WHAT'S LAW GOT TO DO WITH IT?

WHAT *Judges Do,* WHY *They Do It,* AND WHAT'S *at Stake*

EDITED BY
CHARLES GARDNER GEYH

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What Judges Do, Why They Do It, and What's at Stake

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WHAT'S LAW GOT TO DO WITH IT?

Law, Politics, and the Media

Series Editor Keith J. Bybee

To Steve and Victoria

Nearly thirty years wasn't nearly enough

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Introduction

So What Does *Law Have to Do with It?*

Charles Gardner Geyh

DURING THE RENAISSANCE, the ermine became a symbol of purity that English royalty and later English judges adopted by adorning their robes with ermine fur. American judges forwent the fur but retained the symbol, for reasons that were nicely articulated by the Tennessee Supreme Court, writing in 1872:

> The idea that the judicial office is supposed to be invested with ermine, though fabulous and mythical, is yet most eloquent in significance. We are told that the little creature is so acutely sensitive as to its own cleanliness that it becomes paralyzed and powerless at the slightest touch of defilement upon its snow-white fur. A like sensibility should belong to him who comes to exercise the august functions of a judge . . . . But when once this great office becomes corrupted, when its judgment comes to reflect the passions or interests of the magistrate rather than the mandates of the law, the courts have ceased to be the conservators of the commonweal and the law itself is debauched into a prostrate and nerveless mockery. (Harrison v. Wisdom, 54 Tenn. [7 Heisk.] 99 [1872]).

In short, the ermine embodies the norm of impartial justice and the premise that judges are to bracket out extraneous influences on their decision-making and base their decisions upon applicable facts and law. If the story began and ended there, the answer to the question posed by the title of this volume, "What's law got to do with it?" would have to be: "Everything."

In the aftermath of the legal realism movement, a cadre of political scientists, inspired by principles of behavioral psychology, developed what they

dubbed the "attitudinal model" of judicial decision-making. Proponents pitted their attitudinal model against what they characterized as the "legal model," in studies of voting behavior on the Supreme Court (Segal and Spaeth 1993). They found that while judges say that they are following the law, in reality, their decisions are influenced more by their attitudes or ideological predilections. From this perspective, the myth of the ermine is just that, and despite its celebrated purity, the ermine is ultimately just another weasel. If so, what law has to do with it is essentially nothing.

For many years, the legal profession raised its ermines while the political science community nurtured its weasels, with only passing recognition that each was thinking of the same animal in fundamentally different ways. On those infrequent occasions in which one group acknowledged the other, it was typically in derisive or dismissive terms, for the limited purpose of observing that the other had misclassified its mammal in ways too obvious to take seriously. To the extent that there was a debate over the influences on judicial decision-making, it was a dichotomous one: judges were ermines, or they were weasels.

With the diversification of the menagerie in the 1990s, however, the ermine-weasel debate would take a turn for the complicated. Some political scientists challenged the premise of the attitudinal model that judges simply voted their policy preferences; rather, they posited, judges want to see their preferences implemented. For that to happen, the acquiescence, if not the support of other institutional actors—such as Congress or the president—can be essential. Judges therefore think strategically, the theory went, and adjust their decision-making to mollify or circumvent those who could thwart implementation of the judges' long-term policy objectives (Epstein and Knight 1998). Proponents of this "strategic choice" model thus postulate that judges are neither high-minded ermines nor weasels driven to satiate their ideological appetites, but clever, foxlike creatures, whose impulse to act upon their attitudes is tempered by savvy for the politically possible.

Still another cohort of political scientists, influenced by the thinking of social psychology, has questioned the premise underlying attitudinal and strategic choice models, that judges are driven by a single-minded desire to implement their vision of good public policy. Rather, they have argued, judges are social animals who desire respect and acceptance within their various communities to no less an extent than anyone else (Baum 2007). Thus, the argument goes, judicial decision-making is affected by the audiences that judges seek to impress, convince, or placate. The relevant audiences can be varied, and may include fel-

low judges, the bar, the media, the electorate, and others. Insofar as judges are an eager-to-please lot fixated upon ingratiating themselves to their audiences, the judicial mind-set would seem to be more closely akin to a puppy-dog than an ermine, fox, or weasel.

Then there are the economists. While economic analysis begot rational choice theories of legislative decision-making, which in turn spawned the strategic choice model discussed above, the relationship between strategic choice and traditional economic analysis of law is attenuated. The economic model rejects the suggestion that judicial decision-making can be explained by a desire to make good policy or make others happy. Rather, it presupposes a self-interested judge, who seeks to maximize the same things that all self-interested souls seek to maximize: income, power, prestige, leisure, and so on (Posner 1993). Fixed salaries and ethics rules constrain the influence of income on judicial decision-making, but judges may still structure their decision-making to maximize other interests, such as their prospects for appointment to higher judicial office (and the added power and prestige it entails) (Morriss, Heise, and Sisk 2005). In contrast to the ermine, weasel, fox, or puppy, the economic model's judge—who is driven by self-interested desires, is indifferent to the approbation of others, and has goals no loftier than indulging her own creature comforts—seems decidedly feline in orientation.

If analyzed superficially, this proliferation of models would simply seem to have enlarged the "either-or" debate over influences on judicial decision-making from two animals to five or six.[1] A closer look, however, reveals a gradual and perhaps fundamental shift in the way serious scholars think about judges and judicial decision-making. At the turn of the new millennium, political scientists and law professors began unprecedented collaborations on a range of empirical research projects. The net effect has been for each to take the others' work much more seriously than in the past, and to acknowledge with increasing frequency that the influences on judicial decision-making are complex and multivariate. As a consequence, few well-informed scholars would still argue that judges are exclusively foxes, or ermines, or weasels, or puppies, or cats; rather, there is an emerging consensus that judges are, well, foxermeaseluppycats.

For decades, law professors and political scientists were unwittingly engaged in a three blind men and the elephant remake, in which they, oblivious to each other, classified the same animal in different ways, with exclusive reference to the part they were holding. To complete the metaphor, the latest round of in-

terdisciplinary research has been eye-opening. One objective of this volume is to chronicle the recently emerging, if limited, common-sense consensus among law professors, political scientists, and judges that the influences on judicial decision-making are varied, and that law has neither everything nor nothing to do with how judges decide cases—rather, it has *something* to do with it.

To herald this as a moment of interdisciplinary consensus is both notable and overstated. It is notable, in that it marks a turning point in the study of courts: we have, in effect, begun to carve a Rosetta stone enabling the two disciplines with the most to say about what judges do, to communicate in a language that each understands. So equipped, it is possible for the first time to appreciate the extent to which law professors, political scientists, and judges share the common view that law and politics each play a role in the decisions judges make.

Characterizing this as a "consensus" overstates the accord and conceals the profound disagreements that remain. Most, if not all, may agree that law has something to do with what judges do, but is that "something" meaningful enough to matter? The legal establishment has long thought so. It conceptualizes judges as significantly different from public officials in the so-called political branches of government, by virtue of the judge's duty to bracket out extraneous influences and apply the law. Judges have thus been afforded a measure of independence from external controls denied other public officials that affects how judges are selected, regulated, and removed. For judges and many law professors, then, judicial independence facilitates rather than denigrates the rule of law—but that assumes the primacy of law in relation to other influences on judicial decision-making. If "law" is toward the bottom of the list, as many political scientists maintain, judicial independence liberates judges to implement their other priorities, by acting on their ideological preferences; indulging in strategic gamesmanship; pandering to their favored audiences; or satiating their self-interest. From this perspective, judicial independence undermines, rather than facilitates, the rule of law.

In short, the discovery of the foxermeaseluppycat is no small matter, but it is a polymorphous creature that defies classification. Scholars acknowledge its existence and yet disagree as to what it looks like and whether it is better caged or allowed to roam free. The chapters of this volume chronicle both the struggle toward interdisciplinary consensus on what judges do, and the profound disagreements that remain.

In his stage-setting essay in Chapter 1, Professor Jeffrey Segal outlines the

three dominant models of judicial decision-making—legal, attitudinal, and strategic choice—and highlights ongoing debates over their relative merits. This approach should be familiar to political scientists who study the courts, for it describes the field in terms of the differences separating the various schools of thought as they have emerged over the past generation.

Succeeding chapters orient themselves differently, by de-emphasizing what separates competing approaches and focusing instead on ways to reconcile or bridge the law-politics divide, embedded in the legal, attitudinal, and strategic choice models. In Chapter 2, Professor Stephen Burbank introduces complications, further explored by others in this volume, that offer insights into the difficulty of isolating the impact of law on judging. He emphasizes that the relationship between law and politics is not monolithic, but context-dependant, and may vary from court to court, issue to issue, and even case to case. He further argues that the relationship between law and politics is not dichotomous, because the law is necessarily written in terms sufficiently broad to accommodate discretion and consequently ideological (and other) influences. Here, Professor Segal takes issue, because in his view, defining law so flexibly enables it to explain everything, and so nothing—in other words, it is stated in terms so broad that its impact cannot meaningfully be verified or falsified. Burbank rejoins that while so capacious an understanding of law may complicate, if not undermine, the task of creating falsifiable hypotheses to test the respective influences of law and politics on judicial decision-making, he is unfazed, concluding, "I prefer the messiness of lived experience to the tidiness of unrealistically parsimonious models."

For Professor Lawrence Baum, on the other hand, a scholarly obsession with isolating the impact of law as distinct from politics is misdirected. In Chapter 3, Baum notes, consistent with the views of Cross and others, that law and policy are too intertwined to disentangle, and to that extent are less than a dichotomy. At the same time, more than just law and policy can hold sway with judges, whose decisions may also be influenced by the prospect of appointment to higher judicial office, the need for re-election, work-life balance, and the desire to preserve collegial relationships on a given court, among other considerations. To that extent, the universe of influences on judicial decision-making is much more than a dichotomy. Finally, Baum argues that when we do think about the law-policy dichotomy, we should concern ourselves more than most positive empirical scholars have with whether implementing ideological preferences is a judge's conscious motive, or is simply a subconscious effect of

judicial decision-making, because the answer has significant normative implications.

In Chapter 4, Professor Frank Cross further explores the interplay between law and politics by characterizing the former as a subset of the latter. For him, pitting law against politics creates a false dichotomy. By its nature, law leaves room for judicial discretion and the discretion judges exercise is influenced by political ideology, among other factors. Law nonetheless operates as a constraint on judicial discretion, leaving judges to strike a pragmatic balance by making decisions they regard as sound.

If law is politics, however, is the task of isolating the relative influence of law on judicial decision-making hopeless? The legal academy's embrace of eclecticism and complexity in its study of judicial behavior, as evidenced in Professor Cross's chapter, is in tension with the impulse of positive scholars—such as Segal—toward simplicity and reducing the variable influences on judicial behavior to a minimum. As Theodore Ruger observed at a conference where the chapters in this volume were discussed, identifying a variable for "law" generous enough to satisfy legal scholars and yet parsimonious enough to meet the needs of positive empirical scholars, is "the elusive holy grail of interdisciplinary scholarship about judicial behavior."

Professors Eileen Braman and Mitchell Pickerill explore ways to get past these interdisciplinary impasses and reach greater accord on the complexity and nuance of judicial decision-making in Chapter 5. They explain the difficulty law professors and political scientists have had in understanding the relative influence of law on the decisions judges make in terms of "path dependency"—a term that they borrow from the work of scholars who have studied institutions (such as the courts), and turn on the scholars themselves. In effect, each discipline has its own path or way of thinking about the problems it studies, a path that structures its methods of analysis and constrains the extent to which those who walk the path are willing to deviate from it. They identify significant issues of "translation" involving the operationalization of concepts that can influence the perceived usefulness of research across disciplines, and recommend that political scientists and academic lawyers acquire a deeper appreciation for the ways in which scholars in other disciplines conceptualize concepts.

In Chapter 6, Professors Barry Friedman and Andrew Martin offer more specific guidance as to how the influence of law could be more productively studied. They suggest that for the most part the so-called legal model is not re-