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**Justice David Stras, Judicial Politics and Federal Court  
Nomination Politics**

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## Foreword

# From Ivory Tower to Minnesota Supreme Court

David Wippman<sup>†</sup>

David Stras joined the University of Minnesota Law School faculty in 2004 and quickly established himself as a rising star, both as a teacher and a scholar. Only two years after he arrived, he was named the Stanley V. Kinyon Tenure Track Teacher of the Year. The award came as no surprise. Students quickly came to hold Professor Stras in the highest regard. They appreciated his insights, the time he devoted to preparation, and his passion for his subject. Equally important, they knew how much he cared about them. His enthusiasm in class was apparent and infectious.

But David's concern for students was not confined to the classroom. David made it a personal mission to expand our students' clerkship opportunities. He worked tirelessly with judges at all levels, including many of his new colleagues on the Minnesota Supreme Court, to place as many students as possible. David also served as the Law Review advisor, helping the editors identify topics, plan symposia, and navigate the byzantine world of academic publishing. It therefore came as no surprise that the Law Review, on its own initiative, decided to organize and publish this Tribute to Justice Stras.

David also quickly built a reputation as an accomplished and insightful observer of all things Supreme Court. Just a few years into his academic career, David published a series of important articles examining the U.S. Supreme Court's jurisprudence, its docket, and its history, and rapidly established himself as a leading voice in contemporary constitutional debates. The quality and significance of David's scholarship is highlighted in the contributions to this Tribute by Professors Johnson, Scott, and Stein.

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<sup>†</sup> Dean of the Law School and William S. Pattee Professor of Law, University of Minnesota Law School. Copyright © 2011 by David Wippman.

As Professor Scott notes, there is some irony in David's decision to trade the classroom for the courtroom. After all, David spent his academic years dissecting, often critically, the work of judges at all levels, but especially the work of the Supreme Court. He has even proposed increasing judicial workloads to encourage judges to opt for early retirement. One has to wonder whether that prospect may look rather different to Justice Stras down the road. On the other hand, as Professor Stein observes, David has also argued (along with coauthor Ryan Scott) that Congress should offer Supreme Court Justices a golden parachute to make retirement more attractive. One might wish David had made a similar argument for life-tenured faculty before he joined the court.

As Professor Johnson notes, David joined the insights of political science to those of law in developing his arguments. He backed his normative and theoretical positions with careful analysis of the available data. Like most other scholars, David had a clear point of view, one not always widely shared by his colleagues. He had the courage of his convictions, but he did not let his convictions blind him to opposing arguments or data. His scholarship was the richer for it.

David's talents as a teacher and scholar were matched only by his warmth and collegiality. David loves the exchange of ideas. He does not shrink from intellectual debate; certainly, he has never hesitated to tell me when he thinks I'm wrong about something. No doubt he will not hesitate to dissent if he disagrees with a court majority. But when David does disagree with a colleague, he always has good reasons, he articulates them well, and, perhaps most important, he engages in good faith dialogue. He is open to persuasion, and even when he disagrees, he respects the positions of those with whom he disagrees. David's openness and intellectual integrity have earned him the respect and friendship of his faculty colleagues and students alike, whatever their own political leanings.

I will miss seeing David in the classroom and at faculty meetings, but I'm heartened by the knowledge that David's passion and mission haven't changed. As a scholar and teacher, David was committed to advancing the administration of justice and the rule of law. He is now pursuing that same mission as a justice, and I have no doubt he will do so with the same intellect, drive, and good humor he has shown on the faculty.

As James Madison once noted, "Justice is the end of government. . . . It ever has been and ever will be pursued until it

be obtained, or until liberty be lost in the pursuit.”<sup>1</sup> By trading the ivory tower for the courtroom, the suit for the robe, David has chosen to pursue justice in a different, and, I will have to concede, more direct way. The court’s gain is the Law School’s loss, but in the long run, we all benefit by having judges of David’s caliber working to advance our shared mission of promoting the rule of law.

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1. THE FEDERALIST NO. 51 (James Madison).

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## Tribute

### Distinguished Scholar, Dedicated Teacher, and now Justice: David R. Stras

Robert A. Stein<sup>†</sup>

On July 1, 2010, University of Minnesota Law School Professor David R. Stras became the eighty-eighth justice on the Minnesota Supreme Court. He is only the second professor in the 123-year history of the Law School to be appointed to the Minnesota Supreme Court.<sup>2</sup> Professor Stras was a member of the Law School faculty from 2004 to 2010 and codirector of the Institute for Law and Politics at the Law School from 2007 to 2010. In addition to his Law School appointment, Stras also held an appointment as an Associate Professor of Political Science (through affiliation) in the University of Minnesota Political Science Department.<sup>3</sup>

During his six years as a member of the Law School faculty, Stras achieved a distinguished record as a remarkable scholar, teacher, and colleague. He taught courses in constitutional law, federal courts and jurisdiction, and criminal law, and prepared additional courses in constitutional litigation and civil

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<sup>†</sup> Everett Fraser Professor of Law, University of Minnesota Law School. Copyright © 2011 by Robert A. Stein.

2. Professor Maynard E. Pirsig was appointed to fill an unexpired term on the Minnesota Supreme Court in 1942. Randall Tietjen, *Maynard E. Pirsig: A Chronology*, 23 WM. MITCHELL L. REV. 787, 789 (1997). Professor Pirsig later became dean of the University of Minnesota Law School, and served in that capacity from 1948 to 1955. *Id.* at 790–91.

3. Professor Stras received his undergraduate degree (with highest distinction, and was Phi Beta Kappa), an MBA (honored as a top graduate of the program), and his law degree (order of the coif) from the University of Kansas. He was editor-in-chief of the Criminal Procedure edition of the *Kansas Law Review*. Professor Stras clerked for Judge Melvin Brunetti on the Ninth Circuit, Judge Michael Luttig on the Fourth Circuit, and Associate Justice Clarence Thomas on the Supreme Court of the United States. He also practiced law with the Washington, D.C. office of the law firm Sidley, Austin, Brown & Wood LLP before entering academia. From 2009 until his appointment to the Minnesota Supreme Court in 2010, Professor Stras was of counsel in the Minneapolis office of Faegre & Benson LLP.

rights. His scholarship focused on the courts (especially appellate courts) and judges. Indeed, his distinguished scholarship marks him as one of the leading scholars in the country in these subjects. He has been a prolific scholar, authoring or coauthoring more than ten articles on courts and judges and a casebook on federal courts in the six years since joining the Minnesota law faculty. As he leaves the Law School to join the Minnesota Supreme Court, Stras has several writings in process. He is currently working on a book on the U.S. Supreme Court, examining the Supreme Court's plenary and certiorari dockets, as well as several articles on the work of the Supreme Court.

One of Stras's recent articles, authored with Professor Shaun Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*,<sup>4</sup> exemplifies a focus of his scholarly work. In this article, the authors address the rising case load in the circuit courts "through the lens of the Fourth Circuit."<sup>5</sup> Stras and Pettigrew assert that the Fourth Circuit has successfully responded to a dramatically rising caseload over the past thirty years by improving efficiency (through procedural and systemic mechanisms) instead of simply relying on visiting circuit or district judges or senior circuit judges.<sup>6</sup> The authors attribute the Fourth Circuit's increased efficiency to such procedural changes as increasing the number of cases decided through unpublished opinions and decreasing the number of cases allotted oral argument time.<sup>7</sup> Systemic changes identified by the coauthors that have allowed the Fourth Circuit to improve its efficiency and keep pace with the increase in case load include an expanded role of law clerks and the introduction of a staff attorney position.<sup>8</sup> The article is an important resource to appellate judges and courts struggling to identify ways to handle their ever-increasing caseloads from year to year.

In a thought provoking 2007 article in the *Minnesota Law Review*, *Why Supreme Court Justices Should Ride Circuit*

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4. David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421 (2010).

5. *Id.* at 423.

6. *Id.* at 428.

7. *Id.* at 432, 436.

8. *Id.* at 441, 443.

*Again*,<sup>9</sup> Stras proposes a “Circuit Riding Act of 2007 . . . which would require [U.S. Supreme Court] Justices to spend approximately five days per year hearing oral arguments with a panel of one or more of the U.S. courts of appeals.”<sup>10</sup> The article suggests that many of the arguments made in favor of Justices riding circuit in the 1800s are equally relevant today.<sup>11</sup> The article argues that “riding circuit” was eliminated because of the Supreme Court’s larger case load and “difficulties and dangers associated with transcontinental travel,”<sup>12</sup> and explains that these problems should no longer preclude the Supreme Court from riding circuit because the Supreme Court no longer hears as many cases and there have been dramatic improvements to travel.<sup>13</sup> Stras argues that circuit riding is a good idea because it gets the Justices out of Washington, D.C., and introduces them to different communities, and also exposes them to what is going on in the lower courts.<sup>14</sup> Stras distinguishes a circuit riding proposal by Professors Calabresi and Presser that would require Supreme Court Justices to spend four weeks each year riding circuit,<sup>15</sup> and asserts that his proposal is preferable because the four weeks proposed by Calabresi and Presser is excessive—the Justices do not need it—and at a certain point requiring Justices to ride circuit is no longer beneficial from an institutional improvement perspective.<sup>16</sup>

Stras, together with coauthor Professor Ryan W. Scott, addressed the issue of life tenure for Supreme Court Justices in a 2007 article in the *Harvard Journal of Law and Public Policy*, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*.<sup>17</sup> This article responds to a well-publicized proposal by Calabresi and Lindgren to eliminate life tenure for U.S. Supreme Court Justices and replace it with fixed, nonrenewable eighteen-year terms.<sup>18</sup> Stras and Scott as-

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9. David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007).

10. *Id.* at 1713.

11. *Id.*

12. *Id.* at 1727.

13. *Id.*

14. *Id.* at 1729–30.

15. *Id.* at 1742.

16. *Id.*

17. David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL’Y 791 (2007).

18. *Id.* at 792.

sert that Calabresi and Lindgren's empirical research is flawed, suffering from a "period-selection problem" and also "a date-of-observation problem."<sup>19</sup> They challenge Calabresi and Lindgren's observation that average tenure on the Supreme Court has increased dramatically since 1970, concluding that Calabresi and Lindgren's findings are less persuasive using data covering longer time periods and selecting the Justice's date of appointment (rather than when he leaves office) as the point of reference.<sup>20</sup>

In their 2007 article, Stras and Scott also expand on an argument they made in a 2005 article, *Retaining Life Tenure: The Case for a "Golden Parachute."*<sup>21</sup> In this 2005 article, Professors Stras and Scott argue that rather than instituting a mandatory retirement age for Supreme Court Justices, Congress should create a "golden parachute" by increasing their retirement benefits, especially upon reaching an appropriate retirement age or upon certifying a mental or physical disability.<sup>22</sup> The article argues that this is consistent with Judge Richard Posner's analysis that judges are rational actors and would respond like everyone else to economic incentives.<sup>23</sup>

Stras returned to that subject in a 2006 *Minnesota Law Review* article, *The Incentives Approach to Judicial Retirement.*<sup>24</sup> This article was written for a *Minnesota Law Review* Symposium titled "The Future of the Supreme Court: Institutional Reform and Beyond," and Stras wrote the foreword to the Symposium issue,<sup>25</sup> as well as this article. Again Stras in this article supports Judge Posner's view that judges, like everyone else, act in ways to maximize their own utility, and that economic incentives can change the behavior of judges, including with respect to retirement.<sup>26</sup>

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19. *Id.* at 830.

20. *Id.*

21. David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397 (2005).

22. *Id.* at 1400–01.

23. *Id.* at 1467; see also Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

24. David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417 (2006).

25. David R. Stras & Karla Vehrs, *Foreword*, 90 MINN. L. REV. 1147 (2006).

26. Stras, *supra* note 24, at 1419.



In a provocative article in 2007, again authored with Professor Scott, *Are Senior Judges Unconstitutional?*,<sup>27</sup> Stras and Scott make the surprising assertion that the statute allowing federal judges to assume senior status may be unconstitutional.<sup>28</sup> This controversial conclusion is based upon arguments that the statute setting forth the options for judicial retirement<sup>29</sup> is inconsistent with other provisions of Title 28 and raises two constitutional objections under Article III and the Appointments Clause of the Constitution.<sup>30</sup> The article doesn't leave the senior judges in constitutional limbo, but proposes several ways to "fix" the statute so that it no longer raises constitutional problems.<sup>31</sup>

In two book reviews in 2008, Stras examines the difficult challenges presented by the politicization of judicial appointments. In an essay in the *Texas Law Review*, *Understanding the New Politics of Judicial Appointments*,<sup>32</sup> Stras reviews two books on the subject: Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times*, and Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. Stras argues that neither book is able to account for "growing politicization of the judicial appointments process."<sup>33</sup> Stras's explanation is that both structural and external forces have caused this phenomenon.<sup>34</sup> In Stras's view, the passing of the Seventeenth Amendment and "the proliferation of confirmation hearings for judicial nominees, have driven the Senate to take a more active role."<sup>35</sup> Stras's book review also argues that mass media and external interest groups have also put pressure on key players in the confirmation process.<sup>36</sup> Finally, Stras ex-

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27. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

28. *Id.* at 456.

29. 28 U.S.C. § 371 (2006).

30. Stras & Scott, *supra* note 27, at 456–57.

31. *Id.* at 516.

32. David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008) (reviewing BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006) and JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007)).

33. *Id.* at 1034.

34. *Id.*

35. *Id.*

36. *Id.*

presses his view that “the Court’s own ventures into contentious areas of social policy—such as school integration, abortion, and homosexual rights—have raised the stakes of confirmation battles even higher.”<sup>37</sup> In this contention, Professor Stras weighs in on the issue in a very controversial way.

In the second book review published in 2008, then-Professor Stras joins again with Professor Scott in a review of Christopher Eisgruber’s widely read book, *The Next Justice: Repairing the Supreme Court Appointments Process*.<sup>38</sup> Stras and Scott describe Eisgruber’s book as a useful critique of the two most prevalent narratives regarding how Justices decide cases: Justices as “umpires” and Justices as “politicians in robes.”<sup>39</sup> But the book review finds fault with Eisgruber’s proposal on how to reform the appointment process. The review characterizes Eisgruber’s proposed reform as asking the Senate “to confirm only ‘moderate’ Justices.”<sup>40</sup> In the view of Stras and Scott, the most critical flaw in Eisgruber’s proposal is that it fails to “account for the institutional strength of the President.”<sup>41</sup> More specifically, the authors assert that the President has a number of tools available to shape the Senate confirmation process, including “strategic selection, the bully pulpit, recess appointments, and legislative tactics such as logrolling and veto threats.”<sup>42</sup>

In a 2009 article in the *Vanderbilt Law Review*, *Pierce Butler: A Supreme Technician*,<sup>43</sup> Stras analyzes Associate Justice Pierce Butler’s tenure on the U.S. Supreme Court and undertakes the task of explaining why Butler has been largely ignored by Supreme Court scholars and noted only as one of the “Four Horsemen of the Apocalypse” who prevented President Roosevelt from implementing many of the New Deal reforms.<sup>44</sup> In this article, Stras advances four reasons why Butler has been largely ignored by Supreme Court scholars: (1) Butler

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37. *Id.*

38. David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869 (2008) (reviewing CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007)).

39. *Id.* at 1871.

40. *Id.*

41. *Id.* at 1872.

42. *Id.* at 1916.

43. David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695 (2009).

44. *Id.* at 696.

wrote on highly technical areas of the law, including public utilities regulation and tax law; (2) Butler's approach to writing opinions "stressed simplicity and minimalism"; (3) Butler served on the Supreme Court at the time of other more distinguished Justices such as Oliver Wendell Holmes, Benjamin Cardozo, William Howard Taft, and Louis Brandeis; and (4) Butler fell on the wrong side of history in that he was a strict adherent to *Lochner*.<sup>45</sup> This article, which is of particular interest to readers from Butler's home state of Minnesota, charts Butler's life and scholarship and makes the claim that Butler's service on the Supreme Court should not be regarded as a failure, because, indeed, he "made some modest contributions to the development of American law."<sup>46</sup> More specifically, Stras observed that Butler was a supporter of the rights of defendants in criminal procedural law<sup>47</sup> and that Butler "embrace[d] . . . robust notions of personal liberty and private property,"<sup>48</sup> which explains his strict adherence to *Lochner*.<sup>49</sup>

Another Stras publication during his time on the Minnesota Law School faculty is a 2006 book review in the *Texas Law Review*, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*.<sup>50</sup> In this article, Stras reviews two books examining the role of the Supreme Court law clerk through the eyes of the law clerk. The books are Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* and Artemus Ward and David Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. Stras's review concludes that the two books advance the scholarly discussion of the role of the Supreme Court law clerk, but finds that they are each deficient in particular ways. The review criticizes the Peppers's book for failing to draw any conclusions from its data<sup>51</sup> and the Ward and Weiden book for oversimplifying the relationship between

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45. *Id.* at 696–97.

46. *Id.* at 697.

47. *Id.* at 756.

48. *Id.*

49. *Id.*

50. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)).

51. *Id.* at 949.

the law clerk and the Supreme Court Justice.<sup>52</sup> An interesting part of this essay is that it uses material gathered in the reviewed books to address the influence of the Supreme Court law clerks on the Supreme Court workload. Stras observes that the Supreme Court's docket has decreased significantly over the last twenty years and examines 20,000 certiorari pool memos from four Supreme Court terms to determine the impact of the certiorari pool on the Court's declining docket.<sup>53</sup> Stras concludes that "earlier studies too quickly dismissed the potential impact of law clerks and the certiorari pool on the size of the Court's plenary docket."<sup>54</sup>

Stras's distinguished scholarship was not limited to traditional law review publications, and he shared his research and writing with a broader audience beyond the academy. Professor Stras has reached out with his ideas by having contributed to and edited blogs,<sup>55</sup> having written op-ed pieces for newspapers,<sup>56</sup> having written and filed amicus briefs in litigated cases,<sup>57</sup> having been quoted in the *American Bar Association Journal*,<sup>58</sup> and having served as a regular source for comment in the print and electronic media.<sup>59</sup> The quality of a great scholar is not only to produce significant works of scholarship, but to reach out to the bench and bar and the public and share these ideas. Stras understands that concept, and accomplished an extraordinary record during his time on the Minnesota faculty. He made over forty presentations on legal subjects at symposiums, panels, and other programs at law schools, bar associations, and professional organizations since 2005. These

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52. *Id.*

53. *Id.* at 950.

54. *Id.*

55. See, e.g., EMPIRICAL LEGAL STUD. BLOG, <http://www.elsblog.org/>; David Stras, *A Classist Argument?*, BALKINIZATION (July 13, 2009), [http://balkin.blogspot.com/2009/07/classist-argument\\_13.html](http://balkin.blogspot.com/2009/07/classist-argument_13.html).

56. See, e.g., David Stras, *Don't Trade Independence for High-Court Term Limits*, ST. PAUL PIONEER PRESS, Oct. 13, 2005, at 9B; David Stras, *Hail to the Chief*, ST. PAUL PIONEER PRESS, Sept. 8, 2005, at 9B; David R. Stras, *O'Connor Retiring with Dignity from the Supreme Court*, ST. PAUL PIONEER PRESS, July 12, 2005, at 7B.

57. See, e.g., Rochelle Olson, *Pawlenty's Picks Keep High Court Tilting Right*, STAR TRIB. May 14, 2010, at A1, available at 2010 WLNR 10045389.

58. See, e.g., Richard Brust, *No More Kabuki Confirmations: There Are Better Ways to Vet a Supreme Court Nominee*, 95 A.B.A. J. 38 (2009).

59. Adam Liptak, *Justices Opt for Fewer Cases, and Professors and Lawyers Ponder Why*, N.Y. TIMES, Sept. 28, 2009, at A18, available at 2009 WLNR 19160652.

presentations were delivered at over twenty-five law schools throughout the United States from coast to coast. Stras's record of scholarship and outreach mark him as one of the outstanding scholars in the Law School's distinguished history.

In addition to compiling a record as a leading scholar on courts and judges during his six years on the Law School faculty, Stras also demonstrated great skill and ability as a classroom teacher. In recognition of the excellence of his teaching, he was named Stanley V. Kinyon Tenure Track Teacher of the Year in the Law School. His courses gave students great insights into the work of the U.S. Supreme Court. Drawing upon his close relationship with Justice Clarence Thomas of the Supreme Court, for whom he clerked, Stras was able to bring Justice Thomas into the Law School to teach with him in his class on Selected Fundamental Principles of Constitutional Law. Obviously, having a Supreme Court Justice as a teacher in their course was immensely popular with Stras's students and a highlight of their law school experience.

Stras's concern for students was demonstrated beyond classroom teaching, as well. He served as faculty advisor for the *Minnesota Law Review*, and actively worked with the students to identify potential authors and articles. Stras was a member of the Judicial Clerkship Committee for most of the years he was a member of the Law School faculty. He cared for law students and was a faculty leader in assisting students to land judicial clerkships following their graduation from law school.

Stras's impressive record of scholarship, teaching, and service is extraordinary in the long history of the University of Minnesota Law School. The faculty, students, alumni, and friends of the Law School benefitted enormously from his time on the faculty. Stras now brings his keen intellect, principled judgment, talented scholarship, and his dedicated work ethic to the Supreme Court of Minnesota. The citizens of Minnesota and the entire nation will be the better for this appointment.

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## Tribute

### Justice David Stras, Judicial Politics, and Federal Court Nomination Politics

Timothy R. Johnson<sup>†</sup>

I have known Justice David Stras since his first year on the faculty of the University of Minnesota Law School. I do not remember now who sought out whom, but we were brought together by our common interest in understanding the pinnacle of the American federal judiciary—the U.S. Supreme Court. Specifically, while we were trained in very different ways—David in the legal academy and me in the realm of political science—we shared the common viewpoint that the best way to understand the judiciary is through strong theoretical arguments, good data, and sound empirical analysis. Our professional relationship quickly bloomed into a personal friendship as well. Thus, it is with great pride that I offer this short tribute in Justice Stras’s honor.

When I received the call from then-Professor Stras in late June of 2010 announcing he was about to be nominated by Governor Tim Pawlenty to Minnesota’s highest court, I was delighted to say the least! I know Justice Stras is having the time of his life and, while we often disagree about politics and legal issues, he is a thoughtful, insightful, and excellent judge for our state. While we talk less often today given his new position, I seek to highlight his contributions to the academy in the years leading up to his appointment. In particular, while I briefly overview his major contributions, I focus on a topic about which we both have a great interest—the nomination and confirmation process of federal judges.

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<sup>†</sup> Morse Alumni Distinguished Teaching Professor of Political Science and Adjunct Professor of Law, University of Minnesota. Copyright © 2011 by Timothy R. Johnson.

## I. JUSTICE STRAS AND THE ACADEMY: AN OVERVIEW

For almost half a century since C. Herman Pritchett's *The Roosevelt Court*,<sup>1</sup> it was rare for political scientists and the legal academy to cross boundaries to engage each others' research. While there was certainly some crossover between disciplines, it was not until the early 1990s that it became clear that these once competing communities had much to say to one another.<sup>2</sup> Over the past twenty years such conversations and collaborations have led to many important insights into the judiciary.<sup>3</sup> In fact, such collaborations have led a number of major law schools to hire political scientists and many legal scholars, including Justice Stras, to join political science faculties as adjunct professors.<sup>4</sup>

Since his time clerking for Justice Clarence Thomas during the 2002–2003 term, and until his elevation to the bench last year, Justice Stras was an integral player in this cross-disciplinary movement. In fact, as he and I were beginning to work on several projects, he had already published with at least one political scientist.<sup>5</sup> I know that, as he continues his important work for the state of Minnesota, he will keep a finger on the pulse of research into a variety of areas of judicial politics and public law. Here I seek to highlight several of Justice Stras's contributions to both the legal academy and to political science.

One of the key differences between political scientists and legal scholars is that the latter are more willing to delve into important normative debates about the judiciary. Justice Stras

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1. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* (1948).

2. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991).

3. See, e.g., STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* (2009); Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489; Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009).

4. Four major scholars in the realm of judicial politics have been hired at prestigious law schools: Lee Epstein is the Henry Wade Rogers Professor at Northwestern; Kevin Quinn is professor of law at University of California, Berkeley School of Law; Andrew Martin is professor of law at Washington University in St. Louis; and Stefanie A. Lindquist is the A.W. Walker Centennial Chair in Law at the University of Texas Law School.

5. James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515 (2011).

is no exception. Thus, I begin with maybe his most interesting normative contribution to the literature. In the 2007 *Cornell Law Review*, Justice Stras took on the important yet controversial topic of senior judge status in federal courts.<sup>6</sup> In this study, Stras and his coauthor discussed the constitutional deficiencies of senior status and offered several solutions to what they described as a “constitutional bind.”<sup>7</sup> In fact, they made it clear that this system is both accepted and admired within the judiciary. This analysis is the epitome of how Justice Stras used his research to bridge the gap between law and politics. Indeed, while this piece can be seen as a normative one, Stras demonstrated how combining theory and qualitative evidence can be used to address and answer difficult questions about our system of justice.

Another important normative contribution from Justice Stras is his argument that Supreme Court Justices should once again ride circuit as they had done before the Courts of Appeals were created in 1891.<sup>8</sup> This article demonstrates that the Court’s reasons for riding circuit during the first century of its existence apply equally to the twenty-first-century Supreme Court. That is, circuit riding exposes Justices to life outside of Washington, which forces them to face (and rule on) issues that may not otherwise appear before the Supreme Court. Justice Stras then suggests that requiring Justices to ride circuit would increase their workload and may ultimately encourage them to retire earlier than many do today. Normatively, for Justice Stras, this would be good for the federal judiciary as a whole.

Beyond his melding of the normative with the empirical, Justice Stras clearly bridged the chasm between fields with his foray into the social scientific side of public law. In his scholarship on the relationship between the work of Supreme Court clerks and the Court’s docket, Stras focused on two key areas.<sup>9</sup>

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6. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

7. *Id.* at 458.

8. David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007).

9. See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 947 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)).



The first part of this important article demonstrated the dramatic shift in the Court's plenary docket. Indeed, Stras showed how the number of decided cases plunged by half between the time Chief Justice Rehnquist took over the Court (in 1986) and 2003. He then turned to a closer examination of the role Justices' clerks play in setting the Court's docket and how the cert pool may have played a role in the dramatic decline.

Like others before him, Stras turned to one of the most interesting and in-depth sources of data: Justice Harry Blackmun's papers at the Library of Congress. Specifically, he analyzed the certiorari pool memos to determine the impact of this institutional feature on the Court's declining docket. Stras's analysis led him to two key conclusions. First, he suggested that the chambers of Justices who do not belong to the certiorari pool make more recommendations for the Court to hear cases than does the certiorari pool itself. Second, Stras found clear evidence of a correlation between the recommendations of the certiorari pool and whether the Court granted certiorari. The bottom line is that the insights Justice Stras gleaned from being a clerk himself, along with rigorous analysis of rich data, led him to provide important new insights into how scholars should understand the Court's agenda-setting process.

Finally, I turn to Justice Stras's last published piece before his ascension to the bench. In the *Georgetown Law Journal* he and Professor James F. Spriggs II analyzed why the Court would ever issue plurality opinions that ostensibly do not hold the weight of precedent.<sup>10</sup> As they stated, plurality opinions result when five or more Justices agree on the result of a case but not on the legal rule. In the first empirical analysis to examine this phenomenon, Stras and Spriggs examined the ideological, collegial, contextual, and legal factors that theoretically may lead to plurality decisions. They found, importantly, that a case is more likely to end in a plurality decision if it involves an issue of constitutional interpretation (rather than one of statutory interpretation), and if the case involves an issue of civil liberties. Additionally, their study revealed that when a Justice in the majority is ideologically distant from the author of the Court's opinion, and that Justice and the author have not been collegial with one another in the past, she is more likely to concur in the result only. The point is that Spriggs and Stras provided strong theoretical reasons why understanding pluralities

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10. Spriggs II & Stras, *supra* note 5.

is important and then identified factors that actually lead to these nonprecedent setting decisions.

During his time at the University of Minnesota, Justice Stras certainly published on a variety of important topics. But perhaps his most important work focuses on the Supreme Court's nomination and confirmation process. It is to that work that I turn in the next section.

## II. POLITICAL SCIENCE AND THE SUPREME COURT NOMINATION AND CONFIRMATION PROCESS<sup>11</sup>

The modern-day Supreme Court confirmation process is among the most contentious aspects of American politics.<sup>12</sup> The U.S. Senate and the President both believe that their institution is crucial to determining the next Supreme Court Justice. Whereas President Nixon, for example, believed the Senate should always acquiesce to the President's choices,<sup>13</sup> former Senate Judiciary Committee Chair Patrick J. Leahy (D-VT) recently pointed out that the Senate's role "is advise and consent. It isn't advise and rubber-stamp."<sup>14</sup> This tension has made the confirmation process a seismic, and oftentimes public, battle between the President and the Senate.

The importance of the Supreme Court confirmation process—and the resulting political battles—makes the subject an attractive area of study for political scientists and legal scholars. The Supreme Court confirmation process has been studied generally;<sup>15</sup> scholars have also investigated specific aspects of it, including how Presidents choose nominees,<sup>16</sup> how the ideological relationship between the President and the Senate affects the ideology of the eventual nominee,<sup>17</sup> and what drives individual Senator's confirmation votes.<sup>18</sup>

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11. Portions of this section are drawn from Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Confirmation Process*, 66 J. POL. 663, 663–68 (2004).

12. See, e.g., President Reagan's public defense of Robert Bork and President Nixon's nominations of Clement Haynsworth and G. Harrold Carswell.

13. See JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 12 (1995).

14. Helen Dewar & Amy Goldstein, *Appeals Court Choice Rejected*, WASH. POST, Mar. 15, 2002, at A1, available at 2002 WLNR 15300858.

15. See, e.g., GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* (1995).

16. See, e.g., CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH* (2007).

17. See, e.g., Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics*,

This scholarship has provided unparalleled insight into the interactions between the President and the Senate during the confirmation process.<sup>19</sup> Most recently, Lauren Bell has studied the extent to which the increased activity of special interest groups has made the nomination and confirmation process more contentious and more difficult for a President's nominee to be confirmed.<sup>20</sup>

A second vein of theoretical and empirical work explores the President's explicit choice of nominees. This research focuses on the spatial dynamics of the confirmation process and finds that aligning the President, the Senate, and the Court median along an ideological continuum allows scholars to accurately predict the ideology of a President's chosen nominee.<sup>21</sup> Scholars have also learned a great deal about what motivates the Senate to act on an institutional level and what drives the individual Senator's confirmation votes. Sarah Binder and Forrest Maltzman,<sup>22</sup> for example, suggest the presence of divided government slows the confirmation process for lower court nominees. Segal finds that confirmation battles are as much about partisanship as they are about a struggle between the Senate and the President.<sup>23</sup> Finally, John Massaro observes that ideological differences between the nominee and the Senate play a major role in almost all failed nominations.<sup>24</sup>

In sum, the literature analyzing the Supreme Court confirmation process demonstrates that the ideological relation-

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*Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS & PRESIDENCY 31, 31–48; 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, 1069–94 (1999).

18. See, e.g., Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 96–118 (1992).

19. See, e.g., G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* (1981) (exploring the political exchanges for all executive nominations); WATSON & STOOKEY, *supra* note 15 (analyzing the political process for Supreme Court nominations).

20. LAUREN COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* 67–87 (2002).

21. See Moraski & Shipan, *supra* note 17.

22. See Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190, 196–97 (2002).

23. See Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998, 1000–03 (1987).

24. See JOHN MASSARO, *SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* 1–31 (1990).

ship between the nominee and the Senate—and the President and the Senate—plays a key role in the choices that Presidents make during the Supreme Court nomination process. It is here that Justice Stras's most important work was done. Indeed, his essay in the *Texas Law Review* has made it clear that legal scholars and political scientists alike may have to reconsider the way in which they view, analyze, and ultimately understand the Supreme Court nomination and confirmation process.<sup>25</sup>

### III. JUSTICE STRAS'S CONTRIBUTION TO UNDERSTANDING THE SUPREME COURT CONFIRMATION PROCESS

Stras's work on the confirmation process is similar to his analyses I discuss above. That is, it stands firmly at the intersection of political science and the legal academy. Indeed, he puts his work squarely in the social scientific theoretical debate and then provides several important policy and normative prescriptions that may help presidents better navigate this process.

His analysis of the confirmation process begins with him identifying the structural, judicial, and external factors that account for the politicization of the judicial appointments process over the past quarter century.<sup>26</sup> For him, the structural factors include the Seventeenth Amendment and the proliferation of confirmation hearings featuring the judicial nominees themselves since the 1950s.<sup>27</sup> Accordingly, both of these changes have led the Senate to take a more prominent role in who ultimately ends up on the federal bench.<sup>28</sup> Beyond structural factors, Justice Stras posited that external, organized interest groups and the mass media have also become key players in the confirmation process.<sup>29</sup> Finally, he pointed out that the stakes of confirmation battles are even higher because the Court now

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25. See David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1056–78 (2008) (reviewing BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006) and JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007)).

26. See *id.* at 1057–72.

27. See *id.* at 1058–62.

28. See *id.* at 1075–78.

29. See *id.* at 1062–68.

deals with many of the nation's most hot-button issues—from campaign finance to reproductive freedom to GLBT rights.<sup>30</sup>

For Justice Stras, the combination of these factors means the new politics of judicial appointments are so contentious that it has become one of the focal points of the political polarization that is usually reserved for other issues within Congress.<sup>31</sup> The evidence he wields to support this claim is impressive and suggests that scholars today need to make sure they account for these factors.<sup>32</sup> But because of how he straddles the legal academy and political science, Stras goes beyond his empirical findings to make normative and policy statements about this process.<sup>33</sup> Most generally, he suggests his findings are not only academic.<sup>34</sup> Rather, he makes clear they will help relevant actors—Presidents, Senators, and the nominees—better navigate this highly contentious process.<sup>35</sup>

More specifically, Stras makes three key policy prescriptions for the President that may improve the process. First, he argues Presidents should employ political tools to smooth the confirmation process for their preferred judicial nominee.<sup>36</sup> In other words, Presidents account for the various external constraints and the preferences of key Senators when they make an initial choice of who to nominate.<sup>37</sup> Second, Stras believes Presidents can help win confirmation for their nominees by “going public” in support of a nominee.<sup>38</sup> Third, Stras suggests that if the President faces a particularly hostile Senate, he could resort to recess appointments.<sup>39</sup> This strategy would at least allow a nominee to sit on the bench until the end of the next session of Congress.<sup>40</sup> In the end, Stras suggests Presi-

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30. *See id.* at 1068–72.

31. *See id.* at 1034–35.

32. *See id.* at 1072–76.

33. *See* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869 (2008) (reviewing CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007)).

34. *See* Stras, *supra* note 25, at 1078.

35. *See id.*

36. *See* Stras & Scott, *supra* note 33, at 1896–02.

37. *See id.* at 1898–02.

38. *See id.* at 1902–06 (citing Johnson & Roberts, *supra* note 11, at 665–67).

39. *See id.* at 1906–10.

40. *See id.* at 1906 (citing U.S. CONST. art. II, § 2, cl. 3).

dents have the means to ensure that the confirmation process for their judicial nominees goes as smoothly as possible.<sup>41</sup>

#### CONCLUSION

While here I only provide an overview (and smattering) of Justice Stras's academic research, the glimpse it provides demonstrates his desire to speak to two academies that had, for many years, deliberately ignored one another. The academy needs more of this type of work. And, while I reiterate how good a judge I believe Justice Stras will be, he (and his scholarship) will be missed.

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41. *See id.* at 1917.

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## Tribute

### Tribute to David Stras: Under the Microscope

Ryan W. Scott<sup>†</sup>

In July 2010 my former professor and longtime collaborator David Stras began service as an Associate Justice of the Minnesota Supreme Court. The nomination was an inspired choice, and a fitting tribute to Professor Stras could cover a lot of ground. As a scholar, he has quickly established himself as one of the nation's brightest and most influential commentators on the U.S. Supreme Court and the federal judiciary. As a teacher, he received a Teacher of the Year award for his work in the classroom. As a mentor, to me and to countless other students, he has worked tirelessly as an advisor and advocate. A tribute to Professor Stras might praise his radio and television analysis of the judicial appointments process, or his outstanding Federal Courts casebook,<sup>1</sup> or his commentary at the leading Supreme Court web site, SCOTUSblog.<sup>2</sup>

But I want to focus, instead, on the rich irony of Professor Stras's latest career move. After years of research on judicial decisionmaking, placing judges under the microscope, he has somehow managed to hop under the microscope himself. Before joining the court, he generated an impressive body of scholarly writing that scrutinizes and challenges judges' decisions. He has cheerfully proposed methods of manipulating judges into leaving the bench.<sup>3</sup> He has suggested increasing judges' work-

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1. ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, *FEDERAL COURTS* (2d ed. 2009).

2. See, e.g., David Stras, *The Politics of the Sotomayor Nomination*, SCOTUSBLOG (May 31, 2009, 7:11 PM), <http://www.scotusblog.com/2009/05/the-politics-of-the-sotomayor-nomination>.

3. David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397 (2005).

load,<sup>4</sup> while openly discussing whether to reduce their support staff.<sup>5</sup> He has even questioned the constitutionality of senior status, the generous retirement program prized by the federal judiciary.<sup>6</sup> Some of these excesses, no doubt, can be blamed on reckless and irresponsible coauthors. Still, after spending the better part of his career devising innovative ways of provoking judges, how did this guy become a judge himself?

Professor Stras's groundbreaking work on the judiciary deserves greater attention, not only because of its importance to scholars but because of what it reveals about his future as a justice. This Tribute summarizes three strands of Professor Stras's scholarship—on judicial retirement incentives, the judicial appointments process, and decisionmaking on the Supreme Court of the United States—that have proven especially influential. Although his writing frequently places judges under the microscope, it also reflects a profound respect for the work of the courts, and for the proper limits of the judiciary in the constitutional design.

### I. JUDICIAL RETIREMENTS

As other contributors to this Tribute have noted, Professor Stras's early work focused on judicial retirement decisions, and in many ways charted the course of his later scholarship. In *The Incentives Approach to Judicial Retirement*,<sup>7</sup> he proposed and developed a rational-choice decision model for judicial retirements. Drawing upon research into judicial opinions, especially the attitudinal and rational-choice models of judicial decisionmaking advanced by political scientists, Professor Stras contended that judges behave rationally in determining whether and when to retire.<sup>8</sup> Recognizing that retirement decisions are rational, he argued, has important implications for policy-

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4. David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007).

5. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 947 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)).

6. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

7. David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417 (2006).

8. *Id.* at 1431.



makers who hope to change judicial retirement patterns. Fixed-term lengths, mandatory age limits, and similar direct measures for restricting judicial tenure are not the only options.<sup>9</sup> Equally viable, he contended, are indirect methods that alter judges' incentives, for example by manipulating their retirement income and workload.<sup>10</sup>

Other articles developed and applied the incentives approach. In *Retaining Life Tenure: The Case for a "Golden Parachute"*<sup>11</sup> and a follow-up piece,<sup>12</sup> Professor Stras and I weighed in on the long-standing debate over life tenure for federal judges. We acknowledged that, despite its advantages, life tenure creates a serious risk of mental infirmity among elderly judges, which threatens the performance and legitimacy of the courts. Yet we criticized "command and control" measures like mandatory age limits and fixed terms for Supreme Court Justices, instead recommending less drastic reforms that would not require a constitutional amendment.<sup>13</sup> Empirical research by political scientists and economists, we noted, has demonstrated that throughout the nation's history the single strongest predictor of judicial retirements is pension eligibility.<sup>14</sup> We therefore proposed a "golden parachute" for Supreme Court Justices, providing strong financial incentives to retire in a timely fashion—especially upon experiencing a serious mental disability—rather than clinging to office into extreme old age.<sup>15</sup>

In *Why Supreme Court Justices Should Ride Circuit Again*,<sup>16</sup> Professor Stras turned to the workload of Supreme Court Justices. He proposed resuscitating the nineteenth-century practice of "circuit riding" by compelling Supreme Court Justices to spend a week or more each year sitting as judges on the federal courts of appeals.<sup>17</sup> Circuit riding would benefit the Justices themselves, he argued, by wrenching them from their isolation in Washington and exposing them to other judges, lawyers, and communities. He argued that the Court's

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9. *Id.* at 1419.

10. *Id.* at 1446.

11. Stras & Scott, *supra* note 3.

12. David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791 (2007).

13. Stras & Scott, *supra* note 3, at 1426–39.

14. *Id.* at 1447–49.

15. *Id.* at 1455–59.

16. Stras, *supra* note 4.

17. *Id.* at 1735–37.

work product would improve if Justices were required, from time to time, “to grapple with the gaps or inconsistencies in the Court’s contemporary opinions or the challenges faced by lower courts in implementing them.”<sup>18</sup> Moreover, increasing Justices’ workload would also provide a strong incentive to retire in a timely manner. Social science research has confirmed a significant relationship between federal judges’ workload and their retirement decisions. Measures like circuit riding, which would make Supreme Court Justices’ work much more demanding, therefore can be expected to induce earlier retirement.<sup>19</sup>

Another important advantage of Professor Stras’s proposal, in my view, is that circuit riding might provide a particularly strong retirement incentive for mentally infirm Justices. Today, a Justice whose mental health is failing can easily “hide out” in Washington, insulated by protective law clerks and Court staff, seldom interacting with outsiders. A weeklong stint serving with a new slate of judges, however, poses a real risk of public embarrassment for a mentally infirm Justice. That makes a dignified resignation more attractive.

Several of Professor Stras’s strengths as a scholar are evident in his early work. His writing on judicial retirements and workload focuses on practical questions—what works?, what doesn’t?, what institutional hurdles realistically can be overcome?—and not just abstract debates about theory and doctrine. At a time when much legal scholarship is aimed primarily at other academics, Professor Stras has produced a body of work that is of equal interest to judges and lawmakers, developing and defending concrete proposals for legal change. In addition, his writing on judicial retirement and workload showcases his facility with empirical methods. Not content to speculate about how judges will respond to changing incentives, from the outset he has grounded his proposals in the kind of social science research that too many law professors overlook.

## II. JUDICIAL APPOINTMENTS

Next Professor Stras wrote several articles analyzing changes in judicial appointments. In *Understanding the New Politics of Judicial Appointments*,<sup>20</sup> he catalogued key structur-

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18. *Id.* at 1731.

19. *Id.* at 1733–34.

20. See David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1056–78 (2008) (reviewing BENJAMIN WITTES, CONFORMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY

al, external, and judicial factors that have contributed to increasing politicization of the federal judicial appointments process in the last century. One underappreciated structural change was the Seventeenth Amendment, which has required the direct election of Senators since 1913. Another was an amendment to the Senate rules in 1929 to require roll-call votes for judicial confirmations.<sup>21</sup> Structural changes, including the direct election of Senators and roll-call votes and public committee hearings on judicial nominees, made Senators directly and publicly accountable for their votes on judicial nominations.<sup>22</sup> External forces such as interest group lobbying and intense media attention now play a powerful role in whether the nominee is confirmed to the Supreme Court.<sup>23</sup> Meanwhile, the judiciary itself has contributed to the politicization of the process by injecting itself into hot-button social and political questions and thereby raising the stakes of each new confirmation battle.<sup>24</sup> Professor Stras dissented from the common view that Presidents have caused the confirmation process to become more divisive by “selecting ideologically controversial nominees.”<sup>25</sup> Presidents’ “ideologically driven selection” of nominees, he argued, is primarily a response to the aggrandizement of the power of the federal judiciary, and therefore “more of a symptom than a cause of the new politics of judicial appointments.”<sup>26</sup> In a follow-up article, *Navigating the New Politics of Judicial Appointments*,<sup>27</sup> Professor Stras and I extended that analysis to the confirmations tug-of-war between the President and the Senate.

### III. SUPREME COURT DECISIONMAKING

Most recently, Professor Stras has made two important contributions to the empirical literature on Supreme Court de-

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TIMES (2006) and JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007)); see also David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869 (2008) (reviewing CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007)).

21. Stras, *supra* note 20, at 1061–62.

22. *Id.* at 1059–62.

23. *Id.* at 1062–66.

24. *Id.* at 1069.

25. *Id.* at 1071.

26. *Id.*

27. Stras & Scott, *supra* note 20.

cisionmaking. The first, a study called *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*,<sup>28</sup> traces the dramatic decline in the size of the Supreme Court's docket between 1981 and 2007 to changes in the Court's membership. Using the private papers of Justice Harry Blackmun, now available at the Library of Congress, Professor Stras generated a unique new dataset of certiorari votes for every case on the Court's plenary docket between 1986 and 1993.<sup>29</sup> The data are striking. Different Justices voted to grant certiorari "at considerably different rates," and several new members of the Court—Justices Souter, Thomas, and Ginsburg—voted to grant certiorari at a much lower rate than the Justices they replaced.<sup>30</sup> Scholars frequently attribute the decline in the Supreme Court's docket to the certiorari pool, the elimination of the Court's mandatory jurisdiction, and changes in the actions of the Solicitor General's office. Professor Stras's study powerfully demonstrates that, whatever the influence of those factors, turnover in the Court's personnel also has played a central role.

The second, *Explaining Plurality Decisions*,<sup>31</sup> is the most comprehensive study to date of plurality decisions on the U.S. Supreme Court. Cases that produce only a plurality opinion, with one or more opinions concurring in the judgment, have come under criticism because they often provide unclear and unstable answers to high-profile legal questions.<sup>32</sup> Professor Stras and coauthor James Spriggs developed a case-level model of plurality decisions, identifying a host of ideological, collegial, legal, and contextual factors that might contribute to a breakdown in the process of coalition building and compromise necessary to produce a unified opinion for the Court.<sup>33</sup> They found, surprisingly, no evidence that ideological factors systematically influence when, or how often, the Court issues plurality opinions.<sup>34</sup> Instead, the strongest predictors of a fractured Court related are legal and contextual: constitutional interpretation, common law and administrative review cases are more

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28. David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMM. 151 (2010).

29. *Id.* at 153.

30. *Id.* at 155–58.

31. James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515 (2011).

32. *Id.* at 518.

33. *Id.* at 532–43.

34. *Id.* at 545.

likely to produce a plurality opinion, while cases reviewing circuit splits in the lower courts are less likely to produce a plurality opinion.<sup>35</sup>

These studies mark Professor Stras's transition from a consumer to a producer of first-rate empirical work on the Supreme Court. That evolution should come as no surprise, given his long-standing joint appointment in the political science department and his regular contributions to the Empirical Legal Studies blog. In an increasingly interdisciplinary world, he has proven himself capable both as a legal scholar and as a social scientist.

#### IV. JUSTICE STRAS

But here's the irony. For all of their strengths, Professor Stras's articles do not read as if they were written by an aspiring judge. To the contrary, they mostly treat judges as objects of *study* and objects of *manipulation*.

Professor Stras's research frequently places judges under the microscope as objects of study. His work reflects a keen interest in the factors, conscious and unconscious, that influence judicial decisionmaking. And he has never hesitated to engage the political science literature that emphasizes the role of judges' attitudes and strategic choices. His research on the Supreme Court, for example, has demonstrated that Justices' ideological values, turnover of Court membership, and collegiality can concretely affect judicial outcomes. Judges rarely acknowledge those influences.

His scholarship also cheerfully encourages legislatures to manipulate judges. In his work on judicial retirements, he has championed an "incentives approach." He proposes, for example, enhancing Supreme Court Justices' retirement benefits (through a "golden parachute") while ratcheting up their workload (through circuit riding), as a way of inducing mentally infirm Justices to leave the bench in a timely manner. Judges seldom embrace that kind of carrot-and-stick approach to their own decisions.

To put it mildly, that is an unusual background for a newly minted Justice. But I predict that Professor Stras's distinctive perspective on judicial decisionmaking will serve him well on the court. His familiarity with the distorting effects of ideology, honed by years of research, gives him an unusual ability to rec-

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35. *Id.* at 547–48.

ognize and avoid them.<sup>36</sup> And his calls for reform, especially his proposals for workload and retirement incentives, reveal a healthy sense of the judiciary's limited role in the constitutional design. I trust, as he repairs from Mondale Hall to the Judicial Center, that Professor Stras will retain the intellectual rigor, curiosity, and modesty that have made him an outstanding scholar and collaborator.

On behalf of the many law professors he leaves behind, I wish Justice Stras congratulations. Enjoy life on the other side of the microscope. We look forward to scrutinizing your every move in the years to come.

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36. *E.g.*, Stras & Scott, *supra* note 20, at 1873–74, 1879.