**Embracing Policy Formation and Implementation as Legitimate Judicial Functions**

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**Abstract:** Courts, including the Supreme Court, are facing a legitimacy crisis. In part this is due to the fact that while the role of judges in crafting policy is understood by political scientists, overtly considering policy is not accepted as a legitimate part of the judicial role by the public or even many legal scholars, a view re-emphasized by public statements of judicial actors. This leads to accusations of hypocrisy when cases inevitably reflect policy judgments as well as sub-par policy outcomes from attempts to focus solely on legal issues. This paper surveys ways in which judges make policy, examines existing views of legal roles and proposes a view that embraces rather than rejects policy considerations as a core element of the judicial role and the practice of law. It concludes with a brief consideration of the barriers to establishing such a view including the current practice of teaching law and public perceptions of the law/policy distinction.

For more than a century, the process of judicial decision making has been the subject of ongoing debate in a number of academic disciplines within the United States. Scholars in law, politics, sociology, economics and psychology as well as a number of judges and lawyers have weighed in on this issue, predominantly with a focus on the behavior of appellate courts. A number of models of behavior have been announced, ranging from an essentially normative assertion that judges dispassionately consider the law and facts to an empirically rooted assertion that the Supreme Court is a body of unconstrained policy actors looking to further their own agendas. There have also been suggestions about the influence of psychological factors ranging from perceptions of legal role to heuristic shortcuts shaping outcomes, along with numerous attempts to look for the roots of particular opinions in judicial biography and background.

Just looking at the last few weeks of the 2014-15 term of the Supreme Court, though, should give anyone pause about what we think influences judicial decisions. On the one hand you have a perceived liberal and activist in Justice Kagan asserting that the business friendly opinion in *Kimble v. Marvel Entertainment* (2015) is commanded by principles of *stare decisis*. On the other, the committed conservative legalist and self-described “umpire” Chief Justice Roberts announcing in *Halbig v. Burwell* (2015) an opinion that rests, first and foremost, on policy analysis favoring the centerpiece legislation of a Democratic administration. One takeaway might be that most of the Justices are somewhat pragmatic rather than dogmatic in their approach to decision making, a view shared by jurists like Judge Posner (2008) and Justice Breyer (2010). At root the bench is composed of people who respect the concepts of the rule of law and justice and seek to effectuate both in particular cases, with results in keeping with Epstein and Knight’s (2013) suggestion that a broad range of influences can matter. If this were widely understood and accepted, perhaps papers like this would be unnecessary.

But then we come to cases like *Obergefell v. Hodges* (2015) and its finding that the individual right to marry embraces same-sex marriage as a matter of dignity. The case falls along what has come to be the expected split on cases relating to sexual orientation in particular. Namely, four conservatives in dissent, to one degree or another asserting that the majority is embracing policy in disregard of their duty to consider the law and specifically the Constitution. In echoes of Wechsler’s “neutral principle” critique of *Brown,* Justice Roberts’ dissent asserts that the outcome had “nothing to do with the Constitution” and invoked the specter of a new *Lochner* era of judicial overreach. Of course as sharp as this critique is, it pales in comparison to Justice Scalia’s colorful and fundamentally disrespectful language, with its allusions to lasting shame by mere association with such “fortune cookie” wisdom and denigration of the ability of elite Justices to understand the views of most Americans. Meanwhile, Justice Kennedy’s opinion (and the concurrences supporting it) asserts the majority is following the law and that any considerations of policy are secondary (and certainly not the motivation for the opinion). Despite this protest, the majority opinion plays up the sympathetic nature of the plaintiffs and the negative consequences of alternative outcomes even as it asserts the ruling stems not from these influences but a perceived fundamental set of values. Disaffected partisans have seized on the dissent’s criticism to trumpet that the Court is simply composed of unelected political actors, while those who favor the majority position have trumpeted the triumph of the “rule of law” in bringing our nation one step closer to true equality.

The broader debate on this issue was utterly predictable, even if the precise nature of Justice Kennedy’s opinion was not. Historic circumstances have arguably uniquely set up the Roberts Court to have numerous cases where the Court can be assaulted as deciding policy questions instead of legal ones. Whereas formerly cause litigation and “judicial activism” was decried by conservatives, today many of the cases attacking government programs are brought as openly partisan fights by the right. For example, the litigation strategy at the heart of *Halbig* was born out of an American Enterprise Institute retreat designed at killing the Affordable Care Act. (Toobin 2015). Its champions have made it clear that their goal is to achieve judicially what they could not do legislatively. When added to the longstanding tradition of cause litigation from the left, it can appear besieged on all sides looking to enlist the Court in the cause of policy agendas.

In doing so, these advocates fuel a growing sense that the courts are simply another political body rather than a place of reasoned decision-making. The recent disputes over whether a replacement should be named for Justice Scalia despite the fact that nearly a year remains in President Obama’s term has underscored that perception. The perceived political nature of the current court is also reflected in decline in trust in it as an institution. (Gallup 2014). Admittedly, the Court still polls better than Congress, and on par with the President, but its reservoir of trust has steadily declined for the last 15 years. Arresting that slide is particularly important for the legal system, given that it lacks any enforcement mechanism beyond legitimacy. As Hamilton (1788/2003) noted in defending its creation, the Court still lacks the power of the sword or purse, and history illustrates that it can be rendered impotent if it insists on rendering judgments that other political actors or the people will not honor. (Breyer 2010).

What to do about this disaffection with the Court? This paper asserts a logical, but perhaps counterintuitive, solution – reframe the role of courts to openly embrace policy formation and implementation as valid judicial functions. This is based on a view that the unease or dissatisfaction of the public is primarily rooted in the perception that the “proper” role of courts and judges is only to disinterestedly apply law to facts – what is sometimes referred to as the “legal model” of judicial decision-making. This in turn leads to perceptions that any judgment embracing a view of policy is inherently suspect. Since policy choices are necessarily present in many, if not most, significant legal issues at all levels, this leaves judges open to charges of “legislating from the bench” regardless of the outcome of cases. Empirical evidence that judicial rulings – and in particular Supreme Court rulings – are likely to align with the political attitudes of a Justice (Segal and Spaeth 2001) only enhances this perception of impropriety.

This perception is misplaced, though, as it rests on a misunderstanding of the role of the judge. The judges in our system are not merely there to robotically apply the law, if that were even possible. Judgment is inherently a subjective task, and the contested cases most likely to be the subject of public scrutiny are apt to reflect value conflicts that cannot be resolved to an objective certainty. They are the “wicked” problems of the law, and in keeping with Rittel and Webber (1973) have no clear stopping or starting points, no “yes” or “no” answers. In these cases, judges at any level are called on to provide justice and wisdom, not rote legal analysis. In that context, they are necessarily engaging in policy determinations, not simply legal ones. But only if we change the perception of the proper role of courts can we hope for the public to understand this truth and respect the efforts of judges.

Indeed, judges who embrace the legal model overtly are limiting their ability to rationally explain their conduct and undercutting their own standing in the eyes of the public. As Rawls (1997) noted in his use of the Supreme Court as a model for public reason, the Court’s opinions are not there to make bare its actual decision making process – which may rely as much on feel as reason - but an effort at legitimating its conduct to a potentially skeptical audience. To do so on issues touching at their core on matters of policy would seem to necessitate openly embracing the policy elements of the dispute. Instead, the training and socialization of lawyers and judges in the language of laws and facts, of rights and remedies, often needlessly constrains these efforts. Judges seeking to stay true to the legal model are thus forced to effect a fiction where they overstate the impact of law and do not surface latent policy considerations, even as they shade fact patterns and shape narratives to try and enhance acceptance of their truth claims.

In some senses, this is both an old and new concept. On the one hand, it is in keeping with the tradition of legal realism and the normative vision of authors such as Carter and Burke (2010) that the best legal reasoning balances law and facts with social norms, expectations and underlying realities. At the same time, embracing a broader, more holistic approach to dispute resolution is also in keeping with Geyh (2016)’s argument for replacing the “rule of law” paradigm with one rooted in “legal culture”. In particular, though, this paper takes its position from the emerging concept of new public governance. One of the central tenets of new public governance is that administrators at all levels must recognize the existence of inherent values and conflicts and seeking to craft solutions that honor those concerns – something that would seem to resonate with such classic ideas as justice and equity, while still respecting the idea of the rule of law. Getting the legal system to embrace such an approach, however, faces a key obstacle in the current state of legal education, which focuses on the teaching of doctrinal law with a secondary emphasis on lawyering skills, and very little appreciation for overt policy considerations. Additionally, there is a concern that if judges were to openly embrace policy considerations they would be seen as even less legitimate in the eyes of the public inclined to think that courts are at their best when they are the least comprehensible. Ultimately, though, this argues for greater public education rather than perpetuating mythology.

This paper begins with some illustrative cases of how legal rulings make policy, whether the courts clearly confront the policy implications of the disputes or not. With this grounding, a discussion of the default understanding of the role of courts as commonly held by the public and announced by judicial actors follows. Next comes an overview of some of the critiques of this default view, mainly from the field of political science, which posit that extra-legal factors are frequently drivers of judicial conduct, with policy views often correlating with outcomes. Finally, a framework that valorizes open consideration of the policy implications in appropriate cases is considered as well as difficulties associated with bringing about such a change in perspectives given the current modes of legal training and popular conceptions of the “appropriate” role of judicial actors.

1. **How Courts Make Policy – Imposing Standards, Approving or Condemning Conduct and Crafting Remedies**

 The idea that courts make policy should be beyond dispute. As Dahl (1957) and Shapiro (1968) made clear, it is difficult not to see the Supreme Court in particular as a policy actor, albeit not as the independent author of social change critiqued by Rosenberg (1991). The premise of policy making as central to judicial conduct has been an established view of judicial politics for decades. (Murphy and Pritchett 1974). The central premise of several books is that it necessarily happens. (Carp and Rowland 1983). Cooper’s (1988) examination of institutional mandates states it as a fact. Nonetheless, it remains controversial, with even President Obama (2016) asserting the role of the judiciary is to interpret, rather than make law – much less policy.

 At the outset, it should be noted that claiming a policy making role for courts is not so limited as the assertion of Hart (1994) that courts make law where “open texture” permits it. Even Geyh’s (2016) conception of a “legal culture” in which law controls except in cases of “legal indeterminacy” is arguably too cramped given the scope of judicial orders that can and do re-shape public policy. The crafting of precedent in a common law system is only one element of the policy-making impacts of legal disputes. In reality, judges influence and ultimately make policy whenever a ruling leads to alterations in conduct – which can come in forms ranging from the creation of legal doctrine or the recognition of new rights to a particularized remedy that is embraced as a model for behavior. Seen in this light, the full sweep of potential judicial authority becomes clear – courts can and do fundamentally shift both private and public conduct, oftentimes through what might seem like small acts.

 What follows are brief sketches of three ways in which courts have had massive policy impacts in American life. The first is the shift in products liability law initiated by the California Supreme Court, which ushered in an era of mass tort lawsuits and re-shaped business considerations through the imposition of a strict liability standard. The second discusses how the Supreme Court’s handling of issues relating to criminal procedure has effectively re-shaped the policies of multiple levels of law enforcement without cases directly examining policy implications. The third looks at how remedies in institutional and administrative reform cases that grew out of the broadening appreciation for civil rights as applied to prisons and schools have placed courts in the role of directly shaping institutional policies.

1. **The Imposition of Strict Liability for Defective Products – a Study in Judicial Policy Entrepreneurship**

The case law approach to studying cases and the rule of law conception tends to treat cases as independent events. Principles are derived from the study of precedents, and the lurching advance and retreat of ideas like equal protection, substantive due process and the right to privacy over years are compacted into a few hours of study. What is sometimes lost is how significant developments in law – especially common law doctrine – are related to the actions of particular individuals. Only rarely is a case recited as the vision of a particular judge or Justice, while slightly more frequently individuals are credited with exceptional dissents such as Harlan’s prescient analysis of the consequences of *Plessy v Ferguson* (1896)or Brandeis’ articulation of the right to privacy in *Olmstead v. United States* (1928)*.* Even then while we may praise the insight or eloquence of the opinion, the judicial actor’s role is almost always seen as that of a reactive analyst rather than a proactive shaper of policy.

However, when one adopts the lens of policy analysis instead of law the proactive role of certain individuals becomes clearer. In particular, particular judges can be seen as policy entrepreneurs in keeping with either the multiple streams or punctuated equilibrium models of policy change. (Schlager 2007). In multiple streams, the entrepreneur is seen as the key mover who matches policy solutions to problems in moments of opportunity. (Zahariadis 2007). Punctuated equilibrium approaches tend to focus less on the entrepreneur as an active manipulator of events and more as a contributor to overall outcomes, but they are nonetheless significant in the shaping of ultimate events. (Baumgartner and Jones 2009). In keeping with multiple streams theory, a judge may act as a policy entrepreneur in applying a legal standard that has been suggested but never fully transformed into precedent to an identified problem in a particular case in an opportune moment. In keeping with punctuated equilibrium theory the success of any effort at shaping the law frequently turn on conditions beyond the particular judge’s control such as the availability of an appropriate case vehicle, and not infrequently result in a sudden, rapid change in policy after a prolonged period of struggle with indeterminate results. It is thus possible to see Chief Justice Marshall’s establishment of judicial review in *Marbury v. Madison* (1803) or Chief Justice Warren’s careful political efforts to achieve unanimity in *Brown v. Board of Education* (1954) as exercises in policy entrepreneurship.

A similar effort – one that reflects both elements of multiple streams and punctuated equilibrium models – took place in the California Supreme Court over several decades on the issue of product liability. Justice Roger Traynor first announced the potential application of strict liability for manufacturer’s in product defect cases in a concurrence in *Escola v. Coca-Cola Bottling Co.* (1944). As anyone who has taken torts can attest, strict liability is at odds with the classic conception of liability as a synonym for blame or wrongdoing. This theory does not take into account whether the manufacturer intentionally caused a defect, nor how careful or negligently the manufacturer behaved – the cost of unanticipated harms caused by a product is to be borne by its manufacturer (and ultimately by the consuming public at large) so long as it is used as intended.

Traynor’s reward for articulating this concept was to be accused of attempting to make industry and ultimately society an insurer against all harms. (Ursin 2009). His own view was more nuanced – he acknowledged that cost shifting was an element of his proposal, but far from the only one. (Traynor 1965). It was not a matter of simply insuring all injuries are compensated – Traynor specifically noted that harms that are the foreseeable result of the intended use of a product whose risks are understood should still be borne by the actors making the choice. Thus, he rejected the idea of a lawsuit predicated on the impact of claiming soda caused tooth decay – that harm is well understood and accepted by the user. On the other hand, where one purchases a soda only to discover the manufacturing process led to the inclusion of a dead mouse, he asserted that it should not require a showing of particular negligence on the part of the manufacturer for the state to impose liability on the manufacturer for damages.

Like any true policy entrepreneur, Traynor used many different opportunities and channels to advance his position. Over an extended period of time he expressed his support for the shift to strict liability in a series of concurrences and dissents, as he could not command a majority of the court. Ultimately, though, the tide turned. In keeping with punctuated equilibrium, the shift was rapid and radical. In *Greenman v. Yuba Power Products, Inc.* (1963), Traynor wrote an opinion embracing strict liability nor just for a majority but a unanimous bench. He followed this with a course of advocacy in law reviews and public speaking during and after his tenure on the bench. (Traynor 1965; Ursin 2009).

It is worth noting that Traynor viewed the issue of product liability as an evolving, policy laden issue rather than a timeless principle of law. This may have had something to do with the fact that Traynor also held a doctorate in political science and had done government service in the 1930s as something other than an attorney. For him, the law could not and should not stand outside of time as formalists argued, or rest on some set of “neutral principles” as articulated by the legal process school. (Ursin 2009). Instead, he articulated a view of the law as playing a vital role in society rather than being abstracted from it, and sought to encourage others to adopt his view.

Ultimately, Traynor’s conception of product liability largely won out. Over time the locus of discussion went from whether strict liability should apply to defective products to the proper test for assessing whether a product is defective. (Owen 1998). From Traynor’s work grew entire bodies of law relating to product liability and enterprise liability that govern many modern suits. Products liability has became so embedded as a distinct category of law that it commands its own field specific *Restatement of Law*. Thus, in the span of a few decades a Kuhnian revolution in law on this point was nearly complete, with Traynor having moved from heretic to beatified founder.

This change could not and did not limit itself to the confines of courts. Businesses are now aware of the fact that they will be held liable whenever their products cause unexpected injuries. This shapes everything from cost benefit analysis of initial production, to price points that ensure adequate reserves, to corporate form choices designed to limit liability. Some argue that the American system has made it too easy for companies to be sued and therefore is thwarting innovation – one of the arguments in the overall tort reform movement. (Kagan 2001). Others look at the same evidence and concur with Traynor that strict liability is an appropriate policy point for a mature industrial or post-industrial society. (Owen 2010). What is undeniable is that courts have dramatically shaped policy in this area, and almost no one would argue today that Justice Traynor’s conduct was illegitimate. Thus, conscious policy making is not intractably inconsistent with the judicial role.

1. **How Civil Liberties Cases Have Re-made Police Policy**

Where Traynor consciously acted as a policy entrepreneur, oftentimes the policy implications of legal action are less obvious, and only play out over time. Frequently courts simply declare the existence of a right or limit on government action as a principle, without meaningfully addressing how it will be implemented as a matter of policy. This approach is sometimes spoken of approvingly as minimalism (Sunstein 1996) as it theoretically permits agencies and others greater freedom of operation to achieve compliance with the pronouncement of a right. However, simply announcing an abstract right without some greater guidance is just as likely to lead to confusion and a proliferation of potentially conflicting holdings in lower courts and agency actions in efforts to give meaning to the right. In this context the court’s failure to openly embrace a policy role has sometimes been problematic.

For over a hundred years after ratification the Bill of Rights provided very little meaningful protection to individuals. (Lowi, Ginsberg, Shepsle and Ansolabehere 2014). Even after passage of the Civil Rights Amendments Supreme Court cases held that there were few if any meaningful protections for individuals embedded in the Constitution. This changed acutely in the wake of the rise and expansion of government in the 20th century with advent of recognition of “fundamental rights” in the Constitution that neither state nor Federal agents could violate. This has led to what has been an ongoing debate about the scope of those rights that has generally tended to favor a more expansionist, inclusive set of limitations on government actors, albeit with periods of backlash and creative efforts to minimize the impact. That debate, in turn, has fundamentally altered the policies of all levels of government on a number of issues.

One of the key areas of expanding civil liberties has been the creation of meaningful limitations on local police power. Although the Fourth Amendment states that the people are to be secure from “unreasonable search and seizure” and the Fifth that they cannot be compelled to testify against themselves, until the 20th century this concept had not created meaningful restraints on local police.[[2]](#footnote-2) In no small part this owed to the fact that at the time of its passage the modern police force had not yet been created, limiting the potential for agents of the state to stop or search persons without first seeking a warrant from a magistrate. This changed with the emergence of modern police as a security force in the nineteenth century, but the law lagged behind. Even as “beat cops” proliferated and highway patrols began cruising public roads, it was unclear what police could or could not do in their efforts to ensure public safety.

This changed in the 1960s with cases such as *Mapp v. Ohio’s* (1961) embrace of the exclusionary rule in state proceedings. *Mapp* of course rapidly followed by cases finding that the accused has a fundamental right to counsel at trial (*Gideon v. Wainwright* 1963), during questioning (*Escobedo v. Illinois* 1964) and the right to be aware of these rights as well as the right against self-incrimination (*Miranda v. Arizona* 1966). During the same time period the Court placed the burden on the state to provide the accused with any exculpatory evidence it might possess (*Brady v. Maryland* 1963) and recognized a right to sue the government for violations of the Fourth Amendment (*Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics* 1971).

These basic statements have had a major impact on the policy of law enforcement agencies at all levels. Because of these and later rulings, police are expected to navigate a maze of standards based on a given situation. They have to be able to differentiate when they have a reasonable suspicion that might support a pat down frisk under *Terry v. Ohio* (1968) from when at most they can ask permission to search. They need to be able to differentiate between what is in “plain sight” at any given point, whether they can rely on the assertion of ownership of an individual proffering consent to a search, and ensure that their basis for a search is justified lest they risk litigation. At the same time, they are under performance pressures from a society that demands ever more from all of its civil servants.

This should not be taken as a suggestion these civil rights are not vital. If the Constitution is to mean anything, the Bill of Rights should place stringent requirements on the exercise of police power. At the same time, in shaping these cases as only issues of declaring rights, courts have tended to ignore the full range of policy implications of this conduct. A more direct acknowledgement of the policy impacts may not have altered any outcomes, but it may have limited the potential for conflicting obligations on the part of police or at least an articulation that did not seem to be setting police and citizens in adversarial positions.

1. **The Imposition of Remedies as Policy Directives**

One of the more direct ways that judges can impact policy is through the creation of remedial orders running against state actors. (Rowland and Carp 1996). Unlike policy entrepreneurship or recognition of rights by higher courts, remedies almost always the creation of lower courts, either alone or in consultation with the parties to a particular lawsuit. (Cooper 1988). The scope of these orders can range from a single act in a particular case, to an injunction requiring a relatively small policy change by a particular actor, to wholesale, specific alterations in policy by a state’s entire institutional system, such as in some instances of prison reform.

Two notable areas of policy change through remedial orders have been in the areas of school integration and prison reform. In the wake of *Brown v. Board of Education* (1954)and *Cooper v. Aaron* (1958), local school districts throughout the nation came under scrutiny for *de jure* and *de facto* policies of segregation. While the Supreme Court had made clear the need for integration, it had intentionally left it to localities to try and craft appropriate remedies. The highest profile battles occurred in Little Rock and other Southern jurisdictions, but there were just as bitter contests in northern states. As Cooper (1988) documents, the fight over integrating Detroit’s schools is a case in point. Ultimately, over the course of two decades, the involvement of multiple judges and two different appeals to the Supreme Court, what emerged was a plan that all but dictated specific bus routes for various parts of the metropolitan school district - and if the initial remedy had not been vacated by the Supreme Court, would have included enforcing desegregation throughout much of Michigan to ensure effective elimination of *de facto* segregation in the greater Detroit region.

This case also illustrates the general unease or the population with seeing courts as policy actors. (Cooper 1988). Both sides seemed ambivalent at best towards the prospect of a court crafted remedy. For example, despite having sought court action the Detroit Board submitted a variety of possible remedies but endorsed none of them, leaving the judge to openly question if they really had a position. When judges sought to include the views of impacted defendants and give them a role to participate, the response was to avoid involvement and then vilify the resulting remedy as having been imposed on them. Moreover, the open hostility of some of the parties was reflected in public anger including personal attacks on the judges. Ultimately it is somewhat remarkable that the judges persisted in what they saw as an obligation to craft a meaningful remedy, including engaging expert assistance, rather than find a way to reject the project on any number of grounds.

Another area in which district courts found themselves making policy over several decades was in the context of prison reform. Until the mid-20th century, prisons were seen as an exclusively administrative domain, with conditions essentially off limits from judicial review. (Feeley and Rubin 1998). This changed when district court judges started to hold that the Eighth Amendment’s prohibition on cruel and unusual punishment extended not only to the manner of punishment (imprisonment or torture) to the conditions of confinement. Judged against this standard, a number of individual institutions as well as entire state prison systems were found wanting – hardly a surprise given the general view that prisoners deserve harsh treatment and certainly are not a funding priority for most states.

In several of these cases, judges were again placed in the position of setting policy. Frequently, though, the judges were at least initially assisted by administrators who saw involvement in crafting a remedy as preferable to having one imposed. (Feeley and Rubin 1998; Cooper 1988). Feeley and Rubin’s analysis of prison reform notes this occurred in at least the early stages of reform efforts in Alabama, and only grew more contentious when state personnel changed and/or the impact on the budget became more noticeable. Cooper also notes that generally judges were willing to accept concessions from state agencies rather than push them past the breaking point. One of the judges at the heart of reform – the appropriately named William Wayne Justice of Texas– reflected after the fact that his goal was always a negotiated agreement, but that when state actors refused to suggest policy reforms he had no choice but to impose them. (Justice 1992/2013). Far from the sort of super-legislator he was sometimes portrayed as in the media, he saw himself as much more of a facilitator of resolution – just one backed with the authority to impose change if parties could not or would not work with him.

It is fairly obvious from this overview that judges have and will continue to have a significant role to play in making policy in a broad range of ways. Despite this, judges are not typically seen as policy actors – or at least not as legitimate ones. Instead, judges in these settings are routinely attacked as venturing into “activism.” Judges who ordered integration of schools were vilified on this basis, as were the judges who ordered prison reform. (Baum 2006; Cooper 1988). Ultimately, though, it is difficult to see how these judges could have acted any differently given the circumstances. The reality was that these policy changes were needed to address shortcomings in the law in the case of Traynor and ameliorate violations of rights in the others – which in the absence of any other actor made the judge ultimately responsible for effectuating change. By not recognizing this as a reality, parties potentially lost the opportunity to more meaningfully shape the policy changes and the broader society perpetuates a misunderstanding of the role of courts in policy issues.

1. **The Legal Model of Adjudication and its Impact on Lawyers and Judges**

Despite the evidence of judicial policy making, policy considerations are typically not at the forefront of legal arguments. This is in no small part due to the core premise of most legal training in the United States that law is an endeavor focused on two related activities – finding facts and applying law to those facts. (Clayton 1999; Geyh 2016). At the trial level, courts and jurors are routinely tasked with making a number of subsidiary factual determinations and then applying the law. (Rowland, Traficanti and Vernon 2010). Appellate law in theory removes one of these activities, as the facts are to be taken as found by the court below. As President Obama recently stated, this collapses the acceptable role of a Justice to “interpret the law, not to make it” (2016). At most, this model would allow for variability based on issues such as the selection of which facts to emphasize or how to characterize them in an opinion. (Carter and Burke 2010).

In the classic legal model of decision making, therefore, all that should matter is the parties’ presentations of the law and facts before a disinterested decision-maker. (Heise 2002, Geyh 2016). The judge (or judges in appellate cases) is presumed, in a conceit going back to well before Locke, to lack any incentive to favor either side but rather is a rational objective user of legal principles. (Locke 1690/2002). This is a position that accords with judges’ own subjective view of their role, as they commonly report seeing themselves as referees or umpires, and routinely denounce anyone who asserts they are acting as advocates. (Kozinski 1993/2013; Bandes 2011). Indeed, judges report being reluctant to be seen as intervening even on issues such as the appointment of expert witnesses on matters of contested science or policy when the case itself appears to pit fairly evenly matched parties. (Cecil and Willigang 1993). Instead, the expectation is that the parties will curb any excesses or overreach through rebuttal and cross-examination. (*Eastman Chemical Company v. Plastipure, Inc.* (5th Cir. 2015) (noting with approval trial court’s refusal to intervene in a “battle of the experts”)).

If this model were to hold, then there should be little to no consistent variation in the conduct of individual judges attributable to personal or institutional factors. There would be expected to be some variation based on the objective strength of the case presented and the skill of the parties presenting matters, although some judges dispute even the role of skill. (Bandes 2011). Additionally, it is still likely that there would be some variation as there is almost always a residual disagreement between parties judging the same circumstances. (Galanter 1993; Heise 2002). Nonetheless, if this model explained the adjudication process then consistent treatment of issues regardless of which judge or panel of judges heard the evidence would be expected.

Fig. 1. A Simplified View of the Legal Model of Ajudication.

This model leaves at most a narrow role for policy considerations or outcomes. There are occasional circumstances such as the grant of injunctive relief where a judge must overtly consider if the proposed remedy is in the public interest. However, this is supposed to be a distinct assessment from whether the law supports the claim for relief or the particularized facts of a case. As an approach it does not suggest a need for routine consideration of the policy implications of conduct, even in significant cases.

There is strong normative and cultural support for the legal model. Hart (1994: 145), for example, suggests that judges in a true legal system should only be permitted to make law in the narrow confines of the “open texture” left by other law makers, and that even then they are bound by procedural safeguards. Fuller (1977) famously asserts following principles of the legal model creates in law an inherent moral core lacking in policy considerations. Similarly, Dworkin (1977) asserts the law is rooted in principle, a concept that to him suggest that even hard cases have “right” answers. In the same analysis, Dworkin consciously distinguishes principle from considerations of policy, which he equates with unduly narrow evaluations of outcomes in light of political and other temporal considerations. Judges are sometimes argued to be obliged to follow the law as a matter of integrity. (Dworkin 1986). These sentiments, while not expressed in philosophical terms, seem to be reflected in cultural expectations of judges if the language of confirmation hearings and Presidential commentary is any sort of meaningful reference point. (Bandes 2011; Obama 2016). Thus, if nothing else the legal model is one that is defended strenuously on philosophical grounds and as an aspirational goal. (Heise 2002).

It is also worth noting that there is empirical evidence of the legal model at work in studies of judicial decision making. Even though the Supreme Court primarily takes contentious cases where a split of authority is perceived to exist, it has historically reached a unanimous decisions in nearly 40 percent of its opinions. (Epstein and Knight 2013: 16-17). As a function of overall voting, Justices who are seen as having broadly divergent views nonetheless appear to have some sizeable areas of agreement. Thus, the liberal (at least for the Supreme Court) Ruth Bader Ginsburg can agree with her most conservative colleagues Clarence Thomas and Antonin Scalia no less than 65% of the time. (Neubauer and Meinhold 2013: 465). This echoes both the arguments of Edwards and Livermore (2009) based on the DC circuit and findings by Howard (1981) that unanimity rather than dissensus is the rule at appellate courts.

There is also evidence that judges internalize the legal model to a significant degree. In experimental settings judges have demonstrated susceptibility to psychological biases like anchoring, representativeness and hindsight in a manner similar to the general public. (Guthrie, Rachlinski and Wistrich, 2007). Yet when an issue is framed in keeping with legal concepts such as Constitutional considerations, judges can resist considering inadmissible evidence in a way normal test subjects do not. (Wistrich, Guthrie and Rachlinski 2005). Similarly a recent paper from the Cultural Cognition Project reported that judges and lawyers tend to show conscious application of legal reasoning in circumstances where the general public tends to be influenced by cultural values. (Kahan et. al 2016).

One explanation for this pattern of conduct is in the training and socialization of judges. They are steeped in the legal model from their own education. Law school is largely isomorphic, with an emphasis on case method instruction and forms of reasoning in keeping with the legal model. (Epstein 1981; Clayton 1999). Judges are further led by experiences as practicing attorneys to think of their roles in very particular ways. (Kozinski 1993/2013). Moreover, either in law school or in practice, future judges also become aware of the fact that the law is not self-enforcing, but that the legal system relies on legitimacy in the eyes of the general public as well as the support of other branches of government to carry out judicial statements. (Breyer 2010). The process of judicial nomination and confirmation in the Federal system all but ensures the most radical elements of the bar are further eliminated from the pool of potential decision makers. (Posner 2008). Similarly, elected judges in state systems have to conform with cultural expectations, which currently embrace the legal model. (Geyh 2016).

Once on the bench, judges remain surrounded by people who believe the legal model should be followed. It is human nature to consider the judgment of peers and colleagues – and for judges, this includes lawyers, other judges and (potentially) legal scholars. (Baum 2006; but see Horwitz 2013: 957 (quoting Chief Justice Roberts’ criticism of legal scholarship as largely irrelevant)). Most judges have at least some collegial interactions, either in making their decisions or just their working conditions. (Edwards and Livermore 2009). Similarly, judges routinely engage with friendly audiences, such as the Federalist Society for Justices Scalia and Thomas and the American Constitutional Society for Justices Breyer and Ginsburg. (Baum 2006). Even judges who disdain the very concept of legal realism and the possibility of extralegal influences admit to being impacted by the esteem of fellow judges, attorneys, and their clerks. (Kozinski 1993/2013). The audiences judges turn to for appraisal of their performance are thus almost entirely composed of people who think about the law through the lens of the legal model and its norms of behavior.

 Moreover, there are also negative pressures that reinforce at least outward conformity to the legal model. Judges subject to periodic retention elections or the prospect of being recalled are apt to be sensitive to any appearance of non-conformity. In the Federal system, impeachment and removal is a real if limited threat, having only rarely been successful and generally attached to a serious felony. (Neubauer and Meinhold 2013). While the odds of promotion to a higher court are low, they would be eliminated completely for judges seen as violating established norms. (Posner 2008). There is also a serious risk for lower judges to be sidelined or limited in their conduct. Judicial conferences can and do recommend limitations of responsibilities and other restrictions for judges who are seen as incompetent, unethical or out of line. (Neubauer and Meinhold 2013). Older judges are particularly susceptible to conformance pressures if they have taken senior status, as they generally surrender discretion over their case assignments to the chief judge of their district or circuit. (Posner 2008).

Thus, the legal model can be asserted to be the default model for judicial decision making and may well explain most conscious judicial behavior. Nonetheless, the legal model is far from a complete explanation of judicial behavior. Disagreements are common between judges, even when applying identical frameworks. Indeed the potential for splits on legal issues is one of the key criteria the Supreme Court uses in selecting cases from lower courts. Moreover, as shown by the behavior of the Supreme Court itself it is clearly possible for judges steeped in the same education, applying the same rules to the same facts to arrive at diametrically different conclusions. There are clearly other influences at work, and by continuing to insist they do not matter judges set themselves up for constant attack when their opinions track these understandable but “illegitimate” considerations such as policy implications.

1. **Empirical Critiques of the Legal Model**

The legal model has been attacked as a myth by generations of scholars in law, politics and psychology. Oliver Wendell Holmes, Jr.’s (1897/1997: 994) seminal assessment that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law” is one of the earliest “modern” attacks on this idea of judges as dispassionate arbitrators. This viewpoint was taken up by the realists in the 1920s and 30s, notably in Frank’s *Law and the Modern Mind* (1931)*.* The view that has achieved the most prominence in the literature assumes that courts, and especially the Supreme Court, are composed of policy actors, and that when they are thwarted it is primarily due to external constraints such as the lack of an appropriate case vehicle to express their positions. An alternative view offers a range of potential motivations that can include policy aims but also reflect the idea that judges have internalized constraints such as the respect for the concept of *stare decisis* and deference to the will of the people expressed through Congress. These approaches have been in turn criticized, mainly by judges and legal scholars, as making too much of areas of disagreement and fostering a tendency of courts to be viewed as political actors. This latter criticism, however, does nothing to help address the clear evidence that judges are doing something beyond just applying the law to facts when they reach decisions, and ignores what how courts can or should do in cases with clear policy considerations.

1. **The Attitudinal Model – Judges as Motivated Policy Actors**

The empirically driven critique that arguably has had the most influence in the last several decades is the attitudinal model. First espoused by Schubert (1965), this model asserts that political attitudes drive the outcomes of disputed cases. In its simplest form, the attitudinal model asserts that to the extent they can judges advocate policy views, with conservatives favoring conservative outcomes and liberals furthering liberal values. (Segal and Spaeth 2002). Embedded within the attitudinal model are concepts borrowed from economic and social theory including that actors are assumed to be rational economic maximizers, but constrained by rules and norms. However, the structure of the federal judiciary and the unique position of the Supreme Court reduces the constraints of judges, and the Justices in particular, to a significant degree. Similarly, the fact that removal from office and even legislative reversal is a fairly minimal threat, and that modern Justices seem to lack the political ambition of prior generations, all provide reasons the members of the Court might be less constrained than other actors. Thus, per Segal and Spaeth, maximizing policy outcomes becomes the default objective of a rational actor, at least at the Supreme Court.[[3]](#footnote-3)

At the heart of the attitudinal model is the concept of attitudes. As seen by Segal and Speath, attitudes are a “‘relatively enduring’ set of interrelated beliefs about an object or a situation.” (Segal and Spaeth 2002: 91). Social action results from the interaction of attitudes about an object interact with those regarding a situation. In particular Segal and Spaeth assert that cases involving similar issues build to form “issue areas” in which a judge’s conduct will be predicated on their values. Justices can be placed into a essentially linear ideological space from conservative to liberal based on their positions on these issues. Thus, at the heart of the attitudinal model is an expectation that how Justices vote in any given case will be a function of their pre-formed attitudes towards social groups and legal issues.

Fig. 2. A Simplified Representation of the Attitudinal Model

In a number of studies, correlations of attitudes to outcomes have been established. This seems to be a trait reflected not only at the Supreme Court but to some degree in lower courts as well. (Miles and Sunstein 2008). For example, judges appointed by liberal Presidents have in turn taken more liberal positions on issues like civil rights throughout the appellate court system. (Songer, Sheehan and Haire 2003). Panels composed of liberal judges vote more liberally than panels of conservative judges on issues of administrative law, with mixed panels moderating their positions. (Miles and Sunstein 2008). However, these results are not universal, but seem to vary by subject matter of the dispute, the circuit court that hears them and other factors.

The impact of political affiliation have also been studied with regards to trial courts. Rowland and Carp (1996) report statistically significant if not massive variations based on whether a judge was appointed by a liberal or conservative President in a variety of areas. The magnitude of the difference is variable, with politically salient issues demonstrating a greater degree of variation. Other work suggests that even pre-trial rulings like the admissibility of expert witnesses may be subject to the influence of partisan attitudes. (Buchman 2007: 680-690). However, Buchman’s methodology may significantly overstate the impact of attitudes on overall behavior, as his case search specifies tort cases – an area of particularly high salience for conservative judicial actors and the tort reform movement. (Kagan 2001: 147-150). Similarly, Rowland and Carp overtly looked for cases where political views might matter, such as civil rights litigation. This tendency has led to criticism, especially from legal scholars, that political scientists are unnecessarily sensationalizing the work of courts. (Tamanaha 2009; Edwards and Livermore 2009). But this criticism does nothing to address the fact that judges set themselves up for charges of hypocrisy or illegitimacy when they deny this evidence in its entirety. (Geyh 2016).

1. **Strategic/Institutional Models of Judicial Decision Making – Policy May Matter, But Much More May be at Work**

Although a number of correlations have been found between judicial attitudes and verdicts, the attitudinal model has never been fully embraced. As noted, a number of defenders of the legal tradition assert the attitudinal model overstates the impact of politics and that the legal model has been misrepresented, rendering the results largely irrelevant. Other researchers, while still critiquing the legal model have also criticized the attitudinal model is too reductionist. For example it has been asserted that the attitudinal model ignores the role of institutions in shaping the nature of judicial decision making. (Heise 2002; Clayton and Gillman 1999). In this tradition, the rules and practices of a court as well as the pattern of interaction between courts and other government actors may explain deviations from what the attitudinal model predicts. Another element that has been mentioned as lacking is any consideration of the judge’s cognitive limitations, such as the tendency of all humans to take mental shortcuts or fall back on pre-existing understandings when confronting new information. (Rowland and Carp 1996). One way to conceive of this model is that rulings are a composite blend of a judge’s own subjective goals (typically assumed by political scientists to be policy outcomes, but just as amenable as being personal or professional satisfaction or other objectives) the impact of institutional constraints, considerations of other actors and the inherent cognitive limitations of humans. (Epstein and Knight 2013: 12-13 (framing strategic model and critiquing focus on policy as only goal); Baum 2006).

Fig. 3 A Simplified View of the Strategic/Institutional Model

One of the most sophisticated recent analyses of the Supreme Court has identified a number of restraints that can be characterized as strategic or institutional and seem to influence outcomes in ways that vary with attitudinal preferences. (Bailey and Maltzman 2011). One of these – deference to precedent under the doctrine of *stare decisis –* is consistent with the legal model in a broad sense. The ability of other branches to influence the Justices’ behavior also suggests interbranch relations serve as a strategic institutional constraint. Consistent with interpretivist views of institutions, the influence of these factors varies over time rather than remaining constant, with individual members of the Supreme Court generally following historic trends.

Going beyond the Supreme Court to the broader subject of judicial decision-making introduces a series of new institutional factors. Some of these are products of formal rules, others of social norms and expectations. Initially, the vertical hierarchy of the Federal Court system places a clear if limited measure of constraint on courts other than the Supreme Court. (Posner 2008). They are obligated to at least craft their decisions in a way that comports with precedent, although it has been noted that the forest of precedential cases actually creates more opportunities for freedom of action. Case filings have grown significantly over time, with ever greater resulting pressures on judges to handle matters as expeditiously as possible. (Boyd 2013; Robbennolt, MacCoun, and Darby 2010). Moreover, the fact that judges are generalists, and expected to deal with a much greater diversity of cases than either the lawyers who appear before them or their academic critics also puts pressure on judges to conform to what they perceive as controlling standards. (Posner 2008).

Additionally, the uneven timing of appointments and the nature of lifetime appointments can lead to situations in which individual judges are out of step with the prevailing sentiments of their communities or controlling circuits. (Justice 1992/2013). In that circumstance it would be irrational for a judge to act as the sort of sincere policy actor posited by the attitudinal model. Such actors are unlikely to openly court reversal and the associated stigma– although they will often try to use circuit precedent where they can in furtherance of what they see as important vindications of rights. The discretion and power of these judges lies much more in shaping the immediate resolution of disputes or the subjects of appeal than in creating legal precedent. (Rowland, Traficanti, and Vernon 2010). This is no mean feat of course, as it has fundamentally recast significant areas of policy such as prison administration. (Feeley and Rubin 1998).

What emerges from strategic and other institutional models is a more nuanced vision of judicial behavior. As Rowland and Carp (1996) note, conceiving of extra-legal influences in terms of unconscious cognitive effects makes it less confrontational or offensive for judges steeped in the legal tradition. It also allows for consideration of a broader array of influences. However, it is arguably counterproductive to getting judges to openly embrace the policy making aspect of their roles. Indeed it may reinforce the idea that judges should try to follow the legal model and simply accept their inability to do so completely as a foible of human nature, rather than grappling with the policy implications of their conduct.

1. **Confronting Judicial Policy Making Openly – Towards a New Model of Judicial Behavior**

Barring a fundamental shift in American institutions, courts will continue to make policy. There are still vast areas of common law in which judges will have to constantly solve and re-solve issues of liability and fault. The Constitution will remain susceptible to competing interpretations with vast implications for the scope of government authority and obligation. If trends continue, each new piece of legislation and administrative rule of any significance will be subject to litigation and judicial interpretation which will also in turn fundamentally shape policy. So long as any sizeable group of judges and the general public think of policy concerns as illegitimate or subservient to some overarching responsibility to follow the legal model, it is likely that rulings and remedies addressing politically salient issues will result in charges of activism or hypocrisy by dissatisfied parties. This will likely continue the erosion of legitimacy of the court system and fuel overall anti-government sentiment.

Geyh (2016) recently laid out a case for bridging the gap between the legal model and its empirical critics. According to this work, the answer lies in a conceptual shift to a “legal culture” model. In this model, the basic structure of the American legal system would remain unchanged, but with a conscious recognition of the need for judges to rely on extralegal considerations in certain cases. In particular, the idea is that judicial independence coupled to an understanding of this culture would lead to an appreciation of how extralegal considerations allow judges to render just outcomes in certain cases.

While Geyh’s proposal suggests a necessary shift in perspective, it is ultimately not a sufficient answer to how to address the policy making role of courts. In particular, it still suggests courts are addressing what are fundamentally legal disputes, without explicitly considering broader policy implications. One that has been adopted by some scholars of “new governance” or “new public governance”[[4]](#footnote-4) is a radical redesign of institutions to try and wall the court off from policy issues as beyond their competency, but this seems at odds with other fundamental values. An alternative approach, one endorsed by number of judges and in keeping with views emerging from new public governance is to openly recognize the potential regime leadership role of courts as mediators of contested values and identifiers of rights and obligations. Where this differs from the current legal model is by seeking to ground courts’ actions in conscious appraisal not just of law but of the purposes and impacts of their conduct in a complex, inter-branch relationship. This approach, moreover, would not require significant alteration of the legal system but actually rests on the espoused positions of many current jurists and historical conduct of judges in America.

1. **New Public Governance and its Potential Application to Judicial Conduct.**

There appears to be a growing recognition that the modern administrative state embodies a series of complex relationships that do not track with prior conceptions of government and law. (Morgan and Cook 2014; Rubin 2005; Dorf 2003). Early state political theory conceived of government as a repository of essentially vertical powers and debated the proper allocation of power amongst different bodies. (Rubin 2005). Similarly, social contract theory conceived of individuals as atomistic holders of natural rights who tempered those rights only to the extent doing so led to greater overall benefits. (Locke 1690/2002). By comparison, more recent work has tended to conceive of governance as processes carried out in distributive networks involving dynamic relationships operating in a range of dimensions in which neither rights nor obligations are rooted in transcendent principles, but rather are social constructions. (Rubin 2005; Mogren 2014). New public governance reflects a concern with the need for institutions and leaders to be empowered to take on not just issues of efficiency and client responsiveness as a business would, but also to address wicked and chaotic problems that reflect value conflicts. (Morgan and Shinn 2014; Magis, Ingle and Duc 2014).

One strand of new public governance literature asserts that this approach will necessitate not just a recognition of the complexity inherent in governance and the training of leaders but a fundamental redesign of institutions. (Trubek and Trubek 2010; Simon 2010). These scholars see this as an opportunity for experimentalism in the tradition of Dewey, but arguably on a much more aggressive scale. (Wilkinson 2010; Simon 2010; Dorf 2003). This includes the potential for change in every aspect of governance and embracing the concept of continual re-invention. One question that arises is what will happen to existing institutions such as the court system or even law itself.

Whether it is in spite of or because of the fact many of these writers are legal scholars primarily grounded in a comparativist tradition, they are suspicious of whether the courts will have a significant role to play – at least without significant institutional change. (Wilkinson 2010). There is an empirical basis to doubt the ability of courts to employ traditional tools to effectively address the sorts of problems new public governance is designed to address. (Dorf 2003). For example, it has been well documented that the American legal system can impede the progress of major public works programs, such as the dredging of port channels and disposal of toxic sediments. (Kagan 2001). This is brought into sharp relief by comparison with similar projects in European cities, where a more collaborative and less confrontational approach is the norm and courts are rarely involved. Many new public governance writers emphasize the goal of creating community empowerment and partnership at least in part to try and minimize these sorts of complications. This is in keeping generally with the thrust of deliberative democracy as an approach to policy formation that seeks to minimize conflict through the search for common understanding. (Gutmann and Thompson 1996/2003).

Owing to the perceived nature of American court processes and new public governance, some scholars think the court system cannot be a meaningful contributor in a world of new public governance. (Wilkinson 2010). This suggestion is made on the grounds that the orientation gap between the rights based legal system on the one hand and a collaboration based governance system on the other is simply too great to be bridged. This goes beyond the questions raised by Rubin (2005) about the disconnection between the historic language of law and its role in the modern state to a fundamental view that the entire legal system is being overtaken by events. Taking this view, ultimately the courts system would become irrelevant to the question of governance and policy much as irrelevant statutes persist yet are never enforced.

An alternative view that results in a similar conclusion is that courts do not need to be involved in any issues that arise from new public governance, even if the matter involves traditional court functions like adjudication and legal interpretation. (Rubin 2005). These functions are no longer the exclusive domain of judges and courts (if they ever were). A wide swath of actors at all levels of government engage in such tasks, often with limited or no meaningful judicial oversight. Agencies routinely engage in interpretation of the laws relevant to their mission in everything from formal rule-making to adopting informal policies, and often adjudicate disputes over compliance with those interpretations. (Rubin 2005; Trubek and Trubek 2010). Many of these decisions are never subject to judicial review, either because parties do not contest them or because there is no party who can effectively seek review. (Zaring 2006, *Lujan v. Defenders of Wildlife* 1992). Moreover, at least in theory courts give deference to agency actions under the *Chevron* doctrine, although the degree of that deference is uneven. (Breyer 2010; Rubin 2005).

 This reality when coupled with the perceived problems litigation has led to a suggestion the role of courts be minimized, informally or formally. As Zarang (2004,2006) has noted, agencies often act in a way that is designed to limit the potential for legal involvement. The use of informal practices and policies that are not the sort of action that is ever subject to legal review, when coupled to interagency “best practices” identification can create widespread uniformity amongst legally distinct entities almost on a par with a legal requirements with minimal court intervention.. (Zarang 2006; Trubek and Trubek 2010). Bingham (2010) goes further, proposing formal limits on legal review under a Collaborative Government Act. This builds on similar approaches used when private or public parties engage in dispute resolution mechanisms short of court cases, such as arbitration, mediation or “negotiated rule making.” Under this approach, courts would have only a very limited basis on which to review any collaborative governance processes. In fact, it would be more limited than the sort of jurisdiction courts have over consent decrees frequently used currently by law enforcement agencies. (Bingham 2010; Dorf 2003). In this approach, though, courts would still retain their classic role of evaluating disputes against legal standards, albeit on a very narrow basis.

As interesting as these approaches are, the regime values of the United States render any of these approaches as a large-scale change unlikely. While the adversarial process does sometimes lead to cumbersome processes and less than ideal outcomes, it is also a deeply ingrained value that aggrieved parties should have a right to seek redress. (Kagan 2001). The repeated guarantees of due process, equal protection and right to jury trial in the Constitution reflect how important these values are. These values also reflect skepticism of any agency to self-police, as reflected in the Administrative Procedure Act and why agencies’ internal appeals processes are typically subjected to external judicial review. (Dorf 2003). Moreover, even if a Collaborative Government Act were passed, there would likely be both a significant series of legal challenges to the Act itself and any resulting agreements as delegating government authority to private actors in violation of the Constitution.

Additionally, the more radical of these approaches assumes that legal intervention is always a negative. In fact, though, courts have played major roles in shaping policy in generally positive ways in both public and private law. As discussed above, it was through the courts that corporations came to have liability for product design defects to all the people they hurt, which has helped ensure consumer safety. (Baum 2006; Ursin 2009). Similarly, it was the courts that largely created modern criminal procedure by breathing life into the right to counsel at all stages in proceedings and defining the scope of permitted police conduct. (Dorf 2003). It was also a series of court decisions that enforced integration of schools and other institutions, reformed prisons, exposed the maltreatment of developmentally disabled individuals in state institutions and have struck down numerous popular acts that nonetheless violated fundamental rights. (Cooper 1988; Feeley and Rubin 1998). [[5]](#footnote-5) Simply assuming courts lack a role to play in policy issues moving forward is unnecessarily pessimistic as well as deviating from societal expectations. The better question, therefore, is how courts can address the sorts of policy disputes modern governance and collaborative processes are apt to engender. In keeping with this expectation that there will still be a vital role for courts even as new public governance approaches proliferate.

1. **Regime Leadership Jurisprudence – Something Judges Already Speak of Under Other Names**

If courts are not apt to be eliminated or sidestepped, then the question remains of how judges and courts can meaningfully engage policy issues. The need for an approach to judicial decision making that embraces the complexity of the issues posed by the modern world generally and governance in particular is something that judges have been articulating for over a hundred years. (Holmes 1897/1997). More recently policy considerations have been articulated as an aspect of a pragmatic approach to jurisprudence. (Posner 2008; Breyer 2010). They do not discuss it in these terms, but judicial pragmatism similar in some regards to Cook’s theory of regime leadership for public servants in that it reflects a conscious choice to be mindful of both a constitutive impact from even seemingly instrumental conduct and the complexity of the role of the judge in an overall system of government. (Cook 2014). Arguably, it is in this sort of role, with a conscious emphasis on policy issues, that judges can best embody the regime values associated with the legal system of enabling rigorous challenges to the status quo and standing as a bulwark against undue governmental intrusion. However, this is not a universally accepted view, and likely requires for both educational reform and some measure of institutional adaptation to be fully realized.

It is doubtful that many judges, and particularly newly appointed or elected judges, are well versed in the literature of policy processes, the realities of public administration, or any scholarship associated with new public governance. Most judges have responsibility for cases in a broad range of subject matters, rather than being specialists. (Posner 2008). They frequently do not even have a background in subjects they are charged with applying, like using the tenets of the scientific method to screen proposed expert testimony. (Gatowski, et al. 2001). At the same time, they are very much products of their environments, including law schools and legal societies as well as their own personal audiences. (Baum 2006). They also tend to vary over time in terms of how they value particular considerations such as precedent or deference to Congress, likely as a result of how those considerations were viewed by society generally and lawyers in particular when they formed their own views of legal doctrine. (Bailey and Maltzman 2011). Similarly, judicial approaches to legal questions such as the value of individual liberties have altered considerably over time, generally in keeping with changes in broader social norms. (Songer, Sheehan and Haire 2003). Thus, given their exposure to the modern administrative state it should not come as a surprise that judges have written reflectively on how this modern reality has impacted the legal system and in turn been impacted by it. (Posner 2008, Breyer 2010).

There is an emergent sense from perspectives on both the right and left that complex questions require lawyers and judges to go beyond legal formalism and understand the real stakes in cases. As noted, this is the gravamen of Geyh’s (2016) call for a shift in legal culture. Judge Posner has emerged as both a staunch advocate of the value of economics and rational choice theory as applied to law and questioning adherence to a narrow law/policy distinction. (Posner 2008). Justice Breyer is one of if not the most consistently liberal, humanist Justice on the current Supreme Court (although that is arguably more a comment on how far the Court has moved to the right than Breyer’s inherent liberalism), but is also outspoken in his criticism of doctrinaire approaches. (Posner 2008; Breyer 2010). Despite this seeming ideological divide, both Posner and Breyer describe the role of the judge as being “pragmatic” rather than relying on any sort of formalistic conception of the “right” way to interpret and apply legal principles. (Breyer 2010, Posner 2008). In doing so they build on a legacy from Holmes to Cardozo to Traynor. (Ursin 2009)

The essential characteristic of this pragmatic view is the breadth of considerations a judge is to entertain, which are adaptive to the particular case setting. Posner argues that essentially a judge should be akin to a skilled craftsman, with a variety of tools at his disposal ranging from purely legalistic construction for simple circumstances such as the clear application of controlling rules, to overt policy considerations in complex, value laden matters. (Posner 2008). Breyer similarly argues for a judge to take a broad approach, looking for ways to further the purposes of legislation and honoring the expertise of agencies, other branches of government and the practical knowledge of local decision makers rather than trying to shoehorn modern principles into hoary canons of construction or pre-existing legal doctrines – all while honoring fundamental values such as liberty and equal protection. (Breyer 2010). Both argue that the full consequences of decisions should be considered and that attorneys should seek to provide judges with relevant evidence of this rather than just relying on argument based on resort to precedent or analogy. (Breyer 2010; Posner 2008). In different ways, both also endorse an approach in which judges and attorneys act realistically regarding their own limitations – Posner by suggesting that judges act on best estimates of outcomes while admitting imperfection rather than seeking illusory precision, Breyer by noting several occasions where the Court was on the wrong side of history and what we would now consider fundamental principles of justice.

Notably neither one argues that judges should either have a monopoly on legal interpretation or that their efforts should always end at purely legal considerations. (Posner 2008; Breyer 2010). The former position rejects formalist theories of government in favor of a recognition of reality. (Rubin 2005; Breyer 2010; Trubek and Trubek 2010). The latter position stands in contrast to the minimalist school of judicial conduct, in which judges should not attempt to actually craft solutions where policy is implicated but simply either uphold or invalidate laws and policies based on legal considerations. (Sunstein 1996). Minimalism theoretically fits the mode of new public governance by honoring the expertise of others and showing some form of judicial restraint. (Sunstein 1996; Rubin 2005). However, it is also a recipe for perpetual uncertainty as courts can simultaneously insist on having oversight and the ability to strike down the conduct of other actors but refuse to provide the sort of clear signal that is a core function of supervisory entities in a network environment. (Dorf 2003; Rubin 2005). By comparison, Posner and Breyer both articulate a position that would require a more direct interaction with others and recognition that judicial conduct is part of a complex, networked system. A resulting ruling might therefore identify a lapse and suggest a functional standard for correction, without necessarily articulating precise solutions or insisting on subsequent judicial oversight.

In many ways Posner and Breyer are simply the latest incarnation of a lengthy tradition. In *McCullogh v. Maryland* (1819) Chief Justice Marshall spoke to the need to understand not just the text but the fundamentally broad nature of the Constitution as a statement of principles, a lesson that was sometimes lost on his successors. Holmes asserted that economics and statistics would be the key to modern approaches to law. (Holmes 1897/1997). At the same time, he famously asserted a need for deference to other branches of government in his dissent to the *Lochner* decision. (Ursin 2009). Cardozo openly spoke of the role of judges as occasional legislators. (Posner 2008). Traynor, recognizing this role, urged judges to consider reading works or consulting experts in other fields on cases where appropriate (and then duly informing the parties of their efforts to preserve the adversarial process). (Ursin 2009).

In many respects this approach echoes the concept laid out by Cook of administrators as regime leaders. Initially, judicial officers – and particularly Federal judges – share key traits of executive agency administrators. Federal judges are unelected, being appointed by the President and confirmed by the Senate. Especially at the trial court level, they are routinely made aware of just how policies as announced in legislation are playing out for real people – what Cook calls the experiencing function of administration. (Cook 2014). Particularly in public law cases, judges see just how often there is a value conflict between different groups in society as well as between various legislative and Constitutional principles. Trial judges, moreover, have this conflict personified in the parties who appear at hearings or testify at trial.[[6]](#footnote-6)

Judges also have a similarly complex relationship with society to other administrators. They are called on primarily as instrumental actors, at least from the perspective of the parties before them. Disputes do not wind up in court for an academic exploration of the law. Both sides want a result that favors their interests, ideally without conceding anything to the other side. At the same time, judges unavoidably have a constitutive function. Sometimes, this is transparent – when a novel legal doctrine is announced, for example, such as the foreseeability doctrine in negligence or strict liability for product design defect. (Carter and Burke 2009; Ursin 2009). Finding a prison system has violated core Constitutional values, or that a state cannot deprive a person with a disability of their right to live in the community just for administrative ease also plainly evokes a constitutive function. (Sabel and Simon 2004; Justice 1992/2013; Feeley and Rubin 1998). Even though a trial court’s conduct has no precedential value, the trial rulings of only a few judges can and have served to alter national policies on a variety of subjects by signaling evolving norms and safe harbors to institutional actors. (Feeley and Rubin 1998; Sabel and Simon 2004; Zaring 2004). Judges who have made such policy are keenly aware that what they were doing had constitutive impacts and reflected core values – indeed, that awareness allowed them to rebut charges of “judicial activism” on a principled basis. (Justice 1992/2013; Baum 2006).

Despite what would seem to be the clear evidence that judges do therefore make policy and as such are potential regime leaders in the same way as administrators are, this is not a proposition without controversy. As Posner discusses at some length, attorneys frequently refuse to engage the broader policy implications of their cases, choosing instead to focus on legal arguments that frustrate judicial efforts to understand the real stakes of a dispute. (Posner 2008). Certain judges – primarily conservatives, but certainly not universally – repeatedly assert that nothing beyond the law is ever considered in reaching their determinations. (Segal and Spaeth 2002; Kozinski 1993/2013; Posner 2008). Others like Justice Scalia will admit they make policy but only in an exceptionally narrow sense, and will assert they strive to hone to ideological principles in all cases (regardless of what empirical research suggests). (Scalia 1989/2013; Segal and Spaeth 2002; Bailey and Maltzman 2011). Thus, while many judges openly advocate what amounts to a regime leadership position, many still do not admit that they are in fact key policy actors who are subject to a wide variety of influences. (Peretti 2002). Even more divided are the American people, who seem perpetually uneasy with the idea of judges as policy makers even as they accept their most clearly policy oriented decisions. (Bailey and Maltzman 2011; Carter and Burke 2009; Breyer 2010).

This divide over the appropriate role of judicial officers has led to an uneven history of judicial actors on questions impacting public policy. On the one hand, in a number of instances of particularly egregious public agency conduct, engaged judges have successfully used a variety of mechanisms to develop the facts of the cases and arrive at remedies that sought to ensure significant policy improvements moving forward. (Cooper 1988; Feeley and Rubin 1998; Sabel and Simon 2004). For example, the reform of Alabama’s prisons included judges who took novel approaches to the scope of the Eighth Amendment, appointed counsel and expert witnesses to document the situation, relied on special masters to help institute reform and made government officials at the highest level legally responsible for carrying out the reforms. (Kagan 2001; Feeley and Rubin 1998). On the other hand, the expansion of policy lawsuits over environmental issues led to the Supreme Court to erect more difficult standing doctrines and similar efforts on school integration were curtailed by the Court altering the bases on which integration could be justified. (*Lujan* 1992; *Parents Involved in Community Schools* 2007). Moreover, concern with perceived “judicial activism” – along with frivolous litigation and the length of death penalty appeals - was one of the reasons articulated by Congress in passing legislation restricting the availability of the sorts of habeas petitions that had triggered the initial wave of prison reform litigation. (Neubauer and Meinhold 2013; Feeley and Rubin 1998).

Given the evidence that judges are reactive to shifts in policy, make policy and are subject to many of the same pressures and roles of other policy actors generally and administrators in particular, it seems likely that many judges will not take a dogmatic stand against embracing policy issues – at least *de facto* if not *de jure*. Given that, an alternative course of conduct would be for judges to openly embrace a regime leadership role consistent with the dynamics of new public governance. (Cook 2014). In many respects this would not require much of a change from existing practice. Judges already honor regime values associated with adversarial processes by allowing parties to take primary responsibility for determining the fundamental framework of the proceedings, at least below the Supreme Court level. (Kagan 2001; Segal and Spaeth 2002). Similarly they honor the regime value of allowing an ongoing discussion about the scope of rights and their application by taking a view that generally permits a wide range of legal arguments so long as certain core requirements such as standing are satisfied. (Neubauer and Meinhold 2013). There is no reason judges would suddenly have to become inquisitorial actors on the European model, or seek to start cases unprompted, to satisfy a regime leadership role.

At the same time, judges can and should be realistic about what they are doing and why in keeping with the pragmatism espoused by Breyer and Posner. This includes being aware of the potential consequences of their conduct, and insisting that the parties provide them with the evidence and materials they need to fully assess these implications. (Breyer 2010; Posner 2008). In public law disputes or other cases with clear policy implications, this can involve insisting on policy briefing at the appellate level or even the appointment of expert witnesses at the trial level in the same manner they are appointed on scientific issues. (Cwik 2013). Similarly, if a violation is clear but the remedy is one that can only be effectuated with expertise beyond the scope of a trial judge, judges can appoint special masters to craft or execute the requisite remedy subject to particular standards and judicial oversight. (Feeley and Rubin 1998). If the question is not one of legal remedy but the legal standard moving forward, a trial or appellate court might provide functional guidelines that do not dictate exact policies in respect of subsidiarity and expertise of others in formulating specific solutions in various contexts. (Dorf 2003). It may also be appropriate in some cases to assert there simply is no satisfactory answer at this time, as well as generally being more open about the possibility of subsequent adjustments over time.

Alternatively, a trial court could even seek, in the right case, to facilitate the use of collaborative governance. Judges have wide discretion in their approach to facilitating settlement. (Boyd 2013; Hornby 2007/2013). They can order parties into formal conferences and negotiations, facilitated mediation and court annexed arbitration, just to name a few of their tools. (Neubauer and Meinhold 2013). There is no reason courts could not seek to build a collaborative process with a broader range of stakeholders into their settlement processes in the right case, either as the means to arriving at a short term resolution or an element of a long term plan. Of course, this would not necessarily obviate the need for the court to act directly if the process broke down or if there were allegations of violations of any resulting agreement. (Dorf 2003; Feeley and Rubin 1998). It also likely would not transform the court system into a series of collaborative problem solving entities, any more than engaging in such processes for long term planning means the Forest Service never acts as a command and control enforcement agency with regards to timber harvesting in a particular area.

Many readers familiar with the law might react with horror to this proposal, visions of *Lochner* dancing in their heads. Indeed, the dread specter of *Lochner* is invoked repeatedly in the dissenting opinions in *Obergefell* as a means of discrediting Kennedy’s analysis that individual dignity is a component of the fundamental rights of citizens. However, this fear is misplaced as to the current proposal. Openly embracing the policy dimension of disputes is not the same thing as elevating a particular view of policy to Constitutional dimension. To the contrary, it should permit judges and lawyers to recognize that they are addressing complex and potentially “wicked” problems that are not subject to ultimate resolution. (Rittell and Webber 1973). As Guthrie, Rachlinski and Wistrich (2007) note, consciously having to address issues in the opinion writing process likely diminishes the operation of latent biases and foster self-examination. Even judges vehemently opposed to the idea that extra-legal considerations should matter admit the need for critical introspection. (Kozinski 1993/2013). Thus, judges could be led to more fully consider the impacts of their conduct and limit, rather than expand, their actions. (Holmes 1897/1997; Breyer 2010). However, unless policy considerations are openly acknowledged such introspection is less likely to occur.

Indeed, embracing policy questions openly could actually enhance the legitimacy of the court system. As both Hamilton (1788/2003) and Rawls (1997) note, the central tool courts have in establishing their legitimacy in a democratic system lies in the power of reason and articulation in judicial opinions. When lawyers and judges overtly limit themselves to legal considerations instead of speaking to the broad issues of policy that are obvious to the public, they diminish the power of the resulting opinion as a persuasive force. Reversing that stance – admitting reality, rather than insisting that the law exists distinct from the web of policy considerations – ultimately should make their opinions more, rather than less, legitimate.

1. **Overcoming Barriers to Embracing Policy Making – The Need to Alter Role Expectations and Legal Training**

The fact that judges can, within the state of current authority, engage policy issues directly and creatively is no indication that they will. Any judge using these tools may well be accused of being an “activist” or in some way losing neutrality. Just such criticisms have been leveled at drug court judges, on the grounds that being part of a “treatment team” inclined them to bias against a defendant who failed the program. (Dorf 2003; Simon 2010). Similar accusations were routinely thrown at the judges who implemented integration and reformed the prison system. (Justice 1992/2013; Baum 2006). These accusations, however, ignore the fact that judges routinely are called on to adjudicate matters where they know more about a defendant than is allowed as evidence. (Frankel 1976/2013). Similarly, claiming that judicial involvement in resolutions makes them illegitimate as adjudicatory agents is no more credible than the notion that just because they put on a black robe they are able to ignore the influences that operate on all human beings. (Baum 2006; Peretti 2002). In other words, such accusations are another artefact of the prior theoretical conception of governance that does not mesh with the modern administrative state and reflect a lack of realism rather than an empirically grounded objection. (Rubin 2005).

In fact, this mindset, rather than any defect in the tools judges have or shortcomings in existing laws, is likely the largest barrier to effective policy engagement by judges and courts. Unfortunately, it appears to be a broadly shared conception. It is repeatedly reinforced by the behavior of public officials and judicial nominees insisting that legal issues and rule enforcement are their only considerations. (Bandes 2011). The persistence of this view surfaced in the uproar resulting from President Obama suggesting a judge should have an empathic capacity. This was widely seen as calling for judges to step outside of the accepted realm of legal considerations, even though empathy is a prerequisite to understanding the complexities of policy issues.

 One way to address this issue is through public education. Dror (1994) for example writes of the need to educate the public as to the complexity of modern governance. More recently there has been some discussion in new public governance of the need to reinvigorate civics education as a route to fuller participation and understanding of the modern administrative state. (Newbold 2014). Judges have also discussed this need, with retired Justice O’Connor spearheading a campaign on Constitutional education. (Breyer 2010). As discussed above, Geyh (2016) advocates a shift in legal culture that at least admits of the legitimate use of extralegal criteria. However, if this process does not accurately reflect the scope of the issues judges face and the role courts have repeatedly played in shaping policy, it is apt to reinforce the idea that courts are not legitimate policy actors but should instead confine themselves to some narrowly conceived idea of law.

The public’s conception of courts as bodies that should limit their considerations to the application of legal standards is also shared by many judges. As Rowland and Carp (1996) note, historically only a minority of judges viewed themselves as law makers as opposed to law followers. This general view has led to social pressure and role conformity that likely helps explain why the legal model of adjudication is still so staunchly defended by some jurists. The case method of instruction prevalent in law schools reinforces the legal model, with its focus on facts and the application of legal doctrine, at the expense of considerations like social impact, efficacy or cost benefit analysis that would be relevant to policy analysis. (Epstein 1981; Clayton 1999). From their first day in practice, attorneys who form the pool who supply judges are surrounded by colleagues who share a similar point of view. One of the key needs of almost all humans is for the respect of their colleagues, friends and family. (Baum 2006). For judges and attorneys this includes their fellow lawyers, most of whom are using the legal model to evaluate their conduct. Thus, lawyers generally and judges in particular are likely going to be strongly influenced in their official behavior by what they see as the limits of legal conduct. Moreover, most lawyers are so socialized to believe in these limits that jurists find report frustration at the parties’ failure to address the implications of their arguments. (Posner 2008; Breyer 2010).

The fact that lawyers are so singularly focused can be placed at the feet of legal education and training, which tends to cling to classic models of government functions and a narrow conception of legal roles. (Wegner 2009). For these reasons, it may be time for a fundamental reappraisal of law school curriculums. The case law method has served the institutional needs of law schools well since it was first implemented at Harvard more than 100 years ago. (Epstein 1981). It is an excellent way to learn how to read, understand and ultimately produce legal work product that follows a particular scheme of facts, issues, rules, analysis and conclusion. However, this isomorphic approach has arguably caused attorneys to think the law is both a rational, comprehensive study and that standing alone it has the ability to address any conceivable issue that could arise in a dispute. (Ackerman 1974).

Law schools are aware of the fact that their educational models are not optimal. The Carnegie Foundation report on legal education highlighted a gap between the law as taught and skills –oriented education. (Wegner 2009). At the same time, the primary focus has been on making better practicing attorneys. Moreover, most law schools are focused on producing students who can pass state bar examinations, as this is one of the key metrics law school accreditation rests on. (Wegner 2009). Broader educational groundings in normative ethics, theories of government and public policy are lacking to a point where lawyers (who, after all, later become judges) often think of their profession as having an exclusively instrumental function tied strictly to a reified concept of “law” even as it has outsized impacts on policy and society generally. When law students raise public policy, it is typically as a fallback and ill-conceived of argument, rather than a mindful attempt at policy analysis – a trait that carries over to practice. (Margolis 2001). If these missing elements are not corrected somewhere in the education of lawyers, then lawyers and ultimately judges will be at a distinct disadvantage in addressing value conflicted questions with potentially disastrous consequences.

To illustrate the potential impact of disconnecting law and policy, consider *Korematsu v. United States* (1944) and the OLC memos authorizing torture. In the effort to force what was essentially a policy judgement into a legal framework, in *Korematsu* the Court created precedent authorizing a broad scope of executive action during national crises that Justice Jackson presciently labeled a “loaded gun”. Decades later, the authors of the torture memos used the logic of *Korematsu*, among other cases, to justify their position that somehow techniques that were in flagrant disregard of the Convention against Torture were permissible on a theory of national self-defense. (Mayer 2009) One of the authors, John Yoo, has blended an instrumental view of law and his preference for unitary executive theory to such extremes that he is on record as suggesting inflicting violence on a child to elicit a confession from their parent would be legal – and that he had no obligation to consider whether providing a legal justification for torture was a good idea as a matter of policy or basic humanity. (Mayer 2009). More recently, Donald Trump has suggested he would kill the families of enemies of this nation – and he would no doubt be able to find lawyers willing to take a purely instrumental approach to suggesting it was perfectly legal in line with the OLC memos. (LoBianco 2015). As a field, the law must stop teaching its students – and future judges – to merely think in terms of what can be done, rather than what should be done, lest these exceptions become the norm.

1. **Conclusion**

Judges make policy and likely will continue to do so. This is not without controversy, in light of common perception that judges are to limit their considerations to purely legal factors. This view has persisted even in the face of a mounting body of evidence that judges often decide matters in a way that correlates with their political orientations or other attitudinal factors. Ultimately, the role of courts is and has been very similar to that of other administrators in the networked environment of new public governance. If the public, attorneys and judges are educated realistically and embrace this role, they can and should embrace the potential for the legal system to play a vital role of shaping policy and providing meaningful stewardship of regime values for the foreseeable future. If not, then courts may well wane in significance through a pattern of self-limitation and irrelevance.

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2. The Supreme Court had embraced exclusion of wrongfully seized evidence in Federal cases as early as 1886, but this had no impact on the actions of state or local authorities. [↑](#footnote-ref-2)
3. At the same time, Segal and Spaeth assert there is a singular attitude common to all Justices, namely that the Supreme Court has a key role to play in national issues. This is posited, for example, as a means of explaining both the history of the Court dating back to *Marbury v. Madison* and why Nixon’s own appointees would not support the President’s position in *United States v. Nixon.* (Segal and Spaeth 2002: 94, 118, 168). [↑](#footnote-ref-3)
4. Certain authors sometimes call their undertaking “new governance” and at other times “new public governance” but seem to be part of the same body of literature trying to address how institutions have and will continue to change to reflect the needs of modern societies. (Rubin 2005; Trubek and Trubek 2010). [↑](#footnote-ref-4)
5. Admittedly, many of these actions were subsequently criticized as unduly stretching the perceived legitimacy of courts using the traditional perception of their “proper” role. (Simon 2010; Dorf 2003). The societal gains of many of these programs, however, have been lasting. (Feeley and Rubin 1998). [↑](#footnote-ref-5)
6. If there is a distinction between judges and other administrators, it may in fact lie in how judges do not get to see when policies are implemented successfully and without conflict. This in turn may create a potential for availability bias to render them unduly skeptical either of complaints or the assertions of agencies, depending on their particular history in adjudicating such matters. (Kahneman 2011; Guthrie, Rachlinski and Wistrich 2007; Frankel 1976/2013). However, this particular complication is beyond the scope of the present analysis. [↑](#footnote-ref-6)