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Cynical Realism and Judicial Fantasy

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CYNICAL REALISM AND JUDICIAL FANTASY

DANIEL HINKLE*

ABSTRACT

Recent scholarship on the workings of the court system has cast doubt on the ability of judges to make neutral, unbiased decisions. Statistical analyses of judicial decisions have identified a sizable minority of decisions that appear to be influenced by a judge's ideology. These findings have fueled a "neutrality crisis" regarding the courts system's ability to live up to its role as a neutral arbiter. Naïve realism accounts for this ideological bias by suggesting that judges, as humans, are subject to the same sort of perception biases as anyone else and that these unconscious biases can affect their decisions. By locating the source of the "neutrality crisis" in the unconscious, these scholars seek to account for the findings of the political scientists, while maintaining the legitimacy of the current institutional structure. However, this response is cynical. Cynicism anticipates the revelation of some real truth that undermines the ideology supporting the social fabric of society. By framing politically derived decisions as a product of naïve realism and offering advice on how to obscure unconscious judicial bias, legal scholars are employing cynical reasoning to maintain an illusion of neutrality while justifying non-neutral decision-making. This cynical reasoning sacrifices long-term "Rule of Law" interests for the sake of short-term political stability—an unnecessary and detrimental tradeoff. This Note seeks to isolate this issue and offer an alternative solution to the neutrality crisis informed by the latest findings from cognitive psychology and behavior economics. Judges must cultivate an independent ideology that is self-conscious of any personal biases and seeks to overcome those biases so that they may engage legal questions with a more detached, reasoned, and just decision-making process. This method will lead to more neutral, unbiased decisions from the bench and strengthen the rule of law in the United States.

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I. INTRODUCTION

The way judges decide cases is profoundly important to the way society is organized and the perceived legitimacy of the law in a society. It is ingrained in our collective conscious that one of the most fundamental forms of freedom that liberal constitutionalism secures for its citizens is the promise that government will not impose legal obligations that presuppose adherence to a moral or political orthodoxy.¹ In the United States, institutional scaffolds do much to structure the decision-making logic in a particular way that seeks to ensure this neutrality. However, recent scholarship on the workings of the court system has called this presupposition into serious doubt. Statistical analyses of judicial decisions from the field of “judicial politics” have identified a sizable minority of

1. Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 6 (2011). See also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

decisions that appear to be influenced by the judge's ideology.² These findings have fueled a neutrality crisis regarding the courts system's ability to live up to its role as a neutral arbiter.³

This crisis first sparked a dialogue about whether judges were consciously abdicating this responsibility to neutrality and imposing their ideological preferences on society. The so-called "attitudinal model" posits "judicial decisionmaking as determined by the attitudes or preferences of individual judges, whose votes in particular cases reflect their sincere policy preferences largely unconstrained by legal precedent."⁴ In this view, the Law⁵ is reduced to a means for implementing the policy preferences of individual judges. The use of the "Law as a Means to an End" is a serious charge that opens the judiciary to the charge of being a political branch—a charge that has the potential for undermining the rule of law and our system of governance.⁶

This view has been successfully transcended by a law and psychology movement that has classified this sort of decision-making as the product of naïve realism⁷ and motivated cognition.⁸ These theories posit that, while a judge's individual policy preferences may affect judicial decision-making in hard cases, this sort of biased, ideologically-driven decision-making is not evidence of judicial manipulation. Rather it is because the law does not supply answers to all questions, judges must fill in the gaps, and judges are humans who are subject to the same sort of perception biases as anyone else. Any potential disagreement regarding how the judge interpreted the law is a product of differing subjective perceptions—not objective evidence of judicial manipulation. While it is argued that this bias still undermines judicial impartiality, proponents counter that, even if any unconscious judicial beliefs *do* affect their decision-making capabilities, there is nothing we can do about it and therefore we should not be

2. See Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 235 (2009).

3. Kahan, *supra* note 1, at 4–6 (describing the "neutrality crisis").

4. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007). See also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 92–94 (2002) (elaborating and defending the "attitudinal model," which holds that Supreme Court decisions reflect ideological attitudes and the values of the Justices).

5. I use the capitalized "Law" to refer to law writ large—as in the absolute the concept of the Law (which, by no means, is fully defined but I take the basic assumption that everyone has some idea as to what the Law is in an abstract understanding). I use the lowercase "law" when referring to a particular legal regime or law on the books.

6. See generally BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END* (2006).

7. See Lammon, *supra* note 2.

8. See Kahan, *supra* note 1, at 6–7.

concerned.⁹ Instead, scholars should focus on finding ways to obfuscate any ideological bias influencing the judge's decision. Thus, naive realism seeks to account for the findings of the political scientists, while maintaining the legitimacy of the current institutional structure.

This response is *cynical*. Cynicism anticipates the revelation of some real truth that undermines the ideology supporting the social fabric of society. It accounts for the distance between “reality as it truly is” and the “social reality as determined by ideology” so as to render the revelation impotent.¹⁰ Cynicism is a prop to the political order, protecting it against the “new knowledge” that constantly assails the symbolic-institutional structure that orders social reality. In this case, by framing politically derived decisions as a product of *naïve realism* and offering advice on how to obscure unconscious judicial bias, legal scholars are employing cynical reasoning to maintain the illusion of neutrality. This cynical reasoning sacrifices long-term “Rule of Law” interests in the name of short-term political stability—an unnecessary and detrimental tradeoff.

The goal of this Note is twofold. First, it attempts to illustrate that the naïve realist response to the charges that judges are politicians in robes has been cynical. Second, it explores the implications of this cynicism in the development of a coherent solution to the “neutrality crisis” facing the court system today. As an initial matter, this Note frames the neutrality crisis as a crisis on two fronts: one, the charge of the informed-academic community that judges do not decide cases neutrally, and two, the charge of the polity that judges do not decide cases neutrally. The Note goes on to illustrate how the cynical response offered by legal academics works well to address the charge from the polity while neglecting the academics. These problems pose a long-term threat to the sustainability of our political order. In addition, the Note draws lessons from cognitive psychology—particularly the work of Daniel Kahneman—to show that judges do not need to be cynical about decision-making. I hope to provide judges with concrete advice on how they may create an *independent ideology* that is self-conscious of their innate ideological stance so that they may engage legal questions with a more detached, reasoned, and just decision-making process.

9. See TAMANAHA, *supra* note 6, at 242 (“Nothing can be done about the subconscious springs of human intellect”).

10. SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 28 (1989) [hereinafter ŽIŽEK IDEOLOGY].

II. IDEOLOGY, OR *SIE WISSEN DAS NICHT, ABER SIE TUN ES*

If a man is offered a fact which goes against his instincts, he will scrutinize it closely, and unless the evidence is overwhelming, he will refuse to believe it.

If, on the other hand, he is offered something which affords a reason for acting in accordance to his instincts, he will accept it even on the slightest evidence.

—*Bertrand Russell*

Ideologies are “intellectual efforts to rationalize the behavioral pattern of individuals and groups.”¹¹ There are three basic aspects to ideology. First, ideology is worldview that simplifies decision-making.¹² Second, this worldview is “inextricably interwoven with moral and ethical judgments about the fairness of the world.”¹³ Third, individuals alter their ideological perspective when their experiences are inconsistent with their ideologies.¹⁴ Hence, an individual’s ideology is that individual’s subjective perceptions about the way the world *is* and how *it ought to be*. It serves as a heuristic to guide behavior and attitudes to novel situations and everyday life.

The content of ideology is the background framework from which individuals must act. This framework has been termed the level of ideological fantasy—“the level on which ideology structures the social reality itself.”¹⁵ Ideology, as Marx articulated it, is “*Sie wissen das nicht, aber sie tun es*,” which is translated: “they do not know it, but they are doing it.”¹⁶ Ideology defines and sustains a given set of social relations. Marx employed this formula to try to illustrate that the proletariat was laboring under a “false consciousness” in bourgeoisie nationalistic capitalism, a consciousness that must be thrown off to see reality itself—to understand the world as it “really is.”¹⁷ However, it has come to be

11. DOUGLASS NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 48 (1981) [hereinafter NORTH, *STRUCTURE*].

12. *Id.* at 49. E.g., Adam is a Democrat; Democrats support a progressive income tax; and therefore, Adam will support a progressive income tax.

13. *Id.* E.g., Adam believes that progressive income taxes are good. This example also illustrates that the “proper” distribution of income is an important part of ideology.

14. *Id.* E.g., Adam worked hard to make earn enough money to be part of the top income tax bracket and the progressive income tax requires me to pay a higher share of my income in taxes together cause me to reconsider my identity as a tax-and-spend Democrat.

15. ŽIŽEK, *IDEOLOGY* *supra* note 10, at 28.

16. *Id.*

17. *Id.*

understood that this unmasking is a fallacy itself—ideology can never be “thrown off” because reality itself can never be directly apprehended, it cannot be reproduced without a level of ideological fantasy.¹⁸

Because the concept of ideological fantasy is counterintuitive, a sample framing is necessary. First, even at the base level of raw perceptual awareness, “reality itself” is incomprehensible. From an anatomical design perspective, we are unable to directly apprehend and make sense of the boundless perceptual stimuli constantly bombarding our senses. Most of these stimuli are completely ignored, some are comprehended unconsciously, and even less are consciously recognized. These parts that we are conscious of are formed together and experienced as if we live in a simple, seamless universe. Second, the same is true for constructed narratives of our existence. Our self-narratives are contradictory, incomplete, and, occasionally, paralyzingly puzzling upon introspection. What we do know about ourselves is dwarfed by what we do not. Our motivations, passions, and sparks for action emanate not from logical analysis but from a wellspring of unconscious factors that overwhelm our conscious capacities.¹⁹ They all interact to create our perceptions, shape our analysis, and cause both our unconscious and conscious actions. It is this underlying background of *unknown knowns*—the “unconscious” forces—that forms the level of ideological fantasy.²⁰

Social reality and the “world we live in” are built (at least partially) upon the complex interaction of billions of human beings all with their own unique living, breathing brains shaping the way they understand the world.²¹ Thus, understanding the way ideology works is essential to the understanding of how social, political, and economic institutions remain

18. *Id.* Thus, Marx’s utopian understanding of the relation of labor to capital is also a “false consciousness,” because its foundations rest on a level of ideological mystification—a level of normative values about the way the world is and should be.

19. Such factors should include: the language we think in and its grammatical constraints, our diet, sleep, and hormonal patterns, what is and is not available to be recalled from our memory, and a myriad of other elements.

20. *THE REALITY OF THE VIRTUAL* (Ben Wright Film Prods. 2004). In this lecture/documentary Žižek highlights the statement by Donald Rumsfeld about epistemological categories—“[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—there are things we do not know we don’t know.” He then turns to the fourth and unmentioned category—the unknown knowns. The unknown knowns are the things we do not know that we know, the unconscious, and Žižek cautions that it is important to keep this category in mind when thinking about who we are and how we act.

21. This is just a starting point of course. I am certainly undervaluing the impact other animals and objects (animate and inanimate) have in structuring our daily existence. For one example, see the documentary *OBJECTIFIED* (Plexi Prods. 2009).

stable and viable through time. Institutions, in North's terms, are the rules of the game—the basic framework within which human beings interact or the humanly designed constraints placed on choices.²² The institutional structure that governs our interactions can be described as the “social order.”²³ It is the social order that mediates the relationships between the subject and other subjects.²⁴ This social order informs our belief structure at the level of ideological fantasy because it limits access to beliefs about the way the world *is* and *should be*.²⁵ Because of the complications introduced above and the natural complications inherent in the world itself,²⁶ no belief system could ever be completely accurate in its depiction of the world around us.²⁷

A shared belief, or consensus ideology, in the legitimacy of the social order increases cooperation and lowers compliance costs because individuals are more likely to engage in first-person enforcement of the rules of the game.²⁸ In a self-reinforcing style, institutions generate behaviors by structuring incentives in certain ways.²⁹ These repeated behaviors give rise to beliefs about how the world works, which beliefs reinforce the institutions that generated them in the first place.³⁰ The legitimacy of the institution fosters cooperation, and limits the opportunities and incentives for shirking or opportunism.³¹ However, as diverse ideologies evolve, different groups may view the institutional arrangement differently—as unfair and illegitimate because it works against their interests.³² In such a case, resources must be invested into convincing those holding divergent beliefs that the institutions are fair and legitimate so as to maintain cooperative norms.³³ In addition, rules must be

22. NORTH, STRUCTURE, *supra* note 11, at 49.

23. DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS 29 (2009) [hereinafter NORTH, VIOLENCE].

24. *See generally* IDEOLOGY, *supra* note 10, at 28–36.

25. NORTH, VIOLENCE, *supra* note 23, at 29.

26. Of course here I am talking about the level at which the basic laws of physics, chemistry and biology constrain the possible ways of interacting and being.

27. NORTH, VIOLENCE, *supra* note 23, at 28. While I recognize that this statement is a strong claim that North has made, I do not plan to address directly the question of whether it is possible that someone *could* have an accurate, or even “correct,” depiction of the world as it “really is.”

28. NORTH, STRUCTURE, *supra* note 11, at 53.

29. NORTH, VIOLENCE, *supra* note 23, at 29.

30. *Id.*

31. NORTH, STRUCTURE, *supra* note 11, at 53–54.

32. *Id.* at 56.

33. *Id.*

formalized and compliance procedures developed with an eye towards the costs of detecting and punishing violations.³⁴

Thus, an ideological framework that holds the judiciary as a legitimate institution is essential for maintaining order with its own set of internal rules (formal and informal) governing its structure and operation. The judicial branch is responsible for determining the formal rules of society.³⁵ Maintaining a stable social order requires cooperation and a willingness to comply with the law.³⁶ In a symbolic sense, the judge signifies the Law and, occasionally really does determine it.³⁷ Therefore, the perceived legitimacies of the judge and the court are important signs that the Law itself is legitimate, which in turn fosters a willingness to comply with it. This behavioral pattern derived from the perceived legitimacy of the Law can be called a “rule of law norm.” Accordingly, any affront to this legitimacy may also lead to a decrease in the rule of law norm.

A. *Naïve Realism*

This concept of ideology—that ideology is an individual’s subjective perceptions about the way the world *is* and how *it ought to be*—is broader than the one commonly articulated by legal scholars. Bryan Lammon, in his article *What We Talk About When We Talk About Ideology*, lays out his reading of judicial politics scholarship’s use of the term ideological and its meaning.³⁸ Lammon describes “judicial politics scholars” as political scientists who, by studying the courts, seek to uncover the determinants of judicial decisions empirically and have conceived of ideology in partisan,

34. *Id.*

35. See generally *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”

36. NORTH, STRUCTURE, *supra* note 11, at 53–54.

37. See John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 WASH. U. J. L. & POL’Y 131, 142 (2008) (“Occasionally, Judges really do decide cases and determine what the Law is, even though the greatest impact is the number of potential cases that were avoided because of the symbolic function of the Law and the regularity of its decisions allows for actors to incorporate the likely consequences should they go in front of a Judge. (i.e., in deterring a crime, in negotiating a settlement before filing a claim, etc. . . .)”).

38. Lammon, *supra* note 2.

political terms.³⁹ In developing the attitudinal model of judicial decision-making, these scholars tend to explain ideology along a simplistic Democrat versus Republican political leanings model.⁴⁰ Early scholarship portrayed judges as influenced by a number of different “extra legal” factors, but not necessarily as partisans.⁴¹ Later political scholarship abandons this pluralistic framework of judicial fallibility and focuses on the distinctly partisan nature of judicial decision-making.⁴² Overall, the legacy of this scholarship conflates the terms “political” and “ideological”; hence, the influence of the strict attitudinal model maintains “an image of the judiciary that is ambiguously political at best and pejoratively partisan at worst.”⁴³

This perception of judges as political actors has come under sharp rebuke in recent years from legal scholars on two fronts. First, the attitudinal model has been charged with not adequately taking into account legal doctrine and norms.⁴⁴ This positivist approach emphasizes that the vast majority of decisions are reached by following legal precedent, but in some cases discretionary determinations are unavoidable or inherent parts of the law.⁴⁵ If the political worldview of the judge dominates in these decisions when no clear legal rule exists, then so be it.⁴⁶ Second, the attitudinal model fails to take into account the fact that judges are human, and therefore judges are subject to the same biases and flaws that all humans are susceptible of when making decisions.⁴⁷

This psychological approach provides a powerful theoretical model of decision-making that critiques the attitudinal model, while accounting for the empirical findings of judicial politics scholarship.⁴⁸ Naïve Realism is the psychological theory that life is inherently subjective and that, in making decisions, each individual may be influenced by different

39. *Id.* at 233–37.

40. *Id.* at 256–62.

41. *Id.* at 255 (“Perhaps the findings of early judicial politics scholarship can best be summed up on the oft-repeated adage that judges are human.”).

42. *Id.* at 256–62.

43. *Id.* at 262.

44. Kim, *supra* note 4, at 404 (“The simplest explanation for lower court compliance is that judges have legal preferences independent of their political preferences. More precisely, even if judges care about whether the outcome in a given case advances their preferred policy, they likely care about whether it conforms to legal norms as well.”).

45. *Id.* at 385.

46. *Id.*

47. See Lammon, *supra* note 2; Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

48. Lammon, *supra* note 2, at 262.

cognitive, perceptual, and motivational biases.⁴⁹ Further, individuals will often believe their judgments are the most objective and rational ones out of a given choice set.⁵⁰ In addition, individuals believe that those who disagree with them are most likely influenced by some cognitive or perceptual bias when they make an alternative decision.⁵¹ Thus, individuals attribute decisions made by others to cognitive biases, while simultaneously believing that when faced with similar decisions they are able to rise above their own cognitive biases and prejudices to make a truly rational decision.⁵² Essentially, individuals are blind to their own perceptual or cognitive biases, but not those of others.

This theory has been supplemented with the introduction of *motivated reasoning*. Motivated reasoning is the “unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.”⁵³ One such goal extrinsic to the formation of accurate beliefs is *identity protection*.⁵⁴ Individuals often define themselves by the groups of which they are members.⁵⁵ When such a group is threatened with a proposition that critiques the group or a group belief, thus harming the individual by reducing the social standing or self-esteem that person enjoys by virtue of the group’s reputation, individuals engage in identity-protective cognition.⁵⁶

Naïve realism, motivated reasoning, and identity protection provide a theoretical model for how decisions are made and the hazards accompanying such tasks; *cultural cognition* brings this theoretical model full circle. Cultural cognition is the theory that individuals tend to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews.⁵⁷ “Cultural worldview” is a synonym for ideology; the theory posits that ideology plays a prominent place in our political lives.⁵⁸ Individual and group differences influence beliefs about how the State should best attain the secular goods of safety, health, security, and

49. *Id.* at 271.

50. *Id.*

51. *Id.* at 272–80.

52. *Id.* at 278–80.

53. Kahan, *supra* note 1, at 19.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 23 (“Cultural cognition refers to the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews. Cultural worldviews consist of systematic clusters of values relating to how society should be organized.”).

58. *Id.* at 23–27.

prosperity.⁵⁹ Differences in ideology trigger identity-protective cognition. Naïve reasoning is the standard response as parties go back and forth over “facts” surrounding and supporting their beliefs.⁶⁰ This response typically manifests itself in the form of competing empirical, welfare-oriented arguments that tends to generate cycles of “recrimination and resentment.”⁶¹

Naïve legal realism is the theoretical model applied to judicial decision-making. It is the most generous theory to date for describing the underlying psychological mechanisms that play out in judicial decisions and explaining the empirical findings of judicial politics scholarship. However, the implications of this theory jeopardize the Court’s legitimacy. At face value, it tends to describe this back and forth as an inevitable byproduct of differing worldviews and suggests that judges are unable to escape making decisions along ideologically-derived lines. As a truly liberal institution, the Court’s role is to be the enforcer of the State’s “obligations to count every citizen’s preference in the democratic-lawmaking calculus but to refrain from imposing a collective vision of the best way to live.”⁶² Thus, the implication is that judges are unable to live up to their obligations because their decisions are inescapably premised on their vision of the best way to organize society. While naïve legal realism critiques and dispenses with challenges that a judge’s political and policy preferences determine his or her votes in individual cases, it does nothing to address the underlying charge that, occasionally, judicial decisions are made based on the judge’s political beliefs.

The normative implications of this fact are not readily apparent at this level. Some scholars see this truth as unchangeable,⁶³ while others do not view it as problematic,⁶⁴ and still others see it as an essential feature of our constitutional process.⁶⁵ Some theorists tend to believe that structural

59. *Id.*

60. *Id.*

61. *Id.* at 26. The “debate” over the effects of anthropogenic climate change offers a good example of how diametrically opposed interest groups can engage in such a back and forth over what would presumably be “objectively” determinable facts. When each side brings its own facts to the table, and refuses to acknowledge the legitimacy of an opponent’s facts, a cycle of recrimination and resentment is perpetuated. This example further illustrates the pitfalls of such a debate for the party proposing political changes: for over 40 years we have debated whether and how much CO2 emissions affect the climate with virtually no progress on addressing the potential problem that increased atmospheric CO2 may pose.

62. *Id.* at 4.

63. See TAMANAHA, *supra* note 6, at 242 (“Nothing can be done about the subconscious springs of human intellect”).

64. See generally Kim, *supra* note 4.

65. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L.

features of our national system of governance keep the court in check.⁶⁶ Yet other scholars have recognized that this distance between what judges *say* they do and what they *actually* do is troubling for our system of government.⁶⁷ The responses from this group of scholars have not been to challenge the courts biases, nor have they articulated how and why neutrality should find root within the court. Instead, these scholars have proposed either structural changes in the way the court is organized in order to minimize dissensus,⁶⁸ or rhetorical changes in the way the court communicates its decisions to minimize the impact of this political reasoning.⁶⁹ Implicit in these arguments is the notion that the gaps between what judges say they do and what they really do must be obscured as best as possible.

B. *The Two Fronts in the Neutrality Crisis*

Non-neutral judicial decision-making, as I have described it, resonates on two fronts. First, among judicial scholars, non-neutral decision-making is mostly accepted and treated as a curiosity. Scholars seek to develop an accurate positive model for judicial decisions by employing empirical studies and cognitive theory to develop a model of judicial decision-making that takes such non-neutral biases into account. The idea that judges made decisions solely based on reasoning from prior law—reasoning described as “legalism” or “formalism”—is universally mocked.

REV. 549, 563, 565 (2009) (“When courts exercise judicial review to strike down laws, they often work in cooperation with the dominant national political coalition” and “They are active participants in the national political coalition of their era.”).

66. *Id.* at 566 (Noting that “institutional and structural elements in the political system tend to hem in judicial constructions” and pointing to professional legal culture, the symbolic relationship between courts and the political branches, and control over the appointment process as guarantees that judicial innovations are likely to occur only within certain boundaries); Tamanaha, *supra* note 6, at 242 (2006) (Rule bound decision-making keeps justice in check); *see generally* Kim, *supra* note 4 (Noting the discretion in the lower courts decentralizes authority and that power diffused within the layers of Court authority counteracts any select group of judges authority to enforce their policy preferences as Law).

67. Kahan, *supra* note 1, at 6.

68. Lammon, *supra* note 2, at 302 (2009) (proposing smaller circuits and fewer judges to encourage collegiality). Dissensus is defined as “widespread disagreement” in MERRIAN-WEBSTER, but their term is much richer than that. I understood it to be the opposite of a consensus—a division in or opposition to the common understanding. In searching for a more appropriate definition, I came across Jacques Ranciere’s statement of dissensus as “a division inserted in ‘common sense’: a dispute over what is given and about the frame within which we sense something is given.” JACQUES RANCIERE, *DISSENSUS: ON POLITICS AND AESTHETICS* 69 (2010).

69. Kahan, *supra* note 1, at 6 (encouraging Judges to employ aporia and affirmation in writing legal opinions to minimize identity protective cognition).

However, among the population at large—“We the People” to put it in Constitutional terms—judicial neutrality is still hailed as an essential feature of our constitutional republic. A non-neutral judiciary would have a profound impact upon the legitimacy of the institution should this understanding of judicial decision-making erode the convergent ideology of judicial neutrality. The impact would be found in the people’s behavior and beliefs. This undermines one of the most basic premises of liberal, Western democracy: the rule of law, not man.

It appears that the distance between these two fronts is great. At the academic level, these problems seem as old as the Republic. Political parties truly evolved in opposition to the Federalists and the long history of bitter congressional infighting began in earnest over the Midnight Judges Act of 1800.⁷⁰ Justices Marshall and Story dominated federal questions for almost the first fifty years of our republic, setting a decisive tone for the role the judiciary would play in filling out the scaffolds put in place by the Constitution. The New Deal justices dramatically expanded federal authority in the wake of the Great Depression. Since the 1930s, judicial scholars have known and charged that legal formalism is a lie, that the law is not whole, that occasionally judges must fill in the gaps, and that in these gaps the judge has the ability to influence the path of the law.⁷¹ Jurists have long expressed a view of judging that acknowledges the limitations of law and judges.⁷² This is to be expected from a nation that was born out of the Enlightenment, which sought to establish reason as the guiding force of society by turning a critical lens on historically sacred institutions. The Enlightenment ethos elevated the “rule of law” over man as the “rule of reason” and was essential in both the American and French Revolutions. However, the Enlightenment has failed in one critical respect: it has failed to formulate objective principles of law and society.⁷³ Thus, paradoxically, the critical eye of the Enlightenment undermined the “rule of law” as traditionally understood (evolving from natural law and long held customs) without offering any adequate replacements. While

70. See Judiciary Act of 1801, 2 Stat. 89. See generally LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW.

71. See generally BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2009) (debunking this narrative, but ultimately endorsing a belief that jurists have *always* expressed a balanced realism about judging).

72. *Id.*

73. See TAMANAHA, *supra* note 6, at 22 (noting three reasons for this failure, multiple answers to life’s questions discovered in exploring the world, that human nature at its most common level is rather base, and that the power and scope of reason were restricted to finding means but not developing ends).

utilitarian theory and secular liberalism seem to provide a goal for the modern state, there are sharp divides over the means of achieving such ends.

Despite this intellectual quagmire, at the level of the common man, society seems to be progressing, blissfully unaware of the crumbling philosophical underpinnings of the law. As John Drobak writes in his forthcoming work *COURTS, COOPERATION, AND LEGITIMACY*, there are a number of factors that foster the perceived legitimacy of the courts.⁷⁴ First, judges are traditionally viewed as non-political actors whose decisions are based on non-political reasons.⁷⁵ Second, the court makes heavy use of symbolic representations of power⁷⁶ and performs rituals that instill a reverence for the court.⁷⁷ Third, the court often practices self-restraint and refrains from stepping beyond its authority.⁷⁸ Fourth, the court is respectful of the other branches of government.⁷⁹ Lastly, the court has a long history of producing quality decisions and opinions.⁸⁰ These behaviors lend a tremendous deal of support for the court.

This support has shown up consistently in Gallup polls, which show a high percentage of Americans approve the way the Supreme Court handles its job.⁸¹ Over the past sixteen years between 65–80% of people consistently have said that they trust the judicial branch headed by the Supreme Court.⁸² These beliefs are held even though 75% of people believe that “Supreme Court Justices usually decide their case . . . sometimes let[ting] their own ideological views influence their decisions.”⁸³ When asked if “Supreme Court justices usually decide their cases based on legal analysis without regard to partisan politics, or . . .

74. See JOHN N. DROBAK, *COURTS, COOPERATION, AND LEGITIMACY* (Sept. 26, 2011) (unpublished manuscript) (on file with author).

75. *Id.*

76. *Id.* For example, judges wear black robes, the judge sits at a higher bench than everyone else in the room, court houses often are very phallic in appearance, etc.

77. *Id.* For example, all persons rise before the judge enters the room, parties and attorneys refer to the judge as “your honor,” etc.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited May 13, 2013). The Supreme Court has held an approval rating between 42 and 62% over the past 12 years.

82. *Id.* Between 65% (Sept. 13–15, 2004) and 80% (Feb. 4–8, 1999) of Americans have a great deal or fair amount of confidence in the judicial branch headed by the U.S. Supreme Court. This is also consistent with older surveys from the 1970s where confidence was between 63% (June 1976) and 71% (Apr. 1974).

83. KAISER FAMILY FOUNDATION HEALTH TRACKING POLL, from Jan. 12–17, 2012, *available at* <http://www.pollingreport.com/court.htm> (last visited May 13, 2013).

they sometimes let their own partisan political views influence their decisions,” 19% said “usually legal analysis” while 78% said “sometimes political views” with only 4% saying they were unsure.⁸⁴ While it appears as though there are no data on people’s perceptions as to whether we should be governed by the “rule of law” or not, given its fundamental place in our design, it is dogma that there is at least nominal support for this idea.

These data present us with a paradox. While the people have consistently supported the Court, they also view the Justices as partisan political actors. There are two ways to interpret these data. On the one hand, the people think along the same lines as Justice Breyer, who stated: “By the time you have 40 or 50 years in any profession, you begin to formulate very, very general views. . . . What is America about? What are the people of America about? How in this country does law relate to the average human being? How should it? And it’s a good thing, not a bad thing that people’s outlook on that court is not always the same.”⁸⁵ On the other hand, the people may think partisan decision-making is acceptable because at least some of the Justices maintain the same partisan beliefs as their supporters. Consequently, they are considered to be protecting the vital interests of that particular group.

This second way of interpreting the data presents some very serious problems to minorities whose beliefs are not represented in the courts system. If no one on the Court embodies the political values of the minority, then the Court’s judicial power is built solely upon the raw power embodied in its judicial decree—a decree with the power to lock individuals away, take away a child, take property from one and give it to another, or demand any other remedy available to the Court. This power is backed up by the executive’s ability to send heavily armed men anywhere in their sovereign domain to enforce those directives. If that power is used to systematically discriminate against a minority’s interest, then the list of options for protecting that group’s interest becomes increasingly short.⁸⁶

84. AP National Constitutional Center Poll, from Aug. 11–16, 2010, *available at* <http://www.pollingreport.com/court.htm> (last visited May 13, 2013).

85. Emmarie Huetteman, *Breyer and Scalia Testify at Senate Judiciary Hearing*, N.Y. TIMES, Oct. 6, 2011, at A21, *available at* <http://www.nytimes.com/2011/10/06/us/politics/breyer-and-scalia-testify-at-senate-hearing.html> (last visited May 13, 2013).

86. For example, say you are a polygamist and believe that group marriage is a legitimate form of relationship that deserves equal protection under the law. The state you are in has an anti-polygamy law that violates your perceived “rights”—be they individual, associational, or religious—to marry more than one person and have that marriage recognized by the state. Any judge that hears your case is most likely going to be biased against your position, as there is no partisan distinction on sympathy towards polygamy as the political parties are currently constituted. How you react to this fact will

The insights provided by North's *Structure and Change in Economic History* intimate that this unrepresented minority will only obey the rules if the calculus of getting caught and paying the price outweighs the expected return of breaking them.⁸⁷ Given the levels of enforcement vis-à-vis opportunities for acting contrary to the rules, this choice will occur rarely. Naïve realism seems to call into question the ability to judge impartially and indicates that judges may be biased along political lines. Thus, the more people who fit into that unrepresented minority category and believe its voice is not being represented by the Justices, the less likely the judiciary is to be viewed as a legitimate institution. In the face of this critical theory, both legal academics and the informed polity may all engage in maintaining the ideological façade, because all are able to comprehend the catastrophic consequences of revealing the lie as such.

III. CYNICISM

If you're sick and tired of the politics of cynicism and polls and principles, come and join this campaign.

—George W. Bush

In the end, that's what this election is about.

Do we participate in a politics of cynicism or a politics of hope?

—Barack Obama

In the late 1930s and into the 1940s, legal realism fell into disrepute after witnessing the rise of Nazism and Communism.⁸⁸ The ascendant paradigm for understanding judicial decision-making only a decade before was rejected in the face of the legal regimes being erected in Germany and the new Soviet state. Judicial actors engaged in identity protective cognition and motivated reasoning to reject any implication that American law was anything like Nazi law.⁸⁹ However, legal realism was not, itself, a

probably be determined by how you view the legitimacy of the institution—if you believe in the judiciary's legitimacy, you may feel wronged but that at least your grievance was heard and that you can continue your campaign as a legal matter by looking for alternative legal theories that will better represent the legal reasoning behind your petition. However, if you view the court's reign as illegitimate and hostile to your interests at their core, then why would you not grab a bunch of guns, set up a quasi-autonomous collective on the edges of society, and fire upon any state agent that gets close?

87. NORTH, STRUCTURE *supra* note 11, at 53.

88. TAMANAHA, *supra* note 6, at 73–74 (“Legal Realism was effectively silenced”).

89. *Id.* at 73.

pioneering exercise. Rather, legal realism was simply a comment on the underpinnings of the law drawn from various other fields, including the natural sciences and Marxism, and furthermore, was not unique to the law.⁹⁰ Today, the ideas that underpinned this movement have cut so deep that even our unconscious, ideological processes are turning the law from a coherent whole into the manipulated instrument of legislators in robes. We are becoming more and more cynical.

A clear definition of cynicism is necessary before delving into more detail. Cynicism is a philosophy of “saying the truth” with “strategy and tactics, suspicion and disinhibition, pragmatics and instrumentalism—all in the hands of a political ego that [t]hinks first and foremost about itself, an ego that is inwardly adroit and outwardly armored.”⁹¹ Cynicism is a two-step process, and it can occur unconsciously. First, one must “say the truth.” In order to do so, they must either reveal a big secret or point to some previous unknown (or all too well known) thing and declare it to be true (or false). In this case, the big truth is that the ideal of judicial neutrality is a lie because it is undermined by the judge’s ideological biases. Second, the response must be designed to meet the critical-ideological attack by recognizing and taking into account the particular interest group behind the ideological universality and then find reasons to retain the mask.⁹² In this case, the interests protected are, purportedly, the common good that stems from having the judicial branch appear to be both a neutral arbiter and a check on the use of coercive state power.

The key to this dilemma is perception. An analogy, suggested by Benforado and Hanson, may be helpful here. In sports broadcasting there are two different sets of commentary: on the one hand there is the play-by-play description of players’ movements and the outcomes of their actions, and on the other there is the colored commentary focusing on the strengths, weaknesses, tendencies, and background of the teams.⁹³ Judicial scholars from law schools, political science departments, and the bench are all currently engaged in the play-by-play descriptions of judicial decision-making by describing how it happens and discussing how it should be played. In doing so, they bring out policy and economic arguments to assert that a certain way of playing is more beneficial than others. The media commentator class provides the colored commentary on the way

90. *Id.* at 74–75.

91. PETER SLOTERDIJK, *CRITIQUE OF CYNICAL REASON* xxix (1988).

92. ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 29.

93. Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 *EMORY L.J.* 499, 505 (2008).

decisions are made and shapes public opinion on how to interpret as well as understand the background to judicial decision-making.

In the world of “informed academics,” the “play-by-play description” has become increasingly cynical. Critical Legal Studies turned against the law to expose its inner contradictions and how the law protects some interests over others. The latest positive models—embodied by naïve legal realism—assert that at least some portion of judicial decisions is determined by the judge’s unconscious ideological biases. In confronting this question, they raise the question of what to do about it in a straightforward manner. Responses to this question focus on limiting the neutrality crisis’ scope by reinforcing the notion that this unconscious bias only affects a small portion of cases where the law does not provide a clearly determined outcome. It then proposes solutions that would mitigate the neutrality crisis’ impact on the polity. For example, Lammon points out that there is not widespread dissensus among courts of appeals because 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.”⁹⁴ Failing that, institutional factors like “collegiality” allow for “open and amicable discussion of real values and views,” which can overcome the problems posed by naïve realism.⁹⁵ Simultaneously, Lammon suggests institutional changes that would foster collegiality to further reduce the instance of dissensus or politically derived judicial decisions in an attempt to make the game fairer.⁹⁶ Kahan argues that when judges must articulate decisions with an “inherent risk that citizens will perceive decisions that threaten their group commitments to be a product of judicial bias,”⁹⁷ then the judges should engage in the expressive virtues of “aporia”⁹⁸ and “affirmation.”⁹⁹ These strategies change the way the judge communicates decisions in order to reduce instances of identity protective cognition and cynical rebuke from dissenting judges.¹⁰⁰ While these mitigation responses

94. See Lammon, *supra* note 2, at 297.

95. *Id.* at 297-300.

96. *Id.* at 298.

97. Kahan, *supra* note 1, at 28.

98. *Id.* at 62. Aporia refers to a particular mode of philosophical or argumentative engagement with the distinctive feature of acknowledging complexity. *Id.*

99. *Id.* at 67. Affirmation refers to a rhetorical device for mitigating identity-protective cognition by conveying information by means that are likely to affirm rather than to threaten individuals’ group commitments. *Id.*

100. *Id.* at 60–72.

are no doubt useful, they present clear evidence that the legal academy's response to this neutrality crisis has been cynical.

In the world of “everyday people,” the colored commentary has turned cynical as well. People overwhelmingly believe that a Supreme Court justice's ideological or partisan political views influence their decisions.¹⁰¹ Newspaper stories increasingly carry either “democratic appointee” or “republican appointee” when naming a federal judge.¹⁰² Critiques of certain decisions are becoming more hyperbolic in their characterization of judges in those opinions as unelected ideologues.¹⁰³ This tone is adding fuel to the fire and shaping the way “everyday people” approach what a judge is, and what a judge should be.

A. *Legal Instrumentalism*

Legal instrumentalism is the idea that the law is a means to advance some interest.¹⁰⁴ At its ideal, such instrumentalism is used to advance the common good alone.¹⁰⁵ This is important for protecting the rule of law norms in the polity. As Brian Tamanaha points out, “what entitles the law to obedience, at least in the eyes of the citizenry, is the claim that it furthers the public good.”¹⁰⁶ As Kahan explains,

The most fundamental form of individual freedom that liberal constitutionalism secures for its citizens depends on the promise that government won't impose legal obligations that presuppose adherence to a moral or political orthodoxy. It is only because citizens are assured that their laws are confined to pursuit of secular goods—ones open to enjoyment by persons of all cultural and moral outlooks—that they can view their assent to legal duties as

101. See *supra* notes 83–84. This cynicism is represented by the 75% and 78% numbers.

102. Adam Liptak, “Politicians in Robes”? Not Exactly, But . . ., N.Y. TIMES, Nov 27, 2012, available at <http://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html>.

103. Jeffrey Toobin, *A Judicial Atrocity*, THE NEW YORKER, Jan. 29, 2013, <http://www.newyorker.com/online/blogs/comment/2013/01/the-awful-recess-appointment-ruling-in-canning-v-national-labor-relations-board.html> (last visited May 13, 2013).

104. See TAMANAHA, *supra* note 6, at 1.

105. *Id.* at 215. This understanding that the Law should be used for the sake of what is common to the whole of society goes all the way back to Plato's *Laws* and has been explicitly repeated through history, including in Locke's famous *Second Treatise*. In fact, that the King “has refused his Assent to *Laws*, the most wholesome and necessary for the public good” was the first of the enumerated grievances our nation's founders listed in the *Declaration of Independence*. *Id.*

106. *Id.* at 221.

consistent with their freedom to pursue happiness on terms of their individual choosing.¹⁰⁷

However, the “common good” differs for each individual depending on varying ideology—what is in the “common good” is determined by an individual’s perception of what the world *is* like and what it *should be*.¹⁰⁸ Moral pluralism, skepticism, and “incommensurable paradigms” about what is in the “common good” pervade modern society.¹⁰⁹ Naïve realism and motivated cognition fuel an identity protective cognition that galvanizes group solidarity in promoting *their* version of the common good over the opponent’s adaption.¹¹⁰

The cynical response to this is to find ways to minimize the symptom without addressing the cause. Scholars are well aware that, next to corruption and bias, nothing can undermine the legitimacy of courts more than a perception that courts are acting politically.¹¹¹ Thus, the institutional legitimacy of the judiciary seems to depend upon maintaining the cynical distance between the ideological front (judicial neutrality or formalism) and the “reality” (naïve realism). What else explains the near obsession with making judges say they are formalists when being confirmed to the high court? For instance, Justice Thomas, said that as a judge, “you want to be stripped down like a runner,” and “shed the baggage of ideology.” Justice Roberts provided another analogy when he stated: “I will remember that it’s my job to call balls and strikes and not to pitch or bat.” Most blatantly Sonia Sotomayor declared: “I don’t judge on the basis of ideology.” The record indicates that the assertion that one will strengthen the rule of law by ruling in an impartial manner is an essential prerequisite to becoming a Justice of the Supreme Court. However, to do so with empirical knowledge that this sort of decision-making is “impossible” requires cynical reasoning.¹¹²

This is the paradox of an enlightened false consciousness—cynics are very aware of the political motivations underlying the ideological universality of the “formalist” judge. Still, they do not renounce it, as they continue claiming that the job of a judge is to make determinations free

107. Kahan, *supra* note 1, at 6.

108. The recognition of this historically true fact in the past century has furthered the dissent of the old lie of Christian moral unity or that science can supply universal ideals of law and morality.

109. See TAMANAHA, *supra* note 6, at 223.

110. See generally Kahan, *supra* note 1.

111. DROBAK, COURTS, COOPERATION, AND LEGITIMACY, *supra* note 74.

112. I assume that Supreme Court nominees are aware of the modern theories about judicial decision-making. Only if they were completely unaware would my charge that they are acting cynically be misdirected.

from political motivations. This distance between what is “known” and what is “said” is evidence of judicial cynicism; “[t]he cynical subject is quite aware of the distance between the ideological mask and the social reality, but he none the less still insists upon the mask.”¹¹³ The formula, therefore, for the cynic is: “they know very well what they are doing, but still, they are doing it.”¹¹⁴ This distance, however, does not sustain itself indefinitely, and requires new infusions of energy to be maintained.

B. The Cynical Response to Naïve Realism

The implicit advice given by Lammon and Kahan is that, by making structural and rhetorical changes, the judge can forestall the perception that she is acting in a non-neutral manner and, thus, continue to create this distance. To return to the analogy of play-by-play versus colored commentary, these suggestions are made to blunt any colored commentary that asserts judicial decisions are made politically by advocating changes to the way the actors stage the game.

Lammon, picking up on a suggestion from Judge Harry Edwards, suggests increasing collegiality in the courts to facilitate an “open and amicable discussion of real values and views” to overcome the problems posed by naïve realism.¹¹⁵ This discussion would undoubtedly lead to less politically divisive court rulings and opinion because judges would be forced to confront and defend their biases, resulting in the emergence of a synthesized vision of the common good, which would be useful in perpetuating the current judicial order by reducing divisiveness. However, it does not address the reviled fact that a judge’s unconscious beliefs about the “common good” seep into the law. First, even if two “partisan” judges can agree as to what the common good embodies in a single decision, it is likely that it is shaped by other biases left unacknowledged, be they racial, social, class, gender, regional, sexual, or other. Second, this approach still facilitates biased decision-making because the judges’ ideological framework is left uninhibited; in fact, this approach encourages ideologically charged debate. It suggests that judges must actively promote and shop their values to other judges or else they will be lost in the subsequent negotiation over what the court’s policy preference will be

113. ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 29.

114. *See* ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 29 (citing Peter Sloterdijk, *CRITIQUE OF CYNICAL REASON*, *supra* note 91).

115. *See* Lammon, *supra* note 2, at 298–99 (citing Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998) and Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1641 (2003)).

in the case before it. Instead of refocusing the debate on how to keep judges rule-bound and restrict the importance of ideology in decision-making, collegiality encourages them to defend their beliefs.¹¹⁶

Similarly, Kahan recommends that judges engage in certain rhetorical practices in opinion writing in order to minimize identity protective cognition and vicious rebukes from dissenting Justices.¹¹⁷ Still, Kahan fails to address the underlying fact that judges are engaging in political rulemaking. Instead, he addresses the fact that

ordinary individuals cannot know, or be reasonably expected to know, whether the myriad laws that govern their lives [are not neutral]; they must depend on readily available and credible signs to be confident that the promise of liberal constitutionalism is being kept. All citizens in a democracy live with the risk that the law will at some point take a position that profoundly disappoints them. In a political culture devoid of the cues that would enable them to find evidence of the law's neutrality in that circumstance, citizens necessarily lack the resources required to reconcile their moral autonomy with their duty to obey the law.¹¹⁸

To provide cues of the law's neutrality, he encourages judges to engage in "aporia" and "affirmation."¹¹⁹ By "aporia" he means employing a literary or rhetorical style that acknowledges the complexity of legal issues and eschews expressions of certitude, particularly empirically-based certitude.¹²⁰ This reservation is because "studies of motivated cognition and related dynamics show that pronouncements of *certitude* deepen

116. *Id.* at 301–03. Further, notes from game theory would suggest that a member of the court whose ideological loyalties are slightly askew from the other members of the court could use his or her distinct position to extract tremendous concessions from an ideological bloc to win a vote if it proves to be decisive. Collegiality would only matter within the ideological bloc and the minority outsider whose vote is necessary to gain a majority. There would be no need to integrate and work with members of an opposing coalition.

117. See Kahan, *supra* note 1. Kahan focuses on *Brown v. Plata* and on Justice Scalia's vicious dissent, which decried the majority, stating: "[T]he idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have 'found' that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make 'factual findings' without inserting their own policy judgments, when the factual findings *are* policy judgments." 131 S. Ct. 1910 (2011) (emphasis in original).

118. Kahan, *supra* note 1, at 6.

119. *Id.* at 60–72.

120. *Id.* at 60.

group-based conflict.”¹²¹ Engaging in such activity would mean that “cultural intermediaries in the media, in government, and elsewhere might be less able to frame a particular case as culturally consequential. . . .”¹²² Thus, the Justices are allowed to retain their anonymity, which protects the institutions’ legitimacy.¹²³ In addition, he recommends that the Court engage in “affirmation” of groups that might otherwise be motivated by identity protective cognition to doubt the Court’s neutrality by “lining their opinions with a surplus of meanings.”¹²⁴ This surplus would place a “shield between the Court and the dueling cultural constituencies that were most likely to question its neutrality.”¹²⁵

These responses suggest judges should adjust their opinions not to address the underlying issues of the judge’s instrumental use of the law, but instead to placate a fidgety polity. Employing these mechanisms would address the crisis generated by a people skeptical of the Court’s neutrality. In this way, it would minimize the Court’s impact on national discourse, thus protecting its perceived legitimacy and neutrality. This solution would prop up the cynical distance between the way things “really are” and the image necessary to maintain the social order.

This puts cynical reasoning at the heart of the debate over how judges should respond to the insights provided by the naïve realist theoretical model. Naïve realism’s insights are not limited to those who consciously set out to influence the law in this way. Therefore, in order to assert the truth of statements such as, “I do not permit my sympathies, personal views, or prejudices to influence the outcome of my cases,”¹²⁶ cynical reasoning is required. One’s beliefs about how best to order society affect the way one interprets facts, events, risks, and the law. Consequently, such statements cannot be “objectively true” because the individual’s ideological background influences opinions at the basic level of ideological fantasy by structuring the judges’ perceptions about the way the world *is* and *should be*. It is universally acknowledged that Justice Scalia reasons and votes as a Conservative judge, while Justice Breyer

121. *Id.* at 60–61 (citing Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 414 (1995)).

122. *Id.* at 63.

123. *Id.*

124. *Id.* at 69.

125. *Id.* at 70. Kahan points to Justice Scalia’s opinion in *Columbia v. Heller*, 505 U.S. 833 (1992) as a prototype for this sort of decision. Justice Scalia explained not only the country’s rich history of guns but also the country’s rich history of gun regulation.

126. Confirmation Hearing of Justice Sotomayor, *available at* http://epic.org/privacy/sotomayor/sotomayor_transcript.pdf (last accessed May 13, 2012).

does the same as a Liberal. Yet, both justices would claim that they apply the law as best they can to the case at hand. According to naïve realism, they are both correct. However, their individual perceptions about a particular case and the law are very different.

The recent case of *Crawford v. Marion County Election Board*¹²⁷ is a helpful illustration. Indiana’s election law, referred to as either the “Voter ID Law” or “SEA 483,” requires citizens voting in person on election day to present photo identification issued by the government.¹²⁸ The requirement does not apply to absentee ballots submitted by mail, and the statute contains various exceptions for individuals living in nursing homes, indigents, and those voters with a religious objection to having their pictures taken.¹²⁹ The Indiana Democratic Party and various other entities and individuals affiliated with the Democratic party filed a complaint seeking to enjoin enforcement of the act as it places a burden on the right to vote by individuals that, historically, tended to support Democratic candidates (mostly African Americans who are less likely to already have IDs).

The District Court Judge Sarah Evans Baker granted defendants motion for summary judgment finding that the plaintiffs

[h]ave not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements. Plaintiffs also have repeatedly advanced novel, sweeping political arguments which, if adopted, would require the invalidation, not only of SEA 483, but of other significant portions of Indiana’s election code which have previously passed constitutional muster and/or to which Plaintiffs do not actually object; indeed, they offer them as preferable alternatives to the new Voter ID Law. In so doing, Plaintiffs’ case is based on the implied assumption that the Court should give these Constitutional and statutory provisions an expansive review based on little more than their own personal and political preferences.¹³⁰

A divided Seventh Circuit Court of Appeals affirmed.¹³¹ Acknowledging that the law would disenfranchise at least some voters and that those

127. 553 U.S. 181 (2008).

128. *Id.* at 185.

129. *Id.*

130. *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006).

131. *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007)

voters would most likely be Democratic voters, the court nevertheless ruled that “the inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests that the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls.”¹³² The fact that there was not a disenfranchised voter among the class of plaintiffs seems to have been determinative for the court. Yet, this holding is a strange and novel way of disposing the case, considering that there was in fact standing to challenge the application of the statute. Furthermore, as the new law had not actually been employed yet, an “as applied” challenge would presumably be unripe. The dissent viciously retorted: “Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”¹³³

As is readily apparent from a full reading of both opinions, the political nature of this question and the decidedly political impacts of the court’s ruling dominated both the majority’s and the dissent’s opinions of how this case should be decided. Because the District Court and majority in the Seventh Circuit found the Democrats’ challenge to be a thinly veiled attempt to force the court to impose its own “personal and political preferences” over the will of the Indiana legislature, the court applied a lower form of constitutional scrutiny and upheld the law. The dissent believed that the burdens fell on the right to vote—a fundamental right—and, therefore, would have applied “strict scrutiny light,” a level of constitutional scrutiny used precisely for these sorts of political cases, in striking it down.¹³⁴

The key points in the lower court’s decision can be found by pulling out the objective criteria indicating political bias. The District Court judge—Judge Sarah Evans Baker—was a Ronald Reagan appointee, former legislative counsel for Representative Gilbert Gude (R-MD) and Senator Harting Percy (R-IL). The Seventh Circuit majority was written by Judge Posner, a Reagan appointee, eminently respectable Right-wing intellectual, and supporter of the Republican Party and its politics,¹³⁵ and

132. *Id.* at 951–52 (citing exit polls acknowledging that 67% of voters with incomes below \$15,000 vote Democrat and they are the ones most unable to get to the polls).

133. *Id.* at 954.

134. *Id.*

135. See Nina Totenberg, *Federal Judge Richard Posner: The GOP Has Made Me Less Conservative*, NPR, (July 5, 2012) <http://www.npr.org/blogs/itsallpolitics/2012/07/05/156319272/federal-judge-richard-posner-the-gop-has-made-me-less-conservative>. In the article, Judge Posner

Judge Diane Sykes, a George W. Bush appointee and purportedly a member of the Federalist Society. The Seventh Circuit dissent was written by Judge Terrance T. Evans, who was appointed to the district court by Jimmy Carter and later appointed to the Seventh Circuit by Bill Clinton. Thus the law was upheld along strictly partisan lines—even if that partisan line was towed because of unconscious beliefs, its effects are apparent in the lead up to the Supreme Court taking the case. Despite the fact that the impacts of the law may have been considered disproportionately discriminatory, the Conservative judges examined the case through the lens of ideology. In doing so they implicitly concluded that there was an attempt by the Democrat Party to overturn a legitimate law whose requirements fell broadly and evenly on all aspects of society. In dissenting, the Liberal judge felt that the impact restricted the right to vote and, thus, required closer scrutiny.

At the Supreme Court, the ideological divide also proved conclusive, but with a slight twist of interest to our analysis. The law was upheld in a three-three-three split, with Justice Stevens writing the lead opinion (joined by Chief Justice Roberts and Justice Kennedy) and Justice Scalia writing a concurrence (joined by Justice Thomas and Justice Alito).¹³⁶ The Stevens opinion upheld the law against the attack by the Democratic Party because it was a broad facial attack and unsupported by evidence to say that there was an “excessively burdensome requirement,” although the Stevens opinion left the door open for a more targeted as-applied attack with a narrower remedy.¹³⁷

Justice Scalia’s concurrence was much more favorable to the defendant State of Indiana and can be read as a blanket invitation for states to impose even stricter voter identification laws. So long as the law’s burdens are “ordinary and widespread,” and states have an important regulatory interest like preventing voter fraud, the law will be upheld.¹³⁸ This outcome includes those situations “even when their burdens purportedly fall disproportionately on a protected class.”¹³⁹ Thus, while Justice Stevens’ opinion holds out the possibility of an as-applied challenge,

acknowledges that he, and the conservative members of the Supreme Court, are openly aligned with the Right-wing political party (the Republicans) but that the “right-wingers” made a serious political mistake in criticizing Chief Justice Roberts’ decision in *National Federation of Independent Business v. Sebelius* (567 U.S. ___, 132 S. Ct. 2566 (2012)) and that this was making Chief Justice Roberts re-think his ties to the party and the conservative ideology.

136. *Crawford*, 553 U.S. 181.

137. *Id.* at 202.

138. *Id.* at 206.

139. *Id.* at 207 (emphasis omitted).

Justice Scalia forecloses such a challenge when the burdens are not severe. This more extreme position tracks the perceived ideological loyalties of the justices adhering to it.

Similarly, on the other side of the debate, the more Liberal justices of the Court—Justice Souter, Justice Ginsberg, and Justice Breyer—all believed the law should have been struck down as the state interests failed to justify the practical limitations placed on the right to vote, and the law imposed an unreasonable and irrelevant burden on voters who are poor and old.¹⁴⁰ Justice Souter and Justice Ginsberg focused on the lack of evidence to suggest that in-person voter fraud was even a problem for the State of Indiana.¹⁴¹ Justice Breyer was concerned that a voter ID law, as restrictive as the Indiana law is, in effect, was the equivalent of a poll tax. In his view, even if the State makes free photo ID available, there is still a cost in obtaining transportation or the underlying document required to procure the ID (e.g., a birth certificate).¹⁴²

The partisan ideological breakdown from the lower court all the way to the Supreme Court on this highly controversial issue of an obvious partisan character fuels the neutrality crisis. The lead opinion in this case—formed from a coalition of a Liberal (Justice Stevens has historically been viewed as a Liberal on the Court), a Conservative (Chief Justice Roberts) and a Libertarian (Justice Kennedy)—can be read as an attempt to strike a pragmatic compromise. It puts off the hard question of whether the law is severely discriminatory as applied to some individuals, while upholding the law on its face. However, such a pragmatic compromise could not appeal to a majority of the Court. The majority of the justices—split down the middle between the Conservative concurrence and the Liberal dissent—decided to apply the law “as they see it,” which happened to correspond to their political beliefs. Motivated cognition, implicit bias, and identity protection undoubtedly played a part in the way these opinions were written.

However, on its face, each opinion is written as if the law is the determinate factor. It helps that election law is relatively anomalous. The cynical approach to constitutional scrutiny tends to be that the “level” of scrutiny corresponds to the desired outcome. If a justice wants to uphold the law, then “rational basis scrutiny” is appropriate. This was the scrutiny

140. *Id.* at 237, 239. Justice Breyer goes even further than Justice Souter and finds that the burdens imposed in this case are severe and cannot be implemented unless narrowly tailored to a compelling state interest.

141. *Id.* at 236 (Souter, J., dissenting).

142. *Id.* at 239 (Breyer, J., dissenting).

employed by Justice Scalia. On the other hand, if a justice wants to strike down the law, then “strict scrutiny” or something close to it is appropriate, as Justice Souter and Justice Breyer applied. The test applied by Justice Stevens in the lead opinion—the amorphous balancing standard announced in *Anderson v. Celebrezze*¹⁴³—is a prime example of how the Court will establish a legal doctrine that is impossible to apply in a systematic way when facing a tough case. Such an approach leaves room for the Court to enact its policy preference as law. By relying on the law as a cover for the partisan ideological preferences of each justice, the Court uses cynical reasoning to protect its opinions from charges of overt political bias. Without doubt, Conservative political commentators were able to defend the Court’s opinion as a legitimate application of established legal precedent, and Liberals were able to attack it.¹⁴⁴

C. So What? Why Bias Matters

In confronting cynical reasoning as it applies to judicial decision-making, it is clear that this Note is beset with normative charges subtly alleging that such cynical reasoning will likely result in negative societal consequences. But such a conclusion does not necessarily follow. The insight of the legal realists was that the “law must be viewed as it actually works and functions, not as an abstract body of rules, concepts and principles.”¹⁴⁵ By framing the issue in such a way, it is easier to see that judges throughout history have been influenced by their particular backgrounds and have shaped and written the law—while calling it “interpretation”—in ways that comport with their ideology. Thus, the law changes with society. As new judges take the bench with different ideologies, they shape the law. In this way, the common law is not so much a coherent whole as it is whatever the new generation of judges wants it to be. Normative rules about the limits of judicial discretion do a lot to hem in departures from established precedent, so things do not get too out of hand.¹⁴⁶ So what is the big deal? The only thing of absolute importance is to minimize popular distrust of the court so that it (and the ruling coalitions it partners with) may govern effectively. Any advice for

143. 460 U.S. 780 (1983).

144. For an example of this sort of back and forth, see Matt Gertz, *Fox Defends Texas’ Voter ID Law With Fraud*, MEDIA MATTERS (Mar. 13, 2012), <http://mediamatters.org/research/2012/03/13/fox-defends-texas-voter-id-law-with-fraud/184282>.

145. See TAMANAHA, *supra* note 6, at 66.

146. See Kim, *supra* note 4, at 404.

how to minimize rancor and dissensus is both imperative and appropriate in mediating the polity's perception of the court.

While it is reassuring that the court system can be sustained through this crisis of neutrality, the underlying logic of the movement pushes towards an inevitable resolution of this dichotomy. The naïve realist insight should influence the appointment processes in predictable ways. Appointments to the higher courts have often been contentious, but most appointments to the lower courts in the federal judiciary have been used as a form of political patronage, not to advance a specific policy agenda.¹⁴⁷ However, the promise to appoint ideologically sympathetic judges can be a tool when building political coalitions.¹⁴⁸ In fact, there is evidence that this strategy has been in use ever since Reagan.¹⁴⁹ Some critics dismiss this reality as inconsequential, suggesting that Presidents are likely to pick judges who maintain viewpoints that align with their own.¹⁵⁰ However, this politicization of the Court is reinforced by the naïve realist insight that such appointment behavior works and is not dependent on judges who are willing to make up the law in an overtly political fashion. Simply seeing the law with Liberal/Conservative eyes is enough.¹⁵¹ Thus, the battle to impose legal orthodoxy by a temporary political majority may be achieved through the law by picking ideologues to pack the bench.¹⁵²

D. But Nevertheless! The Implications of Cynical Logic

Cynicism leaves untouched the level of ideological fantasy—the level on which ideology “structures our effective, real social relationships.”¹⁵³ Ideological fantasy structures what we *do*; it is the way the social reality is perceived, and not some external influence on what we know or think.¹⁵⁴ Cynicism is one of the ways we blind ourselves to the structured power of

147. TAMANAHA, *supra* note 6, at 175–85.

148. *Id.* at 178–88.

149. *Id.* at 181.

150. Lammon, *supra* note 2, at 282–85.

151. See Editorial, *Politics and the Supreme Court*, N.Y. TIMES, Feb. 4, 2012, at SR10, available at <http://www.nytimes.com/2012/02/05/opinion/sunday/politics-and-the-supreme-court.html> (last visited May 13, 2013) (arguing that the 2012 election will determine the makeup of future courts, thus having tremendous import on the law's direction); Editorial, *The Court and the Next President*, N.Y. TIMES, Oct. 28, 2011, at A20, available at <http://www.nytimes.com/2011/10/29/opinion/the-supreme-court-and-the-next-president.html> (last visited May 13, 2013) (noting that had John Kerry been elected in 2004, that John Roberts and Samuel Alito would not have been nominated to the Court and hypothesizing that therefore the *Citizens United* decision would not have happened).

152. TAMANAHA, *supra* note 6, at 178–88.

153. ŽIŽEK, IDEOLOGY, *supra* note 10, at 30, 45.

154. *Id.*

ideological fantasy.¹⁵⁵ Cynicism is how jurists are able to reconcile the competing narratives about judicial decision-making.

Law students are told a fictional story that judges used to decided cases by looking to a closed system of laws for the rule that applied to the case at hand. Then, students are told that this story is an illusion and judges really make decisions by looking at a number of factors, the law being one of those factors. This realism has come to be the ideologically dominant understanding of judicial decision-making.¹⁵⁶ Naïve realism adds to this by acknowledging that there are factors that judges do not know they are considering when they make their decisions—that at least a part of their decision is driven by unconscious biases. With these revelations comes the cynical distance between how judges “really decide cases” and the professed belief in legal formalism. Judges have come to know very well that their formalist rhetoric in decision-making masks a more realist approach to the law. In this way, the cynical injunction to profess a belief in legal formalism, but understand that decisions are made based on one’s situational dispositions, has come to order our social reality. This, we are told, is how judges act.

An important and unique feature of ideology is that it locates the subject within the social fabric.¹⁵⁷ How one experiences the world structures one’s understanding of one’s place in society (i.e., as an autonomous consumer, legal subject, king, or judge).¹⁵⁸ It is a peculiar function of ideology that it imposes, without appearing to do so, what is considered to be obvious as being obvious. It defines what we cannot fail to recognize as obvious. It is ideology that generates the inevitable and natural reaction of crying out (either aloud or in the “still, small voice of conscience”): “That’s obvious! That’s right! That’s true!”¹⁵⁹ Ideology is the mental structure that “minds the gap” between the knowledge (real) and belief (symbolic).¹⁶⁰ In a way, it conflates belief with knowledge.

When one is aware of this gap, but maintains it nonetheless, that is cynical. Cynicism is a “but nevertheless” logical connection between

155. *Id.* at 32–33.

156. LEE EPSTINE, WILLIAM M. LANDES, RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 26–30 (2013).

157. ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 38.

158. See generally Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* (Ben Brewster trans., Monthly Review Press 1971). This concept is probably most simply illustrated with Althusser’s understanding of ideology: 1) there is no practice except by and in an ideology, and 2) there is no ideology except by the subject and for subjects.

159. ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 38.

160. SLAVOJ ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR* 241 (1991) [hereinafter ŽIŽEK, *FOR THEY KNOW NOT*].

belief and knowledge when the gap is recognized. As applied, we can see that it is cynical to maintain an “inner distance” from the “external ritual” of applying the law as though it were a formalist coherent whole, yet continuing to partake in the “external ritual” of “legal analysis” to maintain the front.¹⁶¹ It is “obvious” that formalism is not true, *but nevertheless* judges continue to engage in formalist analysis (at least on paper) when answering legal questions.

To fully understand the power of cynical ideology and how it undermines the relationship between the Law and the subject, it is necessary to first appreciate the way symbolism structures our relationship with authority and how a cynical judiciary fits within the social fabric.¹⁶²

1. The Mystique of the Institution

Traditional authority is based on charismatic power, symbolic ritual, and the form of the “institution” as such.¹⁶³ The traditional person holding power in such a relationship as could be personally dishonest and rotten, but when a person adopts the insignia of “authority,” that individual experiences a kind of mystic transubstantiation.¹⁶⁴ When the Judge qua Judge speaks, it is the Law itself that speaks through him, and in this capacity he has the ability to compel obedience.¹⁶⁵ For an example, take the trial of Socrates. Socrates understood that the judge was acting out of fault and vindictiveness, but Socrates did not want to flee judgment since the “spirit of the Law” itself must remain inviolate.¹⁶⁶ He sacrificed himself to the Law; not to the judge. The spirit of the Law thus dwells in the symbolic rituals that constitute the institution of the Law, not in the rottenness of the momentary bearer.¹⁶⁷

However, this traditional authority realizes itself as actual only in its potential or symbolic state.¹⁶⁸ The real authority of the judiciary is in organizing the power of the Law to compel obedience, and not in the coercive power exercised by the judge over the individual parties who

161. *Id.* at 241–44.

162. *Id.* at 249. Examples include king/president to subject, master to servant, employer to employee, father (or mother) to child, or other hierarchical structure where one is the dominant and the other must submit to authority.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 250–51.

happen to find themselves before him.¹⁶⁹ The judiciary's power and authority are ultimately founded in its symbolic position within our ideological landscape and are accepted on trust.¹⁷⁰ When that power fails to live up to the trust placed in it, the judiciary's authority is still supported by the logic that "if he knew" then "he would set things right."¹⁷¹ As in, "if the judge knew I was being held contrary to the dictates of the law, then he would set things right without delay."¹⁷² This formalism preserves the belief that the Law is the authority, rather than the individual actors who come to embody it. At its ideal, this is how the Law operates. In order to maintain this mystique, the judge should employ the Law in a way that is neutral, fair, just, and so forth.

2. *The Manipulative Authority*

The second mode of authority is based not on the performative power of the symbolic ritual, but directly on the manipulation of its subjects.¹⁷³ In this mode of authority, individuals take part in a social game where the goal is to deceive the other side in order to exploit both naivety and credulity.¹⁷⁴ In this game, the actors "wear social masks" and "play their roles" as manipulative imposters who do not take their social roles seriously, but instead play to "make an impression on the other."¹⁷⁵

This is the basic attitude of "cynical manipulation."¹⁷⁶ The cynic seeks to exploit the naivety of the subject by using the gap between the "real" and the "symbolic" by creating and maintaining that distance, as illustrated

169. In fact, if one steps back and understand the *reality* of the judicial branch one realizes just how impotent the judiciary is. *By design*, the judiciary does not have the power to execute the laws that it shapes (or makes)—that power is left to the executive branch—or the power to raise its own army or legion of Marshalls as it is dependent on the legislative branch to fund its operations. When one realizes that the power of the judiciary is *solely this power to shape the Law*—to lend legitimacy to the actions of Congress and the President, one realizes its awesome force compared with the power of the purse and the sword. See THE FEDERALIST NO. 78 (Alexander Hamilton).

170. ŽIŽEK, FOR THEY KNOW NOT, *supra* note 160, at 250.

171. *Id.* Interestingly, this role appears to be the most important function of the *habeas corpus* petition. It is a device that preserves this *hope* that the Law will set things right in the face of the failure of individuals involved in the case. Therefore, even the stranger who is unjustly convicted of a crime he did not do, and who spends decades in jail because of it, can still maintain a *faith* in the Law to set things straight as opposed to enact one of his other choices—attempting to escape, starting riots, murdering guards, or engaging in general anarchy to tear down what would be perceived as an unjust and unfair system.

172. *Id.*

173. *Id.* at 251.

174. *Id.*

175. *Id.*

176. *Id.*

above. While cynics claim that authority (in its symbolic form) is a fiction, it is a fiction that has the power to regulate our behavior. As such, it serves as a perfect tool to manipulate individuals' behavior.¹⁷⁷ Thus, the cynic maintains the law as authority as a mask to cover up the reality of money, power, or influence.¹⁷⁸ The cynic creates an external distance between his (secret) knowledge and his projected belief with the aim of using that distance to manipulate the subject.¹⁷⁹

However, the cynic often overlooks that we are naked only beneath our clothes; as in, the "naked reality" is sustained only by the symbolic fiction.¹⁸⁰ By manipulating the law to serve their selfish interest, they undermine the value of the law's symbolic authority. From a subject's perspective, this sort of cynical manipulation of the law only works until its power is brought to bear on that entity.¹⁸¹ The house of cards stands only until it falls.¹⁸² While the Law may be cynically manipulated to serve some interest for a while, ultimately the discovery that the Law is being used cynically destroys the credibility and legitimacy of those who use it as such.

3. *Totalitarian Authority*

This cynical manipulation takes on a different dimension, however, when the use of the law as a means to an end is employed to achieve some result bigger than individual enjoyment. When authority is based on the fiction that the authority figure is himself made of some "special stuff," cut from a special mold, or the "direct embodiment of the Will of History," the authority can be appropriately identified as totalitarian.¹⁸³ While at the level of knowledge the believers may "know very well" that they are people just like all others, they nonetheless believe themselves to

177. *Id.* "[P]hrases about values, honour, honesty are all empty words, they serve only to deceive the suckers." *Id.* at 252.

178. *Id.*

179. *Id.* at 252. The cynic, when confronted with illegal enrichment (say robbery or fraud) reacts by saying that *legal enrichment* is a lot more effective and, moreover, is protected by the Law. "As Bertolt Brecht puts it in his *Threepenny Opera*: 'what is robbery of a bank compared to the founding of a new bank?'" ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 30.

180. ŽIŽEK, *FOR THEY KNOW NOT*, *supra* note 160, at 251.

181. *Id.* ("The efficacy of the fiction takes its revenge on him when a coincidence of the fiction with reality occurs: he then performs as 'his own sucker.'")

182. See Jack Abramoff, *Times Topic: Jack Abramoff*, N.Y. TIMES (June 24, 2010), http://topics.nytimes.com/top/reference/timestopics/people/a/jack_abramoff/index.html (last visited Feb. 12, 2012).

183. ŽIŽEK, *FOR THEY KNOW NOT*, *supra* note 160, at 251.

be special figures that exude special power.¹⁸⁴ While at one level they may fully acknowledge that the symbolic fiction is false, they retain the mask of symbolic authority because the totalitarian party mission requires taking advantage of all sources of symbolic authority.

E. Let the Emperor Keep His Clothes!

The differences between these three modes of authority can be examined through a critical reading of the Hans Christian Andersen’s tale *The Emperor’s New Clothes*.¹⁸⁵ The “demasking” gesture of critical studies can often be compared to the phrase uttered by the child—“but he has nothing on at all!”¹⁸⁶ In the story, the Emperor has been swindled into believing that he is buying a “new suit” that has the ability to distinguish between clever people and stupid ones.¹⁸⁷ In that regard, only those who can see the suit are truly worthy of their post, while those who do not see it are unworthy of their positions. The suit, of course, does not exist. However, the whole kingdom is, perhaps not surprisingly, afraid of being condemned as stupid for failing to see the suit. Thus, the entire kingdom praises the suit as the most beautiful clothing ever made. First, the Emperor’s advisors lie by saying it is beautiful. Then the Emperor himself is exposed to the ploy, but continues to maintain the belief that it is beautiful. Finally, the whole kingdom is exposed to the emperor’s nakedness and the kingdom cheered at how beautiful the suit is. This illusion only comes crashing down at the end of the story when a child points out the obvious—*of course!*—the Emperor has nothing on at all.¹⁸⁸ This final act is traditionally considered to be a moral liberating gesture; the innocent can expose the truth for what it is.

The Emperor’s New Clothes has two take-aways that are relevant to this Note. First, it illustrates the difference between cynical logic and totalitarian logic to demonstrate how each would respond.¹⁸⁹ The Emperor’s clothes stand in for his traditional authority as Emperor—the garments of symbolism that give him his power.¹⁹⁰ The cynical response is the one shown by the Emperor’s advisors. Each advisor knows there are

184. *Id.*

185. HANS CHRISTIAN ANDERSEN, A TREASURY OF HANS CHRISTIAN ANDERSON 79–83 (Erik Christian Haugaard trans., Barnes & Noble Books 1993).

186. *Id.* at 83.

187. *Id.*

188. *Id.*

189. ŽIŽEK, FOR THEY KNOW NOT, *supra* note 160, at 252.

190. *Id.*

no clothes, but nevertheless praise the garment as beautiful to protect his own self-interest (in not looking stupid).¹⁹¹ They let the Emperor expose his nakedness to the polity because they do not see it as problematic. They know that beneath the Emperor's clothes he is always naked.¹⁹² They believe that the clothes are merely trappings; the power of the Emperor is in the physical, coercive power the Emperor may wield, not in his symbolic authority.¹⁹³ In contrast, the totalitarian response would not be to protect the individual self-interest, but instead to protect the power of the ruling party. The fact that the Emperor exposes his nakedness to the polity becomes the reason to come together and work for the "cause" (maintaining the Emperor's power despite his nakedness).¹⁹⁴

The catastrophic consequences of such a liberating gesture on society as a whole are lost in the traditional narrative.¹⁹⁵ One wishes to discard the unnecessary hypocrisy and pretense that the "new suit" represents. However, after the emperor is exposed as naked, the very community sustained by the Emperor disintegrates.¹⁹⁶ When his symbolic authority has been denounced as illusory *en masse*, isn't his ability to govern also undermined?

Applying this to judicial decision-making, the "Rule of Law" is the Emperor, and judges are the advisors. For the judge who accepts the naïve realist insight that the symbolic authority supporting the Rule of Law is a fallacy, it is theoretically possible that his response will fall into one of three camps. First, the responses can be cynical. While judges acknowledge that symbolic authority of the law is illusory, they nevertheless believe that they can use that authority to gain some advantage.¹⁹⁷ This advantage can be achieved by manipulating the law in a way that serves one's personal goals.¹⁹⁸ Second, the response could be totalitarian. Under such a response, even though the symbolic authority of

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. ŽIŽEK, *IDEOLOGY*, *supra* note 10, at 36.

196. *Id.* at 36.

197. *Id.*

198. See EPSTINE, *THE BEHAVIOR OF FEDERAL JUDGES*, *supra* note 156, at 30–47. For example, as a young practitioner I might make connections with prominent political persons and demonstrate that I can formulate specific ideas about what the Law *should* be in a way that supports an interest of theirs—such as advocating for the expansion of the business judgment rule or belief that the first amendment extends to corporate donations to political campaigns. Then, when a spot for federal judge opens up, I am promoted as a viable candidate because I have adopted such business friendly positions, gaining for myself the power and prestige of being a life-time tenured federal judge and benefiting those who were able to use my appointment to raise campaign funds.

the law is illusory, the law is used as a means of protecting the “cause.”¹⁹⁹ This is done because the movement, the party, or the will of history must be actualized, and to do so all available sources of power, including the law must be used to their utmost advantage.²⁰⁰ Third, and perhaps most radically, the judges could work to preserve the mystique of the rule of law by trying to judge in a neutral way, without bias. In that way, the rule of law may keep its clothes.

By stating that judges are in fact political, as political scientists have articulated in the attitudinal model, researchers hope to draw our attention to how the judiciary is used as a political arm. If the plot line is read in this way, the cynical response, as advised by Lammon and Kahan, suggests ways to protect the social order from catastrophic effects by realizing that judges are inescapably biased along ideological lines.²⁰¹ So long as the Law’s nakedness is covered up, this cynical distance can be maintained to the insider’s advantage. This reasoning is further justified, not only because this sort of bias only appears in some decisions, but also because when it does appear it is most likely because of unconscious cognitive functions rather than some overt plot to control the Law. This understanding eases the apprehension of those individuals who recognize how the Law’s naked authority is being manipulated—those who may recognize that this manipulation is preferable to the alternative of tearing down the Law’s symbolic authority.

The fear, however, is that this approach will ultimately fail as well—by creating this distance between the symbolic power of the Law and its actual operation, the door is opened for totalitarian logic to work its way into the judicial process. The more the Law is politicized, the more it is obscured from those who are fighting for the “cause” that the goal of their movement is simply power itself.²⁰² The winners within a totalitarian society—the totalitarian subjects—would seek to employ the Law as a

199. ŽIŽEK, FOR THEY KNOW NOT, *supra* note 160, at 252.

200. *Id.* For example, as a true believer in the federalist cause, I advocate and develop arguments for limiting the reach of the federal commercial clause power to maintain a realm of independence for the states. Recognizing the ultimate illusion of the Law, I work to elect ideological sympathizers into the legislature and executive branches who will then, reciprocally, appoint me to the bench so that we can all work towards limiting the reach of the federal government—the *Cause* of our ideological in-group. The exact same thing can be said for the liberal who believes in expanding the reach of the federal government to promote an elitist liberal agenda. Similarly, one could view the “government by injunction” response to railroad strikes by federal judges like William Howard Taft as a totalitarian response to shifting labor relations with the cause of protecting the existing social order. See William E. Forbath, *Government by Injunction*, in *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 59 (1989).

201. See *supra* notes 47–68.

202. ŽIŽEK, FOR THEY KNOW NOT, *supra* note 160, at 252.

means to achieving the “cause.” The rest must then become accustomed to naked legal authority being used to protect a political victory.

Instead of conceding that the rule of Law and unbiased decision-making is impossible, we should accept the third response and thereby let the rule of law “keep its clothes.” The symbolic authority of the judiciary is derived from its impartiality and legalist foundation. Even if an individual judge acts in a cynical or totalitarian way, the institution of the judiciary is maintained so long as the judges’ robes continue to hold their symbolic value. That symbolic value is only maintained through a continued belief that the judge can and will rule in an impartial way. Only in this way are the subjects free from political tyranny imposed by one group’s idea for how society should be organized or from exposure to the cynical manipulation by the in-group. To protect their symbolic authority, judges must actively try to live up to their ideal—the power conceptualized in the neutral, independent judiciary. Judges must work to clothe the rule of Law in earnest. To do so, judges must be reassured that they can, in fact, try to be neutral in making judicial decisions.

IV. NAÏVE REALISM IS NOT INEVITABLE

Progress is impossible without change, and those who cannot change their minds cannot change anything.

—George Bernard Shaw

To sustain our historic understanding of the judicial role, we must confront the problem of how judicial ideologies are determined and whether they can be influenced in such a way as to maintain a non-instrumental use of the law. A different perspective on cognitive psychology and a renewed focus on professional and craft norms can help to ground a judge ideologically in his unique and independent role outside of the political branches. Judges are in a unique position to resist competing political visions. To do so, judges must cultivate an independent ideology that is grounded in traditionally accepted craft norms and rational analysis of facts and law. The goal of this ideology is to sustain the social order by maintaining the rule of Law as a goal of, and ideal in, American jurisprudence.

In order to cultivate an independent judicial ideology, a more detailed and richer account of decision-making would be useful for this inquiry. The eminent psychologist Daniel Kahneman illustrates how the mind

processes content and makes decisions within the framework of this two-system approach.²⁰³ He borrows from other noted psychologists and paints a picture of “two selves”—a “System 1 self” and a “System 2 self.” System 1 operations are “typically fast, automatic, effortless, associative, implicit (not available to introspection) and often emotionally charged; they are also governed by habit and are therefore difficult to control or modify.”²⁰⁴ System 2 operations, on the other hand, are “slower, serial, effortful, more likely to be consciously monitored and deliberately controlled; they are also relatively flexible and potentially rule governed.”²⁰⁵

This split between the systems is hierarchical, with System 2 being built on top of System 1. One of the main tasks of System 2 is to “monitor and control thoughts and actions ‘suggested’ by System 1.”²⁰⁶ Individuals differ, often dramatically, in the ease with which they engage in System 2 thinking, as “[i]t is now a well-established proposition that both self-control and cognitive effort are forms of mental work.”²⁰⁷ The willingness to engage in System 2 thinking reflects the individuals’ ability to control their minds and exhibit the characteristics of intelligence and rationality.²⁰⁸ Researchers Keith Stanovich and Richard West, who introduced the terms System 1 and System 2, have used this model to distinguish between intelligence and rationality.²⁰⁹ Those with high intelligence are able to think slowly and do highly demanding computations, yet are not immune from biases.²¹⁰ To avoid biases, one must be rational—a concept Kahneman labels “engaged.”²¹¹ To be “engaged” is to be constantly reflecting on the intuitive answers suggested by System 1 thinking.²¹² However, many of us have a lazy System 2, one that will not engage in the mental work of checking every mental impression and will simply seek to confirm the intuitive answer provided by System 1.²¹³

203. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) [hereinafter KAHNEMAN, THINKING]

204. Daniel Kahneman, *A Perspective on Judgment and Choice*, 58 AM. PSYCHOLOGIST 697–72 (2003).

205. *Id.*

206. KAHNEMAN, THINKING, *supra* note 203, at 44.

207. *Id.* at 41.

208. *Id.*

209. *Id.* at 48–49.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 41.

Kahneman never uses the term “ideology,” yet he implies that ideology is a System 1 process. He states, “The measure for success for System 1 is the coherence of the story it manages to create.”²¹⁴ Naturally, System 1 does not seek to incorporate knowledge that it does not have. As Kahneman puts it, “what you see is all there is, System 1 is radically insensitive to the quality and the quantity of the information that gives rise to impressions and intuitions.”²¹⁵ Thus, “the combination of a coherence-seeking System 1 with a lazy System 2 implies that System 2 will enforce many intuitive beliefs, which closely reflect the impressions generated by System 1.”²¹⁶

A. *Craft Norms and Ideological Fantasy*

The level of ideological fantasy is located in System 1 thinking. System 1 processes are shaped by continued practice and developed expertise in a field or subject.²¹⁷ In the legal context, judges have developed and complicated craft norms that determine the acceptable ways of going about formulating legal decisions. As Pauline Kim argues:

Judges may have a variety of legal preferences regarding matters such as the appropriate mode of interpreting statutes, or the relevance of foreign legal materials, and these preferences may vary from judge to judge. But their decisions are also guided by a set of widely shared norms—some of which are formulated as legal rules—regarding their role in the judicial hierarchy. One fundamental and widely accepted norm requires that lower federal court judges follow precedent established by a court directly in line above them in the judicial hierarchy. Adherence to this norm offers a straightforward explanation of why lower courts comply with superior court precedent, even that with which they disagree.²¹⁸

This well-developed body of legal preferences and norms shapes the way judges think and act about making decisions within the judicial context. This is precisely ideology’s real aim: to compel us to follow a certain attitude demanded by it.²¹⁹ This attitude can simply be maintaining the rule

214. *Id.* at 85.

215. *Id.* at 86.

216. *Id.*

217. *Id.* at 241–44.

218. Kim, *supra* note 4, at 404.

219. ŽIŽEK, IDEOLOGY, *supra* note 10, at 84 (noting that the real goal of ideology is simply to maintain the consistency of the ideological attitude itself).

of law or some third, independent ideological attitude such as enacting the policy preference of one party, protecting corporate interests, expanding individual rights, or maintaining a Federalist Society-friendly judicial record. As Kim points out, “judges’ preferences regarding *legal* outcomes might be understood as an ‘attitude’ in much the same way that . . . political preferences” are in the attitudinal model.²²⁰ This attitude can come from the socialization process involved in professional training or from the other judges that judges have been previously exposed to.²²¹ It can also come from a judge acting in her own self-interest in ensuring respect for herself or for the judiciary more generally, or from some inherent utility from playing the game as it is meant to be played.²²² So long as the attitude that motivates the judge points in a direction that employs these means, the rule of Law may be maintained at the ideological level.

B. Thinking Slowly about Judicial Decisions

Thus, when judges are initially presented with “facts” of a case, they “continuously monitor what is going on outside and inside the mind, and continuously generate assessments of various aspects of the situation without specific intention and with little or no effort.”²²³ To become more neutral decision-makers, judges must engage in System 2 thinking when reaching non-intuitive answers to difficult questions—especially to questions that must predict, *ex ante*, the implications of certain decisions before a judge. “Obvious” understandings are the problem. While not inherently a product of laziness—it is difficult to be suspicious of something you consider obvious—these obvious answers are products of ideological fantasy constructing a seamless understanding of how the world is and should be, and therefore these answers may be logically suspect.²²⁴ Although “[s]ignificant effort is required to find the relevant reference category, estimate the baseline prediction, and evaluate the quality of the evidence,” it is essential for judges to overcome their intuitive predictions about how a case (or fact) should be interpreted.²²⁵ This challenge is, in a word, “complicating.” As Kahneman explains,

220. Kim, *supra* note 4, at 405.

221. *Id.*

222. *Id.*

223. KAHNEMAN, THINKING, *supra* note 203, at 89.

224. *Id.*

225. *Id.* at 192.

A characteristic of unbiased predictions is that they permit the prediction of rare or extreme events only when the information is very good. If you expect your predictions to be of modest validity, you will never guess an outcome that is either rare or far from the mean. If your predictions are unbiased, you will never have the satisfying experience of correctly calling an extreme case. You will never be able to say, "I thought so!" when your best student in law school becomes a Supreme Court justice, or when a start-up that you thought very promising eventually becomes a major commercial success.²²⁶

Kahanemen explains that a "preference for unbiased predictions is justified if all errors of prediction are treated alike, regardless of their direction."²²⁷ This is precisely the sort of error distribution that would be appropriate for judges to strive towards. To maintain such impartiality in judicial decision-making, unbiased predictions and judgments must be regarded as the ideal. Rules based on reason, rather than those based upon the biased opinions of the judge, should govern society.²²⁸

Legal education is designed to provide lawyers and judges with the cognitive tools to engage in reasoned System 2 logic. Professional craft norms emphasize detailed articulation of the reasons and principles behind a judge's decision. Engaging in this sort of slow, reasoned, and logical System 2 analysis requires work and patience. But this is something that judges are entirely capable of handling if they so choose.

C. Structural Suggestions for Protecting Rule of Law Norms

For an independent judicial ideology to clothe the rule of Law through a more rational and deliberative process, judges must possess substantive and procedural legal rules that minimize the ability for bias to play a part in decision-making. That is, for an independent ideology that tells judges to think slowly, be more rational, and protect the rule of Law, there must be clear rules for applying facts to law so that judges may make a neutral decision. A return to *Crawford* demonstrates how this might be implemented.

226. *Id.*

227. *Id.*

228. See THE FEDERALIST NO. 78 (Alexander Hamilton). The independence of the judiciary has, from its conception, been an essential element in to "secure a steady, upright, and impartial administration of the laws."

In *Crawford*, the key to the split at the Supreme Court level was the very muddy balancing approach known as the *Anderson-Burdick* test.²²⁹ The test required the Court to balance the burdens imposed on the plaintiff against the State's interest in the election administration law to determine whether there existed a constitutional violation.²³⁰ But, rather than a simple balancing test, the Court must also factor in "the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights."²³¹ According to the various opinions in *Crawford*, if the restriction is severe, meaning if it goes "beyond the merely inconvenient,"²³² or if it is invidiously discriminatory²³³ then "strict scrutiny" is applied. But, according to Justice Stevens, "[r]ather than applying any 'litmus test' that would neatly separate valid from invalid restrictions," the Court "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule," in order to "make the 'hard judgment' that our adversary system demands."²³⁴ This approach suggests that, if the state interest is "sufficiently weighty" to justify the burden, then a "balancing test" should be used.²³⁵ According to Justice Scalia, a litmus test approach is appropriate, and if the burden is "ordinary and widespread . . . , requiring a 'nominal effort' of everyone," or is "reasonable" and "nondiscriminatory," then a deferential "important regulatory interests" standard is employed by the Court to (most likely) uphold the Law.²³⁶ This standard applies "even when their burdens purportedly fall disproportionately on a protected class."²³⁷

This amorphous, ambiguous, and apoplectically designed standard serves to purposely obfuscate the legal analysis to mask an end that the justices seek to protect. Justice Stevens found the burdens not severe enough to meet the threshold and the state interest to be "sufficiently

229. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

230. *Burdick*, 504 U.S., at 441.

231. *Id.* at 434 (citing *Anderson*, 460 U.S. at 789).

232. *Crawford*, 553 U.S. at 204 (Scalia, J., concurring).

233. *Id.* at 189.

234. *Id.* at 190.

235. *Id.*

236. *Id.* at 204 (Scalia, J., concurring).

237. *Id.* at 207 (Scalia, J., concurring) (emphasis omitted).

weighty” to justify the burden.²³⁸ Justice Scalia claimed the burdens imposed here are “ordinary and widespread,” so the State meets its burden by articulating an important regulatory interest (detering voter fraud) even if it fails to substantiate the need for the anti-fraud statute.²³⁹ Justice Souter found the burdens severe and also found that the State failed to substantiate the need to impose them.²⁴⁰ Justice Breyer came to a similar finding, while noting that the less-restrictive laws in place in Florida and Georgia would be more narrowly tailored alternatives that Indiana could have implemented.²⁴¹ The standard is so muddy that there is a lack of consensus regarding its boundaries and a difference of opinion concerning how the standard should be applied. In the midst of this chaos, each individual’s understanding of the burdens and interests dominate their approach to the facts in *Crawford*. Therefore, implicit bias, motivated reasoning, and identity protective cognition could determine the individual opinions of the case. The lead opinion by Justice Stevens seems to strive for a middle way in upholding the law from a facial attack, while leaving open the possibility for an as-applied challenge by a burdened litigant. Yet, the failure to muster the will to fashion a coherent and administrable rule served as a failure to secure the rule of Law in election administration cases. This standard, or lack thereof, dooms us to ideological determinant decisions in election administration cases.

Thus, taking the constructive approach laid out in this Note, future research and judicial opinion drafting should be made with an eye towards creating coherent, administrable rules that minimize the room for an individual judge’s bias to influence decisions in these cases. This goal can be accomplished by creating strictly applicable rules that minimize the “hard decisions” that judges must make and instead requiring simple rules that lead to clear outcomes. In a phrase, emphasize crystals over mud in cases where bias tends to play a part. By identifying the types of decisions that tend to be biased and by recognizing the underlying legal rules that allow for this bias, scholars and judges can work to establish clear and administrable rules that would be more valuable to achieve the desired judicial end: protection of the rule of Law. Finding ways to change those legal rules to minimize judicial bias would provide a structured and productive way to deal with the implications of naïve legal realism.

238. *Id.* at 204.

239. *Id.* at 207 (Scalia, J., concurring).

240. *Id.* at 218, 236 (Souter, J., dissenting).

241. *Id.* at 237–41 (Breyer, J., dissenting).

V. CONCLUSION

This Note attempts to inspire others to provide normative answers to our most pressing questions about how judges should make decisions. The last element to cementing a slow form of judicial analysis is to develop a motivating factor for why judges should engage in reasoned, rational analysis on top of a preference for legal opinions. It is here that the cynical logic of post-modern critique and moral skepticism has done the most damage to the “first principles” of analysis. Still, there remains one overriding principle that can be salvaged: sustainability. That guiding principle is the maintenance of the political, economic, environmental, social, and legal order. In that regard, it can serve as the guiding force for a well-respected, legitimate judiciary that strives to employ the law not as a means to some end, but as an end in itself. The method of achieving sustainability is simple: do not employ the law as a means to serve anything except its own end. Instead, strive to achieve a neutral set of rules that govern all of society in a way that is equitable, administrable, and just.

The greatest problem facing this sort of sustainable decision-making today is the entrenched belief, on both sides of the political aisle, that there exists *one* right answer to important policy questions facing the nation. To overcome this inaccurate belief, judges must truly change the way they see the world. Judges must begin to understand that the rule of Law itself is the most important value to maintain. We must not have a shortsighted view of history; rather we must understand that ideological extremism is a threat to liberty and freedom so long as those words should have any meaning. Fundamentalist, dogmatic faith to any party line is the most dangerous belief that can ingrain itself in the judiciary.

To counteract that risk, judges must be encouraged to think slowly about judicial decision-making. They must cultivate an attitude in decision-making that will undermine any intuition to decide along expedient partisan political beliefs. The rule of Law has always been an ideal and is only realized as the ideological fantasy guiding judicial decision-making—but never as something that can actually be achieved. The intent of this Note was to show that service as a guide makes the rule of Law “real” in a very important sense. Even though rule of Law decision-making may be “impossible,” it is still an essential value that pushes those who hold tremendous power to overcome their intuitive biases and become the more neutral arbitrators upon which our concept of liberty depends.