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## **The New Legal Realism**

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## **Executive Summary**

The last decade has witnessed the birth of the New Legal Realism – an effort to go beyond the old realism by testing competing hypotheses about the role of law and politics in judicial decisions, with reference to large sets and statistical analysis. The New Legal Realists have uncovered a Standard Model of Judicial Behavior, demonstrating significant differences between Republican appointees and Democratic appointees, and showing that such differences can be diminished or heightened by panel composition. The New Legal Realists have also started to find that race, sex, and other demographic characteristics sometimes have effects on judicial judgments. At the same time, many gaps remain. Numerous areas of law remain unstudied; certain characteristics of judges have yet to be investigated; and in some ways, the existing work is theoretically thin. The New Legal Realism has clear jurisprudential implications, bearing as it does on competing accounts of legal reasoning, including Ronald Dworkin’s suggestion that such reasoning is a search for “integrity.” Discussion is devoted to the relationship between the New Legal Realism and some of the perennial normative questions in administrative law.

## **The New Legal Realism**

Thomas J. Miles and Cass R. Sunstein

In 1931, Karl Llewellyn attempted to capture the empirical goals of the legal realists by referring to early “efforts to capitalize the wealth of our reported cases to make large-scale quantitative studies of facts and outcome.”<sup>1</sup> Llewellyn emphasized the “hope that these might develop lines of prediction more sure, or at least capable of adding further certainty to the predictions based as hitherto on intensive study of smaller bodies of cases.”<sup>2</sup> But Llewellyn added, with apparent embarrassment: “I know of no published results.”<sup>3</sup>

We are in the midst of a flowering of “large-scale quantitative studies of facts and outcome,” with numerous published results. The relevant studies have produced a New Legal Realism – an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.<sup>4</sup> Our goals in this Essay, prompted by Peter Strauss’ illuminating discussion,<sup>5</sup> are to offer a few general remarks on the New Legal Realists and to place those remarks in the context of some of the central questions in administrative law.

### **I. Law and Politics**

#### **A. From Old to New Realism**

Llewellyn wrote in reaction to the formalist claim that law, as expressed in statutes and precedents, determined the outcomes of particular cases.<sup>6</sup> He believed that much of the time, existing law did not compel particular case outcomes, and that at times the law itself was contradictory. “[I]n any case doubtful enough to make litigation respectable[,] the available authoritative premises . . . are at least two, and . . . the two

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<sup>1</sup> Karl N. Llewellyn, Some Realism About Realism: Responding to Dean Pound, 44 Harv L Rev 1222, 1243-44 (1931).

<sup>2</sup> Id. at 1244.

<sup>3</sup> Id.

<sup>4</sup> As best we can determine, the term New Legal Realism first appears in Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw U L Rev 251 (1997).

<sup>5</sup> See Peter Strauss, U Chi L Rev (forthcoming 2008).

<sup>6</sup> Brian Leiter, American Legal Realism, in *The Blackwell Guide to Philosophy of Law and Legal Theory* (W. Edmonson and M. Golding, eds.) (2003).

are mutually contradictory as applied to the case at hand.”<sup>7</sup> For Llewellyn, the indeterminacy, even incoherence, of law meant that “the personality of the judge” must to some degree explain case outcomes. In his view, “our government is not a government of laws, but one of laws through men.”<sup>8</sup> To modern readers, Llewellyn’s suggestions are far too crude. The personality of the judge surely can matter, but what, exactly, is meant by “personality”? More fundamentally, whether ours is a “government of laws,” and what it means for a system to be one “of laws through men,” are partly empirical questions.<sup>9</sup>

Empirical work on judicial behavior is not, of course, a new endeavor. An entire subfield of political science, known as “law and politics,” has contributed a large and illuminating empirical literature documenting the influence of ideology on judicial outcomes.<sup>10</sup> Some early contributions to this literature cast the influence of law (the legal model) as a competing hypothesis to the influence of judicial ideology (the attitudinal model). These studies often rejected the legal model in favor of the attitudinal model.<sup>11</sup> More recently, political scientists have given greater attention to the institutional context of judicial decision making by positing and testing models of strategic behavior.

For their part, legal academics long took little notice of “law and politics” political science. Perhaps they did so because the empirical methodology was unfamiliar and different from their own.<sup>12</sup> But recently, the appetite for empirical work in general has grown rapidly among law professors, and empirical research within law schools has become so prevalent as to constitute its own subgenre of legal scholarship, “empirical

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<sup>7</sup> Llewellyn, *supra* note, at 1239. In the context of statutory interpretation, a famous reflection of this view is Llewellyn’s attempt to show that the canons of construction offset each other, producing contradiction and indeterminacy. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons*, 3 *Vanderbilt L Rev* 395 (1950).

<sup>8</sup> Llewellyn, *supra* note, at 1242-43.

<sup>9</sup> We say “partly” because some conceptual and normative analysis is necessary to establish what, exactly, will be tested, and how to evaluate what is found.

<sup>10</sup> See, e.g., Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisted* (2002); Jeffrey A. Segal and Lee Epstein, *Advice and Consent: The Politics of Judicial Appointments* (2005).

<sup>11</sup> Howard Gillman, *The New Institutionalism*, 7 *Law & Courts* 6 (1996-97) (describing the “reign of the attitudinal model”).

<sup>12</sup> See also Barry Friedman, *Taking Law Seriously*, 4 *Perspectives on Pol* 251 (2006) (arguing that political science literature on judicial behavior has not “received the attention it deserves” because it has ignored normative implications, overlooked the actual operation of legal institutions and actors, and failed to acknowledge the limitations of its data).

legal studies.”<sup>13</sup> In view of the importance of judicial decisions as a source of law and their centrality to both teaching and scholarship in law schools, it is unsurprising that much of the burgeoning empirical legal scholarship focuses directly on judicial rulings and their sources.<sup>14</sup>

We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism.<sup>15</sup> The New Legal Realists are conducting what Llewellyn and his peers only envisioned – “large-scale quantitative studies of facts and outcome” that assess the influence of the judicial personality on legal outcomes. We suspect that the new realist studies of judicial behavior will erode the distinctions between “law and politics” political science and “empirical legal studies.” Through its conferences and professional journals, the economic analysis of law has long drawn contributions from both law faculties and economics departments. We hope, and

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<sup>13</sup> The most revealing development here is the emergence of a new journal devoted solely to empirical studies, with the (unsurprising but descriptive) name, *The Journal of Empirical Studies* and a new professional organization, the Society of Empirical Legal Studies. The causes of the renewed interest in empirical studies among law schools are intriguing and well worth sustained attention. We speculate that important factors in this change include the decline in the costs of computing and data-gathering, the increasing presence on law faculties of people with post-graduate training in both law and social sciences, and the prevailing sense in certain interdisciplinary fields, particularly economic analysis of law, that empirical work rather than abstract theory now presents the greatest opportunities for contributions. See also Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 *J Legal Educ* 323, 331-33 (1989) (listing reasons why empirical research runs counter to careerist objectives of legal academics, particularly untenured ones).

<sup>14</sup> See, e.g., Frank Cross, *Decision Making in the U.S. Courts of Appeals* (2006); James Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 *Ohio LJ* 1675 (1999); Richard Revesz, *Environmental Regulation, Ideology, and the DC Circuit*, 83 *Virginia Law Review* 1717 (1983); Gregory Sisk et al., *Searching for the Soul of Judicial Decisions*, *Ohio State L J*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=486148](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=486148); Christina L. Boyd, Lee Epstein, and Andrew D. Martin, *Untangling the Causal Effect of Sex on Judging*, Northwestern University Law School working paper, available at <http://ssrn.com/abstract=1001748>; Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *Yale L.J.* 1759 (2005) (studying cases from 1999-2001); Max M. Schanzenbach and Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, \_\_ *U Chi L Rev* \_\_ (2008) [this volume]. The prefatory “eg” should be taken seriously; in the limited space of this reply, we do not attempt a comprehensive review of the relevant literatures. Apologies to the many whom we have omitted.

<sup>15</sup> Others have used the phrase New Legal Realism to describe a broader set of interdisciplinary inquiries not limited to judicial decision making. See, e.g., Howard Erlanger, et al., *Is It Time for a New Legal Realism?*, 2005 *Wisc L Rev* 335, 337 (2005) (“[N]ew legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating policy”); Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 *Wisc L Rev* 365, 385-86 (2005) (describing the new legal realism as involving “the law in action . . . the gap between law on the books and the actual practices of legal officials and the public in cases of disputes”). In contrast, still others label recent studies of judicial behavior the new legal empiricism. See, e.g., Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 *U Ill L Rev* 819 (2002).



are willing to predict, that the New Legal Realism will increasingly bring together scholarly efforts of both lawyers and political scientists; economists will play a substantial and probably growing role as well.

A distinguishing feature of the New Legal Realism is the close examination of reported cases in order to understand how judicial personality, understood in various ways, influences legal outcomes, and how legal institutions constrain or unleash these influences. These inquiries represent an effort to test the (old-style) realist claims about the indeterminacy of law, and to implement its call for empirical study of how different judges decide cases by responding to the “stimulus” of each case. Political science has devoted much attention to the Supreme Court, a sensible choice given the Court’s importance. But the New Legal Realism tends to focus on lower federal courts, because the random assignment of judges to cases is a sort of natural experiment that permits plausible causal inferences about the effect of judicial characteristics on outcomes.<sup>16</sup>

## **B. The Standard Pattern**

The New Legal Realists are beginning to make progress on these questions because of increasing agreement about how to measure the “personality of the judge” and the features of each case. What Llewellyn termed “personality,” the New Legal Realists have taken to mean the observable, personal characteristics of the judge, such as their political affiliations, demographics, and prior professional experience.<sup>17</sup> The goal is to develop testable hypotheses – and then to test them.

The characteristics of the cases most commonly examined by the New Legal Realists are the types of litigants, the nature of their claims, and the procedural posture of the case. The New Legal Realism also seeks to capture the institutional context of judicial behavior. Dimensions of the institutional setting include whether a judge renders her decision while presiding alone or as a member of a panel, and if as a member of a panel, whether the co-panelists have similar characteristics. An important stimuli – and

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<sup>16</sup> Some researchers are also investigating judges in state courts. See, e.g., Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary, U of Chicago Law & Economics, Olin Working Paper No. 357 (August 2007), available <http://ssrn.com/abstract=1008989>. Much more remains to be done on this count; state courts are a fertile place for study, and little has been done to date.

<sup>17</sup> But see Heise, The Past, Present, and Future, *supra* note \_\_\_ at \_\_\_ (describing early attempts to examine the personality of the judge from a psychological perspective).

sometimes an important constraint – is the law itself. Some legal scholars play up the role of legal constraints<sup>18</sup> while others emphasize what they see as the decisive role of the values, or commitments, of particular judges.<sup>19</sup> The old-style realists tended to adopt the latter position,<sup>20</sup> but they rested content with impressions and anecdotes. By contrast, the New Legal Realists take these claims about legal reasoning as hypotheses, which can and should be tested. They want to know when and how law is indeterminate and thus exactly how and when “the personality of the judge” matters for outcomes.

To date, the question that has received the most attention from the New Legal Realists is the influence of a judge’s political ideology or attitudes.<sup>21</sup> This question has perennial interest because judicial ideology – perhaps as proxied by the party of the appointing president<sup>22</sup> – often appears influential in constitutional decisions, and it is a recurrent, even dominant, theme of media coverage of the Supreme Court. But do Republican appointees systematically differ from Democratic appointees? It is reasonable to speculate that in ideologically contested domains – involving, for example, environmental protection, sex discrimination, abortion, and campaign finance law – the two sets of appointees will vote very differently. If so, how much do they differ? Do these differences persist in less ideologically contested domains?

If party effects can be found, does the institutional setting of decision making matter as well? Much of the New Legal Realism has examined federal appellate decisions. In federal circuit courts, judges sit in three-member panels, and the New Legal Realists have investigated whether the presence of a judge’s colleagues on a panel influence her decision making. It is reasonable to speculate that when Democratic appointees sit on three-judge panels consisting exclusively of Democratic appointees, their voting patterns will be unusually liberal – and that when Democratic appointees sit

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<sup>18</sup> Within the New Legal Realism, this is the tendency in Frank Cross, *Decisionmaking in the US Circuit Courts of Appeal*, 91 *California Law Review* 1457 (2003).

<sup>19</sup> With the New Legal Realism, this is the tendency in Revesz, *supra note*; Revesz, by the way, played a significant role in spurring the New Legal Realism.

<sup>20</sup> See, e.g., Llewellyn, *supra note*; Max Radin, *Statutory Interpretation*, 44 *Harv L Rev* 863 (1930).

<sup>21</sup> This issue is explored in many places, see, eg, William Landes and Richard A. Posner (unpublished manuscript 2007); Miles and Sunstein, *Do Federal Judges Make Regulatory Policy*, *supra note*; Frank Cross, *supra note*; Sunstein et al., *supra note*.

<sup>22</sup> The appropriate measure of judicial ideology has been vigorously contested. Compare Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship*, 69 *U Chi L Rev* 135 (2002) with Gregory C. Sisk and Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 *Nw U L Rev* 743 (2005).

on three-judge panels with two Republican appointees, their voting patterns will be unusually conservative. It is even reasonable to speculate that it might be possible to do pretty well in predicting judicial votes, in some areas, by asking about the political affiliation of the appointing president – and perhaps equally well by asking about the political affiliation of the judge who appointed the two other judges on the panel. New Legal Realists describe the impact of the colleagues on an appellate panel on a judge’s own votes as “peer effects” or “panel effects.”

A good deal of evidence on these questions has recently emerged. In many domains, the basic pattern of judicial voting looks much like it does in the following stylized figure.<sup>23</sup>

INSERT FIGURE 1 here [stylized version of standard model]

In many areas of law, Democratic appointees cast liberal votes more often than Republican appointees do, whatever the partisan configuration of the panel. But the liberal voting rate typically increases with the number of copanelists who are Democratic appointees and correspondingly falls with the number of Republican appointees.

Results of this kind have been found in so many areas that they might fairly be described as the Standard Pattern of Judicial Voting, at least in ideologically contested cases.<sup>24</sup> In the Standard Pattern, the political affiliation of the appointing president greatly matters. The observed panel effects are commonly interpreted as two behavioral responses. The first is *ideological dampening*: Republican appointees show fairly liberal voting patterns when sitting with two Democratic appointees, and Democratic appointees show fairly conservative voting patterns when sitting with two Republican appointees. The second is *ideological amplification*: Republican appointees show very conservative voting patterns when sitting with two Republican appointees; and Democratic appointees show very liberal voting patterns when sitting with two Democratic appointees.

But the Standard Pattern is not universal. Republican appointees and Democratic appointees do not differ in their voting patterns in some areas in which differences might

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<sup>23</sup> See, e.g., Miles & Sunstein, [this volume].

<sup>24</sup> Thus the Standard Pattern can be found in many places in Cass R. Sunstein, et al., *Are Judges Political?* (2006); Virginia Hettinger, Stefanie Lindquist, and Wendy L. Martinek, *Judging on a Collegial Court* (2006).

be expected; examples include criminal appeals, property rights, congressional power under the Commerce Clause, and standing to sue.<sup>25</sup> Moreover, panel effects are not present in the important domains of abortion and capital punishment. In those domains, judges apparently vote their convictions, and are not influenced, at least in their conclusions, by the other judges on the panel.<sup>26</sup>

Other New Legal Realist work has begun to investigate the role of other aspects of a judge's background, particularly the judge's demographic characteristics, such as race and sex. These results mirror the findings for partisanship or ideology in two ways. First, just as with partisanship, these characteristics may influence a judge's own vote as well as those of other judges on the panel. Second, these judicial characteristics matter in certain legal contexts but not in others.

For example, a significant finding is that in sex discrimination cases, a judge's sex matters; female judges are more likely to vote in favor of plaintiffs, and male judges are more likely to vote in favor of plaintiffs if a female judge is sitting on the panel.<sup>27</sup> In sexual harassment cases, there is a clear gender effect.<sup>28</sup> However, a judge's race does not exert a meaningful influence in employment discrimination cases, an area where one might predict race would be particularly salient. In contrast, race matters in voting rights cases; African-American judges are more likely to vote in favor of plaintiffs, and white judges are more likely to vote in favor of plaintiffs if an African-American judge is sitting on the panel.<sup>29</sup> Interestingly, a judge's sex does not matter in voting rights cases.

### **C. Limitations**

Notwithstanding several advances in understanding judicial behavior, the New Legal Realism continues to have important limitations, and a great deal remains to be done. Some of these limitations involve data-gathering. Others are conceptual and normative.

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<sup>25</sup> See Sunstein et al., *supra* note, at

<sup>26</sup> See *id.* at

<sup>27</sup> See Lee Epstein et al., *supra* note (unpublished manuscript 2007)

<sup>28</sup> Jennifer L. Peresie, Note, Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts, 114 *Yale L.J.* 1759 (2005).

<sup>29</sup> See Adam Cox and Thomas Miles, Judging the Voting Rights Act, 108 *Colum L Rev* \_\_\_\_ (forthcoming 2008).

Most of the relevant studies are limited to published judicial decisions.<sup>30</sup> Such decisions are likely to be unrepresentative of the typical case, and if courts are more likely to publish difficult and controversial cases,<sup>31</sup> the estimates from published cases will likely overstate the actual effects of judicial ideology and other characteristics. A great deal might be learned by incorporating unpublished decisions into the analysis. But to the extent that an objective of the New Legal Realism is to understand the impact of judicial personality on law, rather than quotidian decisions lacking precedential value, published cases are relevant subjects of analysis.

It also remains true that the current findings provide only parts of the overall puzzle. We know something, for example, about judicial behavior in EPA and NLRB cases between 1996 and 2006. But it would be much better to know about judicial behavior in a much broader range of administrative law cases in that period, and better still to be able to learn as well about cases from 1986 to 1996, and 1976 to 1986, and even 1946 to 1976. Even in the domain of administrative law, no one has explored the effects of party affiliation on purely procedural challenges to agency decisions. Studies of race, sex, and disability discrimination cases remain badly incomplete, limited as they are to relatively brief periods of time. Many areas of law remain entirely unstudied in the standard terms, including (for example) antitrust law, intellectual property, and bankruptcy. It would be useful to know in which areas of law and under what circumstances the judicial personality has the greatest (and the least) influence on decisions.

In addition, we continue to know only a small amount about what might be learned with respect to aspects of judicial background and the effects of those aspects on judicial voting. What is the impact of age or of number of years on the bench? Of service as (for example) a prosecutor or a corporate lawyer? Of religious background? (Are

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<sup>30</sup> A valuable exception is Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan L Rev* \_\_ (forthcoming 2007) (studying published and unpublished immigration cases heard by immigration judges, the Board of Immigration Appeals, and the Circuit Courts of Appeals). On publication rates generally, see William L. Reynolds and William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 *U Chi L Rev* 573 (1981) (measuring publication rates and opinion lengths in the federal circuit courts).

<sup>31</sup> Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J Legal Stud* 257, 277-81 (1995) (reporting the judicial characteristics do not affect outcomes in cases representative of the average docket of federal trial courts).

judges of certain religious backgrounds likely to rule differently in abortion cases or sex discrimination cases or religion cases than judges of other religions or of no religion?) How do sex and race affect behavior in multiple areas of the law? In these domains, we know only the tip of the iceberg.<sup>32</sup>

Still more troubling is that the fact much of the New Legal Realism remains largely atheoretical. The preferences of judges and thus the predictions of how they will respond to law and court structure are often either absent or rudimentary. Our work in administrative law is vulnerable to just this criticism; our inquiry is simply whether judicial ideology matters to judicial votes in the context of *Chevron* and arbitrariness review cases. The mechanisms generating panel effects in particular remain inadequately understood.<sup>33</sup> An exception to the absence of behavioral theory is the set of papers that employ rational choice models to predict how the possibility of review by higher courts, such an en banc review of a panel's decision, may influence a judge's decision. A core prediction of these analyses is that the risk of reversal by an unfriendly overseeing court may induce a judge to alter her vote or the legal basis of her decision.<sup>34</sup>

A particular advantage of these models is that they generate (and test) predictions about a judge's strategic choice of the grounds for a legal decision; in so doing, they move beyond the focus on mere votes and come closer to Llewellyn's vision of studying the effect of judicial personality on legal reasoning in appellate decisions.<sup>35</sup> Even in the

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<sup>32</sup> See Cross, Decision Making, *supra* note at (providing some analyses of these characteristics in a random sample of published appellate decisions).

<sup>33</sup> See Sunstein et al., *supra* note (discussing possible explanations).

<sup>34</sup> See, e.g., Max M. Schanzenbach and Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, *\_\_ U Chi L Rev \_\_* (2008) [This Volume] (finding that judges depart whose political affiliation aligns with the circuit court's partisan majority is more likely to depart from the Sentencing Guidelines); Max M. Schanzenbach and Emerson H. Tiller, Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence, *J Law, Econ & Org* 24 (2007) (finding that judges aligned with the circuit court tend to alter criminal sentences under the Sentencing Guidelines through law-base departures rather than fact-based adjustments); Joseph L. Smith and Emerson H. Tiller, The Strategy of Judging: Evidence from Administrative Law, *31 J Legal Stud* 61 (2002) (presenting evidence on the choice between law- and fact-based decisions in administrative law).

<sup>35</sup> Also see Steven J. Choi and Mitu Gulati, Bias in Judicial Citations: A Window into the Behavior of Judges? *\_\_ J Legal Stud \_\_* (forthcoming) (reporting that federal judges are more likely to cite judges of their own political party, particularly in high stakes litigation, and that judges are more likely to cite judges who cite them back); Michael Abramowicz and Emerson H. Tiller, Judicial Citation to Legislative History: Contextual Theory and Empirical Analysis, Northwestern Law & Econ Research Paper No. 05-11, available at SSRN: <http://ssrn.com/abstract=725919> (May 25, 2005) (reporting that the more judges of one political party on a circuit court or on a panel, the higher the rate of legislative history citations to legislators of that party, irrespective of the party of the judge authoring the opinion).

absence of explicit rational choice models, other researchers have begun to consider the application of particular legal doctrines, rather than a judge's votes, as a unit of analysis.<sup>36</sup> We think that a great deal might be learned by examining opinions, not just votes, though the coding problems are far more serious for the former than for the latter.

In addition, the implications of the Standard Pattern for (old-style) legal realism and its opponents are not so clear, because the baseline level of ideological influence is unknown. Are the observed impacts of judicial ideology large or small? Committed realists, emphasizing the importance of political judgments, will want to declare a clear victory. They will stress the evident disagreement, in many domains, between Republican and Democratic appointees -- and thus point to the clear impact of political convictions on judicial decisions. But on the data as it stands, judicial policy preferences are only part of the picture.<sup>37</sup> In most domains, the division between Republican and Democratic appointees, while significant, is far from huge; the law, as such, seems to be having a constraining effect.<sup>38</sup> We are speaking, moreover, of the most contested areas of the law, where political differences are most likely to break out -- and also of appellate cases, where the legal materials are likely to have a degree of indeterminacy. For those who believe in the rule of law, and in the discipline imposed by the legal system, the results of the New Legal Realism need not be entirely discouraging. The glass is half-empty, perhaps, but it is also half-full. There is much greater room here for conceptual and theoretical analysis.

The New Legal Realism also has jurisprudential implications, which remains to be explored. Consider, for example, Ronald Dworkin's account of law as a search for "integrity," through which judges seek both to "fit" and to "justify" preexisting legal decisions.<sup>39</sup> Dworkin's account suggests that disagreement about law operates along the dimensions of fit and justification. Sometimes a particular outcome, however appealing,

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<sup>36</sup> See, e.g., Mark J. Richards and Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 *Am Pol Sci Rev* 305 (2002) (developing a test for "jurisprudential regimes" that define relevant factors or set standards of review for subsequent decisions); Adam B. Cox and Thomas J. Miles, *The Transformation of Voting Rights Act Litigation*, working paper, University of Chicago Law School (October 29, 2007) (examining how judicial ideology correlates with the application of multi-factored tests in voting rights decisions).

<sup>37</sup> See Cross, *supra* note.

<sup>38</sup> See *id.*

<sup>39</sup> See Ronald Dworkin, *Law's Empire* (1986).

will not fit precedent. Sometimes two or more possible outcomes show adequate fit, and the question is one of justification. (In Llewellyn's view, this was a standard situation.<sup>40</sup>) One reading of the empirical findings, and in particular of the Standard Model, is that Democratic and Republican appointees disagree along the dimension of justification. The high level of agreement between the two sets of appointees, in most domains, shows the disciplining power of "fit." In hard cases, perhaps "fit" runs out, and it is not so surprising that Republican appointees will find that a stereotypically conservative position best justifies the law, and that Democratic appointees will disagree with that. Much more work needs to be done to see if this account is the right one, and if other accounts, perhaps rejecting Dworkin's, do better.

## II. The New Legal Realism Meets Administrative Law

In recent years, we have been particularly interested in empirical tests of two of the largest questions in administrative law. (a) How do federal judges deal with agency interpretations of law?<sup>41</sup> (b) What is the role of judicial politics in reviewing agency action that is alleged to be arbitrary?<sup>42</sup>

On both questions, the doctrinal instructions are reasonably clear. In the face of statutory ambiguity, judges are supposed to uphold reasonable agency interpretations.<sup>43</sup> This standard is designed to reduce the policymaking discretion by federal judges -- and to ensure that the key political judgments will be made by agencies instead.<sup>44</sup> It is therefore natural to wonder: Are Republican appointees more likely to strike down liberal interpretations than conservative ones? Are Democratic appointees more likely to strike down conservative interpretations than liberal ones? We have found that the answer to both questions is "yes."<sup>45</sup> This finding raises serious questions about the proposition that current doctrine has succeeded in eliminating a large policymaking role for the federal judiciary.<sup>46</sup> We have also found that panel effects aggravate party differences. Republican

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<sup>40</sup> See Llewellyn, *supra* note.

<sup>41</sup> Thomas J. Miles and Cass R. Sunstein, Do Federal Judges Make Regulatory Policy? An Empirical Test of Chevron, 73 U Chi L Rev 823 (2006).

<sup>42</sup> Thomas J. Miles and Cass R. Sunstein, The Real World of Arbitrariness Review, U Chi L Rev (2007).

<sup>43</sup> See *Chevron v. NRDC*, 467 US 837 (1984).

<sup>44</sup> *Id.* at

<sup>45</sup> Miles and Sunstein, *supra* note, at

<sup>46</sup> See Miles and Sunstein, Do Federal Judges Make Regulatory Policy, *supra* note, at

appointees, sitting on RRR panels, look starkly different from Democratic appointees on DDD panels.<sup>47</sup> The Standard Pattern can be found in this domain as well.

It is also important to know about the real world of arbitrariness review – about the actual rate of invalidation of agency action challenged as “arbitrary” (or as lacking substantial evidence), and about the role of judicial policy preferences in decisions about whether agency have behaved arbitrarily. Before we began, we asked several administrative law specialists and federal judges to predict the invalidation rate, and the answers were frequently, “I have no idea.” Some people, including some judges, guessed that the invalidation rate would be about 10 percent. Studying cases involving the NLRB and the EPA, we have found that the invalidation rate is fairly high – 39% -- and that judicial policy preferences are playing a large role.<sup>48</sup> Republican appointees are more likely to invalidate liberal decisions than conservative ones; Democratic appointees are more likely to invalidate conservative decisions than liberal ones. Indeed, we were surprised to see that our findings involving review of agency interpretations of law are quite close to our findings involving review of agency decisions for arbitrariness.

It is of course useful to bring empirical findings in contact with existing debates over existing doctrine. Peter Strauss, among the keenest participants in those debates, does not object to our methods or our findings, but he does offer an array of illuminating observations about what lessons to draw from them.<sup>49</sup> His most important doctrinal objection is that it is important to distinguish between “State Farm review” and review of the decisions of the National Labor Relations Board for “substantial evidence.” By State Farm review, he means to refer to relatively intensive hard look that the Court endorsed in the State Farm case; substantial evidence review, he believes, is a different kettle of fish.

It is hazardous to disagree with Peter Strauss on doctrinal issues (or anything else), but as a purely doctrinal matter, we are not so sure that he is right. In State Farm, the Court purported to set out a general framework for assessing whether agency

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<sup>47</sup> Notably, it is also possible to offer certain tests of the behavior of Supreme Court justices. We know which are relatively neutral, in the sense that their validation rates do not differ depending on whether the agency’s interpretation is liberal or conservative, and which are relatively restrained, in the sense that they tend to vote to uphold agency interpretations of law. We also know which are relatively partisan and which are relatively activist. See *id.* at

<sup>48</sup> Miles and Sunstein, *supra* note.

<sup>49</sup> Peter Strauss, *U Chi L Rev*

interpretations of law are arbitrary – a framework that would seem to apply in many areas. And as an empirical matter, we are even less sure that Strauss is right. Indeed, we have produced an independent study of all court of appeals cases citing *State Farm*, and that study attests to the perceived generality of the Court’s framework.<sup>50</sup> The overall validation rate in the cases citing *State Farm* was slightly lower – 51% -- than among cases not citing *State Farm*, but it is difficult to generalize about this difference because the number of cases citing *State Farm* was small (87). More importantly, we observed that when the court cited *State Farm*, political commitments influenced the operation of judicial review in much the same way as did when the court did not cite it. The validation rates of Democratic and Republican appointees showed the familiar see-saw pattern, rising when the nature of the agency decision aligned with the political party of the appointing president and falling when it did not.<sup>51</sup> Panel effects were also substantial. Democratic appointees showed higher liberal voting rates (64%) when sitting with at least one other Democratic appointee. Republican appointees showed lower liberal voting rates (39%) when sitting with at least one other Republican appointee. The resulting difference between the two sets of appointees – 25% -- is comparable to our findings in the set of decisions that did not cite *State Farm*.

True, it is reasonable to ask whether *State Farm* review, announced in a case reviewing a high-profile exercise in rulemaking, is the same as substantial evidence review of more mundane questions of fact and policy standardly raised by NLRB orders. But judicial review of such orders is undertaken under the standards established by *Universal Camera*<sup>52</sup> and *Allentown Mack*,<sup>53</sup> and those standards are relatively stringent, in a way that is not easy to distinguish, in principle, from *State Farm* review. In short, we

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<sup>50</sup> See Thomas J. Miles and Cass R. Sunstein, *What’s Arbitrary? An Empirical Analysis of State Farm*, University of Chicago Law School unpublished manuscript (May 24, 2007). Full disclosure: We began our investigation into arbitrariness review with this study, limited to cases citing *State Farm*. But we concluded that the number of such cases was too small for a detailed examination of panel effects, so we compiled a more comprehensive data set instead.

<sup>51</sup> When the agency decision is liberal, the rate at which Democratic appointees voted to validate under *State Farm* was 61% and for Republican appointees, it was 47%. When the agency decision is conservative, the Democratic validation rate dropped to 40% and the Republican validation rate rose to 57%. For both Republican and Democratic appointees, then, the spread between liberal and conservative agencies was significant when *State Farm* was cited. Notably, however, it was significantly higher for Democratic appointees (21%) than for Republican appointees (10%).

<sup>52</sup> *Universal Camera Corp v. NLRB*, 340 US 474 (1951).

<sup>53</sup> *Allentown Mack Sales and Service v NLRB*, 522 US 359 (1998).

do not think that *State Farm* carves out a separate “kind” of judicial review of agency action, distinguishable from ordinary arbitrariness review or from substantial evidence review. We think that *State Farm* offers the state-of-the-art account of arbitrariness review, and we are willing to speculate that substantial evidence review is not meaningfully different as a doctrinal matter.<sup>54</sup>

Strauss is correct, however, to point to an array of distinctive features of NLRB orders. Suppose that he is therefore right to say that EPA cases and NLRB cases are relevantly different. It remains true that most of the patterns found in the one domain can be found in the other as well. The real world of judicial review of EPA decisions appears to be quite close to the real world of review of NLRB decisions. We hope that in the future, others will see whether those patterns apply to other agencies as well.

But Strauss’ largest claim lies elsewhere. He contends that our major “point” is to show that hard look review should be softened<sup>55</sup> – that the Court should rethink *State Farm* to the extent that it invites the kinds of policy-driven judicial oversight that our evidence reveals. But our major “points” are empirical, not normative. We sought to understand the real-world of arbitrariness review, not to change it. To be sure, we do read our data to suggest the need to reduce the role of judicial policy preferences in review of agency action. We do not approve of a situation in which Republican appointees are invalidating liberal agency decisions, or Democratic appointees invalidating conservative agency decisions, at a high rate. If agency decisions really are arbitrary, they should be struck down. But it is reasonable to worry that on DDD panels, conservative decisions are being wrongly invalidated as arbitrary -- and that the same is true for liberal decisions reviewed by RRR panels. Moreover, the size of the ideological effect in these arbitrariness cases is about as large as that seen in other areas of law.<sup>56</sup>

But we are also interested in considering the possibility of softening the current hard look, if only because such softening should reduce the likelihood that judges will invalidate agency decisions only when they are genuinely arbitrary. A softer look should ensure that judicial policy preferences do not, in the end, account for invalidation on

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<sup>54</sup> Of course it is likely that the stringency of review will vary depending on a range of factors, including the technical quality of the issues and whether the agency has a strong or weak reputation.

<sup>55</sup> Strauss at

<sup>56</sup> See, e.g., Sunstein, et al., *Are Judges Political?*, supra note \_\_\_ at \_\_\_.

arbitrariness grounds. But Strauss is correct to say that our findings are not sufficient to justify any such softening. We need to know what would be lost as well as what would be gained. Hard look review probably serves as an important ex ante deterrent and ex post corrective to bad decisions, rooted in insufficient care, interest-group pressures, or political commitments that override sound analysis.<sup>57</sup> A relaxation of judicial review could produce more genuine arbitrariness even as it reduced the risk that judicial policy preferences would play a role in invalidation of agency action. We do not mean to take a final stand on whether arbitrariness review should be softened.

### III. Whither the New Legal Realism?

In 1931, Llewellyn asked for a “*temporary* separation of Ought and Is” in the realist study of law.<sup>58</sup> But the need for a just legal system is urgent; it cannot wait until researchers achieve a comprehensive understanding of the “Is.” Legal academics and the lawyers they train must often make normative evaluations of legal rules and institutions on the basis of only partial information.<sup>59</sup> They ought do so with full awareness of the limitations of their analyses, and we hope that we have done so as well. We do not place such faith in our statistical analysis as to claim that it should be the sole criterion for evaluating judicial performance,<sup>60</sup> but we are willing to offer some tentative speculations.

Professor Strauss raises the possibility of mandatory judicial diversity.<sup>61</sup> Any such mandate would generate many questions, but we do find, in both Chevron and arbitrariness cases, that our findings of political judging are driven almost entirely by what happens on DDD and RRR panels. Strikingly, there is little difference, in both domains, in how Republican appointees vote on RRD and RDD panels, and Republican

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<sup>57</sup> See id; Paul Pederson, Yale LJ (197?); Cass R. Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Supreme Court Review.

<sup>58</sup> See Llewellyn, supra note, at

<sup>59</sup> Jack Goldsmith and Adrian Vermeule, Empirical Methodology and Legal Scholarship, 69 U Chi L Rev 153, 164-65 (2002). Barry Friedman has even criticized studies of judicial decision for too often lacking “normative bite.” Friedman, infra note \_\_\_ at 262 (“What matters, at bottom, is whether the positive scholarship has something to teach about how law and legal institutions operate in a way that is pertinent to how they should, and to the aspirations put upon those institutions by society”).

<sup>60</sup> But see Stephen Choi & Mitu Gulati, A Tournament of Judges?, 92 Cal L Rev 299, 299 (2004); Stephen J. Choi & G. Mitu Gulati, Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance, 78 S Cal L Rev 23 (2004).

<sup>61</sup> Strauss [This volume]. Also see Schanzenbach and Tiller, [This Volume] supra note \_\_\_ at\_\_\_ (contemplating hierarchical judicial diversity).

appointees, on such panels, look quite similar to Democratic appointees on the same panels. In administrative law cases at least, the role of political judging is sharply diminished on mixed panels. If we take ideological voting together with ideological amplification, the New Legal Realists might be prepared to be suspicious, on normative grounds, of what is likely to happen on RRR or DDD panels.

The remedy is not clear. Knowledge sometimes provides a degree of inoculation, and on an optimistic view, judicial awareness of the risks associated with unified panels might provide a safeguard. If a DDD panel finds itself striking down a conservative regulation as arbitrary, or if an RRR finds itself doing the same with a liberal regulation, there is a good reason for every member of the panel to pause and rethink. It also makes sense to consider en banc review in cases in which unified panels go in the predicted direction – and for the Supreme Court to consider such cases to be promising ones for grants of certiorari.

In the domain of administrative law, however, our major submission is empirical, not normative: the strong correlation between validation rates and the ideological alignment of judges and agencies strongly suggests that judicial ideology affects appellate rulings about whether an agency action is arbitrary. In the future, bolder normative claims may be possible for many questions. An immense amount of material has long been available with which to test hypotheses about the sources of judicial behavior. The New Legal Realism remains in its infancy; as it grows, we will learn much more.

**FIGURE 1**  
 Liberal Voting Rates of Circuit Court Judges in Arbitrariness Review Cases  
 by Panel Composition and by Party of Appointing President

