in Richard A. Posner
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# 1

# Nine Theories of Judicial Behavior

There are many positive (that is, descriptive as distinct from normative) theories of judicial behavior.[1] Their primary focus is, as one would expect, on explaining judges' decisions. The theories are the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological, and, of course, what I am calling the legalist theory. All the theories have merit and feed into the theory of decision making that I develop in this book. But all are overstated or incomplete. And missing from the welter of theories—the gap this book endeavors to fill, though in part simply by restating and refining the existing theories—is a cogent, unified, realistic, and appropriately eclectic account of how judges actually arrive at their decisions in nonroutine cases: in short, a positive decision theory of judging.

I begin with the attitudinal theory,[2] which claims that judges' deci-

1. For reviews of the literature, see Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior*, ch. 1 (2006); Barry Friedman, "The Politics of Judicial Review," 84 *Texas Law Review* 257 (2005). For an anthology suggestive of the diversity of the literature, see *Supreme Court Decision-Making: New Institutionalist Approaches* (Cornell W. Clayton and Howard Gillman eds. 1999).

2. See, for example, Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002); Robert A. Carp and Ronald Stidham, *Judicial Process in America* 294 (2001) (tab. 10–1); William N. Eskridge, Jr., and Lauren E. Baer, "The Supreme Court's Deference Continuum: An Empirical Analysis (from *Chevron* to *Hamdan*)" (Yale Law School, May 11, 2007); Andrew D. Martin, Kevin M. Quinn, and Lee Epstein, "The Median Justice on the United States Supreme Court," 83 *North Carolina Law Review* 1275 (2005); Micheal W. Giles, Virginia A. Hettinger, and Todd Peppers, "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas," 54 *Political Research Quarterly* 623 (2001); Tracey E. George, "Developing a Positive Theory of Decision Making on U.S. Courts of Appeals," 58 *Ohio State Law*

sions are best explained by the political preferences that they bring to their cases. Most of the studies that try to test the theory infer judges' political preferences from the political party of the President who appointed them, while recognizing that it is a crude proxy. The emphasis is on federal judges, in particular Supreme Court Justices. State judges are of course not appointed by the President, and sometimes the method of their appointment—for example, by nonpartisan election—makes it difficult to classify them politically.[3]

Justices and judges appointed by Democratic Presidents are predicted to vote disproportionately for "liberal" outcomes, such as outcomes favoring employees, consumers, small businessmen, criminal defendants (other than white-collar defendants), labor unions, and environmental, tort, civil rights, and civil liberties plaintiffs. Judges and Justices appointed by Republican Presidents are predicted to vote disproportionately for the opposite outcomes.

Other evidence of a judge's political leanings is sometimes used in lieu of the party of the appointing President, such as preconfirmation editorials discussing the politics or ideology of a judicial nominee.[4] A neglected possibility is a fourfold classification in which the intermediate categories would consist of judges appointed when the President and the Senate majority were of different parties ("divided government"). However, Nancy Scherer finds no difference in the decisions of federal district judges appointed by "divided" versus "united" government,[5] and I find only a small difference (as shown in Table 1[6]) in the case of federal court of appeals judges appointed by Republican Presidents. But when

Journal 1635, 1678 (1998). For criticism, see Frank B. Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance," 92 *Northwestern Law Review* 251 (1997); Barry Friedman, "Taking Law Seriously," 4 *Perspectives on Politics* 261 (2006).

3. Paul Brace, Laura Langer, and Melinda Gann Hall, "Measuring the Preferences of State Supreme Court Judges," 62 *Journal of Politics* 387 (2000); Carp and Stidham, note 2 above, at 296–297.

4. Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," 83 *American Political Science Review* 557 (1989); Segal et al., "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," 57 *Journal of Politics* 812 (1995). See also Martin, Quinn, and Epstein, note 2 above, at 1285–1300.

5. Nancy Scherer, "Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?" 35 *Law and Society Review* 191 (2001).

6. Some of the classifications used in the data set from which the statistics in Tables 1 and 2 are drawn are erroneous, such as classifying all votes for plaintiffs in intellectual property cases as "liberal." I have corrected such errors; for the details of the corrections and a fuller analysis of the data, see William M. Landes and Richard A. Posner, "Judicial Behavior: A Statistical Analysis" (University of Chicago Law School, Oct. 2007).



Table 1 Judicial Votes in Courts of Appeals as Function of United versus Divided Presidency and Senate, 1925–2002 (in percent)

| | Republican President | | Democratic President | |
|---|---|---|---|---|
| Vote | Republican Senate | Democratic Senate | Democratic Senate | Republican Senate |
| Conservative | 55.8 | 55.9 | 49.6 | 55.3 |
| Liberal | 37.1 | 35.9 | 43.5 | 37.9 |
| Mixed | 7.1 | 8.2 | 6.8 | 6.8 |

*Sources: Appeals Court Attribute Data,* www.as.uky.edu/polisci/ulmerproject/auburndata.htm (visited July 17, 2007); *U.S. Court of Appeals Database,* www.as.uky.edu/polisci/ulmerproject/appctdata.htm, www.wmich.edu/~nsf-coa/ (visited July 17, 2007). Votes were weighted to reflect the different caseloads in the different circuits. "Mixed" refers to multi-issue cases in which the judge voted the liberal side of one or more issues and the conservative side of the other issue or issues.

Table 2 Judicial Votes in Courts of Appeals as Function of United versus Divided Presidency and Senate, Judges Serving Currently (in percent)

| | Republican President | | Democratic President | |
|---|---|---|---|---|
| Vote | Republican Senate | Democratic Senate | Democratic Senate | Republican Senate |
| Conservative | 66.9 | 63.2 | 49.7 | 57.0 |
| Liberal | 25.6 | 27.0 | 39.5 | 35.6 |
| Mixed | 7.5 | 9.8 | 10.9 | 7.5 |

*Sources: Appeals Court Attribute Data,* www.as.uky.edu/polisci/ulmerproject/auburndata.htm (visited July 17, 2007); *U.S. Court of Appeals Database,* www.as.uky.edu/polisci/ulmerproject/appctdata.htm, www.wmich.edu/~nsf-coa/ (visited July 17, 2007). Votes were weighted to reflect the different caseloads in the different circuits. "Mixed" refers to multi-issue cases in which the judge voted the liberal side of one or more issues and the conservative side of the other issue or issues.

the President is a Democrat, it makes a significant difference whether the Senate is Democratic or Republican, probably because the Republican Party is more disciplined than the Democratic Party and therefore better able to organize opposition to a nominee.

Table 2 is similar to Table 1 except limited to currently serving judges. Notice that the effects of divided government on judicial voting are more pronounced than in Table 1, consistent with the strong Republican push beginning with Reagan to tilt the ideological balance of the courts rightward. Notice also that federal judicial decisions as a whole tilt toward

Table 3 Ideology of Currently Serving Justices and the Appointing President

| | President's Ideology | | |
|---|---|---|---|
| Justice's Ideology | Conservative Republican | Moderate Republican | Democratic |
| Conservative | 4 | 1 | 0 |
| Liberal | 0 | 2 | 2 |

Table 4 Conservative and Liberal Supreme Court Justices as Function of United versus Divided Presidency and Senate, Justices Serving Currently

| | Republican President | | Democratic President | |
|---|---|---|---|---|
| Justice | Republican Senate | Democratic Senate | Democratic Senate | Republican Senate |
| Conservative | 3 | 2 | 0 | 0 |
| Liberal | 0 | 2 | 2 | 0 |

the conservative end of the spectrum and that the tilt is more pronounced among currently serving judges.

Presidents differ in their ideological intensity, and taking account of that difference can improve the accuracy of the attitudinal model. Seven of the nine current Supreme Court Justices were appointed by Republican Presidents, but it is more illuminating to note that four conservative Justices were appointed by conservative Republicans (Scalia and Kennedy by Reagan, and Roberts and Alito by the second Bush), two liberal Justices by a Democratic President (Ginsburg and Breyer, appointed by Clinton), and one liberal and two conservative Justices appointed by moderate Republicans (Stevens by Ford, Souter and Thomas by the first Bush). See Table 3.

There is also a divided-government effect in Supreme Court appointments, as shown in Table 4.

Whatever the method of determining a judge's political inclinations, and whatever the level of the judiciary (Supreme Court, federal courts of appeals—on which there is now an extensive literature[7]—or federal district courts[8]), the assumed inclinations are invariably found to explain much of the variance in judges' votes on politically charged issues. The hotter the issue (such as abortion, which nowadays is much hotter than, say, criminal sentencing), the greater the explanatory power of the political variable. The attitudinal theory is further supported by the unquestionable importance of politics in the appointment and confirmation of federal judges;[9] by the intensity of congressional battles, almost always politically polarized, over the confirmation of federal judges and particularly Supreme Court Justices; and by the experiences of lawyers and judges. Every lawyer knows that the accident of which judges of a court of appeals are randomly drawn to constitute the panel that will hear his case may determine the outcome if the case is controversial. Every judge is aware of having liberal and conservative colleagues whose reactions to politically charged cases can be predicted with a fair degree of accuracy even if the judge who affixes these labels to his colleagues would not like to be labeled politically himself.

Further evidence is the tendency of both Supreme Court Justices and court of appeals judges to time their retirement in such a way as to maximize the likelihood that a successor will be appointed by a President of

7. Christina L. Boyd, Lee Epstein, and Andrew D. Martin, "Untangling the Causal Effects of Sex on Judging" (Northwestern University School of Law and Washington University School of Law and Department of Political Science, July 28, 2007); Cass R. Sunstein et al., *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006); Thomas J. Miles and Cass R. Sunstein, "Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*," 73 *University of Chicago Law Review* 823 (2006); Ward Farnsworth, "The Role of Law in Close Cases: Some Evidence from the Federal Courts of Appeals," 86 *Boston University Law Review* 1083 (2006); Jeffrey A. Segal, Harold J. Spaeth, and Sara C. Benesh, *The Supreme Court in the American Legal System* 236–242 (2005); Daniel R. Pinello, *Gay Rights and American Law* (2003); Frank B. Cross, "Decision Making in the U.S. Circuit Courts of Appeals," 91 *California Law Review* 1457, 1504–1509 (2003); David E. Klein, *Making Law in the United States Court of Appeals* (2002); Emerson H. Tiller and Frank B. Cross, "A Modest Proposal for Improving American Justice," 99 *Columbia Law Review* 215, 218–226 (1999); George, note 2 above; Richard L. Revesz, "Environmental Regulation, Ideology, and the D.C. Circuit," 83 *Virginia Law Review* 1717 (1997); Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," 69 *American Political Science Review* 491 (1975). For an interesting case study of how the political preferences of court of appeals judges affect decisions, see Paul J. Wahlbeck, "The Development of a Legal Rule: The Federal Common Law of Public Nuisance," 32 *Law and Society Review* 613 (1998).

8. C. K. Rowland and Robert A. Carp, *Politics and Judgment in Federal District Courts* (1996); Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning," 73 *New York University Law Review* 1377 (1998); Ahmed E. Taha, "Judges' Political Orientations and the Selection of Disputes for Litigation" (Wake Forest University School of Law, Jan. 2007), http://ssrn.com/abstract=963468 (visited Sept. 2, 2007).

9. On which see, for example, Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (2005); John R. Lott, Jr., "The Judicial Confirmation Process: The Difficulty with Being Smart," 2 *Journal of Empirical Legal Studies* 407 (2005).

the same party as the one who appointed the retiring Justice.[10] Still another bit of evidence is what might be called "ideology drift"—the tendency of judges to depart from the political stance (liberal or conservative) of the party of the President who appointed them the longer they serve.[11] A judge closely aligned with the ideology of the party of the President who appointed him may fall out of that alignment as new, unforeseen issues arise. A judge who was conservative when the burning issues of the day were economic may turn out to be liberal when the burning issues become ones of national security or social policy such as abortion or homosexual rights.

There is more: the outcome of Supreme Court cases can be predicted more accurately by means of a handful of variables, none of which involves legal doctrine, than by a team of constitutional law experts.[12] While there is a high correlation between how a given federal appellate judge (court of appeals judge as well as Supreme Court Justice) votes for the government in nonunanimous (hence "close") constitutional criminal cases and in nonunanimous statutory criminal cases, there is a low correlation between the votes of different judges for and against the government in criminal cases.[13] Some judges have a progovernment leaning, others a prodefendant leaning, and these leanings appear to be what drives their votes in close cases whether the case arises under the Constitution or under a statute—though from a legalist standpoint the text of the enactment being applied ought to drive the outcome, and there are huge textual differences between the Constitution and statutes. Apolitical judges would not be expected to vote the same way in both types of case.

10. Ross M. Stolzenberg and James Lindgren, "Politicized Departure from the United States Supreme Court" (University of Chicago and Northwestern University, Mar. 18, 2007); James F. Spriggs and Paul J. Wahlbeck, "Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991," 48 *Political Research Quarterly* 573 (1995); Deborah J. Barrow and Gary Zuk, "An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987," 52 *Journal of Politics* 457, 467–468 (1990). Another straw in the wind is the surprising finding in a recent study that Supreme Court law clerks' self-described political identity (Democratic or Republican) influences the political valence of their Justices' votes. Todd C. Peppers and Christopher Zorn, "Law Clerk Influence on Supreme Court Decision Making" (Roanoke College, Department of Public Affairs, and University of South Carolina, Department of Political Science, June 14, 2007).

11. See Andrew D. Martin and Kevin M. Quinn, "Assessing Preference Change on the US Supreme Court," 23 *Journal of Law, Economics and Organization* 365 (2007); Susan Haire, "Beyond the Gold Watch: Evaluating the Decision Making of Senior Judges on the U.S. Courts of Appeals" (University of Georgia, Department of Political Science, 2006).

12. Andrew D. Martin et al., "Competing Approaches to Predicting Supreme Court Decision Making," 2 *Perspectives on Politics* 761 (2004); Theodore W. Ruger et al., "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking," 104 *Columbia Law Review* 1150 (2004). The variables are "(1) circuit of origin; (2) issue area of the case; (3) type of petitioner (e.g., the United States, an employer, etc.); (4) type of respondent; (5) ideological direction (liberal or conservative) of the lower court ruling; and (6) whether the petitioner argued that a law or practice is unconstitutional." Id. at 1163.

13. Ward Farnsworth, "Signatures of Ideology: The Case of the Supreme Court's Criminal Docket," 104 *Michigan Law Review* 67 (2005); Farnsworth, note 7 above.



All this is not to say that *all* judicial votes are best explained as politically motivated,[14] let alone that people become judges in order to nudge policy closer to their political goals. We shall see in subsequent chapters that to explain the political cast of judicial decisions does not require assuming that judges have conscious political goals. No attitudinal study so finds, and data limitations cannot explain the shortfalls. Even at the level of the U.S. Supreme Court many cases do not involve significant political stakes, but that cannot be the entire explanation either. Think of Oliver Wendell Holmes. The publication of his correspondence after his death revealed that he was a rock-ribbed Republican, yet he voted repeatedly to uphold liberal social legislation (such as the maximum-hours law at issue in the *Lochner* case, in which he famously dissented) that he considered socialist nonsense. He may of course have been an exception among Supreme Court Justices in this as in so many other respects. He may have few successors in point of political detachment in today's more politicized legal culture.

We get a sense of the attitudinal model's predictive limitations in Tables 5 and 6, in which judicial votes that lack any political valence are coded as "other," and the liberal, conservative, mixed, and other votes are correlated with the party of the President who appointed the judge who cast the vote. Notice that apart from the substantial percentage of votes that were either mixed or other, a large percentage of conservative votes were cast by putatively liberal judges (judges appointed by Democratic Presidents) and a large percentage of liberal votes were cast by putatively conservative judges. Notice, as in the earlier tables, the apparent trend toward the increased politicization of court of appeals voting re-

14. See, for example, Cross, note 7 above; Cross, note 2 above, at 285–311; Sunstein et al., note 7 above; Daniel R. Pinello, "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis," 20 *Justice System Journal* 219 (1999); C. Neal Tate and Roger Handberg, "Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88," 35 *American Journal of Political Science* 460 (1991); Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," 69 *American Political Science Review* 491 (1975).

Table 5 Judicial Votes in Courts of Appeals as Function of Party of Appointing President, 1925–2002 (in percent)

| Vote | Republican President | Democratic President |
|---|---|---|
| Conservative | 42.2 | 37.6 |
| Liberal | 28.1 | 33.3 |
| Mixed | 5.9 | 5.1 |
| Other | 23.9 | 23.9 |

*Sources: Appeals Court Attribute Data,* www.as.uky.edu/polisci/ulmerproject/auburndata.htm (visited July 17, 2007); *U.S. Court of Appeals Database,* www.as.uky.edu/polisci/ulmerproject/appctdata.htm, www.wmich.edu/~nsf-coa/ (visited July 17, 2007). Votes were weighted to reflect the different caseloads in the different circuits. "Mixed" refers to multi-issue cases in which the judge voted the liberal side of one or more issues and the conservative side of the other issue or issues.

Table 6 Judicial Votes in Courts of Appeals as Function of Party of Appointing President, Judges Serving Currently (in percent)

| Vote | Republican President | Democratic President |
|---|---|---|
| Conservative | 51.2 | 42.5 |
| Liberal | 22.9 | 33.1 |
| Mixed | 7.3 | 7.6 |
| Other | 18.7 | 16.9 |

*Sources: Appeals Court Attribute Data,* www.as.uky.edu/polisci/ulmerproject/auburndata.htm (visited July 17, 2007); *U.S. Court of Appeals Database,* www.as.uky.edu/polisci/ulmerproject/appctdata.htm, www.wmich.edu/~nsf-coa/ (visited July 17, 2007). Votes were weighted to reflect the different caseloads in the different circuits. "Mixed" refers to multi-issue cases in which the judge voted the liberal side of one or more issues and the conservative side of the other issue or issues.

sulting from judicial appointments by Republican Presidents. But notice, too, that the differences between the two types of judge, exhibited in the first two rows of the tables, though significant, are only partial. And a comparison just of means obscures the fact that the distributions overlap; some judges appointed by Republican Presidents are less conservative than some appointed by Democratic Presidents. This does not refute the attitudinal model, but it does highlight the fact that the party of the appointing President is an imperfect proxy for a judge's judicial ideology. One reason is that ideological issues important to judges need



not have salience in political campaigns; capital punishment is a current example. Another reason is that judges pride themselves on being politically independent rather than party animals.

An explanation for the attitudinal model's predictive limitations that would hold even if all decisions involved significant political stakes is that a case may pose a conflict between two political values, both of which are important to a judge, as when, for example, a civil rights suit (liberal) is brought challenging affirmative action (a conservative bête noire). One might think that in such a case the political considerations would cancel and the decision could be attributed to conventional legal reasoning. But no; the political considerations are unlikely to weigh equally in the judge's mind, and if they do not, the heavier may determine his decision. A notable example is *Buchanan v. Warley.*[15] Decided at a time when the Supreme Court was strongly disinclined to invalidate racially discriminatory laws, it nevertheless invalidated a southern ordinance that forbade blacks to live on any block in which whites were in the majority, and vice versa. The ordinance had blocked the plaintiff, a white, from selling property to a black. The Court distinguished mere "social rights"—the right of blacks to associate with whites (and likewise of whites *not* to associate with blacks, a "right" that the whites who remained in the neighborhood were denied), which the Court had refused to recognize in *Plessy v. Ferguson*—from "those fundamental rights in property" that the Fourteenth Amendment was intended to secure to blacks on equal terms with whites.[16] The distinction is not found in the equal protection clause. Michael Klarman argues persuasively that the Court simply thought government interference with property rights a worse affront to personal liberty than segregation of schools and other public facilities, especially since the person complaining that his property rights were being infringed was the white seller.[17] The upshot was that the Court issued a liberal decision, rejecting racial segregation in private housing.

The attitudinalists' traditional preoccupation with politically charged cases decided by the Supreme Court creates an exaggerated impression of the permeation of American judging by politics.[18] Most cases decided

15. 245 U.S. 60 (1917).
16. Id. at 79.
17. Michael J. Klarman, *Unfinished Business: Racial Equality in American Law* 83–84 (2007).
18. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 187, 188 n. 22, 192 (2007).

by American courts are neither politically charged nor decided in the Supreme Court. And to use the political party of the appointing President as a proxy for a Justice's political inclinations misleadingly implies that *partisan* politics pervades Supreme Court decision making. A President invariably appoints most judges (usually more than 90 percent) from among members of his own political party, but once appointed they are more likely to want to be good judges than to want to toe anyone's political line. You do not find judges saying, even to themselves, "How would Bill Clinton [or George Bush, etc.], who appointed me, decide this case?" Nevertheless, in the frequent cases in which a political judgment is required to "close the deal" because legalist analysis of the case leads nowhere, the judge is likely to lean toward the position that the political party to which he belongs (or belonged) would support, for it is usually not an accident that he belongs to that party rather than another. But "lean toward" is different from "identify with." Supreme Court Justices are political, but politically independent. Most of them, indeed, are outside (either more liberal or more conservative) the range bounded by the political preferences of the President and the Senate that confirmed them.[19]

*Any* amount of political judging challenges orthodox conceptions of the judicial process, however, and the attitudinalists have shown that there is plenty at all levels of the American judiciary (though more, the higher the level). Yet their findings, while heresy to the legal establishment, have the paradoxical effect of blunting criticisms of the courts as acting undemocratically when they invalidate legislative and executive acts. As explained by Mark Graber,

> Judicial review is established and maintained by elected officials. Adjudication is one of many means politicians and political movements employ when seeking to make their constitutional visions the law of the land. Elected officials provide vital political foundations for judicial power by creating constitutional courts, vesting those courts with jurisdiction over constitutional questions, staffing those courts with judges prone to exercising judicial power, assisting or initiating litigation aimed at having those courts declare laws unconstitutional, and passing legislation that encourages justices to make public policy in the guise of statutory or constitutional interpretation. Judicial review does not serve to thwart or legitimate popular majorities; rather that practice alters the balance of power between the numerous political movements that struggle for power in a pluralist democracy.[20]

19. Michael Bailey and Kelly H. Chang, "Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation," 17 *Journal of Law, Economics and Organization* 477, 508 (2001).



The judge who orients his judicial philosophy to the ideology of the President who appointed him (or the electorate that elected him) might be thought the democratic judge, who amplifies rather than undermines the people's choice. Those who regard the Presidency as the most perfect embodiment of the democratic principle should applaud such judges.

The strategic theory of judicial behavior (also called the positive political theory of law), to which I now turn, hypothesizes that judges do not always vote as they would if they did not have to worry about the reactions to their votes of other judges (whether their colleagues or the judges of a higher or a lower court), legislators, and the public.[21] Some of the strategic theorists are economists or political scientists who model politics as a struggle among interest groups and use game theory to sharpen the analysis. Others study historic struggles between the judiciary and other branches of government.[22] At its core the theory is just common sense: whatever a judge wants to accomplish will depend to a considerable degree on other people in the chain of command, broadly understood. At its periphery, however, the theory becomes fanciful, as when the votes of Supreme Court Justices on issues of statutory interpretation are predicted to depend on whether the same political party controls Congress that controlled it when the statute was passed. The

20. Mark A. Graber, "Constructing Judicial Review," 8 *Annual Review of Political Science* 425, 427–428 (2005).

21. See, for example, Daniel B. Rodriguez and Mathew D. McCubbins, "The Judiciary and the Role of Law: A Positive Political Theory Perspective" (forthcoming in *Handbook on Political Economy*); Symposium, "Positive Political Theory and the Law," 15 *Journal of Contemporary Legal Issues* 1 (2006); Stephen J. Choi and G. Mitu Gulati, "Trading Votes for Reasoning: Covering in Judicial Opinions" (New York University School of Law and Duke University School of Law, Sept. 2007); Thomas H. Hammond, Chris W. Bonneau, and Reginald S. Sheenan, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (2005); Lee Epstein and Jack Knight, *The Choices Justices Make* (1998); Andrew F. Daughety and Jennifer F. Reinganum, "Speaking Up: A Model of Judicial Dissent and Discretionary Review," 14 *Supreme Court Economic Review* 1 (2006); Forest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (2000); McNollgast [Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast], "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law," 68 *Southern California Law Review* 1631 (1995); William N. Eskridge, Jr., "Overriding Supreme Court Statutory Interpretation Cases," 101 *Yale Law Journal* 331 (1991).

22. Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (2006).

idea is that the Justices will feel freer to depart from the original meaning of the statute if the party that controlled Congress when the statute was passed is no longer in power.[23]

The strategic theory is compatible with the attitudinal,[24] as it is a theory of means and the attitudinal theory one of ends. The judge who wants the decisions of his court to conform to his political preferences will be likely to choose a voting strategy that promotes that goal, although he *could* care just about expressing his political views and not about their adoption. Brandeis was a judge of the second type, Holmes of the first, with an occasional aberration—such as *Buck v. Bell*,[25] the "three generations of imbeciles are enough" case. Holmes's mistaken belief in the importance for the nation's future of the eugenics law that he was voting to uphold is palpable.

But the strategic theory is compatible with any other goal-oriented theory of judicial motivation as well. Even a legalist judge might adopt a voting strategy designed to maximize the likelihood that his views will be adopted, as distinct from a strategy of always voting in conformity with those views, come what may. That is a possible, though highly controversial, interpretation of *Bush v. Gore*. The five conservative Justices voted for the liberal outcome (the vindication of constitutional voting rights) and the four liberal Justices voted for the conservative outcome. Both camps must have been aware that it would make a difference, should there be a vacancy on the Court, whether the President was a Republican or a Democrat. A more innocent example is a judge who forgoes a public dissent in a case because he fears it would lend prominence to the views of the majority or that if he dissented too often his colleagues would be annoyed and retaliate (perhaps unconsciously) by paying less heed to his views in other cases. Few judges are completely insensible to strategic considerations (though Justice Scalia, our most

23. See, for example, Lee Epstein, Jack Knight, and Andrew A. Martin, "The Supreme Court as a *Strategic* National Policymaker," 50 *Emory Law Journal* 583 (2001); John A. Ferejohn and Barry R. Weingast, "A Positive Theory of Statutory Interpretation," 12 *International Review of Law and Economics* 263 (1992); Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *Journal of Public Law* 279 (1957).

24. See George, note 2 above, at 1665–1696; Max M. Schanzenbach and Emerson H. Tiller, "Strategic Judging under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence," 23 *Journal of Law, Economics and Organization* 24 (2007).

25. 274 U.S. 200 (1927).



prominent legalist judge, comes close). In effect they trade off principle against effectiveness.

What I shall call the sociological theory of judicial behavior, because of its focus on small-group dynamics and hence on appellate judging, is an application or extension of the strategic theory, combined with the attitudinal theory. Drawing on both social psychology and rational choice theory, it hypothesizes that panel composition (federal courts of appeals normally sit in three-judge panels, randomly selected from the members of the full court, of which there might be as many as 28, and even more when senior judges are included) influences outcomes. Specifically, a panel having a Republican or Democratic majority is likely to decide differently from one that is all Republican or all Democratic (bearing in mind the special sense in which a judge is usually classified in studies of the political element in judicial behavior as "Republican" or "Democratic"—on the basis of the party of the President who appointed him).[26] And similarly a panel in a sex discrimination case in which all the judges are male is likely to decide the case differently than a panel that contains a female judge.[27]

Several explanations for why panel composition should have this curious effect—why, that is, a majority would ever yield to the wishes of the minority—have been hypothesized. One is that the odd man out acts as a whistleblower, threatening to expose in a dissenting opinion the majority's position as unprincipled. A less contentious hypothesis is that he may simply bring to the panel's deliberations insights that the other judges, with their different political orientation, have overlooked. Either way his presence is an antidote to the tendency of collective deliberations of the like-minded to drive them to extreme conclusions, as the literature on group polarization finds.[28]

26. See, for example, Sunstein et al., note 7 above; Thomas J. Miles and Cass R. Sunstein, "The Real World of Arbitrariness Review" (forthcoming in *University of Chicago Law Review*); Joshua B. Fischman, "Decision-Making under a Norm of Consensus: A Structural Analysis of Three-Judge Panels" (Tufts University, Department of Economics, May 2, 2007); Sean Farhang and Gregory Wawro, "Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making," 20 *Journal of Law, Economics and Organization* 299 (2004); Frank B. Cross and Emerson H. Tiller, "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals," 107 *Yale Law Journal* 2155, 2175–2176 (1998).

27. Boyd, Epstein, and Martin, note 7 above.

28. See Alice H. Eagly and Shelly Chaiken, *The Psychology of Attitudes* 655–659 (1993); references in Sunstein et al., note 7 above, at 75–77 nn. 26–30. The focus of the panel-composition