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## BOOK REVIEW

### THE POSITIVE FOUNDATIONS OF FORMALISM: FALSE NECESSITY AND AMERICAN LEGAL REALISM

THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE. By Lee Epstein, William M. Landes & Richard A. Posner. Cambridge, Mass.: Harvard University Press. 2013. Pp. 422. \$49.95.

*Reviewed by Lawrence B. Solum\**

#### I. INTRODUCTION

The great debate over formalism and realism has a tortuous history. It was *the* jurisprudential debate of twentieth-century American legal theory, and it continues, rehashing old moves, relabeling old positions, and — this is the hopeful bit — exhibiting new, surprising, and productive developments. One of those productive developments has been the turn to rigorous methods in positive legal theory. Contemporary legal theory is increasingly influenced by methods and ideas imported from the social sciences — a development that is part of a larger trend in the legal academy: interdisciplinarity. Some of this story is old hat by now. Law and economics<sup>1</sup> and the law and society movement<sup>2</sup> entered the legal academy long ago. Other parts of the story are new. Today, interdisciplinary approaches to legal theory include the transplantation of empirical methods for the study of judicial behavior from political science,<sup>3</sup> the application of the game-theoretic models developed under the rubric of positive political theory (PPT) to the strategic interactions among judges and between judges and the political actors who select them and react to their decisions,<sup>4</sup> and the na-

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<sup>1</sup> For a history of law and economics, see Richard A. Posner, *The Law and Economics Movement: From Bentham to Becker*, in THE ORIGINS OF LAW AND ECONOMICS 328 (Francesco Parisi & Charles K. Rowley eds., 2005).

<sup>2</sup> For a history of the law and society movement, see Lawrence M. Friedman, Essay, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

<sup>3</sup> See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008).

<sup>4</sup> See Tonja Jacobi, Essay, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NW. U. L. REV. 259 (2006); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 273–74 (1987) [hereinafter McNollgast]; McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994).

scient emergence of experimental jurisprudence (or “X-Jur”), which applies experimental techniques developed in psychology and cognitive science to the problems of legal theory.<sup>5</sup>

One of the most promising trends has been the gradual erosion of the wall of acoustic separation<sup>6</sup> that insulated lawyers, judges, and legal scholars from the rich body of empirical work on judicial behavior developed by political scientists, represented by the so-called “attitudinal model,” pioneered by Professor C. Herman Pritchett<sup>7</sup> and famously associated with the work of Professors Harold Spaeth and Jeffrey Segal, among many others.<sup>8</sup> The core idea of the attitudinal model is that ideology (and not the law) is the most important determinant of judicial behavior. The rise of the attitudinal model in political science was anticipated and influenced by the American legal realists, a loosely defined group of judges, lawyers, and scholars, who marked the difference between the “law in action” and the “law in books”<sup>9</sup> and formulated early versions<sup>10</sup> of what is now called “the indeterminacy thesis”<sup>11</sup> associated with the critical legal studies (CLS) movement. Like the attitudinalists in political science, critical scholars who embraced the indeterminacy thesis contended that politics, not law, is the primary determinant of judicial behavior.

But attitudinalism and PPT in political science and CLS in law were not the only heirs of realist skepticism about the determinacy of law. Judge Richard Posner’s influential 1993 article, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*,<sup>12</sup> proposed a model of judicial behavior that viewed judges as rational

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<sup>5</sup> The label “experimental jurisprudence” is modeled on the analogous phrase “experimental philosophy.” See generally EXPERIMENTAL PHILOSOPHY (Joshua Knobe & Shaun Nichols eds., 2008). For examples of contemporary work employing these theories, see JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION (2011); and Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149 (2012).

<sup>6</sup> The metaphor is borrowed from Meier Dan-Cohen’s article *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

<sup>7</sup> See generally C. HERMAN PRITCHETT, THE ROOSEVELT COURT (1948); C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890 (1941).

<sup>8</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

<sup>9</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>10</sup> See James E. Herget, *Unearthing the Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59 (1995); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 754–56 (2013). Professor Brian Leiter notes that legal realist arguments for indeterminacy were lawyerly in contradistinction to the arguments made later by scholars associated with the critical legal studies movement. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 274 (1997).

<sup>11</sup> See generally Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

<sup>12</sup> Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

maximizers, whose decisions are explained by a utility function that included leisure time and pecuniary income.<sup>13</sup> Posner's model eliminated ideology as a direct consideration in judicial decisionmaking: "My approach downplays the 'power trip' aspect of judging, the focus of most of the few previous efforts to model the judicial utility function. In fact, I assume that trying to change the world plays no role in that function."<sup>14</sup> And law itself played no role in Posner's model. His skepticism about the role of law in legal decisionmaking is further illuminated by his essay for the one hundredth anniversary issue of the *Harvard Law Review*, in which he argued that legal theory had failed to develop tools for the interpretation of legal texts, with the consequence that statutory interpretation (and by implication, the interpretation of constitutions, rules, regulations, and even judicial opinions) is indeterminate.<sup>15</sup> Posner later wove the various strands of his thought into the tapestry he calls "pragmatism," articulated most fully in his magnum opus, *How Judges Think*.<sup>16</sup>

Posner assumed that policy preferences play "no role"<sup>17</sup> in the determination of judicial behavior, but his economic approach to judicial behavior was nonetheless in the rational choice tradition: rational choice theories explain judicial behavior on the basis of the preferences of individual judges. In political science, the rational choice paradigm was combined with game theory in what is called "positive political theory." Unlike the attitudinal model (which predicts the behavior of an individual judge based only on that judge's preferences), PPT models of judicial behavior take strategic interactions between judges into account. For example, the behavior of a Supreme Court Justice is not just a function of the policy preferences (or ideology) of the individual Justice in isolation. The Justices must take the preferences of their colleagues into account; only by modifying their positions can they get five votes and thereby shape the content of the law.<sup>18</sup>

PPT approaches to judicial behavior frequently employ "pivotal politics" models, originally developed in the context of modeling legislative behavior.<sup>19</sup> According to these models, in the House of Representatives, the member whose ideological views are at the median (with equal numbers of colleagues to the left and the right) is the "pivot," the member whose vote will determine whether bills brought to

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<sup>13</sup> *Id.* at 31.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-87*, 100 HARV. L. REV. 761, 774-76 (1987) (discussing the indeterminacy of statutory interpretation).

<sup>16</sup> RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

<sup>17</sup> Posner, *supra* note 12, at 3.

<sup>18</sup> See sources cited *supra* note 4 (collecting sources on positive political theory).

<sup>19</sup> See generally KEITH KREHBIEL, *PIVOTAL POLITICS* (1998).

the floor will pass or fail. On a collegial court like the Supreme Court, we call the vote of the pivotal Justice the “swing vote” — in cases where the swing vote will determine the outcome, the opinion writer must write an opinion that will attract the vote of the pivotal Justice to form a majority. Pivotal politics models identify these key players, the “pivots” whose preferences define which outcomes are possible (assuming, of course, that the models are confirmed). While Posner’s model assumed that policy preferences play almost no role in shaping judicial behavior, PPT models assume the opposite — that policy preferences are the driving engine of judicial behavior.

On the surface, it might seem that progressives from the 1930s, radical legal scholars from the 1980s, a conservative federal judge, and (supposedly) value-neutral social scientists have little in common. But there is a common thread. As Judge Harry Edwards and Professor Michael Livermore put it: “The theories underlying the attitudinal model, legal realism, critical legal studies, and pragmatic adjudication share the view that the law generally does not constrain judges in their decisionmaking because it does not provide clear answers.”<sup>20</sup> This shared view or common assumption can be expressed as the “indeterminacy thesis,” the key realist move in the grand debate with formalism.

Enter *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (or *Behavior of Federal Judges* for short or *Behavior* for really short), a magisterial and important book, co-authored by Lee Epstein, who was trained as a political scientist and who is currently appointed in law and political science at the University of Southern California; William Landes, trained as an economist and currently on the faculty at the University of Chicago Law School; and Richard Posner, trained as a lawyer and currently a judge on the United States Court of Appeals for the Seventh Circuit. Although the subtitle of Epstein, Landes, and Posner’s book is *A Theoretical and Empirical Study of Rational Choice*, the emphasis is decidedly on the empirical — with theory getting the short shrift. Chapters two through eight, which consume 320 of the 422 pages or about 75% of the total, summarize the literature on judicial behavior and present important new empirical findings. Theory (with a corresponding economic model) appears in chapter one, entitled “A Realistic Theory of Judicial Behavior,” which presents an updated version of Posner’s 1993 model of judicial behavior, now recast as a labor economics model (pp. 25, 48) and self-described as a summary of Posner’s *How Judges Think* (p. 25).

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<sup>20</sup> Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1915 (2009).

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*The asterisks and ellipses are my way of indicating that I am stepping out of my formal and ritualized role as reviewer and breaking the imaginary “fourth wall” between author and reader. At this point, four pages into the review, I imagine that you are somewhat frustrated. “Thumbs up or thumbs down?” Thumbs up for most of chapters two through eight. Thumbs down for chapter one.*

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In this review, I begin in Part II with the book’s core, situating *Behavior of Federal Judges*’s empirical findings in the context of the evolution of the attitudinal model and the emergence of empirical studies of judicial behavior that emphasize the role of law as an important causal factor. Part III is about microfoundations. *Behavior of Federal Judges* offers a rational choice account of the causal mechanisms that determine judicial behavior in the form of a labor economics model — judges are viewed as agents of a diffuse principal whose preferences range over their income and who obtain satisfaction from the various ways in which they spend their time (p. 48).

In Part IV, the review then takes a step back from the details of *Behavior of Federal Judges*’s empirical and theoretical account and engages the fundamental issues at stake — the questions raised by the debate between formalists and realists. *Behavior* presents itself as a purely positive account: “Ours is strictly a positive analysis. We do not ask how judges should decide cases but how they do decide them — more broadly, how they do their judicial work (which is not limited to casting votes in cases)” (pp. 5–6). Implicitly, *Behavior* assumes that the empirical findings and rational choice models show that judging is an inherently realist enterprise — not only *does* ideology partially determine judicial behavior, it does so *necessarily*. But this assumption is undermined by *Behavior*’s empirical findings. In fact, Epstein, Landes, and Posner provide strong evidence that the claims that judging must be political involve false necessity. Putting this same point positively, *Behavior* provides evidence that legal formalism is possible — inside the feasible choice set and not mere “pie in the sky.”

## II. IDEOLOGY AND THE BEHAVIOR OF FEDERAL JUDGES

The core of *Behavior of Federal Judges* is the presentation of data and analysis (especially regression analysis) of that data. We can get a good sense of the book by examining some of the highlights.

A. *The Quality and Scope of Empirical Studies of Judicial Behavior*

The empirical study of judicial behavior has come a long way from Pritchett's pioneering work in the 1940s.<sup>21</sup> One of the key developments was Spaeth's compilation of The United States Supreme Court Database, which now provides values for 247 variables relating to every Supreme Court decision since 1946.<sup>22</sup> *Behavior of Federal Judges* provides a concise and erudite survey of an important segment of the empirical literature in chapter two, which narrates the history of the study of judicial behavior, albeit from a somewhat technical perspective, emphasizing the development of measures of judicial ideology and the assembly of datasets (pp. 70–77). Strikingly, the only category of studies singled out for separate treatment is “judicial ideology” (pp. 77–85), while the rest of the literature is relegated to the category of “other influences” (pp. 85–89). Strikingly — because the labor economics model presented in chapter one does not even include “ideology” as a distinct variable (pp. 30–47). Chapter two concludes with an appendix that presents a bibliography in narrative form (pp. 89–99). The continued domination of the field by studies of the Supreme Court is apparent, but the very welcome extension of empirical work to other courts, especially in recent years, is reflected in the bibliographical essay.

Missing from chapter two's narrative literature review and chapter one's theoretical discussion is any mention of a crucial development in both rational choice modeling and the empirical study of judging — the emergence of PPT models and a body of empirical work that tests the predictions of those models. For example, no mention is made of *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*,<sup>23</sup> putatively by “McNollgast” but actually authored by Professors Mathew McCubbins, Roger Noll, and Barry Weingast.<sup>24</sup> Indeed, the whole of *Behavior of Federal Judges* is written as if PPT simply did not exist. The book does not acknowledge the application of the influential pivotal-politics approach developed by Professor Keith Krehbiel<sup>25</sup> to courts, judicial selection, and the interactions between courts and Congress. This is a shame, because many readers of *Behavior* will assume that its distinguished authors can be trusted to

<sup>21</sup> See sources cited *supra* note 7.

<sup>22</sup> *The Genesis of the Database*, U.S. SUP. CT. DATABASE, <http://scdb.wustl.edu/about.php> (last visited May 10, 2014), archived at <http://perma.cc/N9G9-87CS>.

<sup>23</sup> See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995).

<sup>24</sup> See Michael Asimow, *On Pressing McNollgast to the Limits*, 57 LAW & CONTEMP. PROBS. 127, 127 (1994).

<sup>25</sup> See KREHBIEL, *supra* note 19.

accurately represent the state of play in rational choice approaches to the study of judging. Sadly, this assumption would not be warranted.

What *Behavior of Federal Judges* does well is to present a survey of studies in what might be called the “attitudinalist tradition” — the large body of work done by political scientists that investigates the relationship between ideology and judicial behavior. This presentation goes far beyond a literature review: data sets are improved, new data analysis is done, and all of this is integrated with prior research. Chapter three focuses on the Supreme Court and begins with a simplified version of the labor economics model, with an accompanying explanation that both job satisfaction and external rewards are driven, in the case of Supreme Court Justices, by ideology (p. 103). Most of the data comes from the Spaeth database, corrected for categorical coding mistakes: for example, the Spaeth database codes pro-plaintiffs decisions in commercial speech cases as liberal, but Epstein, Landes, and Posner move these cases into an “unable-to-classify category” called “other” (p. 105).

*Behavior of Federal Judges* uses three ideological measures (Segal-Cover scores, Martin-Quinn scores, and Epstein et al. scores) to rank the Justices who have served from 1937 through 2009 from most to least conservative (pp. 106–11). Of the current nine Justices, four (Alito, Roberts, Scalia, and Thomas) score as among the six most conservative on at least one of the measures. Justices Scalia and Thomas are each ranked as the most conservative Justice since 1937 by Segal-Cover scores and Martin-Quinn scores, respectively. Only Justice Sotomayor is ranked among the ten least conservative justices by more than one of the measures. Justice Kagan is not ranked (p. 111).<sup>26</sup> This chapter also reports findings on ideological drift: twelve of the twenty-three Justices who served for fifteen or more terms moved significantly, with eight moving to the left and four moving to the right (p. 116).

Chapter four is about the courts of appeals and it is here that the authors take on “panel composition effects” — famously reported by Professor Cass Sunstein and his coauthors.<sup>27</sup> After reporting their results, the authors opine:

The fact that a judge of one ideological persuasion will tend to go along with the other judges on the panel even when they are of a different persuasion is unsurprising given dissent aversion; what is surprising is that a judge in the majority will also bend in the direction of the judge who has a different ideology. (p. 192)

<sup>26</sup> It seems most likely that Justice Kagan was not ranked because of the recency of her appointment to the Court.

<sup>27</sup> See generally CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?* (2006) (describing the impact of politics on appellate panel decisions); see also Miles & Sunstein, *supra* note 3, at 837–41.

*Behavior of Federal Judges* concludes that group effects of all sorts “may mainly reflect effort aversion” (p. 199), but this conclusion will come as a surprise to most readers because none of the analysis directly tests effort aversion against rival explanations for these group effects.

Chapter five investigates the district courts and selection effects. One of the most interesting findings concerns the effect of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*<sup>28</sup> and *Ashcroft v. Iqbal*.<sup>29</sup> Simplifying a complicated story, *Twombly* raised the pleading bar for plaintiffs but left open the question whether that change applied generally or was limited to a particular category of cases (p. 227). *Iqbal* made it clear that the new “plausibility” standard was the general rule for cases governed by Federal Rule of Civil Procedure 8(b).<sup>30</sup> Epstein, Landes, and Posner report no effect of *Twombly* on the overall dismissal rate, but “a large and highly significant” effect from *Iqbal* (p. 231). This finding is interesting, because it suggests that clear legal rules can have a significant effect on judicial behavior. While *Twombly* may have left substantial uncertainty about the general standard for the sufficiency of the pleadings in federal court, *Iqbal* provided substantially greater clarity and hence may have had a causal effect on dismissal rates.<sup>31</sup>

Chapter six examines dissents and dissent aversion, and it is in this chapter that the authors actually employ the labor economics model to formulate testable hypotheses about judicial behavior. *Behavior of Federal Judges* argues that dissents will be more likely when the ideological stakes are high, because writing dissents may entail collegiality costs and always involves an effort cost (pp. 256–58). This chapter tests a number of interesting hypotheses. These hypotheses include the arguments that dissent rates are higher in circuits with more judges, when workloads are lighter, and when ideological differences are greater (p. 292). The authors report that their regression analysis supports each of these hypotheses (p. 293).

Chapter seven investigates the questioning of lawyers at oral argument, testing the hypothesis that the number or length of questions

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<sup>28</sup> 550 U.S. 544 (2007).

<sup>29</sup> 129 S. Ct. 1937 (2009).

<sup>30</sup> *Id.* at 1949.

<sup>31</sup> On *Twombly*’s lack of clarity, see, for example, *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008), stating *Twombly* was “less than pellucid”; and *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008), describing *Twombly* as “confusing.” On the clarity provided by *Iqbal*, see Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1246 (2010). The question whether *Iqbal* actually provided clarity is complex and the very brief remarks offered here should not be read as taking a definitive stand on that question.



asked of the lawyer are negatively correlated with the likelihood of the Court voting for the lawyer's client. The authors report that "the fewer the questions (or number of words in the questions) that the Justices ask a party's lawyer, holding constant the number asked the opponent, the higher the probability the party will win" (p. 322). At the level of individual Justices, the same effect is observed, although for Justice Kennedy there is no effect at all, which the authors take as further evidence for Justice Kennedy's "status as the swing Justice" (p. 336).

Chapter eight, the last of the six chapters that report empirical results, addresses the hypothesis that the desire for promotion affects judicial behavior by creating auditioning effects (p. 337). The authors conclude that their evidence, "though it is not conclusive," supports the existence of an auditioning effect, and thereby supports their "judge as worker" model of judicial behavior, since angling for promotion is typical behavior in labor markets" (p. 379).

So far, we have examined the empirical findings of *Behavior of Federal Judges* on topics that are only loosely connected to the role of politics or ideology in judging, but that concern is actually at the heart of the empirical chapters.

*B. A Nuanced Account of the Role of Ideology  
in Determining Judicial Behavior*

The once impenetrable wall of acoustic separation between scholars studying judicial behavior in political science and academic lawyers in the legal academy undoubtedly had many causes for its existence. Surely, the sociology of the disciplines played a role, with academic lawyers guarding their turf and doubting the capacity of social scientists who lacked legal training to comprehend the mysteries of the law. It seems likely that another factor was the difference in perspective, with lawyers taking the internal point of view (looking at law from inside the practice) and social scientists assuming an external stance (looking at judicial behavior from a viewpoint that disregarded the phenomenology of judging). Whatever the causal mechanisms, the wall of acoustic separation once stood high and strong — and even today the mention of "positive political theory" or "pivotal politics models" will often draw blank stares in the halls of the legal academy.

*Behavior of Federal Judges* covers a variety of topics, but the core of the book is an attempt to present both a rational choice model of judging and a set of empirical findings in a manner that is accessible to judges, lawyers, and legal scholars. Moreover, *Behavior's* nuanced report of empirical findings suggests that social scientists and legal scholars may find a ground for rapprochement between the extremes of "law, law, law," and "it's all politics." The wall of acoustic separa-

tion between social scientific studies of judicial behavior and jurisprudence began to develop holes some time ago, but *Behavior's* highest ambition is to be Joshua's trumpet, sounding a clarion note that will bring the walls tumblin' down.<sup>32</sup> To understand that ambition, we need to take a step back and examine the skeptical attitude of academic lawyers toward the extreme claims made by some social scientists, who sometimes seem to suggest that law plays no significant role in the explanation of judicial behavior.

The history of legal variables in studies of judicial behavior is complex.<sup>33</sup> For example, in 1984, Professor Jeffrey Segal found that legal variables, such as, in the case of a search, whether or not a warrant was issued, whether a home or a car was searched, or whether the search was proximate to the border, had predictive power.<sup>34</sup> But it was common for proponents of the attitudinal model to claim that the law and legal reasoning had no influence on judicial behavior. For example, in 1978, Spaeth compared legal reasoning to "creative writing, necromancy, or finger painting."<sup>35</sup> In the early nineties, Segal collaborated with his former teacher, Spaeth, resulting in their important and influential monograph, *The Supreme Court and the Attitudinal Model*.<sup>36</sup> Professor Howard Gillman explains that "[b]y the early 1990s, Segal and Spaeth were sufficiently confident about the weight of the accumulated evidence that they were willing to assert that Supreme Court decision making reflected the personal policy preferences of the justices and almost nothing else."<sup>37</sup>

Of course, almost every lawyer in the United States would agree that ideology is correlated with the way Supreme Court Justices vote. And many judges, lawyers, and legal scholars would endorse the further proposition that political ideology plays a causal role. But from a perspective internal to the law, the claim that judging is politics *all the way down* seems absurd, because it fails to account for the phenomenology of judging. Judges, lawyers, and legal scholars do not experience legal decisionmaking as the exercise of discretion based on politics. This point is actually common ground between legal scholars as

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<sup>32</sup> The allusion is to the lyrics of the traditional spiritual, *Joshua Fit the Battle of Jericho*. See Robert Cummings, *Traditional Spiritual: Joshua Fit the Battle of Jericho*, ALLMUSIC, <http://www.allmusic.com/composition/joshua-fit-the-battle-of-jericho-mc0002388855> (last visited May 10, 2014), archived at <http://perma.cc/SF5W-UQXL>.

<sup>33</sup> In 2001, Professor Howard Gillman provided a brief but magisterial history of the changing roles of ideology and law in studies of judicial behavior. See 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 (2001) (book review).

<sup>34</sup> See Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 891, 898-900 (1984).

<sup>35</sup> HAROLD J. SPAETH, SUPREME COURT POLICY MAKING 64 (1979).

<sup>36</sup> SEGAL & SPAETH, *supra* note 8.

<sup>37</sup> Gillman, *supra* note 33, at 474.

diverse as Professor Ronald Dworkin, who believed that there was a legally correct outcome in every dispute,<sup>38</sup> and Professor Duncan Kennedy, who defends the view that law is deeply political.<sup>39</sup>

For Dworkin, judges are always engaged in the search for the legally correct answer — political ideology is never part of legal reasoning. Dworkin's theory, however, postulates that the legally correct answer is a function of the theory that fits and justifies the law as a whole.<sup>40</sup> Because the dimension of "justification" is explicitly normative, beliefs about moral concepts can play a causal role in determining judicial beliefs about what outcomes are normatively correct. For example, when interpreting the Equal Protection Clause, the Dworkinian theory of legally correct outcomes will require the judge to interpret the clause in accordance with the best theory of equal citizenship. And beliefs about which theory of equality is best are likely to correlate with political ideology.<sup>41</sup>

But on Dworkin's theory, beliefs about equality are not the sole determinant of the legally correct outcome — a Dworkinian interpretation of the Equal Protection Clause must satisfy the dimension of *fit*, which will disqualify outcomes that might otherwise be favored by the judge's beliefs about the best conception of equality. As Dworkin wrote, "[e]ven a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution."<sup>42</sup> Studies of judicial behavior simply do not engage Dworkin's version of legalism — they do not test the predictions that his theory would make. If the extreme version of the attitudinal model were correct, one might have expected the most liberal members of the Supreme Court — for example, Justices Brennan, Douglas, Goldberg, and Marshall — to have argued explicitly for a constitutional right to economic equality.<sup>43</sup> Despite academic support for this idea,<sup>44</sup> the Supreme Court never seriously considered finding such a

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<sup>38</sup> See RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in A MATTER OF PRINCIPLE 119, 119 (1985).

<sup>39</sup> See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 520–21 (1986) [hereinafter Kennedy, *Critical Phenomenology*]. Kennedy later elaborated upon his theory of phenomenology of judging in *A Critique of Adjudication*. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1998).

<sup>40</sup> See RONALD DWORKIN, LAW'S EMPIRE 380 (1986).

<sup>41</sup> See generally RONALD DWORKIN, SOVEREIGN VIRTUE (2000).

<sup>42</sup> RONALD DWORKIN, FREEDOM'S LAW 11 (1996).

<sup>43</sup> These four Justices are identified as the least conservative by Epstein, Landes, and Posner (p. 111).

<sup>44</sup> See, e.g., Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1005 (1973); C. Edwin Baker, *Property and Its*

right.<sup>45</sup> As between extreme attitudinalism and Dworkin's theory, examples of this kind support Dworkin and not the attitudinalists.

Kennedy's critical phenomenology of judging denies Dworkin's right-answer thesis, but it explicitly affirms the idea that law constrains legal reasoning. Kennedy's approach is even more explicitly phenomenological than is Dworkin's. Briefly, Kennedy develops his phenomenology of judging by describing the thought process that he would go through were he to decide a labor injunction case. Kennedy argues that the phenomenology of judging is best captured through the metaphor of work in the field of legal materials (cases, statutes, constitutional provisions, and so forth). We begin with our initial perception of a case and with a tentative preference for its outcome, what Kennedy calls "how-I-want-to-come-out."<sup>46</sup> In some cases, this field of legal materials may be fluid and disorganized, subject to manipulation through legal work that lines up the precedents in a pattern that produces a rule favorable to "how-I-want-to-come-out." In other cases, the field may be highly impacted, with the precedents already set in patterns laid out by the work of prior judges and lawyers. Kennedy argues that a judge never knows in advance when more research or a brilliant, creative legal argument will allow the judge to reach an outcome that initially seemed to have been made inaccessible by the lay of the legal landscape.<sup>47</sup> Unlike Dworkin, Kennedy allows for the direct influence of ideology (how-I-want-to-come-out), but *pace* extreme attitudinalism, Kennedy believes that the phenomenology shows that you can't always get what you want, but if you try sometimes, you just might find that the law lets you get what you need.<sup>48</sup>

Because academic lawyers engage in legal work themselves, they are especially receptive to the argument against extreme attitudinalism from the phenomenology of judging, but their skepticism is also based on another concern — what legal economists call "selection effects."<sup>49</sup> Disputes where there is no uncertainty about the legal outcome usually will be settled in the shadow of the law;<sup>50</sup> disputes that are litigated

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*Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 760 (1986) (arguing for the "constitutional protection of individual claims to a certain quantum of property"); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 43 (1988) (advocating a constitutional duty "to protect equal citizenship against the worst ravages of material want").

<sup>45</sup> Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1003 n.530 (2013).

<sup>46</sup> Kennedy, *Critical Phenomenology*, *supra* note 39, at 519.

<sup>47</sup> *See id.*

<sup>48</sup> *See* MICK JAGGER & KEITH RICHARDS, *You Can't Always Get What You Want*, on LET IT BLEED (London Records 1969).

<sup>49</sup> *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1–2 (1984) (describing selection effects).

<sup>50</sup> *See generally* Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225–26 (1982); Rob-

despite legal certainty will be resolved at an early stage (motion to dismiss or summary judgment); disputes that go to trial despite legal certainty will rarely be appealed; and disputes that are appealed despite legal certainty will rarely result in a grant of certiorari from the Supreme Court. In other words, the United States Supreme Court's docket is likely to consist almost entirely of the cases in which the degree of legal uncertainty is the highest. Professor Frederick Schauer puts the icing on the cake by observing that the initial classification of some event or a transaction itself involves a selection effect:

[A]ppellate cases are even more unrepresentative when the entire domain includes all legal events rather than merely those identified as disputes. A large amount of what we ought to recognize as part of the law never amounts to a dispute, or if disputed never amounts to litigation, or if litigated never amounts to an appeal.<sup>51</sup>

For this reason, the failure of legal variables to explain the outcomes in the reported decisions of the Supreme Court would be perfectly consistent with the hypothesis that the law clearly determines the proper legal characterization of almost all of the events and occurrences that make up our social world. Legalism (formalism) could be true as a general theory, so long as it incorporates the idea that legal rules are sometimes underdeterminate, leaving a zone in which competent judges can disagree about the legally correct outcome.

These rather obvious points about the role of law in determining the outcome of legal disputes reveal a fundamental gap between the conceptual framework of early attitudinalists and the mindset of academic lawyers. One of the ways that social scientists can close the gap is to offer models and empirical studies that account for the lawyers' lived experiences of the role of law in judging. One of the virtues of *Behavior of Federal Judges* is its nuanced account of the role of ideology in determining judicial behavior. For example, chapter three provides an extensive discussion of unanimous Supreme Court opinions, which suggests that legal factors play a role in determining Supreme Court decisions. Of cases argued orally between 1946 and 2009, 29% resulted in unanimous decisions. Strikingly, 73% of Ninth Circuit decisions reviewed over this period were reversed unanimously (p. 124). After describing their regression analysis, the authors report that "ideology plays only a small role in unanimous decisions" (p. 136). But in

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ert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>51</sup> Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1725 (1988); see also *id.* at 1723-25 (describing this selection effect more generally). There is a remediable technical problem with Schauer's reading of Priest and Klein. See Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1743 n.33 (1988).

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nonunanimous cases, they report “a substantial ideology effect” (p. 149) — a result that would be expected by almost every positive theory of the causal role of law and politics on the Supreme Court (because of selection effects).

Chapter four turns to the courts of appeals. Reporting the results of their regression analysis, the authors conclude that “ideological voting is less frequent in the courts of appeals than it is in the Supreme Court” (p. 168). Whereas the percentage of conservative votes in the Supreme Court by Republican-appointed Justices is 57% and by Democratic appointees is 40%, for a difference of 17%, the comparable difference in the courts of appeals is only 4.5%. As the authors comment, “The difference is so small that one might wonder why any fuss is made in Senate confirmation hearings about the ideological leanings of nominees for court of appeals judgeships” (p. 168). Indeed, studies by others report no ideological effects in some case categories (for example, criminal law) in which such effects might be expected.<sup>52</sup> Epstein, Landes, and Posner also report that more than a third of judges appointed by Republican presidents are liberal voters, and more than a third of Democratic appointees are conservative voters. They speculate that this may be explained by voting motivated by legal reasons, and especially on the basis of precedent (p. 180).

Chapter five investigates the United States district courts with an emphasis on selection effects. The chapter begins with a concession to the argument against the indeterminacy thesis from easy cases, observing that “[a] substantial fraction of cases filed in the district courts . . . have no possible merit,” but the authors’ conclusion that these cases are “just noise in the data” (p. 207) would simply be incorrect if our goal was to determine whether easy cases actually exist. Moreover, *Behavior of Federal Judges* predicts that “[a] district judge’s own ideology can be expected to influence some of his decisions, though probably only a small percentage because of the prospect of reversal if he deviates from the precedents established by and the known ideological propensities of the judges of the court of appeals for his circuit” (p. 226). This chapter also tests for selection effects, finding that ideology plays an increasingly important role as cases move from the district courts to the courts of appeals and the Supreme Court (pp. 231–37).

Even more interesting is the discussion of what the authors call “the paradox of discretion” (p. 237–41). The paradox results from the “discretion” conferred on trial court judges by the “abuse of discretion” and “clearly erroneous” standards of review. If these standards are

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<sup>52</sup> Cass R. Sunstein et al., Essay, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 325–26 (2004) (reporting that there is no evidence of ideological voting in criminal cases by circuit court judges).

strictly observed at the appellate level, then district court judges have more freedom to act on the basis of their ideological preferences. But if the appellate judges act contrary to law and fail to defer to trial judges, the result may be to decrease the role of ideology at the trial court level. Although there is some evidence for this effect, the authors conclude that appellate courts “apparently exert sufficient control over district judges, even when the appellate judges are adhering scrupulously to a deferential standard of review, to dissuade the district judges from allowing ideology to determine their decisions” (p. 241).

All in all, the findings reported in *Behavior of Federal Judges* are remarkably favorable to sophisticated versions of legalism — the view that legal variables are the primary determinant of judicial behavior. *Behavior* finds very little evidence of ideological influence at the trial court level, statistically significant but modest influence at the appellate level, and substantial (but not overwhelming) influence in the federal court of last resort — the United States Supreme Court. Given selection effects, these findings are consistent with a largely determinate body of law, with the primary correlation to ideology operating in the zone of underdetermination created by vagueness, ambiguity, gaps, or contradictions in the authoritative legal materials.

We will come back to the great debate between formalists and realists, but first we need to take up the question of whether *Behavior of Federal Judges* provides adequate microfoundations for its account of judicial behavior.

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*Readers of this Review may be puzzled about the role that ideology plays in Behavior of Federal Judges. The labor economics model in chapter one seems to downplay ideology, but the empirical chapters are mostly about the role of ideology in judging. At some points, Behavior seems to be endorsing a realist picture of judging in which policy preferences are the driving engine of judicial behavior, but at other points, Behavior presents empirical results that seem to suggest that law is the real engine of judicial decisionmaking, with the great exception of the hard cases that reach the Supreme Court and perhaps another exception for some categories of cases at the court of appeals level. If you are puzzled, so am I. After spending quite some time with Behavior, it seems to me that the authors are of two (or perhaps three) minds about the respective roles of politics and law. What does seem clear is that their account of microfoundations (causal mechanisms) is not up to the task of providing either a perspicuous theory or a testable hypothesis about the contribution that either law or politics makes to the decisionmaking process — and that is our next topic.*

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### III. MICROFOUNDATIONS: LABOR ECONOMICS VERSUS POSITIVE POLITICAL THEORY

Microfoundations are the mechanisms or powers that link cause and effect.<sup>53</sup> Without microfoundations, even the best and most sophisticated statistical analysis will inevitably fall short of proving the existence of causation. Statistical analysis will instead yield correlations between variables without providing an explanation of the causal processes that produce these correlations. This fact about statistical analysis is important because the independent variable (for example, the political ideology of individual judges) could be causally inert (epiphenomenal) if some other factor (for example, beliefs about contested moral concepts) caused both the dependent variable (for example, judicial votes) and the independent variable.

*Behavior of Federal Judges* relies on labor economics for its account of microfoundations. On the one hand, that move is problematic on its own terms — the judicial utility function fails to provide an illuminating causal story. On the other hand, *Behavior* ignores a more generally promising alternative: game-theoretic models of strategic interaction among judges, and more particularly, the pivotal politics account of such interactions offered by PPT.

#### A. *The Labor Economics Model of Judicial Behavior*

One of *Behavior of Federal Judges*'s strengths is its frank acknowledgement of the need for microfoundations. Arguing for the superiority of an economics-based rational choice approach, Epstein, Landes, and Posner observe:

Other social-scientific research on judicial behavior has tended to be empirical to the virtual exclusion of theory — in other words, it has tended to lack “microfoundations.” It has tended to posit, rather than to derive from a utility function, such propositions as that the goal of Supreme Court Justices is to produce outcomes that coincide with the Justices’ ideological preferences . . . . (p. 29)

The authors’ general strategy is rational choice theory, and the particular tactic that they employ is a “judicial utility function” (p. 48) that operationalizes their general “labor-market theory of judicial behavior” (p. 30). Start by examining the function itself; we can then

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<sup>53</sup> On the role of microfoundations in the social sciences, see JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (1989); SOCIAL MECHANISMS: AN ANALYTICAL APPROACH TO SOCIAL THEORY 21–25 (Peter Hedström & Richard Swedberg eds., 1998).



turn to a very serious problem: the model is devoid of predictive content.

Here is the judicial utility function (p. 48):

$$U=(S(t_j),EXT(t_j,t_{nj}),L(t_l),W,Y(t_{nj}),Z).$$

Although the formula may seem complex, the model is actually quite simple, as we can see once we unpack the variables in Table 1:

TABLE 1: THE JUDICIAL UTILITY FUNCTION

Symbol	Meaning
U	Judge's utility function over the variables identified below.
$S(t_j)$	Internal satisfaction derived from the job of federal judge, including the internal satisfaction of feeling that one has done a good job and the social benefits and costs produced by dealing with one's colleagues.
$EXT(t_j, t_{nj})$	External satisfaction derived from reputation, power, prestige, and celebrity produced by the time spent on both judicial and nonjudicial activities.
$L(t_l)$	Satisfaction derived from leisure time, for example the time spent outside of judicial and nonjudicial work.
W	The salary and nonmonetary tangible benefits one receives for doing judicial work.
$Y(t_{nj})$	Other earned income from nonjudicial activities, such as writing books.
Z	The combined effect of all other variables, including the possibility of promotion to a higher or more prestigious court or moving to a high paid private sector job.

Judges (and their families, friends, and former law clerks) who examine this table will immediately recognize a mismatch between the judicial utility function and the data described in Part I of this review. The utility function is well suited for the job of explaining and predicting how much time judges spend on opinion writing and supervision of their clerks and staff — as opposed to leisure, on the one hand, and writing books and articles, giving distinguished lectures, teaching, and going on comparative law junkets to exotic foreign locales, on the other hand. For example, the judicial utility function highlights some of the factors that go into the decision whether to write a dissent or concurrence, whether to provide comments on opinions that one intends to join, and so forth. Some judges may derive both satisfaction and income from writing books and articles and teaching. Other judges who highly value sex, drugs, and rock and roll (or making love, fine

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Bourdeaux, and opera) will maximize their leisure time. This utility function, which focuses on utilities derived from time spent on work-related activities and leisure time, focuses on exactly those variables that determine how judges (viewed as employees) allocate their time between doing the job for which they are paid (judging), doing other work (moonlighting), and doing no work at all (leisure).

But the judicial utility function is not well suited to the task of predicting the ideological valence or legal content of judicial decisions and opinions, because it does not include ideological or legal preferences as variables. Of course, ideology could affect the variables that are included. Thus, time spent writing opinions with an ideological valence one agrees with would produce more utility than time spent writing opinions with outcomes one abhors. While the model suggests that many other variables should affect ideological content, it simply does not focus on the ideological and legal variables that drive much of the research reported in *Behavior of Federal Judges*. To the extent the model includes these variables, it is only because of ad hoc assumptions about the role of ideology and law in increasing the satisfaction judges derive from spending time doing judicial work.

### *B. The Emptiness Objection*

This leads to a serious weakness in *Behavior of Federal Judges*'s account of microfoundations. The labor economics model and associated utility function are devoid of content that would enable the derivation of predictions about judicial decisionmaking. Remember, *Behavior* claims to “derive[]” its account of the causal role of political ideology “from a judicial utility function” rather than merely “posit[ing]” this role (p. 29). In fact, Epstein, Landes, and Posner have done no such thing. Their account of microfoundations is subject to what we can call the “emptiness objection.” The utility function and the labor economics model are consistent with any conceivable behavior by federal judges.

To illustrate the emptiness objection, consider two imaginary judges, Alice and Ben. Imagine that we have coded their ideological scores identically. We now attempt to use the judicial utility function to predict the mean ideological valence of the opinions they will produce over the next two-year period, the number of opinions they will write, the total number of characters in these opinions, the total number of cited sources, and so forth. The problem with generating testable hypotheses is immediately apparent. We need to know Alice and Ben's utility functions, and the data that we have collected does not allow us to draw any inferences about these functions, which are actually private mental states (preference structures) held by Alice and Ben. The

revealed preference assumption is no help here, because it makes the model nonfalsifiable.<sup>54</sup> Without individualized data, the model is predictively inert. Alice and Ben could have identical ideology scores, but produce wildly different judicial decisions — because these differences can be explained by the judicial utility function on a post hoc basis. The utility function cannot be falsified, because the crucial information about their individual preference functions consists of mental states that are very difficult to observe.<sup>55</sup>

This is not to say that we could not generate some testable hypotheses. Chapters three through eight include a whole mass of ad hoc hypotheses that are consistent with, but not required by, the judicial utility function. For example, if we did not find an auditioning effect (where judges moderate their behavior in order to improve their chances for confirmation to the Supreme Court), that result could be explained in any number of ways: a conservative judge might derive a high level of satisfaction from deciding on the basis of her ideological preferences and believe that the effect of this behavior on her chances for promotion is very small. Indeed, there is no result that is inconsistent with the model as applied to particular individuals — absent data on those individuals' preference functions.

The emptiness of the model is highlighted by the inclusion of the final variable, Z, which is the combined effect of all other variables not otherwise part of the model. Absent data on individual preference structures, the judicial utility function is empty — it is simply a restatement of the axiom of rational choice theory that all individuals act to maximize their utility. Plainly put, the labor economics model predicts that federal judges will do what will give them the most satisfaction given their preferences, taking into account anything and everything.

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*At this point, you may be wondering how the authors of Behavior of Federal Judges ever imagined that they could get away with claiming that the labor economics theory and associated utility function provide rigorous microfoundations from which predictions about the role of ideology in determining judicial behavior can be derived. Moreover, you surely noticed the mismatch between the empirical*

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<sup>54</sup> See Mark Kelman, *Hedonic Psychology, Political Theory, and Law: Is Welfarism Possible?*, 52 BUFF. L. REV. 1, 69 n.105 (2004).

<sup>55</sup> A similar point is made by Sunstein in his review of *Behavior of Federal Judges*. See Cass R. Sunstein, *Moneyball for Judges: The Statistics of Judicial Behavior*, NEW REPUBLIC, Apr. 10, 2013, <http://www.newrepublic.com/article/112683/moneyball-judges>, archived at <http://perma.cc/WV6A-LYRX>.

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*findings reported in chapters two through eight and the model in chapter one. The centerpiece of chapter two was ideology — measures and prior studies. Chapter three shows that the ideological valence of votes of Supreme Court Justices correlates strongly with measures of ideology. Chapter four shows that this effect is weaker at the court of appeals level, and chapter five demonstrates that the effect is weaker still at the district court level. These findings practically beg for a PPT account, which could systematically model the strategic interactions among judges on collegial courts, between judges at the trial level and those at the intermediate courts of appeals, and between those judges and Justices on the court of last resort. Such accounts are provided by PPT models, which consider strategic interactions among judges on a collegial court, between judges at different levels in the hierarchy, and between courts and other political institutions, such as Congress or the executive branch.*

*Why the choice of a labor economics model? You might think that the answer is provided by the labor economics model itself. Development of a PPT account would have required the model builder — presumably Posner according to the acknowledgments (p. 405) — to recant prior work and reach outside his (admirably massive) toolkit and deep into game theory and the dense thicket of literature on pivotal politics models developed by practitioners of PPT. You might think that this effort would divert time from other activities that he enjoys more or that yield greater pecuniary benefits — he is, after all, a very busy fellow.*

*Now you might very well think that, but of course I could not possibly comment.<sup>56</sup>*

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### *C. Positive Political Theory: Strategic Interactions*

The labor economics model views judging as primarily a solipsistic activity. The behavior of each judge is driven entirely by the satisfaction the judge takes in spending time on various activities. One can imagine a judge writing a concurrence or dissent solely to please herself — to express a view of the law that has a negligible chance of influencing others but that gives voice to deeply held values and convictions. Opinions of this kind are much like legal scholarship. But if

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<sup>56</sup> See Werner Vogels, *Couldn't Possibly Comment*, YOUTUBE (July 16, 2008), <http://www.youtube.com/watch?v=Oz8RjPAD2Jk> (excerpt from lines delivered by Ian Richardson as Francis Urquhart on BBC's *House of Cards*, "Now you might very well think that, but of course I couldn't possibly comment.").

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judges want their opinions to change the world, they must take into account that other judges and political institutions will react to their decisions and opinions. Trial judges must consider the possibility that an appellate court will reverse their decisions. When a judge on a three-member panel of one of the United States courts of appeals writes an opinion, she will need to consider whether her colleagues will join — and especially whether her opinion will achieve majority status. And panels of the courts of appeals are constrained by the possibility of en banc reversal and of reversal by the Supreme Court — although both of these events are unlikely, unless the case is particularly salient (for reasons of policy, politics, or law).

In statutory interpretation cases, the Supreme Court needs to consider the possibility that its decisions might trigger congressional reversal. Even in constitutional cases, the Court must take into account the reactions from other political institutions. For example, *Chisholm v. Georgia*<sup>57</sup> was overruled by the Eleventh Amendment — despite the difficulty of the Article V amendment process. Congress and the President can respond to decisions they strongly oppose in other ways, such as by refusing to cooperate in implementation, using the power of the purse to squeeze the Court, and so forth.

The labor economics model and judicial utility function can be adjusted on an ad hoc basis to take these strategic interactions into account. Panel effects can be psychologized as preferences for harmonious collegial interactions. The relationship between lower and higher courts can be psychologized as reversal aversion. Indeed, there are some situations in which the labor economics model illuminates PPT explanations. For example, the auditioning effect involves strategic interaction between judges and the Senate — the very kind of phenomenon that game-theoretic models seek to explain. But in this case, the labor economics approach, which focuses on the personal desire of judges for promotion to the Supreme Court (with a higher salary, more honor and prestige, and better working conditions) seems to capture an important piece of the story that game-theoretic models that consider only policy preferences miss.

So, the question is not whether labor economics approaches to the study of judicial behavior can make a useful contribution — they surely can. The real question is whether a labor economics approach produces the tools necessary to provide microfoundations for the role of ideology, politics, and policy preferences in judging. The answer to

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<sup>57</sup> 2 U.S. (2 Dall.) 419 (1793).

this question is “no.” The judicial utility function cannot model strategic interaction in a rigorous and testable way — that requires a different kind of model altogether. Rational choice theory turns to game theory to model strategic interactions among political institutions and actors. This approach is the tradition of PPT.

Readers of *Behavior of Federal Judges* who are unfamiliar with PPT approaches and rely on the book for an accurate survey of the social science of judicial behavior would be quite surprised if they verified the completeness of *Behavior*'s report on the literature. The well-known McNollgast piece, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*,<sup>58</sup> goes without mention. A whole body of work applying pivotal politics models of congressional decisionmaking to law is ignored,<sup>59</sup> as is work applying PPT to judicial nominations,<sup>60</sup> and a variety of other topics in which PPT approaches have played an important role.<sup>61</sup> The phrase “positive political theory” does not appear in the text of *Behavior*, nor is there any mention of pivotal politics models.<sup>62</sup>

Consider the following very simple pivotal politics model of the Supreme Court. Imagine that each Justice's policy preferences (or ideology) can be represented as an “ideal point” on a real line from left (representing progressive or liberal preferences) to right (representing conservative preferences). We could represent the current court as follows<sup>63</sup>:

<sup>58</sup> McNollgast, *supra* note 23.

<sup>59</sup> See generally KREHBIEL, *supra* note 19. For applications to law, see William N. Eskridge, Jr., & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

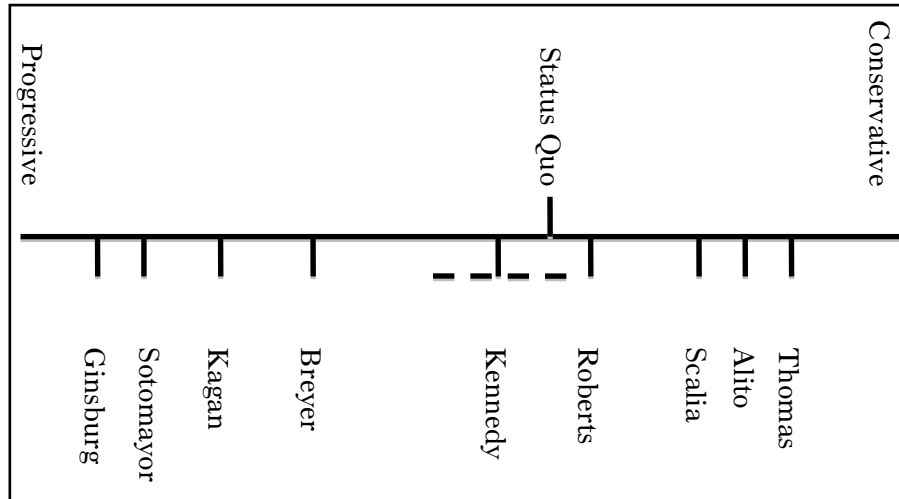
<sup>60</sup> See, e.g., Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS & PRESIDENCY 31 (2005); David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51 (2006).

<sup>61</sup> See, e.g., Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749 (1994); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005); 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 (2001); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

<sup>62</sup> The absence of these phrases was verified using the search function in the web-based version of the Kindle reader. “Positive political theory” (p. 97) and the word “pivot” (p. 93) do appear in the titles of works cited in the bibliographical essay in chapter two. In HOW JUDGES THINK, Posner spends two pages on strategic models. POSNER, *supra* note 16, at 29–31.

<sup>63</sup> The ordinal ranking is drawn from the Epstein et al. scores (p. 111), but an arbitrary (yet plausible) value for Kagan has been added. The intervals are just guesses.

FIGURE 1: PIVOTAL POLITICS MODEL OF SUPREME COURT



Let us assume that the ideological valence of a holding on a particular issue can be represented as a point on the same line, as can the status quo (the current state of the law). Justice Kennedy is the pivotal justice — the “swing vote” in legal parlance. He will only join an opinion that moves the law from the status quo to a point that is closer to his ideal point than is the existing law: this interval is represented by the dotted line in Figure 1. Other Justices must take this into account when they write opinions. For example, assume that the conference vote has gone in Justice Ginsburg’s favor and she assigns herself the opinion. If Justice Ginsburg seeks to attract or retain Justice Kennedy’s vote, she cannot write an opinion that moves the law to her ideal point. This opinion would lose or fail to attract Justice Kennedy, and perhaps Justice Breyer. Justice Kennedy might react to such an opinion by writing his own opinion, or he might join a conservative opinion that is closer to his ideal point than is the opinion circulated by Justice Ginsburg. Instead, given her policy preferences (ideology) and those of Justice Kennedy, the best she can do in theory is to move the law slightly to the left of the status quo but still within the interval that is acceptable to Justice Kennedy. Positions within that interval are preferable to the status quo for five members of the Court, but any point outside that interval will not be preferable. So if Justice Ginsburg wishes to attract or retain Justice Kennedy’s vote, she will stay within that range — even though she would prefer an outcome that is even more progressive than the leftmost point within the range.

Strategic models can also be used to represent interactions between three-judge panels and the en banc composition of one of the circuits of the United States courts of appeals. Professor Pauline Kim’s article

*Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects* represents this approach.<sup>64</sup> She reports that her “findings strongly suggest that panel effects are influenced by circuit preferences. Both minority and majority judges on ideologically mixed panels differ in their willingness to vote counter-ideologically, depending upon how the circuit as a whole is aligned relative to the panel members.”<sup>65</sup>

Strategic models seem far more promising than the labor economics model for the generation of testable hypotheses about the role of ideology in judicial decisionmaking. Such models can yield precise and hence testable predictions of judicial behavior — which the labor economics model simply cannot provide absent data about the utility functions of individual judges (and the quest for that data is obviously hopeless). In *Behavior of Federal Judges*, the labor economics tail wags the positive political theory dog.

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*I should be clear about my take on the role of PPT in explaining judicial behavior. PPT models can yield precise and hence testable predictions of judicial behavior, but that does not imply that PPT models that consider only policy preferences can do all the work of explaining the way judges decide cases. Both the attitudinal model and PPT will do relatively well if we are trying to explain the way that judges vote in courts of last resort in cases that have been selected for review because the law is unsettled or underdeterminate in a way that affects the outcome. But such cases are only a tiny (though important) sliver of the universe of judicial behavior. One of the important lessons taught by Behavior of Federal Judges is that law plays an important role, most clearly at the trial court level, but in important ways in the Supreme Court as well. If the labor economics model falls flat when it comes to explaining the role of policy preferences in judging, it fares even worse when it comes to accounting for the role of law.*

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#### IV. REALISM AND FORMALISM

PPT models assume that policy preferences drive judicial decisionmaking, but the results reported in *Behavior of Federal Judges* make it clear that a purely ideological model does not fare well at any level, even the United States Supreme Court. The data strongly sug-

<sup>64</sup> Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

<sup>65</sup> *Id.* at 1375.



gest that law and legal preferences play an important role in explaining judicial behavior. Sophisticated empiricists and theorists have begun to build and test models that provide a complex explanation of the interaction between law and politics. One important example of such work is provided by Professors Frank Cross and Emerson Tiller's important 1998 essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*.<sup>66</sup> Cross and Tiller argue that law plays a key role in explaining panel effects. As they explain their hypothesis:

[T]he prospect of a "whistleblower" on the court — that is, the presence of a judge whose policy preferences differ from the majority's and who will expose the majority's manipulation or disregard of the applicable legal doctrine (if such manipulation or disregard were needed to reach the majority's preferred outcome) — is a significant determinant of whether judges will perform their designated role as principled legal decisionmakers.<sup>67</sup>

And they report confirmation of the hypothesis: "In our study, we found that the presence of a whistleblower — that is, a minority member with *Chevron* deference favoring the minority member's political preference — significantly increases the chances that the court majority will follow doctrine."<sup>68</sup> To be fair to Epstein, Landes, and Posner, there is one sentence in *Behavior of Federal Judges* that mentions the whistleblower hypothesis (p. 272), but the topic is immediately dropped.

Cross and Tiller's work points the way to a new approach to the study of judicial behavior that integrates legal preferences with policy concerns. Recent work in this direction includes *The Constrained Court*, an important book by Professors Michael Bailey and Forrest Maltzman,<sup>69</sup> and *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, an article by Professor Corey Yung.<sup>70</sup>

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<sup>66</sup> Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

<sup>67</sup> *Id.* at 2156.

<sup>68</sup> *Id.* at 2175–76. These results may be at odds with those reported by Kim, *supra* note 64, at 1337–38 (finding it to be unclear "whether the possibility of a dissent and subsequent review actually influences the panel behavior of court of appeals judges," *id.* at 1338). For additional discussion of Kim's argument, see Derek J. Linkous & Emerson H. Tiller, Response, *Panel Effects, Whistleblowing Theory, and the Role of Legal Doctrine*, 158 U. PA. L. REV. PENNUMBRA 83 (2009), <http://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENnumbra-83.pdf>, archived at <http://perma.cc/673P-C5Y4>.

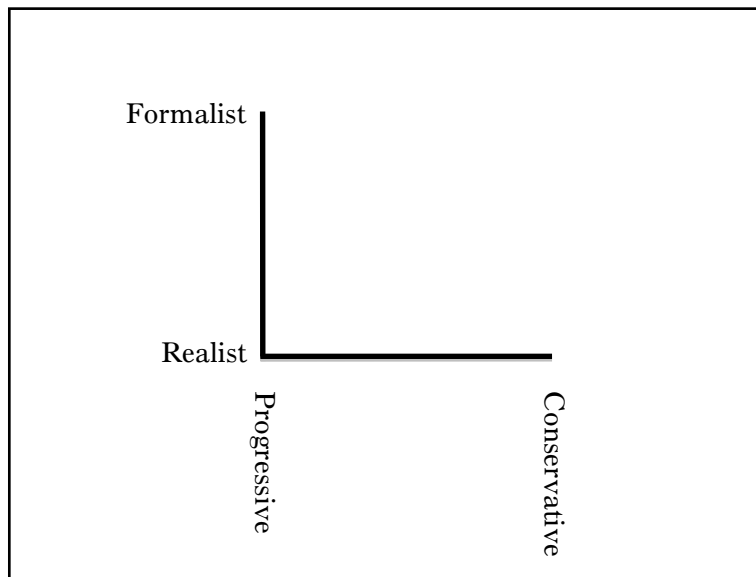
<sup>69</sup> MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT* (2011).

<sup>70</sup> Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1 (2011).

A. *Legal Preferences and the Virtue of Justice as Lawfulness*

The empirical evidence reported in *Behavior of Federal Judges* and the work of others like Cross and Tiller suggest that neither the idiosyncratic labor economics model nor the rival account offered by PPT tells the whole story about the role of law in judicial decisionmaking. A richer account must incorporate the idea of legal preferences — the desire of many judges to “get the law right” even if the legally correct result does not accord with the judges’ ideologies or policy preferences. Of course, the relative strength of legal and policy preferences could vary from judge to judge. We can represent this insight by constructing a two-dimensional model as represented by Figure 2<sup>71</sup>:

FIGURE 2: TWO-DIMENSIONAL MODEL OF LEGAL AND POLICY PREFERENCES



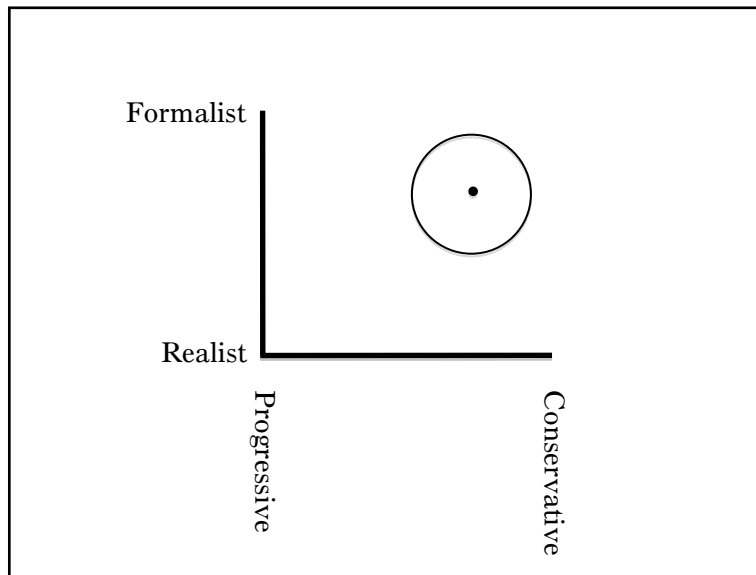
This model incorporates the idea (from pivotal politics models of legislative and judicial preferences) of a political dimension of judicial preferences, represented by an “ideal point” or position on the line. But a second dimension is added, represented by the vertical line from

<sup>71</sup> This diagram is adapted from Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 668 fig.3 (2005). An early version was presented in 2003. Lawrence B. Solum, *The Importance of Assessing Judicial Character*, Panel on Judicial Character and the Federal Appointment and Confirmation Process at the Annual Meeting of the American Political Science Association (Aug. 29, 2003). Bailey and Maltzman presented a similar model in 2011. See BAILEY & MALTZMAN, *supra* note 69, at 49 fig.3.1.

perfect realism at the origin to perfect formalism at the terminus. A perfectly realist judge would decide entirely on the basis of policy preferences; a perfectly formalist judge would decide entirely on the basis of the authoritative legal materials.

Of course, a fully developed two-dimensional model would need to provide much more detail. Each judge would have an ideal point (represented by the intersection between values on the X and Y axes). If the preferences of these judges were Euclidean, they would be indifferent between outcomes that occupy positions that are equidistant from their ideal point. Such equidistant positions can be represented by an indifference curve in the shape of a circle, as represented in Figure 3:

FIGURE 3: EUCLIDEAN PREFERENCES



Taking the point in two-dimensional space to represent the ideal point of a relatively conservative and formalist judge, the circle represents the judge's indifference curve. Any point that is inside the indifference curve would be preferable to any point that is outside it. Such a model can be extended to strategic interactions among judges on collegial courts; an example of such an extension is provided in recent work by Bailey and Maltzman.<sup>72</sup>

The idea that judges have legal preferences is traditionally discussed in qualitative frameworks (and not formal quantitative models).

<sup>72</sup> See BAILEY & MALTZMAN, *supra* note 69, at 95–120.

One vocabulary draws on the tradition of virtue ethics<sup>73</sup> and describes the disposition to act in conformity with the law as the virtue of justice as lawfulness — where law is broadly conceived as the conjunction of the deeply held and widely shared social norms of a given political community and the positive law as identified by those norms.<sup>74</sup> Using a less theoretical vocabulary, some judges can be described as “results oriented” while other judges consider themselves “bound” by legal rules they would change if they were in a legislature rather than on a court.

In a legal and political culture where almost all the judges have legal preferences approximating perfect realism, judicial decisionmaking would be explained almost exclusively by ideology; in a culture where legal preferences approximated perfect formalism, we would expect the opposite, with almost no role for ideology. In a mixed legal culture, we would expect a more complex pattern, with the respective roles of law and politics determined by the legal and ideological preferences of the judges on particular courts — the extent to which the law creates zones of underdeterminacy — and the ways in which the institutional structure facilitates or discourages decisions that are contrary to law. The empirical evidence presented by Epstein, Landes, and Posner, as well as others, seems to suggest that the legal regime in the United States is mixed — with law and politics both playing important roles. There may not be any absolute formalists on the federal bench, but it may also be the case that perfect realists are very scarce or even nonexistent.

*B. The Real Debate: Realism and Formalism  
as Normative Legal Theory*

Part of the problem with the way that *Behavior of Federal Judges* frames the debate between realists and formalists was identified by Professor Brian Tamanaha in *Beyond the Formalist-Realist Divide*,<sup>75</sup> where he demonstrates that realist scholars systematically exaggerated their claim that formalists engaged in “mechanical jurisprudence,”<sup>76</sup> resulting in a distorted picture of the role of law in politics.<sup>77</sup> Once we set aside the cartoon versions of formalism and realism, it seems likely that there will be a substantial amount of common ground.

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<sup>73</sup> See generally VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2008) (collecting essays on virtue jurisprudence as the legal form of virtue ethics).

<sup>74</sup> See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 89–91 (2006).

<sup>75</sup> BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2010).

<sup>76</sup> The phrase is from Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

<sup>77</sup> See TAMANAHA, *supra* note 75, at 44–63.

But a distorted picture of legal formalism is only part of the problem. *Behavior of Federal Judges* conceives of the debate between legal realists and legal formalists as a debate in positive legal theory. That is, Epstein, Landes, and Posner seem to think formalists and realists are mostly disagreeing about an empirical question: does law or something else play the central causal role in determining judicial behavior? If this conception of the debate were correct, we would expect contemporary legal formalists to argue that current legal practice conforms to the rule of law — while legal realists would argue that law is politics. But this conception of the debate and particularly of the position of contemporary formalists is seriously flawed. The real debate between realists and formalists is normative.<sup>78</sup> Formalists argue that law should play a greater role in judging; realists argue for an instrumentalist conception of judging in which policy preferences should trump formal considerations like original meaning of the constitutional text, the plain meaning of statutes, or the doctrine of stare decisis.

The prescriptive nature of neoformalism is most obvious in the constitutional context. Contemporary originalists do not argue that the Supreme Court's behavior over the last several decades conforms to the predictions of originalism as a positive theory. Quite the contrary, originalists criticize the Supreme Court for its disregard of original meaning. Cases where the Justices focus exclusively on original meaning are rare; originalists see *District of Columbia v. Heller*<sup>79</sup> as the exception and not the rule.<sup>80</sup> Indeed, originalism was motivated, at least in part, by the perception that many of the decisions by the New Deal, Warren, and Burger Courts were rendered by realist judges who advanced a progressive agenda that was contrary to the original meaning of the constitutional text.

One line of realist reply to the originalist critique of progressive constitutionalism relies on an implicit assumption that originalism simply cannot work in practice.<sup>81</sup> This objection can take many forms; one version argues that originalist judges construct the original meaning of the text to serve their political ideologies, cherry-picking the evidence to reach the outcomes they prefer on political grounds. The most ambitious form of the objection puts this claim in modal form: originalism is impossible because judges necessarily decide on the basis of their political preferences — legal reasoning is merely the

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<sup>78</sup> *Behavior of Federal Judges* briefly mentions this possibility (p. 52) and then proceeds to other topics.

<sup>79</sup> 554 U.S. 570 (2008).

<sup>80</sup> See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 940 (2009).

<sup>81</sup> A modest version of this objection is found in Cross's recent and important book. See FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013).

window dressing they use to disguise their ideological decisionmaking. Formalism is normative “pie in the sky,” because it would require judges to be “saints,” to use Epstein, Landes, and Posner’s word (p. 62).

The hypothesis that only saints can possess the virtue of justice as lawfulness is an empirical claim, but this hypothesis is not supported by the empirical findings or the labor economics theory presented in *Behavior of Federal Judges*. The empirical findings strongly suggest that judges overwhelmingly follow the law in the United States district courts and courts of appeals. The judicial utility function neither favors nor disfavors the existence of strong legal preferences.

If we take Epstein, Landes, and Posner’s empirical findings seriously, it becomes apparent that the real action is in constitutional cases heard by the Supreme Court. And there, it seems clear that even realist judges are highly constrained by the meaning of the constitutional text. No Supreme Court Justice has suggested that the two-senators-per-state rule (clearly stated in the Constitution’s text<sup>82</sup>) can be overridden on the basis of the one-person-one-vote principle derived from the Equal Protection Clause. And although there is no opposing text, progressive Justices never attempted to use the Equal Protection Clause as the basis for a constitutional right to welfare.<sup>83</sup>

Many originalists admit that the open-textured provisions of the Constitution seem to create “construction zones”<sup>84</sup> in which normative considerations of some kind must operate.<sup>85</sup> (One needs to be cautious about claims of open texture; for example, it may turn out that the original meaning of “due process” was process specified by law<sup>86</sup> and not procedural fairness.) This admission flows from an important idea in contemporary neoformalist theory — the interpretation-construction distinction.<sup>87</sup> Interpretation is the activity that discerns the communi-

<sup>82</sup> U.S. CONST. art. 1, § 3.

<sup>83</sup> See *supra* notes 43–44 and accompanying text.

<sup>84</sup> See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010).

<sup>85</sup> Not all originalists will make this admission — some originalists argue against the existence of significant construction zones. For example, Professors Michael Rappaport and John McGinnis argue that the combination of legal terms of art and the original methods of constitutional interpretation can eliminate (or virtually eliminate) the need for constitutional construction. See John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 739, 741. For the contrary argument, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 503–11 (2013).

<sup>86</sup> See Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1721–26 (2012).

<sup>87</sup> See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 6–13, 204–19 (1999); Solum, *supra* note 84; Solum, *supra* note 85, at 457. The distinction played an important role in twentieth-century contract theory. See, e.g., 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 532–35 (1960).

cative content or linguistic meaning of a legal text. Construction is the determination of legal effect, including the construction of legal rules or doctrines that are associated with the text. Neoformalists in general and originalists in particular are committed to the normative principle that the communicative content of legal texts ought to constrain their legal effect; construction should be guided by interpretation. Some legal realists (perhaps most) disagree. They argue that judges ought to have the authority to override the meaning of the text — if there are good enough reasons for so doing.<sup>88</sup>

Even in the construction zone, neoformalists can and should argue that personal policy preferences or ideologies can be minimized. Justifying methods of construction requires a turn to normativity, but rule-of-law values are themselves normative. For example, a rule-of-law approach to constitutional construction could incorporate a strong presumption in favor of *stare decisis*<sup>89</sup> and settled historical practice. If further construction is required, neoformalists might choose rules that provide bright lines for the guidance of future judges and that are likely to remain stable (because they are consonant with deeply held and widely shared social norms). And if underdeterminacy remains, neoformalists could rely on constitutional default rules that minimize the role of judicial policy preferences: one such default rule would defer to democratically elected officials, while another might favor action at the state level where state and federal legislatures or executives clash.<sup>90</sup> The claim that underdeterminacy requires that judges inject their personal ideologies or policy preferences into judicial decisionmaking involves false necessity — mistaking the way things are for the way things must be.

One of the most important techniques for formalizing the law is precisification, the process by which vague or open-textured legal standards are transformed into legal rules (which may provide bright lines or at least reduce the size of the construction zone). One of the best examples of this technique was provided by Judge Posner in *Herrmann v. Cencom Cable Associates, Inc.*,<sup>91</sup> which dealt with the hoary question as to when two claims are so closely related to be considered as one for the purposes of *res judicata* (claim preclusion). His opinion is remarkable:

It is not much use being told, as by the restaters, that the question what claims constitute a single transaction is to be decided “pragmatically,” with

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<sup>88</sup> See Solum, *supra* note 85, at 534 tbl.1.

<sup>89</sup> See generally Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006).

<sup>90</sup> See Solum, *supra* note 85, at 511–23.

<sup>91</sup> 999 F.2d 223 (7th Cir. 1993).

due regard for whether they form “a convenient trial unit,” whether the evidence concerning them is similar, and whether “their treatment as a unit conformed to the parties’ expectations.” We’re all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance in an area where a false step can result in the forfeiture of valuable legal rights than generalities about practicality, convenience, similarities, and expectations can furnish.<sup>92</sup>

Judge Posner then provides a rule that precisifies the open-textured transactional approach of the Restatement (Second) of Judgments: “[T]wo claims are one for purposes of *res judicata* if they are based on the same, or nearly the same, factual allegations.”<sup>93</sup> This is the rulification of standards in action. One might even say it is *formalism with a vengeance*.

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*Should you buy The Behavior of Federal Judges? My answer is “yes,” because so many parts of the book are valuable in their own right. The extensive discussions of the courts of appeals and the district courts alone are worth the price of admission. And even chapter one, the weakest part of the book, is full of interesting and trenchant observations. Judges are human beings and the labor economics model focuses us on their very human foibles — even if that focus diverts our attention from more important questions.*

*But if you want a sophisticated account of judicial decisionmaking that integrates PPT with serious consideration of the role of law, the book you want to buy is The Constrained Court by Bailey and Maltzman. It integrates pivotal politics models with a two-dimensional model of judging that represents legal preferences in a rigorous way. The Constrained Court is rigorous and illuminating, where The Behavior of Federal Judges provides empty models that obscure the most interesting questions.*

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## CONCLUSION

We are well into the twenty-first century and yet the jurisprudential concerns of twentieth-century thinkers rule us from the grave. We continue to rehearse the moves made in the great debate over formalism and realism by the realists and their critics, by critical legal theorists and their interlocutors, and by the attitudinalists and their opponents in political science. And yet there is hope! The twentieth-

<sup>92</sup> *Id.* at 226 (citations omitted).

<sup>93</sup> *Id.*



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century version of these debates was conducted, for the most part, on the basis of armchair speculation or empiricism that was informed neither by sophisticated legal theory nor by the most sophisticated game-theoretic versions of rational choice theory. This began to change before the turn of the century as PPT began to influence thinking about the relationship between law and politics by both legal scholars and political scientists. The emergence of empirical legal studies in the legal academy has given rise to sophisticated research that confirms the role of law in legal decisionmaking and dispels extreme versions of the indeterminacy thesis. These developments cast the normative debates between moderate realists and neoformalists in a new light. As the issues become clear and the shape of the debates begins to change, new possibilities emerge and old assumptions begin to fall away.

Our thinking about the law is shaped by the jurisprudential gestalt,<sup>94</sup> our big picture view of law at the highest level of generality and abstraction. Gestalts integrate our narratives about legal history with normative theories of judging and legislation and doctrinal theories that summarize the basic structures of public and private law. For much of the twentieth century, the jurisprudential gestalt was dominated by assumptions derived from moderate to strong versions of legal realism. We saw constitutional law through the eyes of progressive realists, who celebrated the New Deal Settlement and embraced the Supreme Court's creation of unenumerated rights without any convincing explanation for their relationship to the constitutional text. We saw torts, contracts, and property as the domain of judicial legislation in the common law mode, with formal distinctions giving way to instrumentalist considerations such as compensation, deterrence, and distributive justice. We saw statutory interpretation as purposive, driven by policy concerns that were only loosely anchored to the meaning of the text. The post-realist twentieth-century jurisprudential gestalt embraced the realist assumption that judging must be driven by policy preferences and ideology — this was a claim of jurisprudential necessity.

In the late twentieth century, an alternative jurisprudential gestalt began to emerge. The alternative gestalt embraced the rule of law as a central value and questioned both the desirability and inevitability of instrumentalist approaches to judging. Originalism emerged as a rival to living constitutionalism. Plain meaning approaches to statutory interpretation began to displace functionalism and purposivism. Even in the common law, where instrumentalism was seen by many as inevitable, the possibility of formalism began to seem plausible.

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<sup>94</sup> Cf. Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

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*And what now, you ask? In the second decade of the twenty-first century, it is possible to detect the stirrings of a jurisprudential gestalt shift. We can begin to imagine a new formalism that replaces the cartoon picture of mechanical jurisprudence with a picture of judging that acknowledges underdeterminacy but embraces sophisticated techniques for engineering legal institutions and doctrines that minimize the role of politics and maximize the rule-of-law values of transparency, neutrality, uniformity, predictability, and stability of law. Precisification and default rules are two such techniques. But old habits die hard and fundamental assumptions resist change. The belief that ideological judging driven by policy preferences is inevitable provides a central structural support for the realist edifice. But that assumption is nothing more than false necessity. And once the support gives way, the edifice may begin to crumble. Old normative theories can begin to seem implausible; new ones start to seem attractive. Old narratives are replaced by new. Lost causes become new orthodoxies.*

*Whither jurisprudence? Time will tell.*