Book Review

THE JUSTICES OF STRATEGY

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A review of

THE CHOICES JUSTICES MAKE, by Lee Epstein and Jack Knight (Congressional Quarterly Press, 1998).

Oliver Wendell Holmes declared that judges "are apt to be naif, simple-minded men."[1] Two prominent political scientists, Lee Epstein and Jack Knight, beg to differ. They suggest that Supreme Court Justices are sophisticated and strategic, maximizing their personal public policy preferences while simultaneously satisfying external observers that the Court is legitimately staying within the bounds of the law.[2]

Judicial strategy is not much considered by legal scholars. It is common to speak of strategizing by litigators, but judges are typically considered to be above such devices. Judges, it is often assumed, sim-

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1. OLIVER W. HOLMES, JR., *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 295 (1920).

2. Justice Frankfurter hinted that Justices may behave strategically when he declared:

> The compromises that an opinion may embody, the collaborative effort that it may represent, the inarticulate considerations that may have influenced the grounds on which the case went off, the shifts in position that may precede final adjudication– these and like factors cannot, contemporaneously at all events, be brought to the surface.

Felix Frankfurter, *The Administrative Side of Chief Justice Hughes*, 63 HARV. L. REV. 1, 1 (1949). These are precisely the considerations that Epstein and Knight attempt to bring to the surface.

ply and sincerely apply the law to the best of their abilities.[3] Walter Murphy's classic book, *Elements of Judicial Strategy*,[4] introduced the concept of judicial strategy in 1964, but legal researchers have paid his book relatively little heed.[5] Into this breach come Epstein and Knight with their new book, *The Choices Justices Make*. While the recent trade book, *Closed Chambers*,[6] has received more press,[7] *Choices* offers a more detailed, and ultimately more interesting, look at the Supreme Court. *Choices* recently received the 1998 Herman Pritchett Award, an annual prize given by the American Political Science Association for the best book published on law and the courts.

This Book Review has three purposes. First, I hope to increase the legal community's familiarity with the political science research about judicial decisionmaking and strategy. This research is extensive and important. Second, I attempt to identify some shortcomings in that research, perhaps attributable to a lack of legal understanding among political scientists. By focusing exclusively on the policy ends of the Justices, *Choices* neglects the real complexity associated with legal concerns. Third, I hope to provoke further research on strategic Supreme Court decisionmaking. While political scientists require no further prodding on this matter, the research would benefit from greater analysis by legal scholars.

Indeed, *Choices* arrives for review at a time when legal researchers themselves are beginning to focus some attention on judicial strategy. A growing school of legal research known as "positive political theory" (PPT) has begun to focus on various aspects of judicial strategy and competing political institutions in courts' decisionmaking. Some of the most prominent PPT researchers are William

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3. *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255-64 (1997) (describing the classic legal model of scholarship); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1642-43 (1998) (describing the tradition of formal legal theory under which "judicial decisions were based on logical reasoning").

4. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

5. Nor have political scientists paid great attention to Murphy's classic book. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE xi-xii (1998) (noting its "limited influence").

6. EDWARD LAZARUS, CLOSED CHAMBERS (1998).

7. *See, e.g.*, Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23 (criticizing CLOSED CHAMBERS and suggesting that the author be prosecuted for breach of trust); Gretchen Craft Rubin, *Betraying a Trust*, WASH. POST, July 13, 1998, at A27 (criticizing the book's "poisonous influence").

Eskridge,[8] McNollgast,[9] and Emerson Tiller.[10] PPT has not itself produced a general book such as *Choices*,[11] but Epstein and Knight provide a valuable window into many of the claims and methodologies of PPT, as well as those of the rational choice field of political science research.

Epstein and Knight give close scrutiny to the decisions of Supreme Court Justices and discern several patterns of strategic behavior. They find the Justices to be highly strategic in their pursuit of their ideological policy objectives. These judicial strategies are of two

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8. *See* William N. Eskridge, Jr. & Jenna Bednar, *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); William N. Eskridge, Jr. & John Ferejohn, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 S. CAL. L. REV. 1545 (1995); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382 (1993); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding Supreme Court*]; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging on History?*].

9. McNollgast is the *nom de plume* of Matthew McCubbins, Roger Noll, and Barry Weingast on those occasions when they write together. *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) [hereinafter McNollgast, *Politics and the Courts*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992). The trio has split up for other articles. *See* John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) [hereinafter Ferejohn & Weingast, *Positive Theory*]; John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); Robert W. Hahn & Roger G. Noll, *Barriers to Implementing Tradable Air Pollution Permits: Problems of Regulatory Interactions*, 1 YALE J. ON REG. 63 (1983); Arthur Lupia & Matthew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

10. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J. LAW & ECON. 435 (1996); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J. LAW ECON. & ORG. 114 (1998); Emerson H. Tiller, *Putting Politics into the Positive Theory of Federalism: A Comment on Bednar and Eskridge*, 68 S. CAL. L. REV. 1493 (1995) [hereinafter Tiller, *Putting Politics into the Positive Theory of Federalism*]; Emerson H. Tiller & Pablo T. Spiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997) [hereinafter Tiller & Spiller, *Decision Costs*]; Emerson H. Tiller & Pablo T. Spiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996).

11. There is an early book, WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973), though it deals with what is generally known as public choice theory rather than what is now known as positive political theory.

general types—internal and external. The authors first describe strategies within the Court, including those used by a Justice in arranging (or avoiding) a grant of certiorari for a case and then in amassing a majority opinion for his or her political position. Second, they describe strategies of the Court *vis-à-vis* other institutions, primarily Congress, by which Justices strive to avoid having their decisions reversed or otherwise undermined by legislation.

This Book Review first discusses the authors' two categories of judicial strategy and the considerable evidence they present for their position. I then consider some limitations of the theory, both theoretical and empirical. Epstein and Knight make a compelling case for the presence of judicial strategizing on the Supreme Court. Equally importantly, they describe precisely how such strategizing may take place and its potential effect upon the law. These findings have significant import for our understanding of Court opinions and the path of the law. The authors are not satisfied, however, with demonstrating an important role for judicial strategy; they claim that political strategy explains *everything*.[12] Epstein and Knight's Justices are engaged in the single-minded pursuit of ideological aims. The authors believe that the law has no significance in and of itself and that Justices are utterly without respect for, or fidelity to, the law. The Justices, on this view, are set upon maximizing their policy preferences, constrained only by institutional concerns, such as the risk of legislative reversal of their decisions[13] or public perception of their activities.[14] In the world depicted in *Choices*, no Justice does the "right thing" or has a sense of responsibility or dedication to the law.[15]

Fortunately, one need not accept this strong and cynical claim in order to appreciate the value of the book. The authors' insights are important and surely contain a substantial measure of truth. Indeed,

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12. *See* EPSTEIN & KNIGHT, *supra* note 5, at xiii ("[L]aw, as it is generated by the Supreme Court, is the long-term product of short-term strategic decision making.").

13. *See* EPSTEIN & KNIGHT, *supra* note 5, at 138-45.

14. *See id.* at 157.

15. This vision is roughly consistent with various internal anecdotal tales of the Court, which have depicted the Justices as ideologically oriented and scheming. *See generally* LAZARUS, *supra* note 6; BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979). Insider academic reports present a more respectful but generally similar case. *See* BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES (1996); JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995). A prominent former politician agrees. *See* Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MTN. L. REV. 123, 142 (1962) ("Exercising high political powers, the Court must have a high sense of strategy and tactics.").

the authors are doubtless much closer to the truth than is the conventional doctrinal analysis of Court opinions. Epstein and Knight provide a valuable counterbalance, but their political perspective is in some ways as narrow as the traditional legal perspective. The authors' account is nevertheless fascinating and generally informative and should serve as a useful foundation for additional research on Supreme Court strategy.

The final part of this Book Review presents some questions about Supreme Court decisionmaking strategy that require further research. For example, the naive view of sincere legal decisionmakers offers a straightforward explanation of why decisions command different-sized majorities or fail to reach a majority opinion altogether. The sincere legal model also presents no difficulty in explaining why Justices affirm a significant minority of the decisions they review or why Justices don't trade votes. However, these questions become more perplexing if one embraces Epstein and Knight's strategic model in which Justices maximize political preferences—which is not to say that they cannot be answered given further research and consideration.

I. STRATEGY WITHIN THE COURT

For the Justices, there are two principal components to strategy within the Court. First, there is the strategy of the certiorari grant. Second, there is the strategy of putting together a majority coalition. There are several strategic points within this decisionmaking process: discussions, including the discussion at conference; the opinion assignment; the circulation of opinions; and the final vote on the merits. This process has not been studied extensively by PPT researchers, who have focused most of their analysis on the role of competing political institutions in the strategy of the Justices.

In discussing the strategy of the certiorari grant, Epstein and Knight describe "aggressive grants" and "defensive denials." An aggressive grant occurs when at least four Justices "take a case that may not warrant review" because the case provides a promising tool for the development of doctrine in a way that those Justices favor.[16] A defensive denial, by contrast, involves Justices who vote to deny certiorari, even when they disapprove of the decision under review and

16. EPSTEIN & KNIGHT, *supra* note 5, at 80.

believe it to be significant. They fear that if the case is taken up by the Court, they will lose on the merits, creating undesirable doctrine.[17]

Epstein and Knight do not invent the theory of aggressive grants and defensive denials.[18] They even cite a memorandum written to Justice Marshall by one of his clerks, explicitly suggesting that "a defensive denial is in order."[19] However, the authors advance the discussion by recapping research on certiorari voting in the 1982 Term that considered both the ideology of the voting Justice and that of his colleagues.[20] The authors also review tactics that can influence the certiorari decision. For example, the Justices occasionally write draft dissents from denials of certiorari and circulate these dissents to other members of the Court. The purpose of the draft dissents is to persuade other Justices to take the case. Indeed, this procedure is how *Bowers v. Hardwick*[21] ultimately came before the Court.[22] The authors offer interesting data about the frequency with which individual Justices dissented from a denial of certiorari and their relative success with the tactic.[23]

Once certiorari is granted, the next strategic node is putting together a majority coalition. Epstein and Knight observe that the Justices consider the opinion assignment central to this process, as the

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17. *See id.* For an example of defensive denial practice, see WOODWARD & ARMSTRONG, *supra* note 15, at 132 (reporting that Justices Brennan and Marshall resolved not to vote for certiorari in Fourth Amendment cases during the Burger Court for fear that Warren Court precedent might be reversed). A liberal quartet composed of Justices Brennan, Marshall, Douglas, and Stewart likewise voted against certiorari in obscenity convictions, fearful that review "would convert local [decisions] into national precedents, turn minor inequities into landmark losses." *Id.* at 331. They would not push for review "until a fifth vote to reverse a conviction seemed likely." *Id.*; *see also* LAZARUS, *supra* note 6, at 267 (describing how liberal clerks in the early years of the Rehnquist Court would downplay the certworthiness of certain cases in order to avoid a decision that could result in a "significant liberal defeat").

18. *See, e.g.*, Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995).

19. EPSTEIN & KNIGHT, *supra* note 5, at 81 (referring to *United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1979)).

20. *See id.* (explaining the research results of Gregory A. Caldeira and his colleagues, which show that "justices who are ideologically distant from the majority of their colleagues tend to cast fewer votes in favor of cert").

21. 478 U.S. 186 (1986).

22. *See* EPSTEIN & KNIGHT, *supra* note 5, at 61-62.

23. *See id.* at 63-64. White, Marshall, and Rehnquist most frequently employed the tactic. Over one-fourth of the time, the draft opinion dissenting from denial of certiorari obtained the fourth vote necessary to grant certiorari. *See id.* at 63.

drafter is given "a great deal of control of a case."[24] The first draft of a majority opinion may take advantage of two very powerful psychological heuristics—framing[25] and anchoring.[26] Moreover, the opinion's author may seize upon his initial position and be relatively hesitant to depart from it. Additionally, the resource costs associated with drafting a concurrence or dissent advantages the initial opinion assignee.

When the Chief Justice is in the majority, he assigns the opinion. When the Chief Justice is in the minority, the senior Justice in the majority assigns the opinion. In a close vote, one strategy is to assign the opinion to the most tentative member of the majority in hopes of avoiding a switch of that Justice's vote.[27] A related strategy is to as-

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24. *Id.* at 127; *see also* Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 99 (1996) [hereinafter Edelman & Chen, *The Most Dangerous Justice*] (contending that the "significance of opinion assignments cannot be overstated").

25. The framing heuristic describes how the presentation of information affects how it is evaluated. The matter of school prayer, for example, might be framed as an Establishment Clause issue of government involvement in religion or as a Free Exercise Clause issue of religious expression. Framing has a demonstrably powerful effect on decisionmaking, and the opinion writer gets the first crack at framing the issue favorably. *See, e.g.*, N.S. Fagley & Paul M. Miller, *The Effect of Framing on Choice: Interactions with Risk-Taking Propensity, Cognitive Style, and Sex*, 16 PERSONALITY SOC. PSYCHOL. BULL. 496 (1990); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981).

26. The anchoring heuristic describes the tendency of people to "anchor" their judgment on an existing situation or on current information. The initial opinion may set the tone for future discussions, with changes centered on tinkering with its language. For a discussion of the anchoring effect, see, for example, Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1235-41 (1994).

27. *See* LAZARUS, *supra* note 6, at 310 (reporting that Earl Warren would protect "a bare majority by giving the writing assignment to its least certain member"); WOODWARD & ARMSTRONG, *supra* note 15, at 152 (noting that Justice Douglas believed that "the best way to hold a swing vote was to assign that Justice to write the decision"). Chief Justice Burger similarly would assign opinions to the "least persuaded" member of his majority coalition. *See* SCHWARTZ, *supra* note 15, at 47. There is evidence that Chief Justice Rehnquist also engages in strategic opinion assignments. *See* SIMON, *supra* note 15, at 67 (noting that Chief Justice Rehnquist assigned the opinion in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that while 42 U.S.C. § 1981 does not extend to racial harassment incurred in the course of employment, it does prohibit racial discrimination in making and enforcing private contracts and does not require a plaintiff to show that he or she was in fact better qualified than the person selected for the position) to Justice Kennedy in order to hold his vote). Some empirical research suggests that assignments are often given to the weakest member of the majority coalition. *See* Sue Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, 74 JUDICATURE 66 (1990); William P. McLauchlan, *Ideology and Conflict in Supreme Court Opinion Assignment, 1942-1962*, 25 WESTERN POL. Q. 16 (1972). Chief Justice Burger's decision to assign the opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that a carefully drafted statute, insuring that sentencing is suitably directed and limited, suffices to counteract the inconsistent imposition of capital punishment by sentencing authorities) to Justice White

sign the opinion to a strategically adept Justice, such as Brennan, who will likely be able to hold a majority through compromise.[28]

However, Justices do not always assign opinions in the ways mentioned above. Assigners tend to keep particularly important decisions for themselves to retain more control over the ultimate opinion of the Court.[29] Some research also shows that assigners may tend to assign the opinion to a Justice very close to their own position.[30] This is probably a better strategy than assigning the opinion to the "least persuaded" Justice—the latter writer is likely to draft a weaker opinion than otherwise might be achieved.[31] A stronger ally can keep the majority coalition together through compromise while making the opinion as strong as possible. Moreover, assigning the opinion to the most tentative Justice provides no guarantee that the majority coalition will remain intact.[32]

A Justice may overplay his strategic hand in opinion assignment. Chief Justice Burger apparently felt so strongly about the need to as-

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rather than Justice Powell, the weakest member of the majority coalition, may have cost a majority opinion. *See* LAZARUS, *supra* note 6, at 115-16. Similarly, Justice Brennan may have lost a majority in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a defendant employer in a gender discrimination suit may avoid a finding of liability if it proves that it would have made the same decision even if plaintiff's gender had not been taken into account), by taking the opinion himself rather than assigning it to Justice O'Connor, the shakiest member of his coalition. *See* LAZARUS, *supra* note 6, at 278.

28. Brennan has been called the "strategist behind Supreme Court jurisprudence." SCHWARTZ, *supra* note 15, at 170.

29. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 271-72 (1993).

30. *See* DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 177 (1976); SEGAL & SPAETH, *supra* note 29, at 268 (reporting data showing that Chief Justices tend to assign opinions to those ideologically closest to them); *see also* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 110-12 (1997) [hereinafter BAUM, PUZZLE] (summarizing research to this effect). Of course, flexibility in strategic opinion assignment is constrained by the need for a fair division of the writing workload among the Justices.

31. This effect may be counteracted by the desire of Justices to author a majority opinion. For example, when Justice Douglas assigned an opinion to Justice Harlan, the most moderate of his majority in *Cohen v. California*, 403 U.S. 15 (1971) (holding that the government may not suppress protected expression simply because it is offensive to some), Harlan's opinion was too weak. When other Justices threatened to write stronger concurrences, Harlan agreed to strengthen his opinion to command the majority. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 152.

32. *See* SEGAL & SPAETH, *supra* note 29, at 274-75. Empirical research on the Warren Court found that the marginal Justice was just as likely to abandon a majority when he received the opinion assignment as when he didn't. *See* Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72 (1988). Nor does assigning an opinion to the fifth Justice improve the prospects for getting additional votes for the opinion. *See* Saul Brenner et al., *Increasing the Size of Minimum Winning Coalitions on the Warren Court*, 23 POLITY 309 (1990).

sign opinions that he would change or even misreport his conference vote in order to obtain the assignment right. This produced a considerable backlash from the other Justices.[33] Epstein and Knight provide additional, rigorous evidence of Burger's strategic approach to opinion writing. They examined the record of Justice Burger's conference votes and discovered that he passed on voting an unusually large number of times, a strategic move that ensured his ability to select the majority opinion writer.[34]

Once certiorari has been resolved, the case heard, and the opinion assigned, Epstein and Knight discuss several strategic methods of coalition building. Obtaining a majority coalition requires a measure of bargaining with fellow Justices.[35] Epstein and Knight illustrate strategic coalition building with an analysis of *Craig v. Boren*,[36] the well-known decision that established an intermediate level of scrutiny for gender discrimination claims under the Equal Protection Clause.[37] *Craig* involved two issues. The male plaintiff in the case complained of Oklahoma's law that set the minimum drinking age at eighteen for females and twenty-one for males. In addition to the equal protection issues in the case, *Craig* also involved standing questions, because the plaintiff had turned twenty-one by the time the case reached the Court.

Epstein and Knight use the conference notes of Justices Brennan and Powell to break down the positions of the nine Justices on the standing question, the standard of scrutiny to be applied to gender discrimination, and how each believed the case should be resolved.[38] The varied alignments created a tricky bargaining problem. Five Justices felt that the plaintiff had standing and wanted to decide in his favor, but one of the five (Stewart) favored use of the lenient rational basis test for gender discrimination, while Justices Brennan, Marshall, and White wanted strict scrutiny for such cases.[39] An opinion based on the conference positions would either have yielded no majority opinion or a very weak opinion, applying the deferential ra-

33. *See* EPSTEIN & KNIGHT, *supra* note 5, at 127-34.

34. *See id.* at 129-30.

35. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 304 (3d ed. 1993) (observing "how important postconference deliberations and communications among the chambers have become for the Court's decision making").

36. 429 U.S. 190 (1976).

37. *See id.* at 208-09.

38. *See* EPSTEIN & KNIGHT, *supra* note 5, at 5 tbl.1-2.

39. *See id.* at 4-7.

tional basis test to gender discrimination. As the senior Justice in the majority, Brennan assigned himself the opinion and set out to produce a stronger opinion.

Justice Brennan's strategy resulted in the intermediate scrutiny standard. Had he pressed for strict scrutiny, his preferred position, he could not have mustered a majority. Moreover, the strict scrutiny position risked the possibility that some of the minority Justices might change their position on standing and put together a firm majority ruling for the plaintiff by applying the rational basis standard to gender discrimination cases. By adopting the intermediate scrutiny test, Brennan put together a majority behind a standard for gender discrimination that has survived to this day. Epstein and Knight describe his action as "sophisticated" and "strategic" and argue that he was guided by "his beliefs about the preferences of the other actors and the choices he expected them to make."[40]

Some readers might find this conclusion obvious, but the finding has great significance for the law. Law professors still engage in doctrinal analysis, seeking rational consistency and principle in the Court's rulings. The strategic account of *Craig* implies that such analysis may be useless and denies the independent relevance of precedent, except as a strategic tool to be used in compromising among various positions and institutional concerns.

Political scientists are not satisfied with mere anecdotes, but *Craig* was not the only case in which the Justices employed strategy.[41] Epstein and Knight illustrate how the author of a majority opinion will be especially solicitous of the opinion of the most moderate member of the majority, or the "fifth Justice."[42] One memorandum

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40. *Id.* at 56:

> Brennan took the course of action that any rational actor, concerned with maximizing his policy preferences, would take. In other words, for Brennan to set policy as close as possible to his ideal point, strategic behavior was essential. In this instance, he needed to act in a sophisticated fashion, given his beliefs about the preferences of the other actors and the choices he expected them to make.

41. Brennan engaged in a similar episode of strategic opinion writing in *Keyes v. Denver School District*, 413 U.S. 189 (1973) (holding that state-imposed segregation in part of a school district may allow a finding of a dual system in the entire district). *See* EPSTEIN & KNIGHT, *supra* note 5, at 95-96. Justice Brennan was reportedly "always willing to mold his language to meet the objections of his colleagues." SCHWARTZ, *supra* note 15, at 164. *See generally* George, *supra* note 3, at 1660-62 (discussing negotiations over the content of opinions).

42. EPSTEIN & KNIGHT, *supra* note 5, at 66; *see also* SIMON, *supra* note 15, at 148-49 (discussing liberal strategy in *Hodgson v. Minnesota*, 497 U.S. 417 (1990)). Justice Brennan assigned the opinion to Justice Stevens with the understanding that he would "be writing his ma-

from Justice Rehnquist to other members of his coalition reported that he had been "negotiating with John Stevens for considerable time in order to produce a fifth vote" and that he had "agreed to make the following changes in the currently circulating draft."[43] In *Hampton v. Mow Sun Wong*,[44] Justice Stevens was clearly the fifth Justice (the Court split 4-4 before he assumed his position), and he controlled the opinion even though no other Justice really agreed with his legal position.[45] The opinion in *Baker v. Carr*[46] was significantly limited by the need to gain Justice Stewart's fifth vote.[47] In a close case, a majority is often forced to make substantive compromises in order to obtain an opinion of the Court. Conversely, the minority coalition will try to capture the majority's fifth Justice through a persuasive preliminary dissenting opinion.[48]

Under the strategic view, the fifth Justice clearly carries most of the power within the Court. By controlling the decision, this Justice can control the opinion. Some Justices may have affirmatively employed a "deliberate strategy" of "[o]ccupying the pivot" on the Court.[49] There is an active debate among legal scholars over the iden-

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jority opinion with the objective of holding O'Connor's vote." *Id.* at 148-49. Justice Stevens made numerous revisions in an effort to please Justice O'Connor but ultimately failed. *See id.*

43. EPSTEIN & KNIGHT, *supra* note 5, at 74. Woodward and Armstrong relate how Supreme Court obscenity doctrine was controlled by Justice Blackmun, who demanded concessions from Chief Justice Burger as a condition for becoming the fifth vote. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 299.

44. 426 U.S. 88 (1976) (holding unconstitutional a Civil Service Commission regulation that barred resident aliens from holding most federal jobs).

45. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 477. Although Justice Stevens thought the discrimination against aliens was unconstitutional because it was based only on a Civil Service Commission regulation, he differed from the other eight Justices because he thought it might well be constitutional for Congress or the President to ban aliens from federal jobs. *See id.*

46. 369 U.S. 186 (1962) (holding that the federal courts may review legislative apportionments under the Equal Protection Clause).

47. *See* SCHWARTZ, *supra* note 15, at 222 ("Since Justice Stewart's vote was then necessary for the bare majority in favor of reversal, the Chief Justice and the other three agreed that Justice Brennan would limit his draft opinion to the jurisdictional issue.").

48. *See* EPSTEIN & KNIGHT, *supra* note 5, at 77 (reprinting an excerpt of a memorandum from Chief Justice Burger to Justice Stewart urging that the latter Justice draft a quick dissent, because the majority's fifth vote, Justice White, was "tentative" in his conference vote). The majority, by contrast, may attempt to capture the votes of dissenters by modifying an opinion. *See* Saul Brenner et al., *Fluidity and Coalition Sizes on the Supreme Court*, 36 JURIMETRICS J. 245, 253 (1996).

49. LAZARUS, *supra* note 6, at 515 (describing how Justice Kennedy boasted of employing this strategy).

tity of the fifth Justice and the method for ascertaining this identity.[50] This debate assumes the existence of such a pivotal Justice and his or her significance.

Another strategic node involves the first draft of a majority opinion. The opinion assignee may take the preferences of his or her colleagues into account in the first draft, but it may be more strategic not to compromise at this early stage. A relatively uncompromising initial draft leaves leverage for later bargaining. After a first draft of the majority opinion is circulated throughout the Court, additional communication and negotiation ensues. Epstein and Knight use *United Jewish Organizations of Williamsburgh v. Carey*[51] to illustrate this process. The case involved a challenge by Hasidic Jews to the redistricting process. The initial positions of the Justices were: five to affirm the state redistricting plan (Stevens, Powell, Blackmun, White, and Burger); two to dismiss certiorari as improvidently granted (Stewart and Rehnquist); one to remand (Brennan); and one not participating (Marshall).[52] Assigned the majority opinion, Justice White began by adopting a rationale for which there had been little enthusiasm at conference. Justice Stevens then circulated a concurring opinion. Justice Brennan then sought to strike a bargain with White, sending a bargaining statement and offering to join White's opinion if certain modifications were made. White then revised his opinion to incorporate the approach of Stevens's concurrence, causing Stevens to join the majority opinion.[53]

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50. *See* Edelman & Chen, *The Most Dangerous Justice*, *supra* note 24, at 63 (1996) (setting forth a methodology for identifying the Court's "swing" vote); *see also* Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187 (1996) [hereinafter Baker, *Interdisciplinary Due Diligence*] (responding to Edelman and Chen and criticizing their methodology for identifying the fifth Justice); Paul H. Edelman & Jim Chen, *"Duel" Diligence: Second Thoughts About the Supremes as the Sultans of Swing*, 70 S. CAL. L. REV. 219 (1996) [hereinafter Edelman & Chen, *"Duel" Diligence*] (responding to Baker's criticisms).

51. 430 U.S. 144 (1977) (upholding an intentionally created black state assembly district whose creation foreseeably resulted in the splitting of a community of Hasidic Jews who had previously been concentrated in one district).

52. *See* EPSTEIN & KNIGHT, *supra* note 5, at 68.

53. *See id.* Bernard Schwartz provides another remarkable example of the willingness of Justices to compromise by quoting a memorandum from Chief Justice Rehnquist written in regard to *Irwin v. Veterans Administration*, 498 U.S. 1075 (1991). Rehnquist wrote:

> I prefer the position taken in the most recent circulation of my proposed opinion for the Court, but want very much to avoid a fractionated court on this point. . . . If a majority prefers Nino's view, I will adopt it; if I can get a majority for the view contained in the present draft, I will adhere to that. If there is some 'middle ground' that will attract a majority, I will even adopt that.

Epstein and Knight also closely examine the bargaining statements made by Justices in the 1983 Term. They report that some sort of bargaining memorandum was circulated in 64% of the cases reviewed, a figure which does not include private memoranda or casual oral communications. The average case had six public memoranda.[54] The authors also examine "landmark cases," some of the most important decisions of the 1970s and 1980s.[55] In these cases, they find considerable evidence of bargaining through private memoranda.[56] Moreover, drafts of majority opinions are frequently rewritten with major changes, a fact that provides empirical evidence of the significance of internal memoranda among the Justices.[57] Epstein and Knight describe, for ten major cases, the major opinion changes made in direct response to bargaining statements.[58] The description makes it clear that such bargaining statements are an important element in Court decisionmaking.

In addition to circulating brief bargaining statements, a Justice may take a stronger stand by circulating a full dissenting or concurring opinion to the entire Court. The former is presumably intended to persuade a member of the majority to switch, while the latter threatens the "majority" opinion writer with the prospect that his or her opinion may not command a majority of votes. Once again, Epstein and Knight closely examine cases from the 1983 Term as well as landmark cases. The circulation of a dissent, concurrence, or unla-

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SCHWARTZ, *supra* note 15, at 21.

54. *See* EPSTEIN & KNIGHT, *supra* note 5, at 72.

55. Landmark cases were identified as those listed in ELDER WITT, GUIDE TO THE U.S. SUPREME COURT 915-26 (2d ed. 1990), that were decided during the 1969-1985 Terms. *See* EPSTEIN & KNIGHT, *supra* note 5, at 78 tbl.3-3. For a listing of ten landmark cases, see *infra* note 58.

56. *See* EPSTEIN & KNIGHT, *supra* note 5, at 72-73.

57. *See id.* at 98-99. The authors report that opinion writers produce 3.2 drafts in typical cases and nearly four drafts in landmark cases. *See id.* at 98. Among landmark cases, 64.8% saw a major change in opinion, and 45.2% of all 1983 Term cases saw such a change. *See id.* at 99. Epstein and Knight carefully lay out how they defined "major change," including in that category a substantial deletion of a section, a switch in whether a prior case was overruled, an introduction of a new rationale, etc. *See id.*

58. *See id.* at 100-05 (listing *Garcia v. SAMTA*, 469 U.S. 528 (1985), *Tennessee v. Garner*, 471 U.S. 1 (1985), *Wallace v. Jaffree*, 472 U.S. 38 (1985), *H.L. v. Matheson*, 451 U.S. 398 (1981), *Ballew v. Georgia*, 435 U.S. 223 (1978), *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), *United States v. Nixon*, 418 U.S. 683 (1974), *Roe v. Wade*, 410 U.S. 113 (1973), *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)).

beled opinion ultimately influenced the majority opinion in over 25% of the landmark cases and over 10% of the 1983 Term cases.[59]

Some strategies depend upon getting Justices to switch their votes, so that a dissent may become a majority opinion or a majority opinion may command more support. While Epstein and Knight believe that Justices are always exercising their exogenous ideological preferences, they claim that the Justices' votes are at least somewhat protean. Vote switching does not occur randomly, however. The smaller the coalition at conference, the more likely the Justice is to switch. A lone dissenter is most likely to switch, making the decision unanimous.[60] The probability of switching steadily declines as the size of the coalition grows.[61] One study of the Vinson Court found that Justices switched their vote between conference and the final opinion 9.7% of the time; there was a switch of at least one vote in 44% of the cases.[62] This frequency leaves a respectable amount of room for post-conference persuasion and strategy.[63]

It must be pointed out, however, that of all vote switches, fewer than 6% occur in a five-person majority coalition.[64] This suggests that post-conference strategy plays a limited role in explaining the ultimate decision reached by the Court. Of course, changing 6% of Supreme Court decisions may be quite significant in an absolute sense. Bernard Schwartz has catalogued a number of very important decisions resulting from a vote switch after conference.[65]

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59. *See id.* at 78.

60. Lone dissenters at conference switched to the majority nearly 37% of the time. *See* Brenner et al., *supra* note 48, at 250.

61. For the Vinson Court, coalitions of two saw switches more than 24% of the time; of three, 25% of the time; of four, 17% of the time; and so on to an initial unanimous vote, in which the probability of switching was less than 1%. *See id.* at 249. A study on a more recent Court generally confirms these patterns. *See* Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 587-89 (1996).

62. *See* Brenner et al., *supra* note 48, at 248.

63. One cannot necessarily ascribe *all* of these switches to judicial strategizing as they may have been sincere responses to legal persuasion. But strategizing may also occur before the conference vote, so evidence of strategy is not limited to instances of switching. Moreover, evidence indicates that many switches are prompted by strategy. *See* BAUM, PUZZLE, *supra* note 30, at 106-07 (reporting evidence of bargaining over opinion language).

64. *See* Brenner et al., *supra* note 48, at 248.

65. *See* SCHWARTZ, *supra* note 15, at 178-255 (listing, for example, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (5-4 decision), *Bowers v. Hardwick*, 478 U.S. 186 (1986) (5-4 decision), and *Lochner v. New York*, 198 U.S. 45 (1905) (5-4 decision)).

A Supreme Court case passes through a series of strategic nodes on its way to a decision. Choices made at each node may determine the decision and almost certainly will influence the opinion. The strategic deftness (or ineptness) of a specific Justice may substantially affect this nation's legal doctrine. This should not be surprising. Anecdotal tales of the Court have revealed the important role of strategy,[66] and such strategy is probably an unavoidable aspect of group decisionmaking. However, the practice does raise normative questions about the proper role of the Court in our democracy.[67]

II. STRATEGY BEYOND THE COURT

The Court is but one of several interacting political institutions in this country. Decisions do not automatically actualize the Court's policies. The impact of Court opinions may depend upon the compliance of Congress or other external actors; cooperation with a Court holding cannot be automatically presumed.[68] In some cases the other institutions of government may override the Court's decisions. For example, if the Court interprets a federal statute in a particular manner, Congress may rewrite the statute to contravene the Court's policy.[69] Congress has a variety of other powers over the Court, including authority over jurisdiction and budget.[70] PPT research has focused its

66. *See generally* LAZARUS, *supra* note 6; WOODWARD & ARMSTRONG, *supra* note 15.

67. *See* Book Note, *Democracy and Dishonesty*, 106 HARV. L. REV. 792, 793 (1993) (discussing the belief that "cynical strategizing by the Court seems the very essence of democratic betrayal").

68. *See* ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955), *reprinted in* JUDGES ON JUDGING, 20, 20-22 (David M. O'Brien ed., 1997) (observing that the Court is dependent on other branches of government to implement its decisions and may have its jurisdiction limited by Congress); Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993), *reprinted in* JUDGES ON JUDGING, *supra*, at 73 (reporting that constraints imposed by political system are "often overlooked but awesome nonetheless").

69. *See, e.g.*, 18 U.S.C. § 1346 (1994) (redefining "fraud" in the mail fraud statute to contravene the Supreme Court's interpretation of that term in *McNally v. United States*, 483 U.S. 350, 358-360 (1987)); United States v. Stewart, 872 F.2d 957, 960 (1989) (recognizing Congress's rejection of the Court's interpretation of fraud in *McNally* and stating that *McNally* had been superseded by statute).

70. *See* LAWRENCE BAUM, THE SUPREME COURT 252-53 (6th ed. 1998) [hereinafter BAUM, SUPREME COURT] (discussing Congress's "enormous powers over the Court").

attention on these issues, especially the interplay of Congress and the Court.[71] *Choices* acknowledges and builds upon much of this research.

Strategy within the Court is generally conducted with an eye to external constituencies. The decision to accept a case may be influenced by the potential public and governmental reaction to the Court's involvement. The authors' small study on cases involving civil rights in employment shows that a conservative Court was more willing to grant certiorari to such cases when there was a Republican President to help prevent the reversal of its rulings.[72] The opinion assignment may also be influenced by external factors—an opinion by the Chief Justice may carry greater weight or a certain Justice may possess particularly respected expertise in a given area.[73] Finally, voting on the merits can be influenced by anticipated external reactions. The "more authoritative a holding . . . the less likely that Congress will attempt to overturn it."[74] Unanimity is one important way to make a decision authoritative.[75]

Like most PPT analysts, Epstein and Knight focus on the prospect of congressional reversal. The Justices sometimes appear to attend to the risk of such a reversal. This issue is generally associated with William Eskridge, who examined congressional reversals of the Court and demonstrated the salience of the risk.[76] Justices therefore must exercise a measure of self-restraint in advancing their own policy preferences, given the presence of outside institutions with the power to undermine the effects of the Court's opinion. Congress also may attempt to control the Court's decisions through other devices, such as budgetary or jurisdictional restrictions.[77] The Court's deci-

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71. *See* sources cited *supra* notes 8-10. Tiller has also studied the relationships among different levels of courts and between the courts and the bureaucracy. *See* sources cited *supra* note 10.

72. *See* EPSTEIN & KNIGHT, *supra* note 5, at 83-84.

73. *See id.* at 127; Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 427 (1996).

74. EPSTEIN & KNIGHT, *supra* note 5, at 85.

75. *See id.* at 106 (noting that a "unanimous opinion in . . . a major case would have a greater chance of remaining undisturbed by external political actors than a divided opinion").

76. *See generally* Eskridge, *Overriding Supreme Court*, *supra* note 8; Eskridge, *Reneging on History?*, *supra* note 8.

77. *See generally* Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT'L REV. LAW & ECON. 433 (1996) (arguing that Congress's budgetary allocations to the Supreme Court help explain the Court's voting behavior in certain instances).

sions, then, may often reflect congressional preferences rather than the Justices' own.

Epstein and Knight add internal evidence to the existing research on the Justices' concern with legislative reversal. After reviewing the reports of conference discussions, they find that in nearly 60% of the cases examined there is some comment about the preferences and likely actions of other government actors.[78] Moreover, these comments are more frequent in nonconstitutional cases, when the risk of reversal is far greater than in constitutional ones (although the authors believe that the concern is also present in a significant number of constitutional cases).[79] This is certainly evidence of the Justices' concern for the actions of institutions beyond the Court.

However, Epstein and Knight's discussion of strategy beyond the Court is somewhat less persuasive than their review of strategy within the Court. The authors' coding of references to other institutions seems quite broad. Consider one of the authors' examples, in which Justice Blackmun expresses disagreement with a Court precedent on the Civil Rights Act but declines to propose a reversal because "Congress has accepted" the precedent.[80] To Epstein and Knight, this evidence of concern for congressional preferences is strategic. To me, it sounds like a Justice adhering to legal principle, even at the expense of his policy preferences.[81] In a statutory interpretation action, the law dictates that the Court enforce the intent of the *enacting* Congress, which obviously requires consideration of legislative preference but has little to do with the risk of reversal, which involves preferences of the *contemporaneous* Congress. The authors' position would be more persuasive if they limited themselves to the Justices' discussion of the preferences of the contemporaneous Congress, but they do not do so.[82]

Empirical evidence does not particularly support the authors' contention that the Court, concerned about having their decisions re-

78. *See* EPSTEIN & KNIGHT, *supra* note 5, at 149.

79. *See id.* at 149-50.

80. *Id.* at 139 (quoting Justice Powell's transcript of the conference discussion).

81. A general principle of statutory interpretation suggests that when Congress accepts and does not attempt to reverse a statutory opinion, that fact is evidence that the Court correctly assessed legislative intent. For a discussion of the principle, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 242-43 (1994).

82. *See* EPSTEIN & KNIGHT, *supra* note 5, at 150 (reporting that Justice Brennan took into consideration the *enacting* legislature's intent in his attempts to formulate beliefs about congressional preferences and likely actions).

versed, attends closely to the preferences of the other branches.[83] The "determinants of congressional action on an issue are highly complex, and this complexity leads to the notorious difficulty of predicting that action."[84] When decisions produce a mixed public response, the risk of override is very low.[85] Why, then, should a Justice compromise his or her policy preferences in deference to Congress, when the prospects of congressional reversal are uncertain at best?[86] Given general public respect for the Court, its opinion may itself change congressional and public preferences, further minimizing the risk of an override.[87] Moreover, even when reversal does occur, the new statutory policy may be no worse than that adopted by a conciliatory Court. As

83. While empirical research has demonstrated that congressional overrides occur, this is evidence that the Court may not closely attend to congressional preferences. If the Court were modifying decisions to comport with the preferences of the current Congress, one might expect most reversals to occur after time and congressional composition has changed. Yet nearly half of the reversals actually occur within two years of the Court's decision. *See* Eskridge, *Overriding Supreme Court*, *supra* note 8, at 345. One interesting study of search and seizure cases found Congress had no effect on the Court's decisions but found that the President did. *See* Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. POL. 778, 792-95 (1997).

If the Justices feared congressional override, they might be expected to take more constitutional cases during times when Congress might be expected to override statutory interpretation decisions. This hypothesis has been tested. *See* LEE EPSTEIN & JEFFREY A. SEGAL, ASSESSING CROSS-INSTITUTIONAL CONSTRAINTS ON SUPREME COURT AGENDA SETTING (Washington University Political Science Working Paper No. 343, 1997). The authors found only a slight effect, largely because the congressional preferences seldom imposed a material constraint on the Court's preferences and because ideologically homogenous Courts did not respond even when a constraint existed. *See id.* at 19-21.

84. BAUM, PUZZLE, *supra* note 30, at 97 (footnote omitted); *see also* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 437 (1992) (concluding that the reversals may be "simply the product of the confluence of randomly occurring factors, each with variable probabilities at different points in time").

85. *See* Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 391-92 (1965).

86. *See* BAUM, PUZZLE, *supra* note 30:

> [E]ven strategy-minded justices might give little attention to the possibility of overrides in most cases, for any of several reasons: they view overrides as too uncommon to worry about, they find it difficult to predict the prospects of an override, or they can continue to shape the affected policy in future cases even if an override occurs.

Id. at 120 (footnotes omitted).

87. *See* Mark C. Miller, *Courts, Agencies, and Congressional Committees: A Neo-Institutional Perspective*, 55 REV. POL. 471, 478-79 (1993) (describing how three congressional committees held the federal courts in high regard).

a general rule, the best strategy would seem to be for Justices to vote as they wish, even if they suffer the occasional legislative reversal.[88]

There is strong attitudinal model evidence which shows that Justices consistently vote their policy preferences.[89] This evidence suggests that the Court is not significantly constrained by Congress or other institutions. A recent study by Jeffrey Segal carefully examined Supreme Court statutory decisions in civil liberties cases heard in the last fifty years.[90] Segal explained theoretically why Justices seldom need fear congressional reversal, noting the high costs of such action, the multiple vetoes precluding such action (committee chairperson, median congressperson, President, and others), and the ability of the Court to manipulate issues strategically.[91] He hypothesized that if the Justices did fear reversal, they would change their votes as the composition of Congress changed. This did not occur—Segal found that the Justices' votes could be predicted by their own ideological preferences and were unaffected by the preferences of Congress.[92] While Segal's study does not demonstrate that the Court *never* considers possible legislative override, it is persuasive evidence that such a concern is not common.[93]

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88. Walter Murphy recognized that the Justices might have to defer to Congress but argued that the Court should not generally do so, because passing overriding legislation is quite difficult, because the Court's own prestige would reduce the risk of such an override, and because a practice of timidity would diminish the Court's prestige and thereby weaken the Court politically. *See* MURPHY, *supra* note 4, at 175.

89. *See, e.g.*, Boucher & Segal, *supra* note 18, at 824 (observing that "attitudinalists argue that the institutional structures insulating the Court from its political environment and the presumed finality of judicial decisions allow the Court to ignore the preferences of Congress, the president, the mass public, and other interested parties").

90. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

91. *See id.* at 31-32.

92. *See id.* at 39-42. Another recent study found that the likelihood of the Court overturning a precedent is strongly affected by ideological change on the Court but unaffected by the ideological composition of Congress. *See* James F. Spriggs, II & Thomas G. Hansford, Explaining the Overturning of U.S. Supreme Court Precedent (unpublished manuscript, on file with author).

93. Epstein and Knight acknowledge Segal's research but cite to a number of other articles to characterize it as contrary to the "preponderance of research." EPSTEIN & KNIGHT, *supra* note 5, at 155-56 n.g (citing, for example, C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961), WALTER F. MURPHY, CONGRESS AND THE SUPREME COURT (1962), and Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65-110 (Spring 1994)). This seems a bit disingenuous. Segal's study is clearly the best study of the issue, and truth is not found by counting articles, especially when nonempirical ones are included.

The threat of congressional reversal may exist when the Court is ideologically out of step with Congress and the President and when the issue is one of high political salience. But even in these circumstances, Justices are not likely to choose to compromise their decisions. Why would the Court grant certiorari in a case and then defer to Congress and issue an opinion that the Justices find undesirable? More strategic, surely, would be a decision to deny certiorari in such a case.[94] Even if the lower court's decision was undesirable, why reinforce it with a Supreme Court affirmance compelled by fear of reversal? Perhaps this is why Segal found no evidence of congressional influence on the votes of Justices in the cases accepted for review. However, the strategy of certiorari may include considerations of congressional reversal.

More persuasive is Epstein and Knight's discussion of the Justices' amorphous concern for the Court's reputation and legitimacy among the general public and the other branches. Given the authors' belief that the Court is concerned only with public policy, one might question why the Justices do not issue advisory opinions or other dictates regarding such policy. Epstein and Knight's answer is that doing so would destroy respect for the Court and undermine its influence.[95] Walter Murphy similarly suggested that people "are more ready to accept unpleasant decisions which appear to be the ineluctable result of rigorously logical deductions."[96] Justices therefore must be able to maintain an illusion of adherence to legal principle. This in turn surely requires that they in fact adhere to that principle with some frequency.

The Justices' concerns about public perception seem to affect other strategic decisions by the Court, including some decisions that may formally violate the law. For example, at the end of the tenure of

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94. This rationale would not apply to one scenario. Suppose that four Justices are in tune with Congress and five are out of step, even beyond the position of all the multiple veto points. In this scenario, the four would vote for certiorari, and the other five would be compelled to go along in the decision, or risk congressional reversal. However, there is no evidence that this scenario has ever arisen.

95. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 5, at 159-63 (discussing how Justices seldom raise issues *sua sponte* and reasoning that this is necessary to protect the Court's legitimacy).

96. MURPHY, *supra* note 4, at 17; *see also id.* at 31 (observing that "the Court's prestige—and therefore a large measure of its power—is based on its status as a court of law in the common law tradition"); Book Note, *supra* note 67, at 794 ("Further, if, in the interest of candor, the Court concedes the consideration of politics in its decisionmaking, then it will lose the legitimacy required to demand adherence to its most controversial decisions." (footnote omitted)).

Justice Douglas, the Court held over cases in which Douglas was in a 5-4 majority, due to the fear that a conservative replacement for the Justice might result in "half a dozen major decisions being reversed in a year's time."[97] The Court has entirely avoided some highly political controversies, such as the legality of the Vietnam conflict.[98] Moreover, in their dealings with the press, the Justices have assiduously portrayed themselves as being above mere politics.[99] Both the critics and defenders of *Roe v. Wade*[100] believed that the Justices considered public reaction in making their decision.[101] Finally, concern for public acceptance may have enormous practical importance, as suggested by the Warren Court's decision to uphold the death penalty; some have suggested that this decision was motivated by a fear that the Court had already "spread its political capital too thin."[102] If the Court is indeed influenced by its public standing, it may follow that public pressure has a measurable influence on Supreme Court strategy.

III. STRATEGY TO WHAT END?

Strategy is a means, not an end in itself. Contemporary political science is enamored of rational choice theory, which typically identifies a central objective of each political actor and then theorizes about how the actor could best achieve this objective, given external constraints.[103] Epstein and Knight apply this paradigm to judicial decisionmaking. There must be a central objective toward which Jus-

97. WOODWARD & ARMSTRONG, *supra* note 15, at 435. Such a series of reversal would make the Court appear to be a "political institution," a perception feared by the Justices. *See id.*

98. *See id.* at 144-47 (detailing Justice Douglas's failed efforts to bring the constitutionality of the Vietnam conflict before the Court and reporting that the Court showed "little stomach for the issue").

99. *See generally* RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS (1994).

100. 410 U.S. 113 (1973).

101. When the Court took a case to reconsider *Roe*, the Justices were swamped with letters and public protests. *See* LAZARUS, *supra* note 6, at 373-74. These efforts were "mainly political lobbying—an attempt to make the Justices think in terms of constituencies and then bring constituent pressure to bear." *Id.* at 374. The crucial plurality in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), may have responded by "creating a position politically tenable outside the Court and strategically tenable within." LAZARUS, *supra* note 6, at 485.

102. LAZARUS, *supra* note 6, at 88.

103. *See generally* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY (1994) (describing and criticizing the importance of rational choice theory in political science research).

tices strategize, and the authors identify this as the Justices' public policy preferences.[104] Liberal Justices seek to advance their ideological agenda, while conservative Justices pursue their contrary ends.[105] The authors' position is consistent with that commonly taken by PPT, but it is not necessary to a theory of strategy.[106]

By "public policy" the authors do not mean legal policy, such as the proper state of standing doctrine, but something more closely akin to ideological policy, such as the proper state of environmental regulation. Epstein and Knight implicitly contend that the Justices do not care about legal policy at all. Of course, distinguishing between public policy and legal policy can be difficult. For example, a judicial action protecting freedom of speech may be either a public policy preference or evidence of legal dedication to the First Amendment.[107]

Many political scientists have conducted empirical studies to demonstrate that the votes of most Justices are the product of public policy preferences. The classic attitudinal or behavioral model contends that Justices simply vote their policy preferences, and supports this thesis with empirical studies showing that policy preferences effectively predict votes.[108] The alternative model claims that the Justices are "political" in a different sense, and frequently follow the public will and the will of other branches of government.[109] Epstein

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104. This view of Justices as concerned primarily with policy ends is consistent with the bulk of political science research. *See* Cross, *supra* note 3, at 265-79 (describing this "attitudinal model" of judicial decisionmaking). Among political scientists this view is clearly the "conventional wisdom." *See* BAUM, PUZZLE, *supra* note 30, at 70.

105. The ideological characterization of judicial outcomes is common in political science research. For an example of ideological categorization, *see* George, *supra* note 3, at 1673-74.

106. *See, e.g.*, Ferejohn & Weingast, *Positive Theory*, *supra* note 9, at 265 (noting that many models assume that courts act "on the basis of their preferences (or ideologies) rather than out of principles" but that "PPT is not committed to any such *Realpolitik* vision of the judiciary").

107. On the difficulty of distinguishing between principled legal decisionmaking and ideological political decisionmaking, see Cross, *supra* note 3, at 290-94.

108. There is a wealth of empirical scholarship contending that judicial decisions are driven by the judges' political attitudes. *See, e.g.*, SEGAL & SPAETH, *supra* note 29; Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 1 (1992); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

109. *See, e.g.*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW 279, 293-94 (1957); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). Judges may act politically only when they are confident that their aggressive position is fundamentally supported by the public. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 219 (1998) (finding that judges abandon texts only when their beliefs are "strongly felt and widely held,

and Knight blend these two approaches, suggesting that Justices try to effect their personal policy preferences but must bend to the will of the other branches on occasion. The latter acquiescence springs not from any respect for democratic principle, however, but is merely a strategic means of optimizing personal policy preferences. The authors don't admit an independent role for the law *qua* law.

A common criticism of the political scientists' analyses is that they give insufficient attention to the internal workings of the Court.[110] Epstein and Knight certainly cannot be criticized on this score. They rely extensively on truly internal information, such as the case files of Justices Brennan and Marshall and a variety of records from Justice Powell, among other sources.[111] These records enable the authors to visualize the internal workings of the Court, especially the discussions at conference. Their review is far more "internal" than is conventional political science research. These internal discussions presumably reflect much greater candor than do the written opinions of the Court.

Epstein and Knight's review of the internal workings of the Court appears to show that policy plays a considerable role. They drew a random sample of cases orally argued during the 1983 Term and categorized the remarks of each Justice. They coded the remarks as relating to precedent, to policy concerns and to threshold procedural issues. The authors found that nearly half of "the justices' conference comments involved policy concerns."[112] The authors then reviewed the bargaining memoranda circulated in the same case sample. They found that 65% of the suggestions in such memoranda were requests for policy-oriented changes.[113]

The evidence presented by the authors clearly demonstrates that public policy is a significant factor motivating the Justices. Epstein and Knight, though, are not satisfied with demonstrating the significance of policy concerns in the decisions of the Court. They are determined to claim that the Justices have an "exclusive focus" on pol-

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that is that these beliefs are truly elements of social morality"). Feeley and Rubin suggest that "the judiciary proved to be quite sensitive to changes in public opinion" over time. *Id.* at 332. *But see* BAUM, SUPREME COURT, *supra* note 70, at 217-18 (arguing that the "Court's two distinctive policy positions in the twentieth century"—resistance to the New Deal and expansion of civil liberties in the Warren Court—"had only minority support" from the populace).

110. *See* Cross, *supra* note 3, at 280-82 (discussing this criticism of political science research).

111. *See* EPSTEIN & KNIGHT, *supra* note 5, at xv.

112. *Id.* at 29.

113. *See id.* at 32.

icy goals.[114] However, they must confront the fact that their data indicate that 25.5% of the conference statements refer to precedent and another 13.8% refer to threshold issues such as jurisdiction.[115] The authors observe that some of these comments regard altering or overruling precedents. Making an illogical leap, they then claim that the results do not provide support for the view that Justices are motivated to reach decisions in line with precedent.[116] The authors provide no evidence that nearly all mentions of precedent call for overruling or ignoring them; their argument is supported by a mere handful of examples. The remainder of Part III outlines limitations to the argument that Justices are pure policy-seekers and contends that judicial behavior is more complex than is assumed by *Choices*.

A. Limits of the Evidence on Judicial Policy

In several respects, the evidence in *Choices* does not support the authors' extravagant conclusion about the Justices and policy. As noted above, a substantial minority of the Justices' comments at conference refer to precedent, and Epstein and Knight have failed to explain away all these references. Additionally, the authors' argument suffers from three broad flaws.

First, Epstein and Knight downplay evidence from their own research that shows that Justices do have some concern for the law, independent of any ideological policy. In the certiorari process, for example, they acknowledge that a legally principled decision might be to take a case to resolve a conflict among the circuit courts. Supreme Court Rule 10 states that the presence of such a conflict is a factor in the granting of certiorari.[117] Epstein and Knight themselves illustrate the relevance of this principle. Their discussion of *Bowers v. Hardwick*[118] explains how certiorari was granted in part due to the persua-

114. *Id.* at 36. Former clerk Edward Lazarus apparently feels the same way, writing that "[n]either [liberals nor conservatives] respected precedent, except when convenient; both sides tried to twist the Court's internal rules to attain narrow advantage." LAZARUS, *supra* note 6, at 8.

115. *See* EPSTEIN & KNIGHT, *supra* note 5, at 30.

116. *See id.* at 30-31. In an earlier article, the authors appear to concede that these conference discussions do indicate some sincere concern for precedent. *See* Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 AM. J. POL. SCI. 1018, 1024-28 (1996).

117. "The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ." SUP. CT. R. 10.

118. 478 U.S. 186 (1986).

sive effect of Justice White's dissent from the denial. The substance of that dissent involved the need to resolve a conflict among the circuits.[119] The existence of this enormously important decision is thus at least partially attributable to Court concerns about conflicts and legal policy.

Epstein and Knight do not want to accept that Justices might be so principled, however, claiming that "equally impressive"[120] evidence refutes the legal perspective. They note that between 1953 and 1995, the Court specifically mentioned conflict as a reason for granting certiorari in only 24% of cases.[121] This statistic is potentially misleading, as there may have been other cases in which the Court took conflict into account but was not explicit in doing so. Epstein and Knight may have understated the number of cases granted certiorari due to circuit court conflicts. They counted only those grants in which the Supreme Court expressly cited such a conflict as its reason for certiorari. Arthur Hellman adds to this figure cases in which the Court's opinion pointed clearly to the existence of a conflict and cases in which the conflict was explicitly acknowledged by a circuit court.[122] He found that a conflict existed in slightly over 50% of the statutory cases taken by the Court from the courts of appeals between 1983 and 1985 and in about 85% of the cases taken between 1993 and 1995.[123] These statistics indicate that the Court is concerned with resolving intercircuit conflicts. Finally, Hellman also found that ideological preferences did not appear to have a significant effect on certiorari decisions.[124] However, even if one accepts the authors' 24% figure, that number represents a substantial minority of certiorari grants, the significance of which cannot be easily dismissed.

Epstein and Knight also argue that in 1989 the Justices declined to review more than 200 intercircuit conflict cases that fell within Rule 10 in some respect.[125] This is not compelling evidence—no one

119. *See* EPSTEIN & KNIGHT, *supra* note 5, at 61 (focusing on Justice White's threat to publish his dissent).

120. *Id.* at 40.

121. *See id.*

122. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 415.

123. *See id.* at 416 tbl.3.

124. *See id.* at 428 (noting that in the 1990s, for "every category of federal-court litigation, 'liberal' and 'conservative' grants appear in numbers that are virtually equal").

125. *See* EPSTEIN & KNIGHT, *supra* note 5, at 40 (citing BAUM, SUPREME COURT, *supra* note 70, at 114). The authors do not specify how many of these cases involved a conflict among the circuits.

suggests that the Court is obliged to take all alleged intercircuit conflicts. Hellman has carefully examined the intercircuit conflicts presented to the Court for which certiorari was denied.[126] As he noted, the Court might sensibly deny review of a conflict in many circumstances, as when "the conflict is not yet ripe for definitive resolution; the case is not an appropriate vehicle for deciding the question; or the issue is not one of continuing importance."[127] Hellman found that most conflicts were eventually resolved by subsequent Court decisions or litigation or failed to generate continuing litigation and do not persist.[128] Given these limitations on the true extent of the intercircuit conflict problem, it may very well be the case that the Court is granting certiorari in all or most of the salient, persistent conflicts among the circuits.

Other evidence suggests that legal concerns are important in the Court's certiorari process. H.W. Perry closely examined the certiorari process, conducting numerous interviews with the Justices. He found some evidence of concern for policy objectives and strategic behavior but concluded that "the Court acts much less strategically than we political scientists might expect."[129] An earlier review by Doris Provine likewise found that the Justices did not "appear routinely to calculate probable outcomes on the merits in deciding whether or not to vote for review."[130] The evidence that the Justices are concerned with nothing but policy objectives is simply not as strong as Epstein and Knight imply.[131] Research also shows that the Supreme Court sincerely considers the correction of legal errors made by lower courts in deciding whether to grant certiorari.[132]

The second broad problem with the authors' argument is that the authors' data conflate different types of policy arguments, thereby

126. *See* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995). Hellman analyzed 210 cases of circuit conflicts that the Supreme Court did not review during the 1988, 1989, and 1990 Terms. *See id.*

127. *Id.* at 732-33.

128. *See id.* at 792.

129. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 144 (1991).

130. DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 130 (1980).

131. A recent review of the research characterized the evidence on outcome prediction of strategic certiorari voting as "mixed." *See* BAUM, PUZZLE, *supra* note 30, at 112.

132. *See id.* at 79 (summarizing this research and citing, among others, PROVINE, *supra* note 130, and Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1185-94 (1979)).

obscuring the decisionmaking process. They note the frequency of policy arguments at the Court and assume that every policy argument is an expression of the Justices' personal policy preferences. But a policy argument may instead be an expression of congressional policy that the judges are sworn to uphold.[133] Supreme Court opinions are replete with references to policy, but they nearly always reflect respect for a congressional policy.[134] When the authors coded a comment as a "policy argument," they apparently did not distinguish between a Justice expressing his or her own preferred policy and a Justice discussing the congressionally preferred policy. Epstein and Knight's example of a policy argument comes from notes taken by Justice Brennan at a conference discussion, in which Justice Stevens is noted as addressing a Title VII action and stating that the "clearly prohibited is policy not to hire blacks or women."[135] To Epstein and Knight, Justice Stevens is expressing personal public policy preference in his conference notes. To me, the comment noted by Brennan sounds much more like a discussion of the congressional policy behind the statute rather than Stevens's personal preference (though it presumably reflects both). Perhaps the references to congressional policy are insincere projections of personal policy, but the authors' evidence doesn't prove this.

A third problem with Epstein and Knight's claims is that their analysis of the Justices' comments focuses on the margin and ignores matters of consensus. Imagine a case in which all nine Justices agree upon 90% of the opinion, including perhaps the application of precedent. The resulting debate between the Justices would focus entirely upon the 10% in dispute. A study of the content of the debate could misleadingly ignore the 90% agreed upon and overemphasize the unsettled 10%. Justice Stevens concedes that the Court may ignore or disrespect precedent on occasion but emphasizes that the

133. *See, e.g.*, FEELEY & RUBIN, *supra* note 109, at 8 (noting the tendency to conflate policymaking and interpretation when the two are conceptually different).

134. *See, e.g.*, Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 839 (1998) (deferring to a congressional policy decision limiting waivers of age discrimination act claims); Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2133 (1997) (respecting the policy judgment of Congress in favor of imposing assessments to pay for collaborative agricultural advertising); Abrams v. Johnson, 117 S. Ct. 1925, 1927 (1997) (deferring to the legislative policy underlying a redistricting plan).

135. EPSTEIN & KNIGHT, *supra* note 5, at 28.

"framework for most Court opinions is created by previously decided cases."[136]

In fairness to the authors, I must concede that they present substantial evidence that the Justices are motivated by ideological policy goals. Other internal reports on the Court support this view,[137] as do occasional concessions by the Justices themselves.[138] There is also considerable empirical evidence supporting the attitudinal model.[139] There is an important difference, though, between caring about policy ends and caring *only* about policy ends. Epstein and Knight have not demonstrated that the latter is the case.

B. Oversimplification of Judicial Behavior

Epstein and Knight's one-dimensional vision of judicial objectives is consistent with that of many political scientists. The limited view of judicial behavior may simply be characteristic of particular disciplines. Just as the currency of economists is currency, the currencies of political scientists are political power and policy. Just as economists may try to monetize every value, political scientists may reduce every issue to politics and legal scholars may reduce every decision to the dictates of law. Perhaps not surprisingly, however, none of these rather narrow perspectives promises to capture much of the complex reality of judicial decisionmaking.

In defense of Epstein and Knight, they are presenting an initial model, which almost by definition means an incomplete simplifica-

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136. John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 4 (1983).

137. *See* sources cited *supra* note 15.

138. Chief Justice Earl Warren declared in his memoirs that neutral legal principles were merely a "fantasy." EARL WARREN, THE MEMOIRS OF EARL WARREN 333 (1977). Justice Harlan, described by Justice Brennan as the "only real judge" on the Court, WOODWARD & ARMSTRONG, *supra* note 15, at 263 (failing to identify the origin of Justice Brennan's statement), nevertheless once declared that "if we [Justices] don't like an act of Congress, we don't have much trouble to find grounds for declaring it unconstitutional." ALPHEUS T. MASO, THE SUPREME COURT FROM TAFT TO WARREN vii (1958) (quoting Harlan from a talk given to law students).

139. *See* EPSTEIN & KNIGHT, *supra* note 5, at xii n.b (citing Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); SEGAL & SPAETH, *supra* note 29); *id.* at 57 n.a (citing SEGAL & SPAETH, *supra* note 29). However, Epstein and Knight's strategic account cannot rely too heavily upon these results. If Justices do consistently vote their ideological preferences, that fact minimizes the impact of Court strategies. It suggests that Justices don't worry much about the preferences of other institutions, such as Congress.

tion.[140] The authors seek not to explain everything but to present a model that can be used to explain and predict central trends in decisions. Of course, the best models are those with the most explanatory power. While models are necessarily oversimplifications, the simplest model is not necessarily the best. The model presented in *Choices* requires some refinement and elaboration to account for the role of the law in judicial decisionmaking.

There is reason to believe that the law matters considerably. Some Justices may abide by the law simply because it is their duty.[141] Walter Murphy was no naive formalist, but he recognized the potential call of duty and referred to this prospect as "oughtness."[142] The elemental concept of doing what one ought to do can be elaborated through a theory of role orientation. The judicial role may drive Justices to respect the law itself.[143] If the concept of duty seems too pious for social science, consider the economic evidence that finds preferences to be affected by emotions, including guilt and shame.[144] Even the archetypal, hypothetical maximizing *homo economicus* acts "according to certain moral values (e.g., rule-abiding attitudes, *esprit de corps*, class solidarity, pride in workmanship, generalized altruism)."[145]

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140. *See, e.g.*, Lee Epstein, *Studying Law and Courts, in* CONTEMPLATING COURTS 1, 7-8 (Lee Epstein ed., 1995) (noting that models "are not meant to constitute reality" but "are purposefully designed to ignore certain aspects of the real world and focus instead on a crucial set of explanatory factors").

141. *See* FEELEY & RUBIN, *supra* note 109, at 10 ("If judges think policy making is wrong, they may actually desist from doing it."); *id.* at 209 ("Judges, after all, are conscious beings, and they must have had some means of justifying their decisions to themselves, some conceptual process that assimilated their decisions to their existing understanding of their role."); Kozinski, *supra* note 68, at 72 (referring to the legal realist position as "horse manure" and contending that judges are constrained by the law and their sense of self-respect); *id.* at 74 (suggesting that even a vague standard like unreasonability provides "a meaningful constraint for the large majority of cases").

142. MURPHY, *supra* note 4, at 39.

143. *See* Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2026 (1996) ("[J]udges are likely to take the rule of law quite seriously. It is part of their set of role expectations–their institutionally induced beliefs about the way they should carry out their official functions."); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 120 (1992) ("Most judges hold deeply internalized role constraints and believe that judgment is not politics."). When academics are appointed to the bench, their opinions have been less ideological than were their scholarly writings. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 89-90 (1991) (contrasting the opinions and writings of Antonin Scalia and Frank Easterbrook).

144. *See* Jon Elster, *Emotions and Economic Theory*, 36 J. ECON. LIT. 47 (1998).

145. Ha-Joon Chang, *The Economics and Politics of Regulation*, 21 CAMBRIDGE J. ECON. 703, 722 (1997).

It is also possible that judges care about and gain utility from legal policy, as well as public policy. Justices are trained in the law, at schools largely devoted to traditional legal analysis. Like many professors of law, judges may sincerely care about the politically neutral state of the law.[146] Perhaps it "pleases judges to carry out what they perceive as the judge's role."[147] Considerable empirical research supports the ideological, realist view of judging at the Court, but these studies typically have not even considered the possibility of an explanatory legal variable. Introducing such a variable can be difficult, but some political scientists have defined methodologies that include precedent and have found that precedent can indeed be a significant determinant of the Court's decisionmaking.[148] Even those legal researchers that admit to a substantial political influence on judicial decisionmaking also believe that "craft," or reasoning, or concern with reputation influences judges to decide cases according to legal factors.[149]

A somewhat less noble but potentially powerful reason for deferring to precedent is leisure-seeking. Judge Posner has observed that stare decisis is an efficient approach for reducing the time and effort necessary to decide cases.[150] Pursuit of leisure would explain the Justices' increasing delegation of responsibilities to clerks and other contemporary Court practices.[151] Justice Stevens himself has conceded that precedent provides "special benefits" to judges, such as

146. *See* Cross, *supra* note 3, at 299-300.

147. BAUM, PUZZLE, *supra* note 30, at 61.

148. *See, e.g.*, Herbert M. Kritzer et al., Bringing the Law Back In: Finding a Role of Law in Models of Supreme Court Decision-Making (April 1988) (unpublished manuscript, on file with author). Kritzer and his colleagues found that the Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that the government may not proscribe the advocacy of illegal action unless the advocacy is aimed at producing or inciting imminent lawless action, and is likely to succeed) had a significant effect on subsequent Court decisions. *See id.* at 21; *see also* Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992) (finding that legal doctrine constrained the attitudinal preferences of Justices in death penalty cases); Wahlbeck, *supra* note 83, at 794 (finding that the quantity of relevant existing precedent significantly reduced the prospect of attitudinally based change in precedent).

149. *See, e.g.*, Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469 (1998); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

150. *See* RICHARD A. POSNER, OVERCOMING LAW 141 (1995).

151. *See* BAUM, PUZZLE, *supra* note 30, at 44-47; SCHWARTZ, *supra* note 15, at 50.

making "their work easier."[152] Justices sometimes even join opinions with which they disagree, simply to avoid writing a dissent.[153] The pursuit of leisure surely strengthens judicial inclinations to recognize stare decisis.

Further evidence of the importance of precedent in legal decisionmaking comes from a variety of sources. In *The Brethren*, Bob Woodward and Scott Armstrong acknowledge a material role for precedent, reporting that Chief Justice Burger's efforts to undo certain Warren Court opinions ran afoul of the power of precedent. Woodward and Armstrong observed that "the Chief found that his conservative colleagues, with their concern with precedent, caused him as much difficulty as the liberals."[154] Another prominent political scientist, Lawrence Baum, believes that the judicial maxim consists of both policy preferences and "legal accuracy."[155] Even Epstein and Knight admit that Justices frequently discuss precedent at conferences.[156]

At a minimum, precedent creates some stickiness and temporal consistency in the law. Precedents are overruled occasionally but not often. Epstein and Knight themselves have previously observed that "[e]ven though the Court's propensity to alter precedents has increased over the past couple of decades, the percentages remain minute."[157] Presidents Reagan and Bush were dedicated to overturning major Warren Court doctrines, as well as liberal Burger Court decisions such as *Roe v. Wade*.[158] They sought to appoint Justices and Chief Justices similarly dedicated. Yet the politically objectionable precedents have largely survived.[159]

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152. Stevens, *supra* note 136, at 2.

153. *See* SCHWARTZ, *supra* note 15, at 56.

154. WOODWARD & ARMSTRONG, *supra* note 15, at 76. This is illustrated by *Coleman v. Alabama*, 399 U.S. 1 (1970) (holding that denying a person counsel during a preliminary hearing violated the Sixth Amendment Confrontation Clause), a case in which Justice Harlan's dedication to a liberal criminal rights precedent caused a reversal in the Court's opinion.

155. BAUM, PUZZLE, *supra* note 30, at 65 (arguing that the objective of accuracy constrains a bias for politically preferred outcomes "because decision makers want to reach results that they can accept as correct").

156. *See* EPSTEIN & KNIGHT, *supra* note 5, at 28-31.

157. Knight & Epstein, *supra* note 116, at 1031.

158. *See* SIMON, *supra* note 15, at 11 (suggesting that Reagan and Bush sought to "reverse the liberal legacy of the Warren Court and its successor, the Burger Court," and had the "numbers" to expect that they would be successful).

159. *See* SCHWARTZ, *supra* note 15, at 152 (observing that "no important Warren Court decision was overruled during the Burger tenure"). The more conservative Courts have surely trimmed controversial doctrines such as the exclusionary rule and abortion rights. But the fun-

Another problem with the authors' exclusive focus on policy concerns is the inability of their perspective to shed light on the large number of Court cases that do not have a clear ideological implications or that are politically insignificant. The Court regularly hears cases that lack ideological or political import.[160] *Choices* might cause one to think that the Justices would be at a complete loss to resolve such cases. In reality, of course, the Court concerns itself with other ends and resolves the nonpolitical cases accordingly.[161] If the Justices place some value on nonideological objectives in resolving these nonideological cases, it is none too difficult to believe that those objectives might likewise carry at least *some* value in resolving more political cases. The mere fact that the Court grants certiorari to review such nonideological cases demonstrates the power of legal concerns.

For an example of the limits of the ideological, strategic vision of the Court, consider the recent decision in *City of Boerne v. Flores*,[162] striking down the Religious Freedom Restoration Act of 1993 (RFRA).[163] The Act was passed to strengthen the right to the free exercise of religion, which the Court had recently limited in *Employment Division v. Smith*.[164] RFRA was popular among both conservatives and liberals in Congress.[165] Here was a law without a strong political component, about which Congress plainly cared a great deal. The strategic model suggests that the Court should have upheld the law. The Court should have found it ideologically acceptable, as the Justices' politics are presumed to track those of the other branches. In any event, the Court should have upheld the Act to avoid a fight with Congress over a nonideological matter. Yet the Court struck

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damental principles remain. This is precisely the result one would expect from Justices who are concerned about both ideology and precedent. Nor has the Rehnquist Court reversed most of the precedents that the conservatives found objectionable. *See* SIMON, *supra* note 15, at 11 (describing the Rehnquist era as a "conservative judicial revolution that failed").

160. *See infra* notes 261-62 and accompanying text.

161. For example, "Supreme Court justices undoubtedly have trouble superimposing an ideological framework on boundary disputes between states: the Island Exception to the Rule of the Thalweg, for example, is not easily classified as a liberal or a conservative doctrine (Louisiana v. Mississippi 1995)." BAUM, PUZZLE, *supra* note 30, at 66.

162. 117 S. Ct. 2157 (1997).

163. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

164. 494 U.S. 872 (1990).

165. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994) (describing enormous bipartisan support for the legislation).

down the law. The apparent reason was that the Court genuinely cared about the legal issues.

Two political scientists, C.K. Rowland and Robert Carp, have sought to integrate the legal and attitudinal models, using the federal district courts as a basis for their study.[166] They believe that judges are dedicated to sincere and formal legal decisionmaking but that their decisions may nonetheless be somewhat political due to the judges' subconscious heuristics. Judges use "cognitive shortcuts to process imperfect information," and these shortcuts are influenced by their political perspective.[167] A judge's ideology thus influences her "evaluation of information" more than her motives.[168] On this view, politics may still be functionally quite significant but not paramount; close investigation of cases may override a judge's ideological cues.

Two law professors, Malcolm Feeley and Edward Rubin, reject the argument about the effect of the judicial subconscious but emphasize the role of law in judicial behavior.[169] They contend that judges sometimes base decisions "on their own best efforts to understand an authoritative text" but also sometimes decide on the basis of "their sense of the best public policy."[170] While Feeley and Rubin do not try to provide a comprehensive explanation of when judges are policymakers, they emphasize that Congress sometimes requires such policymaking by leaving gaps in a statutory framework. Feeley and Rubin also observe that judges may become policymakers to address a practice that violates "a widely held principle of social morality"[171] but that has not been addressed by the accountable branches. Regardless, when judges become policymakers, Feeley and Rubin argue, they remain constrained by doctrine and other institutions.[172] They

166. *See* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996).

167. *Id.* at 171. These cognitive shortcuts may relate to the facts—a liberal Justice may view minorities arguing for affirmative action as historic victims of discrimination while a conservative Justice may view the same parties as special pleaders seeking legal favoritism. The shortcuts may also relate to the law. Justices presumably have their "favorite" precedents, with which they are most familiar.

168. *Id.* at 164.

169. *See* FEELEY & RUBIN, *supra* note 109, at 11.

170. *Id.*

171. *Id.* at 161.

172. *See id.* at 209 (noting that judges are constrained even when creating new doctrine). Feeley and Rubin emphasize that the ability of any individual judge or court to create new doctrine or policy is significantly constrained by the need to coordinate their decisionmaking with other courts. *See id.* at 226-33.

argue that a judge's "need to maintain contact with existing doctrine, to stretch it without snapping it, is one of several conditions for effective judicial policy making."[173]

A more complex vision, in which Justices care independently about the law, is actually more consistent with Epstein and Knight's focus on judicial strategies. If public policy was the sole objective of each Justice, there wouldn't be much room for strategizing—judicial policy positions would be determined, presumably known by the other Justices, and hard to move. Once legal policy enters the equation, strategizing becomes more complex and promising. A Justice may assess the relative significance of his or her own legal and public policy values and those of others. The Justice can then lobby other Justices on the set of values to which they are most susceptible and put together an opinion package that bows to the wishes of others. A Justice who cares particularly about a given legal policy may sacrifice some public policy value, and vice versa.

Epstein and Knight ultimately concede that law may sometimes restrain the results reached by the Court. The Justices may "strategically modify their position to take account of a normative constraint—such as *stare decisis*—to produce a decision as close as possible to their preferred outcome."[174] Even here, though, the authors refuse to concede that matters of principle or responsibility might motivate the Justices. Rather, they claim that respect for precedent is simply a tool for strategically effecting policy goals.[175] Precedent, Epstein and Knight argue, may become important as part of the "external strategic dimension" for the Court.[176] Society's willingness to accept the Court's authority may hinge on the perception that Justices are constrained by the law and precedent.[177] Justices therefore may adhere to the law in order to protect their institutional position. The authors suggest that the Justices will generally adhere to precedent for institutional reasons but depart from precedent occasionally in individual cases when they have a particularly strong policy preference.[178] The result is a norm of stare decisis that does not

173. *Id.* at 355.

174. EPSTEIN & KNIGHT, *supra* note 5, at 45.

175. *See id.*

176. *Id.* at 164.

177. *See, e.g.*, Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137, 137-38 (1994) (describing the pervasiveness of the belief that the Supreme Court's legitimacy derives from the view that its decisions are "dictated by law").

178. *See* EPSTEIN & KNIGHT, *supra* note 5, at 164-65.

universally control decisions and opinions but does influence them in many cases.[179]

Epstein and Knight's theory of the external strategic basis for precedent is supported by some other evidence of Court policy, such as Supreme Court Rule 58. This Rule dictates that the Court will grant rehearing of a decided case only if one of the Justices in the original majority moves for reconsideration.[180] This means that the Justices will not quickly reverse themselves based entirely on a change in the Court's ideological composition.[181] Rule 58 thus protects the Court from appearing too politically oriented. Some members of the Court went even further than this Rule in the wake of the dramatic and rapid ideological transition from the Warren Court to the Burger Court. Justice Stewart had an unwritten rule not to join Nixon-appointed Justices as the fifth vote in favor of overruling a Warren Court precedent, even if he had dissented in the earlier case.[182] This recognition of the importance of appearances is sometimes even explicitly conceded. Justice Stevens declared that adherence to stare decisis strengthens the perception that Judges are administering justice impartially, which "obviously enhances the institutional strength of the judiciary."[183] In discussing *Patterson v. McLean Credit Union*,[184] Justice Scalia reportedly said that "*Runyon* was wrong . . . but public reaction [to the threat of overruling it] is appropriate and I would not overrule."[185] Justices have even conceded in a written opinion that adherence to stare decisis is necessary so as

179. *See id.* at 177.

180. *See* SUP. CT. R. 58.

181. *See, e.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (stating that a "basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of Government" and that "[n]o misconception could do more lasting injury to this Court").

182. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 482.

183. Stevens, *supra* note 136, at 2. Justice Goldberg earlier made a similar point. *See* ARTHUR GOLDBERG, EQUAL JUSTICE 75 (1971) ("[S]tare decisis foster[s] public confidence in the judiciary and public acceptance of individual decisions by giving the appearance of impersonal, consistent, and reasoned opinions.").

184. 491 U.S. 164 (1989) (holding that the prohibition against racial discrimination in the making and enforcement of contracts, embodied in 42 U.S.C. § 1981 (1994), only applied to contract formation).

185. SIMON, *supra* note 15, at 47 (failing to identify the source of this statement). Of course, Scalia took this position only after it became clear that there was no majority to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 (1994) prohibits racial discrimination in the making and enforcement of private contracts).

not "to weaken the Court's capacity to exercise the judicial power" and maintain its "legitimacy."[186] External strategy does appear to explain some adherence to precedent.[187]

Although Epstein and Knight finally conclude that precedent does have some importance, they insist that its significance is entirely attributable to external strategy, not sincerity. This is essentially a preempirical matter; it would be extremely difficult to test whether adherence to precedent was sincere or strategic. The best guide is probably the internal, "behind-the-scenes" evidence. I think this evidence suggests that Justices sincerely care about both policy and precedent. But perhaps the motivation does not matter. Even if stare decisis is a product of nothing more than leisure-seeking and political strategy, the doctrine of adherence to precedent has substantial practical importance.

Nothing in the concept of judicial strategy requires the assumption that Justices are exclusive maximizers of their policy preferences, which Epstein and Knight have themselves recognized in the past.[188] Justices might be concerned with *both* legal principles (such as respect for precedent or text) and policy objectives. Epstein and Knight's fundamental strategic thesis is not contingent on the presumption that Justices are concerned only with policy. Rational choice analysis can apply where the actors pursue multiple goals; studies of Congress have been based on an assumption that the representatives pursue both ideological and electoral objectives.[189] The authors' presumption of a lexicographic preference system (where

186. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

187. There is a general belief that Justices must appear to follow the law in order to protect their legitimacy, yet this belief is largely undemonstrated. Actual research suggests that the institutional legitimacy of national high courts is related in part to the people's policy satisfaction with the court's decisions. *See* James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 354 (1998). Gibson and his colleagues also found, though, that courts benefit from their ability to cast unpopular decisions as compelled by the law, shifting responsibility to other entities such as the legislature. As a result, a court can gain credit for favored decisions and escape accountability for disfavored ones. *See id.* at 357.

188. *See* Lee Epstein & Jack Knight, Documenting Strategic Interaction on the U.S. Supreme Court, 11 n.16 (1995) (unpublished paper presented at the Annual Meeting of the American Political Science Association, on file with author) (noting that researchers typically assume that judges are "single minded seekers of policy" but conceding that this "need not be the case").

189. *See, e.g.*, David Austen-Smith, *Explaining the Vote: Constituency Constraints on Sophisticated Voting*, 36 AM. J. POL. SCI. 68, 70-71 (1992); Arthur Denzau et al., *Farquharson and Fenno: Sophisticated Voting and Home Style*, 79 AM. POL. SCI. REV. 1117, 1118 (1985).

one good is so preferred that it is consumed exclusively and tradeoffs are not made) simplifies modeling and the empirical testing of hypotheses. Such reductionism is unrealistic and unnecessarily undermines the credibility of the book. Far more plausible is the position that judges are concerned with a variety of ends, including ideological policy.[190] Presumably they exercise strategy in pursuit of those ends. Walter Murphy suggested that rulings are "a medley of legal principle, personal preferences, and educated guesses as to what is best for society."[191] The following Part presents some outstanding questions, answers to which may provide more sophisticated insights into the Justices' strategies.

IV. INTRIGUING QUESTIONS OUTSTANDING

While I have criticized some aspects of *The Choices Justices Make*, I wish to point out that Epstein and Knight have done a great amount of research and have advanced the ball considerably in the study of strategic Supreme Court decisionmaking. Notwithstanding the amount of research they present, however, many questions remain unanswered. The authors note that the rational choice approach "seeks to explain all the choices justices make—from the initial decision to grant review to the policy enunciated in the final opinion."[192] They do not personally claim to have completed this explanation. Future research, some of it undoubtedly to be done by Epstein and Knight themselves, promises greater understanding of judicial strategy. The participation of law professors would surely enhance this understanding.

190. *See* Edelman & Chen, *The Most Dangerous Justice*, *supra* note 24, at 97 ("The question of voting power at the margins of complex, multifaceted legal issues is independent of any particular Justice's ideology."). This contrary claim seems far too extreme—ideology obviously matters a lot. But it is not the only thing that matters. *See* FEELEY & RUBIN, *supra* note 109, at 213 (arguing that "both [legal and political] factors are at work and it would be more productive to explore their interaction than to choose between them"); Edelman & Chen, *"Duel" Diligence*, *supra* note 50, at 232 (arguing that ample scholarship demonstrates that Justices' preferences are not "single-peaked in a single dimension").

191. MURPHY, *supra* note 4, at 17.

192. EPSTEIN & KNIGHT, *supra* note 5, at xiv.

A. Why Do Justices Value Majority Opinions?

There is an old saying at the Supreme Court that "five votes can do anything around here."[193] Indeed, Epstein and Knight's analysis of strategy within the Court places central importance on obtaining a majority opinion. At first blush, the reason for this seems obvious—only a majority opinion carries the formal legal weight of the Court. A closer look, however, gives reason to question the authors' reasoning. The principle that a plurality opinion expresses no law rests only on a legal rule. Epstein and Knight, realists when it comes to explaining substantive judicial decisionmaking, become naive formalists in accepting this legal rule. A more realist perspective calls this acceptance into question.

When nine Justices are sitting, all decisions are majority decisions, as the Court is confronted with only binary options. It must affirm or reverse, deciding for either appellant or appellee. Even with nine separate opinions, there is only one result.

A majority *decision*, though, is not the same as a majority *opinion*. To obtain a majority opinion requires such compromise as is necessary to get five votes, giving the fifth or median Justice considerable control over the opinion's language. This practice could produce a considerable moderation of the opinion's language, something experienced by Justice Brennan and others in *Craig v. Boren*.[194] In the event that a group of Justices does not moderate its proposed opinion to get a fifth vote, presumably the median Justice would file a special concurring opinion expressing his or her more moderate views. In this scenario, while the more extreme plurality opinion would have only four supporting votes, it would still form the basis for a majority decision. Epstein and Knight suggest that this result yields no binding precedent, but this view is overly formalist.

Holmes famously declared that the law consisted not of opinions' *ratio decendi* but of "prophecies" of what the courts will do.[195] A majority opinion is not required for lower courts or others to make such predictions. A rational lower court, for example, will simply find the position of the fifth Justice and treat this as the law. Even the Su-

193. This statement is most closely associated with Justice Brennan. *See* SIMON, *supra* note 15, at 54; LAZARUS, *supra* note 6, at 369.

194. The decision in *Craig v. Boren*, 429 U.S. 190 (1976), is detailed *supra* in the text accompanying notes 36-40.

195. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

preme Court has suggested use of this practice,[196] which has in fact been followed by lower courts.[197] It should hardly matter whether the fifth Justice's opinion is found in the majority opinion or in a concurrence. The majority coalition of four has no reason to seek the fifth vote, unless the fifth Justice is willing to compromise his or her position. And a concurring fifth Justice has no reason to compromise his or her position, as his or her lone concurrence would serve to functionally define the law.[198]

Given the ability of the fifth Justice to define the law regardless of whether a majority opinion exists, why are majority opinions commonly produced? There are many possible reasons, most of which reflect the Court's external environment. First, there is clearly a norm in favor of reaching a majority opinion.[199] Majority opinions may be necessary to preserve societal respect for the Court.[200] Second,

196. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., plurality opinion))).

197. *See, e.g.*, LAZARUS, *supra* note 6, at 459 (describing how a Third Circuit decision assumed that the Supreme Court abortion policy corresponded to the position of the perceived fifth Justice); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 433-34 (1992) ("Lower courts have consistently treated Justice O'Connor's concurrence in [*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)] as the holding of the Court.").

198. There may be some vanity benefit to authoring a majority opinion of the Court, as such an opinion generally would get more attention from the press and from law reviews. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 63 (reporting that Chief Justice Burger believed that "concurrences detracted from the main opinion and were, in some cases, almost an insult to the author assigned for the majority"). But on Epstein and Knight's unidimensional scale of ideological preferences and rational choice decisionmaking, I can find no benefit to the fifth Justice joining a majority.

199. *See* Saul Brenner & Robert H. Dorff, *The Attitudinal Model and Fluidity Voting on the United States Supreme Court: A Theoretical Perspective*, 4 J. THEORETICAL POL. 195, 198-200 (1992) (reporting that Justices shift from the minority in order to create a greater Court consensus); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 52-53 (1993) (finding it the "norm for judges to sacrifice details of their convictions in the service of producing an outcome and opinion attributable to the court"). The most remarkable testimony to this effect can be found in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 674 (1994) (Stevens, J., concurring in part and concurring in the judgment) (declaring that he favored an affirmance but agreeing to a judgment vacating the FCC decision because otherwise "no disposition of this appeal would command the support of a majority of the Court").

200. *See* Douglas J. Whaley, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions* 46 TEX. L. REV. 370, 371 (1968) (contending that the presence of plurality decisions represents a "breakdown in the judicial system"); Note, *Plurality Decisions and Judicial Deci-*

there may be some value in being a member of a majority.[201] Justice O'Connor, for example, seems to place some value on Justices being accommodating in producing a majority opinion.[202] Third, the existence of plurality opinions may invite revisitation by the Court.[203] Finally, there seems to be some vanity value to authoring a majority opinion. The majority may be able to elicit compromise from the fifth Justice in exchange for permitting him or her to write the opinion.

However, the best strategic reason for producing a majority opinion may be the room that a plurality opinion leaves for interpretive incompetence or clever disobedience by the lower courts.[204] Lower courts may be unable to identify the position taken by the fifth Justice and therefore may interpret the rule incorrectly. Alternatively, a lower court may adopt the rule produced by the largest plurality (usually four Justices), even if this coalition clearly does not contain the fifth Justice.[205] These decisions may be erroneous, but they might also reflect shrewd strategy by lower courts that seek to pour their own preferences into the plurality opinion's vessel. Moreover, the first lower court to address the issue has an opportunity to define the Supreme Court's plurality opinion, a definition which may be followed by subsequent lower court decisions.[206] The Supreme Court's loss of control over the doctrinal application of plurality opinions may help to explain the true value of majority opinions.

Assuming that Justices do value majority opinions, a trickier question is why some cases fail to produce a majority opinion, leaving

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sionmaking, 94 HARV. L. REV. 1127, 1128 (describing such opinions as a "failure to fulfill the Court's obligations").

201. *See* Brenner & Dorff, *supra* note 199, at 198-200.

202. *See* Edelman & Chen, *The Most Dangerous Justice*, *supra* note 24, at 65; David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, § 6 (magazine) at 65, 69 (quoting a former Rehnquist clerk as saying that Justice O'Connor is "very willing to build consensus on opinions").

203. *See* Nichols v. United States, 511 U.S. 738, 746 (1994) (suggesting that when the Court is "splintered," that fact gives "a reason for reexamining that decision").

204. *See* John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 71 (arguing that plurality decisions create confusion in the lower courts). One such example is *King v. Palmer*, 950 F.2d 771, 781-83 (D.C. Cir. 1991) (en banc) (noting that the court of appeals was unable to ascertain "narrowest ground" among the Justices after the Court's plurality opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), because Justice O'Connor's concurrence seemed too inconsistent with the theory of the main plurality opinion).

205. *See* Thurmon, *supra* note 197, at 448 (reporting that, historically, lower courts took the largest plurality opinion as authoritative).

206. *See id.* at 419.

plurality opinions to define the law. Plurality opinions are not uncommon[207] and can be found in some of the Court's most important decisions.[208] If Justices decided all cases on a linear range of political preferences, as Epstein and Knight claim, a majority could always be achieved by shifting the opinion to the preferred political position of the fifth Justice. Why then do plurality opinions exist in important cases?

Once Epstein and Knight's unidimensional ideological scaling is abandoned, plurality opinions become more interesting and complicated. If Justices are assumed to care about the law, merely shifting the opinion to the policy preference of the fifth Justice would not necessarily produce a majority. The prospective majority would also have to conform to the legal preference of the fifth Justice without losing the votes of others in the coalition.[209] The fifth Justice on the policy dimension might be different from the fifth Justice on the legal dimension. Compromises necessary to creating a policy majority might incidentally destroy the legal majority. This is the more complicated strategic bargaining situation that commonly confronts the Court.

Craig v. Boren[210] is used by Epstein and Knight as an example of strategy within the Court.[211] The case implicates both policy issues (the type of review to be used in gender discrimination cases) and legal issues of standing.[212] *Craig* is a convincing illustration of how Jus-

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207. In the 1970s, the Court issued 88 plurality opinions. *See* Note, *supra* note 200, at 1127 n.1 (1981); *see also* Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1593 (1992) (reporting a "dramatic increase in the use of plurality decisions").

208. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (issuing a plurality opinion on a Fourteenth Amendment case); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (issuing a plurality opinion on a major civil rights case); Buckley v. Valeo, 424 U.S. 1 (1976) (issuing an opinion on a campaign finance matter with separate concurrences and dissents by six of the nine Justices); Gregg v. Georgia, 428 U.S. 153 (1976) (issuing nine separate opinions on a death penalty case); Furman v. Georgia, 408 U.S. 238 (1972) (same); New York Times v. United States, 403 U.S. 713 (1971) (issuing a *per curiam* opinion with nine separate detailed opinions).

209. *See, e.g.*, SIMON, *supra* note 15, at 64-67 (discussing Justice Brennan's struggle to craft an effective strategy in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), without alienating the three Justices already on his side); *id.* at 133-36 (discussing Chief Justice Rehnquist's effort in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), to attract the moderate conservatives on abortion rights without losing Justices White and Scalia).

210. 429 U.S. 190 (1976).

211. *See* EPSTEIN & KNIGHT, *supra* note 5, at 1-13.

212. Indeed, *Craig* first articulated the intermediate standard of review. *See Craig*, 429 U.S. at 208-09; *see also supra* notes 36-40 (discussing *Craig* in greater detail).

tice Brennan compromised his desire for a strict scrutiny standard for gender discrimination in order to command a majority. A few years earlier, in *Frontiero v. Richardson*,[213] Justice Brennan confronted exactly the same issue. That time, however, he insisted upon the strict scrutiny standard for gender discrimination and authored a plurality opinion[214] after rejecting a compromise with Justice Stewart that would have softened the opinion but produced a majority.[215] Why did Brennan choose to compromise in *Craig* and yet reject the same compromise three years earlier in *Frontiero*? Epstein and Knight's strategic model fails to provide an answer to this question.

In fact, a plurality opinion may itself have considerable practical significance, regardless of the position of the fifth Justice. The internal debate in *Patterson v. McLean Credit Union*[216] offers an interesting illustration. A five-member conservative majority could not agree on an opinion for the defendant company, while Justice Brennan commanded a four-Justice dissent. He switched his result to favor the defendant in an attempt to present the lead plurality opinion, which he obviously considered significant, but wrote an expansive interpretation of the law.[217] The conservative Justices apparently agreed that a lead plurality carries substantial practical significance, because they promptly joined forces in order to produce a majority opinion.[218] It is unclear why the largest plurality, rather than the fifth Justice's position, should have legal significance. Obviously, though, the Justices believe that the lead plurality opinion is of practical significance.

The decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*[219] (*Benzene*) demonstrates the significance of a plurality opinion and simultaneously shows how a linear ideological preference alignment is an oversimplified presentation of the Justices' positions. *Benzene* involved the legal authority of the Occupational Safety and Health Administration (OSHA) to regulate

213. 411 U.S. 677 (1973).

214. *See id.* at 688 (Brennan, J., plurality opinion).

215. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 302-03. According to this account, Justice Stewart favored the tougher standard but believed that it would eventually result from the then-pending Equal Rights Amendment. He offered to accept Brennan's standard in a later case, but Brennan rejected the offer as a "deal." *See id.*

216. 491 U.S. 164 (1989).

217. *See* LAZARUS, *supra* note 6, at 316-17; SIMON, *supra* note 15, at 64-67.

218. *See* LAZARUS, *supra* note 6, at 317-18.

219. 448 U.S. 607 (1980).

carcinogens in the workplace.[220] The appeal presented three choices: a highly deferential standard (the liberal position), a cost-benefit requirement (the most conservative position), or a requirement that the agency establish the presence of a significant risk before regulating (a moderately conservative position). Justices Marshall, Brennan, White, and Blackmun adopted the liberal position.[221] Justice Stevens, joined in part by Justices Burger, Stewart and Powell, wrote a plurality opinion striking down the OSHA regulation using the moderately conservative position.[222] Justice Powell also wrote a concurrence arguing for the more conservative cost-benefit standard.[223] Justice Rehnquist wrote a special concurrence, taking an even more conservative position than that which was presented to the Court, holding that the statutory grant of power to OSHA was standardless and in violation of the delegation doctrine.[224]

The *Benzene* opinions appear to have been ideologically driven, but they were certainly not strategic under Epstein and Knight's theory. Justice Rehnquist's refusal to compromise cost the conservatives a majority opinion. Additionally, Rehnquist certainly did not hold the swing vote on the ideological spectrum. Yet the *Benzene* plurality opinion, one of the most important public health rulings ever to emerge from the Court, has been treated as legally binding and has been readily applied by lower courts and agencies.[225] One might presume that Rehnquist saw that no compromise was needed, and thus chose instead to express his sincere opinion while remaining confident that the moderately conservative plurality rule would nonetheless prevail in future cases.

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220. *See id.* at 611.

221. *See id.* at 689-91 (Marshall, J., dissenting).

222. *See id.* at 662 (Burger, J., concurring).

223. *See id.* at 667 (Powell, J., concurring).

224. *See id.* at 686 (Rehnquist, J., concurring in the judgment).

225. *Benzene* functionally required agencies to conduct quantitative risk assessments and establish that a risk was significant before regulating. *See id.* at 639. The "significant risk" standard produced a major transformation in rulemaking for OSHA and beyond, especially for carcinogens. *See* Frank B. Cross et al., *Discernible Risk—A Proposed Standard for Significant Risk in Carcinogen Regulation*, 43 ADMIN. L. REV. 61, 68-70 (1991) (stating that the *Benzene* decision "established a potentially broad foundation for using a significant risk test throughout federal regulation of carcinogens and other hazardous substances").

B. Why Aren't All Decisions 5-4?

In the basic strategic model, the fifth Justice holds most of the power. The less moderate first four votes must compromise for the fifth vote. Once they get that vote, they have a majority opinion declaring the law of the land. Gaining a sixth, seventh, eighth, or ninth vote would require greater compromise in the opinion. Given that five votes are all that is required for controlling legal authority, what incentive is there for Justices already in the majority to compromise further? This is an application of Riker's size principle, which suggests that winning legislative coalitions will be of the minimal size necessary.[226] It is said that "the only time that an individual Justice's vote matters is when he is in a coalition of exactly five Justices."[227] Edward Lazarus confirms that an opinion author's willingness to compromise "depends mainly on how close a case it is, in other words, how badly the author needs the other Justice to join in order to obtain or preserve a majority."[228] Logically, then, it would seem that 5-4 decisions would be the rule. Yet "winning coalitions of *exactly* five Justices are the great exception rather than the rule."[229]

The reason for the existence of majority coalitions greater than five presumably lies in the greater effective power or influence of a decision backed by more Justices. It is well-known that the Court especially values a unanimous opinion in certain controversial cases, the perception being that unanimity offers a more compelling force.[230] Unanimity was considered essential to *Brown v. Board of Education*[231] and the series of civil rights decisions that followed.[232] The Justices believed that unanimity would reduce resistance by lower courts and other institutions. Other major cases, such as the Nixon tapes case,[233] were unanimous for similar reasons.[234] Unanimity makes a de-

226. *See* RIKER & ORDESHOOK, *supra* note 11, at 177.

227. Edelman & Chen, *The Most Dangerous Justice*, *supra* note 24, at 66.

228. LAZARUS, *supra* note 6, at 25.

229. Baker, *Interdisciplinary Due Diligence*, *supra* note 50, at 193.

230. *See* ROHDE & SPAETH, *supra* note 30, at 200-03 (discussing the importance of producing a unanimous opinion "in situations where there is a threat to the Court's authority").

231. 347 U.S. 483 (1954).

232. *See* RICHARD KLUGER, SIMPLE JUSTICE 694-99 (1977) (reporting that in *Brown*, Chief Justice Warren "wished to avoid concurring opinions; the fewer voices with which the Court spoke, the better"); SCHWARTZ, *supra* note 15, at 92-100 (describing Chief Justice Warren's efforts to obtain a unanimous opinion in *Brown*); WOODWARD & ARMSTRONG, *supra* note 15, at 41 (observing that "the Justices had agreed that it was essential to let the South know that not a single Justice believed in anything less than full desegregation").

233. *See* United States v. Nixon, 418 U.S. 683 (1974).

cision look apolitical and driven by neutral legal principles.[235] Unanimity may also reduce the risk of congressional reversal.[236] Perhaps opinions with relatively larger majorities of six, seven, or eight votes are also more powerful than a minimum 5-4 majority opinion.[237] This point is illustrated by a letter from Justice Scalia to Justice White, after the latter had rejected changes suggested by the former; Scalia's letter nevertheless expressed a willingness to join the opinion because "four votes are even more clearly better than one than they are better than three."[238]

If larger majorities produce stronger law, every vote necessarily has some value. Walter Murphy suggests that "a 5-4 decision emphasizes the strength of the losing side and may encourage resistance and evasion" and conversely that "the greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases."[239] One study found that a larger majority makes it less likely that the Court will later overturn the precedent.[240] If this explanation is true, the Justices in the majority must weigh the increased power of a larger majority against the measure of compromise required for additional votes. The Justices in

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234. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 337-412. A unanimous single opinion was reportedly considered "the greatest deterrent to a defiant President." *Id.* at 366. While Chief Justice Burger was the formal author of the opinion, he made substantial concessions to achieve a unanimous single opinion. *See id.* at 405-07; *see also* Charles M. Lamb & Lisa K. Parshall, United States v. Nixon *Revisited: A Case Study in Supreme Court Decision-Making*, 58 U. PITT. L. REV. 71, 108 (1996) (stating that if the decision had not been unanimous, it might have given "President Nixon a reason to consider noncompliance").

235. Rohde and Spaeth have compared the size of Supreme Court majority coalitions in cases when there was an external threat to the Court's jurisdiction or authority with the size of majorities other cases. They found that eight- and nine-vote majority opinions were much more common in threat situations. *See* ROHDE & SPAETH, *supra* note 30, at 199.

236. *See* Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 447 (1983); Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493, 495 (1989).

237. Chief Justice Warren reportedly wanted every vote he could get for his majority in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See* SCHWARTZ, *supra* note 15, at 109 (describing Warren's efforts to keep Brennan from writing a separate concurrence). *See generally* Thurmon, *supra* note 197, at 449 (reporting that the "traditional view" was "that an opinion's precedential authority is directly proportional to the number of Justices that join it").

238. SCHWARTZ, *supra* note 15, at 59 (quoting a letter from Justice Scalia to Justice White (Dec. 21, 1988)). *But see* Edelman & Chen, *The Most Dangerous Justice*, *supra* note 24, at 75 (noting that dissents seldom command four votes but tend to fracture once a majority is unattainable).

239. MURPHY, *supra* note 4, at 66.

240. *See* Spriggs & Hansford, *supra* note 92, at 22. The authors found that each additional concurrence increased the risk of future overturn by 18.8%. *See id.*

the minority should be making a similar evaluation of the compromises they might extract from the majority.

If majority opinions do have special legal significance, the fifth Justice would have relatively more power than the sixth, seventh, etc. All the latter Justices have to trade is an amorphous loss of influence for the majority opinion. Consequently, they can command far less compromise in the majority opinion. In some special cases with a unanimity norm, though, even the ninth Justice can wield considerable influence.[241] Of course, every Justice could potentially become the ninth Justice with a threatened dissent or special concurrence on any basis, liberal or conservative. Thus, no particular Justice or position is necessarily empowered by a unanimity norm.

A bandwagoning factor may also help produce majority opinions of more than five. Once a Justice's side has lost, he cannot effect his policies in the decision. Writing a dissent may take considerable time and effort, without any guarantee of direct impact.[242] It is far easier to concede one's argument and join the majority. Moreover, some Justices may simply "like to win (or to be perceived as 'winners')."[243] Justices may also go along with the majority opinion for collegial reasons.[244] These psychological factors cannot generally explain large majorities, however. The contemporary numerosity of dissents clearly demonstrates that Justices do not readily join a majority with which they differ. So we are left with the enhanced influence of supermajority opinions as an explanation for their existence.

While the above analysis of bargaining for more than five votes to gain import for an opinion has logical appeal, it is largely unsupported empirically.[245] The analysis is also vague. Does a larger major-

241. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 44-59 (describing Justice Black's ability to drive the terms of the Court's decision in *Alexander v. Holmes County Board*, 396 U.S. 19 (1969) (holding that segregated schools must integrate immediately), by threatening to dissent from a decision permitting any further delay in desegregation). Such a strategy may work only once, however. When Black tried the same approach the next year in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (establishing a presumption against racially identifiable schools once past state discrimination has been shown, thus forcing the school district to show that the current segregation was not caused by past intentional discrimination), the other Justices were annoyed and called his bluff. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 126-27. Black's interest in unanimity caused him to back off his threatened dissent. *See id.* at 127.

242. *See* Cross, *supra* note 3, at 305-06.

243. George, *supra* note 3, at 1661.

244. *See generally* Kornhauser & Sager, *supra* note 199.

245. *See* EPSTEIN & SEGAL, *supra* note 83, at 21. Epstein and Segal have found some support for the hypothesis that larger majorities have greater political power in the external envi-

ity influence the lower courts, Congress, the public, or all of the above? Research is needed to reveal whether larger majorities do in fact command greater adherence and within what audience. Moreover, the whole theory may be invalid—even the unanimous civil rights opinions were disobeyed by lower courts and had an uncertain societal impact.[246] If the facially obvious theory is invalid, then why aren't all decisions 5-4? Perhaps too many 5-4 opinions would make the Court appear too political and less like a legal institution.[247] The potentially dissenting Justices may compromise their principles on occasion to preserve the Court's standing. This reason creates an entirely different strategic dynamic within the Court, however. Power would be transferred to the sixth or seventh Justice in some fraction of cases.

C. Why Does the Court Take So Few Cases?

Were the Supreme Court truly interested in maximizing the projection of its political interests, one would expect the Court to take on as many issues as reasonably possible. For decades, the Court granted certiorari to well over 100 cases per year.[248] In the 1970s, the Court typically granted review of over 200 cases per year, representing about 10% of the petitions filed with the Court.[249] Over the years, 150 cases came to be regarded as a normal-sized docket.[250] Perhaps this was the largest number that the Court could accept while preserving the legal quality of its opinions, a quality that might be necessary to maintain its standing. However, in recent years there has been a significant decline in the number of cases taken by the Court. In 1992, the docket slipped to eighty-three cases, representing only 3%

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ronment. *See id.* They also found that more ideologically homogenous Courts that could command larger majorities were less responsive to the risk of reversal from an ideologically contrary Congress. *See id.* Justices sitting on such Courts may believe that a strong majority opinion is less likely to be overridden. *See id.* at 19.

246. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 42-169 (1991) (contending that the Supreme Court had little to do with civil rights progress in United States).

247. This theory is not self-evident. Norms of dissent and concurrence have varied over time at the Court and they seem to be affected significantly by the Chief Justice. *See* Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 877 (1998).

248. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 80-83 (2d ed. 1996) (reporting the number of petitions made and granted from 1926 to 1995).

249. *See id.* at 82.

250. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987).

of the petitions filed.[251] The docket remained small, and the 1995 Term saw only seventy-seven decisions.[252] This has been called the "incredibly shrinking" docket.[253] Epstein and Knight's strategic model begs the question: why would a policy-oriented Court (or a legally-oriented one, for that matter) choose to decide so few cases?

It might be argued that twelve years of Reagan-Bush appointees to the federal bench has resulted in the lower courts becoming very conservative, thus minimizing the need for a conservative Supreme Court to review a large number of cases.[254] It would be hard to maintain, though, that there are only seventy-five or eighty liberal panels and significant liberal decisions rendered per year that merit review by the Court. Hellman has analyzed the data more closely, noting that the certiorari acceptance rate has decreased for appeals brought by federal and state prosecutors complaining of liberal state supreme court decisions. He concluded that the explanation for the smaller docket could not lie in the conservative circuit courts.[255]

Hellman suggests that the reason for the shrunken docket is that the current Court has a new philosophy that does not focus on maximizing the projection of the Court's power.[256] He cautions, though, that this makes the Court more politically active for the fewer cases that it does accept for review.[257] The hypothesis is interesting, if unproved. Moreover, Hellman's theory does not explain why the Court chose to pursue its new philosophy by reducing the size of its docket.

One might expect that, given a smaller docket, the Justices could focus more on each case. The Court might therefore produce "better" opinions.[258] There does not seem to be any obvious improvement in the legal quality of more recent opinions, however. Perhaps the greater focus better enables the Justices to study each case and ascertain its ideological implications. But it shouldn't be so difficult to reach these ideological conclusions, as evidenced by the

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251. *See* EPSTEIN ET AL., *supra* note 248, at 83.

252. *See* Hellman, *supra* note 122, at 403.

253. David M. O'Brien, *Join-3 Votes, the Rule of Four, the* Cert. *Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J. LAW & POL. 779, 779 (1997).

254. *See* Garrow, *supra* note 202, at 65.

255. *See* Hellman, *supra* note 122, at 424.

256. *See id.* at 431-35.

257. *See id.* at 436-38.

258. *See* John Paul Stevens, *Deciding What To Decide: The Docket and the Rule of Four*, 58 N.Y.U. L. REV. (1983), *reprinted in* JUDGES ON JUDGING, *supra* note 68, at 93 (suggesting that the Court takes too many cases).

predictive accuracy of the extremely simple attitudinal model. Perhaps taking more time in crafting opinions might enable the Justices to create more binding rules for lower courts. By taking fewer cases, however, the Court reduces the lower courts' risk of reversal and thereby encourages lower court disobedience. Perhaps the shrunken docket reflects nothing more than pursuit of leisure,[259] though one wonders why the current Court would be so much lazier than those of the past.[260] The reason for the shrunken docket remains mysterious, and it seems inconsistent with the conventional models of political science, which emphasize the objective of ideological policy projection.

Within its small docket, the Court also takes a number of cases that do not possess any political importance. Justice Harlan called these cases "peewees."[261] Tax cases and Indian cases are two types of cases commonly reviewed by the Court despite their political insignificance.[262] The Court even chose to resolve the status of Antarctica under the Federal Tort Claims Act, an issue of "singular unimportance" that arises "every 20 years or so."[263] Why would ideological policy-oriented Justices squander their scarce time on such insignificant cases? Perhaps these cases are evidence that Justices care independently about the law. Or perhaps these cases are a strategic means of convincing the public that the Justices are not unduly political.

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259. *See* BAUM, PUZZLE, *supra* note 30, at 46-47 (noting that a smaller docket might be the result of the Justices' desire for a "reduced work load").

260. *See* SCHWARTZ, *supra* note 15, at 256-60 (arguing that today's Court is indeed lazier than those of the past).

261. Ronald J. Krotoszynski, Jr., Cohen v. California*: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1255 (1996) (quoting WOODWARD & ARMSTRONG, *supra* note 15, at 148).

262. *See* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 525 (1994) (noting the "view that tax law is less interesting or important than other areas of law pervades even the Supreme Court" and reporting Justices' efforts to evade writing opinions for such cases). Indian cases may have been used by Chief Justice Burger to punish disfavored Justices in opinion assignments. *See* WOODWARD & ARMSTRONG, *supra* note 15, at 425-26. Brennan had a scatological name for these cases. *See id.* at 425. Rehnquist reportedly had "nothing but contempt" for them. *Id.* at 490. Justice Stewart called such cases "dogs" or "nothing cases" but observed that there are such cases every term. SCHWARTZ, *supra* note 15, at 113.

263. BAUM, SUPREME COURT, *supra* note 70, at 114-15.

D. Why Do the Justices Take So Many Cases That They Affirm?

Given the policy-seeking model that predominates in political science, one would expect the Court to spend its time reversing lower courts. When a circuit court opinion is reversed, the Court changes at least one circuit's policy in the favored direction, in addition to setting a national policy. An affirmance, by contrast, sets a national policy but may not enact a change in the law.[264] Affirmances thus seem to be an inefficient use of scarce Supreme Court resources.[265] In an affirmance, one circuit has already reached the Court's preferred position, and others might do so if given a chance.[266] The Court would accomplish more by granting certiorari on a different case that they would reverse.

Epstein and Knight consider this reasoning and conclude that "we should see [the Court] reversing most of the cases they hear and decide."[267] They then observe that this is borne out by data indicating that the Court reverses 61% of the lower court decisions it reviews.[268] Yet this leaves a substantial 39% minority of cases that result in affirmances. This large number would seem to represent quite a waste of resources for a truly strategic Court.

One possible explanation is that the Justices are acting sincerely and in a way that is consistent with their role expectations. Their certiorari votes may not be outcome-oriented but instead grounded in their sincere assessment of the issue's legal import. The various Justices may even be undecided about how they will vote on the case itself. On this view, only after briefing and perhaps oral argument will they reach a decision, and sometimes that decision will be an affirmance. If this rather naive model were operating, one would expect a roughly equal number of affirmances and reversals. The predominance of reversals therefore suggests that the naive model does not fully explain behavior, although the large number of affirmances hints that the model may at times be close to the truth.

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264. In some instances, of course, an affirmance of one circuit court's decision may very well alter the law in another circuit.

265. *See* SEGAL & SPAETH, *supra* note 29, at 191 ("Given a finite number of cases that can be reviewed in a given term, the Court must decide how to utilize its time, the Court's most scarce resource. . . . [O]verturning unfavorable lower court decisions has more of an impact.").

266. *See* LAZARUS, *supra* note 6, at 444 (observing that normally the conservative Justices would not vote to grant certiorari in a capital case in which the defendant had lost below).

267. EPSTEIN & KNIGHT, *supra* note 5, at 27.

268. *See id.*

One could find strategic explanations for the affirmances, of course. For example, the Justices may be aware of the significant cases percolating their way through the courts. A conservative Court might know that a given issue is about to come before a liberal circuit court and may thus affirm a conservative opinion from another circuit regarding a similar issue, in order to head off the expected liberal decision. Unfortunately, this theory is untested.

Another explanation would be that the Justices simply make strategic mistakes.[269] For example, four conservative Justices might vote to accept certiorari in the belief that they can put together a reversal opinion in a given case. Then, after the action is accepted, they may discover that they were wrong about their ability to get a fifth vote. This is not inconsistent with the theory of rational choice—the theory assumes that decisions are made strategically, not that every actor is strategically adept. This theory of strategic error is a theory that is readily tested—if it were true, one would expect to find that most affirmances were 5-4 decisions. In fact, more than one-third of the Court's affirmances are unanimous.[270]

The question about affirmances is independent of the judicial maximand. Even if one assumes that the Justices are primarily concerned with traditional legal principles, one still would not expect affirmances from a strategic judiciary. Reversing an erroneous legal principle would generally have more impact than affirming a correct one. Thus, the question of affirmances goes to the strategic means as well as the assumed end. Although some affirmances may result from mistakes in the certiorari process, certainly this cannot be true all of the time. Alternatively, an affirmance might be used as a form of signaling a change in the Court's direction, though this hypothesis is untested. More study of affirmances is clearly needed.

E. What About the Lower Courts?

Epstein and Knight seem to adopt a paradigm not uncommon among political scientists interested in law: they assume that the Supreme Court is utterly political while lower courts adhere reliably to Supreme Court precedent. Otherwise, all the battling over doctrinal language would be meaningless, and lower courts would follow their policy preferences regardless of Supreme Court doctrine. While the

269. Epstein and Knight note the possibility of this strategic interaction hypothesis. *See id.* at 27 n.e.

270. *See* Kritzer et al., *supra* note 148, at 4.

authors devote considerable attention to the Court's institutional relationship with Congress and to the need to avoid legislative reversal, they largely ignore the institutional relationships within the judicial hierarchy and the possibility of lower court disobedience.[271] Although Epstein and Knight cannot be expected to address every strategic issue that may arise in the course of Supreme Court jurisprudence, the authors' lack of attendance to behavior by lower courts may be the largest lacuna in the book.

The authors observe that research "shows that lower tribunals have a healthy respect for Supreme Court precedent."[272] The empirical case for that statement is unclear, however.[273] Moreover, there is little theoretical reason to believe that lower court judges would be so readily obedient. The motivations of lower court judges are presumably similar to those of Supreme Court Justices.[274] The legal malleability that enables the Court to act ideologically likewise should empower lower court judges. As Walter Murphy explained:

> It is true that a Justice, if he can muster a majority of the Court behind him, can usually apply more impressive sanctions against recalcitrant lower court judges than against recalcitrant colleagues, but used alone these would hardly be likely to engender widespread acceptance of his policies. There are just too many judges and too many cases. . . . [L]ower court judges are apt to have different orien-

271. This possibility is discussed in Cross & Tiller, *supra* note 10.

272. EPSTEIN & KNIGHT, *supra* note 5, at 51.

273. *See* ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 198 (2d ed. 1991) (observing that recent studies have shown that "lower court judges have a great deal of independence" and "'will not follow the lead of higher courts unless conditions are favorable for them doing so'" (quoting Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86, 91 (1976))).

274. There may be some slight difference in judicial motivations. Circuit court judges may seek promotion to the Supreme Court, while few Justices seem to have ambitions beyond the Court. However, the likelihood of promotion to the Court is quite low, and there are no clear standards for promotion that would cause judges to alter their inclinations. Strong pursuit of seemingly ideological ends may have ruined Judge Bork's chances for the Court, but it had no impact on Judge Scalia's. A judge seeking promotion might try to orient his decisions in the direction of the preferences of the President and Congress, but this strategy will not necessarily cause the judge to be more obedient to Court precedent. Supreme Court reversal has no apparent effect on confirmation. Judge Bork and his advocates without avail noted that none of his appellate decisions were reversed. *See* Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 686 (1989). Ruth Bader Ginsburg, by contrast, was reversed in a prominent decision by the Court prior to her confirmation. *See* Clark v. Community for Creative Non-Violence, 703 F.2d 586 (1983) (holding that the state could prevent people from sleeping in parks as a valid time, place, and manner restriction on the people's First Amendment right to dramatize the plight of the homeless), *rev'd*, 468 U.S. 288 (1984).

> tations, different loyalties, different values, and different interests and policy objectives than Supreme Court Justices, and intellectual or emotional arguments alone, no matter how convincing their rhetoric and how close their appeal to self-interest, are not likely to bridge all or possibly even most of these gaps.[275]

The Court needs a strategy to control lower court judges, or its power will be restricted to the relatively few cases actually decided by the Justices.

I suspect that policy-oriented Justices pay much greater heed to the risk of lower court disobedience than to the chance of congressional reversal. Malcolm Feeley and Edward Rubin emphasize that an individual Justice or even the whole Court cannot make law without the cooperation of other judges.[276] The need for coordination, they argue, generally limits Justices to making relatively small, incremental changes within the parameters of existing precedent.[277] The need to gain compliance from lower courts may thus help enforce precedent as a constraint on the Supreme Court.

Assuming that the Supreme Court is concerned with controlling lower courts, one interesting issue is how it exercises such control. One possibility is that control may be exercised through strategies of review. For example, the Court might focus its review and reversals on one particularly disobedient circuit court, correcting the extreme circuit and perhaps attempting to intimidate the others into obedience. If so, this would add another complication to the certiorari process. In addition to selectively taking cases for results, the Court would also have to consider which case offers the best prospects for controlling subsequent lower court decisions.

Obvious review strategies appear to offer relatively little promise for controlling lower courts. The Court simply cannot review enough circuit court decisions to enforce all or even most of its preferences. The conventional legal model assumes that lower courts follow Supreme Court precedent out of duty. This explanation does not sit well with rational choice theory and is contrary to evidence that circuit court panels tend to disobey precedent in order to effect their own policy preferences.[278] A recent study by Tracey George found that circuit court en banc decisions appear to respond some-

275. MURPHY, *supra* note 4, at 92.

276. *See* Rubin & Feeley, *supra* note 143, at 2031.

277. *See id.* at 2018.

278. *See, e.g.*, Cross & Tiller, *supra* note 10, at 2173-76.

what to the Supreme Court's preferences.[279] Yet his results incidentally demonstrated the difficulty of Supreme Court control—the association with Supreme Court preferences was statistically significant but quantitatively weak, even though en banc decisions are far more likely to be reviewed by the Court than are conventional circuit court decisions.[280]

Another approach to the control of lower courts may be doctrinal. Perhaps certain doctrinal approaches are likely to yield greater lower court obedience than others. Some legal researchers suggest that establishing clear rules rather than vague standards or balancing tests will induce greater compliance from lower courts.[281] Some political scientists suggest that the clarity of Supreme Court opinions influences the degree of lower court compliance.[282] One recent study has found that greater specificity in the Court's opinion produces a slightly more obedient response from administrative agencies.[283] These theories are mostly unproven, however. Given the Court's limited ability to sanction noncompliance, clear rules might only produce clear disobedience.[284]

Emerson Tiller offers a different sort of doctrinal strategy for controlling the lower courts (and other institutions). His approach focuses on decision costs.[285] Even if judges are motivated exclusively by ideological ends, they must appear to justify their results through legal analysis. This means that they must confront prevailing doctrines and evade them. The legal realism of political science maintains that every doctrine can be evaded, but some evasions require greater time and effort (given the need to provide a colorable legal explanation for results). By raising decision costs, a Court can make disobedience

279. *See* George, *supra* note 3, at 1692-93.

280. *See id.* at 1694 (reporting that Supreme Court preferences are a "weak factor"); *id.* at 1677 (reporting that the Court is more than four times more likely to grant certiorari in a case involving an en banc decision).

281. *See* Sullivan, *supra* note 143, at 57 (observing that rules "afford decisionmakers less discretion"); Cross, *supra* note 3, at 322-23 (discussing the contention that clear rules better constrain lower court discretion).

282. *See, e.g.*, ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 10 (1983).

283. *See* James F. Spriggs, II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122, 1143 (1996).

284. This is the implication of McNollgast's strategic theory. *See infra* text accompanying notes 287-89.

285. *See* Tiller, *Putting Politics into the Positive Theory of Federalism*, *supra* note 10, at 1499-1500.

more costly for others. Tiller has considered how lower courts may use this strategy to avoid reversal[286] but has not analyzed how the Supreme Court could employ the strategy to control lower courts.

McNollgast suggest a different type of doctrinal strategy for restraining lower court disobedience to Supreme Court opinions.[287] They view appellate court judges as possessing the same basic policy-oriented motivation as Supreme Court Justices.[288] If the Court cannot take every case on review, the circuit court judge has no incentive to comply with the Court's rulings—while some of their cases will be reversed, many others will stand at their preferred policy point. To induce lower court compliance, McNollgast suggest, the Court should create an acceptable doctrinal interval that extends some distance from the Court's precise policy preference.[289] If the Court correctly sets the interval, the lower courts will be better off compromising their preference somewhat (fitting within the interval) than implementing their preferences and risking reversal.[290] The Court, on this view, must modify the interval as the composition of the lower courts changes.[291]

McNollgast's theory is intriguing and might explain why the Court would create relatively loose decision rules, such as a set of standards to be applied through lower court discretion. I have some doubts about its general descriptive power, however. While the theory is plausible under the terms of McNollgast's example, their illustration involves only three lower courts, with a one-third prospect of reversal by the Supreme Court.[292] The interval theory is less promising in the real world, as the Court supervises thirteen circuits and reviews less than 1% of circuit court decisions. The ability to control disobedient lower courts presents a crucial strategic challenge to the Supreme Court, a challenge that demands greater consideration.

F. Why Isn't Strategic Bargaining More Like Congress?

If, like members of Congress, Justices are pure policy-seekers, they should act like members of Congress in their decisionmaking.

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286. *See* Tiller & Spiller, *Decision Costs*, *supra* note 10, at 354-55.

287. *See* McNollgast, *Politics and the Courts*, *supra* note 9.

288. *See id*. at 1633.

289. *See id*. at 1644-47.

290. The details of this strategy are set forth in a mathematical appendix. *See id.* at 1675-83.

291. *See id.* at 1644.

292. *See id.* at 1645.

Yet Epstein and Knight observe that they do not do so. While members of Congress frequently attach riders to pending bills, the Justices do not append new political issues to pending cases.[293] Nor do Justices attempt to issue advisory opinions, perhaps the most direct and effective approach to policymaking from the bench. The institutional reason for this difference seems simple—such actions by the Court would be obvious and would undermine its perceived status as a nonpolitical institution.[294]

A more curious difference involves logrolling. Logrolling occurs when a congressperson trades votes, giving in on an issue of lower personal priority, in order to obtain a vote on an issue of greater concern. In a true strategic situation, Justices would do likewise. A conservative Justice who cared about civil rights policy might, for example, trade a vote for criminal defendants in order to gain a civil rights vote from a liberal Justice who cared particularly about defendants' rights. Such an approach would appear to benefit each Justice. Unlike issue creation, logrolling could be done privately and without threat to the public integrity of the Court.

Significantly, logrolling seldom if ever occurs on the Court.[295] Epstein and Knight do not claim that vote trading commonly occurs. Nor do the journalistic internal accounts of the Court describe logrolling.[296] Murphy discusses bargaining on the Court but does not contend that logrolling occurs.[297] While public logrolling might ruin respect for the Court, this reason does not explain the absence of such behavior in private. Apparently, the Justices sacrifice one means of achieving their policy objectives in deference to some norm. Or perhaps not. Logrolling is essentially an accession to different preference intensities, and Justices may quietly and implicitly defer to others in

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293. *See* EPSTEIN & KNIGHT, *supra* note 5, at 160-62.

294. Advisory opinions also violate the case-or-controversy requirement for a Constitutionally valid exercise of judicial power. *See* U.S. CONST. art III, § 2, cl. 1.

295. *See, e.g.*, Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 764 n.86 ("In going through Justice Brennan's papers selectively for the period from his appointment through 1967 and comprehensively for the period from 1967 to 1986, I found nothing indicating an explicit 'deal' for votes."); CARP & STIDHAM, *supra* note 273, at 160 (reporting that bargaining takes place on the Court "but it is more subtle and does not involve vote swapping").

296. The closest thing to an allegation of logrolling is the suggestion that Justice Brennan traded a vote to gain Justice Blackmun's support in upcoming abortion and obscenity cases. This suggestion proved highly controversial and disputed. *See* Anthony Lewis, *Supreme Court Confidential*, N.Y. REV. BOOKS, Feb. 7, 1980, at 3; Scott Armstrong et al., Letters to the Editor, *The Evidence of 'The Brethren': An Exchange*, N.Y. REV. BOOKS, June 12, 1980, at 47.

297. *See* MURPHY, *supra* note 4, at 56-68.

the presence of such a difference.[298] If a given Justice cares especially about the Fifth Amendment, for example, other Justices might go along in Fifth Amendment cases, in tacit exchange for support from the given Justice on the issues of greatest concern to them. The Court has many fewer members than Congress, and relational deals among the Justices may not have to be so explicit. The possible presence of such logrolling among Justices is interesting and commands further investigation.

In some respects, many of these unanswered questions may cast doubt upon the Epstein and Knight's rational choice theory of Supreme Court decisionmaking, at least as a complete description.[299] The strategic analysis will probably never provide a comprehensive explanation of judicial action, if only because the Court consists of humans with varying personalities and varying degrees of strategic aptitude.[300] But it would be premature and presumptuous to suggest that political strategy cannot explain some currently mysterious Court practices. Greater understanding of strategic behavior may well lend important insight into Court action. Epstein and Knight provide a valuable framework for seeking answers.

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298. For a suggestion that logrolling may not be uncommon on courts with more than one member, see Cross & Tiller, *supra* note 10, at 2175.

299. Of course, the involvement of humans limits the predictive power of any rational choice bargaining model. Some Justices are better at strategy, and some are better-liked. Others are disliked and strategically incompetent. The stronger strategic position might thereby be lost. Moreover, even sound strategic decisions may backfire. Chief Justice Burger held over *Roe v. Wade* for reargument, knowing that the new term would probably bring two new Republican Justices to the Court. As it happened, Justice Powell was appointed, Justice Blackmun used the time to write a stronger opinion, and *Roe* was born. *See* SCHWARTZ, *supra* note 15, at 234-35. This fact does not undermine the academic importance of understanding the strategic structure of decisions.

300. Lawrence Baum provides an interesting example of the difficulties of studying judicial behavior. We know from internal reports that Justice Frankfurter sought to influence his colleagues, but he was so bad at it that "[o]ne might conclude . . . that [he] did not care about influencing his colleagues." BAUM, PUZZLE, *supra* note 30, at 103 n.15 (quoting David J. Danelski, *Causes and Consequences of Conflict and Its Resolution in the Supreme Court*, *in* JUDICIAL CONFLICT AND CONSENSUS, 131-32 (Sheldon Goldman & Charles M. Lamb eds., 1986)). Justice Douglas may actually have taken "perverse satisfaction in diluting his influence on his colleagues." SIMON, *supra* note 15, at 101. Baum observes that congressional reversals of Court decisions occur periodically but cautions that this may be evidence that Justices do not vote strategically or it may simply be evidence that the Justices have made strategic errors. *See* BAUM, PUZZLE, *supra* note 30, at 103; SEGAL & SPAETH, *supra* note 29, at 296-97 (discussing different Justices' different attitudes about compromise).

CONCLUSION

Epstein and Knight's discussion of Court strategy is by turns compelling, fascinating, and frustrating, at least to those who hold more traditional legal views. For many political scientists, on the other hand, it is simply incomprehensible that the Justices might sincerely care about and be faithful to the law. While the authors largely accept this perspective, they provide their fellow political scientists with an argument about why the law may still matter, even if Justices don't care independently about it. To Epstein and Knight, strategic maximization of policy preferences will necessarily lead to the rule of law, including respect for precedent.[301] While the concept of respect for precedent seems unexceptional to legal scholars, that concept is fairly radical in political science.

For legal researchers, Epstein and Knight's book has a different but equally important message. The authors explain how doctrine evolves through the compromises of individual Justices and through strategic interactions between the public policy preferences of the Court and those of the other branches of government. This explanation is probably a more accurate depiction of reality than are the positions taken by either legal formalists, moral theoreticians, or strict legal realists. The authors thereby add needed complexity to the contemporary state of legal analysis. The need for a still-more-complex vision of judicial behavior does not negate the important measure of truth in the authors' policy-oriented strategic account.

Finally, it would be a mistake to dwell entirely upon the debate over what Justices want, or upon unanswered questions about strategizing. Epstein and Knight seek only to make "a compelling case for the importance of injecting strategic analysis into future studies of the Supreme Court."[302] They have made this case most persuasively. Even doubters cannot deny that Epstein and Knight have presented considerable evidence that political strategy forms a component of Supreme Court decisionmaking. The book "marks a beginning, not the end, of an inquiry into judicial decision making."[303] The precise character of judicial strategizing and the aims of the strategy demand further exploration. Epstein and Knight have provided an excellent beginning to this venture.

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301. *See* EPSTEIN & KNIGHT, *supra* note 5, at 184 (concluding that "the legitimacy of the system of law may be sustained even if judges act in political ways").

302. *Id.* at xiv.

303. *Id.* at 184.

Greater understanding of strategy will surely have consequences for the Court. Epstein and Knight's book makes obvious the reasons underlying the Court's consistent penchant for secrecy.[304] The Justices endeavor to keep their most severe disagreements private.[305] They seek to manipulate media coverage as much as other politicians.[306] When the Court's inner workings are exposed by journalistic books such as *The Brethren* and *Closed Chambers*, the Justices and their allies tend to react angrily.[307] If Epstein and Knight are correct, the Justices' goal is to advance their policy positions, and their ability to do so depends on their pretending to apply the law in a politically neutral manner. Exposing the Justices' policy orientation and their strategic interactions not only makes the Court look bad, it directly reduces its power, which rests on a perception that it is above politics. The reasons put forth for maintaining the Court's confidentiality are thus as insincere as many of its opinions.[308] Perhaps the Court itself

304. *See, e.g.*, David R. Fine, *Lex, Lies, and Audiotape*, 96 W. VA. L. REV. 449, 461-62 (1993-94) (discussing the Court's negative reaction to publication of audiotapes of oral arguments and to the release of the notes of Justice Thurgood Marshall); Lawrence R. Velvel, *Justice at the High Court: Not Blind Enough?*, WASH. POST, June 15, 1998, at D2 (observing that "justices and experts" have the shared belief that "the court's prestige and authority will be compromised if secrecy is lost").

305. *See, e.g.*, SIMON, *supra* note 15, at 102-06 (describing the efforts of certain Justices to prevent Justice Douglas from filing dissents in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), that were perceived to risk damage to the Court).

306. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 190 (1990) (declaring that "much of what judges say about their jobs in speeches and opinions partakes of the same falsity that characterizes other political discourse"). Posner observes that judges seek to cover up the "unprincipled compromises and petty jealousies and rivalries that accompany collegial decision making . . . and the desire, conscious or not, to shape the law to one's personal values." *Id.* at 190-91.

307. *See, e.g.*, sources cited *supra* note 7.

308. *See, e.g.*, Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2257-58 (1996). Stack argues that secrecy improves deliberative decisionmaking on the Court. However, his argument assumes that this secret deliberation involves a sincere effort by Justices to "find the law" in a traditional formalist manner. We know from Epstein and Knight and many others that this is not an accurate description of the deliberative process. Exposing more of the process might have the effect of improving deliberation by forcing the Justices to attend more to its proper object. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1342-43 (1995) (suggesting that opening Supreme Court deliberation could undermine judicial independence, but that judicial independence is warranted only if the Court makes legal rather than political decisions).

A more interesting defense of secrecy and criticism of "principled frankness" is found in Book Note, *supra* note 67, at 797. The author suggests that openness would delegitimate the Court, forcing it into concessions of weakness. Even this suggestion carries the implicit and undefended assumption that the Court should play a prominent role in national policymaking. *See id.*

should be subject to some sort of Sunshine Act, so that its deliberations are more transparent. Perhaps the Justices should call public press conferences. The need for transparency is enhanced by the Court's position as a nonmajoritarian institution in our democracy.[309] Such openness might affect the Court's decisionmaking.[310] It might reduce the functional role of the Court in society,[311] but perhaps that is not such a bad thing, especially if the openness adds discipline to the Justices' legal decisionmaking.

309. *See* Joel B. Grossman, *Comments on "Secrecy and the Supreme Court"*, 22 BUFF. L. REV. 831, 835 (1973) (remarking that so long as judges are not directly accountable "knowing as much as possible about what these judges are doing makes a certain amount of intuitive sense").

310. *See* Merrill, *supra* note 177, at 140 ("In other words, if the Court openly acknowledged the political nature of its decisions, it would behave more like a court and less like a political institution.").

311. One judge, Abner Mikva, lamented that the great respect obtained by the judicial branch was accompanied by a lack of public knowledge, expressing his fear that the courts were "only beloved in ignorance." *On Leaving Capitol Hill for the Bench*, N.Y. TIMES, May 12, 1983, at B8. If judicial politics were observable, the Court might command less respect. Merrill argues that Court acknowledgment of its "political discretion" would cause the political branches to check the Court more readily. *See* Merrill, *supra* note 177, at 139.