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What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism

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WHAT WE TALK ABOUT WHEN WE TALK ABOUT IDEOLOGY: JUDICIAL POLITICS SCHOLARSHIP AND NAIVE LEGAL REALISM

BRYAN D. LAMMON[†]

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INTRODUCTION

A large and growing body of law and psychology scholarship has posed new challenges to traditional assumptions about the behavior of legal actors. While mainstream legal thought has often treated individuals as more or less rational, autonomous actors,¹ scholars in a variety of fields are presenting a new, empirically based, and more formal challenge to law's traditional conceptions of human behavior. For example, the behavioral law and economics movement has incorporated empirical findings of systematic deviations from economically rational behavior,² and has suggested how taking account of these deviations might alter

¹ See Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1081 (2003) ("[O]ur legal institutions rest on the same rationalist assumptions about human inference and decision making that underlie classic economics."). The growth of the law and economics school sharpened this conception of human behavior, often applying the more concrete assumptions of "rational choice" theory to actors in legal contexts. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); cf. Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 436 ("The single most important contribution that law and economics has made to the law is the use of a coherent theory of human decision-making ('rational choice theory') to examine how people are likely to respond to legal rules."). Thus, law and economics provided a tangible theory of human behavior that would influence a generation of legal thought. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS 2* (5th ed. 2007) ("Economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law.").

² See generally CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

our conceptions of legal actors.³ Situationists have looked to the ways that individuals often fail to appreciate situational influences on their own behavior and have argued for the incorporation of their findings into the law.⁴ Similarly, behavioral realists have called for legal analysis grounded in the

³ See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998). For examples of behavioral law and economics scholarship, see BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000); Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996); Bryan D. Lammon, Note, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 WASH. U. L. REV. 1101 (2007). For critiques of behavioral law and economics, see, for example, Gregory Mitchell, *Tendencies Versus Boundaries: Levels of Generality in Behavioral Law and Economics*, 56 VAND. L. REV. 1781 (2003); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).

⁴ See generally Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003). For other examples of situationist literature, see Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008) [hereinafter Benforado & Hanson, *Attributional Divide*]; Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008) [hereinafter Benforado & Hanson, *Naïve Cynicism*]; Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004). A number of situationist scholars contribute to a blog, as well. See *The Situationist*, <http://thesituationist.wordpress.com> (last visited Mar. 21, 2009).

findings of social science⁵ and have given special attention to the ways in which implicit bias might affect how we approach antidiscrimination policy.⁶ In these fields and others, law and psychology is challenging the traditional conceptions of human behavior that permeate much of the law and legal scholarship.⁷

One area with especially great potential is the use of psychology to improve our understanding of one of the more persistent questions of legal theory: How do judges decide cases?⁸ Since the legal realists posed this question, legal scholars have searched for the determinants of judicial behavior. Only a few scholars have looked to modern psychology to understand judicial behavior better.⁹ Perhaps most notably, Chris Guthrie,

⁵ See generally Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006).

⁶ For examples of behavioral realist scholarship, see Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 5. For a critique of arguments based on implicit bias, see Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). For a response to Mitchell and Tetlock, see Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007).

⁷ Benforado and Hanson have suggested that there are no clear lines dividing the various approaches to law and psychology, and they often overlap to some extent. See Benforado & Hanson, *Attributional Divide*, *supra* note 4, at 315 n.3 (distinguishing the approaches of law and economics, behavioral law and economics, critical realism, and behavioral realism).

⁸ While the application of social and cognitive psychology to judicial decisionmaking is relatively new, legal scholars in a variety of fields have long debated how judges make decisions. As Dan Simon points out, and as discussed briefly in Part IV, the integration of a psychological approach to judging can inform and expand prior work on judicial decisionmaking. See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 22-32 (1998) [hereinafter Simon, *Psychological Model*] (comparing his psychological model of judging to related theories, including those of the Legal Realists and Critical Legal Scholars).

⁹ There is some debate as to whether general psychological findings can be applied to the specific activity of judging. In particular, Frederick Schauer has argued that we must first ascertain whether there is a *unique* psychology of judging before applying the insights of modern psychology to judicial decisionmaking. See Frederick F. Schauer, *Is There a Psychology of Judging?* 2-5 (John F. Kennedy Sch. of Gov't, Harvard Univ., Faculty Research Working Paper Series, Paper No. RWP07-049, 2008), available at <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-049>. While Schauer raises a valid concern, as others have pointed out, the onus really should be on those that posit a unique psychology of judging. See Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA.

Jeffrey J. Rachlinski, and Andrew J. Wistrich have approached judging from a behavioral law and economics perspective. They have investigated the extent to which judges are subject to cognitive biases¹⁰ and have developed their findings into a general psychological theory of judicial decisionmaking.¹¹ In another line of research, Dan Simon has developed his own cognitive theory of judicial decisionmaking.¹²

Another school of thought on judicial behavior has made recent inroads into legal scholarship. For over fifty years, political scientists studying courts have endeavored to uncover the determinants of judicial decisions empirically. Commonly known as “judicial politics,”¹³ this body of research has hypothesized that a judge’s “ideology” is a significant determinant of that judge’s decisions,¹⁴ and judicial politics scholarship claims to have found substantial evidence supporting

L. REV. PENNUMBRA 1, 2 (2007), <http://www.pennumbra.com/responses/03-2007/Spellman.pdf>. As legal scholars have long recognized, judges are human. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 7 (2008) (“My analysis and the studies on which it builds find that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work.”); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 13 (2007) [hereinafter Guthrie et al., *Blinking*]; Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 178 (2000) [hereinafter Sisk, *Judges Are Human*]; see also Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 128 n.11 (2007) (collecting articles where authors note that judges are human). As humans, general theories of psychology should apply equally to judges as to anyone else.

¹⁰ See generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter Guthrie et al., *Judicial Mind*]; Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227 (2006); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

¹¹ See Guthrie et al., *Blinking*, *supra* note 9. This work is discussed further in Part II.C.

¹² See generally Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004); Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 BROOK. L. REV. 1097 (2002); Simon, *Psychological Model*, *supra* note 8.

¹³ The body of empirical literature on judicial decisionmaking is still referred to by a variety of names, including “judicial politics,” “empirical judicial decisionmaking,” “judicial behavior,” and “courts and judicial decisionmaking.” For the sake of clarity, this Article will only use the term “judicial politics” when describing this field of research.

¹⁴ Judicial politics’ theories of judicial decisionmaking are discussed in greater depth *infra* Part I.A.

this hypothesis. Judicial politics thus presents another possible explanation for judicial behavior: Judges decide the outcome of a case in a way that accords with their "ideology." In the past decade, judicial politics has gained increasing attention in legal scholarship.¹⁵ And while a few legal scholars outside of judicial

¹⁵ For examples of recent empirical studies on judicial decisionmaking published in general submissions legal journals, see James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003) [hereinafter Cross, *Decisionmaking 2003*]; Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 (2007); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001); 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 (1998); Jason J. Czarnecki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841 (2006); Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003); Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998) [hereinafter George, *Positive Theory*]; Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007); Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457 (2007); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156 (2005); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) [hereinafter Miles & Sunstein, *Regulatory Policy*]; Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) [hereinafter Miles & Sunstein, *Arbitrariness Review*]; Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001) [hereinafter Revesz, *Congressional Influence*]; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) [hereinafter Revesz, *Environmental Regulation*]; Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104

politics have suggested that it should inform a variety of areas of legal thought,¹⁶ judicial politics, as a field of study, has been

COLUM. L. REV. 1150 (2004); Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473 (2002); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004); Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) [hereinafter Sunstein et al., *Ideological Voting*]; Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Fred O. Smith, Jr., Note, *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087 (2005); Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689 (2004). For examples of commentary on the empirical study of judicial decisionmaking in general submission legal journals, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) [hereinafter Cross, *New Legal Realism*]; Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998) [hereinafter Edwards, *Collegiality*]; Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007) [hereinafter Kim, *Lower Court Discretion*]; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008) [hereinafter Posner, *Political Bias*]; Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005); Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 56 CLEV. ST. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1024747>; Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999) [hereinafter Tiller & Cross, *Modest Proposal*]; Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006) [hereinafter Tiller & Cross, *Legal Doctrine*]; Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235 (1999); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873 (2008) [hereinafter Sisk, *Quantitative Moment*] (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)).

¹⁶ See, e.g., Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 500 (2007) (noting that the work of judicial politics scholars "makes a very valuable contribution to our understanding of how the Supreme Court actually functions," and suggesting that legal scholars "ought to pay more (which is to say, at least, some) attention to [it]");

embraced by a few,¹⁷ regarded as unremarkable or obvious by some,¹⁸ and rejected by others.

I suspect that this reception is due, at least in part, to the unclear import of judicial politics scholarship. That is, judicial politics scholarship has been woefully inadequate in defining what precisely it means by "ideology." In some senses, then, it is quite difficult to disagree with the conclusions of judicial politics scholarship. Because judicial politics scholarship rarely defines what exactly it means by ideology, its conclusions of ideological decisionmaking can have very little content. Most legal scholars could agree that judging is in some way "ideological," so long as they could provide their own definition for "ideology." And despite judicial politics scholars sometimes claiming otherwise,¹⁹ mainstream legal thought has more or less rejected the formalist conception of judging that judicial politics sets out to refute.²⁰ Indeed, while some judicial politics scholars claim to be the modern vanguard of legal realism,²¹ the general views of legal

Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006) [hereinafter Friedman, *Taking Law Seriously*]; Oldfather, *supra* note 9, at 126 (suggesting that judicial politics studies might be used "to improve judicial institutions"); *see also* Posner, *Political Bias*, *supra* note 15, at 853 (noting "the increasing significance of the empirical study of judges and judicial decisions").

¹⁷ *See supra* notes 15–16.

¹⁸ *See, e.g.*, Wald, *supra* note 15, at 236 (noting her "ho-hum reaction to the notion that judges' personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another").

¹⁹ *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64 (1993) [hereinafter SEGAL & SPAETH, *ATTITUDINAL MODEL*] (alleging that "many legal scholars" believe that judicial decisions can be explained solely in reference to traditional legal materials such as case law and statutes).

²⁰ *See* DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 131 (1997) (noting that "[t]he mainstream legal view is antiformalist"). While this formalist conception of law has become somewhat of an anachronism, much of the early judicial decisionmaking research presented it as the only possible alternative to wholly political and attitudinal decisionmaking. *See* Kim, *Lower Court Discretion*, *supra* note 15, at 394–96. Still, the idea of determinate law seems to retain some allure in modern jurisprudence. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (criticizing foundational grand theories of constitutional law that posit single, correct answers to constitutional issues).

²¹ *See, e.g.*, VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 31 (2006) [hereinafter HETTINGER ET AL., *COLLEGIAL COURT*] ("The attitudinal model of judicial decision making traces its roots to legal realism.");

realists have become conventional wisdom in the legal academy.²² Thus, most legal scholars are unlikely to balk at the idea that judging is “ideological”; the real question, though, is what “ideological” actually means.

As I demonstrate below, a bit of reading between the lines reveals that the majority of judicial politics scholarship conceives of ideology as predominantly partisan politics. That is, an “ideological” decision is one that promotes the agenda or platform of one of the major political parties in the United States. Thus, a judge makes a “liberal” decision when her vote corresponds to the general (or stereotypical) position taken by the Democratic Party on the particular issue, and vice versa for “conservative” decisions and the Republican Party. And while some judicial politics scholars have espoused agnosticism as to the cognitive process by which party politics leads to judicial votes (that is, *why* there is a relation between party politics and judicial votes), as I demonstrate below, much of the scholarship presents an image of judges as consciously and actively promoting a political agenda. Thus, according to judicial politics, judicial behavior boils down to a conscious and purposeful choice of an outcome that relates to the position of the judge’s political party.²³

This conception of ideology and ideological judicial decisionmaking is simplistic and misunderstands human behavior. It conceives of ideology predominantly in political or

SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 19, at 65 (“The attitudinal model has its genesis in the legal realist movement of the 1920s.”). The attitudinal model these scholars speak of is the basic model of judicial decisionmaking in much of judicial politics scholarship and is discussed *infra* Part I.A.

²² See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (arguing that “[l]egal realism has fundamentally altered our conceptions of legal reasoning and of the relationship between law and society,” and that “[a]ll major current schools of thought are, in significant ways, products of legal realism”). As Singer noted, “[t]o some extent, we are all realists now.” *Id.* Mark Tushnet has recently argued that the same holds for critical legal studies. See Mark Tushnet, *Survey Article: Critical Legal Theory (Without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 100 (2005) (arguing that “elements of the original critical legal studies position . . . have become conventional wisdom in the U.S. legal academy.”).

²³ Granted, this is a somewhat broad reading of judicial politics scholarship, and in any summary of any minimally diverse field, some simplification is necessary when describing general theories. Further, there is indeed some judicial politics scholarship that takes a more nuanced view of judging or that incorporates how other factors besides party politics might influence a judge’s decision. These approaches are discussed in greater depth *infra* Part I.A. However, I contend that my reading of judicial politics scholarship is quite plausible, as my analysis of the language judicial politics scholars often employ reveals. See *infra* Part II.

partisan terms, as if the preferences of the Republican and Democratic Parties' positions were the main source of judicial preferences. Further, bearing the influence of traditional notions of individual rationality and autonomy, it portrays judges as rational actors that can consciously impose their policy preferences through their decisions. This portrayal reflects the same conception of individual behavior that law and psychology challenges.

However, even if one rejects judicial politics' conception of ideology and its influence, one still must contend with the reams of empirical research that judicial politics scholars have amassed. As discussed below, judicial politics scholars can adhere to their hypothesis of judging as ideological (and ideology as partisan politics) because their tests of this hypothesis have consistently provided evidence in support of it. If one is to reject judicial politics scholarship, one must still account for why judicial politics scholarship has found such a consistent relation between the various methods of operationalizing a judge's ideology, such as political party of the appointing president, and judicial votes.

This lack of clarity, coupled with scores of empirical studies that one cannot easily dismiss, creates a number of issues for legal scholars. First, judicial politics scholarship effectively characterizes judicial decisionmaking as party politics. In so doing, it misunderstands the human side of judging and perverts our understanding of judicial behavior. Second, as noted above, some legal scholars are calling for the incorporation of judicial politics scholarship into legal theory.²⁴ Much judicial politics scholarship is unapologetically positive²⁵ and, as Barry Friedman has noted, lacks any "normative bite."²⁶ Yet, before turning to the normative implications of judicial politics scholarship, it is important to clarify what exactly this scholarship means. Finally, the language and conclusions of judicial politics scholarship enflame the myth of "judicial activism,"²⁷ and sometimes suggest a possibility of a return to formalist judging

²⁴ See *supra* note 16.

²⁵ See, e.g., Miles & Sunstein, *Arbitrariness Review*, *supra* note 15, at 814 (noting that their study's emphasis was "empirical, not normative").

²⁶ See Friedman, *Taking Law Seriously*, *supra* note 16, at 262. There have been some notable exceptions to this lack of normativity as the study of judicial politics has spread into legal scholarship. See *infra* text accompanying notes 61–62.

²⁷ See KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006).

(or, as it is sometimes called, the “ideal” conception of judging²⁸). As the debate over activism is often more rhetoric than substance,²⁹ we must promote a deeper and more nuanced understanding of our judges so that debate about judicial performance is informed, and perhaps even productive.

In this Article, I look to the social psychological theory of naive realism to understand the empirical findings of judicial politics scholarship. Naive realism begins with the social psychological truism that all perception is subjective. We see the world and perceive reality through the biased lens of our own perception. Our beliefs, our experiences, and the cognitive processes of our brains influence our perceptions of the world. Based on this subjective perception, we construct, or *construe*, a reality, and then make judgments and decisions based on our construal of reality. However, we often fail to recognize the subjectivity of our own perception, instead believing that we are privy to the objective realities of the outside world.

This disparity between how we think we see the world (objectively) and how we really see the world (subjectively) is problematic because we often fail to appreciate the subjectivity of both our own and others’ perceptions. Thus, when someone reacts differently to an object than we did—or we think a reasonable person should—we do not attribute this difference to disparities in subjective perception. We instead attribute such differences to the influence of various biases, which often leads to misunderstanding, aggravated disagreement, and even conflict.

The subjectivity of perception indicates that what might appear to be political or partisan or “ideological” decisionmaking is instead the result of the inevitable influence of human decision makers perceiving their world subjectively. The judicial disagreement that is so central to judicial politics scholarship might, at least in part, be a product of differing perceptions of the relevant facts and law of a case. Understood through the lens of naive realism, judicial politics scholarship demonstrates the human side of judicial decisionmaking. While this might be one

²⁸ See Oldfather, *supra* note 9, at 125–26.

²⁹ In one of the more extreme recent examples, a speaker at the “Remedies to Judicial Tyranny” meeting argued for the impeachment of Justice Kennedy on the grounds that he upheld “Marxist, Leninist, satanic principles drawn from foreign law” in his opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003). Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

way to understand "ideological" judging, I am hesitant to use that term due to its definitional malleability and rhetorical baggage. Instead of defining ideology in a way that encompasses the influence of our beliefs, experiences, and cognition on how we subjectively perceive the word, I merely suggest that judging is "subjective."³⁰ Although the statement that judging is subjective might at first seem obvious, the implications of subjective judging for our understanding of judicial decisionmaking are not.

This Article proceeds in three parts. In Part I, I provide a brief overview of the empirical study of judicial decisionmaking. I introduce judicial politics' general theory of the attitudinal model and its hypothesis that ideology plays some role in judicial decisionmaking. Further, I explain how judicial politics scholars test hypotheses derived from this theory and how the findings of these studies do lend support to judicial politics' general theory. While one might quibble with judicial politics scholars' explanations for their empirical findings, namely that judging is ideological and ideology is party politics, one still must reckon with judicial politics' empirical findings. I end Part I by demonstrating why these findings raise issues that legal scholars must address.

In Part II, I tackle the lack of clarity in what judicial politics scholars mean when they say that judging is ideological. While early attitudinal accounts took a broad view of ideology and its influence, more modern accounts have taken a political turn, often conceiving of ideology in political and partisan terms. As judicial politics scholarship is rarely clear on what it means by "ideology," my exploration of the literature lends some definition to the subject.

In Part III, I introduce the theory of naive realism. First, I demonstrate how individual subjectivity explains that two individuals, including judges, can come to differing yet equally sincerely held beliefs. Second, I show how this subjectivity can result in perceptions of bias and, eventually, conflict. Third, I show when and why we can expect such conflict to occur in our courts. In this way, naive realism indicates one way to understand the sometimes bitter disagreement on appellate courts.

³⁰ Like ideology, subjectivity can encompass a variety of meanings, and I go into greater depth on what I mean by subjective decisionmaking in Part III.

In looking at the findings of judicial politics scholarship through the lens of naive realism, I hope to address the issues that the growth of judicial politics has created for legal scholars. Namely, while legal scholars might reject the meager theory underlying judicial politics, they must somehow account for judicial politics scholars' substantial findings of statistical relations between quantifiers for ideology and judicial votes. By exploring the ways in which these findings might complement other views of judicial decisionmaking, we are likely to come to a more nuanced understanding of judicial behavior. Indeed, even those that reject judicial politics out of hand might take something from it.

This Article, however, is not confined to an internal debate between two approaches to judicial behavior—one based in psychology and one based in political science. In this Article, I hope to show how the study of judicial behavior can inform legal theory. I do this primarily by demonstrating why it is necessary to address the lack of clarity in judicial politics scholarship in Part I.B. But I also want to touch on how law and psychology can inform legal theory. This is the focus of the Conclusion, where I briefly discuss how naive realism complements and informs various areas of legal theory.

I. THE EMPIRICAL STUDY OF JUDICIAL DECISIONMAKING

Before criticizing judicial politics scholarship, we must first understand it. In this Part, I first briefly explain the general theory and practice of judicial politics scholarship. Then, I argue why it is so important to clarify what judicial politics scholars mean by ideology.

A. *Understanding the Empirical Study of Judicial Decisionmaking*

While relatively new to legal scholarship, the empirical study of judicial decisionmaking has its roots in the legal realist movement of the early twentieth century.³¹ According to the popular account,³² the legal realists challenged the classical legal ideal of formalism, or the idea that judges mechanically and

³¹ Friedman, *Taking Law Seriously*, *supra* note 16, at 263.

³² While scholars disagree over the exact contribution of the legal realists, this issue is unnecessary to address or resolve for the purposes of this Article.

dispassionately applied determinate law in deciding cases.³³ The realists argued that traditional legal materials like statutes and precedent were insufficient to determine the outcome of a case. Instead, realists suggested that extralegal factors were, at least in part, behind judicial decisions.³⁴ While legal scholars soon thereafter turned to the normative question of how judges *should* decide cases, political scientists began investigating how judges *actually* decided cases.³⁵

What followed was the development of the empirical study of judicial behavior in political science.³⁶ Having rejected formalism, what judicial politics scholars now commonly refer to as the “legal model” of judicial decisionmaking, political scientists set out to determine what actually determined judges’ votes. Judicial politics scholarship quickly developed the theory that a judge’s “ideology” was the driving force of her decisions. Eventually christened the “attitudinal model” of judicial decisionmaking, this theory came to dominate the study of judicial politics. Even as judicial politics scholarship matured and began to look for other possible determinants of judicial behavior, the influence of the attitudinal model has been inescapable. And in the past decade, legal scholarship has been paying increasing attention to the attitudinal model and judicial politics scholarship in general.

The attitudinal model is judicial politics’ major theoretical answer to the question of how judges decide. In its most basic form, the attitudinal model posits that judges decide cases based

³³ Legal formalism is often summarized with Blackstone’s phrase that judges “are the depositaries of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.” WILLIAM BLACKSTONE, 1 COMMENTARIES *69.

³⁴ See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 113 (2000) (“Perhaps abstract legal rules and principles did not constrain judicial decisions, realists asserted, but concrete facts of the external (and social) world did not influence or even determine such decisions. Furthermore . . . , the relevant facts increasingly seemed to revolve around the actions of individuals.”); see also JEROME FRANK, LAW AND THE MODERN MIND 111 (Legal Classics Library 1985) (1930) (“The peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law.”).

³⁵ Friedman, *Taking Law Seriously*, *supra* note 16, at 263.

³⁶ For histories of judicial decisionmaking literature, see LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR 1 (Nancy Maveety ed., 2003).

on their political attitudes and values.³⁷ As articulated by David W. Rohde and Harold J. Spaeth in their 1976 study of Supreme Court decisionmaking,³⁸ the attitudinal model

assume[s] that the primary goals of Supreme Court justices in the decision-making process are *policy goals*. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences.³⁹

More recent literature shortens the attitudinal model's basic hypothesis to the prediction that "ideology" influences judicial decisions.

To test the theory of the attitudinal model, judicial politics scholars look to the attitudinal theory to build hypotheses, empirical testing of which can potentially disprove the theory. Thus, a common hypothesis that stems from the attitudinal model is that a judge's ideology will relate to the ideological content of her judicial votes. If judicial politics scholars can somehow quantify ideology and the ideological content of judicial votes, then they can test to see whether there is a significant positive relation between the two.⁴⁰ If there is no such relation, then the data contradicts and potentially disproves the theory of the attitudinal model.⁴¹

³⁷ Any theory employed by a variety of scholars across a large field of study is likely to be subject to variations in conception. This generalization, however, captures the major thrust of the attitudinal model as employed by most judicial politics scholars.

³⁸ Although this model was originally used to understand decisions in the unique institutional environment of the Supreme Court, *see* SEGAL & SPAETH, *ATTITUDINAL MODEL*, *supra* note 19, at 69–72, later research has shown that it is of comparable applicability to the United States Courts of Appeals, *see* HETTINGER ET AL., *COLLEGIAL COURT*, *supra* note 21, at 32 ("[S]ystematic evidence demonstrates that the ideological or policy preferences of judges influence behavior on the U.S. Courts of Appeals as well.").

³⁹ DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 72 (1976).

⁴⁰ "Statistical significance" does not mean "significance" in the way the word is commonly used. Instead, if a correlation is statistically significant, then it is unlikely that the correlation is due to chance. *See generally* DAVID FREEDMAN, ROBERT PISANI & ROGER PURVES, *STATISTICS* 477–576 (4th ed., 2007).

⁴¹ One might initially allege that if there *is* a significant relation, the study has still not "proved" the attitudinal model. Indeed, the data has only failed to *disprove* the attitudinal model. But this is the standard approach of statistical analysis. Data demonstrating a relation between judicial ideology and judicial votes does not fail to

However, judicial politics scholars are rarely explicit in what they *mean* by ideological decisionmaking. The mere statement that a judge decides a case “ideologically” tells us very little of what the attitudinal theory really means, as ideology can mean a wealth of different things. In this sense, judicial politics scholarship seems, at least facially, quite undertheorized. Further, depending on one’s conception of what ideology entails, the quantification of ideology into a form that can be subject to empirical analysis might seem exceedingly difficult, or even impossible. However, to understand judicial politics scholarship better, we must for a moment put aside these problems of definitional vacancy and quantifying ideology. For now, what is important is that, if we assume that we can quantify ideology—certainly an arguable assumption—a relation between a judge’s ideology and the ideological content of her vote would lend support to the theory of the attitudinal model.

Judicial politics scholars have found a wealth of evidence of this relation. A number of studies have found that judges appointed by Republican presidents, assumed to be more conservative than their Democrat-appointed colleagues, vote more conservatively than those appointed by Democratic presidents. Judicial politics scholars have found such a relation in a variety of controversial areas, including affirmative action, Eleventh Amendment immunity, National Labor Relations Act interpretation, sex discrimination, disability discrimination, campaign finance regulations, and obscenity convictions.⁴² A number of studies have found similar relations to votes in environmental and other administrative law areas.⁴³ And these results are not limited to traditionally controversial areas; other studies have found similar relations in economic cases, such as corporate taxation⁴⁴ and intellectual property.⁴⁵

disprove the attitudinal model in the same way that a book falling to the floor does not fail to disprove the theory of gravity.

⁴² See CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 24–40 (2006) [hereinafter SUNSTEIN ET AL., ARE JUDGES POLITICAL?].

⁴³ See, e.g., *id.* at 25, 34; Miles & Sunstein, *Arbitrariness Review*, *supra* note 15, at 780–84; Miles & Sunstein, *Regulatory Policy*, *supra* note 15, at 827; Revesz, *Environmental Regulation*, *supra* note 15, at 1744; Tiller & Cross, *Modest Proposal*, *supra* note 15, at 222–24.

⁴⁴ See, e.g., Staudt et al., *supra* note 15, at 1817.

More modern judicial politics scholarship has incorporated the study of how other factors might affect judicial votes while still looking for evidence of ideological influence. Perhaps most predominantly, scholars have posited that judges recognize the possibility of reversal by a higher court or legislature, and thus, act strategically.⁴⁶ Tests of this “strategic model” of judicial decisionmaking, a variant of the attitudinal model,⁴⁷ have found evidence that strategic concerns play a role in how a judge votes.⁴⁸ A number of studies have also found that judges

⁴⁵ See, e.g., Matthew J. Sag, Tonja Jacobi & Maxim Sytch, *The Effect of Judicial Ideology in Intellectual Property Cases* 39, 42 (Sept. 25, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=997963>.

⁴⁶ See Max M. Schanzbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 24 (2007) (“Positive political theories of judging suggest that much of the policy discretion exercised by judges is guided by the judges’ policy preferences, constrained by the prospect of higher court review, and accomplished through a variety of legal decision instruments available to judges when deciding cases.”).

⁴⁷ The strategic model has been gaining in popularity in the literature. See Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 124 (2004) [hereinafter Hettinger et al., *Comparing Accounts*] (“In more recent years, however, the dominance of the attitudinal model has been challenged by a portrayal of judges as strategic actors.”). For an example of the strategic model approach, see Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002). Yet strategic models still include a significant ideological element. See Cross, *Decisionmaking 2003*, *supra* note 15, at 1461 (“[The strategic] model largely accept[s] the premises of the [attitudinal] model but suggest[s] that judges . . . consider external responses to their decisions that would alter the decisions’ ideological effect.”); Hettinger et al., *Comparing Accounts*, *supra*, at 123 (“[S]trategic accounts begin with the [attitudinal] assumption that judges are motivated by their policy preferences.”); Kim, *Lower Court Discretion*, *supra* note 15, at 384–85 (noting that the strategic, or “positive political,” model “shares the attitudinalists’ assumption that judges seek to advance their policy preferences; however, it posits that in doing so, they act strategically, taking account of the likely response of other actors and the institutional context in which they operate”); Revesz, *Congressional Influence*, *supra* note 15, at 1101 (stating that judges engaging in strategic behavior “can ensure that the ultimate outcome, as opposed to merely the judicial decision, is as close to their policy preferences as possible, given the preferences of the institutions that have the power to reverse their decisions”). Under this model, judges act ideologically, but not blindly ideologically.

⁴⁸ For other studies of the strategic model, see Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects* 18–24 (Sept. 1, 2008) [hereinafter Kim, *Deliberation and Strategy*] (unpublished manuscript), available at <http://ssrn.com/abstract=1115357>; Law, *supra* note 15; Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts* (Feb. 1, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1114207>; Schanzbach & Tiller, *supra* note 46.

evidence “panel effects”; while finding a relation between a judge’s ideology and her vote, these studies find that the ideology of a judge’s colleagues on an appellate panel seem to influence that judge’s vote.⁴⁹

As studies uncover other factors that influence judicial decisionmaking, judicial politics scholars are tending to find that ideology plays a lesser—but still statistically significant—role than was once thought.⁵⁰ Still, even in studies that incorporate a number of other possible influences on judicial decisionmaking, ideology usually plays some role.⁵¹ As Gregory C. Sisk notes, “a small effect does not necessarily mean an inconsequential effect. That ideology plays *any* role in judicial decision making is an important and substantive finding, even with the qualifying understanding that the effect is constrained.”⁵²

The real trick of these studies, though, is quantifying the variables in a manner that can be empirically tested. Judicial votes might initially seem easy: We have records of how the judge actually voted (e.g., affirm, reverse). Quantifying judicial votes, however, is not that simple. To test for ideological relation—and note, we still have not defined what we mean by ideology—we have to give some sort of ideological content to judicial votes. This is often accomplished by coding votes for or against certain parties in certain kinds of disputes as either “conservative” or “liberal” according to the general (or stereotypical) position of the Republican and Democratic Parties, respectively, on the issue raised by the dispute. For example, a

⁴⁹ For other studies of panel effects, see SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 42; Christina L. Boyd, Lee Epstein & Andrew D. Martin, Untangling the Causal Effects of Sex on Judging (July 28, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1001748>; Cross & Tiller, *supra* note 15; Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004); Jonathan P. Kstellec, Panel Composition and Voting on the U.S. Courts of Appeals over Time (May 14, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1012111>; Miles & Sunstein, *Arbitrariness Review*, *supra* note 15; Miles & Sunstein, *Regulatory Policy*, *supra* note 15; Sunstein et al., *Ideological Voting*, *supra* note 15.

⁵⁰ See Sisk, *Quantitative Moment*, *supra* note 15, at 887.

⁵¹ See, e.g., Miles & Sunstein, *Arbitrariness Review*, *supra* note 15, at 807 (noting that “judicial ideology is not playing a dominant role” in administrative arbitrariness review, but still finding that “judicial policy preferences do play a significant role, and in the difficult cases, it does [sic] seem to be driving actual outcomes”).

⁵² Sisk, *Quantitative Moment*, *supra* note 15, at 890.

vote in favor of an environmental group challenging Environmental Protection Agency regulations would be regarded as a liberal decision.

More difficult, though, is quantifying “ideology.” Indeed, this is perhaps the trickiest aspect of judicial politics research.⁵³ Judicial politics scholars have developed a number of methods for quantifying judicial ideology, often having something to do with the major political parties in the United States. Judicial politics scholars look to the political party of the judge herself, the political party of the President that appointed her, or the political party of other actors that might have influenced the appointment of the judge (such as Senators in the case of senatorial courtesy). Judicial politics scholars then consider a judge “conservative” or “liberal” in light of these political indicators and tend to see this as a reliable quantification of ideology. As Daniel R. Pinello stated in his meta-analysis of studies that use the political party affiliation, “[political] party is a dependable measure of ideology in modern American courts.”⁵⁴ Some studies have rejected the binary Republican/Democrat quantification in favor of more nuanced measures.⁵⁵

These quantifications still do not explicitly announce what judicial politics scholars mean by “ideology.” Yet one possible indicia of what is meant by ideology is the way in which judicial politics scholars quantify this variable. These quantifiers of ideology suggest a conception of ideology as partisan politics. If ideology can be reasonably quantified by looking to the two major political parties, then it is reasonable to conclude that what judicial politics scholars mean by “ideology” is the popular

⁵³ See Posting of Greg Sisk to Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/2006/12/tricky_variable.html (Dec. 13, 2006, 19:23 CST).

⁵⁴ Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999).

⁵⁵ These alternative measures include Martin-Quinn scores, see Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005), Giles-Hettinger-Peppers scores, see Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001), and Segal-Cover scores, see Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). A full discussion of the methods of quantifying ideology in these alternatives is beyond the scope of this Article.

division between the liberalism of the Democratic Party and the conservatism of the Republican Party.⁵⁶

Perhaps it is unfair, though, to look simply to how judicial politics scholars quantify ideology in trying to determine what they mean by it. Indeed, judicial politics scholars themselves have noted that the traditional political party measure is "crude"⁵⁷ and remind us that "partisanship and the political party of the appointing president (for Article III judges) are best approached as proxies for judicial attitudes, and *not* causes of them."⁵⁸ Further, judicial politics scholars sometimes explicitly avow that they mean more than just party politics when they talk about ideology.

Objections to reading too much into ideological quantifiers alongside claims of broader ideas of ideology, though, do not answer what judicial politics scholarship does mean when it talks of ideology. This does not mean that we are left with no indication, though. As I show below, the language employed throughout much of the judicial politics literature reveals how judicial politics conceives of ideology and its influence on judicial decisionmaking. In short, the political and often pejorative discussion of judging indicates that, when talking about ideology, judicial politics scholars really do seem to mean little more than partisan politics.

B. *The Importance of Clarifying Ideology*

Before investigating what judicial politics scholars mean by "ideology," I must first address why clarification is so important. Some judicial politics scholars have suggested that the meaning of "ideology" and how it influences judicial decisionmaking are irrelevant. There is some merit to this criticism; the studies mentioned above (as well as the scores that were not discussed) do indeed support the theory of the attitudinal model. That is, if we put aside the problems of definition and quantification of ideology, judicial politics scholars have provided significant

⁵⁶ The more nuanced quantifiers that go beyond a binary Republican/Democrat distinction do not escape these partisan politics implications. These measures still place judges somewhere along a linear scale from "liberal" to "conservative." While these measures recognize that there can be different kinds of Republicans and different kinds of Democrats, they still quantify ideology in wholly partisan political terms.

⁵⁷ Heise, *supra* note 15, at 836.

⁵⁸ *Id.* at 837.

support for their theory in an empirically sound way. Frank B. Cross once raised a similar objection, noting that

[n]either the label nor the internal aspects of decisionmaking are central to the present question Both the parties to an individual case and the path of the law itself are affected by ideological judicial outcomes, regardless of the label applied to the process by which those outcomes were reached.⁵⁹

Just as those working within judicial politics might see no need to clarify their theory, legal scholars that reject judicial politics would likely also see no need to delve deeper into the meanings of ideology. These scholars might think that, due to the seeming simplicity of judicial politics' conception of ideology, judicial politics scholarship can merely be ignored.

I suggest that a deeper understanding of judicial politics is internally necessary to judicial politics, as well as externally necessary to the broader study of judicial behavior and legal theory. First, while judicial politics is primarily positive, there are some scholars both inside and outside of judicial politics suggesting normative reforms of the legal system in light of judicial politics findings. And, as mentioned above, some legal scholars are calling for normative scholarship to pay increased attention to judicial politics research.⁶⁰ The lack of clarity in judicial politics scholarship, though, raises problems for judicial politics scholars suggesting normative reform as well as other legal theorists looking to judicial politics to support normative arguments. Without an understanding of what judicial politics really tells us, there is potential for misunderstanding, manipulation, and misapplication of empirical findings. Even if one embraces judicial politics scholarship, it is necessary to clarify what it means before convincing legal audiences of its usefulness.

The problem that an incomplete understanding of ideology presents for the normative application of judicial politics scholarship is evidenced in the few judicial politics studies that

⁵⁹ Cross, *Decisionmaking 2003*, *supra* note 15, at 1478. Cross later seemed to reverse this position when he wrote, "Although the consciousness of the judicial bias has not been determined, the existence or nonexistence of such consciousness may be important. If we were to try to combat ideological judicial decision making, choosing the best strategy might depend on whether the bias was conscious or subconscious." FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS 15* (2007) [hereinafter CROSS, *DECISION MAKING 2007*].

⁶⁰ See *supra* note 16 and accompanying text.

end with a suggestion of possible ways to reform the judiciary. For example, those studying panel effects have argued for increased judicial diversity,⁶¹ with some even suggesting that every appellate panel include at least one Republican and one Democratic appointee.⁶² Such suggestions, however, are based on an incomplete understanding of judicial behavior. That is, if these reforms are meant to rein in “ideological” decisionmaking, we should know what ideology means and how it influences judicial decisionmaking before assessing the normative desirability of these reforms.⁶³

Consider also the potential implications of judicial politics scholarship for other areas of legal theory. If judicial politics scholarship means to indicate that judging is an essentially partisan activity, with judges promoting the agenda of one of the major political parties, judicial politics scholarship might seem to lend support to traditional concerns over the countermajoritarian nature of the federal courts.⁶⁴ Such an understanding (or misunderstanding) of judicial politics scholarship might lead to exaggerated concerns over judicial review. More to the point, if we are to use judicial politics research in discussing and potentially reforming the judiciary, we should have a deeper understanding of what it is exactly that the research tells us.

Second, as to the broader study of judicial behavior, judicial politics scholarship perpetuates a simplistic image of the judge that distorts our perception of judging and the behavior of legal actors in general. While judicial politics scholars deride formalist jurisprudence for naively suggesting that judges could mechanically apply determinate law to arrive at their decisions, they present a similarly simple conception of judging. As I show below, the portrayal of the judge in judicial politics scholarship is that of a partisan, promoting the agenda or platform of one of the

⁶¹ See Sunstein et al., *Ideological Voting*, *supra* note 15, at 347–52.

⁶² See Miles & Sunstein, *Arbitrariness Review*, *supra* note 15, at 813; Tiller & Cross, *Modest Proposal*, *supra* note 15, at 216.

⁶³ See Guthrie et al., *Blinking*, *supra* note 9, at 29 (“Given the central role that judges play in the justice system both inside and outside the courtroom, reformers must understand judicial decision making before they can reshape the justice system to meet the needs of litigants and society.”).

⁶⁴ Barry Friedman has recently taken some steps towards the normative implications of judicial politics scholarship for the institution of judicial review. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1272–82 (2004).

major political parties. Indeed, judges are often portrayed as “politicians in robes.” Underlying this portrayal is a view of judges as rational actors, autonomously pursuing their policy preferences. A deeper understanding of judicial politics demonstrates the antiquated conceptions of human behavior that underlie much of the scholarship. As judicial politics scholarship stands as a potential explanatory force within the study of judicial behavior, we must understand what exactly it means before critiquing it.

Third, while we might ultimately reject judicial politics’ theory of ideological judicial decisionmaking, it is difficult to reject the masses of empirical evidence of the relation between various quantifications of ideology and judicial votes. The attitudinal model and its conception of ideology easily explain this relation: A judge’s political party (or other quantifying measure) consistently relates to her votes because judging is essentially a partisan activity. However, if we reject the attitudinal model and its conception of ideology, how can we make sense of the evidence that a judge’s political party (or other quantifying measure) consistently relates to her judicial votes?

II. WHAT WE TALK ABOUT WHEN WE TALK ABOUT IDEOLOGY

Despite the importance of clarifying ideology, much judicial politics scholarship seems satisfied to leave it more or less loosely defined. Even if we accept judicial politics’ quantifiers of ideology and acknowledge the masses of data that support the attitudinal theory, it is still unclear what exactly this concept of ideology *is*.⁶⁵ This is not to say that judicial politics scholars have left us with no indicia. Consider Gregory C. Sisk and Michael Heise’s explanation of what judicial politics literature means by ideology:

When social scientists studying the lower federal courts or politicians talking about judicial nominees to those courts refer to “ideology,” they usually mean nothing more than the issue positions advocated by the Republican and Democratic political

⁶⁵ Only a few others have noted this deficiency in the literature. See Edwards, *Collegiality*, *supra* note 15, at 1347 (criticizing Richard L. Revesz for never defining ideology in his study, Revesz, *Environmental Regulation*, *supra* note 15); Dan M. Kahan, “Ideology in” vs. “Cultural Cognition of” Law: What Difference Does It Make? 2–3 (Mar. 20, 2008) (unpublished manuscript) (noting that judicial politics scholars “have not been sufficiently clear about what they mean [when] they say that a decision is ‘ideological’”), available at <http://ssrn.com/abstract=1111865>.

parties or the spectrum between conservatism and liberalism in American political discourse (which in turn are associated to a greater or lesser degree with those parties). In both the public arena and the academy, ideology typically is plotted along a single continuum from right to left (or vice-versa) and almost invariably is associated with outcomes rather than the process of decisionmaking Moreover, ideology as used in these contexts typically is evaluated in political terms as an extra-legal influence on judging, not in terms of a judicial philosophy that describes how a judge appreciates and approaches legal problems and sources.⁶⁶

Thus, under Sisk and Heise's conception of the attitudinal model, judicial decisions are, at the very least, associated with the policy positions of the major political parties. Even though an ideological federal judge might not be the same as a party-affiliated legislator or other political actor, the difference is in degree and not in kind.⁶⁷ And Sisk and Heise's brief discussion of ideology, relegated to a footnote, is the exception; rarely does judicial politics scholarship pause to investigate what it means by ideology. As I show below, it is the language of many modern attitudinal accounts that portrays judges as political partisans.

Such partisan portrayal was not always the case. Some early judicial politics research, in the spirit of popular accounts of legal realism, set out to demonstrate empirically that factors outside of traditional legal materials seemed to influence a judge's decision. In this sense, ideology was merely shorthand for all the possible extra-legal factors that might influence a judge's decision.

However, the evolution of the attitudinal model has resulted in a decidedly partisan portrayal of ideology, with partisan motives dictating judicial votes. Jeffrey A. Segal and Harold J. Spaeth's 1993 explication of the attitudinal model, *The Supreme Court and the Attitudinal Model*,⁶⁸ exemplifies this portrayal. Therein, Segal and Spaeth lent significant credence to the image

⁶⁶ Sisk & Heise, *supra* note 15, at 770 n.156.

⁶⁷ Compare CROSS, DECISION MAKING 2007, *supra* note 59, at 13 ("Judicial ideology generally does not mean partisan politics. An ideological judicial activist does not have his political party's interests at heart, according to the attitudinal model. Instead, the judge has a personal ideology, on a two-dimensional liberal to conservative scale, that drives his or her rulings."), with Tiller & Cross, *Modest Proposal*, *supra* note 15, at 224 (noting the "evidence that *partisan* ideology often influences judicial case decisions on a variety of issues" (emphasis added)).

⁶⁸ SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 19.

of partisan judging. While judicial politics scholarship soon backed away from such a strict attitudinal account, Segal and Spaeth's initial articulation of the attitudinal model still influences more moderate attitudinal accounts.

In the sections that follow, I demonstrate how judicial politics' conception of ideology has evolved into a conception of judging as a partisan political activity. I show how the methods and language of judicial politics scholarship evoke a simplistic conception of ideology as partisan politics, where a judge's place along a conservative-to-liberal dimension is a significant determinant of her vote.

A. *Early Attitudinal Accounts*

The partisan portrayal of judges was not always the norm in judicial politics scholarship. In one of the first significant empirical studies of what caused judges to decide cases in a particular way, Glendon Schubert made the case that a judge's attitudes determine the judge's decision.⁶⁹ Basing his theory on stimulus-response behaviorist psychology,⁷⁰ Schubert posited that a judge comes to her job with, or quickly acquires, well-structured attitudes towards the issues that she commonly faces.⁷¹ When a case comes before the court, a judge's attitude towards the particular issue (e.g., a motion to suppress evidence) is activated. This attitude predisposes a judge to act a certain way (e.g., denying the suppression motion). In this way, Schubert portrayed extra-legal influences as decidedly subconscious. A judge does not *choose* to deny a suppression motion due to her attitudes towards criminal defendants or the suppression of evidence generally. Instead, the presence of the particular issue psychologically triggers that response.

While referring to judges as "the political type,"⁷² Schubert did not conceive of attitudes in solely political terms. He

⁶⁹ GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES* 10 (1965) [hereinafter SCHUBERT, *JUDICIAL MIND*]. Schubert defined attitudes as predispositions to respond to particular stimuli in particular ways. *Id.* at 27.

⁷⁰ *See id.* at 22-43, 286.

⁷¹ *See id.* at 37.

⁷² *Id.* at 12. Even this term, though, is not necessarily partisan. Schubert defines the political type as "the man who displaces his private motives on public objects, for which he then provides a rationalization in terms of public interest." *Id.*

recognized that a variety of factors could influence a judge's decision and viewed them as collectively constructing a judge's attitudes.⁷³ In Schubert's words:

It seems likely that the health—both physical and mental—of the justices has an influence upon their decisions; also their ethnic origins, religion, political affiliation, indeed, their whole life experience. But every one of these other sources of variance can be conceptualized as an indirect influence upon a respondent's attitudes toward policy values. . . . In focusing as I have done upon attitudes and ideologies that are oriented toward issues of public policy, these other influences have been sublimated rather than lost⁷⁴

Thus, in Schubert's view, a judge's political affiliation was only one of many sources of attitudes.⁷⁵

Just as a judge's attitudes were not dictated solely by politics, Schubert did not see judicial decisions as dictated solely by attitudes. Schubert made clear that he did not believe that attitudes were everything, "either in life or on the Supreme Court."⁷⁶ While Schubert believed that attitudes were important to judicial decisionmaking, so too were

social relationships and interaction, the quantity and quality of information relied upon to define the decisional issues, estimates of the probable implications of outcome alternatives, beliefs about one's institutional role obligations, concern for the cultural image that one will leave as his judicial trace, a host of largely unexplored biological variables (ranging from temporary but acute physical illness to senescence), and a variety of environmental and cultural variables.⁷⁷

David W. Rohde and Harold J. Spaeth built on Schubert's theory and developed a slightly different conception of extra-legal

Schubert's definition of the political type does not include any substance of those motives.

⁷³ See *id.* at 287.

⁷⁴ *Id.*

⁷⁵ See *id.*

⁷⁶ GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY*, at xiii (1974) [hereinafter SCHUBERT, *JUDICIAL MIND REVISITED*]; see also SCHUBERT, *JUDICIAL MIND*, *supra* note 69, at 287 ("I do not for a moment delude myself in thinking that I have boxed the compass of Supreme Court decision-making, by offering an interpretation exclusively in socio-psychological terms, and at that, one confined to judicial attitudes toward policy values.")

⁷⁷ SCHUBERT, *JUDICIAL MIND REVISITED*, *supra* note 76, at xiii.

influence. Rohde and Spaeth assumed that Justices on the Supreme Court have “preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences.”⁷⁸ Unlike Schubert, who saw attitudes as only one influence on decisionmaking, Rohde and Spaeth argued that the Justices had the freedom to decide cases *solely* on their policy preferences or attitudes.⁷⁹ While Rohde and Spaeth saw a larger potential for the influence of attitudes, they also differed from Schubert in that they gave no indication as to the source or content of a Justice’s attitudes.

Also looking to behaviorist psychology, Rohde and Spaeth took a similarly agnostic view as to the operation of ideology. According to Rohde and Spaeth, the presence of certain parties and legal issues in a case activated a judge’s attitudes towards those parties and issues, resulting in predisposed treatment.⁸⁰ The judge could be conscious or unconscious of these attitudes.⁸¹ In either case, they amounted to a predisposed treatment that did not necessarily imply a conception of partisan judges actively imposing their policy preferences. Instead, judges merely had attitudes that, like anyone else, predisposed them to respond to certain stimuli in certain ways.

As these early attitudinal accounts demonstrate, the initial empirical study of judicial behavior did not adopt a necessarily political conception of judicial decisionmaking. It instead developed empirical evidence that the judge as an individual played some role in the outcome of a case. Perhaps the findings of early judicial politics scholarship can best be summed up in the oft-repeated adage that judges are human.

⁷⁸ ROHDE & SPAETH, *supra* note 39, at 72.

⁷⁹ *Id.* at 72–74. Specifically, Rohde and Spaeth stated that policy preferences are psychologically made up of beliefs, attitudes, and values. *See id.* at 74. But because they defined attitudes as sets of beliefs, *id.* at 76, and values as sets of attitudes, *id.* at 77, I refer solely to attitudes for clarity’s sake.

⁸⁰ *See id.* at 75 (adapting the model in Milton Rokeach, *The Nature of Attitudes*, in 1 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 449, 453 (1968)).

⁸¹ Rohde and Spaeth defined these attitudes as collections of beliefs, with beliefs themselves defined as “any simple proposition, *conscious or unconscious.*” *Id.* at 76 (quoting MILTON ROKEACH, BELIEFS, ATTITUDES AND VALUES 113 (1968) (emphasis added)).

B. *Modern Attitudinal Accounts and Their Implicit Image of the Judiciary*

More modern attitudinal accounts initially embraced the notion of partisan judging.⁸² They conceived of ideology in distinctly political terms and portrayed judges as imposing their policy preferences through their decisions. Jeffrey A. Segal and Harold J. Spaeth's two major accounts of the attitudinal model exemplify this initial portrayal of partisan judging.⁸³ While building on the work of Schubert,⁸⁴ Segal and Spaeth specifically set out to explain judicial behavior by looking at the Supreme Court Justices' "political attitudes and values."⁸⁵ As they put it, "the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."⁸⁶ In making this argument, Segal and Spaeth repeatedly point to the Supreme Court's decision in *Bush v. Gore*,⁸⁷ calling the decision "shamelessly partisan"⁸⁸ and stating that the case should end the "pretense" of judges making decisions on sincerely held legal notions.⁸⁹ And while Segal and Spaeth claimed agnosticism as to whether judges consciously implement their policy preferences through their decisions,⁹⁰ the language used throughout their work at the very least hints at

⁸² See Tiller & Cross, *Legal Doctrine*, *supra* note 15, at 524 (noting that, after Segal and Spaeth's 1993 work, some political scientists "concluded that case outcomes were . . . determined by judicial ideology" and that legal doctrine was irrelevant).

⁸³ SEGAL & SPAETH, *ATTITUDINAL MODEL*, *supra* note 19, at 64, 65; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) [hereinafter SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*].

⁸⁴ See SEGAL & SPAETH, *ATTITUDINAL MODEL*, *supra* note 19, at xvi.

⁸⁵ *Id.* at 1 (emphasis added).

⁸⁶ *Id.* at 65; see also SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*, *supra* note 83, at 312 (noting that "the attitudinal model holds that the justices base their decisions on the merits on the facts of the case juxtaposed against their personal policy preferences").

⁸⁷ 531 U.S. 98 (2000).

⁸⁸ SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*, *supra* note 83, at 2.

⁸⁹ *Id.* at 431.

⁹⁰ See *id.* at 433 ("The attitudinal position on motivated reasoning is one of agnosticism. What matters is that the justices' ideology directly influences their decisions.").

some suspicion of conscious manipulation.⁹¹ Segal and Spaeth thus portray judging as a partisan activity. Under their conception of the attitudinal model, judging is wholly political, and decisions depend solely on the judge's ideology or personal policy preferences. Essentially, legal doctrine is meaningless.⁹²

Along the lines of Segal and Spaeth, some argued that ideology was the sole significant determinant of judicial decisions. However, the inability for ideological quantifiers alone to account for many judicial decisions led judicial politics scholarship to be more measured in its claims of ideological influence. As studies found that ideology alone could not explain all case outcomes,⁹³ judicial politics scholars set out to determine what else did. Thus, as mentioned above, judicial politics scholars have looked to the possible influences of a number of other factors.⁹⁴ However, even as judicial politics scholarship has abandoned the notion of purely ideological judicial

⁹¹ See, e.g., *id.* at 5 (“[T]he Court is free to construe any amendment—whether or not it overturns one of its decisions—as it sees fit, even though its construction deviates appreciably from the language or purpose of the amendment.”); *id.* at 11–12 (hinting that Justice Scalia’s “intelligence does not preclude self-deception” and calling him “a judicial activist piously masquerading as a devoted adherent of the words of the Constitution”); *id.* at 27 (“Aided and abetted by a mythology that blunts criticism and insulates them from the hue and cry, judges blithely do their thing, obligated to none but themselves.”); *id.* at 41 (suggesting that federal jurisdiction doctrine “enables the Court to adapt its policy making to the substantive personal policy preferences of its members”); *id.* (giving *Michigan v. Long*, 463 U.S. 1032 (1983), as an example of a case where “Justices who are conservative on criminal procedure . . . apparently thought the Court’s traditional standard of review unduly hindered them from reversing liberal state court decisions” and “changed the rules of the game . . . so that their substantively conservative policy preferences could continue to be accommodated”); *id.* at 53 (arguing that traditional legal reasoning “serve[s] only to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process”).

Whether the justices [decide] with self-awareness or whether, consistent with fundamental human psychological mechanisms, they are capable of convincing themselves that Congress cannot block slavery in the territories, that the due process clause implies a right to contract, that the Civil Rights Act allows race to be a factor in hiring and promotions, that the Eleventh Amendment applies to suits by a citizen of the state being sued, and that—as implausible as it might seem—the Florida recount violated the Fourteenth Amendment, doesn’t matter. The fact remains that the ideology of the justices drives their decisions.

Id. at 433 (footnote call numbers omitted).

⁹² See generally HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

⁹³ See Kastellec, *supra* note 49, at 19–20.

⁹⁴ See *supra* Part I.

decisionmaking, the influence of strict attitudinal theory remains. Moreover, as judicial politics scholarship has expanded into the study of lower courts,⁹⁵ the strict attitudinal account has continued to inform and influence the scholarship. For example, much of the growing research on the courts of appeals has adopted a political conception of ideological influence.

But it is not solely, or perhaps even mainly, in the findings of ideological influence that modern judicial politics scholarship portrays judges as partisans. Instead, much of this partisan portrayal comes across in the language the scholarship uses. One of the more stark examples of the partisan portrayal of appellate judges is found in Frank B. Cross and Emerson H. Tiller's study of the effects of panel composition on decisionmaking. Criticizing what they characterize as legal scholars' assumption of "the sincere application of legal doctrine without considering the possibility that it may at times be nothing more than a convenient rationalization for political decisionmaking," Cross and Tiller explored how "judges disregard legal doctrine in favor of partisan or ideological policymaking."⁹⁶ Cross and Tiller characterized judges as "decid[ing] cases according to their political proclivities and us[ing] precedent, if at all, as an *ex post facto* justification for their decisions";⁹⁷ they spoke of legal doctrine as "a constraint upon the pursuance of policy goals,"⁹⁸ and they looked for evidence of lower courts "manipulating . . . doctrine to achieve politically desirable outcomes."⁹⁹ Ultimately, Cross and Tiller praised ideologically mixed panels where the minority panel member "can use doctrine to corral the partisan ambitions of a court majority whose policy

⁹⁵ In particular, judicial politics research on the federal appellate court level has grown tremendously in the past decade. As many commentators have noted, for a significant number of litigants, the Federal Courts of Appeals are the last stop in litigation. *See, e.g.*, George, *Positive Theory*, *supra* note 15, at 1635; Kim, *Lower Court Discretion*, *supra* note 15, at 386 n.11. This has led a number of scholars to recognize the courts of appeals' significant role in the judicial hierarchy and judicial decisionmaking in general. *See, e.g.*, CROSS, *DECISION MAKING 2007*, *supra* note 59, at 2 ("The circuit courts play by far the greatest legal policymaking role in the United States judicial system."); SUNSTEIN ET AL., *ARE JUDGES POLITICAL?*, *supra* note 42, at 3 ("[T]he courts of appeals play an exceedingly large role both in settling disputes and determining the likely direction of the law.")

⁹⁶ Cross & Tiller, *supra* note 15, at 2156.

⁹⁷ *Id.* at 2156–57.

⁹⁸ *Id.* at 2161.

⁹⁹ *Id.* at 2162.

preferences would best be accomplished by neglecting the dictates of doctrine.”¹⁰⁰

Cross and Tiller are by no means alone in this depiction of judges. In one study, Donald R. Songer and his colleagues investigated the effect of Supreme Court precedent on appellate court decisions in search and seizure cases.¹⁰¹ Songer et al. characterized judges “as strategic political actors, [who] should prefer that their own preferences control their circuit’s decisions rather than the Supreme Court’s preferences.”¹⁰² While finding that precedent significantly influenced appellate court decisions, Songer et al. still found that appellate judges frequently had “room to maneuver” to pursue their own policy preferences.¹⁰³ Further, Songer et al. characterized this behavior as “shirking.”¹⁰⁴

In another study, McNollgast¹⁰⁵ began with the assumption that judges “act rationally to bring policy as close as possible to their own preferred outcome.”¹⁰⁶ McNollgast, though, admitted some room for what they call “the standard idealistic textbook model of judicial behavior, and do not . . . deny in total the notion that law school education and legal experience produce a ‘judicial temperament’ that influences decisions by judges.”¹⁰⁷ Still, McNollgast ultimately “assume[d] that judges do not check their political ideologies at the courthouse door . . . and are willing to make compromises between judicial and political norms and their personal policy preferences.”¹⁰⁸

Frank B. Cross once suggested that one of the reasons for incorporating attitudinal research into legal scholarship was so

¹⁰⁰ *Id.* at 2175.

¹⁰¹ Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 673 (1994).

¹⁰² *Id.* at 679. Songer et al. clarified this characterization with the assumption that, “other things being equal, liberal judges will prefer liberal decisions emanating from their court.” *Id.*

¹⁰³ *Id.* at 692–93.

¹⁰⁴ *Id.* at 675, 693.

¹⁰⁵ McNollgast is a pen name for the collaborative work of Matthew D. McCubbins, Roger Noll, and Barry Weingast.

¹⁰⁶ McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636 (1995). As McNollgast note, their positive political theory approach is related to the attitudinal model in that both assume that judges vote their preferences. *Id.* at 1636–37 n.10.

¹⁰⁷ *Id.* at 1636.

¹⁰⁸ *Id.* at 1636–37.

that Congress could better “draft legislation in a manner that will somehow constrain courts from disregarding the text and intent of the law.”¹⁰⁹ Richard L. Revesz once posited that particularly malleable procedural standards can “make[] it easier for judges to indulge their ideological preferences.”¹¹⁰ Joseph L. Smith and Emerson H. Tiller suggested that “[t]he political models [of judicial decisionmaking] view judges as routinely subordinating legal doctrine in order to pursue policy outcomes.”¹¹¹ Max M. Schanzenbach and Tiller modeled judges “as strategic policy makers who routinely manipulate doctrines, procedures, and other decision instruments to advance their preferred policies.”¹¹² And so on.¹¹³

Some of the more recent studies in judicial politics have adopted a broader conception of ideology as more than simply partisan politics. In his recent and exemplary study of decisionmaking on the United States Courts of Appeals, Frank B. Cross endeavored to explain what judicial politics scholars mean when they use the term ideology. As Cross saw it, ideological judges do not engage in the usual political activities (e.g., bargaining, lobbying) of legislators and other politicians.¹¹⁴ Instead, they “are sincerely voting their personal preferences, conservative or liberal.”¹¹⁵ Again, the difference between judges and other political actors seems to be one of degree. However, Cross later defines ideological decisions as those influenced by any number of extra-legal influences, including a judge’s

¹⁰⁹ Cross, *New Legal Realism*, *supra* note 15, at 324.

¹¹⁰ Revesz, *Environmental Regulation*, *supra* note 15, at 1731. Revesz later spoke of the strategically ideological judge, who considers the likelihood of reversal and may moderate her ideological voting. *See id.* at 1767. Such a strategic account seems to imply conscious ideological voting.

¹¹¹ Smith & Tiller, *supra* note 47, at 62.

¹¹² Schanzenbach & Tiller, *supra* note 46, at 24; *see also* Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 724–25 (2008).

¹¹³ I do not mean to attribute such accusations of partisan judging to the authors of the works discussed above. I suspect that part of this partisan portrayal stems from the simplifications necessary when testing any model of human behavior. Because the real causes of behavior are likely infinite, we must make simplifying assumptions to begin to understand that behavior. And I suspect a negligent choice of rhetoric is behind some of the more stark portrayals of partisan judging. Yet even if these suspicions are correct, this does not address the problem of the partisan portrayal of judging in judicial politics scholarship.

¹¹⁴ CROSS, *DECISION MAKING 2007*, *supra* note 59, at 13.

¹¹⁵ *Id.* Because of this distinction, Cross prefers the term “ideology” to “political.”
Id.

personal background and sense of justice.¹¹⁶ While Cross admits that, under this conception, “ideological” decisions could just as easily be called “just” decisions, he decided to characterize them as ideological due to the relation to the ideology of appointing presidents.¹¹⁷ By retaining the term “ideological,” however, Cross’s study is burdened by that term’s partisan baggage.

Cass R. Sunstein and his colleagues adopted a similarly broad conception of ideology in their recent studies. Sunstein et al. did not doubt that, at least in cases where there is no binding law, “the convictions of particular, flesh-and-blood judges—their own views about how to handle difficult questions—inevitably play a role” in judicial decisionmaking.¹¹⁸ They explicitly reject, however, the view that their findings “support the simple and unambivalent conclusion that federal judges are, in an important sense, political or ideological.”¹¹⁹ They instead are much more careful with their conclusions on ideology, finding “strong evidence of ideological voting *in the sense that* Democratic appointees are far more likely to vote in the stereotypically liberal direction than are Republican appointees.”¹²⁰ They ultimately conclude that, “[f]or all of their differences, Democratic and Republican judicial appointees are rarely ideologues or extremists.”¹²¹

By taking a broader conception of ideology and backing away from the more partisan conception typified by Segal and Spaeth’s work, Sunstein et al. provide a hint of a return to the broader conception of ideological influence that characterized the work of Schubert; while Sunstein et al. titled their work the provocative *Are Judges Political?*, their answer seems to be the much less provocative “no.” Still, Cross and Sunstein et al.’s explicitly broader conceptions of ideology are much more the exception than the norm. The continued use of the terms “political” and “ideological,” along with the continued influence of strict

¹¹⁶ *Id.* at 16.

¹¹⁷ *Id.*

¹¹⁸ SUNSTEIN ET AL., *ARE JUDGES POLITICAL?*, *supra* note 42, at viii; *see also id.* at 147 (noting that “[n]o reasonable person seriously doubts that ideology, understood as moral and political commitments of various sorts, helps to explain judicial votes”).

¹¹⁹ *Id.* at viii.

¹²⁰ *Id.* at 19 (emphasis added).

¹²¹ *Id.* at 83.

attitudinalism, have maintained an image of the judiciary that is ambiguously political at best and pejoratively partisan at worst.

C. *Alternative Explanations*

This brief review of judicial politics scholarship provides some insight into the concerns raised above. First, it appears as though judicial politics scholarship conceives of ideology in partisan, political terms. Thus, these scholars' senses of ideology seem close to more popular (and pejorative) conceptions of ideology. If one embraces this conception of ideology, then the possible normative implications of judicial politics research are many, especially among those concerned with politicized judicial review. However, such an understanding of ideology can also quite reasonably be rejected as simplistic.

Second, judicial politics scholarship seems to conceive of judicial behavior as traditionally rationalist and autonomous. Judges both know their partisan preferences and actively work to promote them through their decisions. However, as discussed in the Introduction, a large and ever-growing body of law and psychology research is challenging this traditional conception of human behavior. Thus, one might quite reasonably doubt that judges are able to accomplish the behavior that judicial politics scholarship ascribes to them.

Consequently, one might very reasonably reject the theoretical conclusions of judicial politics scholarship. That leaves us, though, with the third issue raised above: How do we reckon with the empirical findings of judicial politics scholarship? Granted, many judicial politics scholars' findings support the hypothesis that judges decide cases ideologically. However, these scholars' conceptions of judging as ideological and ideology as party politics is not the only reasonable conclusion to draw from their data. A significant relation between quantifiers of a judge's ideology and her decision in a particular case does not necessarily lead to the conclusion that a judge is usurping the law and enacting her own policy preferences.¹²²

¹²² See Cross, *New Legal Realism*, *supra* note 15, at 283 ("The fact that judges consistently decide cases in accordance with their political beliefs does not itself prove that they are deciding cases *because* of their political beliefs." (emphasis added)). *But see id.* ("The presence of a statistically significant correlation, however, does provide us with potentially strong evidence of causation and can certainly cast great doubt on the legal model.")

A few scholars have offered alternative explanations for the findings of judicial politics research. Scholars taking a somewhat positivist approach note that discretionary determinations are purposefully and unavoidably inherent in many areas of the law.¹²³ In particular, Pauline T. Kim has argued that judges necessarily run into discretionary issues where the law “runs out,”¹²⁴ and thus *must* make a decision based on some extra-legal factor. In such cases, any number of forces might influence a judge’s decision. By focusing upon the existence of such non-determinate legal issues, Kim offers one response to the portrait of judges and judicial decisionmaking in much of the literature. That is, because law itself is not always determinate, the disagreement that is central to the study of judicial politics is almost inevitable.¹²⁵ Consequently, the legal system has built-in areas where judges must exercise some discretion, and there is nothing problematic if political views influence that exercise.¹²⁶

I suggest that we can better understand the empirical evidence of the attitudinal model, at least in part, by taking a

¹²³ As Orley Ashenfelter and his colleagues state:

A finding of statistical significance in [“close” or opinion-worthy cases] suggests less than it first seems to show. In close cases, something must make a difference. It could be random fluctuation, what the judge ate for breakfast, the judge’s background, or other less obvious factors. It is not self-evidently disturbing when the judge’s worldview (as revealed by party affiliation and other variables) dominates over some competing sources of decision.

Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263 (1995).

¹²⁴ Kim, *Lower Court Discretion*, *supra* note 15, at 410. As Kim writes, in some cases, the

application of the relevant authority to the case at hand requires the exercise of judgment, perhaps because the precise issue raised in the case is not addressed by the rule, or because the rule itself calls for the exercise of judgment, as in the case of a multifactor balancing test.

Id. at 409–10.

¹²⁵ *See id.* at 434.

¹²⁶ *See id.* at 428–29 (arguing that judges coming to different conclusions on the same issue can still be complying with the obligations of governing law where the application of that law requires an exercise of discretion); *see also* Kim, *Deliberation and Strategy*, *supra* note 48, at 19 (“In using [the terms ideology or policy preferences], I do not mean to suggest that judges disregard the law . . . [n]or . . . that there is necessarily anything illegitimate about a judge’s pursuit of policy goals.”). For other examples of alternative explanations to judicial politics research, see Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89 (2005); Kahan, *supra* note 65.

psychological approach to judicial behavior. I am not alone in this assertion; Chris Guthrie and his colleagues recently suggested that their psychological model of judicial decisionmaking might account for the data found by judicial politics scholars. Building on their prior research on judges' susceptibility to cognitive biases,¹²⁷ Guthrie et al. offered a model of judicial decisionmaking that they call the "intuitive-override" model.¹²⁸ Focusing on the roles of intuition and deliberation in decisionmaking, Guthrie et al. conceive of judges as normal human beings that are subject to the same mechanisms of judgment and decisionmaking as everyone else¹²⁹ and argue that judges often reach judgments through intuition.¹³⁰ They then suggest that judges should (and sometimes already do) check these intuitive judgments through deliberation.¹³¹

Guthrie et al. hint that this model is a way of understanding the findings of judicial politics literature, describing their model as a middle ground between formalist/legal and realist/attitudinal models of decisionmaking.¹³² While Guthrie et al. make a valuable contribution to the psychology of judicial decisionmaking, their theory does not offer a satisfactory explanation for the studies of ideological influence in the judicial politics literature. We can place Guthrie et al.'s model within the greater body of research by understanding intuitive judicial decisionmaking as that most influenced by partisan politics, while deliberative decisionmaking checks this influence and moves decisions closer in line with the seeming dictates of the law. Findings of seemingly ideological decisionmaking, then, would be reflective of intuitive decisionmaking. But this explanation still does not tell us why intuitive judgment leads to seemingly ideological results and does not even address the issue

¹²⁷ See Guthrie et al., *Blinking*, *supra* note 9; Guthrie et al., *Judicial Mind*, *supra* note 10; Rachlinski et al., *supra* note 10; Wistrich et al., *supra* note 10.

¹²⁸ Guthrie et al., *Blinking*, *supra* note 9, at 3.

¹²⁹ See *id.* at 9.

¹³⁰ See *id.* at 31-33.

¹³¹ See *id.* at 33-43.

¹³² See *id.* at 3 ("[N]either the formalists nor the realists accurately describe the way judges make decisions, but . . . key insights from each form the core of a more accurate model."); see also *id.* ("Less idealistic than the formalist model and less cynical than the realist model, our model is best described as 'realistic formalism.'").

of what ideology entails.¹³³ Consequently, the psychology of judicial decisionmaking is ripe for study.

In a similar vein, I argue that the seemingly ideological division in judicial decisions can stem from the subjectivity inherent in the act of perception.¹³⁴ In short, we subjectively perceive our world and make judgments and decisions based on that subjective perception. Yet we also often fail to recognize that others might perceive the same objects differently. These different perceptions can then lead to different judgments. And as discussed below, such differences in perception are likely in areas of substantial social disagreement.

In terms of judicial politics research, findings of ideological division might rest in part on differences in perception. Particularly in discretionary or ambiguous areas, judges might perceive the facts and law of a case differently. Consequently, they may come to sincerely believe in the absolute correctness of opposing outcomes. If these judges fail to recognize that their disagreement is due to perception, then they are at risk of misunderstanding, misattribution of bias, and perhaps even conflict.

III. NAIVE LEGAL REALISM

This Part has two purposes. First, I introduce the theory of naive realism. While social psychology has become increasingly popular in legal circles over the past decade, legal scholarship has almost entirely ignored the insights of naive realism.¹³⁵ This is surprising, however, as it is by no means a fringe theory and has great potential for informing a variety of legal debates. By summarizing the theory as well as some of its empirical evidence, I hope to provide a jumping-off point for other scholars to

¹³³ This is not a criticism of Guthrie et al., however, as it was not a question they set out to answer. Instead, I simply want to demonstrate that, even in the literature that looks more closely at the psychological processes of decisionmaking, the question of ideological influence has thus far gone relatively unaddressed.

¹³⁴ Dan Kahan has recently suggested a similar psychological way to account for the findings of judicial politics. See Kahan, *supra* note 65.

¹³⁵ The two notable exceptions are Lee Ross and Donna Shestowsky's brief summary of naive realism, see Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081 (2003), and Adam Benforado and Jon Hanson's very recent and more thorough review of the theory, see Benforado & Hanson, *Naïve Cynicism*, *supra* note 4.

investigate how naive realism can illuminate issues in other areas of the law.

Second, I demonstrate how naive realism can inform the way we think about judicial decisionmaking. Naive realism provides one way we can understand the findings of judicial politics scholarship. Moreover, while I focus on judicial politics research, I also suggest how naive realism has the potential to inform broader discussions of judicial decisionmaking.¹³⁶

A. *Perceptions of Bias and Naive Realism*

Perceptions of bias are common in modern social discourse. We often notice that people's positions on various issues seem to conveniently coincide with their self-interest, monetary or otherwise. We suspect that people's experiences or characteristics (e.g., race, gender, religion, or political party) influence their opinions. And as the insights of cognitive psychology become more common in popular culture,¹³⁷ we spot the effects of cognitive biases in the judgments and decisions of others.

More formally, psychologists have identified and studied a wealth of motivational and cognitive biases that affect judgment and decisionmaking.¹³⁸ In the past decade, the insights of this social psychological research have stormed legal scholarship.¹³⁹ As familiarity with this research grows, the tendency to spot bias in legal contexts has also grown. But even before we had labels like "availability,"¹⁴⁰ "hindsight bias,"¹⁴¹ and "overconfidence

¹³⁶ While a full discussion is well beyond the scope of this article, I also briefly explore the ways that naive realism can extend beyond judicial politics literature in the Conclusion.

¹³⁷ A number of popular social science ("PopSocSci") books have included insights from social psychology research. See, e.g., DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2007); JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW* (Abacus 2007) (2004).

¹³⁸ See JONATHAN BARON, *THINKING AND DECIDING* 56–67 (4th ed. 2008) (cataloguing biases); see also *supra* note 2.

¹³⁹ See *supra* notes 3–6 and accompanying text.

¹⁴⁰ See, e.g., Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 2, at 163.

¹⁴¹ See, e.g., Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 2, at 335; Baruch Fischhoff, *Perceived Informativeness of Facts*, 3 *J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE* 349 (1977); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of*

bias,¹⁴² we have long perceived seeming instances of irrational and biased behavior in others.

Such bias spotting is particularly common when we evaluate the judgments and decisions of those that disagree with us. People on the opposing side of an issue are thought to be selfishly motivated to defend their side because their position gives them benefits, tangible or intangible. We see them as blinded by the biasing influence of experiences that hinder their ability to evaluate an issue rationally. In addition, we regard them as subject to cognitive biases that systematically skew rational thought.

While such perceptions of bias are not necessarily in error (and, indeed, might to some extent be accurate), we often fail to perceive the possibility that the same biases might be influencing our own judgment. We instead see our own judgment as based on a neutral, dispassionate evaluation of the situation. While we notice that an opposing partisan's position suspiciously aligns with her own self-interest, we often fail to notice that our own positions similarly align with our own self-interests. While we may suspect that someone's experiences inhibit their ability to evaluate a situation rationally and objectively, we perceive any influence from our own experiences as a source of enlightenment. Moreover, while we might spot the influence of cognitive biases in the judgments of others, introspection into our own judgments often fails to find any hint of the same cognitive biases.

Consequently, we tend to manifest a significant disparity in the perception of bias in others versus the self. And this disparity is hugely important both inside and outside the law. When we perceive those with whom we disagree as infected by bias, we often exaggerate our disagreement. Not only does this disparity in perceptions of bias hinder communication, but it also can lead to misattribution, misunderstanding, and ultimately, conflict.

The social psychological theory of naive realism has illuminated the cause of such perceived disparities of bias.¹⁴³

Outcome Knowledge on Judgment Under Uncertainty, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975).

¹⁴² See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993); Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143 (1981).

Naive realism begins with one of the “truisms” of modern social psychology¹⁴⁴: Individuals perceive and construe the world subjectively.¹⁴⁵ Social psychology has demonstrated “the fact, and perhaps more importantly the insight, that people are governed not by the passive reception and recognition of some invariant objective reality, but by their own subjective representations and constructions of the events that unfold around them.”¹⁴⁶ In perceiving the world, “we take physical stimuli and each create, or *construe*, a subjective reality which mirrors some external situation through the filter of our own minds and senses.”¹⁴⁷

¹⁴³ Foundational pieces on naive realism on which this Part significantly relies include LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991); Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, 24 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 319 (1991); Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781 (2004) [hereinafter Pronin et al., *Eye of the Beholder*]; Emily Pronin, Carolyn Puccio & Lee Ross, *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra* note 2, at 636 [hereinafter Pronin et al., *Understanding Misunderstanding*]; Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996) [hereinafter Ross & Ward, *Naive Realism*]; Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, 27 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 255 (1995) [hereinafter Ross & Ward, *Psychological Barriers*].

¹⁴⁴ See Ross & Shestowsky, *supra* note 135, at 1088; see also Griffin & Ross, *supra* note 143, at 334 (“[T]he study of situational construal—that is, the study of individual, group, and societal constructions of social meaning—lies at the heart of both classic and contemporary social psychology.”); Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: “Naive Realism” in Intergroup Perception and Conflict*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 404, 404 (1995) (“The recognition that human beings actively construe and even construct the phenomena they encounter, and the further recognition that the impact of any objective stimulus depends on the subjective meaning attached to it by the actor, have long been among psychology’s most important intellectual contributions.”); Ross & Ward, *Naive Realism*, *supra* note 143, at 103. This truism has not been ignored by the judiciary. See Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 76, 80 (David M. O’Brien ed., CQ Press 2008) (1997) (“We all view reality from our own peculiar perspective.”).

¹⁴⁵ For a history of the study of subjectivity in social psychology, see Griffin & Ross, *supra* note 143, at 320–25.

¹⁴⁶ *Id.* at 320.

¹⁴⁷ Robert J. Robinson & Raymond A. Friedman, *Mistrust and Misconstrual in Union-Management Relationships: Causal Accounts in Adversarial Contexts*, 6 *INT’L J. CONFLICT MGMT.* 312, 312 (1995).

At first, the statement that we perceive the world subjectively might seem unremarkable, obvious, or even tautological, but the implications of subjectivity are not. While we perceive the world subjectively, we also systematically fail to appreciate the subjectivity of our own perception. Instead, we often believe that our understanding of reality is based on objective observation. We think we have tapped into an untainted perception of reality and then make rational judgments and decisions based on this seemingly objective reality. We often manifest an illusion of personal objectivity and believe that we see the world “as it is.”¹⁴⁸ This illusion of objectivity “is inescapable and deep, and it governs our day-to-day functioning despite what we may know about the constructive nature of perception.”¹⁴⁹ Further, this illusion is not limited to perceptions of the physical world or trivial matters; indeed,

naive realism makes its influence felt not only in convictions about physical reality but also in convictions about complex social events and political issues. We cannot fully escape the conviction that we likewise perceive such events and issues as they “really are,” and that other reasonable people who have the same information about those events and issues will, or at least should, perceive them similarly.¹⁵⁰

At the same time, we believe that others are making their own judgments based on the same objective reality. As long as they are as rational as we are, we think that they should come to the same judgment of the object or stimulus as we did. If they do not, then we must somehow account for these differences in judgment. It is this accounting for difference that often leads to misattributions of bias.

¹⁴⁸ Pronin et al., *Eye of the Beholder*, *supra* note 143, at 781.

¹⁴⁹ *Id.* at 783.

The failure of perspective taking, or more specifically, the failure to treat the other person’s ‘surprising’ and seemingly ‘unwarranted’ response as a *cue* that the person is responding to a different situation than the one we assume (or at least a different subjective construal of that situation) is a ubiquitous feature of social and political life.

Ross & Ward, *Psychological Barriers*, *supra* note 143, at 278.

¹⁵⁰ Pronin et al., *Eye of the Beholder*, *supra* note 143, at 783.

This situation is best summarized in three first-person tenets:

1. I see stimuli, issues, and events as they are in objective reality, and my social attitudes, beliefs, preferences, priorities, and the like follow from a relatively dispassionate (indeed, unmediated) apprehension of the information or evidence at hand.
2. Other rational social perceivers generally share my judgments and reactions—provided that they have had access to the same information that gave rise to my views, and provided that they too have processed that information in a reasonably thoughtful and open-minded fashion.
3. The failure of a given individual or group to share my judgments and reactions arises from one of three possible sources: (1) the individual or group in question may have been exposed to a different sample of information than I was (in which case, provided that the other party is reasonable and open-minded, the sharing or pooling of information will lead us to reach agreement); (2) the individual or group in question may be lazy, irrational, or otherwise unable or unwilling to proceed in a normative fashion from objective evidence to reasonable conclusions; and (3) the individual or group in question may be biased (either in interpreting the evidence or in proceeding from evidence to conclusions) by ideology, self-interest, or some other distorting influence.¹⁵¹

In short, we believe our judgments to be based on a rational evaluation of reality. Because we see our judgment as the most rational one in light of reality (if we realized that it was not, we would likely change our judgment to that which was most rational), we expect other rational people to share our judgments. When another person disagrees with us, however, we must somehow account for our differing judgments. It is in this reconciliation of disparate judgment that we attribute bias to others.

This attribution is errant in two respects. First, while we might be somewhat accurate in our attributions of bias to the judgments of others, we fail to perceive the same bias in our own judgments. What we believe is a judgment based on objective reality is instead a judgment based on how we have subjectively perceived and construed reality. Second, just as we subjectively perceive and construe the world, so does everyone else. If two

¹⁵¹ Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 647.

rational and dispassionate observers differ in their subjective perception of the same object, they can quite reasonably come to two divergent judgments about that object. Further, each observer can sincerely believe that her own judgment is the only reasonable one based on an objective evaluation of the object. Yet, it is not the *judgment* of the object on which they are disagreeing, but the very *object* that they are judging.¹⁵²

Consequently, our illusion of personal objectivity, our naive belief that we see the world as it really is, can lurk behind much of the conflict in our lives. This is the insight of naive realism. The works of Lee Ross, Emily Pronin, and others have provided a wealth of insight into when such differences in subjective perception lead to misattributions of bias. Further, they have offered ways to possibly mitigate disparities in perceived bias and have hinted at a better way to approach some of our most contentious social issues.

In the sections that follow, I review the evidence of naive realism in both individual and collective decisionmaking. Applying the insights of naive realism to judicial decisionmaking, I offer one alternative way to understand the findings of judicial politics literature.

B. Individual Subjectivity and Individual Decisionmaking

1. Subjective Perception and Perceptions of Objectivity

As noted above, we often perceive the world subjectively while maintaining a belief in our own objectivity. In the sections that follow, I review some of the empirical evidence of these aspects of naive realism. First, I illustrate the subjectivity of our own perception through the phenomenon of biased assimilation. Then, I provide evidence of the tendency for individuals to see themselves and their judgments as objective. Finally, I show how we often fail to notice bias in our own judgments.

¹⁵² See SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 424 (1952) (“[T]here has been no change of evaluation, but rather a change in that which is being evaluated. The fundamental fact involves a change in the object of judgment, rather than in the judgment of the object.” (internal quotation marks omitted)).

a. *Biased Assimilation*

In one classic study, Princeton and Dartmouth football fans demonstrated the subjectivity of perception and construal. Albert H. Hastorf and Hadley Cantril showed a film of a particularly brutal football game between Princeton and Dartmouth to students at those schools.¹⁵³ The Princeton students observed the Dartmouth team committing twice the number of fouls that the Dartmouth students saw.¹⁵⁴ Princeton students also saw two flagrant fouls by the Dartmouth team for every mild foul,¹⁵⁵ while the Dartmouth students saw an equal number of flagrant and mild fouls by their team.¹⁵⁶ These perceptions mirrored the disparate accounts of the game offered by Princeton and Dartmouth newspapers;¹⁵⁷ the disparity in the media was so pronounced that one Dartmouth fan, upon receiving a copy of the film, thought his copy was incomplete and requested the missing part that contained all the infractions by the Dartmouth players that he had read about.¹⁵⁸

While the Hastorf and Cantril study may at first seem to be a simple example of overactive fandom, further reflection reveals the disparity in subjective understanding of the game. As Hastorf and Cantril explained, "the 'game' actually was many different games and . . . each version of the events that

¹⁵³ See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL PSYCHOL. 129, 129-130 (1954).

¹⁵⁴ *Id.* at 130.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 132.

¹⁵⁷ The *Daily Princetonian* reads:

This observer has never seen quite such a disgusting exhibition of so-called "sport." Both teams were guilty but the blame must be laid primarily on Dartmouth's doorstep. Princeton, obviously the better team, had no reason to rough up Dartmouth. Looking at the situation rationally, we don't see why the Indians should make a deliberate attempt to cripple [Princeton's star player] Dick Kazmaier or any other Princeton player. The Dartmouth psychology, however, is not rational itself.

Id. at 129 (quoting DAILY PRINCETONIAN, Nov. 27, 1951). In contrast, the *Dartmouth*, Dartmouth's student newspaper, indicated that the injuries to Princeton's star player "were no more serious than is experienced almost any day in any football practice." *Id.* at 130 (quoting DARTMOUTH, Nov. 28, 1951). Further, the paper indicated that the Princeton coach encouraged his players to injure Dartmouth players and that while both teams were penalized, "most of the roughing penalties were called against Princeton while Dartmouth received more of the illegal-use-of-the-hands variety." *Id.* at 129-30 (quoting DARTMOUTH, Nov. 27, 1951).

¹⁵⁸ *Id.* at 132.

transpired was just as 'real' to a particular person as other versions were to other people."¹⁵⁹ The seemingly singular event resulted in just as many different experiences as there were observers.¹⁶⁰ Indeed, it is misleading to speak of the singular event, as "there is no such 'thing' as a 'game' existing 'out there' in its own right which people merely 'observe.'"¹⁶¹ Instead, "the 'thing' simply is *not* the same for different people whether the 'thing' is a football game, a presidential candidate, Communism, or spinach."¹⁶²

This differing perception is a manifestation of biased assimilation. Biased assimilation is the tendency for people to interpret new information in a manner that reinforces prior beliefs.¹⁶³ Information that supports a previously held belief is accepted relatively less critically while information that is inconsistent with a previously held belief is met with scrutiny and doubt.¹⁶⁴ In the Hastorf and Cantril study, fans of each team likely held beliefs in the sportsmanship of their own players and its absence in opposing players. These fans were then quicker to see infractions by the opposing side than by their own.

In another classic study of biased assimilation, Charles G. Lord, Lee Ross, and Mark R. Lepper found that opponents and proponents of the death penalty differently construed the same body of evidence depending on whether it supported or contradicted their previously held beliefs.¹⁶⁵ All subjects were shown the same two studies on the deterrent effect of the death penalty, one arguing that it was an effective deterrent and the other arguing the opposite.¹⁶⁶ Even though they were viewing

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 133.

¹⁶² *Id.*

¹⁶³ *See* THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 50 (1991).

¹⁶⁴ *See id.* ("When examining evidence relevant to a given belief, people are inclined to see what they expect to see, and conclude what they expect to conclude. Information that is consistent with our pre-existing beliefs is often accepted at face value, whereas evidence that contradicts them is critically scrutinized and discounted.")

¹⁶⁵ *See* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2105–06 (1979).

¹⁶⁶ *See id.* at 2100.

identical information, both sides believed that the evidence lent more support to their side.¹⁶⁷

Another manifestation of biased perception is called the hostile media phenomenon. Robert P. Vallone, Lee Ross, and Mark R. Lepper demonstrated that perception of bias in media has a basis in subjective construal. In their study, Vallone et al. showed the same media coverage of the Beirut Massacre to pro-Arab and pro-Israeli subjects.¹⁶⁸ They found that members of each group perceived identical media coverage to be biased against their side.¹⁶⁹ In another study of the hostile media phenomenon, Lee Ross and Andrew Ward had subjects read the same account of the events surrounding the Clarence Thomas-Anita Hill sexual harassment controversy.¹⁷⁰ Pro-Thomas and pro-Hill subjects both perceived the account as biased against their side and in favor of the other side.¹⁷¹ Vallone et al. suggested that this disparity in perceptions of bias was due in part to the subjects effectively "seeing" two different news programs.¹⁷² In other words, the subjects "disagreed about the very nature of the stimulus they had viewed."¹⁷³

As these studies show, we view the world subjectively, often in a manner beneficial to our prior beliefs. In interpreting stimuli, we "perceive things as [we] have been led by experience or suggestion to expect them to be, and [our] perceptions are further biased by [our] hopes, fears, needs, and immediate emotional state."¹⁷⁴

¹⁶⁷ See *id.* at 2101-02.

¹⁶⁸ Robert P. Vallone, Lee Ross & Mark R. Lepper, *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 J. PERSONALITY & SOC. PSYCHOL. 577, 580 (1985).

¹⁶⁹ *Id.* at 581. Subjects disagreed in their perceptions of the standard Israel was held to, the amount of focus on Israel's role in the massacre, and the strength of the positive and negative cases for Israel. *Id.* On a nine-point scale, ranging from pro-Arab at one to pro-Israeli at nine, pro-Arab subjects rated the coverage at 6.7, while pro-Israeli subjects rated the coverage at 2.9. *Id.*

¹⁷⁰ Ross & Ward, *Psychological Barriers*, *supra* note 143, at 281-82 (discussing Andrew Ward & Lee Ross, Perceptions of Bias in Response to the "Judge Thomas-Anita Hill" Affair (1991) (unpublished manuscript)). The account "suggested that Thomas' transgression had been real but exaggerated by Hill, and that both had been less than candid in their testimony" before the Senate Judiciary Committee. *Id.* at 282. Disinterested subjects (that is, those that did not support Thomas or Hill) rated the account as "fair and balanced." *Id.*

¹⁷¹ *Id.*

¹⁷² Vallone et al., *supra* note 168, at 582.

¹⁷³ *Id.*

¹⁷⁴ Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 636.

b. *The Illusion of Objectivity*

Despite the subjectivity of our perception, we often see ourselves as more objective and insightful than our peers in a variety of situations. Emily Pronin and her colleagues demonstrated this illusion of asymmetric insight in a battery of studies of the common feeling that we know others better than they know themselves, while others do not know us as well as we know ourselves.¹⁷⁵ Pronin et al. found, for example, that subjects tended to believe that they knew a roommate better than their roommate knew them.¹⁷⁶ Similarly, opposing gender, social, and political groups tended to believe that they knew the opposing group better than the opposing group knew them.¹⁷⁷ Thus, liberal and conservative subjects, pro-choice and pro-life subjects, and men and women all felt that they “knew and understood their counterparts better than vice versa.”¹⁷⁸

David Alain Armor found a similar tendency to overestimate the objectivity of one’s own judgment. Armor asked subjects first to evaluate the general objectivity of their own judgment relative to others.¹⁷⁹ Consistent with the psychological literature on the tendency to evaluate oneself as unduly above average, ninety-two percent of subjects in one study evaluated themselves as more objective than average.¹⁸⁰ Armor then asked subjects to answer various judgment problems that, while having an objectively correct answer, have elicited biased responses in prior studies.¹⁸¹ Subjects then indicated the objectivity of their responses, both absolutely and in relation to their peers.¹⁸²

¹⁷⁵ *Id.* at 639.

¹⁷⁶ *Id.* at 656–57.

¹⁷⁷ *Id.* at 659.

¹⁷⁸ *Id.*

¹⁷⁹ David Alain Armor, *The Illusion of Objectivity: A Bias in the Perception of Freedom from Bias* 36–37 (1998) (unpublished Ph.D. dissertation, University of California-Los Angeles) (on file with author).

¹⁸⁰ *Id.* at 46. Armor gave subjects two questionnaires to evaluate perceptions of self objectivity. *Id.* The first found that ninety-two percent of subjects believed themselves to be more objective than average, while the second found a lesser but still significant seventy-six percent of respondents believing themselves to be more objective than average. *Id.*

¹⁸¹ *Id.* at 37–38. Questions included those that tend to demonstrate various cognitive biases, such as failures to appreciate base rates and egocentric bias. *Id.* at 38–43.

¹⁸² *Id.* at 43.

When comparing subjects' estimated and actual levels of objectivity, a majority of subjects consistently overestimated how objective they were in answering the questions.¹⁸³ For all but one of the measures, subjects' "assessments of how objective or how rational they had been, on both specific and general measures of assessment, either did not correlate with how objective they had been, or correlated negatively."¹⁸⁴ Ultimately, Armor concluded, "[m]ost people see themselves as more objective—as more even-handed, insightful, and less biased—than could really be the case."¹⁸⁵

Indeed, the biased assimilation discussed above stems in part from a belief in our own objectivity. According to Pronin and her colleagues, the biased assimilation of new information stems in part from "[t]he sense that our understanding of situations and events is veridical."¹⁸⁶ That is, we construe new information in line with our previously held beliefs because we perceive those beliefs to reflect an objectively true understanding of reality.

Because we perceive that our construal of reality is objective, we also often view our judgments based on that construal as the rational and reasonable responses to reality. This leads us to believe that other reasonable people will share our judgments. The manifestation of this belief is called the "false consensus effect." The false consensus effect is the tendency for people to perceive their response to a given stimulus as the common and reasonable response. Because we see our response as the rational reaction to the stimulus, we believe that other rational people will respond similarly.

In their classic study of the false consensus effect, Lee Ross, David Greene, and Pamela House asked subjects to wear a sandwich board that read either "Eat at Joe's" or "Repent" around a college campus.¹⁸⁷ Subjects that accepted and refused the task both believed that a majority of their peers would make

¹⁸³ *Id.* at 54.

¹⁸⁴ *Id.* at 57.

¹⁸⁵ *Id.* at 57–58.

¹⁸⁶ Pronin et al., *Eye of the Beholder*, *supra* note 143, at 796.

¹⁸⁷ Lee Ross, David Greene & Pamela House, *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279, 289–94 (1977).

the same decision.¹⁸⁸ As Ross and his colleagues later argued, this disparity in response indicated that the subjects were actually responding to two different construals of the relevant situation.¹⁸⁹ Those who accepted the task likely anticipated pleasant responses to their wearing the board, such as peers thinking they were a good sport for participating in the experiment, while those that refused likely anticipated negative responses, such as mockery. Subjects that chose either option failed to perceive that others might differently construe the relevant situation in assessing the commonality of their responses.¹⁹⁰ Instead, they saw their own responses as objectively proper and expected others to follow suit.

Thomas Gilovich later demonstrated that the false consensus effect stemmed from differences in construal. Gilovich asked subjects whether they preferred 1960s music or 1980s music, what percentage of their peers would prefer each era, and what bands they thought of while thinking about these eras.¹⁹¹ Consistent with the false consensus effect, individuals believed that their own preferred era of music would be the more common preference among their peers.¹⁹² Subjects that preferred 1960s music and subjects that preferred 1980s music, however, were essentially not comparing the same eras. Those that preferred 1960s music considered much more appealing exemplars of 1960s music than did those that preferred 1980s music.¹⁹³ Similarly, subjects that preferred 1980s music thought of much more appealing exemplars of 1980s music than did those that preferred 1960s music.¹⁹⁴ Gilovich concluded that “[s]ubjects who made different choices were shown to have interpreted the two alternatives quite differently and in ways that reflected the choices they made.”¹⁹⁵

¹⁸⁸ *Id.* at 292–93. Specifically, those that wore the sign believed that 62.2 percent of subjects would do the same, while those that did not wear the sign believed that 67 percent of people would do the same. *Id.* at 292.

¹⁸⁹ Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 642.

¹⁹⁰ Ross & Ward, *Naive Realism*, *supra* note 143, at 112.

¹⁹¹ Thomas Gilovich, *Differential Construal and the False Consensus Effect*, 59 J. PERSONALITY & SOC. PSYCHOL. 623, 625 (1990).

¹⁹² *Id.* at 626–27. Subjects that preferred 1980s music believed that 67.3 percent of their peers would similarly prefer 1980s music, while those that preferred 1960s music believed that 55.7% of their peers would prefer 1980s music. *Id.* at 626.

¹⁹³ *Id.* at 628.

¹⁹⁴ *See id.*

¹⁹⁵ *Id.* at 629.

c. *The Bias Blind Spot*

A somewhat obvious corollary to our belief in our own objectivity is our common inability to spot bias in our own judgments. Even though few would claim an absolute immunity from the effects of bias (and might even recognize and acknowledge past cases of biased judgment), we are unlikely to identify the operation of bias in any present instant. Along these lines, Emily Pronin and her colleagues found that people tend to display a "bias blind spot."¹⁹⁶ That is, while we can spot the effects of bias in others, we often fail to recognize the same bias in ourselves. In one study, after having various cognitive biases described to them, subjects consistently saw themselves as less subject to the biases than their peers, with relevant peer groups defined as the average American,¹⁹⁷ the subjects' average classmate,¹⁹⁸ and fellow travelers at San Francisco International Airport.¹⁹⁹

In another study, Pronin et al. administered a fake "social intelligence test" to pairs of subjects.²⁰⁰ After completing the test, one person in each pair was told that they had "failed," while the other was told that they had "done well."²⁰¹ The subjects then rated the validity of the test as a measure of social intelligence.²⁰² Each subject was then told of a form of self-serving bias, specifically, the tendency for people to rate tests on which they perform well as more valid measures of whatever is being tested than they do for tests on which they perform poorly.²⁰³

In line with this tendency, subjects who had "failed" rated the test as a less valid measure of social intelligence than did those who had "done well."²⁰⁴ When subjects estimated the extent to which they and their partner—who, recall, had received the opposite score and had likely given the correspondingly opposite assessment of social validity—were influenced by self-

¹⁹⁶ Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369–70 (2002) [hereinafter Pronin et al., *Bias Blind Spot*].

¹⁹⁷ *Id.* at 370–71.

¹⁹⁸ *Id.* at 371–72.

¹⁹⁹ *Id.* at 372–74.

²⁰⁰ *Id.* at 376.

²⁰¹ *See id.*

²⁰² *Id.*

²⁰³ *Id.* at 377.

²⁰⁴ *See id.*

serving bias, Pronin et al. found that both those that had “done well” and those that had “failed” saw their partner’s validity assessment as much more reflective of self-serving bias than their own.²⁰⁵ Whether subjects had “failed” (and rated the test as a poor measure of social intelligence) or “done well” (and rated the test as an accurate measure of social intelligence), they saw their own self-serving evaluation of the test as accurate and objective. It appeared that their partner, however, was unable to assess the true validity of the test due to the influence of self-serving bias.

As Pronin et al. demonstrate, we are often unable to spot the operation of cognitive biases in our own judgment. Indeed, introspection in the search of the distorting influence of bias is unlikely to lead to uncovering anything, as many cognitive biases depend on subconscious operation.²⁰⁶ Yet even while we may be blind to cognitive biases, we often fail to recognize the operation of more obvious experiential biases. We instead see our own life experiences as sources of enlightenment into how the world really is.²⁰⁷

Joyce Ehrlinger and her colleagues demonstrated this tendency towards self-experiential enlightenment. They presented one group of subjects in their study with a proposed change in a college’s affirmative action policy.²⁰⁸ Subjects then estimated how either a racial minority or majority student’s opinion of the change would be influenced by that student’s ethnicity.²⁰⁹ Another group of students, consisting entirely of college varsity and intramural athletes, was presented with a proposal to open the college varsity weight room to intramural athletes.²¹⁰ Subjects then considered how either a varsity or intramural athlete’s opinion of the change would be influenced by his or her athletic status.²¹¹

²⁰⁵ *Id.*

²⁰⁶ See Pronin et al., *Eye of the Beholder*, *supra* note 143, at 783–84.

²⁰⁷ See *id.* at 790; Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 647.

²⁰⁸ Joyce Ehrlinger, Thomas Gilovich & Lee Ross, *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 688 (2005).

²⁰⁹ *Id.* Whether a subject was to consider the view of a racial majority or minority student was determined randomly. *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

Both groups displayed a tendency to view the status of those different from themselves as a significant source of bias. Caucasian subjects believed that a racial minority student evaluating a proposed change in a school's affirmative action plan would be significantly more influenced by her ethnicity than a Caucasian student, while racial minority subjects believed the exact opposite.²¹² At the same time, both Caucasian and racial minority subjects believed that their own ethnicity would be a source of enlightenment in evaluating the proposed change.²¹³ Similarly, both varsity and intramural athletes believed that the other group's status would bias their evaluation of the proposed weight room policy, while their own status was a source of enlightenment.²¹⁴ Ehrlinger et al. ultimately concluded that personal connection to an issue resulted in viewing that connection as a source of enlightenment both in ourselves and those that agree with us, yet a similar connection in those that disagree with us is discounted as a source of bias.²¹⁵

2. Subjectivity, Objectivity, and Judicial Decisionmaking

What naive realism brings to the study of judicial decisionmaking is an awareness of the subjectivity inherent in judicial decisionmaking. And an appreciation of subjective perception can help us to understand how two judges can look at the same case and come to different, perhaps even wildly different, judgments of the proper outcome. Each judge might be influenced by cognitive, perceptual, and motivational biases. Judges are not wholly objectively evaluating case facts and relevant law. Indeed, they *cannot* be wholly objective in their assessments and judgments; no judge is privileged with a wholly objective understanding of the world.

This is not to say that, as a practical matter, subjective perception renders judging wholly unmoored. If it were the case that all judges subjectively perceived the world to be radically different, they would have insufficient common ground to communicate, much less come to any collective decision. Because

²¹² *Id.*

²¹³ *Id.* at 688–89. While minority subjects viewed their ethnicity as a statistically significant source of enlightenment, Caucasian subjects' similar tendency was not statistically significant. *Id.*

²¹⁴ *Id.* at 689.

²¹⁵ *Id.*

everyone shares so much experience—much of it mundane—there is substantial overlap in how we subjectively perceive the world. This might be even more the case in a less heterogeneous group like the federal appellate judiciary.

To take an example, there is likely little disagreement over the requisite age someone must be to be a congressperson²¹⁶: As the Constitution declares, “No Person shall be a Representative who shall not have attained to the Age of twenty five Years.”²¹⁷ Those of us with the shared experience of learning the English language are unlikely to perceive much ambiguity in the words of that clause and are unlikely to construe it to mean anything substantially different.

However, in areas of ambiguity, especially those about which there is significant social disagreement, naive realism indicates that there *can* be differences in subjective perception. Consider the studies of the hostile media phenomenon: The subjects in those studies were looking at the same news coverage of a controversial issue, but they effectively perceived differing news coverage. The stimulus was unchanging, just like the clause setting the minimum age for Congress in the Constitution. Yet the differing experiences and beliefs of the subjects in the hostile media phenomenon studies led them to subjectively perceive and construe that same stimulus differently. In the same manner, judges can differently construe areas of ambiguity, controversy, and even discretion; indeed, they might differ over whether discretion even exists.

Naive realism thus indicates that two judges can differ on the appropriate outcome of the same case due to their differing subjective perceptions of the case and law. Consider the issue areas studied in much of judicial politics literature, such as search and seizure, sex discrimination, affirmative action, and environmental regulation. These are sometimes highly controversial areas with which a judge—just like everyone else—has prior beliefs and experiences. When confronted with a case in these areas, it should not be surprising that judges might be biased in assimilating the relevant information. Moreover, *all* judges are likely biased in assimilating the relevant information.

²¹⁶ But see Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U. L. REV. 250 (1990).

²¹⁷ U.S. CONST. art. I, § 2, cl. 2.

This might explain why we can see such a persistent relation between a judge's political party and the way that she tends to vote. Just as a judge might vote Democrat because the Democratic Party's policies are based on how things "really are," so too she bases her judicial judgment on how the case "really is." Both of these judgments are based on the same reality that the judge has subjectively constructed. The same subjective biases that influence a judge to decide a case likely overlap with what influences her to join a particular political party. One way to think of it is that the judge's membership in the Democratic Party does not cause her to decide a case in a certain way, but that her subjective perception is what leads her to both be a member of the Democratic Party and decide a case in a certain way.

Further, presidential administrations are likely to pick judges who see things as they "really are." Those who pick judges—just like everyone else—have their own subjective perceptions of the world that they believe to be objective. They likely want to appoint judges who see the world in the same way. That is, they want judges who are also "objective" and thus look for those who share their worldview. Thus, they end up picking judges who substantially share their subjective construal of reality. It should thus come as no surprise that these judges can come to the same judgment about an object as those that appointed them.

Naive realism also indicates that, although subjectively perceiving and construing cases before them, judges will often believe their judgments to be the most objective and rational ones. For example, a male judge might believe that his gender allows him to address a female plaintiff's sex discrimination case dispassionately and objectively. He sees his gender as a source of enlightenment. A female judge might also believe that her gender helps her to be more insightful in addressing the same female plaintiff's case. She sees her gender as a source of enlightenment as well. Both of these judges would believe that the experience of living their respective genders has given them some special insight into the reality of the case. However, neither judge is objective.

Naive realism thus offers one way to understand the findings of judicial politics scholarship. Judges are not partisans, manipulating law to achieve certain policy preferences. Instead,

they are human, and the inherent subjectivity of their perception can lead them to construe cases differently. This subjective perception is inevitably influenced by bias. And as noted above, judgments about case outcomes and political party affiliation likely relate because they are both based on this individual subjective perception. Moreover, a liberal judge and a conservative judge can decide cases differently because they are, in effect, evaluating different cases. Each thinks that his or her judgment is the most rational one based on an “objective” evaluation of the facts. Each believes that he or she is carrying out his or her duty of deciding cases according to law.

If there is some insight to this argument, and the majority of judges are sincerely and in good faith trying to dispassionately review cases and render objectively correct decisions (at least most of the time), why do we see so many accusations of illegitimate judicial policymaking? Accusations of biased and political decisionmaking are not uncommon in public and academic discussions of judging. One can even find such accusations in published opinions, often in dissent.²¹⁸ Naive

²¹⁸ See, e.g., *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1800 (2007) (Thomas, J., concurring in the judgment) (“[T]he rule . . . that the Court applies to decide this case exists untethered from the written Constitution. The rule instead depends upon the policy preferences of a majority of this Court.”); *Halbert v. Michigan*, 545 U.S. 605, 627 (2005) (Thomas, J., dissenting) (alleging that the Court’s decision “substitute[d] its own policy preference for that of Michigan voters”); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 195 (2005) (Thomas, J., dissenting) (“[T]he majority return[ed] this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose . . . [and] substitute[d] its policy judgments for the bargains struck by Congress.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 96 (2000) (Stevens, J., dissenting in part and concurring in part) (noting “the present majority’s repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President”); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 594 (1995) (Thomas, J., dissenting) (“The majority’s analysis of [the statute in question] is motivated by its policy preferences.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“Under the guise of the Constitution, this Court . . . impart[ed] its own preferences on the States in the form of a complex abortion code.”); *Furman v. Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting) (criticizing the Court for reading its personal preferences into the Eighth Amendment in finding imposition of the death penalty unconstitutional); *Tejada-Batista v. Morales*, 424 F.3d 97, 106 n.6 (1st Cir. 2005) (Carter, J., dissenting) (“The majority has substituted its own *policy* for the *holding* of the United States Supreme Court.”); *Wachovia Bank v. Schmidt*, 388 F.3d 414, 432 (4th Cir. 2004), *rev’d*, 546 U.S. 303 (2006) (alleging that the opinion of the dissent, as well as two other circuits, is “unsupported by statutory and historical analysis” and thus “amounts to

little more than judicial assertion of a policy preference”); *Ellis v. U.S. Dist. Court (In re Ellis)*, 356 F.3d 1198, 1215 (9th Cir. 2004) (Kozinski, J., concurring) (alleging—after responding to the dissent’s arguments—that “nothing is left of the dissent except strongly voiced policy preferences”); *Haugen v. Brosseau*, 351 F.3d 372, 401 (9th Cir. 2003) (Gould, J., dissenting) (“[T]he majority err[ed] by allowing its policy preference to corrupt its analysis.”); *King v. Marriott Int’l Inc.*, 337 F.3d 421, 428 n.4 (4th Cir. 2003) (interpreting a statute contrarily to another circuit and noting that the other circuit’s “policy preference appeared to drive [its] interpretive analysis”); *United States v. Cabaccang*, 332 F.3d 622, 641 (9th Cir. 2003) (Kozinski, J., dissenting), *cert. denied*, 128 S. Ct. 412 (2007) (alleging that the majority “reach[ed] the result consistent with [its] policy preferences” by “rewrit[ing] [a] statute because it likes it better this way,” thus “usurping” the function of the elected branches of government); *Johnson v. City of Cincinnati*, 310 F.3d 484, 514 (6th Cir. 2002) (Gilman, J., dissenting) (“Recognizing the right to visit grandchildren as a fundamental liberty interest . . . represents an expansion of previously recognized fundamental rights and presents the risk of imposing this court’s policy preferences in the guise of the Due Process Clause.”); *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 868, 871 (4th Cir. 2001) (Luttig, J., concurring) (criticizing particular Fourth Circuit decisions and the “intellectually laz[y] and jurisprudentially misbegotten enterprise of decision by personal policy preference”); *Rosmer v. Pfizer, Inc.*, 272 F.3d 243, 244 (4th Cir. 2001) (Wilkinson, C.J., concurring in the denial of rehearing en banc) (“[T]his dissent’s textual analysis represents a thinly-veiled attack upon diversity jurisdiction[:] The opinion begins with policy, ends with policy, and sprinkles plenty of policy arguments in between . . . [and suggests] that the federal courts are empowered to employ policy arguments to trump the plain meaning of Congress’ words.”); *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 657 (D.C. Cir. 2001) (Sentelle, J., dissenting), *rev’d*, 535 U.S. 137 (2002) (alleging that the majority’s focusing on the goals of a statute instead of its text was motivated by the court’s policy preferences); *Harris v. Garner*, 216 F.3d 970, 999 n.13 (11th Cir. 2000) (Tjoflat, J., concurring in part and dissenting in part) (accusing the majority of “eschew[ing] the text of [the statute at question], and [getting] carried away by considerations of policy”); *Equal Employment Opportunity Comm’n v. Lutheran Soc. Servs.*, 186 F.3d 959, 976 (D.C. Cir. 1999) (Silberman, J., dissenting) (“In any event, I can accept the majority’s policy preference no more than I can subscribe to its assertion of discretionary power. I dissent.”); *Memphis Planned Parenthood, Inc. v. Sundquist*, 184 F.3d 600, 602 (6th Cir. 1999) (Keith, J., dissenting in the denial of rehearing en banc) (noting the judge’s “solemn oath to uphold the law, not to pervert it to serve personal values or social policy preferences” and alleging that the majority’s upholding of certain restrictions on abortion “does violence to the state of the law and . . . does so for no other apparent purpose than to promote its stance on this controversial topic”); *Caterpillar, Inc. v. UAW*, 107 F.3d 1052, 1057–58 (3d Cir. 1997) (Mansmann, J., dissenting) (alleging that the majority, in interpreting the statute at question, “has placed its own policy objectives above plain language”); *McKenzie v. Day*, 57 F.3d 1461, 1489 (9th Cir. 1995) (Norris, J., dissenting) (accusing the majority of “substitut[ing] a policy lecture” instead of “engaging in any legal analysis whatsoever”); *Tipu v. INS*, 20 F.3d 580, 588 (3d Cir. 1994) (Alito, J., dissenting) (“The majority has usurped the BIA’s place and weighed the relevant factors for itself—apparently in accordance with its own views of drug and immigration policy.”); *Dibidale of La., Inc. v. Am. Bank & Trust Co.*, 916 F.2d 300, 311 (5th Cir. 1990) (Jones, J., dissenting) (“[T]he majority’s policy argument . . . is hard to justify except as an expression of judicial preference for a predetermined result.”); *League of United Latin Am. Citizens Council No. 4434 v.*

realism also offers an insight into this question. Indeed, the real implications of such an understanding of judicial decisionmaking are evident when naive realism is considered in a collective decisionmaking environment, to which I now turn.

C. *Individual Subjectivity and Collective Decisionmaking*

1. Making Sense of Those Who Disagree with Us

As the above discussion of subjectivity suggests, accusations of biased judgment might have some truth to them. But, I argue, not as much as we commonly think. Just as others are biased, so, too, are we. Accusations of bias can thus be the ultimate case of the pot calling the kettle black. We are all biased. None of us has a monopoly on objectivity. Recognizing as much might be very beneficial. Unfortunately, we rarely assume situations of universal partiality and instead ascribe to our opponents the distorting influence of bias. It is this attribution that can lead to conflict.

This process has four steps. First, we fail to account for the possibility that differences in perception might explain differing judgments. Second, we instead attribute differences in judgment to the influence of bias. Third, we then tend to falsely polarize our opponents, seeing them as holding ideological caricatures of their actual views. Fourth and finally, all of this combines to create the potential for significant social disagreement, misunderstanding, misattribution, and conflict. I discuss each of these in this section.

Clements, 914 F.2d 620, 654 (5th Cir. 1990) (Johnson, J., dissenting), *rev'd sub nom.*, *Houston Lawyers' Ass'n v. Attorney General of Tex.*, 501 U.S. 419 (1991) (“[T]he majority’s decision is less an attempt to interpret congressional intent . . . and more an attempt to effectuate the majority’s policy determination . . .”); *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1353 (8th Cir. 1990) (Magill, J., dissenting) (alleging that the majority’s opinion was based “on its own view of ‘public policy’ ” and “reject[ing] the idea that this court’s own policy preference is a legitimate basis for reversing” a lower court decision); *Demarest v. Manspeaker*, 884 F.2d 1343, 1346 (10th Cir. 1989) (Ebel, J., dissenting), *rev'd*, 498 U.S. 184 (1991) (“[T]he majority mistakenly has relied upon congressional silence and upon the majority’s own policy desires to abrogate the plain language of the statute.”); *United States v. Capano*, 786 F.2d 122, 134 (3d Cir. 1986) (Garth, J., dissenting) (alleging that the majority had “displace[d] the Congress’s policies with [its] own”); *G & H Prods., Inc. v. NLRB*, 714 F.2d 1397, 1406 (7th Cir. 1983) (Cudahy, J., dissenting) (alleging that the majority “overstepped the proper bounds of our review” and “reweighed the evidence . . . in the light of its own policy preferences”).

a. *The Failure To Account for Differences in Perception*

The conflict that arises from differences in perception begins with the common failure to account for the possibility that other people perceive and construe the world differently than we do.²¹⁹ In one classic study of the failure to account for differences in perception, Elizabeth Newton asked half of her subjects to “tap” the melody of various popular songs and asked the other half of the subjects to listen to the tapping and identify the tune.²²⁰ Both the “tappers” and listeners estimated the percentage of people that would be able to identify the song tapped.²²¹ The tappers estimated that, on average, fifty percent of listeners would be able to identify the song.²²² However, the actual success rate was a mere three percent.²²³

Such a disparity seems almost inevitable once one considers the difficulty of the task. Tappers reported hearing in their heads the actual tunes as they tapped, sometimes including lyrics and orchestral embellishments.²²⁴ For them, the tune being tapped was clear, even obvious. Yet while the tappers knew what tune was being tapped and thus could easily imagine it, the listeners were privy only to monotone taps.²²⁵ The tappers drastically overestimated the ease of identifying the tapped song because they failed to appreciate how the listeners perceived their taps.

Another example of the failure to account for others' differing perceptions is one that is a bit more common. Pronin and Ross asked young men and women to consider the most recent romantic breakup that they initiated and that their partner initiated.²²⁶ Subjects then rated the clarity with which they and

²¹⁹ See Ross & Ward, *Naive Realism*, *supra* note 143, at 109–10 (noting that people fail to realize that they and others experience “different events, or at least . . . different social constructions of those events”); see also Ross & Ward, *Psychological Barriers*, *supra* note 143, at 278.

²²⁰ See Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 643–44 (discussing Elizabeth Newton, *Overconfidence in the Communication of Intent: Heard and Unheard Melodies* (1990) (unpublished Ph.D. dissertation, Stanford University)).

²²¹ *Id.*

²²² *Id.* at 644.

²²³ *Id.*

²²⁴ *Id.* at 643.

²²⁵ *Id.*

²²⁶ See Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 646 (discussing Emily Pronin & Lee Ross, *Two Views of Romantic Break-Ups: Biased*

their partner communicated their respective intentions.²²⁷ In cases where the subject initiated the breakup, they perceived their communications to be much more clear “and less characterized by ‘mixed signals’” than cases where his or her partner initiated the breakup.²²⁸ As Pronin and Ross concluded, the subjects “appeared to have some difficulty in separating what that [sic] they thought they had said, or perhaps what they felt and had intended to convey, from that which they had actually communicated to the other party.”²²⁹

b. *The Attribution of Bias*

When we are confronted with a judgment opposite of our own, we must somehow account for how the individual espousing this judgment came to their opposing judgment. Because we believe that we came to our own judgment objectively, “other actors’ differing views and responses must reflect something other than a natural, unmediated perception of, and reaction to, that objective reality.”²³⁰ Instead of attributing disagreement on an issue to the possibility of differences in construal, we often instead move straight to attributions of bias.

There is significant evidence of the tendency for individuals to attribute bias to those that disagree with them.²³¹ For example, Glenn D. Reeder and his colleagues have found widespread attribution of negative motives by opposing sides in a conflict. In one study, supporters of the Iraq War attributed positive and altruistic motivations to President Bush, such as “self-defense” and “aiming to do good.”²³² Opponents, however, cited more aggressive, self-serving, and hidden motivations, such

Perceptions of the Clarity of Intimate Communications (1999) (unpublished manuscript)).

²²⁷ See *id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Ross & Ward, *Psychological Barriers*, *supra* note 143, at 280.

²³¹ Such attributions of bias are found in some of the studies already discussed. Pronin et al.’s study of perceived validity of social intelligence tests found that subjects were quick to attribute self-serving bias to those that had disagreed with them on the validity of the test. Pronin et al., *Bias Blind Spot*, *supra* note 196, at 377.

²³² Glenn D. Reeder, John B. Pryor, Michael J. A. Wohl & Michael L. Griswell, *On Attributing Negative Motives to Others Who Disagree with Our Opinions*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1498, 1501 (2005).

as "controlling Iraq's oil."²³³ These attributions were not limited to the President; subjects on both sides attributed biased motives to those on the opposing side as well.²³⁴ Subjects also saw their opponents as blind to the realities of the situation and to their own biased motivations.²³⁵ In a similar study, Reeder et al. studied opposing sides on the issues of gay marriage and abortion. Subjects attributed selfish motivations to members of the opposing side and saw their opponents as more likely to have a "hidden agenda."²³⁶ And again, subjects perceived those on the opposing side to be blind to their own motivations.²³⁷

In a study of actual union-management negotiations, Robert J. Robinson and Raymond A. Friedman found that disparities in perception resulted in the two sides perceiving biased caricatures of the other side:

[W]orkers emerge as *suspicious* of management's motives, believing that management is attempting to exploit them, and underestimate the concern that managers report having for worker welfare and for issues which concern workers, not to mention the simple necessity of trying to keep the company profitable and therefore viable. Managers on the other hand see workers as generally sincere but illogical and hostile, unwilling to consider mitigating facts in the form of a causal account, or willing to take positions which might drive the organization into bankruptcy. For managers, union representatives are thus *unreasonable*.²³⁸

Both managers and union representatives thus tended "to construe the other side in terms of extremism and ideological rigidity."²³⁹

In short, opposing sides on controversial issues tend to attribute invidious motives to those on the opposing side. Yet, as discussed in the next subsection, perceptions of difference are often overblown, and two sides often share many motivations and values.

²³³ *Id.*

²³⁴ *See id.* at 1505.

²³⁵ *See id.*

²³⁶ *Id.* at 1507.

²³⁷ *See id.*

²³⁸ Robinson & Friedman, *supra* note 147, at 322-23.

²³⁹ *Id.* at 324.

c. *The False Polarization of Opposing Sides*

Attribution of bias then leads to false polarization. False polarization is the tendency for individuals, once they have attributed a particular disagreement to bias, to perceive the opposing side as influenced or even dictated by the same bias across other issues. In short, we tend to see our opponents, as well as those who agree with us, as ideologically consistent. At the same time, we tend to feel as though we alone are privy to the nuances and difficulties of the issue.²⁴⁰ This leads to a perception of extremity and unreasonableness in those that disagree with us,²⁴¹ which hinders the potential for resolution of the actual conflict.

Social psychologists have demonstrated false polarization in a variety of contexts.²⁴² In one of the primary studies of false polarization, Robert J. Robertson and his colleagues asked pro-life and pro-choice subjects²⁴³ a variety of questions to adjudge the subjects' own views on abortion as well as the subjects' views of their pro-life and pro-choice peers.²⁴⁴ Robinson et al.

²⁴⁰ See Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 651 (“Both sides in the conflict believe that although their own views reflect the complexity, ambiguity, and contradictions of objective reality, the views of the other side have been dictated and distorted by ideology, self-interest, and other biases.”).

²⁴¹ See *id.* (“These attributions [of bias] lead the conflicting partisans to see the other side as extreme, unreasonable, and unreachable.”).

²⁴² False polarization was found in the union-management study discussed in the previous section. See Robinson & Friedman, *supra* note 147, at 324 (noting that the managers and union representatives “are prone to overestimate the ‘gap’ between the two sides”).

²⁴³ In their study, Robinson et al. were particularly interested in false polarization among partisans. Thus, subjects to their studies included members of pro-life and pro-choice student groups and individuals who identified themselves as either “strongly pro-choice” or “strongly pro-life.” Robinson et al., *supra* note 144, at 406.

²⁴⁴ *Id.* In particular, Robinson et al. presented one group of subjects with six hypothetical situations of a woman faced with the decision of whether to have an abortion. *Id.* Three of the situations were meant to be relatively sympathetic, such as pregnancy resulting from rape, while the other three were meant to be relatively unsympathetic, such as a pregnancy resulting from a casual affair. *Id.* Each subject indicated how sympathetic they felt for the woman in each case, the typicality of each hypothetical case, and the bases for their beliefs about abortion (such as moral, pragmatic, and political considerations). *Id.* They then estimated the responses that they thought the typical pro-life and typical pro-choice partisans in their college would give to the same questions. *Id.* Another group of subjects evaluated the likelihood of various possible outcomes from legal restrictions on abortion, such as abortions becoming practically available only for the wealthy and an increase in the number of adoptions and gave estimates as to various factual questions regarding

unsurprisingly found that pro-life and pro-choice subjects indeed possessed differing views on abortion. For example, pro-choice subjects were relatively more sympathetic towards women facing the decision of whether to have an abortion,²⁴⁵ and they believed that the potential negative consequences of legally restricting the availability of abortions were much more likely than their pro-life counterparts.²⁴⁶ However, both pro-life and pro-choice subjects persistently overestimated the extremity of those with whom they agreed *and* disagreed. For example, while pro-choice subjects expressed greater sympathy for women facing the decision of whether to have an abortion, pro-life subjects were significantly more sympathetic towards those same women than either the pro-choice or pro-life subjects estimated.²⁴⁷ In other words, both pro-choice *and* pro-life subjects underestimated the level of sympathy the pro-life subjects would express towards women facing the decision of whether to have an abortion.

In another study, Robinson et al. asked self-identified liberal, conservative, and moderate subjects to evaluate the truthfulness of various statements regarding the Howard Beach incident and then to estimate the typical response of their liberal or conservative peers.²⁴⁸ Consistent with Robinson et al.'s expectations, liberal subjects evaluated the Howard Beach incident in a manner slightly more negative towards the white perpetrators than did conservative subjects.²⁴⁹ However, conservative, liberal, and neutral subjects all "significantly overestimated the extent to which the conservatives would interpret the Howard Beach events in ways that blamed the Black victim and exonerated the White perpetrators."²⁵⁰ Indeed, not a single conservative subject displayed the views expected by all three subject groups.²⁵¹ This resulted in a significant

abortion such as the percentage of abortions that occur before the tenth week of pregnancy. *Id.* These subjects then estimated what they thought typical pro-life and pro-choice partisans in their class would give to the same questions. *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 408.

²⁴⁷ *Id.* at 406-07.

²⁴⁸ *Id.* at 410. In the Howard Beach incident, a black man was struck by a car while fleeing from a group of white men; some, but not all, of the man's pursuers were tried and convicted. *Id.*

²⁴⁹ *Id.* at 411.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 412. Similarly, only three of twenty-three liberal subjects displayed the interpretation expected by conservatives. *Id.*

overestimation of the differences between liberals and conservatives on this issue. And as further evidence of the attribution of bias discussed in the previous section, all subjects believed that people on *all* sides of the issue—that is, those who both agreed and disagreed with the subject—“had been heavily influenced by ideology and relatively uninfluenced by evidence.”²⁵² Robinson et al. concluded that while subjects differed in their construals of the Howard Beach incident, “the magnitude of these real construal differences was far exceeded by the magnitude of the differences assumed by the relevant partisans.”²⁵³

False polarization even infects the evaluation of the importance of our core values to those that disagree with us. Such attributions of divergent values are not uncommon in social conflict.²⁵⁴ John R. Chambers and his colleagues demonstrated as much in their studies of intergroup perception of values. In one study, Chambers et al. presented subjects with strong opinions on abortion with four value statements, two pro-life and two pro-choice.²⁵⁵ Subjects indicated their views—in favor or in opposition—towards these values and the importance of these values to their own positions.²⁵⁶ Subjects then estimated the same for an opposing partisan.²⁵⁷ As expected, the pro-life subjects rated the pro-life values to be relatively more important than did the pro-choice subjects, and vice versa.²⁵⁸ Further, pro-life and pro-choice participants differed in their actual positions on value issues.²⁵⁹

However, the subjects’ perceived disagreement did not reflect their actual disagreement. Pro-choice subjects perceived relative agreement on pro-life values and attributed the disagreement between the two sides to pro-life partisans’ lower valuation of

²⁵² *Id.* at 413.

²⁵³ *Id.*

²⁵⁴ Ross & Ward, *Naive Realism*, *supra* note 143, at 128 (“Parties involved in conflict often attribute the existing stalemate to differences in basic values and/or incompatibility of basic interests.”).

²⁵⁵ John R. Chambers, Robert S. Baron & Mary L. Inman, *Misperceptions in Intergroup Conflict*, 17 *PSYCHOL. SCI.* 38, 39 (2006).

²⁵⁶ *Id.* The values presented were “women’s reproductive rights,” “freedom from government interference in private lives,” “the value of human life,” and “a moral code of sexual conduct.” *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 39–40.

pro-choice values.²⁶⁰ Contrarily, pro-life subjects perceived relative agreement on pro-choice values and attributed the disagreement to pro-choice partisans' lower valuation of pro-life values.²⁶¹ In both of these cases, subjects overestimated the disagreement between their own side and the other side on the values that were of greatest importance to themselves.²⁶² Not only did the subjects disagree over what they actually disagreed about, but they estimated the extent of their disagreement to be much greater than it actually was.

Chambers et al. replicated this study with Republican and Democratic subjects evaluating values important to each party, namely "crime prevention," "a strong military," "funding of public education," and "eliminating social inequalities."²⁶³ Again, Republican and Democratic subjects believed that the values traditionally associated with their own party were of relatively greater importance, and subjects were relatively more favorable towards the values associated with their own party.²⁶⁴ But again, both Republican and Democratic subjects presumed that the two sides disagreed over the issues that were most important to their own side; Republican subjects believed that they disagreed with Democrats over the importance of crime prevention and military strength, while Democratic subjects believed that they disagreed with Republicans over the importance of public education and equality.²⁶⁵ Further, both Republican and Democratic subjects overestimated the degree to which they actually disagreed on the issues most important to their side.²⁶⁶ As Chambers et al. concluded, "[p]artisans seemed oblivious to the possibility that their adversaries shared many of their preferences and values, but differed primarily in how they prioritized those values."²⁶⁷

d. Naive Realism and Conflict

It is when the perception of bias in others is coupled with the illusion of our own personal objectivity that naive realism illuminates one basis for the creation, exacerbation, and

²⁶⁰ *Id.* at 40.

²⁶¹ *Id.*

²⁶² *Id.* at 41.

²⁶³ *Id.* at 42.

²⁶⁴ *See id.*

²⁶⁵ *See id.*

²⁶⁶ *See id.* at 43.

²⁶⁷ *Id.*

perpetuation of social conflict.²⁶⁸ The collision of these two considerations is apt to lead to misunderstanding and conflict between individuals and between groups. "Misunderstanding, mistrust, escalation of conflict, and unwarranted pessimism about the ability to find common ground with those with whom we disagree become likely consequences when we attribute disagreements and bias not to ordinary psychological processes but to evil strategic designs or the unique traits of our 'opponents.'"²⁶⁹

Dacher Keltner and Robert J. Robinson have tested the ability of individuals to resolve conflicts in cases of actual and assumed ideological disagreement. In one study, subjects were placed in groups of two where (1) the subjects were unaware of actual political differences between them, (2) the subjects were aware of actual political differences between them, or (3) the subjects were told that there were political differences between them when in fact there were no actual differences.²⁷⁰ The groups were then asked to allocate a hypothetical budget for various AIDs programs.²⁷¹

Keltner and Robinson found that the groups where the subjects were aware of political disagreement—actual or imagined—took longer to reach an agreement on the budget than did the groups where the group members were unaware of their actual political disagreement.²⁷² This longer time was not the result of more conscientious or nuanced negotiation; the length of the negotiation was positively correlated with perceptions that little agreement was reached and that the subject's partner was neither constructive nor cooperative.²⁷³ In addition, subjects told of actual or imagined political disagreement assumed some amount of ideological consistency in their partner's views, as they expected to disagree with the same partner on other issues.²⁷⁴ There also was no real difference between groups where the subjects were told of actual political disagreement and groups where the subjects were told of political disagreement when no

²⁶⁸ See Pronin et al., *Understanding Misunderstanding*, *supra* note 143, at 636.

²⁶⁹ Pronin et al., *Bias Blind Spot*, *supra* note 196, at 379.

²⁷⁰ Dacher Keltner & Robert J. Robinson, *Imagined Ideological Differences in Conflict Escalation and Resolution*, 4 INT'L J. CONFLICT MGMT. 249, 251 (1993).

²⁷¹ *Id.* at 252.

²⁷² *Id.* at 252–53.

²⁷³ *Id.* at 253.

²⁷⁴ *See id.*

disagreement actually existed.²⁷⁵ Even these imagined ideological differences can exacerbate and exaggerate actual social conflicts.²⁷⁶

Of course, "some conflicts *do* reflect irreconcilable differences in the parties' values, interests, needs, or objectives."²⁷⁷ Yet naive realism illustrates the very real risk of misunderstanding those with whom we disagree. And, as illustrated above, once we attribute disagreement to bias, the two sides can be driven even farther apart on a slew of other issues. This creates the perception of intractable ideological conflict and presents little hope for resolution. A better understanding of how this conflict arises, as well as how it can be mitigated, is essential to addressing all kinds of social disputes. As Lee Ross and Andrew Ward argue, "many and perhaps even most conflicts are far more tractable than they seem; . . . disputants are often constrained not by objective circumstances but by cognitive, perceptual, or motivational biases; and . . . incompatibilities in basic needs, interests, and values are often more apparent than real."²⁷⁸

2. Understanding the Perception of Partisan Judging in Judicial Politics

Consider again a male judge and female judge addressing a female plaintiff's sex discrimination case. Suppose they are sitting on an appellate panel and come to differing judgments as to the proper outcome of the plaintiff's case. The judges likely believe that they have objectively and dispassionately assessed the evidence and come to the most rational judgment based on that evidence. Yet each judge sees that his or her colleague has somehow come to the opposite judgment while looking at the same evidence. They then must somehow account for how a seemingly rational person could come to such a seemingly irrational judgment.

As demonstrated above, they are unlikely to attribute their disagreement to differences in perception. Yet differences in subjective perception might very well account for their differing judgments. Each judge is likely to have some prior beliefs about

²⁷⁵ *Id.*

²⁷⁶ False polarization, discussed above, provides another ground for such imagined disagreement.

²⁷⁷ Ross & Ward, *Naive Realism*, *supra* note 143, at 129.

²⁷⁸ *Id.*

and experiences (judicial or otherwise) with sex discrimination. Perhaps the male judge was falsely accused of sexual harassment in the past and thus, as a result, might be more doubtful of sex discrimination claims. And the female judge, after spending much of her early career in a male-dominated law firm, might be more attuned to the more subtle forms of sex discrimination in the modern workplace. These factors, as well as a wealth of others, result in a general belief towards the issue of sex discrimination. And any new information is construed in light of that belief. Thus, our judges' beliefs and experiences color the ways they perceive this new case, and they might very well come to differing construals of the case. Just as there was no one "game" for the Princeton and Dartmouth fans in the Hastorf and Cantril study, there might be no one "case" for these judges.

Instead of realizing the possible differences in subjective perception, naive realism indicates that our hypothetical judges will likely attribute their disagreement to the distorting influence of bias on the other judge. While each would likely see his or her own gender and experience as an enlightening influence, they are likely to see the other judge's as a source of bias. While the male judge thinks his gender allows him to dispassionately assess the case, he perceives his female colleague's gender and past experience as blinding her to the reality of the case. And the female judge would think similarly. Yet neither judge's experience has blessed him or her with the ability to assess the case dispassionately; they are both biased.

Because both of our judges perceive that their colleague is biased in his or her decision, they are unlikely to come to any sort of resolution of their disagreement. Particularly when the issues are controversial, our judges might falsely polarize and see their colleague as irrational across a number of issues.

Naive realism thus might illustrate what is really going on in some of the cases where politicians, academics, public figures, and even other judges accuse judges of deciding a case solely on policy preferences. These accusations stem from disagreement between how the judge acted and how the accuser thinks the judge should have acted. And instead of being based on actual disagreement, these accusations often imply improper biased behavior (deciding ideologically, imposing policy preferences, etc.). That is, the judge decided the case a certain way only because she is a woman, Republican, Catholic, etc.

Yet naive realism indicates that these accusations are often misplaced. While perhaps containing some accuracy about how a particular characteristic of the judge influenced her subjective perception, such accusations ignore the possibility of differing subjective perception. Those making such accusations implicitly assert that they have objectively and dispassionately assessed the case and come to the most rational judgment on its proper outcome. What they fail to realize is that the judge might perceive a case differently, yet at the same time the judge would believe that her perception is objective. Thus, while one person might see a judge as illegitimately deciding a case in line with that judge's political preferences, that judge might have subconsciously perceived and construed the relevant facts and law such that the decision was instead a vote for what the judge sincerely believed to be the only proper outcome. Just like the judges themselves, those that accuse judges of biased decisions are subject to the same distorting influence of bias, and they too are not privy to an objective assessment of the world.

This is not to say that actual disagreement does not exist. It undoubtedly does. Even in cases where we wrongly perceive those that disagree with us to be extreme and significantly influenced by bias, there is likely some actual basis for disagreement. But the negative manifestations of naive realism prevent us from recognizing and appreciating the actual grounds for disagreement. Instead of realizing that we share much in common with those that disagree with us, and perhaps differ only in the way we have prioritized shared values, we see our opponents as ideologues. This frustrates the potential for resolving the existing conflict. In a similar vein, I am not saying that judges never engage in the illegitimate behavior they are accused of, but I suspect it is likely not nearly as common as these accusations would have one believe.

D. A Note on Dissensus, Collegiality, and Overcoming Naive Realism

While the above discussion of disparities in perception leading to intractable conflict might indicate that we should expect widespread dissensus on the courts of appeals, any casual observer of the courts knows that such dissensus is the exception more than it is the norm. Yet this is not necessarily the case; naive realism does not inevitably lead to dissensus. First, as

discussed above, it is likely that in many cases judges' common experiences lead them to subjectively perceive a case in the same way, or at least similarly enough that there is no significant disagreement in the proper outcome. Thus, differences in subjective perception that lead to conflict are not necessarily found in every case.

The courts of appeals, though, also have a unique institutional factor that aids them in overcoming dissensus. Namely, the collegial environment of the courts of appeals is very much the kind of environment suited to overcome the adverse effects of naive realism. Robinson et al.'s research "suggests the value of candid, relatively informal discussions (and of developing personal relations and settings that encourage such candor), discussions in which participants talk about their factual assumptions and the complexities of their values rather than simply defending their positions."²⁷⁹ The little research on the subject has indicated that such frank and open discussion is important in overcoming conflict stemming from naive realism. After finding evidence of exacerbated social conflict from imagined ideological differences, Keltner and Robinson tested whether individuals with "extreme ideological differences"²⁸⁰ could better resolve conflict after openly discussing their actual views. In one study, opposing subjects recruited from college pro-abortion rights and anti-abortion rights groups were placed in groups of two and asked to identify items of agreement on five issues related to the abortion debate.²⁸¹ While all groups were informed of their partners' actual disagreement on abortion, some groups were given time before the task to "describe the values that are most central to [their] position on abortion."²⁸²

Keltner and Robinson found that subjects who discussed their values before beginning the task reached more comprehensive and integrative agreements and saw their

²⁷⁹ Robinson et al., *supra* note 144, at 416; *see also* Robinson & Friedman, *supra* note 147, at 324 (noting "the value of facilitated candid discussions, in which participants are guided through talking about their factual assumptions and the complexities of their values, rather than simply defending their positions").

²⁸⁰ Keltner & Robinson, *supra* note 270, at 253.

²⁸¹ *Id.* at 254. The five issues were (1) "whether or not the fetus should be tested for viability," (2) "the acceptable grounds for having an abortion," (3) "the status of public funding of abortion," (4) "provisions for informed consent," and (5) "the legitimacy and potential role of parental consent." *Id.*

²⁸² *Id.*

partners as more cooperative than the groups that did not discuss their values.²⁸³ Keltner and Robinson concluded that individuals could counteract imagined ideological difference by disclosing their actual views before discussing the relevant issue.²⁸⁴ They ultimately recommend that partisans involved in ideological conflicts, “first, avoid attaching ideological labels to opponents, issues, or positions; and second, when ideological differences are relevant to the negotiation, as they inevitably can be, ensure that both sides inform each other of their actual views.”²⁸⁵

Thus, even in cases of differing subjective perception, actual ideological agreement, and the potential for false polarization and conflict, open and amicable discussion of real values and views can overcome the potentially debilitating effect of naive realism. Thus, where such interaction occurs, we can expect that the negative manifestations of naive realism will be eliminated or at least mitigated. Further, if such conditions are absent or break down, we can expect the negative manifestations of naive realism to surface.

As we have already seen, naive realism can explain how two judges can come to different judgments of the proper outcome for the same case. Further, naive realism can help us understand when and why these judges can disagree and accuse each other of engaging in illegitimate behavior. Finally, we have also seen how naive realism can explain the relation between political party and judicial decision. In this final section, I briefly argue that the collegial environment of the courts of appeals plays a significant role in overcoming the negative manifestations of naive realism. That is, the collegial environment of the courts of appeals explains, at least in part, why judges agree so often.

Collegiality has gone relatively unexplored in the judicial politics literature.²⁸⁶ However, a few authors have discussed the role that collegiality might play, as well as described the

²⁸³ *Id.* at 255.

²⁸⁴ *Id.* at 259.

²⁸⁵ *Id.* at 260.

²⁸⁶ See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1641 (2003) [hereinafter Edwards, *Effects*] (noting that “discussions of collegiality, mostly by judges, have been brief and suggestive, usually introduced only in passing”).

characteristics of a collegial court.²⁸⁷ As former Chief Judge Harry T. Edwards defined collegiality:

[J]udges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.²⁸⁸

In collegial environments, “divergent views are more likely to gain a full airing in the deliberative process—judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached.”²⁸⁹ Judges in a collegial environment “can admit and recognize their own and other judges’ fallibility and intellectual vulnerabilities.”²⁹⁰ They engage in “careful, collective exploration and consideration of the different views of each judge,” allowing “judges accurately and honestly, and without hesitation, to identify what is common ground and what is not, all . . . while remaining open to revising their views.”²⁹¹

Some of the judges that have spoken on the issue indicate that their courts have such collegial interaction. Again, Judge Edwards has been a vocal proponent of the influence of collegiality, arguing that it plays a central role in appellate decisionmaking.²⁹² The judges on his court “spend a great deal of time listening to each other’s views and considering arguments each of [them] makes.”²⁹³ They “listen[] to and tak[e] seriously the views of [their] colleagues” and approach these exchanges “respectfully” and “with open minds.”²⁹⁴ They “deliberate with

²⁸⁷ Edwards, *Collegiality*, *supra* note 15, at 1359. For a sample of such discussions, see sources cited in Edwards, *Effects*, *supra* note 286, at 1641 n.10.

²⁸⁸ Edwards, *Effects*, *supra* note 286, at 1645 (footnote call numbers omitted).

²⁸⁹ *Id.* at 1646.

²⁹⁰ *Id.* at 1650.

²⁹¹ *Id.* at 1651.

²⁹² Edwards, *Collegiality*, *supra* note 15, at 1358–60.

²⁹³ *Id.* at 1360.

²⁹⁴ *Id.* at 1361.

one another, and are affected by that deliberation in valuable ways."²⁹⁵

Other studies of judges have found similar views. In his study of the Second, Fifth, and D.C. Circuits, J. Woodford Howard, Jr. found that the judges felt "that either sufficient collegiality existed on the courts or as much existed as could be expected under current circumstances."²⁹⁶ While the judges indicated a desire for more collegial deliberation to improve written opinions, they were satisfied with the amount of collegiality when it came to decisions.²⁹⁷ Even on the then-immense Fifth Circuit,²⁹⁸ judges worked together to come to their decisions. Judges on the Fifth Circuit circulated slip opinions before publication, and "[c]ertain judges took it upon themselves to criticize slip opinions in order to iron out errors and inconsistencies."²⁹⁹ These criticisms would result in "an exchange of views among interested members."³⁰⁰ And when a judge on the Fifth Circuit would reverse course midway through an opinion, they would, as one judge put it, "burn the phones up."³⁰¹

These conditions described by Judge Edwards and others are exactly the kind that can lead to two parties recognizing actual causes of disagreement and preempt the misattribution of bias. As Ross and Ward argue, it is not until two parties "carefully and explicitly probe their two divergent sets of assumptions and construals" that they will come to realize that they have indeed responded to, effectively, different events.³⁰² "Even if such discussions do not lead to consensus about policy, they could at least reduce stereotyping (by neutral observers as well as by the partisans themselves) and allow the partisans to see the other

²⁹⁵ *Id.* at 1370.

²⁹⁶ J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 211 (1981). However, one judge did indicate that the courts were "pretty individual, not collegial." *Id.* at 220.

²⁹⁷ *See id.* at 211 ("[N]o one thought that insufficient deliberation led to faulty decisions.").

²⁹⁸ Howard completed his study before the 1981 split of the Fifth Circuit into the Fifth and Eleventh Circuits. *See id.* at xix n.a.

²⁹⁹ *Id.* at 216.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 215 (quoting an interviewed judge).

³⁰² Ross & Ward, *Psychological Barriers*, *supra* note 143, at 278.

side as less of an unreasoning, unreasonable, ideologically driven monolith."³⁰³

Further, dissensus can be understood if there is a lack of collegiality when particular issues arise. As Judge Edwards has stated, judges in an uncollegial environment may "tend to follow a 'party line' and adopt unalterable positions on the issues before them. This is especially true in the hard and very hard cases that involve highly controversial issues."³⁰⁴ If collegiality is lacking on a court, among certain judges, or even breaks down in particular cases, the open exchange of views that mitigates naive realism will be hindered and dissensus becomes more likely.

Thus, one takeaway from the judicial politics research might be the need to encourage collegiality in the courts of appeals. This encouragement could take many forms. Perhaps most obviously would be placing a premium on the personality of judicial nominees. We would want judges that have the ability to engage with their colleagues and be open to the give and take of collective decisionmaking. Indeed, naive realism suggests that our judges should have a healthy humility as to their confidence in their judgments.³⁰⁵ Regardless of how much they might think they have made a rational judgment based on objective evaluation of all relevant evidence, there is always the possibility that the subjectivity of their perception has somehow biased their judgment. By embracing this uncertainty and then looking to the judgments of their colleagues, judges might better be able to address the issues before them.

Further, while some judicial politics scholars have suggested reforms to the structure of appellate panels to ensure that all panels are "ideologically mixed," we might instead want to look to reforms that encourage collegial interactions between our judges. One danger of making sure that every panel contains a Republican judge and a Democratic judge is that, once given these labels, the judges will act much more like a stereotypically Republican or Democratic judge. Instead of mixing panels,

³⁰³ Robinson et al., *supra* note 144, at 416.

³⁰⁴ Edwards, *Effects*, *supra* note 286, at 1645.

³⁰⁵ This approach thus might complement other work that has suggested the importance of judicial humility. See CASS R. SUNSTEIN, RADICALS IN ROBES 27–30, 35 (2005) (presenting minimalism as a humble approach to the law); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 799 (2003) (arguing for the value of humility in judging).

legislation to reform appellate courts might instead aim to create smaller circuits with fewer judges to encourage repeated interaction, investigate technology that would further bridge the geographic gaps between judges, or even consolidate the chambers of circuits so that judges work in the same building and hopefully interact more often. These are, of course, merely suggestions at this point, but if collegiality does have such a strong value in encouraging positive deliberation and decisionmaking, then they are worth investigating further.

CONCLUSION

The recent entry of the empirical study of judicial decisionmaking into legal scholarship is an important development and one that has great potential for illuminating a number of traditional legal debates. However, as I have shown, judicial politics' understanding of judicial behavior is somewhat dubious. By taking a psychological approach to judicial behavior, we might better understand how our judges decide cases. With that knowledge, we can then explore the normative implications of actual judicial behavior.

Such a psychological approach can also inform existing ways of exploring judging. Indeed, on a general level, the insights of naive realism into judging are similar to insights suggested by a variety of approaches to the law. What a psychological approach brings to such discussions is a more formalized, empirical basis for such theorizing.³⁰⁶ For instance, the evidence of inevitable individual subjectivity supports criticisms of the possibility of determinacy or certainty in law. The need to recognize the subjectivity of perception bolsters arguments that judges should be conscious of the perspectives they take in approaching cases.³⁰⁷ Naive realism further indicates that the approach of the more

³⁰⁶ Cf. Simon, *Psychological Model*, *supra* note 8, at 25 (offering a psychological model of judicial decisionmaking that "incorporate[s] some of [Duncan] Kennedy's insights into a more formal structure, that is cognitively realistic and based, at least in part, on empirical findings"). Complementing fields such as legal realism, critical legal studies, and law and postmodernism with empirical and theoretical insights of social psychology is also in line with the general suggestion of the behavioral realists that law and legal decisionmaking should be based upon behavioral assumptions drawn from the social sciences. See *supra* text accompanying note 5.

³⁰⁷ See generally Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

“idiosyncratic” legal realists might not be as easily dismissed as some recent scholarship has suggested. These are only a few of the ways in which a better understanding of judicial behavior might inform the way we approach judging and the law.

