POSITIVE THEORY AND THE INTERNAL VIEW OF LAW

John Ferejohn[*]

I. INTRODUCTION

The purpose of this Article is to ask, first, whether positive theories of law can provide explanations of law, legal practices, and institutions from an internal perspective.[1] H.L.A. Hart argued that in a genuine legal system people, or at least legal officials, do not obey the law out of fear of sanctions, but because they accept legal norms, internally, as providing practical reasons for acting or refraining from acting. Legal norms cannot be reduced to systems of punishment but must be understood to guide action in other ways. Are the methodological commitments of positive theory to economic modeling compatible with such a viewpoint? A number of recent papers have been predicated on there being an affirmative answer to this question.[2] But none of them has as yet confronted the case for the other side. The second purpose of the Article is to show that positive theory can help to clarify and possibly resolve problems that arise from the internal point of view. This seems possible, however, only if we can accomplish the Article's first purpose.

Positive theories seek to establish causal explanations for the actions of legal officials or for the structure of law, and one could think that such explanations are necessarily externalist. This could be so for two distinct reasons. First, such explanations are offered from the perspective of an observer of a system and not from that of one of its participants, and this external perspective might preclude internalism at the start. Second, causal explanations appear to be fundamentally

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* Carolyn S.G. Munro Professor of Political Science and Senior Fellow of the Hoover Institution, Stanford University. Visiting Professor of Law and Politics, New York University. I profited from generous comments and criticisms from Lewis Kornhauser.

1 This question ought not be conflated with the success of such explanations. It is, in this respect, an "is it possible" question.

2 *See, e.g.*, Jeffrey Lax, *Constructing Legal Rules on Appellate Courts*, 101 AM. POL. SCI. REV. 6, 591 (modeling how self-interested judges can implement collegial rules for aggregating preferences); *see also* Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 451–67 (1992) (providing an economic theory of adjudication on collegial courts).

different from explanations that turn on the reasons that actors have for doing things, and one may think that internal explanations necessarily work through reasons. As shall be seen, the first problem does not seem insurmountable if one accepts, as I think Hart did, a "moderate" external perspective that permits an external observer to see and explain the operation of the legal system as internally guided from the participant's perspective. The second objection requires something deeper that I cannot develop here: a way of understanding causation in social science models that allows us to regard reasons as playing a causal role in producing action.[3] Positive theories of law and legal action see agents as choosing actions to realize their preferences in light of their beliefs. In this respect, an agent's preferences and beliefs provide her with reasons for doing things. Positive theory models typically model the structure of interaction among agents as constrained by legal and perhaps political factors. In this way legal outcomes are seen to depend both on the preferences of legal (and other) actors and on legal and political constraints.

In some versions of positive theory, preferences and constraints are simply assumed to be determined by material factors. The preferences of legal actors, the beliefs they hold, and the legal rules and practices that constrain them may be largely fixed by material, economic, or social factors, as some Marxists and legal realists believe. If

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3 A great deal has been written on this topic and it remains philosophically controversial. I am attracted to the view articulated in Fred Dretske, *Reasons and Causes*, 3 PHIL. PERSP. 1, 1 (1989) ("[T]he semantic aspect of reasons, the what-it-is we believe and desire, is the property that, in addition to rationalizing or justifying what we do, also figures essentially in the causal *explanation* of what we do."). As intuitive as this seems, however, it is surprisingly difficult to work out the sense of "causation" that would make this idea work. Beliefs and desires are ordinarily understood to be mental states and, by some accounts, their connections to other mental states are subject to ordinary causal "laws." But reasons are norms, and so, on some understandings, they cannot be things that feature in causal laws. For this and other reasons, it is controversial among philosophers of psychology whether, or in what sense, reasons can be seen as causes of action, and I cannot get into the fine structure of these debates. For example, if the action to be explained is "*X* going to the store at a particular time," there will be a causal account in terms of the set of physical movements that *X* took, which are subject to physical-chemical-biological regularities. Presumably *X*'s going to the store can be given a reason-based account: perhaps she wanted a pack of gum and that was the most convenient place to get one. It seems clear that there must be some kind of overlap between reason-based explanations of action and physical causal explanations of the state of affairs that matches with the action. Part of the problem is that acts cannot be completely described by (reduced to) the physical movements—they have an intentional element as well—so a complete physical causal account of the movements involved in an act cannot account for the intentional component. For this reason, it not obvious that there is any unified notion of causation that can encompass both reason-based (intentional) and physical causal explanations.

that is so, any successful explanatory model of law must embody this material causal structure and will, for that reason, ignore the internal perspective. But materialism of this kind is not a commitment of positive theory approaches in general, and, in the extreme form just stated, seems wildly implausible in any case. Other, more common forms of positive theory take preferences and constraints to be determined by factors external to the legal system such as, for example, the political ideologies of judges or other officials. Models of this kind also seem limited to providing external accounts of law. But I shall argue that other positive theories—in which agents have aims internal to the legal system and face constraints arising from within the legal and political system—are not committed to externalism in either of these ways.

A. Internalism

In *The Concept of Law*, Hart distinguished between what he called the external and internal aspects of rules in at least two ways. At one point he said, "[I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct."[4] An actor who is externally motivated does not accept the rules but simply makes predictions about what kind of action will land him in trouble. He refrains from speeding or stealing or killing because he thinks that he will suffer if he is caught doing these things, not because he accepts rules prohibiting such behaviors. Internally motivated actors are, instead, guided by rules they accept.

Hart thought that someone who took an austere external view of the kind described above cannot "give any account of the manner in which members of the group who accept the rules view their own regular behaviour"[5] and cannot describe their life "in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty. Instead it will be in terms of observable[6] regularities

4 H.L.A. HART, THE CONCEPT OF LAW 89 (Penelope Bulloch & Joseph Raz eds., Oxford University Press 2d ed. 1997) (1961).

5 *Id.*

6 Philosophers of psychology actively disagree as to whether, or in what sense, reasons can be seen as causes of action, and this Article is not the forum to explore the nuances of these debates. Some of the difficult issues are related to the helief that if there is to be a causal account of action, such an account ought to be consistent with physical causal accounts that overlap with it. So, to use the same example, if the action to be explained is "*X* going to the store at a particular time," there will be a set of physical movements that *X* takes which are, presumably, subject to physical-chemical-biological causal explanation

of conduct, predictions, [and] probabilities . . . ."[7] Such an austere description, Hart thinks, will miss "a whole dimension of the social life of those whom he is watching."[8] Indeed, Hart argues that "austere" externalism cannot give a causal account of action at all. The most the extreme or austere forms of externalism can do is to present correlations: to describe how it is that actions line up with legal rules in a statistical way. To use his example, an austere externalist can note the association of people stopping at an intersection and the light showing red, but cannot explain the connection between the two observations (that people take the red light as a reason for stopping).[9]

Hart's contrast between internalism and austere externalism seems to calls into question the capacity of quite widely accepted approaches to the study of law to explain law and legal practices. For example, how is one to make sense of statements in comparative law—internalism is, or seems to be, a perspective within a single legal system (or even a perspective on a single norm)—or of theoretical statements about why legal systems display various structural features? The views of comparativists and various kinds of theorists are surely not those of the participants of the legal systems they study, and so, presumably, their statements are not of the kind Hart calls internal. A comparativist is surely not (necessarily) accepting or endorsing a norm internal to the legal system she is describing. Are comparative approaches to law therefore actually limited to describing statistical regularities? I doubt that Hart can be understood as saying the comparativism about law is committed to any view like austere externalism since he himself seems to take a comparativist perspective throughout his book. Hart's target in this critique of austere exter-

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(explanations that do not point to *X*'s reasons for going to the store). It is clear that an action (like going to the store) is generally described in a way that many distinct patterns of physical movements could realize it, so there is some slippage between projects aimed at explaining actions and those explaining the movements of particles. But it is equally clear that there will be overlap between explanations of action and physical causal explanations. In addition, it may not be possible to have a unified notion of causation that could work. Part of the problem is illustrated by the example just given: acts cannot be completely described by (reduced to) the physical movements required to do it, so a complete physical causal account of the movements involved in an act cannot account for what is left over. Suppose I had a complete causal account of the movement of your body that takes it from your house to the store. It is obvious that these movements of your body do not amount to your taking the act of going to the store. Thus the physical account cannot explain the act even if it explains all of its constituent movements.

7 HART, *supra* note 4, at 89.

8 *Id.* at 90.

9 *Id.*

nalism seems to have been the behaviorists who eschewed recourse to internal mental states as causally relevant to action. As positive theories essentially involve explanatory recourse to such states, we need not pursue them. In any case, I think Hart was actually trying to draw a different distinction, one that leaves room for positive theory to take up a kind of internalist perspective on law. This development is stated most clearly in the postscript to *The Concept of Law.*

In the postscript, Hart rejects the dichotomy between austere externalism and internalism that the terminology of the earlier passages seems to imply, and envisions a third possibility, a moderate form of externalism—externalism about internally motivated agents.[10] He argues that it is possible to give an external account of internally motivated action. We can, Hart thinks, without actually endorsing the rules themselves, describe the actions of someone who is guided by rules. "[T]here is in fact nothing in the project of a descriptive jurisprudence as exemplified in my book to preclude a non-participant external observer from describing the ways in which participants view the law from such an internal point of view."[11] To do this, the external observer would need to "*understand* what it is to adopt the internal point of view."[12] But he can do that without actually endorsing the internal viewpoint or the rules themselves: without, that is, relinquishing his "descriptive stance."[13] In this way, it seems, in principle, possible from the moderate externalist perspective to explain the actions of agents who treat the rules as among their reasons for action. Moreover, moderate externalism would permit the observer to prescribe as well as describe it. The perspective seems to permit the English lawyer consulting with an American law firm, or perhaps a civilian lawyer representing a client in a military court, to give advice from an internal viewpoint even though neither accepts the rules of those systems as her own. As far as I can see, a moderate externalist can even say what system of rules might be best for a group to devise or accept. For this Article, I will take this to be Hart's "mature view" and no longer distinguish between internalism and moderate externalism as, it appears, both are committed to offering the same kind of account of action.[14]

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10 *Id.* at 238–76.

11 *Id.* at 242.

12 *Id.*

13 *Id.*

14 I do not know if Hart actually changed his mind between the original *The Concept of Law* and the later edition that included the postscript or whether his views in the postscript were clarifications of what he believed when he wrote initially. I am inclined to the latter

The distinction between internalism and externalism is closely connected to the distinction between explaining an action intentionally, in terms of the reasons the actor had for doing it, and presenting some other kind of explanation (perhaps a causal account, where the causal considerations are not themselves reasons on which the person could have acted). Being guided by reasons, however, is not sufficient for internalism; the kinds of reasons that are to matter to legal agents must be reasons that figure in law.[15] Agents who are internally rule-guided, in Hart's sense, treat the legal rules they accept as their own as (among their) reasons for action or restraint. An internal account therefore has a justificatory aspect: to explain an agent's actions in terms of the rules of a system she accepts is to justify those actions (in terms of that system of rules).[16]

Two variables undergird Hart's distinction.[17] One is whether or not the observer herself accepts the rules as guides for her own behavior. That is, whether or not she is a participant in the system of rules or is describing it from the outside. The second is the nature of the explanation of action: whether or not actions are explained by reference to reasons for action, specifically including rules of the normative system which she is assumed to accept. An internalist is one who thinks that her own actions, as well as those of the agents in

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view since the perspective of the original *The Concept of Law* seems incomprehensible otherwise. The abstract level at which he described a legal system in the original precludes there being a properly internal view that could be taken about it. Or so it seems to me.

15 I use "figure in" to permit enough latitude for nonpositivist forms of internalism. I do not think that I need enter into any of these issues or disputes.

16 Another way to put this is that reasons are norms or, if you prefer, normative facts rather than facts about the world. Being thirsty is, for example, a reason for an agent to take a drink. In that sense, being thirsty is a kind of norm that could guide the actions of an agent. For normally functioning people, being thirsty is a mental state that relates to a kind of physical state which we might call the state of having too little water to continue functioning. The physical state cannot be a reason for the agent to act since the agent herself does not possess it as a reason for action; something else is needed, and that something else is provided by the mental state of being thirsty. As is clear from the invocation of "normal functioning," the relationship between the two states is contingent rather than necessary. An agent can bave "too little" water in the pbysical sense while having no reason to drink.

17 Scott Shapiro has made a similar argument in a recent article. Scott Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1158–61 (2006). Shapiro argues that Hart's text implies four distinct perspectives: that of the insider who accepts the legal norms; the insider who does not accept them (Holmes's "bad man"); the behaviorist observer (the austere externalist); and the hermeneutic observer (Hart's own position). *Id.* My argument is that positive theories of law belong in Sbapiro's fourth category. In any case, my argument was developed independently for the conference in the fall of 2006. For the "bad man" perspective, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897).

the system, are rule guided. A moderate externalist thinks that while others are guided by the rules of the system, her own are not. An austere externalist does not see actions as rule-guided at all.[18] Hart may have thought that there could not be a valid explanation for why people in rule-governed systems behave as they do unless it is an intentional explanation that recognizes rules as reasons for actions.[19] If that is right, either internalism or moderate externalism—because both are intentional accounts—seem capable of explaining action within a legal system. So the question is whether there are positive theories of law that can qualify as either internal or moderately external accounts.

B. Plan of the Article

In Part II, I try to describe in more detail positive theoretic approaches to law and to ascertain some of their limitations as they pertain to the internal view of law. There are at least two quite specific objections to application of positive theory to an internal view of law that seem to me to require separate treatment. The first is that the aggregative properties of legal and political institutions, which play a central role in positive theories of law and politics, are inconsistent with the internal or norm-guided view. Part III explores the objection that the political models of judging—by positing that judges act ideologically—are inconsistent with internalism. There are two ways in which this might be so. The first is that judges are assumed to be externally motivated. The second is that even if judges are internally motivated, they are placed on courts by political officials (or voters) who have different motivations. In Part IV, I ask whether positive theory is able to model or describe deliberation among norm-guided agents and argue, by means of an extended example, that this is not true. Moreover, I employ a positive theoretic analysis to illustrate a dilemma of internalism and try to map out ways that it might be alleviated.

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18 Obviously there is a fourth category: one who sees her own actions as rule-guided but those of her subjects as subject only to other kinds of regularities. This is the perspective of a scientist, who accepts the norms of the scientific method or of statistical inference, studying nonintentional phenomena. Perhaps Hart's austere observer could take such a view.

19 There are reasons to doubt this conjecture that are illustrated by the examples in Part II.

II. POSITIVE THEORY AND LAW

The elements of a positive theory are few: a description of the preferences of the agents, the sets of actions each can take, a description of the institutional, physical, and fiscal constraints on those actions, and a description of the outcomes that arise as a function of the actions taken by the agents. These basic elements can be elaborated in various ways by giving the theory, for example, game theoretic structure of some kind or another, which requires detailing what information agents have and the sequential structure within which they act. Many of these considerations are not essential to my argument, so I will make sparing use of them. For now, let us start with the kinds of preferences legal officials such as judges, agency leaders, and politicians can be expected to have.

The role that preferences play in positive theory models is to characterize the conflict among the agents. For example, some models of legislative behavior take the distribution of wealth or revenues to be the generic political question, and legislators may be thought to have rather simple preferences over alternative distributions: they are assumed to care only about their share of the net (of taxes) transfer or the share received by their constituents and to be indifferent as to who gets the rest. Even in this kind of a model the question of which actions a legislature would be expected to take is complex since the relationship between outcomes—the wealth a legislator or his constituents gets—and the action she takes is complicated.

But legislatures rarely decide such pure distributional issues and courts almost never do. In these contexts, the question of which outcomes actors will or should seek is much more difficult. It is possible, of course, that actors will have some generalized interest in deciding things in one way or another. Judges are drawn largely from the male, white, middle-aged, upper-middle-class segment of the population and may have a common interest in protecting wealth and property and the settled rules of long-established institutions. But one can hardly think that this is the same kind of interest that a reelection-seeking congressman would have in getting subsidies for his constituents. No particular judge is likely to get much benefit from any particular decision going one way or another.

One of the distinctive features of positive theories of law arises from what we may call aggregative constraints: the fact that judicial decisions are, in various ways, collective decisions. Trial courts, ostensibly presided over by lonely judges (at least in the United States), are embedded within a system of hierarchical subordination to appellate courts, a fact that conditions every choice a trial court judge

makes. Trial court judges are in a kind of agency relationship with respect to courts superior to theirs, and the actions they take need to be seen in that context. Moreover, appellate courts are invariably multimember bodies and typically make their decisions by deliberating and, finally, voting. And the votes are usually aggregated according to some accepted, and more or less fixed, rules for making collective decisions. Finally, the judicial system is itself embedded in a more encompassing political system, so that the decisions of courts can be challenged and changed by political agencies, and indirectly by electoral events. Again there is a kind of agency relationship between such courts and those who can overturn their decisions.[20]

The issue is this: positive theories generally see judges and other legal officials as having preferred ways that a legal decision should come out; but only if the content of these preferences is determined partly or wholly by non-legal factors would we say that such officials are externally motivated.[21] The content of judicial preferences might just as plausibly be grounded in differing judicial conceptions of what the law is. Let us call the latter "judicial ideology" just to keep things clear. If preferences are based in judicial ideology in this way, then it seems plausible that each judge (and each other legal official) could have an internal view of the law in Hart's sense. If that is so, then a positive theory that described the interaction among legal officials motivated in this way would assert that the law itself emerges from the interactions of internally motivated agents and would be, for this reason, internal.[22]

Moreover, the system of constraints facing legal actors does not resemble physical constraints, in that they are part of the normative structure of the legal order. It is not merely a fact that the Supreme Court is entitled to overturn the decisions of lower courts, nor is it a simple matter of fact how the particular sitting Justices are likely to

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20 With respect to statutory decisions, Congress is in the role of the principal. With respect to constitutional decisions, Article V majorities are in such a role. The consequences of these claims are enormously complex and cannot be developed here.

21 I have not yet said anything about the extent of the class of "legal officials." I take the inclusion of judges and public prosecutors and defenders as noncontroversial, and I am inclined to see lawyers in that way as well. But what about politicians and, specifically, elected and appointed officials wben they are acting in their official capacities? I think a case can be made either way, but I want to leave the issue open and am, as the previous sentence implies, inclined to draw the line between the exercise of official duties or authorities and job-seeking or job-preserving activites, recognizing that this line is not always so bright.

22 As I shall argue in Part IV, the conclusion of this sentence does not actually follow from its argnment.

vote. The constraint represented by the presence of the Supreme Court is a normative fact: it is a source of reasons for the lower court to decide one way rather than another. How that is the case is a complex matter. For one thing, it is part of the accepted conventions of our legal system that a higher court can correct a lower one.

There are further justifications for this entitlement. That a trial court may have its actions appealed may be a kind of normative requirement of procedural justice and may, for that reason, be a requirement that anyone with an internal view must endorse. However, lower court judges are not simply subordinates. They have a right and an obligation to decide cases in ways that are sensitive to the normative basis of a potential overruling and not simply the prediction of its likelihood. While in some circumstances lower courts are obligated to follow higher court precedent, they are surely not required to anticipate what a higher court would do in the future. Even in the case of a precedent, the duty to follow it weakens as the case before the lower court differs in some respect from the one on which the precedent was fixed. And so, in novel fact situations, a faithful trial judge will need to understand the principles (norms) underlying the precedent and not merely the fact that it exists.

Similarly, the legislature's right to change the law that judges apply is not merely a political fact about which institutions hold effective power, but is a part of the normative structure of a democracy. To be a democracy is to vest in the legislature (or the people) some authority to shape the law that is enforced in courts. Courts, in a democratic system, are required to respect legislative decisions, at least under normal circumstances where it can be presumed that elections have been (generally) legitimately conducted (so that the legislators are sitting lawfully), lawful lawmaking procedures have been followed, and constitutional prohibitions have been respected. The respect that is owed is, as above, a normative issue: a reason to decide a case one way rather than another.

Judicial failures to respect the normative political order can trigger retaliation by political departments. Courts can be abolished, jurisdictions stripped, and judges intimidated into making decisions other than those they think the law requires. Short of such extreme measures, the composition of courts may be determined by political actors, elections, or by some other set of institutional processes. And in the end, unwelcome judicial decisions may simply be ignored by powerful social and political actors or by ordinary jurors. These facts are routinely invoked in positive theory explanations of what happens in courts and legislatures and therefore what shapes the law. But

these possibilities do not merely describe counterfactual situations; rather, they present constitutional possibilities that are, for the most part, accepted as parts of the legal and political order. At the very least, it seems plausible that many of the ways actors outside the legal system (including ordinary people) can react to and influence the actions of legal actors provide reasons for action (norms) to legal actors and are not merely brute facts of power.

The claim that positive theories are necessarily externalist rests on one of two assumptions, each of which seems gratuitous. First, it might be assumed that the very structure of positive theory models makes positive theory incompatible with internalism, specifically the idea that actors seek to maximize preference satisfaction (or some other objectives). Law, it is argued, is a system of norms, a matter of prohibitions, authorizations, and permissions, the stuff of deontology, and not something where models based on maximization can play any internal role: it has the "wrong shape."[23]

This objection confuses the inner structure of the theory with its domain of application. Legal actors could sensibly be seen as maximizers if they seek to make the best decision in a case, or as crafting the best rule, given the legal and factual materials at their disposal. But the actions taken with such preferences are decisions or rules that can be described deontologically. Such objectives can be internal with respect to law, it seems to me, insofar as the actor is committed to guiding her behavior according to the set of legal norms that apply to her (i.e., they enter either into the objective function, as above, or into the constraints in a certain way). If her actions are externally motivated, it is not because they maximally satisfy such preferences, but because the content of the preferences are external to law. I argue, therefore, that the "wrong shape" interpretation of positive theory misdescribes both the objectives of and the constraints facing legal actors.

The second assumption is less direct and depends on the truth of some version of legal realism: because positive theories aim at explaining how legal officials act, the fact that economic and social factors determine the content of the objectives of legal actors or the constraints facing them makes any successful positive theoretic explanation externalist. But, it seems implausible that legal and social reality could be so tightly connected as the strong form of legal realism contends. This is not to deny that "realist" factors may have

23 *See generally* Lewis A. Kornhauser, *The Normativity of Law*, 1 AM. L & ECON. REV. 3 (1999) (examining the gap between traditional and economics-based approaches to the law).

causal influence on law, but such an assertion is weaker than a claim that the social and economic (or other external factors) literally determine law, or that law reduces to socioeconomic facts.

Indeed, it seems to me that positive theory is not committed to any form of legal realism. Legal actors may well, instead, pursue visions (interpretations) of what law requires that are not rooted in social or economic facts in the reductive way that most versions of realism envision. And, while their actions are surely subjected to procedural and other constraints (such as remaining faithful to settled law), those constraints need not have any particular social or economic roots either. They may be grounded instead in arbitrary conventions among legal officials, for example. Further, the attitude of legal actors toward the political or legal constraints they face may not be to see them as something like physical impediments to taking desired actions, but as normative rules that provide guides or reasons for action or restraint. Insofar as legal actors are motivated in this way, it seems plausible that a positive theory of their strategic interactions can be internal to law.

III. PICKING JUDGES

The objection I will deal with in this Part can be put like this: even if judges are internally motivated, something must determine which judge gets to decide a case, and if we look deeply enough, we will find that nonlegal, external factors ultimately drive this decision. So, insofar as a positive theory of law is committed to explaining legal outcomes, it will have to base part of the explanation on the operation of these external, causal processes and is, for that reason, committed to externalism. There are two versions of this objection. The first one claims that the commitment to explain law requires going beyond intentional explanation (and therefore beyond internalism) to reach relevant causal factors, and this move entails externalism. The second objection, which may be more troubling, involves arguing that a satisfactory intentional explanation of law must involve recourse to intentions that are external to law.

I will consider two examples which illustrate the two worries, each of which is the basis of widely accepted views about how courts and parts of the legal system operate. The first is that there are institutional reasons to think that courts will tend to reach efficient decisions and generate efficiency-enhancing doctrine in private law dis-

putes.[24] The argument relies on competition among courts for jurisdiction and among litigants for favorable legal venues: even if all judges are internally motivated, there may be some process, not susceptible to internal explanation, that leads to the selection of judges or courts that then make decisions. This suggests that a causal but non-internal explanation, based on competition and selection, accounts for legal decisions and legal doctrine.

While two litigants ordinarily have conflicting preferences in their specific case, they share a common interest in getting an efficient decision.[25] One might expect, therefore, that a competitive process of this kind would tend to put cases before courts that would decide them (relatively) efficiently. This might lead some courts to disappear and others to flourish. That courts compete jurisdictionally with each other for cases, and that litigants put their cases before courts where they can hope for the best result, presses courts to develop efficient doctrine and decide cases in ways consistent with economic efficiency as between the parties.[26] Insofar as the surviving courts decide differently from the others, the mix of legal outcomes would reflect this tendency. So, even if each judge has an internal viewpoint about law, the resulting pattern of decisions and doctrine will best be explained by considerations of efficiency, which is a criterion external to law. So would we then be required to say that the internal viewpoint was not really doing any work at all?

I do not think that conclusion is warranted. After all, by assumption, the judge who finally decides the case and explains the outcome to the litigants is completely guided by internal considerations of law and, knowing this, the litigants have reason to confine their argu-

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24 *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 253–59 (1979) (theorizing that competition in the judicial services market leads to efficient changes in substantive law); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1551 (2003) ("[A]n animating insight of the economic analysis of the law has beeu the observation that the common law process appears to have a strong tendency to produce efficiency-enhancing legal rules."); *see also* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law* 4 (Univ. S. Cal. Ctr. in Law, Econ. and Org. Research Paper Series, Paper No. C07-4, Univ. S. Cal. Legal Studies Research Paper Series, Paper No. 07-2, 2007), *available at* http://ssrn.com/abstract=968701 (examining the effect of jurisdictional competition on pro-plaintiff features of the common law).

25 This is so in the weak sense that if court *A*'s likely outcome were to Pareto dominate that of court *B*, from the perspective of the litigants, both would prefer to litigate in front of *A* rather than *B*.

26 The plaintiff might file in one court while the defendant could have the chance to remove the case to another jurisdiction. One would expect a kind of negotiation over where the case would actually be heard.

ments to matters internal to law. The result in the case is therefore produced solely by legal considerations. This is so even if a different result might have been reached in another court. The result reached in that other court would also have been reached internally. The doctrine that emerges out of a succession of such cases is, again by assumption, arrived at internally through norm-guided legal strategizing (by lawyers) and reasoning (by judges). In this respect, the law that emerges from this process emerges by means of processes internal to law. This is so even if we admit that there are causal processes (competition among courts and litigants) that play a causal role in determining what happens in law. Internalism, as I understand it, does not require that there is no valid causal perspective on law, but only that each legal action have an internal explanation.

The second example, drawn from political science, is based on two widely accepted empirical propositions concerning the United States Supreme Court. The first is that the pattern of Supreme Court votes can be explained by assuming that the Justices vote largely on the basis of their political ideologies.[27] Second, in anticipation of this "fact," the appointers of the Justices tend to support potential Justices who share their own ideology. The conclusion usually drawn is that there is an intentional, though non-internal, process that determines which Justices get onto the Court and decide important cases. It is widely believed that these processes are not confined to the Supreme Court but extend to lower federal courts and to the state systems as well. If that is right, there is reason to think that the pattern of legal outcomes is to be explained intentionally but not internally.

This argument depends crucially on the claim that the political actors who appoint judges are externally motivated. While the mode of political appointment varies widely among the states and the federal system, it seems plausible that many of the actors are motivated to pursue their own (or their constituents') political ideologies. Thus, even if all of the potential judicial candidates are internalists, the best explanation of which decisions are made, and therefore how law evolves, must take account of views external to law. So far this seems parallel to the economic example given above and would seem to deserve the same response. Namely that, however they got on their court, the judges still guide their decisions according to law,

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27 *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (giving a recent summary of these findings provided by their most forceful advocates).

and, in anticipation of this, those appearing in court will do the same. But there may seem to be a difference.

In the case of political appointments, we can imagine appointers will be able to learn of the judicial ideologies of the potential candidates and work to appoint those candidates to judgeships on account of those ideologies. Even if each judge takes an internal view, his way of deciding will be anticipated (with greater or lesser success) by the appointers.[28] If this is the case, is it true that the litigants are offered the chance to have their case determined by applicable legal norms? I think the answer to this has to be affirmative. After all, the appointers can do no more than predict how a judicial candidate will act on the bench. The most they can assure themselves of is that the judicial ideology of the new judge (which is internal to law) will be closely related to their own political ideology (which may be external to law). When it comes to deciding any case, the judge acts only on internal considerations as before. So, even in the case where the appointment process is political in the way described here, legal outcomes are reached through internal reasoning about law.

This argument rests, of course, on the assumption that candidate judges are internally motivated and are not, in some sense, corrupt. Some think that the empirical propositions cited above cast doubt on this assumption. While I am not willing to assert that judges are never corrupted in this way, I do not think it is very surprising that legal and political ideologies exhibit a high correlation when it comes to deciding controversial cases and so do not think that these empirical regularities are informative as to the existence and extent of judicial corruption. So I do not think that political appointment of judicial officials commits those seeking to explain those processes to externalism.

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28 *See* CHRISTINE NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH (2007) (providing insight into presidential selections); Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1069–78 (1999) (providing an overview of the selection process); Charles R. Shipan, Partisanship, Ideology, and Senate Voting on Supreme Court Nominees (Feb. 24, 2007) (Univ. of Mich., Dep't of Political Sci., Working Paper), *available at* http://sitemaker.umich.edu/cshipan/files/shipanjels2007feb25.pdf (analyzing Senate voting behavior).

IV. DELIBERATION: A DILEMMA OF INTERNALISM

Another, apparently deeper, objection to positive theoretic models of internalism, which draws on the fact that courts (and court systems) engage in collective decision making, argues that any rational-choice-based model of that activity will be inconsistent with internalism about law. Specifically the claim goes like this: even if all the judges are internalist about law, their collective decisions (specifically those involving the application of doctrine to decisions) cannot generally be understood as internal. Rather, the pattern of decisions will reflect legally arbitrary features of the way in which collective bodies reach decisions and will therefore be explicable only by taking account of factors external to law.

This is a problem for internalism itself and not merely for rational choice models of it. At least this is so if internalism is thought to require, as I suggested above, that courts are explicitly or implicitly collegial—they are either made up of several members (in the case of appellate courts), or litigants in single-judge courts have a right to appeal a verdict to another tribunal—which forces judges to take account of other views in deciding the case before them. If collegiality is actually a requirement of internalism about law—which seems plausible if one thinks that internalism requires that verdicts be reliably connected to law—then it is a problem for internalism that internalist judges, deciding together, will not produce collective decisions that can be justified from an internal perspective.

Positive theory has already offered a description of this problem: Lewis Kornhauser and Larry Sager illustrated the phenomenon which they called the "doctrinal paradox."[29] And I think positive theory may actually be able to help to resolve or ameliorate it. Doing this will require the development of a positive theory of judicial deliberation, and I try to sketch the outlines of one in what follows. Given the variety of the collective decision rules exhibited in a court system, I can only investigate this issue in a rather simplified setting of a three

29 *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 2–3 (1993) [hereinafter Kornhauser & Sager, *The One and the Many*] (labeling the "largely unobserved paradox that can arise when doctrine directs a multi-judge court to resolve issues en route to the decision of a case before it" as the "doctrinal paradox"); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Courts*, 96 YALE L.J. 82, 114–15 (1986) (identifying the problem that arises when multiple judges decide cases on an issue-by-issue basis, thus creating a doctrine that no judge believes is consistent); *see also* Kornhauser, *supra* note 2, at 453–57 (providing further examples of the doctrinal paradox).

judge court that is, somehow, committed to using majority rule to reach final decisions.[30]

More recently it has been appreciated that the doctrinal paradox is actually a general feature of (non-unanimous) collective decision making and has widespread implications for collective decision making. Philip Pettit and Christian List, in a number of articles, have developed the theory in many different directions, arguing that it is an inherent feature of practical reasoning by groups. And they have given it a more general name: the "discursive dilemma."[31] Seeing the problem as one inherent in practical reasoning has suggested to these authors that the issue is whether, or when, a group can be seen as an entity capable of such reasoning—as a person—rather than merely as an assemblage of individuals.[32]

Assume there are three voters, each of whom is to decide whether to pursue an end which any of them may desire. Each may believe that some action is the most effective means to the end. Presumably,

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30 There is a venerable methodological maxim in positive political theory that says that, if the voting rule is ordinary majority, everything (pathological) that can happen in a collective decision procedure can he illustrated with three voters and three alternatives. This maxim extends to spatial settings as well to say that there needs to be three voters, Euclidean preferences, and at least two dimensions.

31 *See* Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 272 (2001) (recognizing that this term is a more general version of the doctrinal paradox); *see also* Christian List, *A Model of Path-Dependence in Decisions over Multiple Propositions*, 98 AM. POL. SCI. REV. 495, 496 (2004) (developing a model for sequential, rather than simultaneous, decisions on related issues); Christian List, *A Possibility Theorem on Aggregation over Multiple Interconnected Propositions*, 45 MATHEMATICAL SOC. SCI. 1, 1–8, (2003) (developing a model to constrain the paradox); Christian List, *Which Worlds Are Possible? A Judgment Aggregation Problem*, J. PHIL. LOGIC (forthcoming) (manuscript at 1–4, *available at* http://personal.lse.ac.uk/LIST/PDF-files/PossibleWorlds.pdf) (extending the idea of the discursive dilemma propositions modeled as sets of possible worlds); Christian List & Philip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 ECON. & PHIL. 89, 92–100 (2002) (asserting that an impossibility theorem results from the doctrinal paradox).

32 *See* Philip Pettit, *Akrasia, Collective and Individual*, *in* WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY 68, 78 (Sarah Stroud & Christine Tappolet eds., 2003) (explaining the cooperative and self-unifying requirements for a collection of individuals to function as a single agent). This idea resonates with others in legal theory, especially Ronald Dworkin's notion of "integrity." *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986). It raises many issues depending on whether personification is seen as an ontological claim—that there is some kind of reality ascribed to the collective entity that is autonomous from the individuals composing it—or merely a practical one. Or as in this Article, as a moral requirement that, depending on one's moral theory, may or may not be endowed with ontological status. *But see* Lewis Kornhauser, *Aggregate Rationality in Adjudication and Legislation*, POL. PHIL. & ECON. (forthcoming) (manuscript at 2, 12–22, on file with the University of Pennsylvania Journal of Constitutional Law) (expressing skepticism ahout personification of this kind and arguing that aggregate rationality, which seems a minimal condition for personification, is too strong to impose on courts).

in the case of an individual, if the end is desired, and the means is the most effective way to get it, there is reason to intend to take the action in question. The problem is that in the case of a group, there can be disagreement as to all three judgments. The dilemma is this: reasoning as individuals, a majority of members have no reason to intend the means, and so a majority would not have reason to intend the means. But, reasoning as a group, a majority thinks the end is desirable, and a majority thinks the means effective, and so the group has reason to form the intention to pursue the means. The dilemma shows that, faced with this pattern of judgments, the group cannot, at the same time, present itself as a rational agent and respect the rational judgments of its members.[33]

Examples of this kind were first noticed in the context of decision making on collegial courts.[34] Kornhauser and Sager argued that this preference pattern, which they labeled the "doctrinal paradox," has actually been observed in multi-judge courts and that, empirically, it has led to some curious judicial reasoning.[35] Here is one of their examples from the area of contract law[36]: contract law doctrine says that the plaintiff who claims that the defendant has failed to perform a contractual duty prevails only if there is a valid contract and that contract has been breached. Perhaps there are yet other necessary conditions as well, but those will be ignored here.

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33 The structure of the dilemma can be stated a bit more formally. Let c_i be a set of members required or decisive for the group to affirm premise i. Then, a discursive dilemma occurs when the set of people contained in all c_i is not itself a decisive set. For majority rule, it is clear that the set of people contained in every c_i may not be decisive as long as there is more than one premise, or if the smallest decisive set is less than the set of all members. For example, suppose in the group {1, 2, 3} that {1, 2} is decisive for premise 1, and {2, 3} is decisive for premise 2, as required by majority rule. The intersection of these sets, {2}, is not a majority and therefore is not decisive for the result.

34 *See generally* Lewis A. Kornhauser & Lawrence G. Sager, *The Many as One: Integrity and Group Choice in Paradoxical Cases*, 32 PHIL. & PUB. AFF. 249, 250 (2004) [hereinafter Kornhauser & Sager, *The Many as One*] (illustrating how the choice of voting protocols in multi-judge courts may affect the outcome of a case); Kornhauser & Sager, *The One and the Many*, *supra* note 29, at 10–12 (describing the difficulty that appellate courts face when the outcome of a case depends of choosing issue-by-issue or case-by-case voting); Kornhauser, *supra* note 2, at 453–57 (noting that collegial courts may decide an identical case differently depending on whether they use a case-by-case resolution or an issue-by-issue resolution).

35 Kornhauser & Sager, *The One and the Many*, *supra* note 29, at 2–3.

36 *Id.* at 10–12; Kornhauser & Sager, *The Many as One*, *supra* note 34, at 251.

TABLE 1

Judge	Valid Contract	Breach	Plaintiff wins
1	*Y*	*N*	*N*
2	*N*	*Y*	*N*
3	*Y*	*Y*	*Y*
Court	*Y*	*Y*	?

The illustrated pattern of judgments by the three judges generates the paradox: a majority of the judges, reasoning individually, would decide against the plaintiff, but a majority of judges also think there was a valid contract and that it was breached. Clearly there are several ways to deal with the decision.[37] One way is simply to have the group's judgment determined by a vote among the members as to how the court should decide, and so, in this case, to decide for the defendant. This could be called result-based decision making. A second way is for the court to decide on the premises first and then let the result in the case be determined by the doctrinal structure—this Pettit calls premise-based decision making—and so, in this case decide for the plaintiff.[38]

There are a few observations that should be made about the structure of beliefs in the discursive dilemma. First, in the conjunctive case the only kind of dilemma that can arise is one in which the results vote is negative while the premise-based votes are all positive.

37 The examples of the discursive dilemma in this Article concern what are called "conjunctive" dilemmas. A person or group should decide in favor of some action only if it agrees to each of a series of premise judgments. A disjunctive dilemma arises when the group or person should decide in favor of some action only if it agrees to at least one of a series of premise judgments. The two kinds are formally equivalent. My reason for confining attention to the conjunctive case is merely one of convenience.

It might be claimed, implausibly I think, that, in general, disjunctive dilemmas are more likely to be found in legislatures and conjunctive ones in courts. The reason for the claim would be this: legislatures are expected to exhibit legitimate heterogeneity of interests and judgments and so to develop norms of legislative deliberation that permit agreement to a decision on any of a number of possibly incompatible grounds. Cass Sunstein has termed this mode of reaching decisions "incompletely theorized." CASS SUNSTEIN, ONE CASE AT A TIME 11 (1999). I do not of course deny that such agreements may be legitimate in legislatures but agree with Sunstein that courts may well adopt this method of reaching agreements too.

38 In a recent paper Philip Pettit has called this way of making decisions "conclusion-centred" since the effective vote of the court is on the final judgment of the case that each judge thinks is warranted. Philip Pettit, *Groups with Minds of Their Own, in* SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY (F. Schmitt ed., 2003).

One interpretation of this is that under results voting the "status quo" (where the plaintiff loses) is privileged in the sense that it can prevail even though the premise judgments support the plaintiff. Obviously, this would be true had there been more premises required for an affirmative premise-based vote. Second, in the example in Table 1, each member is "pivotal" to the pattern of outcomes: there is a way she could change her votes so that the pattern of outcomes would become coherent. Judge 1, for example, might decide that there was no valid contract: the result would then stay the same but the premise judgments would no longer support an affirmative decision. Or she could decide that a breach occurred, which would lead her to change her result judgment to affirmative so that, again, the pattern of outcomes would be coherent. It must be pointed out, though, that it is easy to construct discursive dilemmas so that no group member is pivotal. Suppose, for example, the rows in Table 1 were each to represent the judgments of three judges, on a nine-person court. Then no judge is pivotal to any decision. Thus the deliberative principles that should govern this case cannot depend on pivotality in the same way as in the case of the original table.[39] But perhaps we can find a related principle that will permit the analysis of situations where no one is actually pivotal.

I assume in this example that all the judges have an internal orientation to law: that they are individually committed to answering the legal question posed to them in ways that are maximally faithful to received legal norms. If that is right, the results-based way of deciding seems, on its face, to be troubling. After all, the plaintiff in the case is denied relief even though the opinions produced by the court support the opposite judgement. Even though the judges are all internalist, the court is not. In this respect, the doctrinal paradox implies a conflict within internalism. Is there a way around it?

One might think that if the judges are committed to presenting their collective judgment as internally justified, then they are required to decide in a premise-oriented manner. This conclusion seems too hasty because there are other ways to eliminate the paradox. Internalism, on my (minimalist) account, requires only that the

39 No single member is pivotal in the result decision; at the displayed judgment profile that decision is unanimous. And yet some subgroups can sensibly be thought pivotal and therefore collectively responsible for that choice. This suggests a deliberative principle: a pattern of judgments is deliberatively stable if no subgroup of the members would be willing to change its premise or results judgments, assuming that those outside the group hold their judgments fixed. I do not follow this path as I prefer to see the sense in which individuals may be assigned responsibility as persons and not as members of a subgroup.

final judgment reached in a case coheres with the judgments on the doctrinal premises, or, to put it another way, that the final judgment can be given a coherent justification in terms of the premises. Judicial internalism is something that is owed to potential litigants. Someone who might appear in court is entitled to know which patterns of conduct will make her liable to punishment or civil loss. The reason to insist that judges take an internal view of the law they apply is that it permits them to present their decisions as required by norms every member of the legal system would presumably accept. Presumably an internally oriented judge would then go on to present such a justification.

Therefore internalism, as I understand it, does not require that judgments on the premises are fixed prior to, or more firmly held, than judgments as to the result. Nor does it require that beliefs about doctrine are necessarily prior to the case arising. Internalism certainly requires coherence, or a kind of fit, between the decisions and the reasons offered in its defense (the premise judgments), so that a coherent justification can be given. This might require judges to modify their views about doctrine and its applicability. Premises might sometimes be related to results in the kind of deductive way that legal formalists describe. But the relationship among these elements could be quite different: arrived at through deliberation in a process of what Rawls described as the method of "reflective equilibrium."[40]

In the scenario in Table 1, for example, a judge might feel sure that the plaintiff should prevail, given the fact pattern presented at trial, but a bit less sure that the defendant's promise actually constituted a contract. Or she might feel quite sure that there was both a contract and that it was breached, but still be unsure as to whether the plaintiff should prevail. In other words, a judge may have doubts about the premise judgments or about doctrine (how the court should reach its decisions), and there is no a priori reason to think these doubts need to be resolved in the way that premise-based decision mandates. One of the judges might think, for example, that there were mitigating circumstances that excuse the defendant from performing even though the premises are both affirmed.[41] If this is

40 JOHN RAWLS, A THEORY OF JUSTICE 18 (rev. ed. 1999).

41 This issue can be incorporated in the framework by including another column: whether each judge accepts the doctrinal logic that if the premises are accepted then the conclusion is to be agreed to. If there are additional premises that may be regarded as mitigating the plaintiff's obligations, they could be included as additional columns.

right, a court must commit only to deciding the case coherently (so that the final judgment coheres with the premise judgments) but not necessarily to premise-based decision making. Even with this weaker idea, the court is committed to making its choices based on premises and outcomes coherent, perhaps by adjusting premises rather than outcome judgments, perhaps by providing exceptions to the doctrinal structure, or perbaps by employing other decision-making procedures.[42] Premise-based decision making is only one way to do this.

In this example a premise-based decision produces a win for the plaintiff, but only because of the court's self-imposed prohibition to not decide the case by voting on the result. But why not decide the result and one of the premises and let the judgment on the other premise be determined by the doctrine? Had the court decided to respect individual judgments as to the result, and ruled for the defendant, it might well have refused to consider that there were majorities in favor of each of the doctrinal elements. Or it might say that judgments on doctrinal elements require unanimity or at least a supermajority—that, without consensus, the court cannot reach a conclusion on those issues—but that ordinary considerations of doing justice in the case require a decisive or simple majoritarian procedure on the result. Failure to employ majority rule on the result is to put a thumb on the scale in favor of one or the other party.

In the conjunctive case (where agreement on all premises is required for a positive decision), result-based decision making could be seen as introducing a kind of "bias" against an affirmative result. The only kind of (conjunctive) discursive dilemma that can arise is one in which the premise judgments are all positive, and yet the group decides not to take a positive action. But the opposite interpretation seems as plausible: that premise-based reasoning supports "too many" positive decisions. Either it is "too easy" for a group to decide in a premise-based way in favor of an action, or it is "too hard" to take an action by a conclusion-oriented vote on the action. With other doctrinal structures, such as a disjunctive structure, opposite conclusions would be reached. Since we would have no reason to think that legal doctrine decision making necessarily exhibits only one kind of doctrinal structure, it seems very unlikely that one could find a formal or mechanical way to resolve discursive dilemmas. It is for this

42 Judges may decide to use a supermajority rule for premises but an ordinary majority rule to decide the case. In the Table 1 example, this would produce a coherent pattern of justification and a victory for the defendant.

reason that judicial collegiality poses a problem for the internal view of law.

V. DELIBERATIVE ETHICS: PURE AND IMPURE DELIBERATION

But perhaps the commitment of each judge to internalism—to ensuring that the court's decisions have an internal justification—could distribute the responsibility for achieving coherence among them in some way. Because the decision of the court (on premises and conclusions) is a (joint) consequence of the judges' actions, each of them might have some share in tbe responsibility for that decision. The idea is that individual judgments about premises as well as about the result play two distinct roles. They are normative recommendations of how the court should decide the case and for bow their decision should be justified. These two roles might make it possible to hold each judge responsible for the effect of her votes on the overall pattern of group action and to require that she take account of this responsibility in deliberating about what to do.

So the question is this: Can we devise or imagine a deliberative ethic to address this situation? In group decisions, the members are clearly collectively responsible for what the group does because the group's decisions are the result of the totality of expressed judgments, or votes, of the members. But perhaps responsibility can be distributed so that individuals or subsets of individuals bear individual responsibility for the votes they cast. Holding the actions of the others fixed, a change in the way an individual votes can produce a change in the group's actions: an individual might, in this way, be "pivotal" to the group's decision. When that is the case, the individual might plausibly be accountable for the group's choice. That is the idea I will explore below.

We assume that all the judges have an internal orientation to law, and that each thinks this requires her to help assure coherence between the final judgment of the court and the court's judgments on the premises. We then consider two situations. In the first situation, it is not necessarily commonly understood that each judge has such an internal orientation, or that each feels an obligation to see that the court renders a coherent pattern of judgments. Because the case has reached a multi-judge panel, we can assume that each judge knows that it is possible to disagree reasonably on each of the issues embedded in the case, and that those disagreements could exist at the level of factual judgments, law, legal theory, or the connections among these elements.

Is there anything objectionable about the idea of members seeing all of their judgments, on premises as well as on results, as being in play during the deliberative process? The deliberative practices described here may be troubling if one thinks that the judges are voting deceptively, concealing their own best judgments in order to produce the "appearance" of coherence. Perhaps deceptive voting—not expressing one's actual judgments in votes—is unacceptable in itself, even if a judge has no invidious reason for voting in this way. Perhaps that is reason for them to stick with their initial premise judgments and adopt the result that is required to vindicate those judgments. But why should they privilege their initial judgments in this way, independently of how deliberations proceed?

In my view, the judgments in Table 1 are not mere expressions of private preference, but instead represent a judge's view as to what the court ought to do and how it should present itself in public—and, from a formal perspective, they are more or less symmetrical. Insofar as they represent recommendations to the court, they may permissibly be changed in the course of deliberation. Indeed, the refusal of a judge to reconsider his recommendation could indicate that that judge was unreasonable or arrogant. Of course, there may be substantive reasons for a judge to insist that some judgment of hers ought to have priority over the others; perhaps it is dictated by considerations of judicial morality. Or perhaps some judgment is required to fit external facts so that the court should be guided by considerations of empirical accuracy in ways that make it difficult to defend adjusting that judgment to achieve coherence. But these are substantive issues, and perhaps controversial ones, that would themselves be the subject of deliberation. For these reasons, I think judges ought to be willing to reconsider their judgments and may be criticized for refusing to do so.

I distinguish two models of deliberation: pure and impure. In pure deliberation, the group deliberates about all of its judgments symmetrically, giving no priority to judgments about one issue over another. The aim is to produce a coherent and acceptable pattern of outcomes, and, in this process, each of the group's judgments is on the table for reconsideration throughout the deliberation. There is a search for a kind of reflective equilibrium among group and individual judgments. There may be substantive reasons why it is more difficult to adjust some judgments than others—some beliefs may be more closely tethered to empirical evidence—but such considerations are invisible at the formal level of pure deliberation. In any case, the judgments in these examples are normative judgments that are not

completely determined by factual considerations. Each judgment, whether about premises or the final result, represents a view as to how the court should decide a question.

In impure deliberation, the group decides the issues sequentially according to some (perhaps arbitrary) ordering of the decisions to be taken. In the example in Table 1, the court might decide to fix its collective judgment irrevocably on the first question of whether a valid contract exists and then deliberate on the remaining issues without revisiting its initial decision. I think it is clear enough why procedures of this kind are called impure. Debate on previous issues cannot be revisited but is taken as fixed.

Impure procedures typically involve voting at various points in the deliberative process in order to fix certain decisions so that further deliberations can be simplified and focused. Such procedures may be adopted for reasons of practicality when issues are impossibly complex to handle all at once, or perhaps for reasons of suspicion. The judges may not feel sufficient confidence in the willingness of their brethren to engage sincerely with issues, rather than making their decisions on political or other grounds. In our framework, they may feel that the others do not fully accept their responsibility to bring about a coherent result in the case and lack a fully internal orientation to law. Moreover, the simple fact that actual decision situations arise over time can justify impure procedures. Allegiance to precedent over a sequence of cases can be seen as an example of impure procedure: judges take issues decided in prior cases as fixed and not normally open to reconsideration in a present case.[43] The need to divide deliberative "labor" can be another reason to employ impure procedures. Appellate courts normally defer to trial courts on questions of fact, for example. Or a legislature may employ committees to resolve some issues and refuse to revisit the work of those subgroups. There is a wide variety of impure procedures.

A. Impure Deliberation

Suppose that the court is to decide the case by taking two votes: first on whether there was a valid contract, and second on whether there was a breach. Then, following the premise-based procedure, the final result is determined by the premises accepted by the court; so the court procedure guarantees a coherent pattern of outcomes.

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43 Of course, judges have devised ways to soften this procedural disposition by "distinguishing" a current case from prior ones or even by overruling an existing precedent.

The preferences are as given in Table 1. How would the court, configured in this way, decide the case? One way to answer this is to assume the judges are sequentially rational in expressing their personal judgments, which means that at every point in which a judge needs to make a decision, that decision must be best for her from that point on. The judges are free to alter their initial judgments about preferences or results in light of their deliberations, so we need to specify the ways in which they may do this. To start, let us assume that the judges are each more committed to their views as to how the case ought to be decided than they are to their judgments about the premises.

At the final decision node each judge will need to decide how to vote on breach, recognizing that that vote may affect her own judgment as to the appropriate outcome and could affect how the case will come out. She will know how the court has decided on the contract issue. So, if the court has agreed that the contract is valid, we can see that Judges 1 and 2 now have reason to vote against breach. Judge 2, for example, would see that either her vote would make no difference to how the case would come out, or else it would be pivotal to the outcome. If she were to vote for a breach and her vote turned out to be pivotal, this would lead to a positive outcome which is not the result she thinks is warranted. This means that following a positive determination that there is a contract, Judge 2 has reason to alter her views as to whether there was a breach. At the stage of deciding whether there is a contract, each judge would foresee the pattern of breach voting, and therefore the court would decide that there has been no breach. So, no matter how the judges vote in the first stage, the case would be decided for the defendant. In other words, there is no deliberative "pressure" on their judgments about the contract; they may freely vote their original convictions on this issue.

So, if the court adopts a premise-based procedure and its members are result oriented and sequentially rational in the way assumed here, the outcome would be both in favor of the defendant and coherent: the plaintiff would fail to recover and there would be a coherent explanation for that result. Note that had the votes occurred in the other order, the result would have been the same in this respect though the voting pattern—and therefore the explanation offered to the parties—would have been different. In this example there is no need to consider the question of coherence independently of the decision itself—premise-based procedure, applied sequentially, guarantees that the result will cohere with premise judgments.

When judges are concerned with getting the decision that they think is best, there may be reason to adopt a somewhat different procedure. For example, they may decide to take a vote on the result and then vote on all but one of the premises, leaving the judgment on the final premise to be determined by those earlier judgments. Suppose, for example, that the first decision taken is which party should prevail, all things considered, and the second is whether there was a valid contract. The court does not explicitly take up the matter of whether there was a breach, leaving that to be settled implicitly. It is easy to see that, given the beliefs represented in Table 1, any such procedure would produce a loss for the plaintiff, and there would be a coherent explanation in terms of the reported premise judgments: but that explanation is different than the one produced for the premise-based procedure.

It seems clear that there is a general theorem that covers this case and similar cases. In the conjunctive case, if the initial judgments produce a discursive dilemma, sequentially rational, results-oriented players (in the sense given above) will rearrange their judgments to produce premise judgments supporting a negative result (i.e., for the defendant in Table 1), irrespective of the order in which the issues are voted on. The argument would go as follows: assume that there are k premises and n voters, that the underlying or prior judgments form a discursive dilemma, and that the premises are voted on first. Then, at a final node following a sequence of positive premise votes, for each person that prefers a negative result, voting against accepting the last premise weakly dominates voting for it, and, by assumption, this set of people forms a majority.[44] Thus the outcome is negative, and there is a coherent justification for it.[45] If the result itself was voted as one of the first k votes, it would fail as there is no premise-based reason not to vote initial outcome preferences in the first k votes. And on every one of the k-1 premise votes the judges are free

44 A strategy, x, weakly dominates another strategy, y, for a player if the result of playing x always leaves the player at least as well off as playing y, and better off in some circumstances.

45 I think something like this could be established for indefinite procedures of the following kind: voting terminates whenever a result and coherent pattern of premise votes is reached. Otherwise, it continues in a fixed order. The resulting extensive form is infinite but has a simple Markovian structure. As long as the voters are (at least a little) impatient, I believe that there will be an equilibrium in which the game terminates after one round of voting, that it will not "reveal" a discursive dilemma, and that in conjunctive cases the result will be negative.

to vote their initial judgments. Only the last premise judgment is to be implicitly fixed in a way that supports previous votes.

What if we were to assume that the judges are premise rather than result oriented, in the sense of being more certain about their premise judgments than their views about the outcome? On the first vote each of the judges would vote her initial premise judgment; there is as yet no reason not to. But how should they vote on the second vote: on the outcome? In this case premise-oriented judges would vote in ways that support their initial premise judgments on the issue of breach. This implies that Judge 2 has reason to vote for a positive outcome since only that vote would permit her to support her initial premise judgment on breach.

It may seem that a particular notion of sequential rationality is playing too determinative a role in these examples. Thus, there may be a reason to consider a different notion of sequential rationality, or, if you prefer, a different set of deliberative dispositions. One is this: once a group has made a decision on any of the issues, each member of the group ought to take that judgment for her own from that point forward, rather than applying the "backwards induction" notion given above. For example, consider the structure in which the court decides first on whether there is a contract and then on whether there was a breach. Then, at the final node following a group decision that there is a valid contract, Judge 2 would now accept that judgment as "her own" and favor deciding in favor of breach, and therefore endorse a finding against the defendant. On this principle of sequential rationality the dilemma would again disappear: the premise judgments would both be positive and would agree with the positive result judgment. This might be a reason to adopt, as an ethical maxim, "accept prior group judgments as one's own in further deliberations." And such a disposition seems to support Pettit's ideas about how premise-based procedures would work.

But, if members act on this maxim, the result is even more arbitrary (or path dependent) than before, in that the decision, and not only the explanation for it, wholly depends on the order in which the group has taken up the issues. If, for example, the result had been voted on first (as in what Pettit calls a modus tollens procedure)[46]

46 Philip Pettit, *Personal and Sub-personal Reason: The Case of Groups*, DIALECTICA, (forthcoming 2007) (manuscript at 17, on file with the University of Pennsylvania Journal of Constitutional Law) ("When I realize that some propositions that I believe entail a further proposition, the rational response may well be to reject one of the currently accepted

Judge 3 would have had reason to adjust her views on one of the two premises in a negative way, as she would accept the negative results judgment as her own. Because of this arbitrariness, there is reason to consider a less structured decision-making context in which the agents are able to readjust any of their votes in light of the consequences of those votes. This idea is more in line with some ideas about deliberation, where the deliberators may reconsider and perhaps change their expressed preferences in light of the calculated effects of those expressions.

B. Pure Deliberation

I shall assume, as above, that judges place a value on producing a coherent pattern of results as well as on getting a good result: they want their premise judgments to support their final decision and will see the failure of this coherence as a reason to continue deliberating. Consider the judgments in Table 1. Partition the set, X, of vote patterns into the following subsets: let Y_C be the set of voting patterns that would produce a yes on the result and a coherent set of premise judgments, N_C is the set of negative results with coherent preference judgments, Y_I is the set of yes votes supported by an incoherent set of premise judgments, and N_I consists of no votes with incoherent judgments. So, N_I is the voting pattern that would result if everyone voted their initial judgments in Table 1, their discursive dilemma preferences.

We have already remarked that in the conjunctive case described in Table 1, Y_I is empty, so we need consider only three subsets. We may suppose that the judges have initial rankings of the elements in X, and that these rankings may be revised or adjusted in deliberation. Now let us say that an outcome $x \varepsilon X$ is deliberatively unstable if there is a subgroup of members who can adjust their judgments in such a way as to achieve either a preferred result or a coherent voting pattern with the same result. The first thing to notice is that the pattern of initial judgments in Table 1 is deliberatively unstable. Clearly, Judge 1 could alter her judgment on the contract from Y to N and thereby produce a coherent pattern of judgments in support of a negative result. Or she could change her views about breach from N to Y and produce a coherent judgment pattern in support of a posi-

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propositions rather than to endorse the proposition entailed; modus tollens may be more epistemically promising than modus ponens.").

tive result. Indeed, there seems to be a general result for three judges and two premises: every judgment pattern in N_j is unstable.

But this is true because, in this example, each judge is pivotal to the pattern of outcomes. If each of the rows in that table had represented three judges, none would have been pivotal, and the pattern in the table (N_j) would have been stable. So, it makes sense to try to extend the reasoning here to a wider class of cases. One way of doing this might posit as a maxim of deliberation that judges make their judgments on the (counterfactual) *presumption* that they are pivotal to the result. The presumption of pivotality could be a device for focusing responsibility and organizing deliberation. It does not say what to do, but it says that individuals, judges in this case, might formulate their votes on the assumption that it makes a difference how they vote. I cannot pursue that idea in this Article and leave it open for future research. I shall instead conclude with an observation that follows from the analysis in this Part.

If judges are expected to be open to changing their judgments during deliberation for the purpose of ensuring that the court's decision be internally justifiable, then they must be able to do so in a way consistent with their own internal viewpoints as individual judges. And this seems either to require that there are multiple and mutually inconsistent internal views of law, or else that some changes in individual judgments cannot be made by an internally oriented judge. If the requirement that all views in and by the court are internal is constraining in this way, there is reason to think that conflicts of the kind exemplified in the doctrinal paradox can only be resolved in certain ways. And perhaps, in some cases, not at all. This requirement of a deliberative ethical stance would seem to put pressure on some conceptions of law. That is another issue for future exploration.

CONCLUSION

Positive theories of law can be, but need not be, consistent with internalism about law. There is nothing either in the political or economic processes that govern judicial selection and nothing in the collective judicial processes used in appellate courts that stands in the way of this. The claim that legal outcomes may also, on other accounts, be externally explicable is neither here nor there. It may well be the case that the best scientific explanation of the pattern of legal outcomes takes account of nonlegal factors, as legal realists of all stripes claim. Even if this is true, it may still be true that law itself is developed internally, if the intentional attitudes of legal actors are

describable in that way. There can be multiple, true explanations of a phenomenon as rich as law.

Indeed, as I have argued, even if legal actors are internally motivated, there may be external causes of law. Some of these causes arise from the fact that the legal system is embedded in the larger social world and, specifically, that judges are picked by people outside the legal system, who may not be internally motivated. And some arise from the properties of the decision processes by which judges and courts make decisions. Positive theory can help elucidate the boundaries and overlaps of these forces and possibly point to ways in which they can be improved from an internal point of view.