discretion on a case-by-case basis, they do so as a result of discretionary judgments made at an earlier point in the decisional process. That is, determining the content of any bright-line rule requires judgment, and one with more far-ranging consequences than the outcome of an individual case. (For instance, the First Amendment does not obviously dictate that all content-based restrictions on speech demand strict judicial scrutiny; this apparently bright-line rule is itself the product of judicial discretion.) Thus, judges who embrace bright-line rules also exercise discretion, and their discretionary judgments affect the same universe of decisions.

Consequently, bright-line rules do not seem to limit the scope or impact of judges’ discretionary judgments. Such rules might reduce the number of specific instances of results-oriented decision making, but even that is debatable. And if case-by-case, fact-specific adjudication does not actually increase judicial discretion, it is hard to see how it can accurately be termed more “political” than any other approach to judging.

C. Politics as Individual Policy Preferences

Perhaps the most common meaning of “politics” in accounts of judicial behavior concerns the tendency of judges to vote for the policy results they find most attractive in the immediate cases before them. Courts act politically when (or because) judges cast their votes consistent with their short-term policy preferences or political ideologies. This meaning assumes that judges exercise discretion, for without it there would be no room for judges to pursue their policy goals. But unlike the two conceptions of politics discussed above, this one more specifically addresses how judges use that discretion. Judges, much like other government officials, employ their power to cement their views of sound public policy into the law; politically conservative judges consistently vote for conservative results, while politically liberal judges consistently vote for liberal results.

This conception of politics is generally associated with “attitudinalism,” a school of thought most prominently championed by political scientists Harold Spaeth and Jeffrey Segal.10 Spaeth and Segal, along with many other scholars, have demonstrated empirically that, at least in certain classes of cases, there is a statistically significant association between judges’ pre-existing political views and their votes. At all levels of the federal judiciary, and particularly at the Supreme Court, the variance in judges’ voting patterns correlates with our best measures of judges’ political ideologies. Republican judges more frequently vote for conservative results, while Democratic judges more frequently vote for liberal results.

10 See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).
The empirical foundations for this conception of judicial politics are clearly robust. As one commentator recently observed, "[n]o serious scholar of the judiciary denies that the decisions of judges, especially at the Supreme Court level, are at least partially influenced by the judges' [political] ideology." At the same time, some important qualifications are worth bearing in mind.

First, aspects of the methodology typically used in quantitative attitudinal studies are imperfect. Consider the following:

- The variables used to define a judge's pre-existing policy preferences have concededly been quite rough. The most common measures have been the political party of the appointing president or a composite score based on the content of newspaper editorials published between the judge's nomination and confirmation. These might be decent proxies for a judge's political ideology, but they are hardly precise.

- Attitudinal studies generally ignore the content of judicial opinions, instead basing their findings exclusively on the outcomes for which judges have voted (e.g., to affirm, reverse, vacate, etc.). But in many cases, the content of the opinions is more significant than the outcome in determining what the court actually decided or the relative positions of the judges.

13 I should note, however, that political scientists—in particular, Andrew Martin and Kevin Quinn—have recently developed more sophisticated measures using Bayesian models. See Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999, 10 POL. ANALYSIS 134 (2002). These are known as the Martin-Quinn scores. See http://mqscores.wustl.edu (last visited Aug. 19, 2008). But while the Martin-Quinn scores may mark an improvement over past measures of the justices' ideologies, they are hardly uncontroversial or without their own limitations. See David A. Strauss, Memo to the President (and His Opponents): Ideology Still Counts, 102 NW. U. L. REV. COLLOQUIY 49 (2007), available at http://www.law.northwestern.edu/lawreview/Colloquy/2007/22/LRColl2007n22Strauss.pdf.
14 See POSNER, supra note 11, at 20–22.
15 On the importance of examining opinions and not just outcomes, particularly in studies of the Supreme Court, see Barry Friedman, Taking Law Seriously, 4 PERSPECTIVES ON POL. 261, 266–67 (2006).
16 A terrific example is the Court's recent rejection of a challenge to Indiana's method of lethal injection (using a three-drug protocol) as a violation of the Eighth Amendment's prohibition on "cruel and unusual punishments." Baze v. Rees, 128 S. Ct. 1520 (2008). The majority of justices voted to affirm. See id. at 1525. But in his separate opinion, Justice Stevens wrote that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty. Id. at 1546 (Stevens, J., concurring in the judgment).
Even focusing on votes alone, it is often difficult to code decisions as either "liberal" or "conservative." Some outcomes defy such two-dimensional, left-right categorization. Consider Gonzalez v. Raich:\(^\text{17}\): was the Supreme Court's decision that Congress can use its commerce power to regulate the possession of home-grown marijuana for medicinal use liberal or conservative? What about the Court's expansive conception of equal protection in Bush v. Gore?\(^\text{18}\)

To be sure, quantitative attitudinal studies are still extremely valuable. The objectivity of their data collection and their methods of interpretation minimize the risk of investigator bias, and their testing of falsifiable hypotheses makes the studies scientific in ways that other investigations of judicial behavior are not. But just as it would be a serious mistake not to give this research serious attention, we should also take careful stock of its limitations.

Second, aside from these methodological issues, the statistical associations that attitudinal studies have demonstrated are often more modest than assumed, in both their size and kind. Many of the seminal attitudinal studies (1) concern the behavior of Supreme Court justices, and (2) focus exclusively on politically salient cases, such those involving civil rights and civil liberties.\(^\text{19}\) But of all the decisions handed down within the American judicial system, this is precisely the category where one would most expect to find the influence of the judges' political ideologies. In cases reaching the Supreme Court the law is typically indeterminate, such that it rarely operates as a strong constraint on the justices' choices (at least among the plausible choices presented by the parties).\(^\text{20}\) Moreover, in cases containing strong emotional pulls—such as those involving civil rights and civil liberties—the justices are apt to be moved, if only unconsciously, by their deeply held values and convictions. In contexts other than politically salient cases decided by the Supreme Court of the United States—that is, in the remaining 99.9 percent of judicial decisions in the United States—the influence of judges' political ideologies will not be as strong.\(^\text{21}\)

Finally, and perhaps most importantly, the attitudinal conception of political influence is agnostic about judges' subjective intentions. The statistical association between judges' political ideologies and their voting patterns may be largely (or even entirely) the product of motivated reasoning—subconscious

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17 545 U.S. 1 (2005).
19 See Friedman, supra note 15, at 269-71.
20 See id. at 265.
21 Consider, for example, that a recent examination of thousands of decisions from the United States Courts of Appeals from 1995 to 2004, which found no significant difference in the voting patterns of Republican and Democratic appointees in cases involving criminal appeals, federalism and the Commerce Clause, the Takings Clause, punitive damages, and standing. See Cass R. Sunstein et al., Are Judges Political? An Empirical Analysis of the Federal Judiciary 47–54 (2006).
influences that steer judges’ apparently objective analyses towards their preferred policy results. As Spaeth and Segal point out, “classic social psychological findings demonstrate [that] the ability to convince oneself of the propriety of what one prefers to believe psychologically approximates the human reflex. This is particularly true when plausible arguments support one’s position, as is invariably the case for the types of issues the Supreme Court decides.”22

To most attitudinalists, the content of judges’ cognition is beside the point. For Spaeth and Segal, for instance, “[w]hat matters is that the justices’ ideology directly influences their decisions,” not whether the justices act “with self-awareness.”23 But what goes on in a judge’s mind matters a great deal in normative evaluations of judicial conduct and, arguably, to the rule of law. If courts regularly and disingenuously used the law as a smokescreen to pursue their favored policy ends, this would be a serious cause for concern. Such practices would mean, among other things, that judges did not take seriously their judicial oaths or the norms of the legal profession. But if the patterns uncovered by attitudinalists are merely unconscious, they connote something quite different. Human beings might take steps to mitigate their implicit biases, but no one can suppress them entirely. In this respect, judicial voting patterns tending to reflect the judges’ political ideologies are an inescapable fact of life, not a significant threat to a fair judicial system.

Moreover, it is unclear that judges’ tendency to vote in ways that reflect their political ideology is necessarily detrimental to our judicial system or to the legitimacy of American government. When judges vote in ways that reflect the political ideology of the power holders responsible for their appointment—for instance, the President, the Senate, or even the voters in many state systems—they are acting, at least to some degree, in a representative fashion. In this way, judges’ predictable ideological patterns add a measure of democratic accountability to judges’ discretionary power to make legal policy. Because judicial policymaking is inevitable, some would argue, it is better that it be tethered in some way to voters’ preferences.24

No doubt, American courts, at least to some degree, are political in the attitudinal sense; the empirical research is simply overwhelming.25 Judges are

22 SEGAL & SPAETH, supra note 10, at 433 (citations omitted).
23 Id.
24 For the definitive argument in this regard, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).
25 See, e.g., LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 20 (2006) (concluding that the empirical research establishes that “differences in the positions that the nine justices take in the same cases are best understood as a product of the differences in their policy preferences”); SUNSTEIN, ET AL, supra note 21, at 147 (finding “striking evidence of a relationship between the political party of the appointing president and judicial voting patterns” among United States Court of Appeals judges); SEGAL & SPAETH, supra note 10, at 433 (finding that “the justices’ ideology directly influences their decisions”). See also Jilda M. Aliotta, Combining Judges’ Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking, 71 JUDICATURE 277 (1988); Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 YALE L.J. 2155, 2175 (1998); Karen O’Connor & Barbara Palmer, The Clinton
not as strongly constrained by the law as some legal models might presume, and the variation in judges' voting patterns tends to reflect differences in their political ideologies, especially at the Supreme Court. But the significance of this point can easily be overstated. A statistically significant association does not show that a judge's political ideology is the most important influence on his behavior. Nor does it establish that judges' political ideology matters in every case. Much remains unclear about how and when judges' policy preferences affect their decisions. In other words, as much as the attitudinal model explains about judicial behavior, there is a great deal more that it does not.

D. Politics as Partisanship

On this conception of "politics," judges use their discretion not to pursue their policy preferences or political ideology, but to benefit their political party. At times, these objectives may be difficult to distinguish. A Democratic judge may tend to vote for outcomes supported by the Democratic Party, and the achievement of those results may further the electoral interests of the party. But the two goals are clearly distinct, and they can often diverge.


26 See Friedman, supra note 15, at 267.
27 As a recent example, consider the Supreme Court’s decision last term in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), where the justices found that the Second Amendment protects an individual’s right to keep and bear arms. See id. at 2822. The Court split five to four, with the justices most closely associated with the Republican Party (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito) forming the majority and the Justices associated with the Democratic Party (Stevens, Souter, Ginsburg, and Breyer) in dissent. The result was unsurprising from an attitudinal perspective, as political conservatives currently tend to support gun rights, while political liberals tend to sympathize with government regulation of gun ownership. At the same time, each justice seemed to vote contrary to the interests of the political party with which he or she identifies. Heller seems like a gift to the Democratic Party. Social conservatives, especially in battleground states like Pennsylvania, Michigan, Ohio, and Virginia, can now vote for Democratic candidates without much concern that the government will infringe their rights to keep and bear arms. It will therefore be much more difficult for Republicans to use gun rights as a wedge issue to pry middle- and lower-income voters away from the Democrats, whose economic message...
While many scholars believe that judges behave politically in the attitudinal sense, few seem to believe that American judges regularly act in politically partisan ways. To be sure, appellate panels often split along party lines, with Republican judges voting for the more conservative outcome and Democratic judges the more liberal one. But such voting patterns seem largely unrelated to the judges’ sense of the electoral interests of their respective parties. As Richard Posner has observed, federal judges “are much less Democratic and Republican than their counterparts in elected officialdom, often to the chagrin of the appointing Presidents. Appointment to life-tenured positions liberates federal judges at all levels from partisan commitments.”

Or at least this is the reigning conventional wisdom. Perhaps future research will prove otherwise, revealing a significant association between judges’ party affiliations and the party that stands to benefit from their rulings. But I am skeptical, for at least two reasons. First, most judicial decisions, including those decided by the Supreme Court, have little or no impact on electoral politics. This is true even for decisions that are relatively important to constitutional law. Second, even in those cases that do affect electoral politics, it is often difficult (if not impossible) to discern which party will ultimately benefit from a particular result. For instance, could the justices in 1973 have realized that Roe v. Wade would prove immensely helpful to the Republican Party over the next three decades?

It therefore seems unlikely that judicial decision making is systemically political in a partisan sense. Federal judges lack an obvious incentive to promote their parties’ interests, and regardless, they have few opportunities to do so. Still, it is disquieting that in a handful of recent decisions where the partisan implications were palpable, judges have apparently been incapable of setting their “rooting interests” aside. Bush v. Gore is the most infamous example, but there certainly have been others. Department of Commerce v. U.S. House of Representatives, where the Supreme Court held that the Census Act prohibited the use of statistical sampling as part of the decennial census, and Crawford v. Marion County Election Board, where the Court held that state laws requiring voters to present photo identification are facially constitutional, also come to typically resonate more with such voters. Heller is like many cases where the policy and partisan implications of a decision seem precisely to oppose one another.

28 See Sunstein, et al, supra note 21, at 8–13; Cross & Tiller, supra note 25, at 2175; Revesz, supra note 25, at 1766–1769.
29 Posner, supra note 4, at 75. Of course, partisan attachments might be stronger at the state level, especially in states where the judicial selection process is strongly influenced by party insiders.
30 For example, the Court’s recent spate of criminal sentencing decisions (such as Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004)) have significantly altered prevailing understandings of constitutional criminal procedure and had a substantial impact on the criminal justice system. But they have not registered so much as a blip on the screen of partisan politics.
mind. In both cases, where the outcomes had immediate and obvious partisan consequences, the justices all voted (save Justice Stevens in *Crawford*) for the result favoring the party with which they seemed more closely aligned.35

These decisions are troubling because, unlike most other forms of judicial politics, partisan judicial behavior poses a genuine threat to the rule of law. At bottom, a core aspect of the rule of law is that judges render their decisions without regard to the identities of the parties before them. The federal judicial oath, for example, requires judges to “administer justice without respect to persons.”36 Politically partisan judicial behavior corrodes this value in a way that judges’ predictably “conservative” or “liberal” views of legal issues do not. It suggests that there is no difference between the judicial system and the elected branches in the manner they resolve disputes. Interpreting the First Amendment to permit restrictive campaign finance regulation is one thing; adopting that interpretation only when the plaintiffs are Republican is a different matter altogether.

Again, partisan judicial behavior does not appear to be a systemic problem in the United States. American judges seem to appreciate the importance of nonpartisanship to the judiciary’s legitimacy and ultimately to its power. At the same time, judges occasionally act on their partisan instincts, consciously or otherwise, and sometimes with dramatic consequences. *Bush v. Gore* is a critical datum for understanding judicial behavior, but its lesson is freighted with ambiguity. Was it the rare exception of judicial partisanship that proves the general rule of partisan neutrality? Or does it reveal that, when the stakes are high enough, judges—even justices of the Supreme Court—will use their offices to advance the interests of their political party, much like other politicians? Perhaps the answer is both.

### E. Politics as Constitutional or Legal Ideology

Under this meaning, judges exercise their discretion—not to advance their immediate policy preferences or the electoral interests of their political party—but in pursuit of their own theory of what the law or the Constitution requires. For instance, Justice Alito might vote to declare aspects of the Bipartisan Campaign Reform Act unconstitutional, not because he supports the policy objective of unregulated campaign financing or because he thinks this result will benefit the G.O.P., but due to his broader vision of the First Amendment’s purpose in structuring public discourse.37 He is motivated by his vision of legal or constitutional principles.

This sort of behavior is often considered *legal* rather than political, as the judge’s relevant objectives concern the content of the law, not public policy or

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35 I assume that most people consider Justices Stevens and Souter to be aligned with the Democratic Party, even though they were Republicans when nominated and were appointed by Republican presidents.
electoral politics. But within a judge’s “ideology”—the package of ideas and preferences that move him to action—the legal and the political frequently are intertwined. First, it is often difficult to discern where “political” ideas end and “legal” ideas begin. For instance, consider the view that the Equal Protection Clause prohibits government from employing race-conscious affirmative action programs. As the Supreme Court’s recent opinions on the topic reveal, the reasons affirmative action might be unwise as a matter of social policy are difficult to distinguish from the reasons many justices believe it is unconstitutional. Given the open-textured nature of law (and particularly the Constitution), it is virtually impossible to form coherent “legal” views without some reference to the policy consequences such views entail.

Second, and more fundamentally, we have to ask how judges come to embrace certain legal or constitutional ideologies in the first place. How does a judge come to believe the Due Process Clause offers no protection to any unenumerated, substantive rights, such as the right to privacy? Social psychology shows that the policy consequences such a theory is apt to produce will inevitably (if unconsciously) play a critical role in a human being’s attachment to a given constitutional theory. Thus, it seems empirically dubious that a judge could form an overarching constitutional vision about the nature of substantive due process, for instance, without being influenced by the implications of such a theory for such issues as abortion or gay rights.

The point is not that constitutional ideology is not legal in important respects, or that the law has no independent influence on judicial decision making. Nor is the point to impugn judges’ sincerity or integrity; I have little doubt that Justice Scalia sincerely believes that the Fourteenth Amendment offers no protection to a woman’s right to terminate her pregnancy. Rather, the point is that such views are necessarily political as well as legal. It seems fanciful that Scalia could have formed his constitutional views wholly unaffected by their ultimate policy implications, even if that impact occurred wholly outside his cognition.

In short, political and legal ideologies are inseparable in many ways. Political predispositions, consciously or unconsciously, form the foundations for the legal theories that judges ultimately embrace. Such is the nature of human reasoning, analysis, and decision making.

38 See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (where Chief Justice Roberts opines that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (arguing that affirmative action “programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences”).
F. Politics as Institutional Promotion

Yet another goal judges might pursue with their discretion is enhancing or protecting the power of the courts. Such behavior could rightfully be described as institutional, as it aims to promote the interests of the institution with which judges are most closely affiliated. But it can also be considered political, for its ultimate aim is to expand or preserve the judges’ power to determine legal policy.

The goal of institutional advancement is often associated with strategic behavior (discussed in more detail infra). The idea is that in certain cases judges will set aside their sincere views of the law or public policy to issue rulings that preserve or enhance the judiciary’s institutional prestige. But institutionally-oriented behavior need not be strategic, at least in a conscious sense. Indeed, it seems likely that over time judges’ views of the law are shaped by their institutional place and sense of professional role.

Actors affiliated with an institution are not simply constrained by that institution’s mission. Rather, they tend to define their own objectives in ways that reflect this organizational purpose. As Howard Gillman and Cornell Clayton have explained, “institutions not only structure one’s ability to act on a set of beliefs; they are also a source of distinctive political purposes, goals, and preferences.” Thus, what judges perceive as the correct legal result in a given case will likely be shaded by their identification with the judiciary. In the words of Rogers Smith, institutions shape “the senses of purpose and principle that political actors possess,” purposes and principles that “may be better described as conceptions of duty or inherently meaningful action than as egoistic preferences.”

Whether conscious or otherwise, judges have engaged in this sort of institutionally-minded “politics” throughout U.S. history. Consider the Marshall Court’s famous maneuverings in cases like Marbury v. Madison, Stuart v. Laird, and Cohens v. Virginia, all of which avoided direct confrontations with hostile political forces that would have exposed the Supreme Court as practically powerless. Or consider the Court’s “switch in time” in West Coast Hotel Co. v. Parrish, handed down just as Congress was debating FDR’s Court-packing plan. Or consider the Warren Court’s abrupt about-face in its decisions involving domestic security after “Red Monday,” a reversal made in response to withering attacks on the Court that included jurisdiction-stripping legislation very nearly enacted by Congress. In each instance, the justices apparently cast aside their

42 5 U.S. (1 Cranch) 137 (1803).
43 5 U.S. (1 Cranch) 299 (1803).
44 19 U.S. (6 Wheat) 264 (1821).
45 300 U.S. 379 (1937).
sincere views of the law to reach results that reduced the Court's exposure to damage.

One could argue that, as a criterion for decision making, a judge's desire to advance the judiciary's institutional interests is illegitimate. First, there is an element of self-dealing, particularly when judges' legal constructions are disingenuous. On this view, there is something unseemly in judges' using their power to preserve or expand that power, especially when it is contrary to their sincere understandings of the law. Second, when a court's sense of self-preservation causes it to retreat in the face of strong public pressure, judges arguably sacrifice one of their core functions: to preserve the rule of law when the forces of majoritarian politics are most apt to disregard them.

These are indeed legitimate concerns, but they also seem somewhat naïve. First, it is the nature of human institutions to act to preserve themselves. Office holders identify with their roles, and they derive a sense of mission from the institution's existence. Thus, institutionally-oriented behavior, at least at a subconscious level, seems intractable. As Karen Orren and Stephen Skowronek have observed, incumbent office holders are disposed “to defend [their] own authority against potential incursions from competing authorities,” even when those competing authorities are ideological friends. Second, as an empirical matter, it is simply not the case that courts have ever had the power to defy the will of determined majorities in the United States. The judiciary is a politically dependent institution, and it has never had the strength to withstand the opposition of Congress, the President, or the states, at least on its own. The conception of the courts as counter-majoritarian heroes is largely a myth.

In short, it is surely the case that courts occasionally act politically in the sense of promoting or defending the interests of the judiciary. But rather than a cause for alarm, this sort of behavior generally seems helpful to a well-functioning judicial system. Judges are wise to be institutionally cautious in those rare cases of high political salience, so as to preserve their capacity to speak with authority in the remaining, vast majority of disputes that come before them. In the long run, reckless decisions, issued regardless of the ultimate consequences to the judiciary, seem more likely to undermine rule of law values than to enhance them.

50 See Cass R. Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 Stan. L. Rev. 155 (2007) (arguing that it is legitimate for judges, under certain circumstances, to consider the potential reactions and backlash generated by their decisions).
G. Politics as Strategic Behavior

Another way judicial behavior might be “political” concerns not the goals a judge might pursue, but the means she might employ to pursue those goals. Specifically, judges might act politically by acting strategically—taking actions that betray their sincere beliefs or preferences to better achieve their ultimate ends. As a recent example, consider Chief Justice Rehnquist’s behavior in *Dickerson v. United States.*

Throughout his career, Rehnquist made plain his view that *Miranda v. Arizona* had been wrongly decided. But when the Court was finally presented with the perfect vehicle for overruling *Miranda,* Rehnquist switched sides, voting to reaffirm it. Why? There are several possible explanations, but the most plausible is that Rehnquist voted with the six other justices in the majority so he could assign the opinion to himself, and thus minimize the damage to his vision of constitutional criminal procedure.

Judges might behave strategically to pursue a variety of goals. Rehnquist’s performance in *Dickerson* shows that judges might use strategy to advance their legal or policy preferences. Judges might also act strategically, as the preceding section noted, to promote the institutional interests of the judiciary. For instance, consider the Supreme Court’s refusals in the 1950s to decide whether anti-miscegenation laws violated the Equal Protection Clause. A majority of the justices clearly believed that such laws were unconstitutional, but the Court found ways—indeed, quite disingenuous ones—to avoid deciding the issue until 1967. Already under fire for their decision in *Brown v. Board of Education,* the justices feared that an even fiercer backlash would have significantly eroded the Court’s authority. As Justice Clark reportedly told one of his clerks, “One bombshell at a time is enough.”

Judges might also act strategically in the pursuit of politically partisan objectives. For example, Rehnquist reportedly sought to delay the Court’s decision to grant certiorari in *Planned Parenthood v. Casey* so that the case

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54 See *Dickerson,* 530 U.S. at 432.
59 See *Powe supra* note 46, at 71–73.
would not be heard until October 1992. The exact reasons are unknowable, but a reasonable guess is that he preferred the Court’s decision to come down after the 1992 presidential election. Rehnquist likely feared that a decision overruling Roe v. Wade (which most presumed Casey would produce) would energize Democratic voters and harm the reelection chances of the first President Bush.

Strategic behavior can also take a variety of procedural forms. At the Supreme Court, it might involve voting to deny a writ of certiorari. Even if a case is otherwise worthy of review, a justice might vote defensively to deny certiorari if she thinks the Court is apt to decide the issue contrary to her preferences. The justices might also strategically deny certiorari if the question presented is extremely controversial, and thus likely to entangle the Court in a political thicket no matter what it decides. (In this regard, consider the Court’s studious avoidance of gay marriage since its 2003 decision in Lawrence v. Texas.)

More commonly, judges can act strategically in adopting certain rationales for their decisions. The goal of strategic opinion writing might be straightforward, such as simply to garner enough votes to secure a majority; such is the nature of compromise on a collegial court. Or a judge might adopt a narrower or less permanent basis for the decision—such as construing the relevant statute not to present a constitutional question—to preserve judicial discretion for the future, to avoid responsibility for the policy outcome, or to minimize the confrontation with the legislature. Or the objective might occasionally be more complicated, such as to stake out a policy position that, while not the first choice of external power holders like Congress or the President, is nonetheless safe from being overturned.

There is a wealth of empirical research suggesting that judges do act strategically, at least occasionally. But as with the evidence supporting the attitudinal model, it is important to keep some important limitations in mind. First, not every case presents judges with strategic options. In garden variety cases, judges, typically have little room for strategic maneuvering; though the law is indeterminate in most litigation reaching the Supreme Court, it is fairly constraining in most cases decided by lower courts. Second, and more importantly, it is unclear how cognizant judges can actually be of the various constraints that frame their “strategic environment.” Surely judges are aware of their colleagues’ preferences, and this is the constraint most likely to prompt

63 See id.
64 539 U.S. 558 (2003).
67 See BAUM, supra note 25, at 14–19.
strategic adjustment, especially in the content of opinions. But the other, external constraints are more difficult to discern or predict. Thus, except in unusual cases, it is unclear how much these variables could actually influence judicial decision making.\textsuperscript{68}

In short, it is uncertain to what extent judges regularly act strategically, but there is no doubt that such behavior occurs, at least occasionally. Judges are sophisticated actors, acting within a complicated political environment, and thus will adjust their behavior, consciously and unconsciously, in light of the relevant institutional or political constraints. They have done so in some of the nation's most celebrated decisions, and there is no reason to believe they will refrain from doing so in the future.

H. Politics as Responsiveness to External Power Holders

Another sense in which judges might behave "politically" is by altering their views to accommodate the desires of power holders outside the courts. This conception plainly overlaps with that of judges' promoting the institutional interests of the judiciary. Although institutional objectives might cause judges to take positions that enhance the power of the courts (such as expanding the scope of issues meet for judicial review\textsuperscript{69}), such objectives have historically manifested themselves more frequently in defensive and preservationist actions, taken in response to perceived threats from external power centers.

To the extent judges respond to external power holders, it is principally because the judiciary is institutionally dependent. Courts are largely impotent in the face of determined political opposition—from Congress, the President, or state governments. Without at least the tacit cooperation of these other actors, judicial decisions are largely irrelevant. To cite just one example, the Supreme Court in 1954 held in \textit{Brown v. Board of Education}\textsuperscript{70} that racial segregation in public education was unconstitutional. But eleven years later, ninety-nine percent of African-American children in the deep South still attended completely segregated schools.\textsuperscript{71} Not until Congress enacted major civil rights legislation, and the Justice Department began suing school districts for noncompliance, did meaningful desegregation start to occur.\textsuperscript{72}

The judiciary's vulnerability is a product of the basic institutional arrangements of American government. Congress can adjust the federal courts' jurisdiction, alter the number of courts and judgeships, reduce the judiciary's appropriations, or pass statutes or propose constitutional amendments to overrule judicial decisions.\textsuperscript{73} The President can disregard the courts' decisions or choose

\textsuperscript{68} See \textit{id.}
\textsuperscript{70} 347 U.S. 483 (1954).
\textsuperscript{71} See \textsc{Gerald Rosenberg}, \textsc{The Hollow Hope} 50 (1991).
\textsuperscript{72} \textit{Id.} at 42–57.
\textsuperscript{73} See \textsc{Terri Jennings Peretti}, \textsc{In Defense of a Political Court} 137–44 (1999).
to enforce them only half-heartedly.\textsuperscript{74} State and local governments can evade or, even worse, simply refuse to comply with judicial decisions. Granted, such acts of defiance or retribution against the judiciary have been relatively infrequent in American history. But they have all occurred, and judges know this history.

Judges might also respond to the opinions of other government officials because the respect and admiration of those officials is important to them, not for any instrumental reasons but simply for its own sake.\textsuperscript{75} As Lawrence Baum has explained, people are strongly driven to maintain and enhance their self-esteem, and a person's self-esteem depends heavily on his social interactions.\textsuperscript{76} As human beings, our perceptions of ourselves turn largely on how we are viewed by others (or, more accurately, how we perceive we are perceived by others).\textsuperscript{77} As a result, we are constantly engaged in a process of "self-presentation," consciously and subconsciously managing the impressions we make on others.\textsuperscript{78} And the opinions of the people with whom we strongly identify—our salient audiences—are critical to our self conceptions.\textsuperscript{79} Because political elites are likely an important audience for most judges, judges' understandings of the law are apt to drift, consciously or unconsciously, towards those that are ascendant among the nation's political leaders.\textsuperscript{80}

Whatever the exact cause, the lessons of American history are reasonably clear: when the judiciary has attempted to stake out legal or constitutional positions that threaten important objectives of the governing political regime, the courts have either been forced to back down or have simply been overrun. The Supreme Court held in \textit{Dred Scott} that Congress lacked the authority to regulate slavery,\textsuperscript{81} but the Civil War soon reversed that holding. The Court held in the 1930s that central aspects of the New Deal were unconstitutional, but after coming under serious threat from Congress and the President, the justices reversed course. Judges are politically responsive in this sense because, at the end of the day, they have little choice. By design, the judiciary lacks the power to overcome serious and sustained political opposition.

I. Politics as Responsiveness to Public Opinion

Yet another conception of "politics" concerns the responsiveness of courts to public opinion. And with respect to this meaning, it is obviously critical to distinguish state from federal courts. In thirty-nine states, judges are subject to

\textsuperscript{74} See id. at 144–47.
\textsuperscript{75} See BAUM, \textit{supra} note 25, at 32.
\textsuperscript{76} Id. at 25–30.
\textsuperscript{77} Id. at 27–28.
\textsuperscript{78} Id. at 28–30.
\textsuperscript{79} Id. at 27–30.
\textsuperscript{81} Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
some form of election.\textsuperscript{82} The electoral systems vary widely, so we should expect a similar variation in judges’ attention to public opinion. Regardless of the details, though, states that subject judges to elections have deliberately constructed their judicial systems to be political in this sense. The institutional design creates a direct incentive for judges to consider public opinion in rendering their decisions.

Federal courts, by contrast, are institutionally buffered from majoritarian pressures. Article III of the Constitution provides that federal judges “shall hold their Offices during good Behaviour,” and that their compensation “shall not be diminished during their Continuance in Office.”\textsuperscript{83} Nonetheless, despite these protections, federal judges also are often responsive to the public’s will. To a large degree, this influence is difficult to untangle from the influence of other power holders. Congress, the President, and state governments are themselves highly responsive to public opinion, and thus are apt to pressure the judiciary according to the desires of their constituents.

In some circumstances, though, the public can exert an independent pressure on the judiciary, even when elected officials fail to take such steps on its behalf. In particular, the public might ignore or defy judicial decisions, making the courts look powerless, and thus damaging the judiciary’s prestige. The point is not merely theoretical, nor is it simply a matter of the distant past. Consider the public’s reaction to the Supreme Court’s 2000 decision in \textit{Santa Fe Independent School District v. Doe}, in which the justices held that a public high school’s policy of permitting student-led prayers before football games violated the Establishment Clause.\textsuperscript{84} Two months later, thousands of people were still openly praying at high school football games throughout the South, some in a manner that was probably permissible under the letter (but not the spirit) of \textit{Santa Fe}, some in open defiance.\textsuperscript{85}

Additionally, judges might care about public opinion for reasons other than its instrumental value. Again, like all human beings, judges care about how they are perceived by others because it is vital to their self-esteem. And the general public may be an important audience for judges’ perceptions of themselves, particularly for justices of the Supreme Court.\textsuperscript{86} Thus, judges may alter their behavior, consciously or unconsciously, to win the public’s approval (as well as the approval of an important intermediary, the news media).\textsuperscript{87}

Regardless of the reasons, it is clear that judicial decisions throughout American history have generally reflected the nation’s prevailing social and

\begin{footnotes}
\item U.S. CONST. art. III, § 1.
\item 530 U.S. 290 (2000).
\item See \textit{BAUM}, supra note 25, at 60–72.
\item See \textit{id.} at 135–51.
\end{footnotes}
political mores. The Supreme Court held that racial segregation comported with the Fourteenth Amendment in 1896, but that it was unconstitutional in 1954. It held that states could criminalize sodomy between consenting adults in 1986, but that such laws were impermissible in 2003. On neither issue had the relevant sources of legal authority changed. But on both issues, societal attitudes had evolved significantly, growing less tolerant of racial segregation and more tolerant of homosexuality, respectively. However we describe this effect, the evidence is fairly clear: judicial decisions, particularly those of the Supreme Court, have never veered too far from majority opinion in the nation as a whole. Much as Finley Peter Dunne’s cartoon character Mr. Dooley suggested roughly a century ago, “[N]o matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ election returns.” An oversimplification, perhaps, but maybe not too much of one.

J. Politics as the End to Which Courts Are Placed in Service

A final conception of “politics” concerns its operation on a different theoretical plane. The meanings of politics discussed thus far have generally focused on judges’ individual choices—the existence of discretion and the ways judges might use it. But one can also conceptualize politics as influencing courts at a very different, systemic level as the overarching force that places judges in their offices and issues within their jurisdiction. That is, courts are influenced by politics to the extent that power holders external to the judiciary empower particular judges to resolve particular issues, and in the furtherance of particular political objectives.

This conception of politics is commonly known as “judicial regimes” or “political systems” theory. It is often associated with the basic observation, famously made by Robert Dahl more than fifty years ago, that “the policy views dominant on the [Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.” The animating idea is that judges are not wholly autonomous actors, free to pursue

88 See Jeffrey Rosen, The Most Democratic Branch: How the Courts Save America 7 (2006) (“[T]hroughout American history, judges have tended to reflect the wishes of national majorities and have tended to get slammed down on the rare occasions when they have tried to thwart majority will.”). See also Klarman, supra note 48, at 449 (noting that if the Supreme “Court’s constitutional interpretations have always been influenced by the social and political contexts of the times in which they were rendered, perhaps it is impossible for them not to be”).
89 Plessy v. Ferguson, 163 U.S. 537 (1896).
93 Peter Finley Dunne, Mr. Dooley’s Opinions 26 (1901).
their independent agendas. Rather, courts are generally staffed to serve the interests of other, more powerful institutions.96

The most straightforward manifestation of this relationship is when the ascendant national political coalition effectively uses the courts to cement its political priorities into legal doctrine. By virtue of the appointment process, the federal judiciary will generally be populated with judges who share the ideological priorities of the governing regime. Thus, as the courts decide cases, they will tend to bless and ratify the initiatives of the ascendant coalition, and declare unconstitutional or narrowly construe laws enacted by the coalition that has since been swept from power.97 As Dahl’s thesis suggests, the courts are influenced by politics because electoral politics shapes the judges’ ideological dispositions.

Of course, as Howard Gillman has explained, legal change “never quite works out as a simple story of judges merely acting as faithful ‘agents’ in service of their ‘principals.’”98 But as a substantial body of empirical research has demonstrated, the courts’ decisions, at least in their broad contours, tend to reflect the constitutional values of the political movement that has staffed and sustained them.99 To oversimplify a bit, the decisions of the Supreme Court under Chief Justice Taney, and particularly its decision in *Dred Scott*,100 were an extension of the values animating the Jacksonian political regime that had dominated American politics since the 1820s.101 The Supreme Court of the late 1930s and 1940s effectively cemented the central priorities of FDR’s New Deal coalition into constitutional doctrine, particularly in its federalism and Due Process Clause decisions, which essentially eliminated the judiciary’s role in reviewing the propriety of economic regulation.102 And the Warren Court’s decisions of the 1960s in the areas of race discrimination, civil liberties, and voting rights generally reflected the consensus of political elites during the Great Society, a coalition comprised of non-southern Democrats and liberal

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97 See Dahl, *supra* note 95, at 293.
99 See J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POLITICS 233, 236 (2004) ("A large body of empirical research in political science and history now exists to support the claim made more than a century ago by Finley Peter Dunne’s fictional bartender-philosopher, Mr. Dooley, who quipped: ‘... th’ supreme coort follows th’ iliction returns.”’ [sic]).
Republicans. In each case, the Court functioned more as a policy-making partner of the elected branches than as an independent check on them.

Power holders might also attempt to use the courts—not to ratify their policies while their political movement is in ascendance—but as a place to entrench their ideological views beyond their stay in office. Consider the efforts of President John Adams and the lame duck Federalists, after their routing in the 1800 elections, to pack the federal courts with Adams’s “midnight judges.” No doubt, Federalist judges were constrained in what they could accomplish thereafter, with Republicans holding the presidency and the Congress. But their presence in the judiciary, especially that of John Marshall as Chief Justice, clearly affected the shape of legal policy. Or consider the successful efforts of the Gilded Age Republicans—who staffed the courts with judges who shared the party’s concern for protecting national commercial interests from parochial, agrarian state regulation, and then expanded the federal judiciary’s jurisdiction—to promote Republican economic policies well beyond their control of the elected branches. Or even consider the simple fact of current political life, that a potential nominee’s age is critical to his or her chances of being appointed to the Supreme Court.

Politicians might also use the courts in more sophisticated ways to achieve less obvious political objectives. First, some political issues may simply be too difficult for elected officials to address through ordinary political means. Politicians may not much care how the matter is resolved on the merits, but they want it decided, and they want to avoid the political liability of taking a clear position. In such circumstances, elected officials might funnel the issue into the judiciary, much as Congress created the Military Base Realignment and Closure Commission in 1988. Courts can decide the matter in relatively neutral and principled manner, in a way that is not immediately traceable to elected officials, and politicians can avoid most of the political costs.

Second, elected officials might use the courts strategically to advance their objectives when accomplishing those objectives more directly is politically impossible. Consider recent changes in the law of punitive damages. For years, Republicans in the national government have proposed federal legislation that would limit the punitive damages that juries could award in tort actions

\[\text{\textsuperscript{103}} \text{See Powe, supra note 46; Gillman, supra note 12, at 145–58; Tushnet, supra note 102, at 121–24.}\]

\[\text{\textsuperscript{104}} \text{See Keith E. Whittington, Political Foundations of Judicial Supremacy 93–98 (2007); Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045 (2001).}\]

\[\text{\textsuperscript{105}} \text{See Whittington, supra note 104, at 247.}\]


nationwide. Because of presidential vetoes, Senate filibusters, and various other obstacles, however, the G.O.P. has fallen short of having such legislation enacted. But through the process of judicial appointments, Republicans have created a Supreme Court that has been willing to impose similar limitations through its interpretation of the Due Process Clause of the Fourteenth Amendment.110

Third, politicians may find it advantageous for courts to decide issues that threaten to fracture their party coalitions.111 A great example concerns the Democratic Party and the issue of race in the 1950s and early 1960s.112 National Democratic leaders, such as President Truman, Adlai Stevenson, and President Kennedy, could not aggressively push an agenda of racial equality without the risk of alienating southern Democrats, and the South was a critical element of the party's legislative and electoral coalitions. Yet, largely due to the appointment of sympathetic judges, federal courts advanced an agenda of racial equality through adjudication, and in a way that was not nearly as threatening to the maintenance of the national Democratic coalition. Democrats used the courts to advance aspects of their political agendas that were too controversial within their own party for them to pursue those objectives more openly.

Finally, elected officials might empower courts to render decisions that save politicians from their own somewhat predictable excesses.113 On many occasions, elected officials might be pushed to endorse policies about which they actually hold significant reservations. They may find it politically advantageous to sign onto certain legislation, but they hope the courts will ultimately vindicate their sincere views by striking down the policy. Courts are thus empowered to serve as a constitutional backstop, vindicating the long-term interests of politicians when they lack the spine to push for their sincere views in the first instance. Consider, for instance, President Bush's decision in 2001 to sign the Bipartisan Campaign Reform Act,114 or Senator Arlen Specter's vote in favor of Military Commissions Act of 2006 (even though he stated publicly that he believed significant portions of the law were unconstitutional).115 There are other possibilities. Dominant national coalitions might use courts to impose a national

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112 See WHITTINGTON, supra note 104, at 144–52; Whittington, supra note 104, at 592–93.
113 See WHITTINGTON, supra note 104, at 86 ("Bolstering the authority of judges to hear and resolve disputes over constitutional meaning may insure affiliated political leaders against a failure of will when faced with particular controversial decisions.").
policy consensus on regional outliers or to enhance the credibility of the coalition's commitments to various constituencies.\textsuperscript{116}

The broader point is that the power exercised by American courts in practice, and especially the power of judicial review, is not simply inherent in the natural order of a constitutional democracy. Nor is it plainly spelled out in the Constitution. Rather, that power is the product of political construction. For a host of reasons, power holders throughout American history have found it advantageous to endow the courts with certain authority, and to delegate important issues to them for resolution. And these delegations have been driven by political considerations, not the letter of the law. In this very basic sense, then, every judicial decision is framed by politics. Courts have the authority to render their decisions, and judges have their offices to serve on those courts, due to political constructions of the judicial power—constructions made in the service of political ends.

\textbf{III. SOME IMPLICATIONS}

\textbf{A. The Importance of Specificity}

As the diversity of these various conceptions of politics demonstrates, claims that courts have acted "politically"—in a given case, a series of decisions, or even over the course of an era—can be highly ambiguous. Does the claim refer to the existence of judicial discretion, or the ways judges have tended to use that discretion? Does it concern the means judges have used to pursue their objectives, or how other power holders have used the courts to pursue their political objectives? Or does it refer to the judiciary's responsiveness to various political pressures, such as those from Congress, the President, the states, or public opinion? If claims about the impact of politics on judicial behavior are to carry any meaning, they must be specific about the sort of political influence (or influences) they seek to substantiate.

Likewise, any study that attempts to measure or evaluate the force of politics in judicial decision making must adopt, if only implicitly, a particular conception of politics. Again, several conceptions are plausible, and each is worthy of empirical investigation. But to understand what a given study actually establishes, one must pay careful attention to the meaning of politics it embraces, and exactly how it operationalizes that meaning as a variable. Needless to say, evidence of different sorts of political influence on judicial behavior can have very different implications.

For instance, consider the definition of "judicial independence" that Mitu Gulati and his co-authors, Stephen Choi and Eric Posner, use in their study evaluating the performance of state supreme courts.\textsuperscript{117} They define judicial

\textsuperscript{116} See Gillman, \textit{supra} note 12.

independence as a “judge’s ability to withstand partisan pressures, or disinclination to indulge partisan preferences, when deciding cases.”\textsuperscript{118} And to measure this ability “to withstand partisan pressure,” they examine the relationship between judges’ party affiliations and their voting patterns. Specifically, they understand judges as “succumb[ing] to partisan pressure” when they vote for the same outcome as other judges of the same political party, and as resisting partisan influence when they cross party lines. In other words, the more frequently judges from different political parties vote together, the more independent the court.\textsuperscript{119}

This conception of judicial independence is certainly plausible, but a few points warrant mention. First, as a matter of terminology, it is unclear whether judges of the same political party voting for the same outcomes constitutes evidence of partisan decision making. As discussed earlier, “partisan” often connotes an interest in advancing the electoral interests of a political party, not simply advancing that party’s political or legal ideology. Evidence that judges were partisan hacks—that they deliberately used their offices to advance the electoral chances of their parties—would indeed suggest that the judiciary lacked much independence from the elected branches (or the political coalitions with which the judges were affiliated). But the variable Gulati, Choi, and Posner construct might be better understood as a measure of judicial ideological cohesion. Republican judges consistently voting with other Republicans, or Democrats voting with other Democrats, reflects an ideological consistency that comes with party affiliation.

This sort of ideological homogeneity evidences a lack of judicial independence only if the independence of interest is that from the ideas of the judge’s party, or the ideas common to the judges with that party affiliation. It does not necessarily indicate a lack of independence from external political influence (other than the influence that occurs through the judicial selection process). For example, ideological homogeneity might indicate that the political parties in the state had been particularly astute in selecting judges whose views of the law were consistent with the party’s agenda. Or it could indicate that many of the legal issues on which Republican and Democratic judges in the state differ are those that define the differences between the state parties, making party cleavages on the court particularly acute. In either case, judges could still act independently on their sincere legal beliefs, but those beliefs would be quite consistent within each party.

Conversely, judges’ voting across party lines might not be a reliable indicator of genuine independence. For instance, in states that hold contested judicial elections, judicial decisions might systematically favor the interests of groups donating to the judges’ election campaigns, regardless of the partisan valence. And to many, the influence of campaign money on case outcomes

\textsuperscript{118} Id. at 11.  
\textsuperscript{119} Id.
constitutes a much more sinister threat to judicial independence than that posed by judges’ adopting fairly consistent, party-line legal ideologies.\[120\]

As another example, consider Thomas Keck’s recent exploration of the circumstances under which the Supreme Court invalidated federal statutes between 1981 and 2006.\[121\] Noting that mixed ideological coalitions of justices had frequently struck down laws enacted with the support of both Republicans and Democrats in Congress, Keck concluded that the justices were moved, at least in part, by “some distinctive judicial motivation.”\[122\] 122 Focusing on free speech cases in particular, where the Court invalidated twenty-two federal statutes over that span, Keck reasoned that the decisions represented a “judicial commitment to legal precedent or constitutional principle” that “cuts across ideological or partisan lines.”\[123\]

No doubt, many of the Court’s First Amendment decisions involved majority coalitions of liberal and conservative justices, indicating that something other than politics in the raw attitudinal sense was at work. But free speech is a legal issue on which, by and large, mainstream Republican and Democratic constitutional lawyers currently agree.\[124\] Most lawyers presently believe, as a matter of constitutional ideology, that the courts should aggressively defend the rights of speakers. Thus, it is probably more accurate to say that free speech is a matter on which there is a fair measure of ideological consensus than that the Court’s decisions in this area have demonstrated any particular “commitment to legal precedent or constitutional principle.” Free speech is a place where conservative and liberal constitutional ideologies presently tend to overlap.

If, as Keck contends, the Court’s free speech decisions were “institutionally rooted,” it was only in a particular sense: constitutional lawyers within the respective parties appear to maintain different sets of public ideological priorities than legislators. But as discussed earlier, elected officials’ public positions may not reflect their genuine preferences on a given policy. For instance, legislators might be quite happy for courts to invalidate legislation prohibiting forms of obscenity, limiting campaign contributions, or criminalizing flag burning on First Amendment grounds. Such rulings could vindicate politicians’ sincere ideological preferences, even though they find it too risky to adopt such positions publicly. Moreover, even if lawyers and legislators genuinely diverge

\[120\] See Adam Liptak, Looking Anew at Campaign Cash and Elected Judges, N.Y. Times, Jan. 29, 2008, at A14 (discussing recent research suggesting that campaign contributions affect judicial voting patterns).


\[122\] Id. at 331.

\[123\] Id. at 333.

\[124\] See, e.g., Erwin Chemerinsky, Judicial Election and the First Amendment, 38 Nov.–Trial 78, 78 (2002) (“Where once it was the liberals on the Supreme Court who could be counted on to be consistent champions of the First Amendment, it is now the conservative justices who are often the most protective of free speech.”); Lee Epstein & Jeffrey A. Segal, Trumping the First Amendment?, 21 Wash. U. J. L. & Pol’y 81, 82 (2006) (concluding that “commitment to First Amendment values is no longer a lodestar of liberalism”).

\[125\] Id. at 334.
ideologically on free speech, this does not mean that the courts have acted to promote the judiciary's institutional interests. Rather, it suggests that, within each party, legal ideology varies depending on one's professional role. Their perspectives may reflect divergent institutional norms, but they are not free of legal or political ideology.

Again, the point is not that the conceptions of politics, ideology, or judicial independence embraced by Keck or Gulati and his co-authors are somehow wrong. To the contrary, their choices are eminently defensible. Rather, the point is that every study of judicial behavior makes some important choices about the meaning of politics, selecting particular conceptions among the many plausible alternatives. And to understand what this research tells us, we must be careful to take these choices into account.

B. Law and Politics, Intertwined and Simultaneous

A second point that the various meanings of politics underscores is that "law" and "politics" are not necessarily—or even typically—separable, distinct influences on judicial behavior. Too often, arguments about judicial decision making set the two in strict opposition, like competing variables in a zero-sum game. But this misconceives their relationship, at least in important respects. Generally, the influences of legal authority and politics work simultaneously. The typical judicial decision is shaped by both legal and political variables.

This is especially apparent once one distinguishes judges' subjective intentions from the objective patterns discernible in their decisions. If we take an internal viewpoint and seek to understand what judges subjectively attempt to accomplish through their work, the conventional sources of law—the text, structure, history, tradition, and precedent—are surely critical.126 It defies logic to think that judges' elaborately reasoned opinions, and the carefully crafted arguments that the litigants present in similar terms, are purely a sham. By all available accounts, judges earnestly believe that they are constrained by the law—at least to some degree, at least on most occasions.127 Of course, there

126 See HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 17 (1993) ("Generally speaking, when judges decide cases they do not feel completely unencumbered by existing legal rules and doctrines.").

127 For instance, Supreme Court justices have routinely stated, both in their opinions and outside the Court, that the law forced them to reach results that produced policy consequences that they disdained. See, Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting); Matt Labash, Evicting David Souter, WEEKLY STANDARD, Feb. 13, 2006 (reporting on a speech given by Justice Stevens in which Stevens stated that, in both Raich and Kelo v. New London, 545 U.S. 469 (2005)—two majority opinions that Stevens himself authored—"the law compelled a result I would have opposed if I were a legislator"). Of course, the justices' beliefs that their actions were purely a product of what the law dictated is probably naïve, as human beings generally have little sense of what influences their choices and behavior. See infra notes 142–146 and accompanying text. But my point here is simply that we have no reason to believe that these expressions are cynical or insincere.
remains a wide field of discretion, especially at the Supreme Court. Still, it seems plain that judges largely pursue their sincere understandings of what the accepted sources of legal authority require. In this way, much of what judges do only makes sense as earnestly reasoned legal analysis, within which legal doctrine operates as a true, meaningful constraint.

But judges' subjective motivations can only explain a part of what is going on in their decisions. Human beings are often, and perhaps mostly, unaware of why they hold particular beliefs or choose certain courses of action. We feel ourselves thinking, preferring, and choosing, but our subjective experiences are largely misleading. Much of our behavior is determined by unfelt features of our minds—motives, biases, knowledge structures, and the like—that work automatically, outside our fields of cognition. More than we realize, our experience of conscious will is often an illusion. As Jon Hanson and David Yosifon have explained,

Though we perceive will and behave and experience ourselves "as if" our will were controlling our behavior, and though we project will onto the behavior of others, these intuitive conceptions of the will are fundamentally

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128 For instance, consider these remarks from Justice Breyer:

[P]olitics in our decision-making process does not exist. By politics, I mean Republicans versus Democrats, is this a popular action or not, will it help certain individuals be elected? . . . Personal ideology or philosophy is a different matter. . . . [J]udges have had different life experiences and different kinds of training, and they come from different backgrounds. Judges appointed by different presidents of different political parties may have different basic views about the interpretation of the law and its relation to the world. Those kinds of differences of view are relevant to the legal questions before us and have an effect. One cannot escape one's own training or background. . . . Those differences of legal philosophy do matter. I think the Constitution foresees such differences, and results that reflect such differences are perfectly proper.


129 See Howard Gillman, What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making, 26 L. & Soc. Inquiry 465, 490 (2001) ("When we set aside the unrealistic premise that legalistic behavior must look like formalistic decision making, then it has been fairly easy for empirical social scientists to find legal influences, even at the level of the Supreme Court in so-called hard cases.").

130 See Jon Hanson & David Yosifon, The Situational Character: A Critical Realist Perspective on the Human Animal, 93 Geo. L.J. 1, 25 (2004) (stating that human beings tend "to 'see,' and to attribute a powerful causal role to certain salient features of our interior lives that actually wield little or no causal influence over our behavior, while simultaneously failing to see those features of our interiors that are in fact highly influential").

131 See id. at 25–34.

132 See generally id. at 34–133.

133 See Daniel M. Wegner, The Illusion of Conscious Will (2002). See also Hanson & Yosifon, supra note 130, at 124–33.
unreliable indicators of both the reality of our will and the source of our behavior.\textsuperscript{134}

Thus, even if judges subjectively experience their decision-making as an attempt to reach the most coherent, logical reading of the relevant legal authorities, their own perceptions generally misapprehend much of what actually determines their behavior. The judges themselves can only see a part of what moves them. No matter what they write in their opinions, or how much they might protest to the contrary,\textsuperscript{135} there is much more to their choices than the objective interpretation of law. Forces external to the law and outside the judges' cognition shade their interpretations of texts and precedent and frame their readings of history and tradition.

This is true not merely in judges' application of the law in particular cases, but also in their broader understandings of the law's structure—their overarching interpretive theories and constitutional visions. Whether it is Justice Scalia's originalism,\textsuperscript{136} Justice Breyer's democratic pragmatism,\textsuperscript{137} or Justice O'Connor's case-by-case minimalism,\textsuperscript{138} motivated reasoning surely influences a judge's attraction to a specific theory of interpretation, approach to adjudication, or sense of constitutional meaning. Stated differently, it is inconceivable that a person could embrace a general theory of constitutional interpretation without being influenced, at least subconsciously, by the practical consequences such a theory would entail. It is as true for law professors as it is for judges: our legal and constitutional views are genetically connected to our prior, deeper political attitudes and attachments.

Moreover, as discussed earlier, the ideological composition of the judiciary, as well as the disputes delegated to the courts for resolution, are generally matters of political construction. Regardless of what goes on in judges' minds, judicial decisions are infused with the political groundwork that has created the stage for their performance. This may mean that a given decision, by virtue of the appointments process and the institutional dependence of the courts, reflects the priorities of the dominant political coalition; or that it vindicates the political views, entrenched in the judiciary, of a governing regime that has since lost power; or that it conveniently resolves a dispute that is simply too delicate for

\textsuperscript{134} Hanson & Yosifon, \textit{supra} note 130, at 131.
\textsuperscript{135} For example, the day after the Supreme Court issued its opinion in \textit{Bush v. Gore}—one of the clearest examples in the Court's history of political influence on the justices' decision-making—Justice Thomas told an audience that a justice's party affiliation has "[z]ero" role in shaping his decisions. \textit{See Howard Gillman, The Votes That Counted: How the Court Decided the 2000 Presidential Election} 172 (2001). When asked later that day whether he agreed with Thomas's comment, Chief Justice Rehnquist stated, "[A]bsolutely, absolutely." \textit{Id.} at 173. And in January 2001, a month after \textit{Bush v. Gore}, Justice Breyer asserted that it was the law that determined the Court's decisions—"it isn't ideology, and it isn't politics." \textit{Id.}
elected officials to decide themselves by more straightforward means. In all
events, judges' authority to decide certain matters, and their ideological
disposition to decide them in particular ways, are not a product of happenstance.
The behavior of courts, at least in its broad contours, tends to reflect the political
objectives of various power holders outside the judiciary.

Of course, the point can be overstated. Things never work out exactly as
planned. Judges enjoy a fair degree of autonomy and can often decide issues in
ways that their political patrons could not have envisioned. Indeed, a principal
reason delegations to the judiciary are useful for elected officials is that the
courts' relative independence lends judicial decisions a measure of credibility
that decisions from other institutions lack. Still, the larger point is that judicial
power in the United States is the product of political construction. Whenever a
court hands down a decision, we need to remember what has come before: other
power holders have placed those judges on that court and granted them the
authority to resolve that dispute. Thus, even as judges earnestly pursue their best
understandings of the law—and regardless of the degree to which those
understandings are shaped by their deeper, pre-existing political commitments—
judges are acting in the service of the political objectives of others.

Hence, judicial decisions are inherently both legal and political—
meaningfully constrained by the norms of legal analysis but simultaneously
influenced by a range of political forces. As just one example, consider the
Supreme Court's 2001 decision in *Board of Trustees v. Garrett,*139 which held
that the employment discrimination provisions in Title I of the Americans with
Disabilities Act (ADA) did not effect a valid abrogation of the states' sovereign
immunity. By themselves, the authoritative sources of law cannot explain the
outcome. Either result was eminently defensible as a matter of traditional legal
analysis, as evidenced by the justices' dividing 5–4 and by the split in the circuits
before the case reached the Court.140 What is more, the foundational precedent
for *Garrett—Seminole Tribe v. Florida*141—was only six years old and had
overruled a prior decision to hold that Congress could not use its Article I
legislative powers to abrogate the states' sovereign immunity from suits for
damages. Thus, the law was neither well settled nor clear and could not dictate
an objectively "correct" outcome.

In contrast, a variety of political influences readily come to mind. First, the
outcome seems largely predictable according to models of judicial behavior
based on the justices' political attitudes or observable legal ideologies. The five
most conservative justices—Chief Justice Rehnquist and Justices O'Connor,
Scalia, Kennedy, and Thomas—voted for the identifiably conservative result,
while the four most liberal justices—Justices Stevens, Souter, Ginsburg, and
Breyer—voted for the liberal outcome.142 From a "political regimes"

140 See Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999); Bledsoe v. Palm Beach
County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998).
142 Garrett, 531 U.S. at 358.
perspective, all five justices in the majority had been appointed to their positions by President Reagan or the first President Bush, leaders of the modern Republican Party.\footnote{MEMBERS OF THE SUPREME COURT OF THE UNITED STATES 2, available at http://www.supremecourtus.gov/about/members.pdf.} And a central ideological tenet of the post-Watergate G.O.P. was to reduce and constrain the size of the federal government.\footnote{See Pickerill & Clayton, supra note 99, at 238.} Specifically, support for the judicial enforcement of the limitations on Congress's enumerated powers has been a sort of orthodoxy among Republican constitutional lawyers for the last twenty years.\footnote{See id.} Thus, if the Court often acts as a policymaking partner of the governing regime, Garrett was entirely unsurprising, if not foreordained: the Rehnquist Court vindicated an important objective of the national political coalition responsible for its creation and sustenance, translating the general political goal of trimming the breadth of Congress's enumerated powers into constitutional doctrine.

At the same time, politics alone—even in its many different meanings—cannot fully account for Garrett. If the justices did not take the norms of legal analysis seriously, how could the Court have specifically held that the Eleventh Amendment (or, more accurately, the presuppositions that the Eleventh Amendment confirms) prohibits Congress from enacting those provisions of the ADA (but not, for instance, Title VII of the Civil Rights Act of 1964) that subject state governments (but not its political subdivisions) to unconsenting suits (but not consenting ones) by private parties (but not by the federal government) for money damages (but not for declaratory or injunctive relief)? Were legal authorities irrelevant to judicial behavior, the decision would be positively bizarre. At the very least, law determined the precise form in which various political influences were manifested in constitutional doctrine.

In short, a full and credible explanation of any significant judicial decision requires reference to both law and politics, and often to politics in several of its conceptions. As Garrett nicely illustrates, judicial decision making frequently stands at the confluence of many forces, operating through judges' conscious intentions, through their subconscious values and attitudes, and through the broader political and historical forces that shape and empower the American judiciary.

IV. CONCLUSION

There is no doubt that judicial behavior in the United States is "political" in several senses. Judges tend to decide cases in accord with their political ideologies (at least in certain contexts) as well as their constitutional visions—visions grounded in their deeper political attitudes and attachments. They act strategically on occasion, and they have frequently acted to promote the institutional interests of the judiciary. Relatedly, judges occasionally respond to political pressure from external power centers, such as Congress, the President,
state governments, and the general public. And at bottom, courts always act within a framework of judicial authority created by external power holders and thus generally in furtherance of the political objectives of others.

Consequently, the notion that we should "depoliticize" the judiciary is at best unrealistic, and at worst incoherent. So long as judges are human beings—and so long as political institutions are responsible for staffing the courts and defining their jurisdictions—judicial behavior will remain "political" in several meaningful ways. The point is not that the law does not constrain judicial decision making, or that judges do not typically endeavor to decide cases based on their sincere understandings of the relevant legal authorities. Rather, the point is that there is much more to judges' choices than their subjective experiences. Much of what shapes judicial decision making occurs outside judges' cognition and in the various constitutive and facilitative acts that set the stage for judicial action.

If we are concerned that the courts have become too "political" in certain ways—for instance, that courts have been too willing to "take[] sides in the culture war, departing from [the] role of assuring, as neutral observer, that the democratic rules of engagement are observed,"146 as Justice Scalia claimed in Lawrence v. Texas—we cannot look at the judiciary's actions in isolation. We also have to examine precisely how the courts have been drawn into that fray. More often than not, when courts are enmeshed in nasty disputes, other power holders have enticed them there. Indeed, Lawrence is a good example: both Republican and Democratic elected officials likely welcomed the Supreme Court's willingness to decide whether laws prohibiting consenting adults from engaging in sodomy were constitutional. For both parties, the issue threatened to fracture the national political coalitions they were trying to construct. Perhaps the most frequently cited example in American history of the judiciary mistakenly inserting itself into a contested political dispute is the Supreme Court's decision in Dred Scott.147 There, as the story usually goes, "the Court decided to act unilaterally, imposing its own constitutional vision in the face of congressional disagreement."148 In the process, it "discredited itself with a self-inflicted wound"149 that left the Court unable to speak neutrally or authoritatively for at least a generation. But people seem to forget that elected officials from across the political spectrum forcefully sought the Court's intervention.150

148 ROSEN, supra note 88, at 35.
149 Id. at 37.
151 Id. at 33–34.
inserted provisions for judicial review into any statute addressing the status of slavery in the territories, just to ensure there would be no jurisdictional barriers. 152 The Court hardly acted unilaterally in *Dred Scott*, but instead at the behest (and near insistence) of a majority of the nation’s political elites.

Of course, *Dred Scott* did not work out so well for the judiciary. But if the Court’s attempt to resolve such a politically charged dispute was ill conceived, we cannot simply blame the justices. Most of the responsibility probably rests with the power holders who sought to use the Court for their own political ends. Indeed, before we blame the justices at all, we have to ask whether it was realistic to expect the Court to stand on the sidelines and ignore the desperate entreaties from the elected branches. And if we think *Dred Scott* was a mistaken arrogation of judicial power, we also have to ask whether the ultimate outcome for the nation would actually have been any better had the Court declined to intervene. More generally, if we are concerned that judges are too willing to step into culturally divisive, partisan disputes—and to sacrifice the institutional prestige and apparent neutrality of the courts in the process—we should look carefully at the power holders who have facilitated or encouraged such judicial action, and their incentives for doing so. Focusing on the judicial decisions themselves can confuse the most salient events for their underlying causes.

As Mark Graber has suggested, the process of legal change and constitutional evolution in the United States is a bit like the game of basketball: spectators tend to pay disproportionate attention to the players who handle the ball and put it in the basket. 153 But basketball players cannot score (at least with any regularity) unless several other players have worked hard to create those opportunities—playing defense, setting screens, rebounding, and moving without the ball. These facilitative acts may be less obvious, especially to the untrained eye. But they require a great deal of coordinated effort, and they are indispensible to the ultimate result. Legal policy making is similar. Though judges may be the most salient actors, the most important action is often away from the ball.

152 *Id.* at 34.