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The Politics of Judicial Review

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I. Introduction

In the legal academy, scholarship about judicial review is predominantly normative. It is largely about how judges should decide cases¹ and what posture they ought to take toward the work of other institutions.² This normative focus on the behavior of judges is common irrespective of whether the intended audience is other academics, political officials, or judges themselves.

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1. See, e.g., LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 15 (2004) (“[J]udges are very important constitutional actors, and some of the most important differences between competing accounts of our practice are the implications of those accounts for the behavior of responsible judges.”); Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2056 (1993) (“The judicial opinion and the judicial persona provide the implicit framing and orientation for the presentation and elaboration of the ‘law’ of the academy.”). Even when constitutional scholarship is intended for other audiences, a substantial part of it still is about how judges ought to behave. See, e.g., *infra* note 63 (discussing literature urging Congress to constrain judicial behavior).

2. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102–03 (1980) (urging courts not to overturn legislative enactments unless they impede the process of political change or evidence prejudice against discrete and insular minorities); SAGER, *supra* note 1, at 7 (setting out the standards for judicial review and the posture that the Court should take toward other institutions).

Outside the legal academy, the interest in how judges behave is more “positive.” That is to say, the focus in other disciplines is not so much on how judges should behave, as on how they do and why.³ Positive theorists ask what motivates judges to decide cases as they do and what forces are likely to influence judges’ decisions.

The normative and positive projects have traveled on largely separate tracks, in part because the forces positive theorists identify as influencing judges commonly are political ones. “Politics” is used here in a fairly capacious sense, referring to any influences on a judge’s resolution of a case other than an independent judgment of the law as applied to the facts before the court.⁴ But the political forces identified by positive scholars are often quite base: Many positive theorists suggest that judicial ideology plays a significant role in how judges decide cases⁵ and that judges respond to pressures from other political actors.⁶ Positive scholars believe these forces play a large hand in shaping the content of the law, especially constitutional law.

Normative theorists resist the positive project, in large part because political influence of this sort is anathema to prevailing conceptions regarding judicial review.⁷ Throughout history, and particularly in the last century, the dominant strain of thought in the legal academy has insisted upon theories of judicial review that maintain the separation of constitutional law from politics.⁸ It is difficult to overstate the force of this ideal, which animates some of our most cherished conceptions—such as judicial independence—and gives rise to some of our most enduring puzzles—such as reconciling the role of a constitutional judge with the practice of democracy.⁹ Constitutional theory is all about cabining law from politics, both to ensure that judges are constrained by law (and thus do not simply vote their own values) and to prevent politics from influencing law.¹⁰

3. RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 2 (2001) (“In light of the well-known distinction between ‘positive’ (or ‘descriptive’) and ‘normative’ theories, the questions of what the Court does and what it should do might appear to be sharply distinct.”); Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1031 (1978) (distinguishing between “legal policy studies” and “explanatory studies of law,” a distinction that “roughly parallels that which others have in mind when they distinguish between ‘normative’ and ‘positive’ studies”); Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 601 (2000) (book review) (noting that political scientists have tended to focus on “identifying patterns of judicial voting behavior and the determinants of Court decisions”).

4. See *infra* subparts III(A)–(B).

5. See *infra* notes 74–88, 101–08 and accompanying text.

6. See *infra* notes 404–18 and accompanying text.

7. But see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005) (recognizing that constitutional “legitimacy” has sociological as well as moral and legal components and analyzing the conjunction among them).

8. See *infra* notes 37–64 and accompanying text.

9. See *infra* notes 43–47, 288–99 and accompanying text.

10. See *infra* notes 50–59 and accompanying text.

Despite signs that the project of positive scholars is finally finding a warmer reception in the legal academy, the integration of constitutional law and politics remains quite tentative.¹¹ To be sure, some early, important work in the application of positive political theory to legal institutions actually had root in the legal academy,¹² and there is a growing niche of legal academics producing quite interesting scholarship at the juncture of constitutional law and positive theory.¹³ Yet much, if not most, normative constitutional theory—and certainly theory about judicial review—still fails to come to grips with the lessons of positive scholarship.¹⁴ Old habits die hard.

The thesis of this Article is that normative constitutional theory about judicial review will remain impoverished until it fully embraces the positive project. In pursuing the ideal, normative theorists typically sideline the sort of political influences discussed here.¹⁵ For example, in writing about what

11. See Keith Whittington, *Crossing Over: Citation of Public Law Faculty in Law Reviews*, 14 LAW & COURTS 5, 5–10 (2004) (discussing complaints by political scientists that their work receives insufficient attention from legal academics and providing citation analysis indicating that political scientists have only a limited influence on the legal academy).

12. See, e.g., William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 641–64 (1991) (borrowing from positive political theory to construct a game theoretic framework for thinking about the Congress–Court–President interaction in the interpretation of civil rights statutes); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992) (exploring the implications of positive political theory for law).

13. See, e.g., Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 347–48 (2003) (exploring how social and political factors influenced the Rehnquist Court’s decisions on affirmative action); William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 32 (1994) (explaining that “law” is the product of the interaction between—and balancing of—competing institutional pressures); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923–72 (2005) [hereinafter Levinson, *Empire-Building*] (arguing that positive theory, an analysis of political pressures, is better at predicting government behavior than the “self-aggrandizing” assumption of constitutional law); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 900 (1999) [hereinafter Levinson, *Rights Essentialism*] (arguing that normative theories about constitutional rights should not be separated from the positive realities of their remedial enforcement); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 571–72 (2003) (applying positive theory to try to explain the shift in the direction of the Rehnquist Court); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing that normative theories of legal interpretation should take greater account of institutional capacities); Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 953–54 (2005) (explaining how legal and constitutional rules affect the types of government officials who come to power); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert & Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 761–75 (2000) (applying institutional analysis to constitutional interpretation); see also MAXWELL STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISIONMAKING (2000) (applying social choice analysis to Supreme Court decisionmaking); Adrian Vermeule, *The Judiciary is a They not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005) [hereinafter Vermeule, *Interpretive Theory*] (arguing that statutory interpretive theory must take account of the collective nature of judicial bodies).

14. See Whittington, *supra* note 11.

15. See Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1136 (1995) (noting that many normative theories regard practical considerations to be “an

might be normative theory's most famous constitutional judge, Hercules, Ronald Dworkin recognizes the very practical problems the real-world judge faces, such as the need to obtain the agreement of other colleagues on the Supreme Court or to ensure the implementation of judicial decrees by other governmental actors.¹⁶ Yet, Dworkin expressly puts these problems to one side so that Hercules will be "free to concentrate on the issues of principle."¹⁷

Granting considerations of principle all the due they properly are owed, it nonetheless is the case that many of the institutional constraints Hercules faces are fixed aspects of our constitutional system that Hercules himself has no choice but to heed. The Constitution does grant Hercules a certain degree of independence,¹⁸ but it also embeds him in politics. This is no accident: The Constitution represents a deliberate balance between, on the one hand, separation and independence of the branches and, on the other, accountability and the idea of checks and balances.¹⁹ Hamilton, the nation's first advocate for judicial review, correctly understood that the judiciary is "the least dangerous" branch, readily susceptible to attacks from the other branches and dependent on the "executive arm even for the efficacy of its judgments."²⁰ To the extent the judiciary appears more powerful today than it did in Hamilton's time, this itself is a function of broad popular support for judicial review—a political constituency of the most profound kind.²¹

That Hercules is a judge and not just any other political actor is a fact of enormous significance; still, Hercules must do his judging in a political world. Although he enjoys life tenure, he was appointed through a political

illegitimate infiltration of the non-legal into the legal"). For skepticism about ideal theory, see Richard A. Posner, *Conceptions of Legal Theory: A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377, 381 (1997), which criticizes reliance on "ideal types" of courts and legislatures without interest in "how a legal system actually works"; see also Eric Posner, *Constitutional Possibility and Constitutional Evolution I* (2005) (unpublished manuscript, on file with author) [hereinafter Posner, Possibility] ("The argument differs from most work in mainstream constitutional law . . . by focusing on what is constitutionally *possible* rather than what is constitutionally *desirable*.").

16. RONALD DWORKIN, *LAW'S EMPIRE* 380 (1986).

17. *Id.*; cf. SAGER, *supra* note 1, at 14 (claiming that "no account of constitutional practice can offer itself as universal or ideal" but urging that we should "explain our practice to ourselves in a way that will help us recognize its value and move in the direction of correcting its faults").

18. Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 333 (2003) ("[F]ederal judges enjoy substantial independence from the political branches by virtue of constitutionally mandated life tenure and salary protection."); Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795, 800 (1998) ("From a textualist perspective . . . it looks as if the Constitution deliberately creates a federal judiciary that is as independent as possible of the political branches.").

19. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 70–78 (1967); GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 552 (1969); see also *infra* note 283 and accompanying text.

20. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

21. See *infra* notes 362–83 and accompanying text (discussing the influence of popular opinion on judicial review). For an extended review of the historical relationship between politics, popular opinion, and judicial review, see BARRY FRIEDMAN, *NEITHER FORCE NOR WILL: HOW THE COURT BECAME SUPREME* (forthcoming 2006) (tentatively titled).

process, and his confirmation did not scrub him of the ideology he possessed before he ascended to the bench. Further, Hercules cannot act alone. He requires the consent of his colleagues, who may not always agree with him, making compromise of his views a necessity.²² Even when his colleagues agree, Hercules' court was not given the means to enforce its own decrees. That court must obtain compliance from political actors,²³ as well as from the lower courts that are subservient to it,²⁴ again necessitating some calculation by Hercules about how those institutions will respond. Ultimately, Hercules' power rests on the willingness of the public, and the political actors accountable to it, to respect his independence and the decrees of his court. Any account of Hercules' proper role falls short if it does not take account of these hard-wired constraints.²⁵ "Is does not imply ought, but ought implies can."²⁶

Normative theory about judicial review limits its own possibilities and worth by failing to come to grips with what positive scholarship teaches about the political environment in which constitutional judges act and about the constraints they necessarily face. In part, the claim here is that existing normative theories about judicial review are, and will remain, inadequate to the extent they continue to fail to take account of the lessons of positive scholarship. The argument reaches far beyond this, however, to the very warp and woof of constitutional judging.²⁷ Seen through the lens of a

22. See *infra* subpart III(B).

23. See *infra* subpart III(D).

24. See *infra* subpart III(C).

25. See FALLON, *supra* note 3, at 2 ("The product of evolution, the Court's role reflects the Justices' perceptions not only of the Court's capacities, but also of the capacities of other institutions of state and federal government."); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1695 (1998) ("[F]or normative theory to be coherent, it must respond to what is actually going on, not merely what judges *perceive* themselves to be doing Normative theory uninformed by positive theory is built upon a foundation that is inherently flawed"); Levinson, *Rights Essentialism*, *supra* note 13, at 927 (criticizing "rights-essentialist" theories as "remote from the actual practice of constitutional law, as largely irrelevant and potentially misleading"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 194–95 (1988) (discussing how judges "consider institutional concerns when they apply the Constitution in specific cases"); Vermeule, *Interpretive Theory*, *supra* note 13, at 581–82 (criticizing the "approximation assumption" that if an ideal is not attainable, partial implementation is the second best).

26. Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1576 (2004). Balkin continues: "We cannot know what we may reasonably expect from the institution of [the] judiciary until we understand what is reasonably possible for it to do, and this means understanding the forces that shape its decisionmaking." *Id.*

27. See generally FALLON, *supra* note 3, at 2–5 (discussing the relationship between the practicalities of implementing judgments and the many constitutional doctrines). In fact, although entirely outside the scope of this Article, the positive approach to judicial behavior discussed here deserves attention well beyond the bounds of constitutional theory. For examples in administrative law, see generally Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1254–60 (1992), which evaluates the legitimacy of judicial review in the administrative law context, and Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources*

positive approach, numerous structural doctrines and common practices that form the everyday work of constitutional judges—things like *stare decisis*,²⁸ the appropriate deference to congressional judgments,²⁹ the practice of issuing concurrences and dissents on collegial courts,³⁰ and the standards of review of lower court decisions³¹—all raise provocative normative questions that at present receive inadequate attention because of the failure to consider the political milieu of the constitutional judge. Positive scholarship illuminates rich veins even in the well-mined field of traditional normative and doctrinal scholarship.

Two caveats are in order. First, the focus here on positive scholarship runs the risk of creating the impression that such scholarship itself is flawless. It would be odd if this were true; no body of scholarship is perfect. Some of the shortcomings and difficulties with positive scholarship are discussed here,³² but those difficulties provide no basis for ignoring the endeavor altogether. Second, one of the most significant difficulties with some positive scholarship is its failure to take law and legal institutions seriously. Law *is* unique in its own ways, and positive scholars shortchange their own work when they fail to see or acknowledge this. Defining precisely how law differs from politics (and when it matters) ought to be the central task of legal and positive scholars both. This, however, is a project that cannot be undertaken by isolating law from politics.³³

This Article proceeds in three parts. Part II is a historical sketch of the roots of normative theory's insistence on the separation of law and politics. For reasons of history as much as of theory, by the end of the twentieth century predominant thought had come to believe that law and politics must inhabit separate realms. Only very recently have scholars begun to doubt the possibility, or even the sense, of this separation; but they have yet to find a comfortable accommodation of the two. It is the right project, nonetheless, and all that follows is designed to aid in its pursuit.

Part III is the heart of this project—an analytic tour of how the positive understanding of judicial behavior bears upon the practice of judicial review, making clear the constraints that face constitutional judges and how these constraints bear upon theories of judicial review and important aspects of constitutional practice. This Part first examines “attitudinal” claims that judges decide cases based solely on ideology. In particular, attitudinalists

for *Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) [hereinafter Strauss, *Implications*], which discusses the relationship of the Supreme Court docket to central issues of administrative law doctrine.

28. See *infra* notes 90–101 and accompanying text.

29. See *infra* notes 301–21 and accompanying text.

30. See *infra* notes 115–72 and accompanying text.

31. See *infra* notes 244–64 and accompanying text.

32. This point is more fully developed in Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. (forthcoming June 2006).

33. For development of this point, see *id.*

deny the constraining influence of law.³⁴ Within political science, the notion of ideologically freewheeling judges is challenged by “neo-institutionalists.”³⁵ Most institutionalists believe the restraint on judges comes not so much from law itself as from the other institutions of government with which constitutional judges necessarily interact.³⁶ These are precisely the institutions of which normative scholarship fails to take sufficient account.

The balance of Part III examines in detail the concentric circles of influence and constraint with which a constitutional judge must contend: strategic interaction with other judges on a collegial court, the pressures imposed by judges on the judicial hierarchy’s lower rungs who have their own views of how things should be, interbranch struggles over legal outcomes with significant policy implications, and popular opinion regarding judicial outcomes and the practice of judicial review. At each step of the way, the discussion confronts normative aspiration with positive reality, suggesting that normative thinking must give way, or at least must develop a more thorough and nuanced understanding of judicial review that takes account of positive theory’s lessons. Equally important, Part III highlights how positive studies open up unmined and important directions for normative legal theorists to pursue.

Part IV suggests that normative theorists have spent too much time spinning broad theories regarding the role of judicial review and have thus neglected numerous important, normatively complex, and often mutable aspects of how the practice of constitutional judging should actually operate. At the least (as many positive readers of this piece pointed out), legal scholars should pursue their normative projects conscious of the fact that their work itself is but one of the political influences upon judges. Normative scholars should embrace this realization and forthrightly see their work as ideological prescriptions for constitutional change. However, they also should branch out in new directions and pursue the many neglected questions of constitutional process identified in Part III. Even the doctrinal study of constitutional law is reinvigorated once the positive scholarship is taken into account. These are all things constitutional scholars might do; Part IV is intended only to be suggestive. The broader point—the central one of this Article—is that constitutional theory must take politics into account and that it will be better for doing so.

34. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64–65, 72–73 (1993) (noting that an implementation of the attitudinal model of decisionmaking does not use precedent or plain language readings to limit the discretion of the courts).

35. See Whittington, *supra* note 3, at 608 (discussing neo-institutionalism).

36. See *generally infra* notes 85–87 and accompanying text.

II. Judicial Review and the Separation of Law and Politics

This Part examines how the necessity of separating law from politics became a central tenet of constitutional theory. By explaining how we have arrived at the present, history opens space for understanding our world differently.³⁷ What began as a rhetorical response by opponents of particular Supreme Court decisions has become a fixture of theories of judicial review. This instinct is not wrong: There clearly is a longstanding and central societal belief that law and politics are not the same and should not be considered as such. At the same time, however, history suggests that a strict separation of law and politics is—and always has been—implausible.

Throughout American history, views about judicial review have been shaped more by political responses to judicial decisions in heated controversies than by any jurisprudential theory of what it means to live under a constitution. This was true during the first great clash of will between the courts and the “political” branches following the election of 1800. All the famous partisan skirmishes of that era—the *Marbury* litigation, the repeal of the Circuit Judges Act, and the impeachment of Samuel Chase—were motivated by the Federalist party’s withdrawal to the judiciary and the immediate political challenge this withdrawal posed to Republican policy.³⁸ Nonetheless, these disputes played out as debates about judicial independence, popular accountability, and the separation of politics and law.³⁹

37. Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 929–30 (1997) (book review).

38. See Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 THE WRITINGS OF THOMAS JEFFERSON 301, 302 (Albert Ellery Bergh ed., 1903) (referring to the fury of the Republicans upon learning that the Federalists had “retired into the judiciary as a stronghold”); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 116 (2004) (“Faced with the loss of the executive and legislative branches, the lame duck Federalist Congress acted quickly to secure its adherents a sanctuary in the judiciary.”); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 357–59 (1998) (describing how the Federalists “retreated to the judiciary” after losing control of “both popularly elected branches of government”).

39. See 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL 1801–1815, at 151–63 (1981) (explaining that the debate surrounding the repeal of the Circuit Judges Act largely turned on the controversial issue of the role of the judiciary); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 59 (2000) (arguing that Marshall’s *Marbury* decision was founded upon an attempt to distinguish “between political matters, to be resolved by the legislative and executive branches in the new democratic, majoritarian style, and legal matters, to be resolved by the judiciary”); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 215 (rev. ed. 1926) (highlighting the debate surrounding the Repeal Act as the first major attack on judicial independence); Friedman, *supra* note 38, at 363–67 (discussing the Federalist view of the impeachment as an attack on judicial independence and the Republicans’ intent to use the impeachment power to remove judges with anti-Republican viewpoints); Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55, 101 (1995) (asserting that “[t]he Chase impeachment is perhaps most remembered as a battle over the independence of the judiciary”).

As notions of judicial supremacy slowly took hold during the nation's first century, the law-politics distinction featured regularly in clashes over the role of the judiciary.⁴⁰ By the time of the Civil War, many were prepared to recognize the legitimacy of some form of judicial review.⁴¹ But heard with increasing frequency was the complaint that judges were not confining themselves to "law" and were also taking up questions by their nature "political."⁴²

The early part of the twentieth century saw frequent denunciation of judges for straying beyond the proper bounds of law.⁴³ The primary basis for attack was that courts were interfering with the proper voice of authority in a democracy, that of the people.⁴⁴ Defenders of the judiciary protested that the courts were simply doing their jobs and enforcing what fundamental law (the Constitution) required.⁴⁵ The disputes of that period came to a head famously in 1937 when the President of the United States had had enough of judicial meddling with his political agenda, no matter what the asserted justification, and sought to subjugate judicial power to politics by packing

40. See generally Friedman, *supra* note 38, at 407–31 (describing clashes over roles of the judiciary resulting from an acceptance of judicial supremacy).

41. See, e.g., Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 418 (2003) (arguing that after the Civil War, "judicial review by the Supreme Court had no serious competitor"); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 77 (2000) ("The frequency with which Marshall and Taney Court justices handed down opinions imposing constitutional limits on the federal government suggests that judicial review of federal legislation was a fairly common practice before the Civil War.").

42. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868) (statement of Rep. Bingham) (criticizing the Court for "descend[ing] from its high place in the discussion and decision of purely judicial questions to the settlement of political questions"); *Political Questions in the Supreme Court*, NATION, Jan. 10, 1867, at 30 (arguing that "the chief duty of the [C]ourt . . . is to confine itself strictly to the matter in hand, to decide the precise points before it, and to abstain rigidly from the slightest discussion of political questions not necessarily involved"). But see also *An Important Decision*, LITTLE ROCK DAILY GAZETTE, Dec. 20, 1866, at 2 (praising the Court for "confin[ing] themselves exclusively to the interpretation of the law without regard to the effect which their decision will have upon the prospects of any political party").

43. See KRAMER, *supra* note 38, at 215 (noting that in the early decades of the twentieth century, "courts made themselves a source of controversy by aggressively taking sides in the incipient class conflict, and the propriety of the role they sought to create became one of the questions up for grabs"); *infra* notes 44, 46.

44. See, e.g., 47 CONG. REC. 3368 (1911) (statement of Sen. Owen) (urging that to allow popular decisions "to be set aside by any tribunal not responsible to the people, not elected by the people, not subject to the recall of the people, or of the people's representatives, is to establish a judicial oligarchy and to overthrow the Republic"); GILBERT G. ROE, OUR JUDICIAL OLIGARCHY 197 (1912) (noting that some commentators accused judges of "using the great powers of the judicial office to block and thwart the public will"); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 356 (photo. reprint 1965) (1907) (condemning the antidemocratic nature of the courts in that "they can, and often do, defeat the will of the majority after it has successfully overcome opposition in all other branches of the government").

45. See ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895, at 37, 92–96 (1960) (containing a variety of statements in support of judicial review).

the judiciary with sympathetic judges.⁴⁶ As history so commonly observes, he lost the battle over judicial independence but won the war over constitutional meaning.⁴⁷

In the aftermath of Roosevelt's attempt to pack the Supreme Court, legal scholars logically might have begun to work through how law and politics are—or should be—integrated. Constitutional law proceeded to change rapidly after 1937, and it did so in the minds of many precisely because of actions taken in the political world.⁴⁸ Indeed, this process of constitutional change forged in the crucible of politics is precisely what gave birth to the positive study of judicial behavior.⁴⁹

46. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 138–39 (1995) (“[T]he President . . . came out with his primary reason [for the ‘court-packing’ plan]: that the Court was dominated by conservative Justices who were making it impossible for a national government to function.”); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 593 (2004) (noting President Roosevelt’s admission of “a franker justification” for the court-packing plan, that “the Supreme Court as [then] constituted was frustrating the popular will by invalidating needed social legislation”); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 544 (2004) (“Roosevelt wanted to expand the Court so that he could appoint enough new members to guarantee that New Deal programs . . . would be upheld as constitutional.”).

47. See LEUCHTENBURG, *supra* note 46, at 216 (“In the spring of 1937 . . . in the midst of the controversy over President Roosevelt’s Court-packing message, the Court began to execute an astonishing about-face.”); *id.* at 220 (“Beginning in 1937, the Supreme Court upheld every New Deal statute that came before it.”); see also *infra* note 48 (discussing the dispute over the New Deal constitutional change).

48. “Mr. Roosevelt has won. The court is now his When a series of reinterpretations overturning well-argued precedents are made in a brief time by a newly appointed group of judges, all tending to indicate that same basic disagreement with the established conception of government, the thoughtful observer can only conclude that something revolutionary is going on. And that is what has happened here.” LEUCHTENBURG, *supra* note 46, at 155 (quoting Wendell L. Willkie, *The Court Is Now His*, SATURDAY EVENING POST, Mar. 9, 1940, at 71, 74). Revisionist scholars argue that critical New Deal decisions were in line with prior precedent. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 36–39 (1998) (arguing that the seeming change in 1937 resulted from a gradual doctrinal shift and that earlier New Deal legislation was rejected because of poor drafting); Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 93 (1983) (arguing that the Court had taken a liberal turn after Hoover’s appointments in 1930, several years before the Court-packing crisis of 1937). The revisionist scholarship is altogether of a piece with the legal academy’s intense desire to separate politics and law. Yet, even the revisionists recognize the pace of change in the early 1940s. See Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 106 (1992) (suggesting that the shift in Commerce Clause jurisprudence occurred principally from 1941 to 1942, and not in 1937). Whether political threat influenced the direction of the law, observers at the time plainly saw it that way. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 1050–53 (2000) (describing the public perception that the Court had changed direction in response to the Court-packing threat).

49. See Whittington, *supra* note 3, at 604 (“Behavioralist approaches to the study of law arose out of the conjoined forces of the constitutional revolution of 1937 The heated disputes over the Court in the 1930s emphasized the need to understand the Court as a political institution”); see also Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 1, 10–11 (Nancy Maveety ed., 2003) (discussing how Herman Pritchett’s work on the Roosevelt Court from 1937 to 1947 “aligned judicial politics research with the then current behavioral work in American politics”).

Instead, legal scholars devoted their energies, as they largely have done ever since, to building a wall of separation between law and politics. The perceived need to cabin judges from politics motivated most of constitutional theory in the second half of the twentieth century.⁵⁰ Normative constitutional theorists' obsession with the "counter-majoritarian difficulty"⁵¹ reflected the legal academy's insistence upon defining a "special role" for the judiciary that set it separate and apart from politics.⁵² The 1970s and 1980s were given over to interpretive theory designed to keep judges within the bounds of law and out of politics.⁵³ Later, theories regarding the legitimate process of judicial constitutional change came to play the same duet,⁵⁴ which also serves as the backline for much theorizing about the scope of constitutional protections.⁵⁵

50. See KRAMER, *supra* note 38, at 7 ("We in the twenty-first century tend to divide the world into two distinct domains: a domain of politics and a domain of law.").

51. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

52. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (explaining the genesis of scholarly obsession with the countermajoritarian difficulty).

53. See, e.g., CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 92–96 (1960) (arguing that judicial adherence to constitutional text will result in an appropriate degree of judicial restraint in the form of judicial deference to acts of other branches); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 1–5, 143–46, 154–55 (1990) (arguing that without history as a constraint, judges will utilize their own moral values when making decisions); DWORIN, *supra* note 16, at 378 ("Law as integrity condemns judicial activism, and any practice of constitutional adjudication close to it. It insists that justices enforce the Constitution through interpretation, not fiat . . ."); ELY, *supra* note 2, at 102 (arguing that the representation-reinforcing method of constitutional interpretation "recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives"); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 798 (1999) (describing the "virtue of intratextualism and other forms of holistic textualism: their usefulness in constraining (or at least highlighting) interpretive cheating"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (arguing that originalism avoids "the main danger in judicial interpretation of the Constitution . . . that the judges will mistake their own predilections for the law"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925–27 (1996) (noting that the common law method "has a centuries-long record of restraining judges" and arguing that the common law method is the most effective way of restraining judges from imposing their own will).

54. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1048–53 (1984) (relying upon the judiciary to distinguish between constitutional principle and normal politics, thereby managing constitutional change on behalf of the people).

55. See CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 58 (2001) (arguing that federal judges are specially suited to handle "matters of principle" because of the "independence that comes with life tenure"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 583 (1978) (arguing that the function of the judiciary "is to protect dissenters from a majority's tyranny"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 906 (1963) (acknowledging "the widespread acceptance of judicial review in the United States as a crucial element in maintaining those mechanisms of the democratic process which safeguard the rights of individuals and minorities against the majority"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1 (1996) ("It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian over-reaching."); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 370 (1992) ("For proponents of judicial activism, independence

The insulation of judges from political control, and the importance of law as a constraint on judicial willfulness, have become twin themes echoing through normative theory's effort to enforce the law-politics divide. Judges are to be insulated from politics, independent of it.⁵⁶ At the same time, law must constrain judges from rendering political judgments,⁵⁷ and keep them from imposing their own views.⁵⁸ Normative theory abounds in metaphors and dichotomies that drive home these twin ideas.⁵⁹

allows courts to avoid the prejudice and shortsightedness to which elected officials sometimes succumb. Electorally unaccountable and institutionally insulated, federal judges can preserve rights under attack.”).

56. See CHARLES FRIED, SAYING WHAT THE LAW IS 70 (2004) (“The security of the citizen against arbitrary power, whether presidential or bureaucratic, ultimately depends on the courts, and therefore depends on the degree of independence—separation—of the judicial power from the rest of government.”); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1247 (2002) (“More important than whether judges serve as faithful agents of one political branch vis-à-vis the other is that judges are structurally independent from both political branches of government.”).

57. See BORK, *supra* note 53, at 1–5, 143–46, 154–55 (arguing that an originalist methodology can ensure a constraint of judges that the rule of law requires); DWORKIN, *supra* note 16, at 378 (“Law as integrity . . . insists that justices enforce the Constitution through interpretation, not fiat . . .”); Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 326 (2003) (“[W]e need law to constrain judges rather than judges to serve the rule of law.”); Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001) (“[I]t is . . . widely believed that the personal element [of judging] is either checked, constrained, or filtered through distinctive professional obligations and jurisprudential schools of thought.”).

58. See, e.g., Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 793 (2003) (“Without a theory of constitutional interpretation . . . there arises the fear that judicial review is . . . merely the ad hoc implementation of the judges’ own values.”); David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 558 (1992) (“[T]he notion that judges who rely on moral arguments are ‘imposing their own values’ is a familiar one. This notion does reflect a legitimate concern about institutional competence.”); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (“If [the Court] . . . merely imposes its own value choices, or worse if it tends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.”).

59. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1977) (describing a theory based on the distinction between “policy” decisions determined by political processes and judicial primacy over matters of “principle”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled . . .”). In addition to this “principle” versus “policy” distinction, there is the concept of judicial “insulation.” See DWORKIN, *supra*, at 85 (“A judge who is insulated from the demands of the political majority whose interests the right would trump is, therefore, in a better position to evaluate the argument.”); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 172 (2001) (“If constitutional commitments are not to give way to governance by present political will, the power to interpret them must be assigned to a body insulated from that will.”). There is also the notion of judicial “independence.” See BLACK, *supra* note 53, at 49 (describing the first step in the creation of decisionmaking institutions as a grant of independence from the policymaking branches of government); EISGRUBER, *supra* note 55, at 58 (“Federal judges enjoy a singular advantage: the independence that comes with life tenure.”). Finally, there is the idea that the Court should not be a “naked power organ.” See Phillip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457, 466 (1959) (“I suggest that judicial activism should be rejected because the exercise of such naked power invites a reply in kind from those on whose domain the Court is poaching.”);

Only recently—sparked, as is typically the case, by a spate of contentious Supreme Court decisions—have many begun to see that constitutional judging cannot be insulated from “ordinary” politics in quite the way theory demands.⁶⁰ Recognition of the relationship between law and politics is on the rise.⁶¹ Still, it is apparent that normative scholars remain uncomfortable with the implications of positive scholarship, even as they take notice. Legal theorists indicate their discomfort by moving quickly from positive assertions about the relationship between law and politics to conclusions that positive scholars would suggest simply are implausible.⁶² To take a frequent example, some normative scholars look to the political branches to correct errant judges⁶³ without considering whether there is any reason to think the political branches are likely to do so at present.⁶⁴

The time is ripe, it would seem, to take a closer look at the politics of judicial review. If, as legal scholars increasingly are recognizing, law and politics cannot be kept separate, we still need a theory that integrates the two while adhering to normative commitments about the rule of law this society holds dear. Yet, normative theorists cannot come to even tentative conclusions about how judges should act before understanding the

Wechsler, *supra*, at 19 (urging courts to make principled decisions to avoid acting as “naked power organ[s]”).

60. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052–53 (2001) (criticizing the Supreme Court’s “systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights” and noting that the reappraisal came from “this same bloc of five conservatives [who] handed the presidency to George W. Bush in *Bush v. Gore*”); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 242 (2002) (critiquing the abandonment of the historical sense of “political questions” evident in *Bush v. Gore*); Robert H. Bork, *Federalist Society Symposium*, 13 J.L. & POL. 513, 515 (1997) (“[C]ourts generally have been steadily changing our culture and our society, and they have been doing so against the wishes of the American people. It is and has been a mistake.”); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 158 (2001) (criticizing the Court’s hegemonic approach evident in *Bush v. Gore* and recent federalism decisions).

61. See, e.g., KRAMER, *supra* note 38, at 7–8 (condemning the modern-day distinction between law and politics as unfaithful to the “original conception of constitutionalism [and] its course over most of American history”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1981 (2003) (critiquing the Rehnquist Court’s use of the enforcement model on the grounds that it “is misguided to believe that constitutional law can or should be hermetically insulated from constitutional politics”); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (“[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”).

62. See *infra* notes 335–37 and accompanying text.

63. See, e.g., KRAMER, *supra* note 38, at 249 (suggesting that the political branches should utilize the fact that “[t]he Constitution leaves room for countless political responses to an overly assertive Court”); see also *infra* notes 338–41 (discussing scholarly calls for congressional action).

64. See *infra* notes 338–41 and accompanying text; see also Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) (suggesting that the political branches are not attempting to curb the Court because they “[do] not disagree on the merits with what the Court is doing”).

constraints those judges necessarily face. This is what positive scholarship has to offer.

III. The Political Milieu of the Constitutional Judge

At the heart of the positive project is a question that normative scholars seldom pause to ask: What motivates judges? Positive scholars ask this question because they cannot begin to understand how judges are likely to decide cases and what might influence those decisions without some understanding of judicial motivations. Influence only can be brought to bear upon those who care about it. If a judge cares primarily for wealth, then in the absence of adequate enforcement, judgments may be rendered for money. If a judge does not care to retain her job, then threats of removal will mean little. One must ask, as does Richard Posner, “What do judges maximize?”⁶⁵

Scholars have identified any number of things that might motivate judges, all the while recognizing that defining the utility function of members of the judiciary seems to be more difficult than for other government officials.⁶⁶ The primary (though often implicit) assumption of normative scholarship is that judges ought to be motivated primarily to decide cases based upon an independent assessment of the law and facts.⁶⁷ They might be, and some positive scholars may fail to give proper credit because of the role orientation of judges. But judges also might care about things as varied (and human) as reaching the outcome they prefer,⁶⁸ increasing their leisure,⁶⁹

65. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1 (1993) (presenting a “positive economic theory of judicial behavior”); see also RICHARD A. POSNER, *OVERCOMING LAW* 135–44 (1993) (modeling judicial utility as a function of leisure, income, reputation, popularity, prestige, and avoiding reversal); Lawrence Baum, *What Judges Want: Judges’ Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 760 (1994) (“Judges hold a multiplicity of goals that are potentially relevant to their behavior as judges, and different judges have different hierarchies of goals.”); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 302 (1997) (surveying scholarship on judicial motivations).

66. Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT’L REV. L. & ECON. 169, 169 (1992) (“[T]he inability to identify a plausible objective function to impute to judges has frustrated economic analysis from the outset.”); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1054 (1995) (“Social choice theory has had some difficulty accounting for judicial behavior because the judiciary has been structured to sharply reduce the self-interested motivations typically identified with other political actors (e.g., financial rewards, promotion, reelection).”); see also Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827 (advancing the argument that public choice predictors do not work as well with judicial actors as with legislative officials).

67. See Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 981 (2001) (arguing that proper judicial decisions “should be based on determinations of the evidence and the law”); Matthew J. O’Hara, Note, *Restriction of Judicial Election Candidates’ Free Speech Rights after Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197, 197 (1994) (“The notion of an independent, impartial judiciary that decides cases based on their factual and legal merits, and not on any other considerations, is fundamental to our common law tradition.”).

68. See *infra* notes 84–88 and accompanying text (discussing judges’ preferences as motivating factors).

anticipating what other people or groups think of them based upon their decisions,⁷⁰ seeing that their will is obeyed,⁷¹ and—particularly for lower court judges—being promoted.⁷²

By looking beyond normative assumptions regarding how judges should act to the question of what motivates them to act as they do, positive scholars have identified a number of political forces that influence the decisions of constitutional judges. “Political” is used here in a broadly encompassing manner, referring to any influence brought to bear by the legitimate institutions and actors of democratic government that reflects something other than the individual judge’s best judgment of the way the law determines a case’s merits.⁷³ This definition rests in opposition to normative theory’s twin demands of constraint by law and insulation from politics. Given the central theme that politics and law are symbiotic, the line between them cannot possibly be drawn with surgical precision. What matters is that some of the influences discussed here will pose difficulties for one normative theory or another, and others will pose serious questions to all of them.

A. *The Judge’s Own Values*

It may seem counterintuitive to begin an examination of the political influences a constitutional judge faces by focusing on the way the judge’s

69. See POSNER, *supra* note 65, at 140 (citing as a key component in judicial utility the amount of leisure time judges have in relation to the possible leisure time they would have in possible alternative employment); Epstein, *supra* note 66, at 837–38 (noting that the combination of federal judges’ fixed salaries and life tenure may foster an attempt to maximize leisure time by minimizing the time and effort that they expend on making judicial decisions).

70. See, e.g., POSNER, *supra* note 65, at 140–41 (including reputation in his answer to the question of what judges attempt to maximize when deciding cases); Thomas J. Miceli & Metin M. Coşgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 35–37 (1994) (building and testing a model of judicial behavior that includes reputation and self interest as its determinants); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000) (focusing on reputation as a motivation of Supreme Court Justices and suggesting that peer group esteem might motivate lower court judges).

71. See *infra* section III(A)(2) (arguing that it is likely that a judge’s decisionmaking is, at the very least, influenced by personal ideology and preference, and in certain cases, based directly upon it).

72. See Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J. L. ECON. & ORG. 183, 193 (finding that judges that were more likely to be promoted to an appeals court were more likely to rule the Sentencing Guidelines constitutional); Andrew P. Morriss et al., *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 92 (2005) (finding that federal judges were more likely to write an opinion in Sentencing Guidelines cases as their likelihood of being promoted to the circuit court of appeal increased); see also Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 315 (2004) (noting that lower court judges may face incentives to write “opinions designed to attract the approval” of those in power).

73. The definition distinguishes, for example, any examination of bribery or corruption. Unlike the considerations discussed here, bribery is never considered appropriate behavior. In any event, such corruption is relatively rare in the United States. See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 5 (1964) (providing this reason for his decision not to examine bribery or other unlawful influences on the Supreme Court).

own values affect the decision of cases, but skipping over this would miss a central point of tension between positive and normative accounts. Normative scholarship clearly finds it unacceptable that judges impose their own views regarding constitutional meaning,⁷⁴ yet this is what a prominent theory of positive scholarship, the attitudinal model, argues that they mostly do. Although the attitudinal model has its difficulties, it nonetheless makes a claim about the influence of judicial ideology that deserves more of a response than it gets from normative scholars. Attitudinalists certainly overstate their case when they deny law's influence, but they are probably right that law does not constrain judicial behavior in the way normative theory often seems to require.

The attitudinal perspective is controversial even among positive scholars for reasons that will be instructive to normative theorists. Many positive scholars believe that the attitudinal account is too simplistic, that it neglects other important forces that also bear upon and influence constitutional judges. For the most part, however, the influences upon which other positive scholars focus are the very sorts of political and institutional features that legal scholars ignore.

1. *The Attitudinal Model.*—The central tenet of the attitudinal model is that the primary determinant of much judicial decisionmaking is the judge's own values.⁷⁵ Judges come onto the bench with a set of ideological dispositions and apply them in resolving cases. As the most notable proponents of the attitudinal model, Jeffrey Segal and Harold Spaeth, explain: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."⁷⁶ Although methodologies vary, attitudinalists typically use a measure of judicial ideology and then rely on it to predict judicial votes.⁷⁷ Often, they also try to control for other factors that might influence

74. See *supra* note 58 (discussing sources condemning decisionmaking based on the "judges' own values"); see also Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 84 n.3 (1986) ("Most jurisprudential theories of adjudication consider adjudication, at least implicitly, to be the rendering of a judgment rather than the expression of a judicial preference.").

75. See generally SEGAL & SPAETH, *supra* note 34 (presenting and testing the premise that judges are primarily motivated by their ideological beliefs); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) [hereinafter SEGAL & SPAETH, *REVISITED*] (updating and expanding the analysis from their 1993 work); see also Gillman, *supra* note 57, at 494 (assessing the attitudinal model's value).

76. SEGAL & SPAETH, *REVISITED*, *supra* note 75, at 86.

77. Perhaps, more accurately, it is "post-dictive" rather than predictive; attitudinalists' models typically have as their dependent variable votes that already have been cast. Cf. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (using a computer model of Supreme Court decisionmaking to predict outcomes of cases before they were decided during the 2002 term).

the vote: everything from personal characteristics of the judge (such as race, gender, and prior occupation)⁷⁸ to law itself.

Attitudinalists claim an enormous degree of success in their predictive endeavor, especially with regard to the Supreme Court.⁷⁹ “There is now surpassing empirical evidence in support of [the attitudinal model] of judicial decisionmaking.”⁸⁰ Segal and Spaeth are able to predict over 70% of Supreme Court Justices’ votes based on ideology, and sometimes they do quite a bit better.⁸¹ “For Rehnquist, Blackmun, Brennan and Marshall, simply knowing that a case involves search and seizure would lead to correct predictions of votes between 78% and 90% of the time.”⁸² Even in the lower courts, ideology turns out to be a significant determinant of judicial behavior.⁸³

Virtually all positive scholars agree with attitudinalists that ideology plays an important role in the decision of cases,⁸⁴ though many positive

78. See, e.g., Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 939 (2005) (“[F]emale justices [on state high courts] tend to support female litigants in divorce cases”); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1453, 1457 (1998) (finding that neither gender nor race had a significant effect on district court decisions on the constitutionality of the federal sentencing guidelines in 1988); Kenneth Luis Manning, ¿Cómo Decide?: Decision-Making by Latino Judges in the Federal Courts I (1998) (unpublished manuscript, on file with author) (“[E]ven when controlling for partisanship, region, and gender, Latino judges were more likely to hand down a conservative decision in criminal justice and civil liberties cases than their non-Latino counterparts.”).

79. Note, however, that the attitudinal model predicts the direction of judicial votes but not necessarily case outcomes. See Ruger et al., *supra* note 77, at 1186 (“[R]esort to simple attitudinal assumptions will help predict the votes of some Justices but not others, and not those who matter most for outcomes.”).

80. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1445 (2001); see also Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices’ Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1049 (1996) (“A half century of empirical scholarship has now firmly established that the ideological values and the policy preferences of Supreme Court justices have a profound impact on their decisions in many cases.”).

81. SEGAL & SPAETH, REVISITED, *supra* note 75, at 316–19 (finding that ideology correctly predicts 76% of Justices’ votes in search and seizure cases from 1962 to 1998); *id.* at 324 (“Spaeth was able to predict accurately 88 percent (92 out of 105) of the Court’s decisions between 1970 and 1976 and 85 percent of the Justices’ votes.”); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561 (1989) (finding that ideology explains 80% of Justices’ votes in civil liberties cases between 1953 and 1988); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 820 (1995) (stating that ideology predicts 69% of civil liberties votes and 56% of economic votes from 1946 to 1992).

82. Jeffrey A. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938, 939 (1986).

83. See *infra* notes 231–43 and accompanying text.

84. Whittington, *supra* note 35, at 608 (referring to recent essays by positive scholars moving beyond the attitudinal project in noting that “none of them suggests that judges are not policymakers or that they are not, to some degree, influenced by their own ideological predispositions”); see also Howard Gillman & Cornell W. Clayton, *Introduction to SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 1, 3 (Cornell W. Clayton & Howard Gillman eds., 1999) (“There

scholars believe that ideological behavior is constrained by other institutional forces. According to these “strategic institutionalists,” “[I]t is quite evident that the Justices do not operate simply in a world of their own making, and therefore the contours of judicial institutions must be recognized and they must be situated within [a] larger political environment.”⁸⁵ Strategic institutionalists believe that judges would like to impose their own policy preferences but that they also must take account of the preferences of “presidents, legislatures, interest groups, and lower courts.”⁸⁶ “Strategic judges must calculate what others will do and adjust their behavior accordingly.”⁸⁷

Especially when compared with strategic institutionalists, normative theorists bear a surprising affinity with attitudinalists. In offering up their own theories for how judges should behave, normative theorists apparently believe—as do attitudinalists—that judges are unconstrained by other institutions and thus may decide cases in ways they so choose. Moreover, at least some normative theorists understand that ideology often plays a role in judging. Indeed, attitudinal findings that Supreme Court Justices vote according to their own ideology might evoke a sort of “ho hum” reaction on the part of the legal cognoscenti.⁸⁸

2. *Does Law Constrain Judges?*—Of course, something important does set normative scholars apart from attitudinalists: the law. Normative scholars do not believe that judges should be unconstrained actors, free to impose their values when they wish. Rather, law—defined broadly to include doctrinal requirements of judicial deference—is expected to constrain judges. In this regard, normative scholars and attitudinalists could not be more different.

Many nonattitudinal positive scholars acknowledge law’s influence upon judges. Modeling law is complex and deserves more attention than it is getting,⁸⁹ but few positive scholars (other than attitudinalists) claim law does

is no reason to take issue with the observation that Supreme Court justices act in ways that reflect who they are and what they believe [However,] different contexts make it more or less possible for individuals to act on different sets of beliefs.”).

85. Whittington, *supra* note 3, at 618.

86. *Id.* at 612.

87. *Id.*

88. See, e.g., Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999) (“I register something of a ho-hum reaction to the notion that judges’ personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another.”); Norman Dorsen, Book Review, 95 HARV. L. REV. 367, 383 (1981) (explaining that it is “hardly a cause for wonder” that a judge would let values inform constitutional decisions and stating that “[c]onstitutional adjudication, when not controlled by text or precedent, inevitably forces a judge to resort to personal philosophy and values”).

89. There have been notable attempts. See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992) (testing, with some success, an integrated model of Supreme Court decisionmaking that includes both political and environmental forces, along with doctrinal constraints); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential*

not matter.⁹⁰ To the contrary, they study the role of legal discourse in briefs, oral arguments, and judicial decisions.⁹¹ There is an emerging agreement even among positive scholars that—as lawyers would expect—the force of precedent carries substantial weight in the lower courts⁹² and may be more significant in the Supreme Court than some attitudinalists will admit.⁹³ Justices may well vote consistently with their own precedents,⁹⁴ if not the precedents of the Court.

Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases, 37 LAW & SOC. REV. 827, 829–38 (2003) (finding striking support that the “Lemon test” of *Lemon v. Kurtzman* influences outcomes); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002) (finding strong statistical evidence that the content-neutrality criterion established in *Grayned v. Rockford* exerts a powerful influence on how subsequent freedom of expression cases are decided); Edward P. Schwartz, *Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision-Making*, 8 J.L. ECON. & ORG. 219 (1992) (modeling the Supreme Court Justices as having preferences not just over policy outcomes but also over the level of precedent set by a particular case).

90. *But see* SEGAL & SPAETH, *supra* note 34, at 363 (“The inability of the legal model to explain and predict decisions reduces its utility to normative rationalization”); SEGAL & SPAETH, *REVISITED*, *supra* note 75, at 85 (“To the extent that the doctrine of stare decisis is falsifiable, it also turns out to be false.”).

91. *See* Lee Epstein & Jack Knight, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1033 (1996) (finding evidence that the norm of precedent affects the “nature and substance of the legal rules established by the Court”); Richards & Kritzer, *supra* note 89, at 315 (examining written Supreme Court opinions and finding that key precedents influence the development of the law).

92. *See infra* notes 222–24 for a full discussion of law’s influence in the lower courts.

93. *See* Saul Brenner & Marc Stier, *Retesting Segal and Spaeth’s Stare Decisis Model*, 40 AM. J. POL. SCI. 1036, 1043 (1996) (reanalyzing the votes of Justices Clark, Harlan, Stewart, and White, but including memo decisions left out in the original study, and finding that precedents ruled 47% of their decisions); Songer & Lindquist, *supra* note 80, at 1061 (finding that “the justices appear to cast more than three-fourths of their votes in favor of precedent” when summary cases are included); Linda M. Merola, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices: A Second Look* 18 (2004) (unpublished manuscript, on file with author) (reanalyzing Segal and Spaeth’s data and finding that precedent controlled 58.9% of the time when adherence to precedents is operationalized to take account of dissents that themselves followed precedents).

94. *See* Youngsik Lim, *An Empirical Analysis of Supreme Court Justices’ Decision Making*, 29 J. LEGAL STUD. 721, 723 (2000) (“If a justice participated in the decision of a precedent applicable to a current case, her present decision should be affected by her past decision.”); Maggie Lemos, *Constraint Within the Attitudinal Model of Supreme Court Decision-Making: A Case Study of Justice Scalia and the Fourth Amendment* 9 (2001) (unpublished manuscript, on file with author) (“The Justices may feel constrained to decide cases in accordance with the same legal reasoning on which they relied in similar prior cases, pretextual as it may have been in the first instance.”); Merola, *supra* note 93, at 13 (“A justice may disagree with the majority’s interpretation of precedent In a progeny case, this justice may continue to dissent . . . with the valid argument that *stare decisis*, itself, mandates that he or she *not* join the majority.”).

The problem, however, is that influence is not the same as constraint.⁹⁵ The central attitudinal claim is not that law is without influence but that it does not keep judges from voting their own ideology.⁹⁶ Often the response to attitudinal claims about ideological voting is to raise the problem of behavioral equivalence: How can one be sure it is ideology that is driving the judge, rather than a good faith personal understanding of what the law requires?⁹⁷ Attitudinal scholarship has struggled to answer this question,⁹⁸ but when it comes to normative theory the answer may not matter as much as it seems.

Even if the Justices are deciding cases in good faith based on their best understanding of the law, they still are voting their own values, as is evident from the fact that attitudinal studies are able to predict outcomes based on ideology. At best, law is having an influence, but any judge's view of the law necessarily is influenced by ideology. (At worst, it is ideology and preference all the way down.)

The fact that the Justices' votes can often be explained as consistent with political ideology, and that law apparently does not constrain these votes, requires more thoughtful response from normative scholars than it receives. Normative theorists may claim a finding of ideological voting to be "ho hum," but however savvy the cognoscenti, they still need to square the insider's perspective on the Supreme Court's work with normative theory. Knowing winks to one side, the hard center of normative constitutional theory disdains judges voting their own values and insists that there be a set of constraints to keep judges out of politics and within the bounds of what we think of as "law."⁹⁹ This is what purports to separate normative theorists from attitudinalists. If it is true that judges vote their values, and all the best lawyers and theorists understand this, then it seems reasonable to expect

95. Even positive scholars on both sides of the "does law matter?" divide sometimes miss the point here. Some overstate the demands of constraint. For example, Segal and Spaeth engaged in an extensive study to show that precedent does not constrain Supreme Court Justices. JEFFREY A. SEGAL & HAROLD J. SPAETH, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENCE ON THE U.S. SUPREME COURT* (1999). Though their approach yielded many interesting results, it tested a notion of constraint far more stringent than normative theory would require. See Gillman, *supra* note 57, at 482–83 ("[B]ecause the principle of *stare decisis* is not normally understood to mean that dissenting justices gravitate toward the position held by the majority of their colleagues, very few legalists would consider this research an appropriate test of either precedent or legal influences.") (citation omitted). Others, however, understate the implications of attitudinal findings. Scholars such as Jack Knight and Lee Epstein suggest that attitudinal studies might prove little because of the problem of behavior equivalence: as presently configured, attitudinal studies simply do not tease out whether judges' votes exhibit fidelity to that judge's notion of the law or naked ideology. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 57 (1998). While separating law from attitudes in this way may be instructive, it is unnecessary to do so before concluding that the constraint sought by normative theory is absent.

96. See *supra* notes 75–83 and accompanying text.

97. EPSTEIN & KNIGHT, *supra* note 95, at 57.

98. See, e.g., SEGAL & SPAETH, *supra* note 95.

99. See *supra* notes 50–59 and accompanying text.

scholars to provide theories of judicial review that take value-voting into account.¹⁰⁰ Yet these kinds of theories are in notably short supply.

3. *What Might “Ideology” Tell Us About Judging?*—Normative scholars who seek to develop theories of judicial behavior that take account of value-voting need to focus closely on what attitudinalists mean by “ideology.” Judges do not come color-coded like electoral states, so positive scholars have had to find proxies that indicate the relative ideology of judges. Just as measuring the relative influence of law has posed a problem to attitudinal scholars, so too has finding the perfect proxy for ideology. Although these ideological proxies are subject to criticism, they actually can be quite revealing.

One prominent measure proxy for ideology (particularly for lower court judges) is the party of the appointing President.¹⁰¹ The idea here is that because Presidents appoint judges based on ideology, the party of the appointing President could be used as a proxy for the appointed judge’s own ideology.¹⁰² In short, judges appointed by Republican Presidents will be

100. See, e.g., Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 667 (2004) (“[I]t should give [constitutional] theorists pause to see that politics is the *best* predictor of Supreme Court outcomes.”). The phrase “value-voting” is Terri Peretti’s, and she does attempt a theory that incorporates it. See TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 101–11 (1999).

101. See Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1071 (1999) (“Given the Court’s key role in setting public policy, the president will want a Court that shares his ideology and thus will nominate someone who will bring the Court closer to his preferences.”); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 303 (2004) (“It is reasonable to hypothesize that as a statistical regularity, judges appointed by Republican presidents . . . will be more conservative than judges appointed by Democratic presidents.”).

102. Originally scholars divined ideology from Justices’ votes and then used the measures to predict the same votes, a problem of obvious circularity. See SEGAL & SPAETH, *supra* note 34, at 221–22 (discussing examples of work using this method and pointing out its flaws). The improvement was to identify a measure of ideology from past votes and then use the measure to predict later ones. This method gives rise to a claim of behavioral equivalence, as it is impossible to tease out “ideology” from a judge’s understanding of the law. Another solution was to create a measure of ideology from newspaper editorials at the time of a Justice’s nomination. Segal and Cover pioneered this project and so they are generally called Segal–Cover scores. Segal & Cover, *supra* note 81; see also Segal et al., *supra* note 81 (backdating and updating the scores). This method, while commonly used, is rife with difficulty: The scores for roughly one-third of the Justices are based on four or fewer editorials, with three Justices classified on the basis of only two. See *id.* at 814 (listing the number of editorials used to classify each Justice). There is no reason to believe that the editorialists are neutral observers of a nominee’s ideology; moreover, this method is likely to be applicable only to Supreme Court Justices or perhaps D.C. Circuit judges. See Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 824 n.102 (1999) (“Because the measure of ideology was constructed from newspaper editorials about the nominee . . . this methodology is unlikely to be usable for court of appeals judges, whose nominations typically receive less media attention.”). A recent novel project maps the Justices and other political actors in a common ideological space by using a variety of factors as bridges. These “common space” measures, which receive greater attention below, are promising but still do not solve the problem of behavioral equivalence and are a bit new to assess with complete confidence. See Michael Bailey & Kelly H. Chang, *Comparing Presidents, Senators,*

more conservative than judges appointed by Democrats. There are criticisms of this method,¹⁰³ among them that it is relatively roughly hewn.¹⁰⁴ Nonetheless, the measure enjoys respectable success in predicting judicial votes.¹⁰⁵

The predictive success of the presidential-appointment measure of ideology is telling because it emphasizes the close relationship between politics and constitutional judging. No matter how rough the appointing-President measure is as a proxy for any individual judge's ideology, the predictive success of this variable provides stark evidence of the extent to which the party controlling the political branches influences the outcome of

and Justices: *Interinstitutional Preference Estimation*, 17 J.L. ECON. & ORG. 477 (2001) (developing a method to place Supreme Court Justices, both houses of Congress, and the President in a single ideological space by using the President's preferences as a key reference point); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANAL. 134 (2002) (employing a new synthesis of Bayesian probability and Markov chain Monte Carlo methods to trace the ideological preferences of Supreme Court Justices).

103. See Lim, *supra* note 94, at 730 (“[T]his method might be too naïve to capture Justices’ ideologies issue by issue. Another problem with the measure is that Justices’ ideologies are assumed to be invariant over time.”); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 976–77 (1992) (finding that some Presidents—particularly Johnson, Carter, and Reagan—were especially sensitive to ideology in judicial appointments, while others were not); see also *infra* note 104 (discussing the Senate’s influence).

104. More complex models take account of other factors such as the partisan makeup of the Senate, which must confirm presidential nominees. The Senate has an ameliorating influence on presidential appointments, but the exact extent of that influence has been difficult to capture with certainty, no doubt because the nature of senatorial–presidential interaction has shifted over time in response to the others’ actions. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 89 (2002) (“[Presidential appointment] neglects an important institutional feature of the appointment process—namely, senatorial courtesy—that may have the effect of constraining the President from nominating a candidate . . . who mirrors his ideology.”); Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 628–29 (2001) (arguing that the President’s ideology alone is too blunt an instrument for predicting how judges will vote and advocating instead the use of the appointing President’s ideology if senatorial courtesy is not in force and the senator’s ideology if it is). But see Susan W. Johnson & Donald R. Songer, *The Influence of Presidential Versus Home State Senatorial Preferences on the Policy Output of Judges on the United States District Courts*, 36 LAW & SOC. REV. 657, 666 (2002) (expecting to find “that the practice of senatorial courtesy might lead to judicial appointments consistent with the views of home state senators” but discovering that “presidential preference is more than twice as influential as home state senatorial preferences”).

105. See *supra* notes 77–81 (describing results from empirical tests of the attitudinal model); see also Epstein, *supra* note 66, at 838, 844–45 (recognizing that judges’ decisions will be “heavily influenced by the intellectual orientation and political inclinations that they brought with them to the bench” but accepting nonetheless the checking function of judicial review); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1765–69 (1997) (identifying the ideology of judges based on the party affiliation of the appointing President and predicting votes in environmental cases accordingly); C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175, 177–78 (1991) (coding courts according to the party of the appointing President); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 218 (1999) (discussing partisan judicial appointments by Presidents and the resultant ideological makeup of the judiciary).

cases, and thus the direction of the law. It is this glaring reality, at least in recent years, that has turned the appointments process into a battle royal.

Of late, a small group of normative scholars have sought to turn vice into virtue by explicitly building normative theories regarding judicial review and constitutional change atop this observation that judges vote ideologically and that presidential appointments will thus over time spell the direction of constitutional law.¹⁰⁶ At the heart of these studies is the notion that presidential appointments will serve to bring the courts within the ambit of society's views. One example of such an approach is Jack Balkin and Sanford Levinson's theory of "partisan entrenchment":

Partisan entrenchment is an especially important engine of constitutional change. When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.¹⁰⁷

Even though most today recognize the President's influence upon the federal bench, normative theory still ought to have some difficulty with these presidential-appointment theories of judicial review. After all, theories such as these recognize that political actors can shift constitutional law in response to electoral mandates. Yet most extant normative theories of judicial review rest on the capacity of judges to act in a manner contrary to political or popular preferences.¹⁰⁸ Love it or hate it, the countermajoritarian image of the Supreme Court endures.

* * *

Normative scholars must take account of value-voting, unless they can establish that it does not exist or can explain how it is to be avoided. Normative theorists obviously can argue that what judges are doing is not what they ought to do. But they also must have a story about why judges might act differently or what will make them do so. Despite decades of argument that judges should follow the law and not vote their own preferences, there is a great deal of evidence that ideological voting

106. See Balkin & Levinson, *supra* note 60, at 1049–50 (advancing the theory of partisan entrenchment); Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 65–66 (1999) (advancing a theory relying on irregularly timed appointments); see also Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L.J. 349 (2003) (developing a normative theory of judicial activity rooted in social science findings of ideological judicial voting and limited judicial independence).

107. Balkin & Levinson, *supra* note 60, at 1067–68.

108. See *supra* notes 50–59 and accompanying text; *infra* notes 284–92 and accompanying text.

nonetheless is prevalent. Law undoubtedly plays a role in judging—and positive scholars ignore this at their peril—but law does not always constrain judges in the way normative theory seems to require.

As the balance of this Part explains, there *are* other constraints judges face, very real ones, and these constraints—contrary to attitudinal reports—almost surely have an important influence on the development of constitutional law. But these constraints, institutional in nature, run contrary to others identified by normative theory about judicial review. That is likely why they receive such little attention from normative theorists.

B. The Collegial Court: Intracourt Interaction

That constitutional judges necessarily face constraint is apparent as soon as one looks to the next layer of influence—that of the collegial court. The heart of what an appellate court does is to explicate legal rules, which are found in the court's opinion.¹⁰⁹ When it comes to the written opinion, collegial pressures almost certainly temper what judges can do.¹¹⁰ Attitudinalists, who obviously understand that the Supreme Court operates as a composite body,¹¹¹ miss this because they treat cases as the mathematical sum of individual votes as to outcome, rather than as statements of what the law is.¹¹²

Normative scholars in the legal academy, who obviously also are perfectly aware that appellate judges—and particularly Supreme Court Justices—serve on collegial courts, have proven remarkably inattentive to the truly difficult questions the collegial setting poses for how judges ought to behave. Because the Justices do not act alone, and because the weight of what they accomplish typically depends on the extent to which they agree to act in concert, they face difficult choices regarding how to reconcile their

109. See DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 172 (1976) (“The Opinion of the Court is the core of the policy-making power of the Supreme Court.”).

110. EPSTEIN & KNIGHT, *supra* note 95, at 96 (discussing the strategic decisions that Justices make to reflect the preferences of their colleagues when writing opinions); FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 15 (2000) (“Perhaps the most important institutional feature of the Court is its collegial character.”); Jeffrey R. Lax & Charles M. Cameron, *Beyond the Median Voter: Bargaining and Law in the Supreme Court* (July 20, 2005) (unpublished manuscript, on file with author) (developing a model that shows bargaining influence on the outcome of opinions).

111. See, e.g., SEGAL & SPAETH, *supra* note 34, at 360 (“[T]he justices are not completely free agents. . . . [A] plurality may not render an opinion of the Court; four justices may not overrule five”); see also MALTZMAN ET AL., *supra* note 110, at 10–11 (“Indeed, even Harold Spaeth, the scholar most closely associated with the attitudinal model, has noted that ‘opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate.’”) (citation omitted).

112. MALTZMAN ET AL., *supra* note 110, at 5 (“Political scientists who study judicial process and politics tend to focus on the disposition of cases, because that is where the most readily available data exist.”); see also Ruger et al., *supra* note 77, at 1152–53 (quoting Spaeth, a leading advocate of the attitudinal model, in regards to an exchange with Mendelson, a critic: “I find the key to judicial behavior in what the justices do, Professor Mendelson in what they say. I focus upon their votes, he upon their opinions.”) (citation omitted).

individual views with the need to achieve a group result. Positive theory highlights the choices that the Justices must make, choices that pose particularly troublesome questions in constitutional cases. Surprisingly few normative scholars tackle these issues,¹¹³ and those who do invariably notice the absence of a richer literature.¹¹⁴

1. *Crafting the Law: The Court's Opinion.*—The opinion of the Court is a good place to begin because it is the most familiar part of a collegial court's work, and because it is here that the difficult choices emphasized by positive scholars are most evident. On a fully constituted nine-member Court,¹¹⁵ five votes can make the law,¹¹⁶ but anything fewer than five carries substantially less weight. Justices remain free to express their own views—in concurrences as well as dissents—but there is substantial pressure to obtain an opinion that speaks for “the Court.” Sometimes Justices feel the need to move beyond a mere majority and approach or obtain unanimity.¹¹⁷

113. Among the small number of articles on the subject are: Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2312–33 (1999) (exploring how multimember decisionmaking on the Supreme Court leads to opportunities and incentives for strategic behavior—and vote trading, in particular); Kornhauser, *supra* note 66, at 170 (modeling the decision of a single judge and examining how the process changes when additional judges are added to a decisionmaking process); Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 451–53 (1992) [hereinafter Kornhauser, *Legal Doctrine*] (showing that whether collegial courts adjudicate on a case-by-case basis or on an issue-by-issue basis influences the outcome of individual cases and the development of legal doctrine); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 56–59 (1993) [hereinafter Kornhauser & Sager, *The One and the Many*] (discussing how different mechanisms of decisionmaking on multimember courts affect outcomes); Kornhauser & Sager, *supra* note 74, at 102–16 (exploring the impact of multiple membership on consistency and coherence in judicial decisions); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068 (1988) (examining how the Supreme Court's internal rules affect decisionmaking); Vermeule, *Interpretive Theory*, *supra* note 13, at 550 (reviewing widely debated approaches to statutory and constitutional interpretation and arguing that these approaches “commit the fundamental mistake” of failing to take into account the collective nature of the judiciary).

114. See Caminker, *supra* note 113, at 2298 (“[Legal scholars] have paid insufficient attention to the ways in which the vote of each individual judge is influenced by the views of her colleagues on a multimember court.”); Kornhauser & Sager, *supra* note 74, at 82 (“Traditional theories of adjudication are curiously incomplete Judging is treated as though it were a solitary act The real world of adjudication, though, differs dramatically.”); Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 2 (“Judges have been largely unreflective about the nature of their collegial relationships and responsibilities”); Vermeule, *Interpretive Theory*, *supra* note 13, at 550 (noting that many interpretive arguments “commit the fundamental mistake of overlooking the collective character of judicial institutions”).

115. The size of the Court has varied over time. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 38–40 (2002).

116. See MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 35 (2005) (describing how Justice Brennan would ask clerks what is the “most important rule in constitutional law”; he would then hold up his hand to show five fingers).

117. See Caminker, *supra* note 113, at 2321 (“Unanimity establishes a very durable judicial precedent, and it may elicit greater respect from nonjudicial actors” (citations omitted)); Jed

In order to understand the choices Justices face,¹¹⁸ it is necessary to draw the distinction prevalent in positive literature between sincere and strategic behavior.¹¹⁹ Positive scholars define the distinction in different ways, but in essence it is this: sincere behavior refers to a Justice acting as she would in the absence of any other influence, according to her best personal understanding;¹²⁰ strategic behavior involves acting other than sincerely, in order to ensure an ultimate outcome closest to the one the Justice personally prefers.¹²¹ Judges on a collegial court necessarily must moderate their views to achieve consensus, but often they might do more: They might, at times, act in a manner flatly contrary to their sincere views in order ultimately to move the law in the direction they prefer.¹²²

The authors of *Crafting Law on the Supreme Court: The Collegial Game*¹²³ graphically demonstrate strategic behavior in opinion writing and majority coalition formation by relating a story about Justice Brennan's actions in *Pennsylvania v. Muniz*.¹²⁴ In *Muniz*, the police obtained incriminating statements from the defendant in the process of booking him,

Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 909–31 (2003) (documenting the strategies employed by various Courts to achieve unanimity as a way of establishing stronger precedents).

118. This is as good a place as any to acknowledge Lee Epstein and Jack Knight's *Choices Justices Make*, *supra* note 95, a foundational work on the role of strategic behavior in Supreme Court decisionmaking. Building upon Walter Murphy's *Elements of Judicial Strategy*, *supra* note 73, Epstein and Knight moved the project forward by providing falsifiable hypotheses, and by engaging in truly back-breaking review of the Justices' papers, demonstrating what empirical work of this sort could reveal.

119. See EPSTEIN & KNIGHT, *supra* note 95, at 12–14 (defining strategic behavior as judicial behavior undertaken to further one's sincere preferences, given the preferences and strategies of all the other decisionmakers whose actions will influence the ultimate policy outcome).

120. See Caminker, *supra* note 113, at 2302 (“[A] judge votes sincerely if he supports the position that he honestly thinks should win and that he would endorse were he alone on the court.”).

121. See MALTZMAN ET AL., *supra* note 110, at 16–17 (“The hallmark of [the strategic] approach is its focus on the interdependencies inherent in judicial decisionmaking. To achieve policy outcomes as close as possible to their own preferences, justices must at a minimum take into account the choices made by their colleagues, with whom they ultimately must negotiate, bargain, and compromise.”); see also Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 52–56 (describing strategic voting). Because of normative considerations regarding what is proper and not, Kornhauser and Sager suggest that “[t]he simple line between strategic and sincere behavior seems inapt to multi-judge courts . . .” *Id.* at 52.

122. Caminker's explanation of the essence of strategic voting states:

Not infrequently, there will be opportunities for an individual judge to make her court's disposition of a case more compatible with her convictions overall by misstating her convictions as to particulars. . . . A judge will discover that by supporting an outcome or rationale with which she disagrees, she can prevent her court's adoption of some other outcome or rationale that she thinks worse either for justice in the case before her or for the state of the law, in general.

Caminker, *supra* note 113, at 2299 (citation omitted).

123. The book's authors are Forrest Maltzman, Paul J. Wahlbeck, and James F. Spriggs II. MALTZMAN ET AL., *supra* note 110, is a comprehensive account of the internal processes of the Supreme Court that provides a valuable window into the Court's operations.

124. 496 U.S. 582 (1990).

but they had not at that time read him his *Miranda* warnings.¹²⁵ Justice Brennan wrote for the Court, holding that there was an exception to the *Miranda* rule for “routine booking question[s].”¹²⁶ Private correspondence between Justice Brennan and Justice Marshall indicates that Brennan’s vote and opinion in *Muniz* likely were not an expression of his sincere preferences.¹²⁷ Brennan wrote Marshall explaining that because “everyone except you and me would recognize the existence of an exception to *Miranda* for ‘routine booking questions,’ . . . I made the strategic judgment to concede the existence of an exception but to use my control over the opinion to define the exception as narrowly as possible.”¹²⁸ In response to Marshall’s circulated dissent in the case, Brennan wrote Marshall again: “I think it is quite fine, and I fully understand your wanting to take me to task for recognizing an exception to *Miranda*, though I still firmly believe that this was the strategically proper move here. If Sandra [O’Connor] had gotten her hands on this issue, who knows what would have been left of *Miranda*.”¹²⁹

Assuming Justice Brennan acted strategically in *Muniz*, positive scholars and normative theorists might view Justice Brennan’s actions quite differently. Positive scholars tend to think of judges as possessing relatively fixed preferences:¹³⁰ a judge on a collegial court simply tries to reach an outcome that comes closest to his ideal.¹³¹ That is what Brennan did. Recognizing that his preferred outcome was unlikely to prevail and that if he voted sincerely he would lose control of the opinion so that the law might move considerably further away from his ideal, he settled for second-best; he acted strategically both as to the content of the decision and the outcome of the case. Normative theorists might criticize Justice Brennan for acting in a manner contrary to his sincere preferences based on the notion that a constitutional judge should always decide according to the judge’s best understanding of the law, as applied to a particular case.¹³²

125. *Id.* at 586.

126. *Id.* at 601.

127. See MALTZMAN ET AL., *supra* note 110, at 3 (stating that Justice Brennan personally opposed the *Muniz* rule but joined the majority in an attempt to control the effects of the rule). It is possible, of course, that Brennan’s actions in *Muniz* were sincere, but his expressions to Marshall were not.

128. See *id.* (quoting Letter from Justice Brennan to Justice Marshall (June 7, 1990) (on file with Library of Congress Manuscript Division in Papers of Justice Thurgood Marshall)).

129. See *id.* at 4 (quoting Letter from Justice Brennan to Justice Marshall (June 13, 1990) (on file with Library of Congress Manuscript Division in Papers of Justice Thurgood Marshall)).

130. See, e.g., EPSTEIN & KNIGHT, *supra* note 95, at 66–107.

131. Segal and Spaeth explain the use of ideal points in order to place judges along a unidimensional ideological spectrum. See SEGAL & SPAETH, REVISITED, *supra* note 75, at 90–91.

132. See Caminker, *supra* note 113, at 2303 (“[J]udges endeavor to discern and render their best judgment as to the proper resolution of cases according to their best conception of the law.”); see also *supra* note 15.

How one views Brennan's actions depends upon how one believes a collegial court should operate.¹³³ To the extent a debate has been framed in normative theory, it typically is between aggregative and deliberative models of appellate judging.¹³⁴ Under aggregative models, a collegial outcome simply cumulates the views of the members of the appellate bench.¹³⁵ Under deliberative models, judges are supposed to interact in ways that lead them to consider one another's views, thereby arriving at better decisions.¹³⁶

The Supreme Court's opinion-writing practices suggest that an aggregative model is not descriptively accurate. If the correct model was aggregative, then Justice Brennan violated the norm: He should have voted his preference and let the chips fall where they may. But the Supreme Court eschewed an aggregative model when it abandoned the practice of writing seriatim opinions.¹³⁷ When Justices wrote seriatim opinions—i.e., each Justice expressed his own view—then it was reasonable to assume that each Justice would do as he might and leave it to observers to find the Court's center through interpretation.¹³⁸ Given that the Court today speaks through joint opinions, as a practical matter Justices cannot simply adhere to their

133. See Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 2 ("Judges have been largely unreflective about the nature of their collegial relationships and responsibilities, even when they are called on to consider events that render these matters highly problematic.").

134. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815 (1982) (modeling judicial decisionmaking and "assum[ing] that, in deciding a case, each Justice operates independently; each listens to, but is not bound by, the arguments of any other, and each votes according to his own conclusions"); Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 4 ("Collaboration and deliberation are the trademarks of collegial enterprise, and the objective of collegial enterprise often reaches beyond accuracy to other measures of quality."); see also Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76–77 (1986) (criticizing Dworkin's model Hercules for being a loner and extolling the virtues of deliberative decisionmaking in the courts).

135. See *supra* note 134; see also Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 3 (contrasting the nature of distributed collective enterprises in which individuals perform the same task in such a way that their joint efforts do not affect the outcome (e.g., painting a house) and team enterprises, which "do not merely multiply product or amplify effort: they transform the performance into something that only a group could have produced").

136. See Kornhauser & Sager, *supra* note 74, at 101 (enumerating three ways that deliberation may affect individual judges: exposing the judge to a broader range of rationales for each possible result, providing a more fully elaborated discussion of the consequence of each possible outcome, and allowing social pressures to work on each judge to create compromise).

137. See Caminker, *supra* note 113, at 2321 n.71 (relating that Chief Justice Marshall replaced seriatim opinions with single, unanimous opinions of the Court); William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 344 (2004) (noting that Marshall abolished seriatim opinions and instituted constant discussion of pending opinions among Justices for the purpose of achieving consensus).

138. See Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 12–13 (distinguishing between the English practice of each judge reciting his opinion, analogous to seriatim opinions, and the American practice of a single opinion for the Court).

views without taking account of others.¹³⁹ If they did, there might never be an opinion for the Court.

At the same time, positive scholarship wreaks havoc with prevailing notions of the deliberative Court. Scholars such as Frank Michelman envision the Court as the locus of societal dialogue regarding constitutional meaning,¹⁴⁰ but this sort of theory appears deeply wishful in light of actual practice. Scholars who study how the Court actually operates are clear that the deliberative ideal bears little relationship to the reality of Court practice.¹⁴¹ There is precious little talking that goes on, and even less that might be deemed deliberative, or even a conversation. Justices state their views in conference, an opinion author is assigned, Justices decide whether to join on or write separately, and the ultimate work product is prepared.¹⁴² There is communication among the Justices, to be sure. Justices respond to draft opinions, typically by forwarding suggestions as to language changes and offering to join if those changes are made.¹⁴³ But empirical studies demonstrate that Justices frequently simply join opinions as written,¹⁴⁴ that

139. *See id.* at 13 (“Even in the present, rather fractious moment, the Supreme Court norm remains that of a collegial court striving towards the collective expression of shared judgments . . .”).

140. *See Michelman, supra* note 134, at 76–77 (“[P]lurality . . . is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom.”); accord Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 734 (1993) (book review) (“[Certiorari agenda setting] has implications not only for political scientists interested in judicial process, but also for ‘neo-republicans’ who emphasize the importance of collective deliberation in public decisionmaking and, more particularly, the ability of the Supreme Court to illustrate such deliberation in its own conduct.” (citations omitted)).

141. *See MALTZMAN ET AL., supra* note 110, at 148 (summarizing empirical results demonstrating that Justices make their decisions to join majority opinions based both on individual policy goals and on the strategic steps necessary to ensure that any opinions they join reflect those policy goals).

142. For a description of this process, see EPSTEIN & KNIGHT, *supra* note 95, at 56–98, and MALTZMAN ET AL., *supra* note 110, at 6.

143. *See EPSTEIN & KNIGHT, supra* note 95, at 73–74 (noting that, in the 1983 term, bargaining memos played a role in the outcome of roughly half of the cases before the Supreme Court and, in “more than two-thirds of the most important cases of the 1970s and 1980s, at least one justice attempted to bargain with the opinion writer”); MALTZMAN ET AL., *supra* note 110, at 64 (“If a justice wants to express particular problems with an opinion, he or she may suggest that the opinion author make substantive changes, such as add or delete a phrase, a sentence, or a paragraph in the opinion.”). Indeed, these numbers may underrepresent the amount of bargaining that actually goes on. *See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 145 (1991) (“We know that when justices draft an opinion, they do not always send copies of all drafts to all justices. There are certainly times when they communicate one-on-one.”).

144. *See MALTZMAN ET AL., supra* note 110, at 64 (finding that, in 2,290 cases decided by the Burger court, Justices joined the majority opinion 66.2% of the time without circulating a separate opinion, threatening not to join, or waiting or offering suggestions to the majority opinion writer); SEGAL & SPAETH, *REVISITED, supra* note 75, at 385 (noting that “silent membership in the majority vote coalition is by far the most common action of each of the justices, accounting for 58 percent of the total”). One study shows that there are changes to roughly half of first draft opinions, the rate being higher in “landmark” cases. *See EPSTEIN & KNIGHT, supra* note 95, at 98.

they do so most quickly with their ideological allies,¹⁴⁵ and that though there is some vote-changing between the initial conference vote and the case outcome, it is not a frequent occurrence.¹⁴⁶ Further, when votes do shift, they typically reorganize the Court toward what attitudinal studies would have suggested was the right ideological lineup in the first place.¹⁴⁷

In light of actual practice, positive scholars tend to see collegial interaction as a bazaar, much like a legislative forum, in which votes and opinion language are traded.¹⁴⁸ Note, for example, the scare quotes around select words in Epstein and Knight's description of Justice Brennan forging an opinion in a Title VII case: "Collectively, Brennan had to deal with 'suggestions' from O'Connor, Stevens, and Powell about ways to 'improve' his initial drafts."¹⁴⁹ Epstein and Knight plainly are skeptical that Brennan would have seen the "suggestions" as "improvement" or that he necessarily would have had much choice in entertaining them. As they say, "bargaining has been and still is a fundamental part of the Supreme Court's decision-making process."¹⁵⁰

145. See SEGAL & SPAETH, REVISITED, *supra* note 75, at 385–86 ("Not surprisingly, ideological closeness to both the opinion writer and the emerging opinion coalition dramatically add to the likelihood that a justice will join the majority.") (citation omitted); *accord* MALTZMAN ET AL., *supra* note 110, at 81–82 ("When a justice is in ideological harmony with the author, he or she submits a bargaining memo only 15.0 percent of the time, whereas this number swells to 56.7 percent when a justice is in ideological conflict with the author.") (citation omitted).

146. See Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 581 (1996) ("Fluidity [changing one's vote between the conference and merits votes] is not the norm on the Court, but neither is it rare: During the 1946–75 period, a justice was likely to switch his or her vote . . . 7.3% of the time.") (citation omitted); *id.* at n.1 ("During the 1946–55 period, a justice changed his vote . . . 9% of the time . . . and during the 1956–67 period, 10% of the time." (citations omitted)). In fact, majority coalitions larger than minimum-winning rarely break up at all. See Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72, 77 (1988) ("Using all 226 nonminimum winning original coalitions . . . we found that only three broke up (1 percent). By comparison, 53 of the Warren Court's 260 minimum winning coalitions broke up (20 percent).").

147. See Timothy M. Hagle & Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 W. POL. Q. 119, 122 (1991) (examining coalition defection and finding that "the shifting justice was ideologically closer to the marginal justice in dissent than he was to any member of the majority 72.5 percent of the time"); *id.* at 123 ("[W]e have shown that fluidity with regard to shifts from a majority vote to dissent are compatible with the attitudinal model . . ."); see also *supra* note 145.

148. See EPSTEIN & KNIGHT, *supra* note 95, at 31 (discussing the circulation of draft opinions, noting that "[d]uring this period, justices can request changes, and opinion writers can take these suggestions, follow them in part, or ignore them," and concluding that "justices [essentially] bargain and accommodate").

149. *Id.* at 76 (discussing the drafting of opinions for *United States v. Paradise*, 480 U.S. 149 (1987), and *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)).

150. EPSTEIN & KNIGHT, *supra* note 95, at 76.

The idea of “accommodation” might present a better descriptive model for the Supreme Court’s collegial interaction.¹⁵¹ In the world of legal practice it is quite common to circulate drafts of documents and receive recommended language changes in return. Depending upon whom the players are, the comments may be intended as mere “suggestions” or commands, but the overall point truly is to “improve” the meaning of the text by eliminating uncertainty, dodging thorny problems, and offering greater clarity. No doubt there are agendas aplenty in any such group-drafting effort, but the project is a collegial one, the suggestions are often just that, and improvement—defined in various ways, some tactical and some more objective—is the goal. Moreover, doing this on paper (rather than person to person) makes sense, because the end result is, after all, a text. Discussion can only get so far before the hard work of finalizing the text must take place. This is how lawyers typically do business, and the Justices, after all, are lawyers.

A model of accommodation frames the proper question regarding Justice Brennan’s conduct in *Muniz*: What is the acceptable scope of accommodation on a collegial court? So framed, the answer is not an easy one, but it does seem to have its parameters in normative theory. On the one hand, there appears to be widespread condemnation of the idea of Justices trading votes across different cases¹⁵² (though there is some evidence that such trading has occurred¹⁵³ and thus reason to think the issue is a bit tougher than it usually is imagined to be).¹⁵⁴ On the other hand, moderating one’s

151. See *id.* at 31 (“[J]ustices bargain and accommodate.”); MALTZMAN ET AL., *supra* note 110, at 96–99; see also PERRY, *supra* note 143, at 144–45 (quoting a Supreme Court Justice as saying “[w]e don’t negotiate, we accommodate”).

152. See Caminker, *supra* note 113, at 2380 (“One apparent ‘rule of the game’ of collegial judging is that, while certain forms of output-focused strategic behavior are accepted (even encouraged) and others are quietly tolerated, explicit vote trading is disallowed.”) (citation omitted).

153. Maltzman et al. note:

The statistically significant *Cooperation* variable indicates that justices adopt tit-for-tat strategies with one another. For example, if the author had previously been extremely uncooperative with a justice . . . the justice was likely to respond negatively to draft opinions 30.1 percent of the time. In contrast, a justice has only a slim 3.3 percent chance of bargaining with the author if the author had been very cooperative in the past.

MALTZMAN ET AL., *supra* note 110, at 83. This variable could be capturing fundamental agreement on the law, but one might also conclude that it represents a tacit practice of signing onto the opinions of one’s allies warts and all. See generally Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1345 (2001) (discussing evidence of a norm of acquiescence and hints of implicit vote trading found there).

154. See Caminker, *supra* note 113, at 2380, which sketches a number of objections to the practice of vote trading and concludes:

[D]ifferent objections rest on very distinct foundational assumptions about the nature and purpose of collegial adjudication. Moreover, some (though not all) objections logically entail that certain accepted strategic practices should be equally disapproved as well. Finally, some objections apply to vote trading or other maneuvers only in some contexts but not others

views within a particular case to obtain an admittedly second-best majority opinion seems completely acceptable.¹⁵⁵ An exemplar of this latter practice is again provided by Justice Brennan, this time in *Craig v. Boren*.¹⁵⁶ *Craig* involved the question of the level of scrutiny to be applied in gender discrimination cases. In drafting *Craig*, Justice Brennan apparently moved away from his preferred outcome—strict scrutiny—to the standard of intermediate scrutiny, which was the best he could hope to achieve given the views of his colleagues.¹⁵⁷

As it happens, evaluating Justice Brennan's conduct is a time-bound endeavor; normative views regarding the appropriate level of accommodation have changed over time and in ways that have special significance in the constitutional realm. Today, Justices seem quite comfortable writing on their own when they wish; they do so to such an extent that scholars have condemned the "splintered" court.¹⁵⁸ Yet, for much of the period between the late nineteenth and early twentieth centuries, the norm was very different. During that earlier period, a norm of "consensus" operated in which Justices frequently suppressed not only their views on the appropriate legal rule but their dissenting votes as to outcome as well in order for the Court to display greater unanimity.¹⁵⁹

Extensive empirical work has established this early norm of consensus and its collapse in the twentieth century. Relying on docket books from the Justices, scholars have established that during the earlier period the Justices frequently silently signed on to decisions contrary to their original conference votes.¹⁶⁰ Although in theory it is possible that the Justices simply were persuaded to the other outcome by the time the case was resolved, this appears not to be the case; the Justices often were quite explicit in private communication that they were pulling their punches consistent with the

155. See *id.* at 2300 ("Certain forms of strategic behavior, such as insincere voting to forge a majority or unanimous coalition, are routinely practiced and viewed as permissible . . ."); Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 52–53 ("[I]t is the norm for judges to sacrifice details of their convictions in the service of producing an outcome and opinion attributable to the court.") (citation omitted).

156. 429 U.S. 190 (1976).

157. See EPSTEIN & KNIGHT, *supra* note 95, at 13 (discussing evidence of Brennan's choices and strategy).

158. See Revesz & Karlan, *supra* note 113, at 1067 (noting the sharp differences among Justices that are "reflected in the rising numbers of separate writings, as Justices choose to express their individual views at the expense of uniting behind a single opinion").

159. See generally Post, *supra* note 153 (describing ways in which a norm of acquiescence operated to achieve greater unanimity on the Court).

160. See Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 366 (2001) (noting that only 9% of opinions during the Waite Court had dissenting votes, while conference votes during the same period had dissenting votes 40% of the time); Post, *supra* note 153, at 1340 (noting the "huge discrepancy between the level of unanimity in conference and the level of unanimity in published opinions" and explaining that "[t]his difference clearly reflects an institutional aversion to dissent").

prevailing norm.¹⁶¹ “Justices of the Taft Court felt presumptively obligated to join Court opinions, even if they disagreed with their content, so as to preserve the influence and prestige of the Court.”¹⁶² Of greatest interest, it appears that at least sometimes this happened with the clear (if nonetheless tacit) hope that going along with a colleague in one case would cause that colleague to go along in another.¹⁶³

The norm began to collapse in the late 1930s and early 1940s,¹⁶⁴ and it apparently is no accident that it did so just as societal pressures came to bear on the then-conservative Court, amid shifting notions regarding the extent to which constitutional meaning remains stable and impervious to outside forces.¹⁶⁵ Some have hypothesized that the greater the size of the Court’s majority coalition, the more stable the law will be over time.¹⁶⁶ Others have suggested that public support for judicial rulings may vary in relation to the size of the Court’s majority and that unanimous decisions in particular will quiet social dissent.¹⁶⁷ Whether any of this generally is true—and there is room for some skepticism¹⁶⁸—Robert Post has shown that during the early

161. See Post, *supra* note 153, at 1346 (“I agree with your criticism of the . . . opinion. You will recall that I voted the other way; and the opinion has not removed my difficulties. . . . But I have differed from the Court recently in three expressed dissents and concluded that, in this case, I had better ‘shut up’ as in Junior days.” (quoting letter from Louis D. Brandeis to William Howard Taft (Dec. 23, 1922) (Taft Papers, Reel 248))); Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 317 (“[T]here is a limit to the frequency with which you can [dissent], without exasperating men”); *id.* at 309 (acknowledging that one “can’t always dissent—may have dissented much just then”).

162. Post, *supra* note 153, at 1274. This was common in all sorts of cases, not only ones on the Court’s then-mandatory docket. See *id.* at 1338–39 (finding that achieving unanimity in controversial cases was more difficult than in mandatory cases but was still accomplished 41% of the time).

163. See *id.* at 1345 (noting that “[t]he norm of acquiescence also established among the Justices expectations of reciprocity”).

164. See Epstein & Knight, *supra* note 91, at 1018 (noting a dramatic increase in dissenting opinions in 1941); Post, *supra* note 153, at 1331 (observing that “the Court’s rates of unanimity did not begin their free-fall until the mid-1930s”); Shugerman, *supra* note 117, at 921 (reporting that “[w]hen Chief Justice Harlan Fiske Stone replaced Hughes in 1941, the rate of dissent skyrocketed”). It is clear that the norm collapsed entirely in the 1940s, after some of the events described here. See Thomas Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 363 (1988). But that evidence also shows a consistent rise beginning somewhat earlier. *Id.* Although rates of dissensus may have been higher at prior periods in history, once begun, this trend toward fragmented decisions continued relentlessly. *Id.*

165. See Post, *supra* note 153, at 1347 (noting that the norm of consensus “began to falter” at the same time that “the Court’s opinions began to modulate from the relatively routinized decisions of a court of last resort to interventions designed to shape the progress of American law”).

166. See *id.* at 1275 (“Our law is actually less fixed and certain, in part because unanimous Supreme Court opinions, routine during the Taft Court, are now so unusual.”); Shugerman, *supra* note 117, at 949–50 (arguing that one-vote majority decisions are “too unstable to create reliable constitutional law” and that such opinions “enjoy lesser precedential value”).

167. Post, *supra* note 153, at 1356 (“A major justification for the norm of acquiescence was the need to preserve the authority of the Court.”).

168. For example, *Brown v. Board of Education* often is cited as an example of where the Court labored for unanimity to quiet dissent, apparently without success. See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1,

part of the nineteenth century, the norm of consensus was adhered to most strongly by those who felt that the Constitution's meaning was fixed and that the role of the Justices was to see it remain that way.¹⁶⁹ Formal norms of judicial behavior in place at the time reinforced this, discouraging dissent on the Court.¹⁷⁰ But as the Supreme Court's constitutional decisions came under increasing challenge, other Justices felt an obligation to express publicly a contrary view. Undergirding this alternative understanding of the norm of judicial behavior was a sense—increasingly prevalent in the broader society—that the Justices were overemphasizing constitutional stability in the face of changed circumstances.¹⁷¹

As the foregoing discussion suggests, the constitutional judge on a collegial court faces decisions along two dimensions, neither of which presently receives much attention in the normative literature. On one dimension, does a Justice properly adhere to one's sincere views without regard to the ultimate result? Or does the Justice act strategically, as Justice Brennan may have, to obtain a second-best outcome? On the other, is it the right thing to join in others' opinions, even if they deviate from one's best judgment, to put a common face on legal meaning, perhaps increasing stability if not social complacency? Or is it proper to stand fast to one's guns, speaking over the heads of one's colleagues to the broader public?¹⁷² How judges resolve these questions bears profoundly upon the content of constitutional law and the process of constitutional change. Yet, failing to take account of the positive literature, most normative scholars simply neglect these questions entirely.

34–50 (1979) (analyzing the development of unanimity among the justices in the *Brown* decision). Many of the opinions on “Red Monday” also were unanimous but had little effect in quelling a backlash against the Court. See Shugerman, *supra* note 117, at 925 (noting that “Red Monday” decisions were “‘overwhelming’ in that one was unanimous, two had a solo dissent by Clark, and one had two dissents, by Clark and Burton”) (citation omitted).

169. Post, *supra* note 153, at 1348 (stating that “those who opposed judicial dissent at the turn of the century typically appealed to a jurisprudential account of law that stressed fixity and finality”).

170. See *id.* at 1284 (noting that “[n]orms against dissent . . . were so prominent in the 1920s that they were explicitly embraced in Canon 19 of the American Bar Association’s 1924 edition of the Canon of Judicial Ethics”); *id.* at 1348 (arguing that the Canon discouraged dissents because of the focus on stare decisis as a way of ensuring fixed and established law).

171. See *id.* at 1382, stating:

The norm of acquiescence reflected and sustained a world in which the authority of the Court depended upon its capacity to maintain a domain of fixed and certain rules But as . . . the legitimacy of our legal system came increasingly to be measured by its ability to achieve social ends, neither the norm of acquiescence nor the isolation of legal authority from policy expertise could be maintained.

172. See MALTZMAN ET AL., *supra* note 110, at 68 (“By providing alternative ways to view the legal rule underlying the majority opinion, separate opinions can influence how the majority opinion is perceived, and even implemented, by judges, political decision makers, or private parties. . . . Opinions accompanied by concurrences are at greater risk of being overruled in the future.”).

2. *Influencing the Law: Opinion Assignment and Other Rules of Court.*—Of course, Justice Brennan did two things in *Muniz*, not merely one. In addition to perhaps suppressing his sincere views on the merits in exchange for a better (in his view) net outcome, Justice Brennan also assigned the opinion to himself. The two worked hand in hand, but they are not the same. Justice Brennan might have influenced the content of the opinion if he were in the majority in *Muniz*, whether he was writing or not. As positive scholarship shows, his influence would have related in part to how necessary his vote was in holding the majority coalition together.¹⁷³ But because he also was the senior Justice in the majority, by existing norm of the Court he was able to assign the opinion to himself¹⁷⁴ and have an even greater say in what the law ultimately looked like.

Positive scholarship highlights a variety of court rules, norms, and internal dynamics that have substantial influence on what the law is,¹⁷⁵ but receive almost no attention from normative theorists. Some of these—such as practices that enhance the role of the median Justice—have bite with regard to where power on the Court rests.¹⁷⁶ Others—such as that involving opinion assignment—have implications for how that power is exercised.¹⁷⁷ To take one example, the Chief Justice assigns the opinion if he is in the majority; otherwise the senior associate Justice assigns. Empirical work suggests that the initial opinion assignee often ends up writing the opinion for the Court and that most members of the majority coalition join without

173. See EPSTEIN & KNIGHT, *supra* note 95, 65–107 (discussing the leverage pivotal Justices have exerted over decisions when they have had the opportunity to make or break the coalition supporting the Court's majority opinion); MALTZMAN ET AL., *supra* note 110, at 20 (noting that "an opinion author's willingness to accommodate a colleague is likely to be greater in a 5–4 case than a 7–2 case"); MURPHY, *supra* note 73, at 58 ("It is also clear that where the Court is closely divided an uncommitted Justice has great bargaining advantages . . ."); see generally Lax & Cameron, *supra* note 110 (modeling a bargaining game over the median Justice's vote).

174. See Brenner & Spaeth, *supra* note 146, at 72 (stating the conventional rule of opinion assignment). This is a norm, not a rule, but there are complaints when it is not followed. See EPSTEIN & KNIGHT, *supra* note 95, at 131–32 (discussing Justice Douglas's complaints when Chief Justice Burger assigned *Roe v. Wade* to Justice Blackmun).

175. See Kornhauser, *Legal Doctrine*, *supra* note 113, at 459 (asking: "Does a collegial court's choice of decision procedure influence the development of the law?"). Kornhauser answers the question by identifying one way that it does: the doctrinal paradox that he and Lawrence Sager identify when an issue-by-issue or outcome-based decision rule clearly affects outcomes. See Kornhauser & Sager, *The One and the Many*, *supra* note 113, at 12–21 (analyzing Justice White's vote in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and Justice Kennedy's vote in *Arizona v. Fulminante*, 499 U.S. 279 (1991), as examples demonstrating the outcome determinative effects of choosing between case-by-case and issue-by-issue adjudication).

176. See Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 63 (1996) ("Virtually every observer of the Court believes that certain Justices are more powerful—or more dangerous, if you prefer—than their counterparts."); see generally Lax & Cameron, *supra* note 110 (analyzing the influence of the median Justice).

177. For a rare normative look at this subject, see Edward T. Swain, Hail, No: Changing the Chief Justice (2005) (unpublished manuscript, on file with author) (acknowledging the power of the Chief Justice and suggesting alternative selection methods).

requesting any changes, making the initial assignment incredibly important as to the direction the law will take. (The smaller the majority coalition, the less likely both of these are. Studies also show that when the Court is split 5–4, often the assignment will go to the marginal Justice in an attempt to hold the Court together.)¹⁷⁸

Perhaps normative theorists neglect these practices because they seem insufficiently important or because there seems to be nothing to be done about them. Both points are surely wrong. Practices such as opinion assignment directly influence the very content of the law. It is uncertain whether Congress has the power to alter these rules, and it is unclear whether as a matter of policy Congress should.¹⁷⁹ But it is ironic that, although many scholars today are urging Congress to restrain the Court if the Court will not restrain itself,¹⁸⁰ so few scholars have examined whether some of the Court's less public, yet consequential, practices are subject to congressional control and whether they should be modified in the service of substantive goals.¹⁸¹

3. *Setting the Agenda: The Certiorari Game.*—One Court practice deserves special mention here: the process by which the Court grants review. Not only does certiorari practice serve as a bridge to the next influence on the Justices,¹⁸² but it has an enormous impact on the Court's agenda.¹⁸³ On this

178. Murphy notes:

An astute Chief Justice can also utilize his opinion-assigning power to increase his influence on the Court The Chief may even assign the opinion to a wavering Justice, hoping that this task—if not further reflection and research—will strengthen the Justice's resolve and perhaps sway the minority.

MURPHY, *supra* note 73, at 84. Brenner and Spaeth tested this proposition and found that “the marginal justice was assigned the majority opinion in 111 cases out of 240. The resulting proportion . . . more than doubles the random expectation” Brenner & Spaeth, *supra* note 146, at 77. However, despite this high rate of assignment to the marginal Justice, such assignment did not necessarily hold the original coalition together. *See id.* at 80.

179. Answers are complicated by the risk of unanticipated consequences. For example, a supermajority rule could have the perverse impact of Justices quelling dissent in order to protect the Court's stature.

180. *See supra* note 53 (describing scholars' arguments advocating judicial restraint).

181. *But see, e.g.,* Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 76 (2003) (“Congress theoretically might require supermajority consensus for the Court to invalidate a federal statute on federalism grounds [S]uch a supermajority rule would most likely bring to an immediate halt the recent wave of state-protective decisions.”) (citation omitted); Shugerman, *supra* note 117, at 895 (stating that “a six-three voting rule would appropriately supplement the Justices' individualized determination of deference to Congress”); *see also* Revesz & Karlan, *supra* note 113, at 1132 (examining the Supreme Court's use of the rule of four and the hold rule and finding that these rules are often invoked in service of Justices' ideological goals, leading to inconsistent and incoherent law).

182. *See infra* notes 183–88 (discussing the certiorari process).

183. *See* S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 901 (1984) (“In many instances this agenda-building process determines what and whose problems are to be given national attention, discussion in the media, and possible resolution.”).

subject there may be the grossest disparity between the copious attention fostered by positive theorists¹⁸⁴ and the relative neglect of the legal literature.

Many positive scholars view certiorari as a strategic game in which Justices vote at the review stage based on their ideological preferences on the ultimate merits.¹⁸⁵ They realize that this is not all that occurs at the certiorari stage. The Court may take many cases just to resolve uncertainty in the law,¹⁸⁶ or simply because the Executive Branch is anxious to have a case heard.¹⁸⁷ But central to positive scholarship is the notion that the Justices are strategic in using their almost unlimited control over their docket to manage their agenda along ideological terms.¹⁸⁸ Thus, a Justice who would like to affirm a lower court decision will not vote to grant certiorari unless she is sure she has four other votes on the merits.¹⁸⁹ With those votes, however, she might engage in an “aggressive grant,”¹⁹⁰ just as a Justice who would like to review a case but fears he lacks the votes on the merits will vote to deny

184. There is a large positive literature on the Court’s certiorari behavior. See, e.g., EPSTEIN & KNIGHT, *supra* note 95, at 65 (discussing the opportunities for bargaining that are presented in the decision over certiorari); SEGAL & SPAETH, REVISITED, *supra* note 75; Sara C. Benesh et al., *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RESEARCH 219 (2002); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999).

185. See *supra* note 184. Claims here may be overstated. See Levinson, *supra* note 140, at 729–30 (noting that given “the sheer numbers of certiorari petitions filed . . . it simply defies imagination to believe that any contemporary Justice is familiar enough with more than a fraction of these petitions so that he or she could have a cogent notion of what would constitute a proper outcome in the litigation”).

186. Authors differ over how important they believe conflict is in the certiorari decision. Compare PERRY, *supra* note 143, at 246–52 (stressing the importance of conflicts between circuits in the certiorari decision), with SEGAL & SPAETH, REVISITED, *supra* note 75, at 270 (noting that “the Court sometimes manufactures a conflict in order to justify review”); see also Benesh et al., *supra* note 184, at 229 (“[C]onsider which variables seem most important to the calculation made by the affirm-minded justice at the certiorari vote. The largest substantive impact . . . is made by the conflict variable . . .”); Ulmer, *supra* note 183, at 910 (“[C]onflict is the best predictor [of certiorari grants] for the Vinson and the Warren Courts . . .”).

187. See *infra* note 330 (discussing the influence of the Solicitor General).

188. See Revesz & Karlan, *supra* note 113, at 1104–05 (describing the use of strategic denials).

189. Positive scholars believe that Justices will be much more careful to grant to affirm, as opposed to granting to reverse, perhaps explaining the fact that the Court reverses more than it affirms lower courts. See PERRY, *supra* note 143, at 270 (noting that “[i]f one counts vacates with reversals, the Court reverses at a rate of about 65–75 percent”); see also SEGAL & SPAETH, REVISITED, *supra* note 75, at 253 (“A major premise behind most prior work on certiorari is the assumption that the justices prefer to hear cases they wish to reverse.”); Boucher & Segal, *supra* note 184, at 832 (citing the existence of “overwhelming evidence that justices are reversal minded in their certiorari votes and strong evidence that many justices strategically consider probable outcomes when they wish to affirm”).

190. The following is an example of an aggressive grant: “[O]n a conservative court with a case decided conservatively below, conservative justices, taking into account the likely outcome on the merits, will vote to grant certiorari and strengthen the lower court’s decision . . .” Caldeira et al., *supra* note 184, at 558.

review, a “defensive denial.”¹⁹¹ The positive literature on this subject varies as to the prevalence of these practices,¹⁹² though there seems to be little doubt that they occur.¹⁹³

It apparently is the case that the Justices know what they are looking for and simply search for the right vehicle in which to pronounce their judgment. It also seems to be the case that agenda setting is at least partly ideological,¹⁹⁴ and that the ideological majority on the Court will grant review of the matters they wish to pursue. This agenda setting accounts for the direction of constitutional law, just as the opinions themselves account for its substance. Although judges are sometimes painted as passive actors, the Court’s discretionary docket gives an ideologically committed Court broad ability to push selected areas of the law in preferred directions, while leaving others entirely alone.

One would think legal scholars, quick to say how judges should decide cases, would have more to say about which cases they should decide in the first place. “Those of us who profess some special interest in understanding ‘the processes of constitutional decisionmaking’ should, presumably, be as interested in the processes by which the Justices decide *not* to engage in articulated decisionmaking as those by which they do.”¹⁹⁵ Some scholars have complained that the Court is not doing enough, at least when it comes to developing coherent national law.¹⁹⁶ But for the most part, normative

191. The following is an example of a defensive denial: “[L]iberals on a conservative court will vote to deny certiorari in order to prevent the court from affirming the lower court’s decision, even though their first preference would be to grant and reverse the case in hopes of obtaining a more liberal outcome.” *Id.*

192. Some studies conclude that aggressive grants are more prevalent than defensive denials. Compare Boucher & Segal, *supra* note 184, at 830–32 (studying only cases where certiorari was granted and finding little evidence of defensive denials but significant evidence of aggressive grants during the Supreme Court’s 1946–1952 terms), with Caldeira et al., *supra* note 184, at 570 (examining affirmances and denials but only in a single year and finding that both aggressive grants and defensive denials occur). Perry’s account, based on interviews with Justices and their clerks, seems to confirm the Caldeira et al. result. See PERRY, *supra* note 143, at 198–215.

193. Even Perry, the most legalistic in conclusions of the positive scholars, is clear on this. In fact, the Justices introduced him to the term “defensive denials.” PERRY, *supra* note 143, at 198–99.

194. See *infra* note 252 (discussing ideological considerations in the determination of certiorari decisions).

195. Levinson, *supra* note 140, at 722 (citation omitted). The reference is to the title of a popular constitutional law text, PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000 & Supp. 2005).

196. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1731–33 (2000) (arguing that the Court’s certiorari power “has had a profound role in shaping our substantive constitutional law” but that such power has allowed the Court discretion that “appears to have contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases”); Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 634 (1983) (discussing his findings that “the Court has been denying review in some possibly certworthy cases”).

scholars dwell on the cases the Court does hear and entirely neglect how the agenda itself is set.¹⁹⁷

C. Intrabranch Interaction: Superintending the Lower Courts

Constitutional theory does not think much of the notion of the Supreme Court being constrained by the lower courts. This statement holds in both its senses. That is to say, normative theory apparently does not believe that lower courts ought to have much, if any, influence on the Supreme Court, and (perhaps for this reason) not much scholarship is devoted to the impact that lower courts have on the Supreme Court's exercise of its power of judicial review.¹⁹⁸ Positive theory, however, indicates that the lower courts exert substantial influence over the Supreme Court. To the extent this is true, existing theories of judicial review are necessarily incomplete because they fail to take account of the gravitational pull of the lower courts.

1. Normative and Positive Theories of Lower Court Behavior.—In the legal academy, thinking about the judicial system is distinctly top-down. There is a hierarchy, and at the pinnacle sits the Supreme Court.¹⁹⁹ Normative conceptions of judicial review rely heavily on this top-down understanding, albeit often implicitly. The work of the Supreme Court gets the lion's share of attention,²⁰⁰ and it is simply taken for granted that lower courts do, and should, follow the mandate of higher courts. "It is axiomatic that an inferior court must respect prior precedents created by its superior courts, those courts that exercise revisory jurisdiction over it."²⁰¹ Perhaps

197. Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1785–86 (2004) ("[T]he certiorari authority is the one institutional characteristic that most risks turning the judiciary into yet another agenda-setting branch.").

198. Rare examples include Balkin & Levinson, *supra* note 60, and Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 370. A notable example outside of constitutional review is Peter Strauss's excellent discussion of the impact that docket problems have on substantive law, as the Supreme Court struggles to manage the lower courts (and administrative agency decisions). See Strauss, *supra* note 27.

199. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 186 (7th ed. 1998) ("The Supreme Court . . . stands at the very pinnacle of the judiciary: There is no higher court, and all others bow before it—or, at least, are expected to do so."); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 624 n.94 (2001) (stating that the Supreme Court Justices are at the "pinnacle of the American legal system").

200. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 81 (1994) (noting that "[s]cholars heretofore have paid a great deal of attention to Supreme Court decisionmaking . . . and . . . have focused very little on how lower court judges ought to define and execute their subordinate roles").

201. *Id.* at 12 (citation omitted); accord Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994) ("A lower court must *always* follow a higher court's precedents.") (citation omitted); see also Reynolds & Denning, *supra* note 198, at 397 (noting that "[t]he view of appellate

because this hierarchical conception is driven by the imperative that “like cases should be treated alike,”²⁰² scholars rarely question the compliant role of lower courts.²⁰³

Positive scholars have a very different take on the hierarchical system of judicial review. They tend to view the lower courts as unruly agents whose conduct may have a significant impact on the way the principal does business.²⁰⁴ Theoretical work in the positive world asks how it is that the Supreme Court can “induce” its agents to follow its direction,²⁰⁵ while empirical work tries to get a handle on the extent to which compliance is obtained and in what fashion.²⁰⁶ Focusing on how compliance is obtained, rather than presuming it, gives the positive literature much more of a bottom-up flavor in the sense that action at the bottom rungs of the judicial ladder can set the agenda for what happens above.

judging provided in most law school classes is a fairly simple one: Higher courts select principles, which lower courts then apply faithfully”) (citation omitted).

202. See Dorf, *supra* note 201, at 1997 (stating that “the precept that like cases should be treated alike . . . [is] rooted both in the rule of law and in Article III’s invocation of the ‘judicial Power’”); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1090 (1975) (“The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”); Kornhauser & Sager, *supra* note 74, at 108 n.35 (noting that on multimember courts, inconsistency is avoided when individual judges treat like cases alike).

203. There are scholars who argue that in constitutional cases lower court judges should not be bound by higher court precedents but should exercise their independent judgment as to constitutional meaning. See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 408 (1988) (“A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law” (quoting Kerlin’s Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786))); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 27–28 (1994) (“If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution.”); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2734 (2003) (“[The lower court judges] can, and must, exercise *their own* (reverse-able) constitutional interpretive power independently, and correctly.”). Even these scholars recognize that their views are decidedly not mainstream. See Lawson, *supra*, at 28 n.16 (“[C]ritics of precedent have stopped short of actually declaring the practice unconstitutional.” (citations omitted)); *id.* at 33 (acknowledging that “[t]he doctrine of precedent is too deeply ingrained in the legal system to permit serious inquiry into its own legitimacy”).

204. See *infra* notes 205, 207–08 and accompanying text (discussing models that address this problem).

205. See, e.g., Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation, and the Rule of Four*, 15 J. THEORETICAL POL. 61, 61–62 (2003) (suggesting that “the discretionary docket has become one of the key weapons in the fight to compel compliance in the judicial hierarchy, allowing the justices themselves to determine which battles to fight with the lower courts”); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1633 (1995) (noting that, in order to achieve its policy objectives, the Supreme Court has to “induce lower courts to adhere more or less faithfully to its doctrine”); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 673 (1994) (examining “the extent to which control mechanisms by the principal [the Supreme Court] can minimize shirking [by the appeals courts]”).

206. See *infra* notes 222–30 and accompanying text (discussing findings regarding lower court compliance).

Differences in normative and positive scholarship are captured by the metaphors they employ to describe their models of the court system. Normative work relies on the metaphor of a team, or collegial, enterprise: judges share the task of disposing of cases before them in the most correct and efficient manner.²⁰⁷ Positive scholars, in contrast, describe the system as competitive and refer to principal-agent models: judges at each rung of the policy ladder try to achieve their preferred outcomes and “higher” courts struggle to exert control.²⁰⁸

As one might guess by now, at the heart of these contrasting approaches rest equally different understandings of what motivates judges. In normative thought, judges follow precedent because they are supposed to; role orientation does the trick.²⁰⁹ Formal models premised on the team approach suggest that this norm evolved because it is the most efficient system to achieve the judiciary’s goal.²¹⁰ Positive theory, on the other hand, asks why lower courts would comply with stare decisis if doing so conflicts with policy preferences.²¹¹ Positive scholars acknowledge that there are perfectly good reasons why lower court judges might choose to follow the precedents

207. See Staudt, *supra* note 100, at 633 (“Legal scholars who theorize about the logic of judicial decisionmaking in the context of a hierarchy have converged on a theory of teams.” (citations omitted)); see also Lewis A. Kornhauser, *Adjudication By a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1624 (1995) (developing formal and empirical arguments for strict vertical precedent in a team model of adjudication).

208. See McNollgast, *supra* note 205, at 1632 (“Our approach focuses on the competition and conflict that arise between higher and lower courts . . .”); Charles Cameron et al., *Strategic Defiance of the U.S. Supreme Court C-5* (2003) (unpublished manuscript), available at <http://epstein.wustl.edu/research/defiance.pdf> (“[L]egal doctrine within the federal judiciary emerges from an unrelenting struggle between the few—the hierarchical superiors—and the many—the hierarchical subordinates.”).

209. See Caminker, *supra* note 181, at 79 (“[A] Justice’s interpretations will also be influenced by various role-specific norms that dictate how a federal judge, situated on a particular multimember court within a particular republican form of government, should decide cases.”); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1473 (2003) (“Judges assume a role in which they are expected to follow the law, after having spent much of their life in training under the legal model.”); Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 867 (1998) (“Lower courts follow higher courts and you’re supposed to do what the big boys and girls upstairs tell you to do.”).

210. Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755 (2002) (stating that in order to maintain hierarchical control, “purely policy-oriented judges will often defer to legal precedent, even when doing so requires them to issue decisions that deviate from the rulings they otherwise would prefer”); Kornhauser, *supra* note 207, at 1628 (“When one regards the judiciary as a resource-constrained team that seeks to maximize the expected number of correct decisions, one would expect . . . strict vertical precedent, no horizontal precedent at the trial level, and strict horizontal precedent at the appellate level.”).

211. See Sara C. Benesh, *Modeling the Supreme Court–Circuit Court Relationship Formally* 12 (2000) (unpublished manuscript, on file with author) (asking, “To what extent does Supreme Court policy control these judges? And why do these lower courts allow for this control?”); Cameron et al., *supra* note 208, at A-1 (asking, “Why do lower courts defy higher courts, or, given the minute percentage of lower court cases that are heard and reversed, why do lower courts comply with higher courts?”).

of higher courts.²¹² Besides role orientation, judges also might follow higher court precedents because of a dislike of reversal²¹³ or the desire to be thought well of by peers.²¹⁴ But positive theorists recognize that lower court judges also may be motivated by attitudinal or strategic concerns that cut against following higher court precedents.²¹⁵

Differing motivations imply different behaviors, which in turn have their own normative implications. To take one example that actually is mooted in the legal literature: should a lower court judge who seeks to comply with the commands of a higher court do so by following the precedents as they exist, or by attempting to predict what the higher court will do once the case arrives there?²¹⁶ The weight of legal scholarship—and certainly the Supreme Court’s view²¹⁷—holds that lower courts must adhere

212. See Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63 (1994) (discussing a positive theory of why judges follow stare decisis). And still, the question is somewhat of a mystery. See Benesh, *supra* note 211, at 11 (“On paper, it is easy to provide reasons for lower court avoidance of Supreme Court policy prescription. However, in reality, they almost always follow High Court pronouncements.”).

213. See Baum, *supra* note 65, at 754 (“[T]he desire to avoid reversal, which itself has several sources, also impels judges to follow the Supreme Court’s lead.” (citations omitted)); see also Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC. REV. 143, 147 (2003) (“Indeed, senatorial hearings often focus on the judge’s ‘track record’ in terms of affirmances and reversals, and thus judges interested in elevation may seek to conform their behavior to [higher] court preferences.” (citations omitted)).

214. See BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 36 (2d ed. 1998) (“‘An opinion that patently misinterprets a higher court policy . . . damages a judge’s reputation among other judges and attorneys, just as a physician who ignores new medical findings loses the respect of other physicians.’” (quoting J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS 122 (1981))); Cross, *supra* note 209, at 1474 (“As an occupation becomes more professionalized, ‘conformity to occupational expectations [will increasingly tend to] be achieved through internalized values and peer-group pressure.’” (quoting HOWARD, *supra*, at 89)).

215. See Cross, *supra* note 209 (discussing legal, strategic, and ideological models of lower court behavior).

216. Compare Caminker, *supra* note 200, at 6 (“When an inferior court confronts strongly probative predictive data concerning its superior court’s likely future ruling, the inferior court generally may employ the proxy model to emulate this ruling . . .”), with Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 715 (1995) (arguing that the judges should “resist the temptation” to make predictions and instead attempt to apply the relevant “coherent body of law”).

217. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (overruling a 1953 case, but noting that the Court of Appeals should still have followed it as binding precedent in the case below, “leaving to this Court the prerogative of overruling its own decisions”). Technically *Rodriguez* dealt with the narrower question of whether lower courts must adhere to existing precedents even if subsequent events plainly have undermined them. Even those who are skeptical about the prediction issue believe that *Rodriguez* was in error. See Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, The Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 974 (2000) (“The rule of *Rodriguez de Quijas* thus stretches the Supreme Court’s institutional legitimacy to its limit.”); C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 68 (1990) (“The *Rodriguez* Court, overly eager to protect the doctrine of stare decisis, failed to consider whether the policy concerns behind stare decisis support a

to the rules as laid down by superior courts.²¹⁸ But consider this question from the (positive) perspective of the lower court judge. If that judge dislikes reversal or “crave[s] affirmation,”²¹⁹ then the judge might try to predict what the higher court will do, based in part on the ideology of the higher court judges.²²⁰ (Similarly, a lower court judge seeking promotion might try to please those in a position to help the judge realize her goal.)²²¹

2. *The Decisional Freedom of Lower Court Judges.*—Empirical studies offer some initial support for the top-down hierarchical approach that plays prominently in normative theory. Such studies show that lower courts often act consistently with the preferences of higher courts or in accord with other legal requirements,²²² though it is difficult to tease out whether lower courts do so because of a desire to follow the law or a fear of reversal.²²³ As one

requirement that the lower courts blindly follow even the most doubtful Supreme Court precedent.”); Dorf, *supra* note 216, at 676 n.87 (arguing that while the prediction model is unacceptable, the *Rodriguez* Court improperly ignored the difference between predicting the likelihood that the Supreme Court will overrule a decision and reasoning that the Supreme Court already did overrule relevant precedent).

218. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 95 (1991) (“[A]lthough practicing lawyers may be wise to look not to what courts say, but what they do, as a means of *predicting* the outcome of a case, this is hardly an acceptable method for a judge to use in *deciding* a case.”); Dorf, *supra* note 216, at 715 (“Whenever there exists a coherent body of law . . . judges ought to attempt to apply that law.”); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 187 (“I do not believe that a conscientious judge fulfills her role in a hierarchy of courts by seeking to predict how a superior court will rule.”).

219. Malia Reddick & Sara C. Benesh, *Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework*, 21 JUST. SYS. J. 117, 124 (2000).

220. *Id.* at 134–35.

221. See *supra* note 72 (discussing promotion as a motivation of lower court judges).

222. See Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 547–48 (2002) (finding that lower courts generally comply with Supreme Court decisions overruling prior precedent); Haire et al., *supra* note 213, at 155 (analyzing circuit courts’ sensitivity to Supreme Court policy predispositions when reviewing district court decisions); Songer et al., *supra* note 205, at 687 (finding that circuit court decisions in search and seizure cases appear to be determined in part by case variables the Supreme Court follows, and by shifting preferences of the Supreme Court); Songer & Haire, *supra* note 103, at 974–76 (analyzing obscenity cases and finding that lower court decisions are significantly influenced by Supreme Court precedents); Staudt, *supra* note 100, at 617 (examining standing decisions and finding that lower court judges tend to adhere to precedent when clear precedent exists and there is effective oversight of their decisions); see also Cross, *supra* note 209, at 1468–71 (summarizing several empirical studies of the relationship between supreme courts and lower courts and finding that “law matters, at least sometimes, in judicial decisionmaking”).

223. Compare Songer et al., *supra* note 205, at 693 (“Appeals court judges must be constantly aware that the losing litigants . . . scrutinize their decisions intensely and will bring flagrant doctrinal shirking to the attention of the principal . . . [T]his anticipated response induces a great deal of responsiveness and doctrinal congruence even though the actual level of reversals is very low.”), with David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOC. REV. 579, 602 (2003) (offering that “[a]nother possibility strikes us as especially likely—that congruence flows from lower court judges’ attempts to reach legally sound decisions”).

might anticipate, federal district courts seem to be more constrained than the circuit courts.²²⁴

Before applauding the fidelity of lower court judges to law, however, it is necessary to look more closely because it is not entirely clear how much these studies are telling us.²²⁵ The studies do not really test compliance with law in the strict sense. Instead, what the authors of these studies try to do is identify rather stark legal doctrines that tend to compel conclusions in one direction, such as the standards for fact reversal of lower courts,²²⁶ or the *Chevron* deference doctrine,²²⁷ and see if the run of outcomes is consistent with the doctrine's directional force. Alternatively, the models try to determine whether lower court outcomes in specific areas shift as the Supreme Court shifts ideological or doctrinal direction.²²⁸ These studies do show a sort of wholesale compliance,²²⁹ but because no doctrine requires all cases be decided in the same direction,²³⁰ they say little about case-by-case retail.

Moreover, study after study—often the same body of work—makes equally clear that ideology plays a role in lower court decisions.²³¹ Ideology

224. See Cross, *supra* note 209, at 1481 (observing that lower court decisions may be less ideological than higher courts, in part because they see more easy cases); Staudt, *supra* note 100, at 669 (“[D]istrict courts are subject to a high level of oversight and monitoring, and this works as a powerful deterrent to political decisionmaking.”).

225. The explanatory power of some of the models is quite low, suggesting that the models are not capturing all that goes on. See, e.g., Cross, *supra* note 209, at 1515 (testing the relative effects of legal, political, and strategic variables and finding that “[t]he test with the greatest explanatory power . . . explains less than 20% of the variance of outcomes, leaving a considerable residual”).

226. Cross, *supra* note 209, at 1459.

227. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168–73 (1998) (examining over two hundred cases from the D.C. Circuit Court of Appeals to determine when the court deferred to administrative agencies post-*Chevron*).

228. See Songer & Haire, *supra* note 103, at 975–76 (“After controlling for the changing partisan composition of the courts, the impact of changing Supreme Court precedent appears to be substantial”); Songer et al., *supra* note 205, at 687–88 (“As the Supreme Court became more conservative following the appointment of Chief Justice Burger, the courts of appeals responded with more conservative decisional trends.”); Staudt, *supra* note 100, at 655 (“After 1968, [federal] courts may have granted standing more often to taxpayers (in all contexts) due to the new open-door policy for federal taxpayers enunciated in *Flast*.”).

229. Songer et al., *supra* note 205, at 688 (“As in the metaphor of the dog on the leash, some appeals court panels led and some followed ‘the owner,’ but when the Supreme Court tugged on the leash, both liberal and conservative panels were responsive.”).

230. Cf. Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1111 n.48 (2001) (criticizing the way Cross and Tiller describe their results for just this reason).

231. See, e.g., DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 112 (2000) (“The general picture presented by these studies is clear: across a wide variety of courts and issue areas, Democratic judges are more likely to support the liberal position in case outcomes than their Republican colleagues.”); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1694–95 (1998) (“[W]e can explain and predict micro-level judicial behavior on the en banc [Fourth Circuit] courts of appeals in light of the party of the President who appointed the judges.”); Revesz, *supra*

is more likely to play a role when the range of lower court discretion is broader, as measured either by the likelihood of review (an indication of strategic judging)²³² or the narrowness of the doctrinal command (which could reflect strategic concerns or adherence to the legal model).²³³ Law may hold sway in the lower courts, but ideology plainly does as well.²³⁴

Indeed, these empirical studies likely underestimate the impact of ideology. The vast majority of the studies focus on compliance by the lower federal courts rather than the state courts.²³⁵ Yet it is common wisdom that the state courts may be less compliant than their federal counterparts,²³⁶ though this is a matter of empirical dispute.²³⁷ With regard to the federal courts of appeals, recent studies suggest that the impact of judicial ideology may be understated because of a curious phenomenon called “panel effect.” Important work by Richard Revesz revealed that in determining votes a judge’s colleagues on an appellate panel may matter as much or more than a judge’s own ideology.²³⁸ A panel of three judges appointed by a President of the same party (e.g., three “Republican” judges) acts in a more extreme

note 230, at 1104 (finding “strong, statistically significant evidence of ideological voting” in D.C. Circuit review of health-and-safety decisions); Revesz, *supra* note 105, at 1719 (finding, in a study of environmental cases, that “ideology significantly influences judicial decisionmaking on the D.C. Circuit”); Staudt, *supra* note 100, at 663 (finding in appellate court cases involving federal taxpayer standing “the judges’ politics as measured by the party of the appointing President is the *only* variable that has explanatory value for state and municipal taxpayer outcomes”).

232. See Revesz, *supra* note 105, at 1719 (“[I]deological voting is more prevalent in cases, such as those raising procedural challenges, that are less likely to be reviewed by the United States Supreme Court.”); Staudt, *supra* note 100, at 665 (“With more intense Supreme Court oversight, appellate court judges likely would not risk deciding federal taxpayer decisions according to their political preferences.”).

233. See, e.g., Staudt, *supra* note 100, at 617 (“[J]udges will render law-abiding and predictable decisions in circumstances where clear precedent and effective judicial oversight exists.”).

234. See, e.g., Donald R. Songer et al., *Do Judges Follow the Law When There is No Fear of Reversal?*, 24 JUST. SYS. J. 137, 138 (2003) (“Thus, there seems to be a consensus that in the lower federal courts, at least some judicial decisions are influenced by the policy preferences of judges . . .”).

235. See, e.g., ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 14 (1983) (analyzing data from 27,772 federal district court opinions from 1933–1977 to explore the relationship between policy and judicial outcomes on the federal courts); Sunstein et al., *supra* note 101 (exploring ideological voting on federal courts of appeals).

236. There is an entire body of law given over to the problems of compliance by the state courts with Supreme Court commands. See generally Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004) (discussing the debate over state court fidelity to Supreme Court commands).

237. Compare David W. Romero & Francine Sanders Romero, *Precedent, Parity, and Racial Discrimination: A Federal/State Comparison of the Impact of Brown v. Board of Education*, 37 LAW & SOC. REV. 809, 819 (2003) (comparing federal and state court responses to the *Brown v. Board of Education* decision and finding that “dramatic changes occurred, but only at the federal level”), with Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 353–58 (2002) (discussing empirical work showing “parity” between state and federal courts).

238. See Revesz, *supra* note 105, at 1764 (“[T]he ideology of one’s colleagues is a better predictor of one’s vote than one’s own ideology.”). In studying the size of panel effects on case outcomes, Revesz finds their effects “staggering.” *Id.* at 1763.

ideological fashion than a mixed panel (e.g., two “Republican” judges and one “Democrat”); and on mixed panels the stray judge often will vote in a manner contrary to her own ideology and with that of her colleagues.²³⁹ The effect Revesz observed has been confirmed in an extensive review of numerous court of appeals decisions, which concludes that given the panel effect, a party’s chances “are significantly affected by the luck of the draw”²⁴⁰—a fact that likely does not escape litigants.²⁴¹ “[P]anel composition lead[s] to dramatically different outcomes, in a way that creates serious problems for the rule of law.”²⁴² The effect is severe enough to have led some serious scholars to suggest that panels be drawn intentionally to ensure that they are mixed.²⁴³

3. *The Problematics of Supreme Court Supervision.*—If lower court judges are inclined to willful or ideological behavior, how does the Supreme Court keep them in line? Much positive work has been devoted to figuring out exactly how the Supreme Court governs the judicial hierarchy—a problem normative scholars think about insufficiently, likely because of their assumption that lower courts simply follow precedents. The problem is a vexing one, because—as is common knowledge—the Court hears an infinitesimal number of the adjudicated cases by the lower courts and a small fraction of those that even are offered to it for review.²⁴⁴ For positive scholars, reversal is the key weapon in the Supreme Court’s arsenal,²⁴⁵ yet on

239. See Sunstein et al., *supra* note 101, at 316 (studying a range of cases across circuit courts and finding that “[f]or both Democratic appointees and Republican appointees, the likelihood of a liberal vote jumps when the two other panel members are Democratic appointees, and it drops when the two other panel members are Republican appointees”); Sunstein et al. suggest a third hypothesis, which they call the “collegial concurrence.” See *id.* at 338 (“[D]issenting opinions might also cause a degree of tension among judges, a particular problem in light of the fact that the same judges often work together for many years.”).

240. *Id.* at 306; cf. George, *supra* note 231, at 1689 (finding, in a study of Fourth Circuit en banc cases, that some judges do not vote their ideology but rather act as “swing” voters).

241. Revesz notes:

The D.C. Circuit is the only federal circuit court that announces the composition of its panels before the litigants prepare their briefs By allowing parties to ascertain the composition of the panel before expending the bulk of the costs necessary to litigate a case to a judgment, this procedure encourages litigants to pursue comparatively weak cases only if the panel is favorable.

Revesz, *supra* note 230, at 1108–09 (citations omitted).

242. Sunstein et al., *supra* note 101, at 306.

243. Tiller & Cross, *supra* note 105, at 215.

244. See Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUP. CT. ECON. REV. (forthcoming 2006) (manuscript at 8 n.10, available at <http://www.vanderbilt.edu/Econ/faculty/Daughety/SpeakingUp.pdf>) (“[T]he average yearly number of docketed cases granted cert was 225 in the 1970’s, 155 in the 1980’s, and 92 in the first half of the 1990’s; these totals, respectively, represent 9.9%, 5.9% and 3.8% of the average number of docketed petitions for cert.”) (citation omitted).

245. See Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000) (“‘Judicial culture’ famously includes a desire to avoid reversals.”); see also Lax, *supra* note

its face, “Reversal is a particularly unimpressive sanction in the context of circuit–Supreme Court interactions, where the likelihood of reversal by the Supreme Court in any individual case is so small as to render it essentially meaningless as a sanction.”²⁴⁶

The models of Supreme Court governance offered by positive scholars are extremely creative and ought to be thought provoking for normative theorists. Some scholars explore the idea of the Supreme Court “auditing” lower court cases by some criteria to determine which require review.²⁴⁷ Others examine techniques of “monitoring” and “signaling” by litigants and lower court judges.²⁴⁸ Some conceptualize the appellate review game as a “tournament” in which judges compete to not get reversed.²⁴⁹

These models pose a problem for normative constitutional theory because they are driven largely by ideology. One of the more intriguing models employs a “Nixon goes to China” strategy in which, for example, a conservative Supreme Court is most likely to hear cases involving liberal courts rendering liberal decisions, eschewing review of liberal outcomes by conservative lower courts and conservative outcomes by any court.²⁵⁰ Empirical testing of the model in the area of search and seizure cases indicated good predictive capacity.²⁵¹ The implication is that the Supreme Court’s ideology drives case selection (and outcomes),²⁵² with much else neglected. Similarly, models that rely on the threat of review assume lower courts can conform their decisions to the precedents of the higher court.²⁵³ But in cases that make it to the Supreme Court, the law is almost always

205, at 63 (“Certiorari is the response to non-compliance; compliance is the anticipatory response to certiorari.”).

246. Haire et al., *supra* note 213, at 146.

247. Cameron et al., *supra* note 245, at 110–13; Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 652–65 (2000).

248. Cameron et al., *supra* note 208, at C-5–C-10 (summarizing four different signaling and auditing models and extracting their testable implications); Daughety & Reinganum, *supra* note 244, at 8–15 (developing a model in which lower court dissents are used as signals to indicate to higher courts when review is necessary).

249. Kornhauser, *supra* note 207, at 1609–10; McNollgast, *supra* note 205, at 1646.

250. See Cameron et al., *supra* note 245, at 108. The authors note that this could be called the “Nixon goes to China” proposition because it suggests that higher courts can have a particular kind of certainty about opinions from lower courts they know to be either conservatively or liberally inclined. “[I]f a cold warrior like Nixon goes to China it must be time for a change in American policy.” *Id.* Likewise, if even a *liberal* court comes to a conservative conclusion in a case, it is less likely that the decision needs to be reviewed. *Id.*

251. See Cameron et al., *supra* note 245.

252. But see KEVIN T. MCGUIRE ET AL., A SPATIAL MODEL OF SUPREME COURT VOTING 10 (2004), available at <http://www.unc.edu/~kmcguire/papers/spatial.pdf> (discussing the tempering effect that occurs because potential petitioners to the Supreme Court only appeal if they think the court will rule in their favor and finding that “[f]or the category of affirmances, then, a move to the right [by the Supreme Court] actually produces a greater number of liberal policies, while a shift to the left generates more conservative outcomes”).

253. See, e.g., McNollgast, *supra* note 205, at 1640 (explaining one step in the sequence of decisions they are modeling as “[l]ower courts then decide whether to comply with the doctrine in future decisions”).

open-ended enough that if lower courts are “complying,” it is likely by guessing the correct outcome based on an evaluation of the Supreme Court’s ideology.²⁵⁴ There is some empirical evidence that they do this, despite the Court’s instructions otherwise.²⁵⁵

Most important, these positive studies suggest that lower courts can force the Supreme Court’s hand²⁵⁶ and, in turn, influence the substantive content of constitutional law.²⁵⁷ As Walter Murphy explained, “working in its interstices, inferior judges may materially modify the High Court’s determinations.”²⁵⁸ In order to assure lower court compliance, the Supreme Court must modify constitutional doctrine. One interesting model suggests that when the preferences of lower court judges deviate substantially from those of the Supreme Court, the Court will have to widen the range of acceptable outcomes to ensure compliance.²⁵⁹ Some empirical work, and some experience, suggest that at other times the Court will have to employ very specific tests to ensure its mandates are followed. A recent study of taxpayer standing law finds that “[w]hen the legal precedent is clear, unambiguous, and narrow (or it is perceived to be such) . . . judges adhere to it, apparently in an effort to achieve ‘correct’ outcomes.”²⁶⁰ The *Miranda* rule is a familiar example of lower court deviation driving the Supreme

254. See *supra* text accompanying note 216 (discussing anticipatory compliance).

255. See, e.g., Caminker, *supra* note 200, at 19–22 (discussing circumstances in which circuit court judges expressly respond to Supreme Court preferences instead of preexisting precedents); George, *supra* note 231, at 1692–94 (compiling statistical analysis suggesting that swing votes on en banc panels are often cast strategically and contrary to ideology in order to avoid Supreme Court reversal).

256. Some positive scholars suggest that because of this apparent bottom-up effect, the other branches of government can themselves influence the course of the law by “packing” the lower courts. McNollgast, *supra* note 205, at 1634 (“[U]nder the appropriate circumstances, expansion of the lower judiciary can have the same effect on judicial doctrine as packing the Supreme Court.”); see also JOHN M. DE FIGUEIREDO ET AL., CONGRESS AND THE POLITICAL EXPANSION OF THE UNITED STATES DISTRICT COURTS 17 (2000), available at http://www.wcfia.harvard.edu/seminars/peggroup/deFigueiredo_Gryski.pdf (finding that, while the timing of expansion of the district courts is also driven by political alignment rather than caseload, “both politics and caseload have affected the size of district court expansion”); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 447–54 (1996) (demonstrating that the timing of expansion of the federal appellate courts has been primarily a function of political alignment rather than caseload).

257. See, e.g., Bueno de Mesquita & Stephenson, *supra* note 210, at 755 (modeling circumstances in which the necessity of obtaining lower court compliance will cause judges to adhere to stare decisis despite the fact that it “requires them to issue decisions that deviate from the rulings they otherwise would prefer”); Strauss, *Implications*, *supra* note 27, at 1095 (“The Court’s opinions on the merits may be influenced by its management dilemmas.”).

258. Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1018 (1959).

259. See McNollgast, *supra* note 205, at 1634 (“Our theory suggests that the Supreme Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts.”).

260. Staudt, *supra* note 100, at 659.

Court's doctrine.²⁶¹ Although, since its inception, the rule has been criticized as too "legislative,"²⁶² scholars also recognize that the specific rule was adopted because the Supreme Court could not find any other way to police its views about tolerable interrogation practices.²⁶³ Similarly, whether the Supreme Court can rely on "rules" or "standards" when it decides cases—much mooted as a normative matter—may turn as much on questions of lower court compliance as on jurisprudential preferences.²⁶⁴

4. *Implications for Normative Theory.*—The idea of bottom-up influence is not entirely alien to normative theory, finding its expression in the idea of "percolation."²⁶⁵ There is an established strand of scholarship that sees virtue in lower court divergence, in that it presents the Supreme Court with information and guidance regarding how novel issues should be decided.²⁶⁶ At least one positive model suggests that the Supreme Court encourages some divergence in order to provide it with information as to where its intervention is needed.²⁶⁷

261. *Miranda v. Arizona*, 384 U.S. 436 (1966) (overturning convictions in Arizona and New York in which defendants were not told of their rights prior to interrogation).

262. See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 678 (1992) (noting criticism of the *Miranda* Court for acting as a legislature "in both a procedural and substantive sense"); Strauss, *supra* note 25, at 190 (noting that "[a]s many critics have commented, [the *Miranda* decision] reads more like a legislative committee report with an accompanying statute") (citation omitted).

263. See FALLON, *supra* note 3, at 7 ("In short, *Miranda* . . . shows the Court making practical, instrumental, and tactical judgments about the appropriate role of the judicial branch in securing effective constitutional implementation.") (citation omitted); Strauss, *supra* note 25, at 207–09 (defending *Miranda* on the grounds of institutional reality).

264. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that the Supreme Court should adopt rules as a means of controlling the implementation of the law by lower courts); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 95–121 (1992) (arguing that divisions over rules and standards can be explained either from a political or a jurisprudential perspective).

265. See William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (utilizing the word "percolate" to describe the phenomenon of Supreme Court grants of certiorari only after the relevant legal issues are explored by lower courts); Staudt, *supra* note 100, at 659 n.192 (describing the process of percolation as one through which "lower courts are able to review problems in an uninhibited manner, leading to multiple perspectives on a difficult issue").

266. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985) ("[A] difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it."); Kornhauser, *supra* note 207, at 1626 (discussing the advantages to percolation); Strauss, *Implications*, *supra* note 27, at 1109 ("From a management perspective, it is useful to permit issues to 'percolate' through the system for a time . . .").

267. See Daughety & Reinganum, *supra* note 244, at 5 ("[W]e find that sufficient restriction of access to a supreme court can yield increased information revelation about an appealed case, though excessive restriction can suppress information revelation.").

The problem, though, is that the idea of percolation is in substantial tension with the rule of law.²⁶⁸ Thus, some question whether the percolation argument “at best . . . is making a virtue of necessity.”²⁶⁹ As indicated above, the practice of stare decisis and a model of strong Supreme Court control typically are justified in order to assure that like cases are treated alike and out of a concern for uniformity. Under the most optimistic of views, however, there are going to be many cases that lower courts resolve with limited guidance. Less optimistically, positive scholarship suggests that there is enough play in the joints to allow lower court ideology to decide a significant number of cases. As Chief Justice Rehnquist himself recognized, the Supreme Court cannot hope to resolve many of these cases, and thus it is fairly certain that like cases are not always (or even nearly) treated alike.²⁷⁰ Percolation may just be an appealing rationalization for sharp departure from the rule of law.²⁷¹

Any theory of judicial review that does not account for the actual role of the lower courts will necessarily be seriously incomplete. Two prominent cases make the point. In *United States v. Lopez*,²⁷² the Supreme Court initiated the federalism “revolution” that has raised scholarly ire, holding that the Commerce Clause had teeth that actually limited the scope of congressional power.²⁷³ This is a revolution that began in the lower courts.²⁷⁴

268. Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 690 n.2 (noting that the deference the Supreme Court gives to the practice of allowing each federal court of appeals to determine its own construction of the Constitution “is given false legitimacy by calling it ‘percolation’”).

269. Rehnquist, *supra* note 265, at 11; accord Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 691 (1990) (“[I]t is my strong impression that the virtues of percolation have been wildly exaggerated . . .”); Caminker, *supra* note 200, at 35 (arguing that institutional values such as “judicial economy, uniformity of interpretation, and decisional proficiency” outweigh the potential benefits of percolation) (citation omitted).

270. Rehnquist, *supra* note 265, at 10 (noting that the Court’s docket is not large enough to “enable us to address the numerous important statutory and constitutional questions which are daily being decided by the courts of appeals and by the fifty high courts of the states”); *id.* at 11 (stating that the present situation may violate Cicero’s dictum that the “law is not ‘one thing at Rome and another at Athens’”); accord Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1255–57 (2003) (expressing concern that like cases will not be treated alike by lower courts which, for example, may construe the *Lopez* precedent in different ways depending on the “unsavory” nature of the litigants before them); Scalia, *supra* note 264, at 1178 (“The common-law, discretion-conferring approach is ill suited, moreover, to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.”).

271. Strauss, *Implications*, *supra* note 27, at 1116 (“[T]he Court’s explicit endorsement of percolation and the implicit approval that this carries for nonacquiescence . . . are troubling developments for a nation committed, as ours is, to the rule of law.”).

272. 514 U.S. 549 (1995).

273. See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (labeling *Lopez* “a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers”); Reynolds & Denning, *supra* note 198, at 369–70 nn.2–4 (documenting various sources commenting on *Lopez*). But see Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34

As such, one reasonably wonders if the Supreme Court would have reached out to strike down the congressional law—or any congressional law—that the lower courts upheld.²⁷⁵ At the same time, studies show that the lower courts have since failed to follow the Court's lead here.²⁷⁶ Apparently, revolutions not only can begin in the lower courts, they can end there too. Consider the decision in *Casey v. Planned Parenthood of Pennsylvania*,²⁷⁷ declining also to overrule *Roe v. Wade*.²⁷⁸ The popular story that played about *Casey* was that the Court had upheld liberal ideals, and there is anecdotal evidence that the plurality decision was deliberately crafted to ensure this reaction.²⁷⁹ But the lower courts have run with *Casey* in a way that sometimes has meant serious curtailment of abortion rights.²⁸⁰ The lower courts can permit the Supreme Court to get away with a great deal. A view from the top obscures the story.

Normative theory has failed to develop a satisfactory (or almost any) account of the lower courts' role in the development of constitutional meaning. By seeing the legal landscape from the perspective of the Supreme Court, normative theorists fail even to capture the true content of constitutional law.²⁸¹ There is not enough in the way of bottom-up theorizing

(1995) ("The *Lopez* case is a perfect example not of revolution and not of some amendment out of ordinary course . . . but rather of adjudication precisely in the ordinary course . . .").

274. As Jack Balkin and Sanford Levinson observe, it is often easier to begin a revolution in the lower courts because even with present partisan wrangling, many more of those appointments fall below the radar screen. Balkin & Levinson, *supra* note 60, at 1074.

275. See *id.* (arguing that it is "unthinkable that the Supreme Court would ever have reviewed the federal statute at issue in *Lopez* if the Fifth Circuit had not struck it down in the first place").

276. See Denning & Reynolds, *supra* note 270, at 1256 ("There is evidence from the lower courts' opinions that they are still reluctant to take *Lopez* seriously . . ."); Sunstein et al., *supra* note 101, at 326 ("[N]either Republican nor Democratic appointees seem to believe that those signals [in the federalism cases] should be taken very seriously.").

277. 505 U.S. 833 (1992).

278. 410 U.S. 113 (1973).

279. *Casey* was forced in front of the Court in advance of the 1992 presidential election. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 201–06 (2005) (describing the efforts of abortion rights groups and Justice Blackmun to force a decision in *Casey* before the 1992 election, expecting that *Roe* would be overruled).

280. See *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (overturning an injunction against the enforcement of a Montana statute limiting the performance of abortions to physicians); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (upholding extensive South Carolina regulations imposed on clinics performing any second-trimester abortions or more than five first-trimester abortions), *cert. denied*, 531 U.S. 1191 (2001); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (upholding a Wisconsin law requiring physicians who perform abortions to meet with patients at least 24 hours before performing the procedure and to provide specific oral and printed information, except when the physician, in "reasonable medical judgment," determines that there is a "medical emergency"); see generally Martha A. Field, *Abortion Law Today*, 14 J. LEGAL MED. 3 (1993) (describing *Casey*'s cutbacks on *Roe v. Wade* protections); Brent Weinstein, *The State's Constitutional Power to Regulate Abortion*, 14 J. CONTEMP. LEGAL ISSUES 229 (2004) (sampling "the States' current power to regulate abortion as reflected in post-*Casey* decisions of the lower courts").

281. See MURPHY, *supra* note 73, at 25 (noting that the lower federal and state courts are responsible for most of the law because few cases make it to the Supreme Court); Sanford

and little that takes account of positive narratives of lower courts' behavior. Scholarly fixation on the Supreme Court to the neglect of the lower courts, while understandable, fails to capture the actual process of constitutional change.²⁸²

D. *Interbranch Interaction: The Separation-of-Powers Game*

The judiciary does not stand alone. It is part of a three-branch system often described as one of separated powers but deliberately designed so that power would check power.²⁸³ For this reason, normative and positive scholars both agree that, at least in theory, when judges act, they must do so cognizant of the other branches of government. Here, however, the similarity between the two approaches ends.

Normative constitutional theory is preoccupied with the question of what deference the judiciary *ought* to pay to the wishes of the other political branches, and it is distinctly of two minds. On the one hand, there is a long tradition—that of “restraint”—that encourages judges to take a deferential posture toward legislative judgments.²⁸⁴ But urging restraint tells courts little of what they should do.²⁸⁵ Taken to its extreme (and there are prominent legal scholars who have so taken it), restraint becomes a prescription for judicial passivity. Judicial review implies that courts do something, and the

Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 844 (1993) (“The behavior of the roughly 100 circuit judges and 500 district judges is, for most citizens most of the time, far more likely to count as ‘the law’ than the pronouncements of the nine denizens of the Supreme Court.”) (citation omitted); Reynolds & Denning, *supra* note 198, at 370 (“For the vast majority of litigants, the courts of appeal represent the real last word in constitutional law.”).

282. Denning and Reynolds argue that “reality seems to be more complex than” statements such as “[t]he Supreme Court is the highest court in the land,” or “[l]ower courts follow [the Supreme Court’s] precedents.” Denning & Reynolds, *supra* note 270, at 1310.

283. See Eskridge & Frickey, *supra* note 13, at 30 (explaining that because “interaction [between the branches] is typically sequential . . . each institution has trumping power”); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 362 (1999) (referring to “the broader federalist scheme of making the major departments of government interdependent rather than establishing a strict separation of powers”).

284. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (“Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so”); Kramer, *supra* note 60, at 166 (“[L]ess is more when it comes to limiting self-government, and we should be thinking about a minimal model of judicial review that calls upon judges to intercede only when necessary.”); Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 141 (“[R]estraint grows out of a theory of the division of labor or competence in government and defines not only the occasions upon which the Supreme Court should defer to the will of representative institutions but also the occasions for, and the manner of, judicial intervention.”).

285. See EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* xxxiii–xxxiv (1962) (“[C]onsiderations of judgment and ‘self-restraint’ hardly constitute a theory of judicial action. . . . They tell us when it may be wise for the Court not to act. But they tell us next to nothing about when the Court should act or what it should do when it does.”); Friedman, *supra* note 52, at 245–46 (noting that most advocates of judicial restraint proposed solutions that were “almost meaningless as a guide to decision” and that “gave no clue, standing alone, as to which controversies justified Supreme Court intervention, and which did not”).

competing tradition is one of normative scholars telling judges what precisely to do.²⁸⁶ Much of normative constitutional theory is about how judges should review the work of the other branches and what limits judges should impose upon them.²⁸⁷

These two competing positions represent what might be called the “threat” and “hope” of judicial review.²⁸⁸ The threat of judicial review is believed to be its tendency to diminish or interfere with democratic governance.²⁸⁹ Arguments for deference or restraint are built on precisely this fear. But over time many have believed that judicial review serves an admirable function—ensuring that government adheres to constitutional commands.²⁹⁰ Particularly prominent during the last century has been the belief that judges enforcing the Constitution will protect minority rights and enforce constitutional safeguards.²⁹¹ This is the hope of judicial review. The hope narrative is reinforced by normative thought regarding judicial “independence.”²⁹²

Positive scholars have long doubted the descriptive accuracy of both normative stories about judicial review, largely because they doubt the premise that judges have the capacity to interfere regularly with the work of the other branches.²⁹³ Given that the judiciary, in Hamilton’s words,

286. See *infra* note 288 (describing these competing positions as the “hope” and “threat” of judicial review).

287. See *supra* notes 284–85 and accompanying text.

288. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1267–70 (2004).

289. See *supra* note 44 and accompanying text (discussing the countermajoritarian nature of the courts).

290. See *supra* note 45 and accompanying text (reviewing the views of prominent lawyers and judges regarding judicial review).

291. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 10 (1991) (“[T]he courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations.”); BICKEL, *supra* note 51, at 109 (“[T]he Supreme Court . . . [is] an institution charged with the evolution and application of society’s fundamental principles.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 8 (1980) (arguing that judicial review is a way of “protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule”); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380 (1997) (maintaining that one reason for judicial supremacy under the Constitution is “to remove a series of transcendent questions from short-term majoritarian control”); Terrence Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977) (“[C]onstitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental in defining the limits and distribution of governmental power in our society.”).

292. See *supra* note 55 (collecting commentary on judicial independence).

293. See Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957) (“Under any reasonable assumptions about the nature of the political process, it would appear to be somewhat naïve to assume that the Supreme Court either would or could play the role of Galahad.”); Eskridge & Frickey, *supra* note 13, at 53 (“[S]tructural features of the Court’s position in the federal system make the Court an unlikely ally for outsider groups challenging stable national equilibria . . .”).

possesses neither the purse nor the sword, positive scholars wonder: How could judges wield such affirmative power?²⁹⁴ Positive scholars see judges as beholden to the other branches for their very existence and thus constrained by those other branches.²⁹⁵ Roughly half a century ago, Robert Dahl famously asserted that, given its lack of political force, the judiciary never would be far out of step with the national political branches.²⁹⁶ Believing that “the basic reason constitutional protections for judges have remained strong and stable over the years is that the political branches have not really wanted to alter them,”²⁹⁷ positive scholars have sought a justification for why judicial review serves the interests of those in power²⁹⁸

294. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (forthcoming 2006) (examining why “powerful political actors might recognize such an authority and defer to the judiciary’s particular interpretations of the Constitution”); Matthew Stephenson, *When the Devil Turns . . . : The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003) (developing a model to answer the question of why government “would . . . accept the limits imposed by a truly independent court”).

295. See Eskridge & Frickey, *supra* note 13, at 46 (“If a current President and Congress are united in favor of a national policy, the Court is unlikely to invalidate the policy.”); Ferejohn, *supra* note 283, at 358 (noting that the “constitutional protections afforded to individual judges remain dependent on a congressional willingness to maintain a relatively high barrier for impeachment”); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT’L J. CONST. L. 446, 448 (2003) (“Judges can only remain independent if other political actors can be convinced that it is in their own interest to tolerate judicial independence . . .”).

296. See Dahl, *supra* note 293, at 285 (“The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”); Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 583–85 (2001) (agreeing with Dahl that the judiciary is not likely to clash substantially with the other branches of government but disagreeing on the mechanism).

297. Ferejohn, *supra* note 283, at 357. The rest of the quote is germane to where this discussion is headed: “at least not badly enough (or for long enough) to incur the substantial costs and political risks associated with such an effort.” *Id.*

298. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (suggesting that an independent judiciary that interprets legislation according to the legislature’s original intentions actually “facilitates rather than, as conventionally believed, limits the practice of interest-group politics”). A sample of work in this line includes Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 173–76 (1984) (noting that judicial review is a mechanism by which the legislature can monitor agency decisions that diverge from legislative goals); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84 (2001) (developing a model in which judicial review is supported because of its informational purposes); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT’L REV. L. & ECON. 349, 350 (1993) (arguing that it is in the government’s interest to “maintain an independent judiciary to which they can delegate legislative and other public decision-making powers, because this delegation assists in maximizing their political support and chances of reelection”); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 320 (2002) (book review) (noting that “[q]uite frequently, judicial review is invited by members of the dominant national coalition who hope the federal judiciary will assume responsibility for resolving crosscutting political controversies”) (citation omitted); Posner, *Possibility*, *supra* note 15, at 54 (arguing that judicial review may serve as a focal point for societal conventions that are self-enforcing when the public agrees with the Court’s decisions). For a discussion and critique of these

and have questioned whether courts really can serve as instruments of social reform if the other branches are resistant.²⁹⁹

1. Testing Interbranch Constraint: The Separation of Powers Game.—Positive scholars analyze the extent to which the judiciary is constrained by other branch actors by using “spatial” models—what some refer to as the “separation of powers game.”³⁰⁰ Although the modeling can be quite complicated and the empiricism poses difficult challenges, the intuition is really quite simple. All institutions (including the Supreme Court) have preferences as to policy outcomes, but in acting they also must take into account the preferences of other branches that play a role in the ultimate policy choice.³⁰¹ To choose a familiar example, when Congress passes a bill, it obviously has to consider the possibility of a presidential veto, and it probably also should think about whether the Supreme Court is likely to overturn the statute on constitutional grounds.

Central to the operation of these models is the notion of “anticipated reaction,”³⁰² which can make the play of the “game” difficult to observe.

and other theories, see Barry Friedman, *The Myths of Marbury*, in *ARGUING MARBURY V. MADISON* 65, 71–72 (Mark Tushnet ed., 2005), observing that “the[se] theories do not distinguish between the establishment of judicial review and its maintenance . . . [they] often fail to account for challenges to judicial power . . . [and they] typically fail as an explanation of how judicial review actually is exercised.” See also Ferejohn, *supra* note 283, at 376 (“I am not sure, however, how any of these theories would be able to account for the creation of what I have described as the American system: independent judges within a dependent judiciary. Why, if judicial independence is a good thing from some interest-based perspective, leave the door open for political meddling in the future by allowing the political branches to influence the judiciary as a whole?”).

299. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 35 (1991) (“[C]ourts can be effective producers of significant social reform . . . only when a great deal of change has already been made.”).

300. The origin for this type of work was a famous, but unpublished, paper by Brian Marks. Brian Marks, *A Model of Judicial Influence on Congressional Policymaking: Grove City College v. Bell* (1988) (unpublished Ph.D. dissertation, Washington University) (on file with author). The work was expanded upon and popularized by John Ferejohn and his many students and coauthors. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); John Ferejohn & Charles Shipan, *Congressional Influences on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (Special Issue) (1990); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) (examining the effects of statutory interpretation by courts on deliberative process in other branches of government); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263 (1992) [hereinafter Ferejohn & Weingast, *Positive Theory*] (providing a theory of statutory interpretation by courts where interpretation depends on the relative situation of the Court vis-à-vis the other branches of government); see also Lee Epstein & Jack Knight, *Toward A Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000) (accounting for the growing number of studies that approach judicial politics with a strategic paradigm and examining the strengths and weaknesses of this approach).

301. See Eskridge & Frickey, *supra* note 13, at 28–29 (“Congress, the executive, and the courts . . . seek[] to promote [their] vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs.”).

302. PERETTI, *supra* note 100, at 145–46; see also Eskridge & Frickey, *supra* note 13, at 29 (“To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of

Branch actors do not actually have to take action and then sit back and wait to see what happens. Congress need not pass a statute and then wait for the President to veto it. Rather, institutional actors think ahead to what response their action will engender and then modify their positions in light of the anticipated reaction in a way that moves policy closest to the preferred outcome, while avoiding trumping action by another branch. Thus, Congress—anticipating a veto of legislation that is too liberal—will pass a bill that is just conservative enough for the President to accept it or that ensures a two-thirds vote on congressional override of any veto. The implication of anticipated reaction is that institutions may be responding to constraint, even if this is unobservable.

For reasons that are probably obvious, most positive scholarship applying the separation-of-powers game to the Supreme Court occurs in the area of statutory interpretation.³⁰³ The separation-of-powers game requires that there be an action that the other branches can take in response to one branch's decision. What the Supreme Court does with statutes is fertile ground, as those interpretations obviously can be overturned by new congressional enactments.³⁰⁴ There are notable examples of Congress overruling Court interpretations of statutes, particularly in the civil rights area.³⁰⁵ Scholars argue that the Court is aware of this possibility of congressional override and tempers its statutory rulings accordingly.³⁰⁶ Stated differently, the claim is that when interpreting statutes, the Supreme Court is constrained by the other branches.

Claims of judicial constraint in statutory interpretation cases are hotly contested. As discussed above, attitudinalists question whether the Justices face any meaningful constraint from Congress or the Executive. Their claim is not that constraint is impossible, but that as a practical matter of political

how other institutions would respond.”); Andrew D. Martin, Public Policy, the Supreme Court, and the Separation of Powers 1 (1998) (unpublished manuscript, on file with author) (“[I]f justices are truly interested in policy, they have to anticipate reactions to their decisions by the ‘political’ branches of government.”). Stimson, Mackuen, and Erikson call this “rational anticipation.” James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 544–45 (1995) (“Rational actors make decisions in the present, but the utility they maximize lies wholly in the future. . . . The political import of that future orientation is that *all is anticipation*.”).

303. See, e.g., Eskridge, *supra* note 12 (developing a model where the Court is another actor, together with Congress and the President, in statutory interpretation, and using this model to analyze civil rights statutory interpretation from 1962–1990); Ferejohn & Weingast, *Positive Theory*, *supra* note 300; Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT’L REV. L. & ECON. 503 (1996) (developing a model where congressional overrides of Court decisions are explained not as the result of the Court’s misreading of congressional preferences but rather as fully anticipated by the Supreme Court).

304. See Whittington, *supra* note 295, at 447 (“Judicial interpretation of statutes can be reversed with relative ease by legislative action . . .”).

305. See Eskridge & Frickey, *supra* note 13, at 38 (noting that “the Civil Rights Act of 1991 . . . was triggered by five decisions in the 1988 Term”).

306. See Ferejohn & Weingast, *Positive Theory*, *supra* note 300, at 273 (showing that if the Court’s ideal judgment is not politically viable, then the Court will issue a judgment that is politically viable so that it will not be overridden by Congress).

configuration constraint is very rare.³⁰⁷ Jeffrey Segal argues that existing separation-of-powers models make too many assumptions in favor of finding constraint,³⁰⁸ and that when the data are analyzed correctly, empirical support for the claim of constraint is quite weak.³⁰⁹ “The federal judiciary was designed to be independent,” Segal points out, “so we should not be surprised that in fact it is.”³¹⁰

2. *Constitutional Separation of Powers Games*.—Given that the fact of constraint is contestable in the context of statutory interpretation, one might rightfully be skeptical that the model has any value when it comes to constitutional judicial review. After all, overturning a statutory ruling is easy compared to what is required to overturn constitutional rulings.³¹¹ The amendment process is notoriously difficult and rarely successful. Further, other institutional actors may find some benefit in having a system of judicial review and be loath to tamper with constitutional rulings. It likely is for these reasons that many positive scholars apparently are not rushing to test constitutional separation-of-powers models.³¹²

Even a quick glance at history, however, suggests that there is something to the constitutional separation-of-powers game. Although amending the Constitution is difficult, the political branches retain a broad arsenal of weapons to use against a troublesome judiciary. Judges may be impeached, jurisdiction may be stripped, courts may be packed, and judicial

307. SEGAL & SPAETH, REVISITED, *supra* note 75, at 18 (distinguishing strong checks on the legislature and the executive from those on the judiciary, which “by contrast, escaped relatively unscathed”).

308. Segal and Spaeth argue that the models oversimplify how easy it is to overturn judicial decisions, *id.* at 333–40, assume too readily that judges have complete information about other branches’ actors, *id.* at 348, neglect the transaction costs of Congress overturning decisions, *id.* at 107, and forget that Congress does not necessarily have the last word, *id.* at 108–09.

309. *Id.* at 349 (“If the overwhelming majority of statistical models find no support for the separation-of-powers model, if the few statistical models supporting the separation-of-powers model are seriously flawed . . . there is little need to say more.”); Jeffery A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997) (performing statistical tests of separation-of-powers games and concluding that the “results should at least give pause to those certain about the separation-of-powers model as applied to the U.S. Supreme Court”).

310. Segal, *supra* note 309, at 42.

311. See EPSTEIN & KNIGHT, *supra* note 95, at 141 (“The infrequency of congressional responses to constitutional decisions, coupled with the difficulty involved in overturning them, means the justices may be less attentive to the preferences and likely actions of other government actors in constitutional disputes than in statutory cases.”); Eskridge & Frickey, *supra* note 13, at 42 (“The Court in those cases can usually be overridden only by a constitutional amendment, which is costly and impracticable because it requires supermajorities in Congress and among the states.”) (citation omitted); Whittington, *supra* note 295, at 449 (“[L]egislative reversal in the constitutional context is much less readily available than in the statutory context . . .”).

312. See, e.g., Epstein et al., *supra* note 296, at 595 (“Virtually all existing literature exploring the constraint imposed on Justices by the separation of powers system asserts that the constraint is far more—or, at the extreme, exclusively—operative in cases calling for the Court to interpret a law rather than on cases asking the Court to assess a law’s constitutionality.”) (citation omitted).

budgets may be cut.³¹³ It is not as if the other players have no moves in response to constitutional decisions they dislike.³¹⁴

It is true that the other branches rarely deploy these weapons against the judiciary—at least in recent memory—but the doctrine of anticipated reaction holds that the political branches can both keep the powder dry and the judiciary in check. History is certainly replete with instances in which these measures have been employed.³¹⁵ A candid view of that history, as well as some empirical study, compel the conclusion that judicial change in constitutional doctrine is correlated with utilization of these court-disciplining measures, or the threat to do so. Under threat of judicial impeachments, John Marshall offered to give up the judiciary's last word on constitutional questions.³¹⁶ Jurisdiction was stripped in a manner that prevented the Supreme Court from ruling on the constitutionality of Reconstruction at a critical moment, and the Court acquiesced.³¹⁷ The Court's size was changed at several points during the Civil War and Reconstruction and, in at least one famous instance, this had an immediate and substantial impact.³¹⁸ Roosevelt's Court-packing plan did not succeed in changing the size of the Court, but the doctrine itself changed quickly enough

313. See EPSTEIN & KNIGHT, *supra* note 95, at 142–43 (discussing the tools of the legislature beyond overrides, including “hold[ing] judicial salaries constant, impeach[ing] justices, and pass[ing] legislation to remove the Court’s ability to hear certain kinds of cases”); PERETTI, *supra* note 100, at 137–58 (summarizing formal and informal checks on the Supreme Court); Whittington, *supra* note 295, at 449 (“Congress may, for example, impeach and remove federal judges, and it can also attempt to pack the judiciary Although Congress may not reduce the salary of judges, it may allow judicial compensation to be eroded over time by inflation. The legislature can, more generally, control the funding of the judicial branch . . .”).

314. As Keith Whittington explains, however, these weapons are blunt instruments in that they are not necessarily case specific, and thus Congress must weigh a variety of factors in deciding whether to employ them. See Whittington, *supra* note 295, at 450 (“In deciding whether to sanction the Court for an immediate divergent decision, the legislature must weigh the costs of that decision against the discounted present value of various convergent decisions that might be expected in the future . . .”).

315. See Rosenberg, *supra* note 55, at 377 (“The late 1950s and early 1960s saw a flurry of Court-curbing bills and bills have been introduced in the 1970s and early 1980s withdrawing federal court jurisdiction over substantive areas such as school prayer, abortion, and busing.”). In addition, near misses obviously count, given the doctrine of anticipated reaction. See *id.* at 397 (“[E]nactment of Court-curbing bills is not necessary to curb the Court. Arousing substantial opposition to the Court may be enough to dominate it.”). There are more near misses than are recounted in this paragraph.

316. See Barry Friedman, “*Things Forgotten*” in the Debate over Judicial Independence, 14 GA. ST. U. L. REV. 737, 740–41 (1998) (noting that the attempt to impeach Chase was serious enough that it prompted Chief Justice John Marshall to suggest giving the Senate the power to overturn judicial decisions).

317. See Friedman, *supra* note 115, at 26–38 (documenting legislation passed by Congress that stripped judicial jurisdiction over Reconstruction in the *McCardle* case and the Court’s response of bowing to legislative determination); Rosenberg, *supra* note 55, at 381 (explaining that the *McCardle* Court buckled to the jurisdiction-stripping measure).

318. See Friedman, *supra* note 115, at 38–45 (describing three changes that Congress made to the Court size between 1860 and 1870 and the effect this had on the reversal of the determination of the constitutionality of legal tender).

thereafter.³¹⁹ Congress threatened to strip jurisdiction after Red Monday and the Court moderated its views.³²⁰ To this day, Justices demonstrate an awareness of these historical events as a nod toward the Court's relatively fragile position.³²¹

The game need not be one of all sticks and no carrots. The Court has more at stake than avoiding attack. Preserving institutional integrity and power requires judges to ensure that their orders are implemented by the other branches.³²² The Supreme Court can bluster all it wants about its place as ultimate interpreter of the Constitution, but implementation is not guaranteed, and the Court is unlikely to go ordering a lot of things that are just not going to happen.³²³ Andrew Jackson's apocryphal quip, "John Marshall has made his order, now let him enforce it," captures the sentiment, as did Georgia's hanging of Corn Tassels after Marshall's Court ordered it not to.³²⁴ In recent memory, the Court was careful to ensure that Richard Nixon would comply with its order compelling the production of the tapes before issuing it.³²⁵ As with the sticks, there is evidence that implementing the carrot has its influence on the Court.³²⁶

319. See *supra* notes 46–48.

320. See Shugerman, *supra* note 117, at 925 ("After Red Monday, Congress pressed a full attack against the Court's jurisdiction and its decisions. The most threatening proposals failed narrowly, but they succeeded in pushing the Court into retreat." (citations omitted)); see also L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 717–18 (2003) ("Congress responded [to Red Monday] by delivering the near death experience to the Court which, having got the message, quickly retreated to its 1951 position (of sustaining the constitutionality of the program)." (citations omitted)).

321. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 95–103 (2004) (discussing limits on the Court's ability to confront the political branches and history's confirmation of these "institutional factors").

322. See EPSTEIN & KNIGHT, *supra* note 95, at 144 ("[G]overnment actors can refuse, implicitly or explicitly, to implement particular constitutional decisions, thereby decreasing the Court's ability to create efficacious policy."); FALLON, *supra* note 3, at 5 ("The term *implementation* invites recognition that the function of putting the Constitution effectively into practice is a necessarily collaborative one, which often requires compromise and accommodation."); Salzberger, *supra* note 298, at 351–52 ("[T]he notion of an independent judiciary requires also that these decisions, once given, would not be altered or ignored by the government . . ."); Pedro C. Magalhães, *The Limits to Judicialization: Legislative Politics and Constitutional Review in Iberian Democracies* 285 (2003) (unpublished Ph.D. dissertation, Ohio State University) (on file with author) ("Political actors and elected officials in general can attempt to constrain judicial decisions by simply threatening non-compliance . . .").

323. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 306 (2000) (explaining that the Supreme Court's failure to order relief in *Giles v. Harris* was rooted in the Court's reluctance to issue orders it could not enforce).

324. 1 WARREN, *supra* note 39, at 759.

325. See STEVEN J. BRAMS, *NEGOTIATION GAMES: APPLYING GAME THEORY TO BARGAINING AND ARBITRATION* 178–81 (1990) (suggesting that Justices Burger and Blackmun voted against the President in *United States v. Nixon* not out of true preference but due to their anticipation that Nixon would defy the court if they decided in his favor).

326. The deliberations regarding *Brown v. Board of Education* may be the most famous example. See Hutchinson, *supra* note 168, at 34–44 (noting that the Court placed heavy emphasis

There are reasons to believe the separation-of-powers game actually is easier to play in the constitutional than in the statutory area. William Eskridge and Phillip Frickey explain the importance of “signals” to the interbranch game.³²⁷ Signals by the players permit the other players to calculate what the response to a given decision might be. In the constitutional area the issues are often quite salient, so the Court receives lots of information about what reaction to anticipate.³²⁸ This is particularly the case if one takes account of the President’s role in the separation-of-powers game, which much of the positive literature does not. The President not only fills an essential institutional role with regard to implementation of judicial orders and challenges to judicial authority, but he also has the bully pulpit and plays a clear leadership role.³²⁹ The President also has an agent—the Solicitor General—who appears regularly before the Court and whose influence there is demonstrable.³³⁰ Thus, in constitutional cases the Justices have plenty of leads to follow, enough so it would seem that they could coordinate their behavior tacitly.

3. *The Constrained Court.*—It should come as little surprise, then, to learn that scholars are increasingly finding evidence that the Supreme Court faces constraint in constitutional cases. Empirical work demonstrates the relationship between judicial activism and court-curbing measures—overly activist Justices call such measures down upon themselves and then back away in response.³³¹ One study shows that the Court moderates its views in

on reaching a decision that would garner broad public support in addition to selecting a remedy that would be enforced).

327. Eskridge & Frickey, *supra* note 13, at 39 (“Lawmaking institutions routinely send ‘signals’ to one another—expressions of preference that have no traditionally understood legal ‘authority.’”).

328. See, e.g., EPSTEIN & KNIGHT, *supra* note 95, at 145–46 (discussing amicus briefs and exposure to news as two ways Justices receive information about cases); Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 141 (1991) (suggesting that Congress uses the judicial budget to signal its approval or disapproval of Court decisions).

329. See WHITTINGTON, *supra* note 294, at 28 (“Presidents are better positioned to challenge judicial authority than is the legislature.”). Whittington’s book-length study of the relationship between presidential leadership and Supreme Court behavior suggests that attacks on the Court are most likely during “reconstructive presidencies”: “[P]residents come to office opposed to the established regime but at a time when that order is weak and collapsing.” *Id.* at 36.

330. See EPSTEIN & KNIGHT, *supra* note 95, at 85–88 (arguing that the success rate of the solicitor general may be explained by the fear of retaliation by Congress and the President that the Justices anticipate in cases that the government wants them to hear). Segal and Spaeth analyzed the influence of the Solicitor General and determined that influence itself was largely attitudinal: conservative Justices supported a conservative Solicitor General; liberal Justices a liberal Solicitor General. SEGAL & SPAETH, *REVISITED*, *supra* note 75, at 412 (“[O]ur research has shown that virtually every justice serving between 1953 and 1982 supported the party favored by the Solicitor General in amicus curiae briefs over half the time.”).

331. See Rosenberg, *supra* note 55, at 389–94 (citing several examples of the Court deciding controversial cases against congressional preferences, only to have Congress engage in reprisals); see also STUART S. NAGEL, *LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* 278–79 (1969)

constitutional cases in accord with presidential preferences.³³² And a recent study shows that the most current binge of judicial activism toward congressional enactments—the subject of profound academic complaint—is a perfectly predictable outcome of the separation-of-powers game.³³³ That binge began in 1994, the year that Republicans took both houses of Congress, making it unlikely that there would be much movement to curb judicial activity—especially when one recognizes that most of what the Court was striking at the time were enactments of an earlier (more liberal, Democratic) Congress.

To the extent that the Court faces constraint in constitutional cases, this is problematic for normative theory. At the heart of all “hope” stories about judicial review is the notion that courts can—and will—stand up against the other branches of government in the protection of constitutional safeguards. The fact of constraint calls this story into question. The problem is exacerbated by the role of ideology and party affiliation. The Court likely is most constrained when the other branches are united ideologically, which might be the very time judicial scrutiny is most appropriate in a system of checks and balances.

Interbranch constraint poses a problem for normative “threat” scholars as well. These scholars call upon judges to restrain themselves from interfering in democratic politics. But the separation-of-powers game suggests that restraint will come from without the judiciary, while attitudinal studies suggest that it is unlikely to come from within. To the extent this is correct, restraint may be least likely when it is sought most. The five Justices presently voting regularly to strike congressional enactments are doing so

(examining seven periods of court-curbing behavior and describing this pattern: “judicial provocation, the existence of circumstances that act as catalysts or as retarders, a set of congressional and Presidential responses, and judicial counteraction”).

332. See Epstein et al., *supra* note 296, at 610 (finding that “strong ideologues on the Court . . . vote in accord with their preferences regardless of the preferences of the ruling regime [here, the President],” but stating that “moderate Justices . . . are more likely to vote conservatively when there is a moderate or conservative president”). The paper has its difficulties. In terms of individual Justice voting, only Justices White and Black yield statistically significant results, and even their shifting votes can be explained otherwise (e.g., Black’s voting seems to reflect his general conservative shift in values over time; White commonly voted for the government, whoever that happened to be). The more interesting results are with regard to the Court majority, which is the appropriate measure in any regard, but the method of reporting makes it difficult to assess how strong the influence of the President is. *Id.* at 604 (simply providing a scattergram that indicates some, but not uniform, executive influence).

333. See Friedman & Harvey, *supra* note 64 (using empirical data to demonstrate that the Supreme Court is more likely to overturn legislation when an ideologically similar Congress is in place); accord Rebecca Bill Chavez et al., A Theory of the Politically Independent Judiciary 16 (2004) (unpublished manuscript, on file with author) (stating that as of 1993—when divided government ended—“the conditions became favorable for a Court-led move in the conservative direction”). But see Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1340 (2005) (testing and disagreeing with the hypothesis that the Court is free to overturn laws only when the Court and Congress are ideologically aligned and finding instead that the likelihood of the Court overturning legislation increases only as the Court becomes more conservative).

based on attitudinal considerations because they can. Given the current partisan and ideological unity of the branches, there is no meaningful external constraint on those invalidations, nor is there likely to be one.³³⁴ The conservative Court is striking progressive enactments, and the conservative Congress just doesn't care.

The Supreme Court's recent activism has focused the attention of normative scholars on the politics of judicial review, but those scholars still fail to integrate fully the lessons of positive theory. Even normative scholars who are attentive to the relationship between constitutional politics and law seem to lose their way at precisely this point. Scholars such as Robert Post, Reva Siegel, and Larry Kramer have recognized of late that despite the deepest, longstanding aspirations of normative theory, law and politics cannot be so easily separated—that the two inevitably are intertwined.³³⁵ Yet, recognizing this positive fact, they nonetheless turn prescriptive in ways that positive theory would doubt are plausible. Kramer urges Congress to eschew its complacent posture toward judicial activism.³³⁶ Positive theory suggests that Congress would have little reason to do so at present, given the ideological affinity of the branches. Siegel and Post insist that the Court ought to take present political preferences into account lest it run into trouble.³³⁷ Positive theory suggests that the implicit threat is toothless, given the current ideological alignment of the branches. The Court has been able to do what it has precisely because there is no will elsewhere to make it do otherwise.

Still, these scholars are right to raise what may be the more profound normative question: whether what presently is occurring might bring the entire separation-of-powers game out of kilter. If in fact the Court is acting in a hegemonic way when it comes to determining constitutional meaning, and if it is not getting any guff simply because the other branches like the immediate outcomes, then the question is what this signals for the long term. This is just the question Robert Post and Reva Siegel ask in a recent paper on judicial limitation of Congress's Section Five power.³³⁸ They concede that, at the moment, "Congress seems disengaged and possibly confused," and they recognize that "[m]any on the Hill have no special commitment to the provisions of the ADA or the Violence Against Women Act or the ADEA invalidated in recent cases."³³⁹ But still they insist that Congress should "defend the distinctive ways in which legislatures make judgments about the

334. SEGAL & SPAETH, REVISITED, *supra* note 75, at 348.

335. *See supra* note 61.

336. Kramer, *supra* note 60, at 167.

337. Post & Siegel, *supra* note 61, at 2020–32 (urging the Court to adopt the poliocentric model for Section Five legislation in order to facilitate a crucial connection between law and politics).

338. Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

339. *Id.* at 43.

meaning of invidious discrimination.”³⁴⁰ Similarly, Larry Kramer explains that congressional complacency is dangerous precisely because it breeds an atmosphere of belief that it is inappropriate to muscle around the Court.³⁴¹ If what is occurring is acquiescence in judicial supremacy simply because the political branches approve the results, one might wonder whether power given up so readily can be recalled when the political branches become unhappy with the Court’s behavior. Like the supposed finger on the scales of judicial deference to Congress, this places a finger on the scales of unquestioningly accepting what the Court does and brings the entire system out of balance.

Recent events, however, belie these fears. They are found not in actions Congress has taken against the Court, but in judicial decisions that suggest a tempering of the attitudinal motivations.³⁴² For example, in its latest examinations of congressional legislation on federalism grounds, the Court blinked, approving of legislation that would have seemed vulnerable under precedent.³⁴³ In other cases, the Court has taken what looks to be a decidedly liberal turn, upholding some affirmative action in higher education,³⁴⁴ striking gay sodomy laws,³⁴⁵ and—most recently—challenging the government’s position on detaining suspects in the war on terror.³⁴⁶

Although the separation-of-powers model might provide a persuasive partial explanation for the Court’s recent turn to the left, it also suggests that a piece is still missing from the puzzle. The fact that the Court has shifted while the other branches remain staunchly conservative suggests that something else is going on. The decisions against the administration in the war on terror cases may have been possible because of congressional disenchantment with executive policy.³⁴⁷ But other outcomes are harder to

340. *Id.* at 44.

341. *Kramer*, *supra* note 60, at 14.

342. *See* Levinson, *Empire-Building*, *supra* note 13, at 961–63 (questioning how the motivations facing judges would lead to an expansionist judiciary in the first place).

343. *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Title II of the Americans with Disabilities Act as a valid exercise of congressional power); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding Congress’s right to enact the Family Medical Leave Act, despite the precedents of *Lopez* and *Morrison*).

344. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

345. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding that states may not criminalize homosexual sodomy).

346. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a U.S. citizen being held as an enemy combatant is entitled to a due process right to contest the basis of his detention); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the district court has jurisdiction over claims by Guantanamo Bay detainees).

347. *See* Jeffrey Rosen, *One Eye on Principle, the Other On the People’s Will*, N.Y. TIMES, July 4, 2004, at D3 (“Every time any White House has tried to cut Congress and the courts out of the loop, the Supreme Court has responded by insisting on its own prerogatives. Since presidential overreaching has repeatedly provoked judicial backlash, the Bush administration may have itself to blame for its recent judicial defeats.”). Public opinion—which will be discussed at greater length below—is also cited as a factor allowing the Supreme Court to rule as it did in these cases. *See id.*

explain. Perhaps the sitting Congress is more committed to the Family and Medical Leave Act upheld in *Nevada Department of Human Resources v. Hibbs*³⁴⁸ than it was to the provisions of the Violence Against Women Act or Americans with Disabilities Act struck down in *United States v. Morrison*³⁴⁹ and *Alabama Board of Trustees v. Garrett*.³⁵⁰ Yet a study of the ideological preferences of members of Congress would have a difficult time distinguishing among all the laws upheld or struck down. Certainly when it comes to affirmative action or gay rights, it is unlikely that the present political branches would have brought the Court to book had it voted the other way in these leftward-leaning decisions.

E. The Will of the People

A reasonable candidate for further explaining the Court's recent leftward shift is the final influence on the judiciary discussed here: public opinion.³⁵¹ The shift itself has been accomplished largely through the votes of median Justices, particularly those of Justice O'Connor.³⁵² It is possible that Justice O'Connor's votes are purely a reflection of the attitudinal model: As the Court further pursued its conservative agenda, Justice O'Connor simply may have been reaching her ideological limits.³⁵³ Yet, explaining the difference in outcomes on the Eleventh Amendment issue in cases like

("Throughout history, the court has tended to challenge the president only when it knows that the public will support its intervention.").

348. 538 U.S. 721 (2003).

349. 529 U.S. 598 (2000).

350. 531 U.S. 356 (2001).

351. Although this is a relatively comprehensive catalogue of influences, it still could be more complete. There is no discussion here of the way that state government officials might constrain judicial review, though much of what has been said of the separation-of-powers game is applicable. In addition, it is obvious that at least some of the Justices are increasingly aware of what the international community thinks. See *Roper v. Simmons*, 125 S. Ct. 1183, 1187 (2005) (Kennedy, J.) (describing at length the overwhelming weight of international opposition to the juvenile death penalty and concluding that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom"); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (Kennedy, J.) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."); *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (comparing the U.S. system to international federal systems and noting that "their experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem").

352. See TUSHNET, *supra* note 116, at 70 (discussing how the Rehnquist court lived on the knife's edge of its two different Republican wings and how Justices Kennedy and O'Connor were central to the outcomes); Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1 ("Justice O'Connor, perhaps the court's leading pragmatist, cast only five dissenting votes in the entire term, far fewer than anyone else, and was in the majority in 13 of the 18 most closely decided cases, more often than any other justice.").

353. See TUSHNET, *supra* note 116, at 54 (discussing Justice O'Connor's fact-specific approach to problems); Greenhouse, *supra* note 352, at A1 ("[T]he most consequential debate on the court today may be not so much over first principles, but over how far to carry those principles.").

*Garrett*³⁵⁴ and *Hibbs*³⁵⁵ is more than a little difficult. Similarly, Justice O'Connor voted in the majority in *Bowers v. Hardwick*,³⁵⁶ but recently voted contrary to the *Bowers* result (albeit on equal protection grounds) in *Lawrence v. Texas*.³⁵⁷ One suspects something else may be afoot, and Justice O'Connor herself has provided a suggestion of what it is: "[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions."³⁵⁸

The same tension found in normative scholarship regarding constraints imposed by the other branches also surfaces with regard to the influence of public opinion upon the judiciary. Normative theory tends to see judicial review as a constraint on popular opinion, for better or for worse. On the one hand, judicial review has long been applauded as a desirable check upon the passing passions of popular will.³⁵⁹ On the other hand, another strain of normative scholarship sees judicial supremacy over constitutional meaning as threatening the very essence of democracy itself—popular rule. This latter strain has been somewhat submerged in the last several decades, but recent years have seen a surge in theories of "popular constitutionalism."³⁶⁰

354. 531 U.S. 356 (2001) (holding that suits for money damages under the Americans with Disabilities Act are constitutionally barred by states' Eleventh Amendment immunity).

355. 538 U.S. 721 (2003) (holding that suits for money damages under the Family and Medical Leave Act did not violate states' Eleventh Amendment immunity).

356. 478 U.S. 186 (1986) (upholding as constitutional a Georgia statute that criminalized sodomy).

357. 539 U.S. 558 (2003) (striking down as unconstitutional a Texas statute that criminalized sodomy).

358. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 166 (2003); see also Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, CT. REV., Fall 1999, at 10, 13 ("We don't have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust."); *supra* note 351 (discussing Justice Kennedy's reactions to public opinion).

359. Different strands of thought put this differently. Some say independent judges stand to protect minorities against majority will. See *supra* notes 54–56. Others suggest that judicial review constitutes an appeal from the people drunk to the people sober. Mark V. Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. PA. L. REV. 1357, 1370 (1991) ("John Drunk to John Sober."). Still others believe judicial review serves to separate out fundamental values or constitutional meaning from the preferences of ordinary politics. See 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–33 (1991) (extolling two-track democracy, in which judicial review serves to separate constitutional meaning from ordinary politics); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 58 (1998) ("This is the single most important function of a constitution—to limit present preferences in light of deeper commitments." (citations omitted)).

360. See, e.g., KRAMER, *supra* note 38; Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281 (2002); Post & Siegel, *supra* note 61.

For positive scholars, the whole debate is overplayed; they believe that constitutional law typically reflects popular values, albeit at some ill-understood remove.³⁶¹ Although the mechanisms operating here are not altogether clear, the notion is that popular will might operate as a constraint on judicial decisionmaking, and not vice versa. Methodological work on the relationship between popular opinion and judicial review is somewhat trickier than elsewhere, and the theory underlying it is itself of rougher design. Yet many positive scholars see some connection between the popular will and the work of ostensibly independent judges.

1. *Judicial Decisions and Popular Opinion.*—Typically, empiricism follows theory in positive scholarship. When it comes to the influence of public opinion, however, much work begins with the extremely important empirical observation that there is a correlation between public opinion and judicial outcomes.³⁶² Stated more aggressively, some positive scholars believe that, over time, many important decisions of the Supreme Court are consistent with public opinion.³⁶³ When there is divergence, judicial views ultimately tend to come into line.³⁶⁴ This proposition has been tested by comparing public opinion polls with judicial outcomes³⁶⁵ and by comparing

361. EPSTEIN & KNIGHT, *supra* note 95, at 157 (“Because they operate within the greater social and political context of the society as a whole, the justices must also attend to those informal rules that reflect dominant societal beliefs about the rule of law in general and the role of the Supreme Court in particular—the norms of legitimacy.”).

362. See, e.g., William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 90, 96 (1993) (noting “the close correspondence between the trends in the Supreme Court decisions and the liberalism of the public mood across most of the period” and ultimately concluding that public opinion and Supreme Court decisions influence each other in an iterative process).

363. See *infra* note 365. Congruence could be a result of the Supreme Court influencing public opinions, but here there is greater skepticism. If anything, studies tend to show the opposite: Supreme Court decisions harden opinion in the opposite directions. See Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989) (finding that *Roe v. Wade* tended to reinforce the views of those who opposed discretionary abortions); Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1182 (2001) (“Supreme Court rulings often produce unpredictable backlash effects.”).

364. See DAVID G. BARNUM, *THE SUPREME COURT AND AMERICAN DEMOCRACY* 287–99 (1993) (studying the trend line of public opinion across the issues of free speech, race relations, contraception, and criminal justice; comparing them to Supreme Court decisions; and concluding that the decisions closely followed the public opinion trend line in each area).

365. See JONATHAN D. CASPER, *THE POLITICS OF CIVIL LIBERTIES* (1972) (comparing the Supreme Court’s civil rights, national security, and criminal rights decisions with public opinion polls); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 2 (1989) (examining nearly 150 nationwide polls and corresponding Court decisions since the mid-1930s); ROBERT WEISSBERG, *PUBLIC OPINION AND POPULAR GOVERNMENT* (1976) (comparing the Court’s rulings and opinion polls in school integration, death penalty, and school prayer cases); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 654–64 (1985) (focusing on the relationship between the policy preferences of the Supreme Court and those of the American public on selected issues of public policy, such as birth

shifts in public mood with trends in Supreme Court decisionmaking.³⁶⁶ No one thinks the methodology is perfect,³⁶⁷ but the evidence is highly suggestive: the Court does not “exclusively or persistently act in opposition to public opinion.”³⁶⁸ There are exceptions—First Amendment cases perhaps being a notable one—but they are just that.³⁶⁹

According to positive theory, the Justices certainly have ample incentive to pay attention to public reception of their work. Although the public lacks formal authority to prevent the implementation of constitutional guarantees, they certainly can stand in the way. The massive resistance to *Brown v. Board of Education*³⁷⁰ or the more low-level evasion of bans on school prayer³⁷¹ come to mind. In addition, the Justices may feel they stand trial in

control, interracial marriage, the role of women, and abortion, in the post-New Deal period); Beverly B. Cook, *Public Opinion and Federal Judicial Policy*, 21 AM. J. POL. SCI. 567 (1977) (examining the relationship between public opinion on the Vietnam War and federal judges' sentencing decisions between 1967 and 1975); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004) (“By analyzing Supreme Court liberalism through the lens of reversals alone, we show that the impact of public mood is far greater than previously documented.”); Francine Sanders Romero, *The Supreme Court and the Protection of Minority Rights: An Empirical Examination of Racial Discrimination Cases*, 34 LAW & SOC'Y REV. 291 (2000) (exploring the impact of public opinion on racial discrimination cases from 1954–1996).

366. See Mishler & Sheehan, *supra* note 362, at 96 (finding that “a reciprocal relationship appears to have existed between the ideology of the public mood in the United States and the broad ideological tenor of Supreme Court decisions”); Stimson et al., *supra* note 302, at 555 (“Court decisions do, in fact, vary in accord with current public preferences. Every point in PUBLIC OPINION shift produces a (significant) movement of .30 points in Court policy.”).

367. See Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 313 (John B. Gates & Charles A. Johnson eds., 1990) for a review of the literature. Caldeira, writing fifteen years ago, was somewhat tentative in his conclusions regarding the relationship between popular opinion and judicial outcomes because the methodological problems are difficult. See *id.* at 316 (“Does the Supreme Court represent public opinion? The answer, I think, is that we do not yet have sufficient evidence on which we can place much confidence. The extant studies, although intriguing and suggestive, lack the conceptualization and measurement to permit us to make a well-considered judgment on this issue.”).

368. PERETTI, *supra* note 100, at 177; see also *id.* at 101–11 (reviewing the literature).

369. See Dahl, *supra* note 293, at 286–90 (discussing times that the Court frustrated the will of the lawmaking majority); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 634–49, 604 n.135 (1993) (conceding that “[i]n the First Amendment context . . . the Court most unabashedly seems to take on the majority in the name of minority rights”).

370. 347 U.S. 483 (1954). See Klarman, *supra* note 55, at 22 n.96, for a discussion of the massive southern resistance.

371. See KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS FROM COURT POLICY TO LOCAL PRACTICE 31–33 (1971) (reporting on school district rates of noncompliance with school prayer decisions); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 78 (1984) (“Few decisions of the Supreme Court have generated greater political hostility and popular noncompliance than those proscribing prayer and Bible reading in the public schools . . .” (citations omitted)).

the court of public opinion.³⁷² If not personal reputation, then the Justices might care about the institutional legitimacy of the Court.³⁷³

But public opinion's greatest influence on the Supreme Court may be indirect, wielded against the officials who, in turn, hold power over the Court.³⁷⁴ That influence could work to stir trouble against the Court or to protect it,³⁷⁵ though it is probably the latter that is most significant. "The fear of . . . a public backlash can be a forceful inducement to implement judicial decisions faithfully."³⁷⁶ History has seen popular influence work in both directions. Attacks on the Court in the late nineteenth and early twentieth century came from Populist politicians.³⁷⁷ And popular sentiment for the independent judiciary likely saved it in the face of the politicians' attack in 1937.³⁷⁸

372. See *supra* note 358; see also TUSHNET, *supra* note 116, at 176 (discussing a law clerk's description of the way Justice Kennedy would "constantly refer to how it's going to be perceived, how the papers are going to do it, how it's going to look").

373. See TUSHNET, *supra* note 116, at 178 (explaining Justice Kennedy's awareness that "if judges went too far, the political system would slap them down"); Posner, *supra* note 298, at 30 ("When the Court is wrong, its decision will create an outcry. Its decision will be ignored or challenged, and if it is challenged, the Court will eventually backtrack or risk losing its legitimacy.").

374. See NAGEL, *supra* note 331, at 272 ("One can readily hypothesize . . . that when strong, prestigious groups are on the side of Congress, the attack is strengthened, and when such groups defend the Supreme Court, the attack is weakened."); J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN ix (2003) ("If voters like judicial independence, the politicians who survive electoral challenges will tend to be those who supply it; if voters prefer that their judges respond to the popular will, the politicians who survive will be those who supply that responsiveness instead."); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 113 (1996) ("[O]ur study shows that presidents (and, we suspect, Congress) must act strategically when it comes to the Court. If they do not, as Jefferson knew, they can face severe political penalties.").

375. Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379, 381 (2004) (modeling the impact of public opinion on judicial review and demonstrating that "strong public opposition to government interference with judicial power, judicial rubber-stamping of government action, and apparent government deferral of politically difficult issues to courts can all arise as equilibria within the same simple framework").

376. GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 20 (2005); accord *id.* at 14 ("[T]he principal inducement for governing majorities to comply with high court decisions is the threat of a loss of public support for elected officials who refuse to be bound by them."); see also Whittington, *supra* note 295, at 460 ("An attack on the courts may provoke a public backlash against those who seek to subvert a cherished national institution . . .").

377. See, e.g., *14,000 Pack Garden, Cheer La Follette in Attack on Court*, N.Y. TIMES, Sept. 19, 1924, at A1. These attacks likely failed because of a lack of sufficient popular support. See Rosenberg, *supra* note 55, at 384 ("The defeat of Bryan demonstrated to Congress and Court alike that opposition to the Court's solicitous approach to business did not have strong support among voters."); *id.* at 384-85 (discussing how the 1924 defeat of La Follette signaled low support for the "Court-curbing plan").

378. See David Adamany, *The Supreme Court's Role in Critical Elections*, in REALIGNMENT IN AMERICAN POLITICS 229, 244 (Bruce A. Campbell & Richard J. Trilling eds., 1980); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-1960, at 119 (1973) ("[A] sense of the fitness of things was outraged when Franklin Roosevelt proposed to lay hands on an economically conservative Court in 1937 . . ."); Gregory A. Caldeira, *Public Opinion and the U.S. Supreme*

History confirms the tug that public opinion has on the direction of constitutional law. The most famous example might be events subsequent to the defeat of Roosevelt's court-packing plan. The plan failed, but the Supreme Court bench had many new occupants, and constitutional law took a turn more congenial with popular wishes.³⁷⁹ There was a similar correction in the aftermath of late 1950s attacks on the Court,³⁸⁰ and the same again at the end of the 1960s when Richard Nixon made a challenge to the Court's activism a focal point of his campaign for the presidency.³⁸¹

Some puzzle over the mechanism by which the Justices remain in touch with popular opinion, but in a sense it may be easier to respond to public opinion than it is to play the separation-of-powers game. The Justices live on this planet and typically are aware of what happens on it. They read newspapers, watch television, and come into contact with popular opinion regularly.³⁸² To the extent that this is not enough, evidence indicates that the number of amicus briefs in constitutional cases is on the rise.³⁸³ Certainly, when the gusts may affect them, it should not be all that difficult to discern which way the prevailing winds are blowing.

2. *The Leash of "Diffuse Support."*—One might reasonably ask why public opinion deserves analysis separate and apart from the models that examine interbranch interaction. Principal-agent theory posits the rulers as servants of the ruled. At least in a well-functioning political market, there ought not to be huge slack (though slack there is) between what the governed want and what they receive.

Court: FDR's Court-Packing Plan, 81 AM. POL. SCI. REV. 1139, 1146–47 (1987) (discussing how the actions of the Court led to the rise and fall of popular support for Roosevelt's Court-packing plan).

379. See *supra* notes 46–48 and accompanying text.

380. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 407–08 (2000); PRITCHETT, *supra* note 378, at 121 (describing the Court backing down in the face of popular controversy); Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 6 (Mark Tushnet ed., 1993) (same).

381. See Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 3, 13 (1992) (finding that the conservative shift of the Burger Court was due in part to changing issues and positions taken by the Justices); Friedman, *supra* note 52, at 215 (noting the end of the Warren Court era that followed Nixon's election).

382. One commentator noted:

Justices themselves have some knowledge of what appears in the law reviews, they have a great deal of knowledge of what appears in the newspapers and in the popular press in general, they themselves travel in the same social circles in which the country's intellectual elite travels, and they also travel in the same professional circles in which legal academics often travel.

Schauer, *supra* note 70, at 628.

383. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000) (describing a rise in amicus filings over time). Kearney and Merrill note that "not only are more cases attracting amicus filings, but it is clear that the intensity of participation—whether measured in terms of the mean or median numbers of briefs per case—is also rising." *Id.* at 754.

Positive theory's "diffuse support" hypothesis, however, suggests that the interaction between public officials and popular opinion might alter the constraints that the judiciary faces. The idea of "diffuse support"—which finds root in seminal work by David Easton—is that public institutions maintain a reservoir of popular favor even among those who dislike immediate decisions.³⁸⁴ If diffuse support operates differently for officials than for members of the public, this could affect how constrained the judiciary is. The question then is whether there is this diffuse support among the public.

Scholars—most notably Greg Caldeira and James Gibson—argue that the Supreme Court enjoys a fair amount of diffuse support.³⁸⁵ Testing diffuse support is difficult because it involves teasing out deeper feelings about judicial review and the Court as an institution. Problematic though they may be, studies confirm that diffuse support exists—that people will support the maintenance of an independent judiciary even when quite dissatisfied with present outcomes.³⁸⁶ No better crucible for testing the proposition may have existed than the decision in *Bush v. Gore*,³⁸⁷ studies following the decision confirm the theory.³⁸⁸

Caldeira and Gibson also argue that diffuse support is deeper among the general public than among officials.³⁸⁹ It is remarkable how little we know

384. See D.A. EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965) (conceptualizing diffuse support as "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants").

385. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 640 (1992) (examining diffuse support for the Supreme Court and finding that "a majority . . . believe people should be willing to do everything they can to defeat a proposal to abolish the Supreme Court").

386. See Caldeira & Gibson, *supra* note 385, at 658 ("[T]he mass public does not seem to condition its basic loyalty toward the Court as an institution upon the satisfaction of demands for particular policies or ideological positions. . . . Diffuse support for the Supreme Court among the mass public is, rather, associated with basic facets of individuals such as political values."); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97 (2000) (finding that an individual's support for the Court after a controversial ruling is strongly influenced by that individual's prior perception of the Court; prior attitudes account for 77% of variation in attitudes toward the Court, supporting the idea that diffuse support tempers popular interpretations of judicial decisions).

387. 531 U.S. 98 (2000).

388. See, e.g., James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 555 (2003), available at <http://www.artsci.wustl.edu/~polisci/gibson/bjps2003.pdf> ("[T]he ruling in *Bush v. Gore* did not greatly undermine the legitimacy of the Court . . ."); Herbert Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 38 (2001) ("The Supreme Court's action was dramatic, subject to unprecedented media coverage, controversial, and to many very surprising Nonetheless, the effects [on public opinion] are modest.").

389. See Caldeira, *supra* note 367, at 324 ("Opinion leaders, unlike members of the mass public, apparently condition commitment to the Court as an institution upon agreement with judicial policies.").

about what precisely the public wants from the judiciary,³⁹⁰ but elected officials' incentives may well cause them to react differently to Court decisions than the public at large. Elected officials succeed in the long run by seeing their policies adopted successfully.³⁹¹ Court decisions that frustrate policy are thus likely to have a more immediate impact on officials' interests. Whether this is the reason or not, Caldeira and Gibson report that "for many [opinion leaders], *diffuse* support behaves as if it were *specific* support."³⁹²

The critical question thus becomes how deep the Court's diffuse support among the general public is; for if theory holds, this is the leash on which the Court operates. Actually, a bungee cord might be a better analogy; for, in operation, the diffuse support hypothesis suggests that the judiciary can stray a certain distance from public opinion but that ultimately it will be snapped back into line.³⁹³ Testing the length and flexibility of the cord is hard to do, however. It may be that there is greater tolerance for judicial deviation in some directions, such as with regard to the First Amendment.³⁹⁴

Although the Court's degree of freedom of movement around public opinion may not be certain, positive scholars are fairly confident that one major determinant is information. The dynamics here are complex, but some generalities may be possible. Both negative and positive reactions to the Court influence public opinion, but negative reactions seem to be more intense and have a shorter half-life.³⁹⁵ Perhaps it is for this reason that the

390. There is disagreement about the extent to which the public's perception of a neutral Court is fundamental to the Court's legitimacy. Compare Post, *supra* note 61, at 107 (suggesting that the public will abandon the Court if it "comes to believe that the Court is using its decisions as a screen to advance a nonlegal, cultural agenda"), and Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: the United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 778 (1994) (using empirical analysis to probe the basis of the Court's legitimacy and finding that "perceptions of Court neutrality primarily shape judgments of legitimacy and obligation"), with LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8–9 (2001) (arguing that people will not be upset by a nonneutral Court, and, in fact, what he calls "an 'unsettled constitution' helps build a community founded on consent by enticing losers into a continuing conversation"). Work by Hibbing and Theiss-Morse indicates that what the public might like about the Court is that it can be trusted to make decisions that do not affect their own material well being. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 158 (2002) ("The Supreme Court is relatively popular . . . mostly because their decisions are not perceived to affect their own material well-being.").

391. Cf. *supra* note 389.

392. Caldeira & Gibson, *supra* note 385, at 656.

393. See Posner, Possibility, *supra* note 15, at 30 ("When the Court is wrong, its decision will create an outcry. Its decision will be ignored or challenged, and if it is challenged, the Court will eventually backtrack or risk losing its legitimacy.").

394. See BARNUM, *supra* note 364, at 289 ("[T]he distinct trend of public opinion during that past forty years has been in the direction of greater support for the free speech rights of at least selected unpopular groups.").

395. See Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 774 (2000) ("[A]ggregate Court support responds to public evaluations of Court behavior, but for various reasons, the impact of temporary shocks is relatively short-lived."); Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court*

less people hear about the Court, the better for it.³⁹⁶ As time passes, people develop a store of good feelings about the Supreme Court, reflected in the Court's relatively strong performance in public mood indicators.³⁹⁷ Commentators who have studied public opinion and the Court regularly advise it to keep a low profile.³⁹⁸

Because negative information, especially a steady flow of it, can decrease diffuse support, public support for the judiciary is subject to manipulation. In banning cameras from its chamber and announcing most of its controversial decisions each term in one fell swoop, the Court may (even if unintentionally) be protecting its reputation and support. But vulnerability to information places the Court somewhat at the mercy of policy entrepreneurs who wish to wield influence over it. By publicizing the Court's actions, one might muster challenges to judicial authority. This only confirms what should be the prominence of the President in the separation-of-powers theory. To give but one example, the first flag burning decision that created such a stir largely had dropped from public notice, until then President Bush made much of it, reviving the issue and anti-Court feeling.³⁹⁹

3. *Normative Implications.*—The normative implications of all this flow right to the heart of normative theory about judicial review. One might be tentative in drawing conclusions simply because the positive project here requires greater attention. Still, the connection between positive and normative theory is not difficult to see.

At the least, the connection between popular support and judicial behavior has something to say about the omnipresent countermajoritarian problem. If diffuse support suggests the public approves of what the Court does—or at least approves of the practice of judicial review so long as it is

Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court, 51 POL. RES. Q. 633, 652 (1998) (“Respondents who agreed with both the abortion and the flag-burning decisions gave the Court minimal credit . . . , but people who disagreed with one or both edicts reacted more strongly against the Court in response.”).

396. Studies typically show that the Court's salience is low in the public mind. See PERETTI, *supra* note 100, at 167 (“Clearly the Supreme Court lacks salience for most Americans. Its members are quite unfamiliar to them and, especially significant, ‘many . . . Supreme Court decisions pass by virtually unnoticed by most Americans.’”); Caldeira, *supra* note 367, at 303 (describing the Court's “lack of saliency in all but a few situations”).

397. See HIBBING & THEISS-MORSE, *supra* note 390, at 99 (reporting the results of a 1998 poll showing that 68% of those polled approved of the Supreme Court and further noting that “the Supreme Court has consistently been the most favored institution of government”); MARSHALL, *supra* note 365, at 140–41 (citing polling figures that show the Court to be the most popular of the three branches of the federal government over time).

398. See PERETTI, *supra* note 100, at 181–82 (arguing that the Court will find itself in trouble if it persistently decides issues “out of sync with dominant public opinion”); Caldeira, *supra* note 367, at 325 (“So long as the justices maintain a low profile and policies reinforce expectations, basic political values will shape attitudes toward the Supreme Court.”).

399. See John Dillin, *Bush's Call Sparks Ardent Debate*, CHRISTIAN SCI. MONITOR, July 6, 1989, at 8 (reporting that the flag-burning debate had “exploded like Fourth of July fireworks” in the wake of “Bush's campaign for a constitutional amendment to protect the flag”).

exercised within certain limits—one might question: what is the problem precisely? Others might demur, taking the theoretical position that even if the people decide to be ruled by a monarch, there still is a problem of democratic government.⁴⁰⁰ That may be, but it is a notably different problem than the one typically presented, and it equally calls into question numerous other aspects of modern administrative governance (not to speak of, say, lame duck presidencies).⁴⁰¹

But normative issues run much deeper than this tired academic debate to the very heart of what it is we can expect from judicial review. As indicated earlier, some see a threat in the practice, others a hope. Ultimately, though, the extent to which either is the case is an empirical question. Normative theory recognizes this, but only rarely. If public opinion is a constraint on judicial behavior, then the work of positive scholars in this area starts to provide a window on exactly what it is we can hope for—or fear from—judicial review. This could—and should—be the beginning of a realistic theory of judicial review.⁴⁰²

IV. Integrating Law and Politics in Constitutional Theory

This final Part is about possibility. Positive scholarship unquestionably problematizes normative constitutional theory about judicial review in important respects. At the same time, it signals new directions and highlights difficult questions that, at present, receive insufficient attention from normative scholars. This Part does three things. First, it synthesizes the body of positive scholarship in order to sharpen its challenge to existing theories of judicial review, while making clear the boundaries of positive claims. Second, it discusses what any useful theory of judicial review must look like, in light of positive lessons. Finally, it explains how positive scholarship opens up possibilities for constitutional theory well beyond the question of judicial review itself. The point of this Part is not to offer an alternative theory of judicial review but to set out the range of possibilities for normative theory in light of positive scholarship on judicial behavior. There are theories of judicial review that take account of the positive literature,⁴⁰³ but one of the principal messages here is that developing such broad-gauge theories may not be the best use of normative energy. Rather, positive scholarship highlights many specific aspects of the actual practice of

400. See Kevin L. Yingling, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J.L. & POL. 81 (1999), for an extended discussion of these competing positions.

401. See Friedman, *supra* note 52, at 162–67 (observing that if an “interest in democratic theory” was what actually drove “theory about the countermajoritarian difficulty,” it would be evidenced by scholarly writing on the democratic shortcomings in other areas of governance).

402. For work pursuing this question, see Friedman, *supra* note 288, and Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

403. See *supra* note 106; see also Friedman, *supra* note 288.

judicial review and constitutional judging that are more deserving of normative attention.

A. What Positive Scholarship Does and Does Not Claim

Positive scholarship calls into question critical elements of a story about judicial review that has been told for a long time. In most normative theory, law and politics are to be kept separate. This is accomplished by insisting on judicial independence from politics and by offering law as the constraint on judicial behavior.

If positive scholarship is right, however, much of what is written in theory does not hold in reality. Instead, restraint works in much the opposite direction. Even though judges might take law seriously, it does not keep them from voting their own values, at least in some critical cases. When judges face constraint, it often comes in the form of pressure from other institutions. The decisions of courts are influenced by the institutional structure in which they are embedded. Law and politics are thus integrated, albeit often in complicated and as yet incompletely understood ways.

The challenge that positive scholarship poses to normative theory is serious enough that its claims must be carefully qualified. To begin, positive theory is in many ways still in its infancy. The strategic “revolution” is less than a decade old.⁴⁰⁴ The rough contours of positive theory likely are correct; the theory makes plain sense and empiricism—even rough empiricism—bears out much of what theory suggests. But later work likely will show great refinement of basic positive claims.

Second, it is extremely important to emphasize that positive theory need not—and typically does not—deny the influence of law; it only raises questions about how much law serves to constrain judges in the strict sense demanded by some normative theory. To be sure, occasional positive theorists are cavalier about the role played by law,⁴⁰⁵ but to the extent this is true, that is their failing. Many others recognize the prominence of doctrine and of legal discourse—the significant hand law takes in shaping decisions.⁴⁰⁶ Legal commands undoubtedly influence the decision of cases. Law plays a role, even if it cannot play the particular constraining role that normative theory requires.

Third, for this reason positive scholarship also need say nothing about how judges and lawyers should do their job on an everyday basis. It is perfectly appropriate that lawyers will and should continue to argue cases in legal terms, and judges should continue to resolve them the same way. If anything, positive theory invigorates debates about appropriate interpretive

404. See, e.g., Epstein & Knight, *supra* note 300, at 625 n.1 (describing the rapid increase in strategic scholarship after 1994).

405. See *supra* note 291 (quoting exaggerated claims about law’s place in judicial decisionmaking).

406. See *supra* notes 295–99 and accompanying text.

methodology, if only because the debates need not be shaped by the untenable claim that any particular theory constrains judges from imposing their own values. Theories must now stand on some other bottom.

Finally, and in part a function of the early state of the work, positive theory leaves unspecified the relative strength of the various influences on judges. Positive scholarship suggests that judges are not constrained in some ways normative theory believes essential and that judges are constrained in ways normative theory suggests they should not be. But positive theory is a long way from defining with precision the spheres of autonomy and constraint, particularly given how contextual—by case, by court, by judge—these are likely to be.

Despite these caveats, positive scholarship poses a challenge to normative theory. There are three moving pieces here: law, attitudes, and politics. Unless law constrains judges sufficiently in all cases—and it appears pretty clear this cannot be—then judicial attitudes are deciding cases or judicial decisions are limited by the political and institutional forces described here. Yet there is very little normative theory about judicial review that builds attitudinal freedom or political constraint into the model. The challenge, then, is to develop an understanding of judicial review that builds upon and incorporates positive understandings of how judges behave. The old ways won't do anymore.

B. New Theories of Judicial Review

In considering what new understandings of judicial review might look like, it is useful to specify the demands positive scholarship places on normative theory. Attention to positive scholarship does not deny an important role for thinking in normative terms, and perhaps not even in ideal ones. Indeed, a central point here, discussed below, is that positive scholarship can be liberating for normative theory. But the normative endeavor must play by some rules as well. Especially when it specifies the operation of institutions, it must deal in the realm of the possible. The immutable realities of the world are the parameters within which normative theory must operate. Ought does imply can.

It may be useful to distinguish between theorizing about the substantive content of constitutional meaning, particularly regarding constitutional rights, and theorizing about the process of judicial review. Scholars apparently believe that it is useful to discuss judicially enforced rights in a manner that is abstract from their implementation.⁴⁰⁷ The theory seems to be that, with

407. As Larry Sager explains, "It is part of the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues." Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (citation omitted); see also DWORKIN, *supra* note 16, at 380 (using the example of Justice Hercules, who is

the ideal in mind, we can at least struggle to reach it. Daryl Levinson argues that even in the realm of rights—particularly judicially enforced ones—the separation of the ideal from the practical may be an exercise not worth the candle. If the constraints on judicial implementation will always be with us, then the true nature of the right must take that into account.⁴⁰⁸

Whatever the case when theorizing about substantive rights, it likely makes even less sense to discuss the institution of judicial review in “ideal” terms, or at least the ideal terms typically offered by normative theorists.⁴⁰⁹ It is inappropriate to insist that judges be constrained by law and not impose their own values, absent evidence that law has the capacity to afford the constraint demanded. Similarly, it is odd (to say the least) to demand that judges be entirely independent of politics when the system itself so plainly makes the judiciary dependent upon majoritarian institutions.⁴¹⁰ It might be feasible to design things differently, but the federal judiciary is not likely to receive an overhaul of this magnitude anytime soon. (Nor, for what it’s worth, does making the judiciary elective—the one obvious change—typically earn much normative praise.) The question is whether we condemn over two centuries of judging, or whether we confront the possibility that the stated ideal has missed its own mark.⁴¹¹

What is needed is a realistic understanding of judicial review that takes into account the data points about which we can be reasonably certain and that is fairly comprehensive in its acknowledgement of all the forces that play upon constitutional judging. Specifying what this means is relatively straightforward in light of the extended discussion in Part III. Theories of judicial review must accept and find a role for a certain amount of “value-voting” because that is what is going to happen. Such theories must acknowledge that constitutional law is a product of inevitable compromise; absolutes are unlikely to hold sway here. This is certainly true in terms of collegial decisionmaking by the Supreme Court itself, but it is true in many other ways as well. Constitutional law must be understood as a product of bottom-up influence (from the lower courts) and external pressure (from the

“free to concentrate on the issues of principle” and does not share the practical concerns of actual justices); Sager, *supra*, at 1213 (noting the “difference between the meaning of a normative precept and the application of that precept through the modeling or a theory of structure of analysis”).

408. See, e.g., Levinson, *Rights Essentialism*, *supra* note 13, at 900 (“[C]onstitutional rights so routinely include prophylactic components that attempting to distinguish the ‘real’ right from its ‘remedial’ ingredients is both hopeless and pointless.”); *id.* at 926 (“Rights are designed to work in the real world, which means that their shape will always be influenced by pragmatic concerns about implementation and enforcement.”).

409. See Vermeule, *Interpretive Theory*, *supra* note 13, at 581–82 (discussing the difficulty with pursuing ideal interpretive theory rather than taking institutional features into account).

410. See *supra* notes 18–21 and accompanying text (discussing the system of checks and balances).

411. See Posner, *Possibility*, *supra* note 15, at 37–38 (“The Supreme Court’s role is, in the end, a historical accident, and so it is no surprise that its role is not what it would be in an ideal system constructed by academics.”).

other branches). Constitutional law must be, as Richard Fallon so forcefully reminds us, subject to implementation.⁴¹² And there must be recognition that, subject to limited exceptions, the run of constitutional decisions—at least salient ones—typically must fall somewhere within the range of public tolerance.

That it is possible to develop theories of judicial review cognizant of the political milieu in which it operates is evident from the fact that, of late, several scholars have begun to do so, offering an understanding of the institution of judicial review that acknowledges some or all of the ways that politics bears upon it.⁴¹³ The theories have a tentative air to them—a healthy thing given that we are still gaining a positive understanding of judicial review. But all understand judicial review as entrenched in the world of ordinary democratic politics, yet still apart from it.

The question then becomes: Is there a normatively appealing story that can be told about the practice as it actually exists? Is there some value added in having a judiciary, even if it is constrained in the ways described here? Countless pages have been written by normative scholars regarding a system that bears faint comparison to the one that actually operates in this country. It is time to assess the one we do enjoy and see how it stands up.

Answering the question tentatively, there may be a role for judicial review as it actually operates and an attractive one at that. Indeed, it might be surprising if it were otherwise. The system we have has endured a long time and is being emulated by many others.⁴¹⁴ It is unlikely that judicial review would find wide adoption were it not attractive on pragmatic grounds.

Judicial review can be understood as attractive precisely because it is embedded in politics, but is not quite of it. Politics and law are not separate, they are symbiotic. It would be remarkable to believe judicial review could operate entirely independent of politics or would be tolerated as such. Nor is it clear that this would be desirable given social and constitutional commitments to accountability and checks and balances. The practice of judicial review is valuable in that it serves as one more counterweight, like many others in our constitutional system. Moreover, because judicial decisions about constitutional law are sticky—they cannot be overturned at

412. FALLON, *supra* note 3, at 4–5.

413. See, e.g., *id.* at 4–5; KRAMER, *supra* note 38; PERETTI, *supra* note 100; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Balkin & Levinson, *supra* note 60, at 1066–83; Friedman, *supra* note 288, at 1282–84; Molot, *supra* note 56; Post, *supra* note 61, at 8; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 350–51 (2001).

414. A. E. Dick Howard, *Toward Constitutional Democracy: An American Perspective*, 19 J.L. & POL. 285, 288 (2003) (listing the Founders' concept of judicial review as one of the core principles of modern constitutionalism not only in the United States but also in many other countries).

the drop of a hat⁴¹⁵—judicial review serves to channel and foster societal debate about constitutional meaning.⁴¹⁶ Relatively insulated judges may go off on their own, but, in the face of extended debate, Supreme Court decisions and public opinion ultimately come into some rough accommodation with one another. It could not be otherwise. The system is dialogic and self-enforcing.⁴¹⁷ It creates continual exchange between constitutional meaning and popular opinion, though systemically and at a remove.

This is a very different story than the one that has long been told about judicial review, but perhaps an equally attractive one. It does not cast the judges as saviors, charged with standing against popular will to enforce our fundamental values. At the same time, neither are judges some strange antidemocratic force, wielding power over us without hope of control.⁴¹⁸ Judicial review is simply a practice that permits and yet focuses popular discussion over the meaning of the Constitution, assisting us as a polity to reach decisions consistent with our deepest values.⁴¹⁹

This is, it is to be emphasized, just one reading of the data points positive theory provides, one assembly of the puzzle. There is far more to be theorized and understood. But what this sketch shows is that a positive story can be told about judicial review, in both senses of the word. Warts and all, this is a story about the system of judicial review that actually exists.

C. *The Warp and Woof*

Of course, what all this suggests is that broad-gauge thinking about the nature and function of judicial review may be one of the least productive things normative scholars can do. Why is this? Because the system is self-enforcing, and so much of it is determined by actual practice, broad

415. See SAGER, *supra* note 1, at 8 (“It was anticipated that the Constitution would be hard to amend, and in practice it has been remarkably so.”); Posner, Possibility, *supra* note 15, at 1 (“The Constitution evolves, but slowly and discontinuously, because conventions, by virtue of the fact that they coordinate behavior, are ‘sticky.’”).

416. See Friedman, *supra* note 288, at 1290–91 (describing the national discussion that results when the Supreme Court makes significant constitutional decisions).

417. See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245 (1997) (arguing that “democratic stability depends on a self-enforcing equilibrium” and that “it must be in the interests of political officials to respect democracy’s limits on their behavior”); Barry R. Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century (2003) (unpublished manuscript), available at http://lawweb.usc.edu/csfp/conferences/modeling_const_02/documents/weingast.pdf (applying a theory of self-enforcing constitutions to the early United States, and arguing that, but for a gap created by various crises over slavery, the U.S. Constitution was self-enforcing by 1800 and has continued to be so).

418. Indeed, this positive analysis shows how the central puzzle of much constitutional theory presents a false choice. Thus, Lawrence Sager asks: “Why are we prepared to concede decisions about fundamental political justice to a combination of ancient constitution-making majorities and contemporary courts?” SAGER, *supra* note 1, at 3. Answer: we aren’t.

419. See Friedman, *supra* note 288; Friedman & Smith, *supra* note 359.

normative theory about judicial review may have little to contribute. Positive theory frees up constitutional scholars to devote their normative energies to more productive endeavors.

The first thing liberated normative scholars might do is simply be normative, in a substantive way, without worrying about why it is that judges should feel free to implement scholars' vision of a just society. In a sense, normative scholars can and should see themselves as advocates for constitutional change, as just one more social force acting on judges and the course of the law.⁴²⁰ That scholars are reluctant to do so is itself an artifact of the historical forces that demanded the separation of law and politics. The emergence of this concern in the context of legal scholarship was apparent during the Warren Court era when so much judicially initiated constitutional change gave rise to an anxiety about the role of constitutional law and constitutional judging in a democracy.⁴²¹ Still, the veneer of neutrality in constitutional scholarship and constant reference to the countermajoritarian problem simply distracts from a perfectly legitimate project of constitutional advocacy.

Moreover, if anything is clear, it must be that judges may not be the best audience for such normative scholarship. If judges are constrained by other institutions and public opinion, maybe the better audience for normative scholarship is public opinion itself. The fact that so much of normative scholarship is directed at the constitutional judge simply reflects, again, the unrealistic need to separate law entirely from politics. Yet Justice O'Connor, who has been quite candid in her recognition of the relationship between public opinion and legal change, is hardly a flaming radical. Scholars ought to take her words to heart. If they have a constitutional agenda, they ought to advance it to a broader audience. Popular constitutionalists eagerly urge the people to take back the Constitution, but the people have always possessed it.⁴²² Normative scholars ought to speak prescription to power.

In the realm of legal practice, positive scholarship opens the door to many normative questions that do not receive the attention they deserve. The questions are more fine-grained than "how do we justify constitutional judging," but the fields are more fertile for plowing. At present, normative scholarship engages in assumptions about lower court behavior rather than thinking about the perplexing problem of how lower court judges should behave.⁴²³ Because the judicial hierarchy is not simply top-down and because what happens in the lower courts influences the direction of

420. See Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 935, 952–53 (2001) (suggesting that legal scholars are uniquely well-positioned "to make normative claims about how constitutional cases should be resolved").

421. See Friedman, *supra* note 52.

422. See FRIEDMAN, *supra* note 21 (advancing this argument).

423. See *supra* notes 200–03 and accompanying text.

constitutional law,⁴²⁴ guidance is needed about how lower court judges should exercise the interpretive liberty they enjoy. Similarly, interesting questions obviously exist about the bounds of strategic conduct of members—such as Supreme Court Justices—on collegial courts.⁴²⁵ Beyond the judiciary, the issue of how political actors should, or must, respond to judicial decisions is of enormous consequence. There has been not nearly enough attention given to the prescriptive aspect of compliance.

Positive scholarship also puts many doctrinal rules on the table, things typically taken for granted. As Richard Fallon has explained, much of what we think of as constitutional law is about implementing the decisions of constitutional judges in a world properly fraught with politics.⁴²⁶ Fallon demonstrates that the scope of constitutional remedies, the question of negative and positive rights, and the force of stare decisis can all be understood as pragmatic reactions to the political environment of judicial review.⁴²⁷ Once they are seen in that light, there are plenty of oughts left on the table. For example, if the reluctance to announce positive rights is simply because they are difficult for judges to implement, the ideal question itself is reframed.⁴²⁸ Ought there to be certain positive rights in the Constitution? And can they be managed in a way that implementation becomes possible?

Ironically, attention to the positive aspects of judicial review directs scholars to reinvigorate attention to substantive doctrine. This is an important part of being normative. Doctrine is the messy work of judges seemingly impervious to the higher calling of normative theory, and, in a theory-obsessed world, legal scholars seem to have lost interest.⁴²⁹ But once the close connection between doctrine and implementation is apparent, new ways of thinking about doctrine—the very substance of constitutional law—open up in ways that ought to capture the attention of legal scholars.

424. See *supra* notes 205, 208.

425. See *supra* notes 247–55.

426. See FALLON, *supra* note 3, at 41 (“I believe that the Court’s role in crafting doctrinal tests and especially standards of review is better captured by the term *implementation* than by the term *interpretation*. . . . My central claims involve the multifaceted and largely practical nature of the Supreme Court’s function within a shared project of constitutional implementation.”).

427. See *id.* at 33–34 (“[C]ourts must . . . ask what the main threats to constitutional values are at any particular time, which rules would work more or less effectively to protect those values, and what the empirical effects of alternative rule structures would be.”).

428. See generally SAGER, *supra* note 1, at 8, 79, 149 (arguing that any minimal conception of justice must include the opportunity for individuals to seek material gain).

429. As I have earlier noted,

Many judges think legal academics are not relevant anymore. As they see it, our work is overly abstract and too theorized to be of any use to them. . . . The problem could be that in bygone days legal scholarship was more openly and doctrinally normative. . . . It could be that legal academics feel they cannot be openly and doctrinally prescriptive in the way judges would like. Legal realism has made us skeptical of doctrine. Everyone knows doctrine alone does not decide all cases, or at least all of the hard ones.

Friedman, *supra* note 420, at 953.

Doctrine, it turns out, is a juggling act, balancing normative ideals, practical implementation, the realities of political trends, and the tendency of judges to see things their own way. Designing workable doctrine becomes a whole new challenge.

In sum, positive theory opens up a virtual playground for normative scholars in a field where at least some of the central debates have become stultified. Once the relationship between politics and law is brought into focus, once the idea of sharp separation is rejected, smaller grained boundary lines become suddenly apparent everywhere. All these boundary lines are subject to contest—contest that is part positive but part normative as well. Positive scholarship invigorates the normative project. Rather than ignoring or rejecting positive scholarship, normative scholars *ought to* grapple with it.