POLITICS AND THE COURTS: A POSITIVE THEORY OF JUDICIAL DOCTRINE AND THE RULE OF LAW

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> It is often in the doctrinal realm that the Justices shape the political role of the Supreme Court. Even assuming that the Court is always highly interested in which party [to the case] wins, the flexibility of legal techniques is usually sufficient for the Justices to choose among several doctrinal alternatives. The doctrinal and therefore political content of most opinions is only tenuously related to which party won the case.[1]
>
> In truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment.[2]

The influence of politics on the judiciary has long been acknowledged. Perhaps the most famous example is the "switch in time to save nine," whereby Supreme Court Justice Roberts reversed his opposition to the New Deal after the 1936 elections. Franklin Roosevelt's personal landslide, two-thirds majorities in both the House and Senate and control of nearly three fourths of the state legislatures, provided an opportunity to revise the constitutional interpretations contained in offending Court decisions and gave credibility to Roosevelt's ultimately unsuccessful threat to expand the size of the Supreme Court in order to appoint a majority of Justices that would

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1. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 40 (1964).

2. ROBERT McCLOSKEY, THE AMERICAN SUPREME COURT 23 (1960).

support his policies.[3] A more distant but equally profound example took place during and immediately after the Civil War. Abraham Lincoln's ability to influence the judiciary was enhanced by the creation of a Tenth Circuit (and the creation of a tenth seat on the Supreme Court which was eliminated when Justice Taney, the author of *Dred Scott*,[4] left the Court). The wave of appointments by Lincoln and later Ulysses Grant solidified Republican policies regarding Reconstruction.

The purpose of this Article is to extend a large, impressive body of scholarship about political influences on the courts by developing a theory of exactly how and under what conditions politics affects judicial doctrine. With a few exceptions, the literature about the politics of the judiciary links changes in doctrine to specific political events such as path-breaking court decisions, a rash of new Supreme Court appointments, or changes in judicial jurisdiction, powers, or resources that follow an electoral realignment. Expanding on these considerations, we seek to specify the necessary and sufficient conditions for a distinct and sudden reversal in judicial doctrine.

We are motivated by the observation that not all intermittent changes in the composition of the elected branches are followed by significant changes in judicial doctrine, even when the new political regime seeks such changes. A recent, obvious example is Ronald Reagan's election in 1980. Although Reagan made Supreme Court doctrine on abortion, civil rights, school prayer, criminal justice, and states' rights major themes of his campaign for the presidency in 1980, and although his fellow Republicans controlled the Senate (and, hence, the judicial appointment process) during the first six years of his administration, most observers agree that the Reagan-era Court did not succeed in dramatically changing doctrine.[5] Our theory addresses the question of why Reagan failed while Roosevelt succeeded.

To attack this problem, we deploy the logic of sequential decision theory to the complex system of interactions among the Supreme Court, lower courts (both federal and state), and the elected branches. Our approach focuses on the competition and conflict that arise between higher and lower courts, and between the courts and the

3. Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Supreme Court Packing Plan*, 12 INT'L REV. L. & ECON. 45 (1992).

4. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

5. *E.g.*, BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

elected branches,[6] in contrast to the cooperative or "team" aspects of the judicial system.[7] The primary difference between these approaches is that the former focuses on the resolution of policy differences among courts while the latter focuses on efficient ways for a group of courts to achieve a common objective. We believe that both types of problems arise in the judicial system; thus, both literatures can generate important insights about the evolution of jurisprudence and judicial doctrine.

We focus on the strategic decisions of a Supreme Court that wants either to establish new doctrine (for example, the Warren Court), or to defend established doctrine against an ill political wind (for example, the Court during Roosevelt's first term) in the face of possible resistance from either lower courts, the elected branches, or both. In achieving its policy objectives, the Court faces two problems: first, how to induce lower courts to adhere more or less faithfully to its doctrine (the Supreme Court's agency problem with lower courts in the hierarchy); and second, how to avoid reversals or other punishments by the political branches (the Supreme Court's problem of avoiding being regarded as a noncomplying agent by the political branches).

The instigating event in our drama is the creation of a disjuncture between the preferred policies of the Supreme Court and either the lower courts or the elected branches. Such an event can be caused by either a major electoral change, such as a partisan realignment, or a change in the dominant views on the Court. The latter can occur due to "stealth" appointments of Justices who have undetected idiosyncratic policy preferences, the emergence of a new but highly important legal issue that was not anticipated in picking the members of the current Court, or as is often believed, even a brilliant new insight emanating from academic lawyers.[8] The key point is that the Court, the elected branches, and the lower courts often significantly differ in

6. *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); Charles Cameron, New Avenues for Modeling Judicial Politics (1993) (unpublished manuscript, on file with author).

7. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedent*, 46 STAN. L. REV. 817 (1994); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995).

8. See, for example, Laurence Tribe's discussion of issues not anticipated at the time of appointment and Bruce Ackerman's discussion of the importance of brilliant legal theorists in guiding the Court in new directions. LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

their preferences concerning judicial doctrine. The puzzle is how these differences will be resolved: Under what conditions will the Court impose its preferences, and when will it bend to the will of those with whom it disagrees?

In deciphering this puzzle, one of our more surprising results concerns the relationship between the Supreme Court and the lower courts. Although manipulation of Supreme Court decisions via expansion and replacements has long been understood in the legal and political science literatures, few scholars have studied how politically induced expansion and changes in the distribution of lower court jurists can affect the doctrinal decisions of the Supreme Court. We show that, under the appropriate circumstances, expansion of the lower judiciary can have the same effect on judicial doctrine as packing the Supreme Court.

An important component of our theory is an explanation of how the Supreme Court induces lower courts to adhere to its choice of doctrine. When the Supreme Court's resources are extensive and most lower courts do not disagree substantially with the Court, the Court can enforce a doctrine that focuses narrowly on its preferred interpretation. In contrast, when most lower courts differ substantially from the preferred doctrine of the Supreme Court, the problem of noncompliance becomes important. Our theory suggests that the Supreme Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts. By expanding the latitude allowed under its precedents, the Court both cajoles some lower bench jurists to abide by the new precedents and isolates those who do not. The Court can then focus its attention on the most egregiously nonconforming lower court decisions, and on the issues it most cares about.

Our theory provides us with a better understanding of when and how partisan politics will affect judicial doctrine. For example, following an election that produces a large and permanent change in the policy preferences of the elected branches, the new regime can influence judicial doctrine by manipulating the lower courts. If the newly elected political branches oppose current doctrine, they can expand the federal judiciary (that is, pack the lower courts), thereby forcing the Supreme Court to alter its doctrine. The creation of a large number of potentially noncomplying lower courts forces a strategic court to expand its doctrine so that a wider range of lower court decisions is acceptable. To provide evidence for our claims, we examine

several of the major judiciary acts over the history of the republic. The evidence suggests that permanent changes in the partisan composition of the electoral branches—for example, the Jeffersonian ascendancy in 1800, the Republican victory in 1860, and the Democratic landslide in 1932—all led to a substantial expansion of the lower courts.

Most importantly, our results imply that long-term doctrinal stability hinges directly on electoral stability.[9] Doctrine results from the interaction of the courts in the federal hierarchy and depends on the distribution of preferences among the lower courts and on the Supreme Court.

This implication about doctrinal stability yields an important corollary: Stare decisis, respect for precedent and the rule of law, is the by-product of the strategic and political use of doctrine. Stare decisis reflects a self-enforcing equilibrium of doctrinal preferences among the courts. The properties of stare decisis do not in fact depend on whether judges actually respect precedent and the rule of law. Likewise, precedents do not constrain the Supreme Court's political use of doctrine. Rather, Court respect for precedent emerges when the courts and the political branches are in equilibrium: The Court's doctrine, its ability to enforce compliance among the lower courts, and the actions and threats of action by the elected branches to substitute their own policy preferences for Court doctrine are in balance.

The plan of the Article is as follows. In Part I, we set forth our basic argument. In essence, we argue that the elected branches have the long-term advantage in battling the courts, and in so doing we identify the potent weapons that the elected branches possess: the power to fill vacant lower court seats with judges whose preferences are more compatible with the preferences of the elected branches; the power to expand the lower courts and therefore increase the proportion of judges who share their beliefs; and the power to affect the productivity of the judicial system by altering jurisdictions and controlling the resources available to the courts for hearing cases.

For the most part, the novelty of our argument derives from our analysis of the behavior of judges in the lower courts, who are

9. By elections we do not mean the year-to-year electoral vicissitudes caused by marginal changes in public opinion. We mean instead the long-term stability of the party system itself, typically lasting longer than a generation.

modeled as strategic actors facing a trade-off between pursuing a personal policy agenda and seeing their decisions reversed by a higher court. The argument is presented in two formats: The main text contains a verbal argument with minimal and simple notation setting forth its basic logic; the Appendix presents a formal model of the relationship between higher and lower courts that illustrates how an exogenous change in the composition of lower courts can change doctrine, even though the preferences of the Supreme Court remain unchanged.

In Part II, we explore the history of the size of the judiciary to demonstrate that, indeed, episodes of lower court expansion correspond to periods of changes in judicial doctrine that were instigated by electoral politics, notably Reconstruction and the New Deal. This Part also presents federal budgetary data on the judiciary that provide additional evidence concerning the expansion of the judiciary. In Part III, we examine some specific examples of changes in legal doctrine to illustrate how they emerged from the mechanisms described in this Article.

I. A POSITIVE THEORY OF JUDICIAL DOCTRINE

The core assumption of the argument in this Article is that all of the relevant actors—elected politicians and judges—act rationally to bring policy as close as possible to their own preferred outcome.[10] This assumption need not be swallowed whole: Individual actors may give weight to the preferences of others for nonstrategic reasons, such as altruism, norms of deference, respect for precedent, and other elements of the rule of law. In particular, we are aware of the standard idealistic textbook model of judicial behavior, and do not wish to deny in total the notion that law school education and legal experience produce a "judicial temperament" that influences decisions by judges. The key point is that, after accounting for these factors, we assume that judges do not check their political ideologies at the courthouse

10. Our basic modeling approach is similar to several recent developments in the positive political theory of the courts. *See, e.g.*, Cohen & Spitzer, *supra* note 6; Eskridge & Ferejohn, *supra* note 6; McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994); Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORGANIZATION 8 (1992). The PPT approach is related to attitudinist perspective, which holds that Supreme Court Justices vote their "attitudes," a concept close in spirit to the justice preferences in our model. The attitudinist approach differs in that it sees the courts as independent of the elected branches. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

door. Thus, we assume that judges and elected politicians accord some significant weight to personal views about what the government should do and how government officials should do it, and are willing to make compromises between judicial and political norms and their personal policy preferences. The ultimate source of preferences is inessential; what matters is that different judges and politicians pursue different ends.

For purposes of economy of language, we also speak of the Supreme Court and the elected branches as anthropomorphic entities. A full theory would need to take into account the fact that the House, the Senate, and the Supreme Court are collectivities, subject to the various pathologies of majority rule institutions. A complete theory would also need to consider the agency relationship between the president and the various departments and bureaus in the executive branch. For the present, we ignore these problems and assume that the House, Senate, Supreme Court, and president each has a coherent, consistent set of preferences over policy outcomes, and that each behaves as if it were a single rational actor who takes account of the preferences and strategies of others in making decisions.

The richness of the judicial system's hierarchy is also largely ignored in our argument. Rather than deal separately with state courts, federal district courts, federal courts of appeal, and specialized courts, we simplify reality by grouping them all together as "lower courts" that make decisions that can be appealed to the Supreme Court. The number of lower courts is simply the number of lower court judges, each of whom has consistent personal preferences over policy outcomes.

We further assume that, at the time of appointment, the policy preferences of a new judge on issues that have already been litigated are known without error by the appointing president and confirming Senate. Thus, we confine "stealth" appointments and mistaken expectations on the part of an appointing president and confirming Senate to issues that arise after the appointment process is complete. Whereas the literature documents the difficulties political actors have had in controlling the Court through supposedly friendly appointments,[11] examples of unexpected appointments do not vitiate the proposition that, on average, court appointees do reflect the political

11. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 81-84 (1986) (providing examples of judges who behaved differently from the way the appointing president expected).

views of those who appoint them. Thus, the assumption that the preferences of judges are known in advance covers the preponderance of cases, and greatly simplifies the analysis because it enables us to avoid keeping track of random errors in estimates of the policy preferences of a judicial appointee.

For members of the elected branches, we also assume that their preferences are derived, in part, from electoral concerns. As is standard in the neoinstitutionalist theory of politics, the two most important factors influencing the preferences of elected officials are the preferences of constituents (voters, volunteers, contributors) and the electoral institutions aggregating these preferences. The latter include the geographic scope of constituencies, the length of terms, qualifications for office (for example, term limits), and the restrictions governing behavior during a campaign (such as campaign finance rules).

Here we will not repeat the neoinstitutionalist theory, but it will suffice to say that the policy preferences derived by elected politicians are unstable over time and frequently differ among the elected branches.[12] The reasons are first, that majority rule voting is prone to some instability as a mechanism for deciding policies (the Condorcet paradox) and second, that the rules governing elections of the different branches of government are significantly different, causing them to be differentially influenced by each constituency as well as to reflect aggregations of constituent preferences at different times.

To avoid possible confusion, some attention must be paid to our definition of a decision as it pertains to each actor in the theory.

For the president, the relevant decisions are whom to recommend for appointments to the courts. The structure of our theoretical analysis assumes that these nominees are selected on the basis of the president's policy preferences, the nominee's policy preferences, and the anticipated reaction of the Senate in the confirmation process. We do not deal explicitly with the conventional and theoretically plausible view that the president has more influence in making appointments to the Supreme Court than to lower courts;[13] however, our model easily could be extended to account for this phenomenon.

For the elected branches, two kinds of decisions are made. One consists of confirmation decisions. As in any rational expectations

12. *See* Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

13. *See* O'BRIEN, *supra* note 11.

model, the real action regarding this decision is not the confirmation vote per se, but the power that confirmation authority gives the legislature in negotiating appointments. The confirmation process is best conceptualized as a bargaining session between the president and the Senate that strikes a compromise in terms of the policy preferences of the nominee. The other type of legislative decision is legislation that affects the judiciary. For example: judiciary acts that change the number of judges and allocate jurisdiction among them; appropriations acts that alter the resources available to the courts for handling cases (such as budgets for clerks and magistrates); substantive acts that affect the extent to which citizens use the courts to resolve disputes among themselves or with the government; substantive acts that explicitly override or constrain court doctrine; and administrative acts that change the issues and methods that the courts must address in deciding a particular type of case (such as changes in burdens and standards of proof).

For the courts, decisions are opinions in cases that not only state the outcome of a case but explain the basis for it. The term "doctrine" refers to the principles enunciated by a court to justify its particular mapping of the factual circumstances of a case into an outcome: who wins, who loses, and what happens to both the winner and the loser. As used here, judicial doctrines have a broad meaning. They range from the very general[14] to the highly specific.[15] We interpret doctrine as being the set of rules and methods to be used to decide a particular class of cases. We also allow doctrine to be intentionally nonspecific, and refer to a concept that we call the "doctrinal interval"—that is, the range of particular, perhaps inconsistent rules that are acceptable to the Supreme Court when reviewing decisions by a lower court. Vague or elastic doctrine can be explicit (for example, a Supreme Court opinion can state multiple approaches to deciding a particular type of case) or inferred (for example, the Supreme Court can persistently refuse to resolve inconsistent precedents among the circuit courts).

Finally, we analyze the system of interactions among the various actors in the government by imposing a particular sequence in which

14. See, for example, the discussion of the implied constitutional right of privacy in *Griswold*. Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965) (Douglas, J., opinion of the Court).

15. See, for example, the detailed explication of the so-called Areeda-Turner test for predatory pricing (requiring prices not to fall below average variable cost) in the opinion of then-appeals court judge, now Justice, Breyer, in Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983).

they make decisions. The starting point is an exogenous shock that threatens to upset the existing set of policies. In our model, this happens in one of two ways: an election changes the derived preferences of at least one elected branch, or a lower court resolves a new legal issue in a manner that is controversial among the elected branches and the Supreme Court. In either case, the shock instigates a sequence of decisions by each actor to move policy as close as possible to the actor's preferred position. Each actor is assumed to have rational expectations and to make decisions in full and correct anticipation of the actions that will be taken later by the other actors.

The sequence of decisions among the courts and the elected branches is somewhat different for the two types of exogenous shocks.

For a shock created by an election, the sequence is as follows.

1. The elected branches decide whether to adopt new policy.

2. If a new policy is adopted, the lower courts make decisions in cases regarding that policy.

3. The Supreme Court decides whether to take appeals and, if it decides to do so, issues its doctrine.

4. Lower courts then decide whether to comply with the doctrine in future decisions.

5. The Supreme Court decides which appeals to hear as a means of forcing compliance on noncomplying lower courts.

6. Steps 1 through 5 are repeated until all decisions remain unchanged.

If the shock is a new legal issue, the sequence is as follows.

1. The lower court decides (and the loser appeals).

2. The Supreme Court decides whether to hear the appeal, and if certiorari is granted, issues a decision that establishes a new legal doctrine.

3. Each lower court in future cases decides whether to comply with the new doctrine.

4. The Supreme Court decides which appeals to hear as a means of forcing compliance on noncomplying lower courts.

5. Each elected branch decides whether to attempt an upset of the new doctrine and, if so, how to do so (for example, substantive legislation versus changes in the judicial system).

6. Steps 1 through 5 are repeated until the legal doctrine, the pattern of lower court decisions, and the previous actions by the elected branches are unchanged.

The difference between these two sequences is whether the elected branches act first or last in the sequence of decisions.

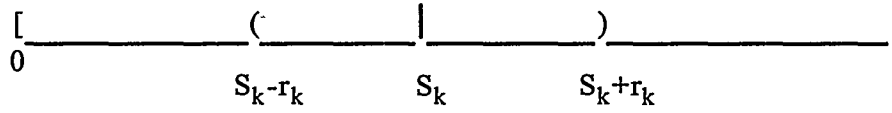
A. The Basic Theory of Hierarchical Courts

Our starting place for the positive theory of judicial doctrine is the relationship between the Supreme Court and the lower courts. A salient fact about decisions to hear an appeal is that the Supreme Court has limited resources, and so cannot grant a hearing to every loser in a lower court. To some extent, the number of cases that the Court can take depends on the resources provided by the elected branches through the budgetary process. Nevertheless, the range of variability in the capacity of the Court is small compared to the gap between the Court's capacity and the number of cases decided by lower courts. Thus, for simplicity, we assume that the Court has a fixed "budget" that determines the number of cases that it can hear each year. In our model of Court decisionmaking we allow the resource requirements of different types of cases to differ so that the Court can make a trade-off between a larger number of relatively undemanding cases versus a smaller number of cases that consume more resources per case. However, for the purpose of simplifying the treatment here, we assume that every case requires the same time and effort by the Court.

To implement the idea of judicial doctrine, we assume that it consists of a statement about the range of lower court decisions acceptable to the Court on an issue of law. For each legal issue or distinct combination of legal issues, there is a separate doctrine, and each doctrine has the effect of ruling out some outcomes of legal disputes. The Court has the discretion to make the range of variability in acceptable outcomes narrow or broad. At one extreme, it can tolerate chaos by refusing to hear all appeals on a given issue, thereby implicitly establishing a "doctrine" that any feasible outcome is acceptable. At the other extreme, the Court can specify completely the outcome that ought to emanate from a given category of cases, and tolerate no deviation.

Graphically, the choice of doctrine on any given legal issue can be represented as shown in Figure 1. Here the choice of doctrine is represented as the selection of an acceptable subset of the line segment

FIGURE 1: CHOICE OF DOCTRINE



from 0 to 1. For simplicity, we depict the doctrinal interval as a symmetric region around the Supreme Court's ideal point, S_k, implying that the Court tolerates deviations of magnitude r_k from its most preferred outcome. In reality, of course, the doctrinal interval would not necessarily be symmetric, but exposition is facilitated if we assume that it is for purposes of illustration. The choice of S_k with $r_k = 0$ represents categorical doctrine that tolerates no deviance, whereas the interval where $r_k > 0$ represents a doctrine that accepts any lower court decision within $[S_k\text{-}r_k, S_k\text{+}r_k]$.[16] We assume that all of the relevant actors have single-peaked preferences over outcomes for each distinct type of case.

If the Supreme Court's preferred outcome is S_k, the obvious question is whether S_k with $r_k = 0$ will be adopted as a categorical doctrine. The answer almost certainly is that it will not. In considering whether to adopt S_k with $r_k = 0$ the Court considers whether noncompliance with this doctrine is likely and, if so, whether the Court wants to use its resources to hear appeals of noncomplying decisions. If all lower court judges also have S_k as their preferred policy, then the Supreme Court has no incentive to adopt an explicit doctrine. This decision might create the illusion of doctrinal chaos—a legal issue exists for which there is no reigning Supreme Court precedent—but in reality the legal doctrine is inferentially obvious from identical decisions by all lower courts.

Suppose instead that lower courts have differing preferences, so that a wide range of outcomes can be expected from cases that raise identical legal issues. Initially, assume that lower courts do not care whether their decisions will be reversed. If so, each lower court will simply make a decision D_{ik} on [0,1] that corresponds to that court's

16. Our analysis does not explicitly take into account the important distinctions in the law between categories of outcomes in Supreme Court cases. These decisions range from simply accepting or remanding a decision with minimal comment to major path-breaking opinions that resemble law review articles, and from joint opinions of a solid majority to a series of sometimes mutually inconsistent opinions, none of which is accepted by a majority. The variability in the form, content, and precedential value of these decisions is obviously related to our notion of judicial doctrine as a range of feasible outcomes, rather than a single point.

preferred outcome L_{ik}, and virtually all outcomes will be out of compliance with the categorical doctrine S_k (where $r_k = 0$). In principle, the Court can hear every single appeal, and replace every decision with its preferred outcome S_k, but in practice this is very unlikely. In most instances, the Court will regard decisions that depart only slightly from S_k as not being worth the cost of accepting an appeal and overturning the decision of the lower court. Because the Court can take relatively few appeals, it will most likely prefer to take a case on some other issue where the lower court decision departs from the Supreme Court's ideal point by a greater amount. Hence, the Court has reason to adopt a more elastic doctrine ($r_k > 0$) where the endpoints represent outcomes nearest to S_k for which the gain from substituting S_k for the lower court decision D_{ik} is worth the opportunity cost in forgone appeals of hearing the case.

In dealing with noncompliance by lower courts, the Supreme Court's optimal decision rule is to establish a doctrine on each issue that minimizes the total loss arising from lower court decisions departing from the Court's ideal decision. Suppose that all cases can be assigned to a dimension like that depicted in Figure 1. For each decision, the Supreme Court receives some utility based on the distance between the decision D_{ik} and S_k. When an appeal is brought, the Court inspects the lower court decision and decides whether to hear the appeal.[17] Thus, the decision to accept an appeal is simplified to two actions: decide whether to bear the cost of the appeal, and, if the appeal is accepted, change the decision. Here we assume that the Court will change the decision to its ideal, S_k; however, because reversing a lower court decision has value in deterring potentially noncomplying judges, the Court's best strategy may be to move to the boundary of the doctrinal interval further from the ideal point of the lower court. Again, for ease of exposition, we ignore this possibility, and assume that when the Supreme Court reverses a lower court decision, it picks its own ideal as the new outcome.

Lower courts make some number of noncomplying decisions; however, the Supreme Court may not be able to review all of them

17. Whereas in reality the Court may not know whether a decision is noncomplying until it hears the case, for the purposes of discussion we ignore this uncertainty and assume that the Court costlessly can determine whether a lower court decision is inside or outside its band of tolerance. All of the core conclusions from the simple model discussed here are retained if the Court costlessly observes a signal about whether a decision is in compliance, where the probability of concluding that the decision is not in compliance declines as the lower court's decision gets closer to the range of acceptable decisions, as discussed in the Appendix.

due to its limited capacity for appeals. If the number of noncomplying decisions exceeds the number of appeals that the Supreme Court can accept, the task of the Court is to accept the cases for which the gain from taking the appeal is expected to be largest. For any two types of cases, i and j, the Court will pick its doctrine such that the marginal cost to the Court of an increment of noncompliance is exactly the same for both issue dimensions.[18]

From the logic of the preceding argument, categorical doctrine emerges only when there are few (but not zero) noncomplying lower court decisions, the Court regards the slightest deviation from its doctrine as very costly, and the costs of reviewing these cases are smaller than the benefits. None of these three conditions alone is sufficient to cause the Court to adopt a narrow doctrine. For example, if the number of cases is small and the Court finds the hearing of all appeals feasible, it may not adopt a narrow doctrine if small deviations from its doctrine are not regarded as very costly. If the court regards even slight deviations as costly, it still cannot hear all appeals if the number of cases exceeds the maximum number of appeals that can be taken.

The most important implication from this simple exposition is the following: *A change in the number of cases or in the distribution of lower court decisions will cause a shift in the judicial doctrine adopted by the Supreme Court.*[19]

Thus far, the argument has assumed that lower courts simply pick their preferred outcome, but this simplification is inconsistent with the assumption that lower courts are rational optimizers. If lower courts correctly anticipate the choice of doctrine and accepted appeals by the Supreme Court, they will not necessarily pick their preferred decision.

Consider the following example in a world with only one type of case (thus we drop the subscript k). A noncomplying lower court can pick its preferred policy L_i. If there are NC noncomplying decisions and the Court reviews R appeals, then the lower court faces a probability R/NC of having the outcome changed to S and a probability $(1\text{-}R/NC)$ of having the outcome remain at L_i, for an expected value of $(R/NC)^* |L_i\text{-}S|$.[20] Alternatively, the lower court can pick the decision that, while complying with doctrine, is closest to its

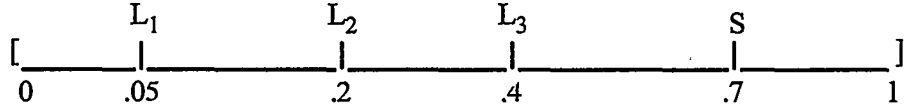
18. We have ignored for purposes of discussion here the possibility that the costs of writing doctrine on the two issues are different.

19. See Proposition 3 in the Appendix.

20. This assumes that the courts have linear Euclidean utility with a slope of -1.

ideal (for example, the lower court will pick the endpoint of the doctrinal interval that is nearest to its ideal decision). This behavior is illustrated in Figure 2, which adds the preferred decisions of three lower courts, L_1, L_2, and L_3, to the situation shown in Figure 1.

FIGURE 2: LOWER COURT DECISIONS



To determine the doctrine that the Supreme Court adopts in equilibrium, we investigate a series of potential choices by the Court. First, assume that the Supreme Court can review at most one of these three cases. Suppose that the Court were to announce the narrowest possible range of acceptable doctrine; in other words, only its ideal point, S, is acceptable. Under this doctrine, none of three lower courts will comply. If a lower court did comply, it would obtain the outcome $S = .7$ with certainty. If a lower court instead picked its own ideal point, it would have a 2/3 probability of remaining there and a 1/3 probability of being reversed to the Supreme Court's ideal, $S = .7$. Because noncompliance is no worse and sometimes better than compliance, the lower court would always choose not to comply.

For the Supreme Court, the total losses of the narrow doctrine S (with $r = 0$) are nearly 1.0: with 1/3 probability, each court is reviewed and placed at S for a loss of zero, but with 2/3 probability, each court remains at its ideal point, for a loss of .65, .5, and .3, respectively.[21]

Notice that the Court does better if it *expands* the range of acceptable decisions. Consider, for example, a range of acceptable decisions of [.49,.91]. In this case, L_3 will comply. If L_3 chooses its ideal point, then it has a 2/3 chance of remaining at its ideal point (with a utility loss of 0) and a 1/3 chance of being moved to S (loss of .3), or an expected loss of .1. If L_3 complies by choosing .49, it loses slightly less than .1, and so it prefers to comply at point .49. Neither L_1 nor L_2 will comply. The total utility loss for the Supreme Court under this doctrine is .785, less by .225 than it received under the choice of narrow doctrine.[22]

21. (1/3)0 + (2/3)(.65+.5+.3) = .967.

22. The expected loss to the Supreme Court from L_1 is (1/2)(.65) + (1/2)0 =.325; the expected loss from L_2 is (1/2)(.5) + (1/2)0 = .250, and the loss from L_3 is .210. These losses sum to .785.

Nonetheless, the Supreme Court can do even better if it further expands its doctrine. Suppose that it increases the range of acceptable decisions from [.49,.91] to [.44,.96]. This induces L_2 to comply.[23] L_2's behavior, in turn, induces L_1 to comply. Because L_1 remains the sole court in noncompliance, it will be reviewed with certainty. L_1 therefore chooses to comply rather than to be moved to S. The total Supreme Court losses under this doctrine are .78, preferable to either of the two choices studied above.[24]

This example illustrates the main mechanism underlying our model. Doctrine emerges as part of the equilibrium interaction among the Supreme Court and the lower courts, each acting to maximize its own preferences or ideology. The Supreme Court sets a narrow or wide range of acceptable decisions to induce the optimal pattern of compliance among the lower courts. Judges in the lower courts are modeled as strategic actors facing a trade-off between pursuing a personal policy agenda and seeing some of their decisions reversed by a higher court, and adopting the best available complying doctrine, without fear of successful appeal.

No general theoretical result can be obtained without further specification of the key elements of the theory: the number of cases, the appeals capacity of the Supreme Court, and the ideal points of all courts. One can construct examples in which doctrinal intervals are relatively narrow and all lower courts comply, or in which doctrinal intervals are relatively broad but the number of noncomplying decisions is large. For our purposes, two key results emerge. First, equilibria exist having the following properties: (i) the doctrine rules out some lower court decisions; (ii) noncomplying decisions arise and are appealed; and (iii) some appeals are taken and the decisions are reversed, but others are not, even when the decision by the lower court is not consistent with established doctrine. Second, these equilibria yield comparative static results that allow us to examine how shifts in various political parameters affect the endogenous creation of doctrine.

The Court can control the degree of noncompliance by changing the width of the doctrinal interval. A narrowing of the interval is worthwhile if pulling most of the decisions at the endpoints of the interval closer to the Court's preferred outcome is more valuable than

23. Complying by L_2—choosing .44—yields a loss of .24 whereas not complying and choosing its ideal point yields an expected loss of .25.

24. All courts pick .44, making the loss to the Supreme Court 3*.26 = .78.

the losses that arise because some lower court decisions move from the endpoints of the old doctrinal interval to more extreme outcomes and are not reversed subsequently.

Two important implications of this model relate to the effects of changing the initial conditions that support the type of equilibrium described above. First, if the number of lower courts with preferred positions outside (inside) the doctrinal interval increases, the Court's doctrinal intervals will expand (contract) and cases, on average, will exhibit a greater (lesser) mean departure from the Court's preferred outcome. Second, if the number of cases decided by lower courts increases (decreases), doctrinal intervals expand (contract).

An interesting implication of this analysis is that, for a Court of fixed size and capacity, a secular growth in caseload in the lower courts will cause a loss of doctrinal influence by the Supreme Court. One would expect that, as time passes, federal appeals courts and state supreme courts will become more influential, and more unresolved disagreements will emerge among courts at the same level of the judicial hierarchy. Of course, if lower courts are more autonomous, judicial doctrine becomes more chaotic in that litigants and legal scholars perceive a wider range of complying decisions and a greater number of noncomplying decisions that are not successfully appealed. The only cures for an increase in doctrinal chaos are: (1) reducing the caseload of the courts by using other dispute resolution mechanisms or by shrinking their jurisdiction; and (2) creating multiple separate courts at the top of the hierarchy so as to increase the capacity of the collective supreme courts to take appeals.

B. Enter the Elected Branches

The starting point for our analysis of the elected branches is the presence of dissatisfaction among them with judicial doctrine on some types of cases. Two questions arise: How can the elected branches affect the equilibrium in judicial doctrine described in the previous section, and under what conditions will the elected branches succeed in this attempt?

The first question has two relatively easy answers: The elected branches can shift policy by passing statutes and appointing judges who reflect the policy preferences of the elected branches. Most of the means by which elected politicians influence the judiciary are well-known, although in some cases the preceding model sheds new light

on the way in which new legislation and appointments affect judicial doctrine.

One way to shift judicial doctrine is to pass laws that change the role of the courts in certain types of cases. For example, the courts oversee the implementation of policy by the bureaucracy. In setting up the procedures to govern agency decisionmaking, the elected branches can make appeals to the court system easy and frequent, or difficult and rare, by the provisions of legislation that establish the agency's mandate, decision process and burden of proof, and the rights to judicial review of agency decisions.[25]

As an illustration, enactment of legislation giving property owners the right to compensation for federal regulations that reduce the value of their property would generate an additional basis for litigation in response to a regulation and would increase the caseload in the lower courts. Some judges, finding the new law offensive, might refuse to enforce it, generating appeals to the Supreme Court. Unless the Court cares so little about this issue that it is willing to accept doctrinal chaos, it will be forced to hear some of these appeals, initially to establish its doctrine and then later to enforce its decision.

The elected branches also can affect the power of the Court by passing laws affecting civil litigation. For example, the proposals before Congress concerning fee shifting and caps on jury awards in personal injury cases would reduce litigation, and so reduce this source of appeals. As a result, the Court could devote more resources to enforcing its doctrine in other areas, leading to narrower doctrinal intervals and a reduced rate of noncompliance by lower courts. Alternatively, the elected branches can reduce the influence of the Supreme Court by passing statutes that increase the effort the courts must devote to hearing a particular type of appeal—for example, switching the standard of proof for an agency decision from "reasonable basis" to "preponderance of the evidence." Holding fixed the number of lower courts, this change would reduce the number of cases by increasing the time and effort devoted to each. Similarly, elected politicians can influence Supreme Court doctrine by changing the Court's budget. All else being equal, greater resources allow the Court to enforce a narrower range of acceptable decisions.

25. *See, e.g.*, McCubbins et al., *supra* note 12.

The main implication of these examples is that legal reforms that superficially appear to be "housekeeping details" about legal procedures can change the ability of the Court to influence policy on completely unrelated matters. Any significant change in the federal caseload affects *all* of the doctrinal intervals established by the Court. An era of major expansion in judicial review of regulatory decisions, for example, would reduce the ratio of accepted appeals to total lower court cases, and so reduce the ability of the Supreme Court to enforce any given doctrinal interval. The lower courts would respond by increasing the number of noncomplying decisions, and the Supreme Court would respond by widening the doctrinal interval. Recognizing this result, if the elected branches seek to weaken the authority of the Supreme Court, one way to do so is to pass laws that increase the caseload of the lower courts.

As has long been recognized, the president and the Senate can influence judicial doctrine by filling vacant judicial posts in a manner that shifts the preferred outcome of the Supreme Court (by changing the identity of the median voter on the Court).[26] Our model shows that political officials may also affect the Supreme Court's choice of doctrine by changing the distribution of preferred policies among members of the lower courts. The mechanism involved in the latter strategy, in the context of our model, is that the president and the Senate can appoint judges who are prone to noncomplying decisions, forcing the Court to expand the tolerable decision interval in Figures 1 and 2.

The new equilibrium after a wave of noncomplying judges are appointed to the lower courts has two key properties. First, on the issues over which the Court and the elected branches disagree, the Supreme Court will take more appeals and reverse more decisions, whereas on issues on which the Supreme Court and the elected branches are closer to agreement, there will be fewer appeals and reversals. This effect arises as the Court reallocates effort to enforce its doctrines on the dimensions in which noncompliance has increased. Second, on all issues, the size of the tolerable decision interval will increase, so that in general the Supreme Court will lose influence on all types of cases, not just on the types in which its preferences conflict with those of the elected branches. This effect occurs because the

26. *See, e.g.*, ACKERMAN, *supra* note 5; TRIBE, *supra* note 8; Gely & Spiller, *supra* note 3; Martin Shapiro, *The Constitution and Economic Rights*, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 74 (M. Judd Harmon ed., 1978).

Court responds to the increase in noncomplying decisions by relaxing its standards everywhere, to balance the marginal cost of loss of influence evenly across all issues. Even if every single new judge is in compliance on issues on which the Court and the elected branches agree, the Court's best response to noncompliance on other issues is to relax doctrine everywhere.

This conclusion can be illustrated by returning to the example depicted in Figure 2. Recall that in this example the Court was able to achieve complete compliance of the lower courts by setting a relatively wide set of acceptable decisions, the interval [.44,.96]. Suppose an election inaugurates newly united political branches on the left. To oppose the Supreme Court's rightward tendencies, the political branches expand the lower judiciary, say by adding a fourth lower court, L_4, at the same ideal point as L_1, .05. Without L_4 and with the doctrine set at [.44,.96], L_2 preferred to comply when its probability of review was 1/2. Adding L_4, however, changes this calculus. Under doctrine [.44,.96] but with the addition of L_4, the probability of review for L_2 falls from 1/2 to 1/3. The smaller threat of review increases L_2's expected value of noncompliance, so it will not comply with this doctrine.[27] Likewise, neither L_1 nor L_4 will comply. In response to the expansion of the lower courts, the Supreme Court will expand the set of acceptable decisions to [.366, 1].

The second effect, expanded intervals across all policy dimensions, tempers the willingness of the elected branches to add noncomplying judges to the lower courts. The elected branches will not expand the lower courts up to the point where the benefits from a larger number of noncomplying decisions plus a more favorable range of complying decisions equal the cost of filling another vacant judgeship. The reason is that expanding the courts also imposes costs on the elected branches in areas where they generally agree with existing Court doctrine. If judges who do not comply with existing doctrine in one area are added to the lower courts, the Supreme Court will respond by adopting wider doctrinal intervals, including those on which all branches have the same preferences. Thus, to be willing to add noncomplying judges to the lower courts as a means of shifting judicial doctrine, the gap between the Court and the elected branches must, in some sense, be "large"—that is, the elected branches must differ with

27. Without L_4, L_2 just barely preferred to comply. With the addition of L_4, L_2's loss from complying remains at .24. If it fails to comply and chooses its ideal point, it loses only (1/3)(.5) + (2/3)0 = .167.

the Court on a large number of issues (so that generally noncomplying behavior is regarded as more likely to be good than bad) or by a very significant amount on a few issues (so that the elected branches are willing to sacrifice policy in many areas to achieve "better" outcomes in a few).

Packing the lower courts requires passing a judiciary act that creates new judgeships, and is an extreme example of filling vacancies with noncomplying judges. An increase in the number of lower court judges brings more rapid change in the shift of judicial doctrine than would arise from simply filling vacancies as they arise. Because court packing is speedier and causes a greater change in doctrine, both its benefits and its costs are greater than simply filling vacancies with noncompliers.

Packing the lower courts is likely to increase the total amount of litigation because an increase in the number of judges will cause a reduction in the waiting period between filing a case and reaching an outcome. This increase in caseload will increase the number of noncomplying decisions, which will force the Court to widen its doctrinal intervals. The new cases can be expected to have lower stakes, and so on average to have less social value than the old cases. In particular, if the elected branches pack the lower courts for the purpose of deriving policy benefits from more noncomplying decisions and wider doctrinal intervals, they will add judges beyond the point at which the cost of the new judgeships and the new cases they create exceeds the social value of those cases. Thus, court packing creates an external cost—a form of "judicial pollution" in the form of low-value cases—that both the existing set of judges and the elected branches would prefer to avoid. Because court packing is costly to all sides, it will not occur unless the gap between Court doctrine and the preferences of the elected branches is extreme. The courts and the elected branches should be expected to reach some compromise concerning judicial doctrine rather than to revert to a circumstance in which the elected branches pack the courts. Consequently, one would expect to find lower court packing, as opposed to a combination of greater judicial deference to the preferences of the elected branches plus appointments of more "friendly" judges to vacancies in the courts, only in periods immediately following a realigning election in which the new

elected branches perceive the entire judicial system to be the defender of a discredited status quo *ante*.[28]

C. Long-term Political Influences on Judicial Doctrine

The most important procedural difference between packing the courts and simply filling vacancies is the number of elected branches of government that must be involved. Appointing judges to vacancies requires cooperation between the president and the Senate, whereas expansion of the federal court system also requires cooperation with the House to pass enabling legislation. Likewise, major legislative changes that alter the workload of the court system — such as changing jurisdiction or the standards for deciding cases — or that explicitly reverse Supreme Court decisions also require collaboration among all three branches. Because the different principles of representation of the three elected branches cause divergent policy preferences among them, it is generally easier for two branches to agree than for three, so that packing and other legislative actions should be relatively difficult to accomplish. Most of the time legislative changes should be a less important factor in explaining changes in doctrine than simply filling vacancies with judges who have preferences similar to the policy preferences of the elected branches. For the political branches to influence judicial doctrine by statutory methods, the policy differences between the elected branches and the Supreme Court must be substantial. Because the Court is appointed by the last few presidents and confirmed by the last few Senates, normally Court doctrine will not be wildly divergent from the preferences of these branches. Thus, statutory methods of changing doctrine should be rare.

The last means available to the elected branches for influencing judicial doctrine is a more subtle implication of game theoretic approaches to judicial behavior, and consists of being able to make credible threats of statutory action against established doctrine. Just as the Court will adjust doctrinal intervals in response to changes in the behavior of lower courts, the Court will also adjust doctrine to take into account possible future actions by the elected branches.[29]

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28. The deFigueiredo and Tiller model also suggests this, and their empirical results provide evidence for this contention. John M. deFigueiredo & Emerson H. Tiller, Congressional Control of the Courts: A Theoretical and Empirical Analysis of the Expansion of the Federal Judiciary (1995) (unpublished manuscript, on file with author).

29. The basic approach has been used by Eskridge and Ferejohn to examine the conditions under which a legislature will reverse a noncomplying Supreme Court decision about statutory

For the elected branches to use statutes or the threat of statutes to force a shift in judicial doctrine, several conditions are usually required.[30] First, there must be a rather recent, dramatic shift in the preferences of the elected branches, such as the kind of partisan shifts that took place around 1860 and 1930. Otherwise, a shift in doctrine would have already taken place. Second, the differences in preferences among the elected branches must be small compared to the general shift in preferences due to election outcomes. Only under this condition will the branches be able to reach agreement about how to change legal doctrine, and either pass relevant legislation or credibly threaten to pack the lower courts. Third, the shift in electoral politics must be reasonably durable. Because of the election cycle in the Senate, at least two elections are almost always required to cause a major change in that body. Moreover, appointing new judges also takes time. Hence, durability is usually required for statutory methods to be used to influence judicial doctrine, and the perception of durability is necessary for the Court to shift doctrine in response to a credible threat of legislation.

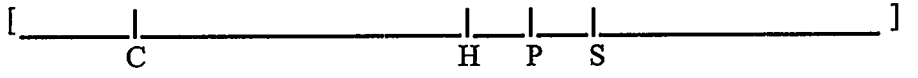
The Court is not without weapons to deal with attempts by the political branches to shift its doctrine. The Court can be expected to prefer strongly that the elected branches shift its doctrine by passing specific substantive statutes and by filling vacancies with noncomplying judges than by packing the lower courts. Court packing, because it generates more cases, weakens the power of the Court more than obtaining the same distribution of preferences among lower court judges by filling vacancies. This effect arises from the fixed capacity of the Court to hear appeals and the importance of the ratio of Court capacity to total decisions in determining the power of the Court to enforce its doctrines. Hence, the Court should be willing to acquiesce to some extent on the areas of judicial doctrine on which it disagrees with the elected branches in order to stave off court packing and to preserve its authority on other issues. Because the elected branches prefer that the Court retain doctrinal authority in areas where all the branches

interpretation, and the best response of the Court to the prospect of statutory reversal. *See* Eskridge & Ferejohn, *supra* note 6.

30. In addition to the mechanism described in this paragraph, another mechanism is an unanticipated novel decision by the Court. Such a decision might arise from the emergence of a new issue or stealth appointments. Here the event that opens a large gap in policy preferences between the Court and the elected branches is a shift by the Court, rather than a shift by the elected branches. Because the Court is appointed by the president and the Senate, this pathway for a distinct, dramatic political intervention to influence doctrine ought to be rare.

agree, a deal that at least limits the extent of packing is likely to be feasible.

FIGURE 3: POLICY CONFLICT BETWEEN THE COURT AND THE ELECTED BRANCHES



Typically the Court will prefer to adopt its own doctrinal changes rather than to wait for change by substantive statute. The reason is that the Court can take advantage of differences that exist among the elected branches. Passing a statute requires either a supermajority in each legislative branch or unanimous agreement among a majority in each legislative branch plus the president. If the Court establishes a doctrine before the elected branches act, it can foreclose the possibility of legislative action if it picks a policy that would create disagreement among the elected branches about the proper form of response. The potential for using this strategy is illustrated by the example depicted in Figure 3. The preferred policies for each branch are shown as *C* (Supreme Court), *H* (House), *P* (President), and *S* (Senate), and the established doctrine is assumed to be *C*. If the elected branches succeed in attacking this doctrine by statute, theoretically they are expected to enact a policy somewhere between *H* and *S*. This range of policies represents the possible compromises between the two legislative branches, and for each branch including the president any policy in this range is closer to the ideal point of that branch than to *C*. If the Court anticipates that such legislation is likely, it can assure a better outcome for itself by adopting *P*, for then, ignoring the possibility of veto overrides, the president will veto all bills that attempt to alter this doctrine.

The Court will also have preferences over how it compromises with the elected branches. Specifically, the Court would prefer to widen the doctrinal interval—indeed, perhaps simply to withdraw from hearing appeals from all but the most extreme lower court decisions—than to adopt the doctrine preferred by the elected branches. This strategy enables the Court to preserve some decisions that correspond to its preferred outcome. Of course, the interval cannot be so wide that it invites more statutory intervention, but the Court generally can expect that the elected branches will not bear the costs of

statutory intervention if the doctrinal interval includes some outcomes in the range of feasible legislation (as defined by *P*, *H*, and *S* in Figure 3) and otherwise does not deviate too far from this range.

The last means by which the Court can protect its discretion is to attempt to contest the elected branches politically by making disagreements between the Court and the elected branches a political issue. For this strategy to make sense, the Court must anticipate that the shift in election outcomes is, or could be made to be, temporary. Because filling vacancies and packing the lower courts takes time—and probably at least two election cycles—the Court has the option of filling this period with highly visible decisions that focus public attention on the policy implications of shifting from the old political regime (now represented only by the Court) to the new, with the hope of causing a backlash.

As a tactical matter, the Court's method can be to change case selection and judicial doctrine in precisely the opposite manner from that which would occur if the political change is widely perceived as durable. That is, in Figure 3, if current doctrine is somewhere between *C* and *P*, the Court can make an "in your face" decision by moving doctrine closer to *C*. Such a decision will highlight the differences between the Court and the political branches. Similarly, the Court could reapportion its appeals in favor of the issues in dispute with the elected branches, reversing more noncomplying decisions than would be rational if the system were in doctrinal equilibrium. This strategy causes the Court temporarily to sacrifice some influence on other issues where the disagreements with the elected branches are small (by reversing fewer noncomplying decisions on those issues) as an investment in retaining greater control in the future.

From these arguments we derive the sufficient conditions for electoral politics to be the source of a significant shift in judicial doctrine. We would expect judicial doctrine to shift after major electoral realignments that sweep across all three elected branches. But to the extent that these electoral sweeps are of doubtful durability, we would expect the effect of the elected branches on doctrine to be small, and for the Court to adopt a relatively visible strategy of fighting the newly elected officials. This phenomenon is more likely if the scope of disagreement between the Court and the elected branches is great (that is, it involves many legal issues). When disagreements are confined to relatively few issues, the Court is more likely to respond to a major shift in electoral politics by essentially abandoning significant

enforcement of doctrine in the areas of disagreement so as to preserve its authority elsewhere.

The necessary condition for a shift in doctrine is that the relationship of preferences among the Court and the elected branches shifts to broaden or narrow the range of judicial discretion. For example, if an election durably shifts the most preferred policy of one elected branch to a position near the preferred policy of the Court, the Court can safely change doctrine toward its preferred position without fear of reversal by either substantive statutes or a court-packing judiciary act. If the shifting body is either the president or the Senate, the long-run threat of noncomplying appointments for vacant positions also disappears. An immediate application of this insight is the congressional elections of 1994. If the shift is perceived by the Court as having a reasonable prospect for being durable, it can be expected to be followed by a wave of decisions that break established precedent in ways generally favored by the Republican majorities on the Court and in Congress.

II. HISTORICAL CHANGES IN THE JUDICIARY

Political change in America is driven by elections. The election of 1932, for example, brought wholesale changes in public policy, the composition of government, and political competition. The elections of 1974 and 1976 saw the end of the conservative coalition that limited Democratic hegemony since 1937. The election of 1980 produced a partisan division between the House and Senate for the first time since 1932 and, together with Republican control of the presidency, produced lasting changes in federal policy. While few elections provide as jarring a shift in policy as did the election of Republican majorities to the House and Senate in 1994, every election engenders some policy effects.

We have argued that the Court, in its choice of doctrine, is driven by the same general electoral forces that drive American politics. Generation-long eras of stability in judicial doctrine reflect an underlying stability in the electoral and partisan arenas. When elections bring about a permanent change in the majority party, elements central to judicial doctrine will also change. Though it is not surprising that electoral politics shapes public policy, the electoral effects on judicial doctrine are subtle, and have not been thoroughly examined. Some scholars have looked for direct effects of electoral change on the Court and have found few such effects. Others have looked for

the effect of public opinion on Court decisions and have found mixed results. Neither group has studied the mechanism of change that we have hypothesized.

Any influence of electoral politics on judicial doctrine must be mediated by the first two branches of government. This mediation affects judicial doctrine both directly and indirectly. Direct actions by the executive and legislative branches of government can include restructuring the court system, changing court procedures and jurisdiction, and making appointments to the bench. Partisan realignments in the elected branches have led to major amendments to the judiciary acts, the creation of new courts and court systems, and the adoption of large, omnibus judgeship appointment measures. Many scholars have documented the effect of politics on judicial appointments and behavior. By contrast, our focus is on how the broad scheme of appointments and changes in the structure of the courts reshape the judiciary in bold, dramatic, and partisan ways.

The changes in the size of the federal bench correspond to our expectations.[31] Of the 403 judgeships added to the lower federal bench from 1869 to 1968, all but twenty-two were added during periods of unified party control. The circuit court of appeals has been expanded thirty-five times since 1802. All but four of these expansions came during periods of unified party control of government. Only two of these exceptions were significant increases, and both were quite recent, involving increases during the Reagan and Bush presidencies. Franklin Roosevelt, with the aid of Democratic majorities in both houses of Congress, expanded the circuit court by more than twenty-five percent.

The most significant changes in the size and structure of the federal bench occur after a partisan realignment of the first two branches of government.[32] The wrangling and maneuvering over the size and shape of the federal bench at the end of the Federalist era and the beginning of the era of the Jeffersonian Democrats are legendary. The writing and repealing of judiciary acts as well as the appointment and refusal of positions to magistrates, culminating in *Marbury v. Madison*,[33] exemplify partisan efforts to affect doctrine.

31. For a similar argument and supporting evidence, see DeFigueiredo & Tiller, *supra* note 28.

32. Our data are taken from Gerard S. Gryski et al., *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM. POL. Q. 439 (1993), and Gerard S. Gryski et al., The Federal Judiciary and Institutional Change (1994) (unpublished manuscript, on file with author).

33. 5 U.S. (1 Cranch) 137 (1803).

Fighting over control of the bench did not end with Jefferson's presidency. During Reconstruction, the Republicans not only amended the Constitution to reverse the Court's decision in *Dred Scott v. Sandford*,[34] but enacted sweeping changes to the structure of the judiciary through a series of judiciary acts in the 1860s and 1870s. By these means and through judicial appointments, the Republicans brought about mammoth change in the composition of the lower federal bench. Ulysses Grant's appointments alone accounted for a swing of more than twenty-six percentage points in the proportion of Republicans on the bench. Republican control of the bench continued throughout the period of Republican dominance of national politics, with the Republicans controlling over eighty percent of the lower courts when William Taft left office and over seventy-five percent when Franklin Roosevelt was inaugurated.

Franklin Roosevelt sought to transform the federal bench, and while he failed initially to persuade the Supreme Court to accept the New Deal, he was able to bend the lower courts in the Democratic direction. The Democrats expanded the bench by more than twenty-five percent during Roosevelt's first two terms, and he ultimately made 184 appointments to the lower courts (out of approximately 250 lower court judges). After a brief interlude of Republican congressional control in the early post-World War II era, the return of unified Democratic control brought Harry Truman the largest increase in the size of the federal bench to that time. Much like Olympic pole vaulting records, the Truman expansion was then surpassed in the short span of two congressional periods by Dwight Eisenhower and the Republicans.

The seemingly "can you top this" expansion of the federal judiciary and the partisan competition to control the bench continued after Eisenhower left office. After thwarting the attempts of the Judicial Conference to gain an increase in the size of the federal bench during the last six years of Eisenhower's presidency, the Democrats gave John Kennedy seventy-three new judgeships, the largest increase in the federal bench to that point. Democratic expansion continued with an additional forty-five new positions under Lyndon Johnson. More recently, Jimmy Carter, president when the liberal wing of the Democratic party controlled Congress, was the beneficiary of the largest single increase in the federal bench, 152 new positions.

34. 60 U.S. (19 How.) 393 (1857).

An examination of judicial appropriations from 1923 to 1989 provides similar support for our thesis.[35] Appropriations for the first half of this time period are given in Figure 4. The first substantial increase in appropriations, after the initial, unified Republican efforts in the 1920s, is a jump after the election of 1936. This corresponds to Roosevelt and the Democrats' battle with the Supreme Court as well as a landslide election. The next significant increase followed the 1948 election when the Democrats regained unified control of the government. The 1956 fiscal year increase occurs when the Democrats recaptured the House and the Senate. Because most judges had been appointed by Roosevelt or Truman, an expanded capacity for hearing cases would be expected generally to reflect Democratic values. Figure 5 provides appropriations for the second part of the period, 1957 to 1989. The notable increase in the 1975 fiscal year is due generally to the continued decline of the conservative coalition, and specifically to the House changes surrounding the Watergate scandal.[36] Finally, the growth in the 1980s follows from Republican control of the presidency and the Senate.

The changes wrought in the judiciary through constitutional amendments, reforms of the judiciary acts, creation (or abolishment) of new court systems, reforms of the civil and criminal codes, changes in the pay and benefits for jurists, and appointments to the federal bench all seem to correspond well with our hypothesis that after substantial partisan changes in the elected branches of government, legislation and appointments will be used to influence judicial outcomes. The remaining question is whether these actions have the predicted effect on judicial doctrine.

III. PARTISAN EFFECTS ON DOCTRINE

What determines the content and stability of judicial doctrine? In this section, we derive comparative static results from the theory described in Part I and stated formally in the Appendix in order to arrive at testable hypotheses concerning doctrinal shifts, which we then examine with specific examples.

Our theoretical model yields an equilibrium set of doctrinal decisions by the Supreme Court that have the following implications: The Court will announce more narrow bands on issues it cares more about;

35. Note that a similar examination of budget estimates for these years yields nearly identical results. Also, Figures 4 and 5 are standardized in 1982-84 dollars.

36. *See* DAVID W. RHODE, PARTIES AND LEADERS IN THE POST REFORM HOUSE (1991).

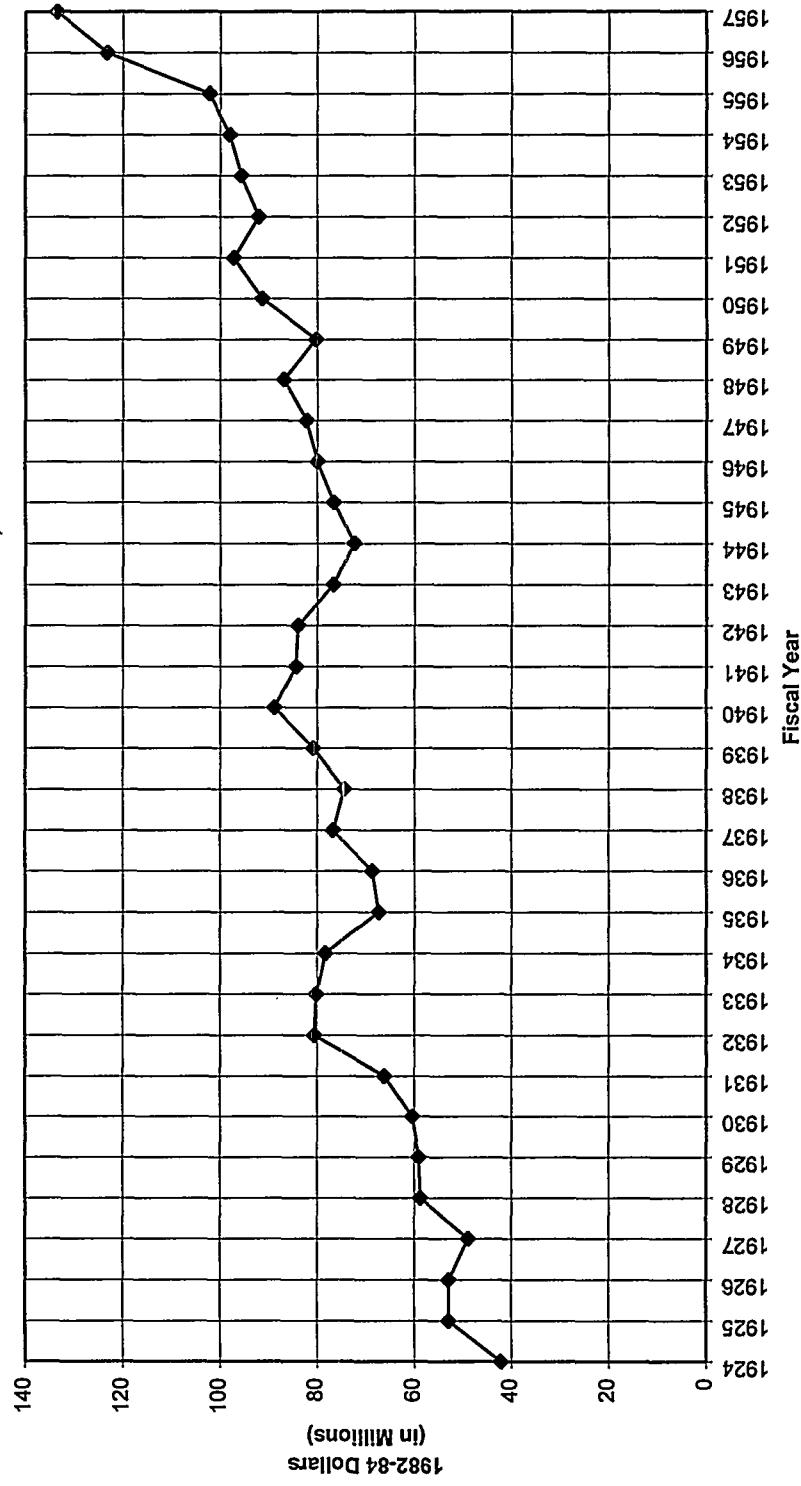


FIGURE 4: JUDICIAL APPROPRIATIONS, 1924-1957

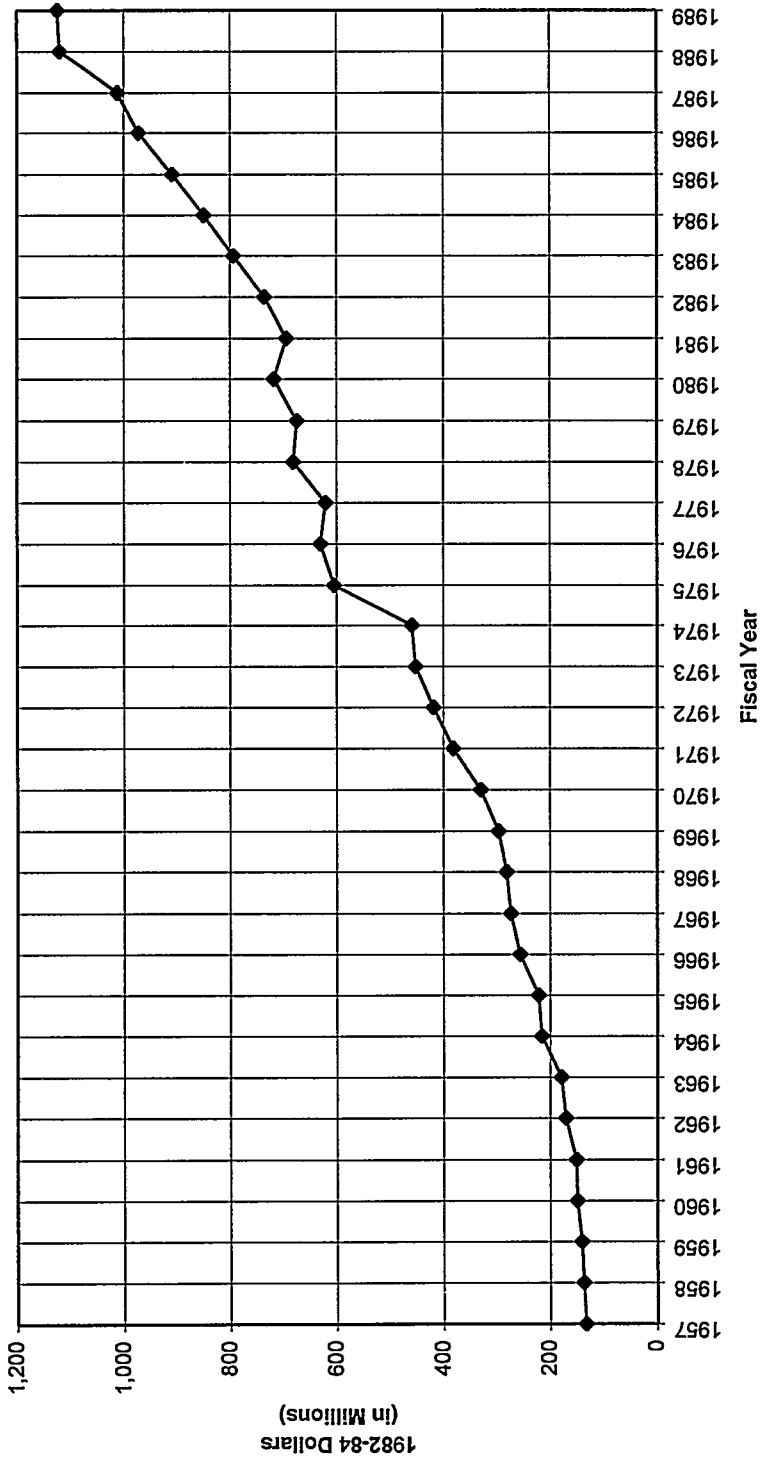


FIGURE 5: JUDICIAL APPROPRIATIONS, 1957-1989

less dispersion between the ideal policies of the lower courts and the Supreme Court will cause a narrower range of acceptable decisions; an increase in the resources available to the Court will cause the range of acceptable decisions to narrow; the appointment to the lower courts of judges with a political ideology different from the elected officials who appointed the Court that created established doctrine will create doctrinal instability by widening the range of lower court decisions acceptable to the Court and, if the political change is durable, eventually will cause doctrine to shift and narrow in the direction preferred by the new political alignment.

These theoretical results point to several political factors that, beyond the obvious influence of appointments to the Supreme Court, influence the doctrinal equilibrium achieved by the courts. Here, we summarize some of the political weapons that directly affect the Supreme Court's doctrinal decisions and the effects of electoral politics on the decision to use them.

First, political officials can indirectly affect doctrine by changing the resources available to the Supreme Court, thus affecting the Court's capacity for reversing defiant lower courts: for example, the Court's budget, the number of bailiffs, the number of issues under the Court's jurisdiction, and the flexibility given to the Court by substantive legislation. The relevant test of the theory here is that legislative changes affecting the balance of resources and caseload in the Court should be associated with changes in doctrine that reflect the preferences of the elected branches.

Second, the elected branches can expand the lower courts. After a political realignment, this expansion changes the distribution of opinions among the lower courts and therefore affects the Supreme Court's ability to enforce its doctrine. The relevant test of our theory is the proposition that an expansion of the lower courts forces doctrinal uncertainties and inconsistencies, which in our terminology is a larger doctrinal interval.

Creating specialized courts is a mechanism of political control similar to packing the lower courts. Congress and the president have created, and sometimes dismantled, such courts in a dozen areas over the last 120 years. New specialized courts not only remove the jurisdiction over a set of issues from the lower courts (or from both the Supreme Court and the lower courts), but they allow political officials to populate the new courts with judges whose views closely accord

with their own.[37] Our theory predicts that these events will occur after major political realignments, and that they will affect judicial doctrine not only in the specific areas affected by the jurisdictional change, but in other areas where the newly elected political leaders disagree with established doctrine.

In sum, the pattern of judicial doctrine, including constitutional jurisprudence, depends not only on the interaction of judges within the judicial hierarchy, but on the direct and indirect effects of political officials. In the remainder of this part, we develop the implications of our approach in three areas of doctrine: labor injunctions early in this century, the role of stare decisis and the rule of law, and the confrontation between the Supreme Court and political branches during the New Deal, including a new interpretation of *Nebbia v. New York*.[38]

A. Labor Injunctions

The history of labor injunctions appears to illustrate our theory. The relevant labor law history divides into four periods.[39] First is a formative period from 1877-95 in which federal judges created the labor injunction and, after 1890, used the Sherman Antitrust Act[40] as a potent anti-labor weapon. Second, 1896-1921 marks a period of experimentation when judges developed limits on the use of labor injunctions. In the third period, from 1921-38, courts removed the limits set in the previous period. Finally, from 1938 onward, the labor injunction has been severely limited by both judicial opinions and considerably more explicit direction from federal legislation.

Each of the turning points dividing these periods reflects major changes in the partisan composition of the elected branches, and several seem to involve the interaction of the lower courts and the

37. Moreover, the threat of removing a jurisdiction from the Court may have an indirect effect even when specialized courts are not created. This conclusion follows from the application of John Ferejohn and Charles Shipan's model. John A. Ferejohn & Charles R. Shipan, *Congressional Influence On Administrative Agencies: A Case Study of Telecommunications Policy*, *in* Congress Reconsidered 393 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 4th ed. 1989). They show conditions under which threats of legislation, even without passage, are sufficient to shift an administrative agency's decisions. Although Ferejohn and Shipan studied the interaction of Congress and an administrative agency, precisely the same logic applies for the interaction of Congress and the Court.

38. 291 U.S. 502 (1934).

39. The details that follow derive primarily from William N. Eskridge, Jr., Dynamic Statutory Interpretation 81-109 (1994).

40. 15 U.S.C. §§ 1-3 (1988).

Supreme Court. The second period reflected the rise of the progressives, the split in the Republican party, and the election of Woodrow Wilson in 1912. William Eskridge calls Wilson's election a watershed for limits on the labor injunction.[41] Not only were Wilson's appointees to the courts generally opposed to labor injunctions, but the Clayton Act, passed by Congress in 1914, became a powerful tool to limit injunctions.[42] The second period came to an abrupt end when the Republicans recaptured united government in 1920. Finally, the third period ended as Roosevelt and the New Dealers wrested control of the courts from the Republican appointees of previous administrations.

Perhaps of greatest interest from our perspective is the swing in policy after 1920. According to Eskridge:

> Notwithstanding [Chief Justice] Taft's early effort at balance, the 1920s were the heyday of the federal labor injunction, with hundreds issued. . . . [T]he Court's decisions in *Duplex*, *Tri-City*, and *Hitchman Coal were rebukes to federal circuit judges who sought to remove the judiciary from labor disputes.* In each case the Supreme Court laid out litigation strategies for employers to follow in complaining about strikes (allege contract violations under *Hitchman Coal*), picketing (allege violence and threats under *Tri-City*), and boycotts (allege secondary activity under *Duplex*).[43]

Duplex Printing Press Co. v. Deering illustrates our themes.[44] Consistent with the pro-labor decisions of the second period, the Second Circuit Court of Appeals announced in *Duplex Printing* a broad interpretation of Section 20 of the Clayton Act, allowing secondary boycotts.[45] Three years later, the Supreme Court not only reversed, replacing the Second Circuit's broad reading with a narrow one, but ushered in the new anti-labor period with considerable parallels to the rulings of the first period.[46] What makes *Duplex Printing* interesting is that the Supreme Court issued its ruling just after the 1920 elections, before any changes in the composition of the lower courts or the Supreme Court had been made. Partisan change in election outcomes appears to have influenced the Supreme Court's decision, but how

41. *See* ESKRIDGE, *supra* note 39, at 93.

42. For example, "[s]ection 6 [of the Clayton Act] overrode at least part of the injunction against the United Mine Workers in *Hitchman Coal*." *Id.* at 96.

43. *Id.* at 101 (emphasis added).

44. 254 U.S. 443 (1921).

45. Duplex Printing Press Co. v. Deering, 252 F. 722 (2d Cir. 1918).

46. *Duplex Printing*, 254 U.S. 443.

would that have allowed the Court to defend a narrower range of acceptable doctrine in the lower courts?

After capturing united government in 1920, the Republicans focused considerable effort on the courts. Several Supreme Court appointments early in the decade allowed the Republicans to expand the Court's pro-business coalition. Republicans also expanded the lower judiciary, filling these positions with judges sympathetic to their views and those of the working majority on the Supreme Court.

Duplex Printing signaled a change in doctrine. Although the Supreme Court's decisions during the first two years of the decade were not as anti-labor as its decisions following 1922, they were less pro-labor than the decisions over the previous decade. Had the sole shift in doctrine occurred in 1923, following changes on both the Supreme Court and the lower courts, we would not be surprised. But the initial and important doctrinal shift during 1921-22, reflecting decisions more conservative than the previous years, also requires explanation.

Our theory suggests the following interpretation. The 1920 election, signaling the return of a closer harmony between the Supreme Court and the elected branches, enabled the Court to narrow its range of acceptable doctrine. The anticipated expansion of the lower courts meant more Republican judges sympathetic to the conservative Court's views, suggesting that the proportion of cases heard by progressive Republican and Democratic judges would decline. That, in turn, would make it easier for the Supreme Court to enforce a narrower range of acceptable decisions, for the number of lower court decisions with which a majority disagreed would decrease. As the Republicans were able to expand the lower courts and make appointments to the Supreme Court, the Court's decisions turned decidedly anti-labor. We also hypothesize that the type of cases brought to the courts changed. Anticipating a doctrinal shift toward business, firms would bring new cases that would have been won by labor under the old precedents but which might now be decided for business.

B. Doctrinal Stability, Stare Decisis, and Self-Enforcing Equilibria

Our theory provides a new perspective on doctrinal stability and stare decisis.[47] The traditional approach to these issues holds that judges are constrained in their decisionmaking by precedent and seemingly settled doctrine. But the extent and force of this constraint has only been operationalized with respect to stability and predictability as valuable ends in themselves.[48] Most legal scholars recognize that the Supreme Court exercises some latitude, for example, with respect to constitutional decisions.[49] When does the constraint of precedent arise and how is it binding?

Some legal scholars argue that judges have positive preferences for stability and precedent, partially inculcated by the process of legal training and socialization. A conspicuous problem with this view is its inability to predict anything other than stability in doctrine. For example, it cannot predict the turning points in jurisprudence that break with the past, such as the three constitutional eras described by Bruce Ackerman[50] or the seven constitutional models described by Laurence Tribe.[51] Nor can it explain how adherence to the rule of law is consistent with a wide range of acceptable decisions, and why some issues seem to have wide doctrinal intervals while others have a narrow range.

In our theory, doctrinal clarity and stability do not depend on the willfulness of judges, nor on the success of their socialization in law school. Rather, doctrinal clarity and stability reflect underlying electoral stability. Stare decisis is not an exogenous constraint or a learned response to temptation, but a *self-enforcing equilibrium* in

47. In his classic treatise, Walter Murphy comes closest to articulating a view similar to ours. *See* Walter Murphy, Elements of Judicial Strategy 30-31 (1964). *See also* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 Chi.-Kent L. Rev. 63 (1980) (providing another game-theoretic interpretation of stare decisis as a coordination mechanism).

48. The basic idea of this class of arguments is that if people are risk-averse, they will be willing to trade some degree of optimality in return for a reduction in the variance of policy. Bruce Owen and Ronald Braeutigam used this to develop a theory of why citizens prefer inefficient regulation to efficient competition. Bruce M. Owen & Ronald Braeutigam, The Regulation Game: Strategic Use of Administrative Process (1978). Frank Michelman's concept of "demoralization cost" (socially destructive responses to seemingly arbitrary changes in public policy), although not articulated in this way, is certainly a close cousin of this concept. Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967).

49. *See, e.g.*, Ackerman, *supra* note 5.

50. *See id.*

51. *See* Tribe, *supra* note 8.

which judges have no incentive to break with established precedent. This equilibrium reflects the interaction of political officials, the Supreme Court, and the lower courts. The Supreme Court sets doctrine to gain adherence by the lower courts; the lower courts decide whether to respect doctrine; and political officials in the elected branches set the parameters constraining the courts, such as the resources available to the Supreme Court to review cases and the size of the lower courts. Electoral stability underpins the stability and clarity of judicial preferences, in turn leading to an equilibrium among the Supreme Court and lower courts based on the Supreme Court's choice of doctrine. Acting individually, no judge has an incentive to deviate. Respect for precedent—that is, the stability of doctrine and the degree of adherence to it by the courts—reflects settled politics on the issue in question. Bright line doctrine—that is, a narrow range of acceptable lower court opinions—also reflects stable politics in which the Court is not forced to accommodate a wide variety of preferences, all of which have or might soon have substantial voice among the elected branches as well as the lower courts.

Temporary electoral shifts are rarely sufficient to provide elected officials leverage over the courts. Only permanent electoral shifts—for example, those occurring in 1800, 1860, and 1932—grant the elected branches both the motives *and* the means for massive intervention to change longstanding judicial doctrine.[52]

This discussion of stare decisis yields a surprising and nonintuitive conclusion. Legal scholars have generally resisted the standard assumption of positive political theory that judges pursue their own preferences or ideologies.[53] These scholars emphasize that judges instead hold a range of additional values—such as the rule of law, respect for precedent, and due process rights of citizens—that are far more important in shaping their decisions than are their own preferences.

52. One qualification is when a temporary shift in hegemonic control allows a minority party to obtain considerable influence over the Supreme Court because it is able to make an unusual number of appointments while in control. For example, during the Wilson administration, the Democrats held united government in an abidingly Republican era and were able to make a number of Supreme Court appointments because of retirements.

53. A particularly interesting example of this is expressed by Judge Abner Mikva. *See* Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167 (1988). Mikva's views in his introduction to a symposium on the theory of public choice stand in striking contrast to most papers in the symposium.

Our approach suggests that these larger, socially valuable goals, such as the respect for precedent and the rule of law, are a by-product of the more narrow and limited goals of pursuing personal policy objectives. Once a self-enforcing equilibrium is achieved, precedent and doctrine remain stable as long as the party system remains stable and no new legal issues arise. Historically, periods of single-party dominance lasting longer than a generation, such as the New Deal Democratic era, have produced considerable doctrinal stability, which is manifested as respect for precedent and adherence to the rule of law. These properties of the system may even be articulated as strong values underlying the judiciary, in part because this rhetoric is useful when higher courts rebuke lower ones. But in our theory, doctrinal stability and the rule of law do not derive from first principles or the beliefs and values of judges but from the equilibrium between the political branches and the judiciary. Thus, models of judicial choice, precedent, and the rule of law need not invoke ad hoc assumptions such as a preference for precedent to explain doctrinal stability.

This conclusion yields a further implication. The assumption that judges pursue their own preferences or ideologies does not imply that jurisprudence merely reflects naked interest group influence, a simple contest over ideology, or an absence of respect for the rule of law. When doctrinal equilibrium emerges, individual judges are highly constrained in their behavior and cannot impose their will or ideology on the nation. Over the long run, judicial choice of doctrine reflects the preferences expressed in the electoral arena. As Robert McCloskey suggests, a Supreme Court with doctrinal preferences at variance with a set of united political branches is highly unlikely to maintain its preferred doctrine for any length of time.[54]

C. Courts, Election Returns, and the New Deal

Our theory provides clarification of the notion that the "courts follow the election returns." While stability in judicial doctrine depends upon stability in the underlying electoral system, the judicial system is insulated from short-run electoral vicissitudes. Looking backward to the New Deal controversy, we now know that the 1932 election initiated a new era in American politics, redefining the role of the federal government in the economy. Moreover, among legal scholars it is now well understood that this election was the cause of a struggle over judicial doctrine that ended in victory for the elected

54. *See* McCloskey, *supra* note 2, at 23.

branches over a recalcitrant judiciary. Further, it is easy to see that most Americans, far more than bare majorities, supported this change from the mid-1930s onward. The Supreme Court's confrontation with the elected branches is most frequently viewed as an entire nation pitted against "nine old men" with outdated, and misguided, notions about the Constitution and the role of the federal government in the economy.

In the context of our theory, the confrontation between the Supreme Court and the New Deal was both strategic and predictable. The years before 1932 were an abidingly Republican era, initiated seventy-two years earlier with the election of Lincoln. Between 1860 and 1932, the Republicans dominated elections. In the thirty-six congressional periods, the Republicans held united government in over half, including several decade-long periods (1860-74, 1896-1910, 1920-30). The Democrats, by contrast, held united government in only four periods. With the exception of the Wilson administration, the Republicans' electoral dominance enabled them to enact their programs during periods of united political control and defend them against change in periods of divided control.

In contrast to the Democrats, Republican influence was enhanced during divided government because they typically held control of both the presidency and the Senate. Even under divided government, the Republicans usually controlled appointments to the Court, holding these two branches during twenty-four of the thirty-six Congresses in this period, while the Democrats held both in only four.[55]

When Roosevelt was elected in 1932, few could have been certain that this election would usher in the New Deal era and Democratic hegemony. At the time, the Democrats' hold over national government appeared tenuous. Given that New Deal policies sought a radical departure from the status quo in both public policy and constitutional interpretation, a rational Republican-dominated Court

55. The Republicans assured their virtually constant control of the Senate by the strategic admission of very sparsely populated Republican states in the west. For example, the Dakota Territory was admitted as four states, three of which were Republican, thirty years before the admission of New Mexico, which had a much larger population but suffered Democratic sympathies. *See* David W. Brady & Roger G. Noll, *Public Policy and the Admission of the Western States, in* THE POLITICAL ECONOMY OF THE AMERICAN WEST 147 (Terry L. Anderson & Peter J. Hill eds., 1994); Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development, in* STUDIES IN AMERICAN POLITICAL DEVELOPMENT 6, at 223-71 (1992).

would have sought to constrain the Democrats.[56] Not knowing whether the electoral shift was temporary or permanent, the Supreme Court would be expected to slow down the Democrats' radical departure from the status quo in hopes that, in an election one or two cycles in the future, the Republican regime would reemerge.

The Court had an incentive to exacerbate the controversy. By focusing public attention on the New Deal's radical departure from the constitutional principles underpinning the old political regime, the Court may have hoped for a political backlash.[57] A strategic confrontation of this type would require the Court to alter its case selection so as to feature issues that were in sharp dispute and were most likely to be approved by voters. But a change in case selection criteria, given the limited capacity of the Court to hear appeals, would cause the Court to sacrifice influence in other areas. The Court would adhere to this strategy until it became convinced that the political change of 1932 was permanent.

The sequence of elections after 1932 provided evidence that the Democrats were immensely popular and that their success was not transitory. The 1934 elections remain one of the few mid-term elections when the party of the president increased its representation in Congress. In the 1936 elections, the Democrats came close to holding the supermajorities necessary to amend the Constitution: two thirds of each branch of Congress and three quarters of the state legislatures.[58]

Looking backward, it is easy to disparage the uncertainty facing the country prior to November 1936. We will never know whether Justice Roberts' famous "switch in time" in January 1937 reflected the realignment evident in the 1936 election or other pressures.[59] The fact remains that the Court's conflict with the New Deal was confined to the period of uncertainty over the New Deal's long-term success,

56. This judgment reflects the individual rationality assumption of positive political theory models and does *not* imply a judgment that the Court's actions were socially rational (in other words, that they were good for the country).

57. The Supreme Court under Chief Justice Taney seems to have applied the same strategy with *Dred Scott* in 1857. Set in the context of the growing controversy over slavery, *Dred Scott* ruled that the policies sought by the Republicans were unconstitutional. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

58. *See* Gely & Spiller, *supra* note 3, at 60-61.

59. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1889, at 26 (1985); MCCLOSKEY, *supra* note 2, at 175-77; SHAPIRO, *supra* note 1.

1933-36. Once the evidence demonstrated that support for Democrats was not an aberration but a direct reflection of massive political support for their policies, the confrontation between the Supreme Court and the political branches came to an abrupt end.

D. A New View of *Nebbia v. New York*

The Supreme Court's constitutional jurisprudence during its confrontation with the New Deal was not necessarily inconsistent. Most discussions focus only on issues arising out of the national government, such as the New Deal's Agricultural Adjustment Administration[60] and the National Industrial Recovery Act.[61] Before 1937, the Court consistently ruled that major elements of the New Deal were unconstitutional. In this context, it is rarely explained why the Court made a remarkable break with the past in other areas of nearly parallel constitutional questions concerning the states.

During the *Lochner* era of substantive due process, the Supreme Court carefully scrutinized the means and ends of state economic legislation and set aside many state laws. The Court held in *Lochner v. New York* that state legislation must have a "direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid."[62]

In the midst of its confrontation with the New Deal, the Court announced the end of substantive due process with respect to the states in *Nebbia v. New York*:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. . . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.[63]

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60. *E.g.*, United States v. Butler, 297 U.S. 1 (1936).

61. *E.g.*, Carter v. Carter Coal, Inc., 298 U.S. 238 (1936); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 539 (1934).

62. Lochner v. New York, 198 U.S. 45, 57 (1905).

63. Nebbia v. New York, 291 U.S. 502, 537 (1934).

This decision represents an important departure from *Lochner*.[64] Moreover, the Supreme Court did not limit its retreat from strict scrutiny of state legislation to the due process clause. For example, in another precedent-setting case, *Home Building & Loan Ass'n v. Blaisdell*, the Court greatly weakened the constraints imposed on state legislatures by the Contracts Clause.[65]

Because the precedents of the previous era underpinned the exercise of strong judicial scrutiny of both state and federal regulation, the juxtaposition of the Court's steadfast fight to maintain limits on the federal government while abandoning scrutiny of state legislation demands explanation. Oddly, most constitutional treatments use *Nebbia* and *Blaisdell* for dramatic purposes, suggesting that these decisions heightened the uncertainty about the Court's intentions with respect to the New Deal.[66] Yet the anomalous nature of these decisions remains without explanation.

In the wake of the Great Depression, policy innovations at all levels of government raised new legal questions about the authority of legislatures. The number of cases threatened to overwhelm the judicial system, and the Supreme Court in particular. With the number of federal cases alone, it was unclear whether the Supreme Court had sufficient resources to fight the New Deal. Given the huge number of cases generated by the states, attempting to impose its views on the lower courts in all state and federal issues probably was simply beyond the Supreme Court's capacity.

Our proposed interpretation of *Nebbia* is that the Court decided to abandon substantive due process with respect to the states so that it could husband its resources for the more important battle with the national government. The standard interpretation of *Nebbia* is that it simply was one of the first cases that ended the *Lochner* era.[67]

64. See, however, Morehead v. New York, 298 U.S. 587 (1936), for a qualification to this conclusion.

65. 290 U.S. 398 (1934).

66. Only William Leuctenberg hints at the problem when he suggests that this was an aberration. *See* WILLIAM E. LEUCTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

67. For example, according to Leonard Weiss and Allyn Strickland, the *Nebbia* decision has been widely interpreted as stating that states could, in effect, "regulate whatever economic activity they so desired," and stands as the case that marks "the end of a half-century debate over what industries could be constitutionally regulated." LEONARD W. WEISS & ALLYN D. STRICKLAND, REGULATION: A CASE APPROACH 199 (2d ed. 1982). According to Tribe, *Nebbia* and *Blaisdell* "presaged" the end of *Lochner*. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 450 (1978). David Currie and Robert McCloskey both use *Nebbia* to heighten the drama

Nebbia did not necessarily reflect the Supreme Court majority's view on the appropriate doctrine. Indeed, members of that majority undoubtedly preferred the *Lochner* era's scrutiny. Rather, the Court abandoned *Lochner* for strategic reasons—expanding the range of acceptable lower court decisions so that it could concentrate on the more important contest with the federal government.

IV. CONCLUSION

The purpose of this Article is to lay out a new approach to thinking about the relationship between courts and politics, and for interpreting and predicting the effects of electoral politics on the evolution of judicial doctrine. The point that we wish to emphasize about our theory is its conceptual approach: that viewing the Supreme Court as rationally pursuing policy objectives, but taking into account the response of political actors and lower courts to the doctrines it proposes, is a productive way to generate new insights about the behavior of the judiciary. If nothing else, the theory makes bold predictions that are falsifiable: hypotheses about the connection between unsettled politics and doctrinal instability and chaos, the use of lower court appointments to influence Supreme Court doctrine, and the connections between legislation relating to the structure of the judiciary and the power of the Court.

Another important aspect of our work that is very likely to be misconstrued is its relation to the idealistic view of courts that, while perilously close to becoming an endangered species in the scholarly literature, still is alive and well in the law school curriculum. While we certainly do not believe that this view of judicial decisionmaking constitutes the basis for a complete theory of the courts, our approach is not totally inconsistent with this view. If judicial decisionmaking is something of a weighted average between the ideal-type judge and the judge emphasized in our theory, our model will apply to some but not all issues. In particular, the appropriate integration of the two approaches would resemble the theory of low-cost objectivity initially

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over the Supreme Court and the New Deal. Currie suggests that, with *Nebbia* and *Blaisdell*, "the Court seemed well on the way to making peace with the modern social state." CURRIE, *supra* note 59, at 208. McCloskey observes that "[t]he *Nebbia* decision of 1934 had strongly suggested an acquiescent judicial temper." MCCLOSKEY, *supra* note 2, at 163. Neither attempts to explain the contrast between these 1934 rulings and those of 1935 and 1936. Our interpretation of *Nebbia* is that it represented no change in the fundamental philosophy of the Court, but a strategic decision to fight the New Deal on a different battleground that was politically more visible than milk regulation in New York.

propounded by Nobel laureate John Harsanyi.[68] In particular, it would predict that judges ordinarily behave as if they were idealists, but behave according to our theory with respect to the more heatedly controversial political issues of the day. We will definitely settle for an outcome in which our theory works only for the most important issues.

Obviously, this Article leaves many stones unturned. The core theoretical model is very simple, and even clearly incorrect in some of the modeling assumptions that have been made to clarify the exposition. An obvious item on the unfinished agenda is to add more sophistication about the choice of the doctrinal interval and the Supreme Court's reversionary point when it vacates a lower court decision, and to add more structure to the concept of a political realignment. Likewise, the evidence about appointments, budgets, and case decisions is no more than suggestive, and certainly far from comprehensive. Another unfinished item on the agenda is to be far more systematic and comprehensive in discussing each of these issues. Finally, we have modeled only one aspect of judicial doctrine, albeit a central one.

The intended legacy of this Article is to influence the terms of the debate about the relationship between politics and the Court. We intend to do additional work on these issues, but our primary hope is that we have provided a framework for empirical and theoretical work that others will adopt or even attack. The most important agenda in this area of research is to develop testable hypotheses that differentiate alternative conceptual models of the evolution of doctrine, and to do the difficult empirical work necessary to determine where theories work, and where they do not.

68. John C. Harsanyi, *Rational-Choice Models of Political Behavior vs. Functionalist and Conformist Theories*, 21 WORLD POLITICS 513 (1969).

APPENDIX
A MODEL OF THE CHOICE OF LEGAL DOCTRINE

A. THE RULES OF THE GAME: THE ORDER OF PLAY

Our model is built around the assumption, borrowed from Linda Cohen and Matthew Spitzer,[69] that the Supreme Court uses legal doctrine as a signal to the lower courts about the range of decisions that it finds acceptable on each issue. Each round of the game has three stages. In the first stage the Supreme Court chooses its legal doctrine, given the Court's limitations and opportunities. Lower courts, however, need not comply with existing legal doctrine. This sets up an *enforcement game* between the lower courts and the Supreme Court. The dynamics of this enforcement game, and the way its equilibrium shifts with changing parameters, drive the determination of legal doctrine.

The enforcement game is captured by the next two stages in our model. In the second stage, the lower courts make decisions on each case brought before them. In the third stage, the Supreme Court chooses which lower court decisions to review, if any, subject to its limitations and opportunities. If the Supreme Court reviews a lower court's decision, and finds it to be out of compliance with the stated doctrine, then the Supreme Court replaces the lower court's decision with its own decision; if not, the lower court's decision stands. At the end of the third stage the players receive their payoffs for this round of play. The choices by all of the players determine the final outcomes of the cases. These outcomes determine the payoffs to the players, as each player receives a benefit determined by the difference between the player's preferred outcome and the actual outcome of the case.

1. *The Players' Actions*

As is the norm in models of policy choice, we adopt a spatial approach to modeling decisionmaking.[70] Issues are represented by dimensions in a policy space. We assume that courts make decisions on K types of cases, $K \geq 1$. We assume further that courts make decisions one dimension at a time and cannot link their decisions across

69. Cohen & Spitzer, *supra* note 6, at 65.

70. *See generally* JAMES M. ENELOW & MELVIN J. HINICH, THE SPATIAL THEORY OF VOTING: AN INTRODUCTION (1984). For models of the courts see Eskridge & Ferejohn, *supra* note 6; Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions, With Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORGANIZATION 263 (1990).

different types of cases. Each decision by the lower courts in stage two is the choice of a point from a *bounded set* [0,1] on one of the K dimensions. If we let N_k be the number of cases to be decided on dimension k, then lower court i's ($0 \le i \le N_k$) decision in a case of type k ($0 \le k \le K$) is denoted D_{ik}.[71] The number of dimensions and the number of cases on each dimension are determined exogenously, prior to the play of the first round.

The Supreme Court makes different types of decisions in the first and third stages of play. Decisions in the first stage involve choosing a doctrine, denoted r_k, for each of the K types of cases that lower courts will decide upon in the next stage. The choice of doctrine involves a statement by the Supreme Court about the range of lower court decisions that it finds acceptable on each of the K dimensions. This range determines an interval about the Supreme Court's ideal point S_k of acceptable lower court decisions, that is, $[S_k - r_k, S_k + r_k]$.

In the third stage, then, the Supreme Court chooses how many lower court decisions to review on each dimension, denoted R_k. We assume, however, that reviewing lower court decisions is costly. Specifically, we assume there is a cost C_{ik} to review each case i on each dimension k. We further assume that the Supreme Court has a constrained budget for reviewing lower court decisions. A consequence of this is that it cannot review every decision on every dimension. We denote the Supreme Court's budget in stage three as B.

2. *The Players' Payoffs*

To define the players' payoffs, we assume that each court has an ideal point, or outcome, on each dimension of its jurisdiction. We denote lower court ideal points as L_{ik}. The payoff a court receives from deciding a case is inversely related to the difference between the final outcome, denoted F_{ik}, for each case and the court's own ideal point on the dimension from which the case was drawn, $|L_{ik} - F_{ik}|$ for lower courts, or $|S_k - F_{ik}|$ for the Supreme Court. Each court also has preferences over the types of cases it must decide defined as a set of weights (W_{ik} for the lower courts and W_k for the Supreme Court) for each dimension of choice. A court's total payoff is the weighted sum of Euclidean distances between its own ideal point on each dimension and the final outcome for each case (in other words, $\Sigma^k_{k=1}\Sigma^n_{i=1} W_k |S_k -$

71. For simplicity and without loss of generality, we assume that each court, 1, 2, . . . N_k, decides a single case on each dimension, k=1, 2, . . K.

$F_{ik}|$ for the Supreme Court and $\Sigma_{k=1} W_{ik}|L_{ik} - F_{ik}|$ for each lower court i).

3. *The Players' Knowledge*

Before we evaluate the play of the game, its equilibrium, and our results, we need to discuss what the players know and when they know it. The players have *common knowledge* about the rules of the game, the actions available to each player, and the structure of payoffs and costs for each player.[72] The lower courts, however, possess some *private information* in that they alone know their own ideal point on each dimension. Thus, while we assume that the Supreme Court knows its own ideal point on each dimension, it does not know the ideal points of *any* of the lower courts.

What the Supreme Court knows at each stage is very important to determining the equilibrium strategies used by each player. It is our assumption that the Supreme Court cannot know what a lower court's decision was in a particular case until it pays the costs of actually reviewing it. But, of course, the Supreme Court has beliefs about what sorts of decisions will emanate from the lower courts. These beliefs are derived from a set of commonly held beliefs about the distribution of lower court ideal points on each dimension, denoted Θ_k. Importantly, this implies that when picking a particular case to review in the third stage, the Supreme Court does not actually know the location of a lower court's decision until after it pays the cost to review it. We also assume that the Supreme Court knows, or can costlessly learn, whether or not a decision D_{ik} is in compliance with $S_k \pm r_k$. That is, the Supreme Court does not know the exact location of a lower court decision but it does know whether or not the decision complies. This knowledge may result from the appeals process or other forms of fire alarms.[73] It follows that the cases the Supreme Court chooses to review in stage three are drawn randomly from the set of noncomplying decisions on each dimension.

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72. Lower courts have asymmetric knowledge about their own ideal points L_{ik}, but the Supreme Court's ideal point S_k, and the weights W_k, that the Supreme Court attaches to each of the k dimensions are common knowledge. Further, the costs that the Supreme Court must pay to review a case on each dimension, C_{ik}, the Supreme Court's total budget for reviewing lower court decisions, B, as well as the existing doctrine, r_k, are commonly known.

73. Arthur Lupia & Mathew D. McCubbins, *Learning From Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORGANIZATION 96 (1994); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

Given its choice of doctrine and its knowledge of the distribution of lower court ideal points, the Supreme Court can calculate the expected value of reviewing a noncomplying case on dimension k, denoted $E_k = \int |S_k - \Theta_k| \, d\Theta_k / NC_k$, where the range of integration is over the portion of Θ_k, where the Supreme Court expects lower courts not to comply with stated doctrine, and where NC_k is the expected number of noncomplying decisions on issue k.

The Supreme Court can also calculate the average cost of reviewing cases on each dimension k; this is $C_k = \Sigma C_{ik} / N_k$. We further assume that C_k is a decreasing function of r_k. This assumption is meant to capture the as yet unmodeled reaction of lower courts to the extent of the Supreme Court's doctrine.

It follows from these assumptions that each lower court is also uncertain about the choices the other lower courts will make during the second stage of the game. Like the Supreme Court, the lower courts only know the number of lower courts in compliance and noncompliance. It follows as well that when N_k is large, lower courts, individually, are "price takers"; that is, a lone lower court cannot affect the actions of the other lower courts.

B. The Play of the Game

We will analyze the game described above using the technique of backward induction. Backward induction ensures that the strategy combination that results will be a perfect Bayesian equilibrium. Thus, we begin by analyzing the third stage first.

1. *The Third Stage: The Supreme Court's Reviewing Strategy*

In the third stage the Supreme Court chooses its reviewing actions. The Supreme Court picks a set of reviewing actions, $[R_1, R_2, \ldots, R_K]$, given its reviewing strategy. With the information it has, the Supreme Court attempts to maximize the following:

$$\Sigma_1^K \, W_k R_k E_k \qquad (1)$$

This maximization is subject to the budget constraint ($\Sigma_1^k R_k C_k = B$) such that the sum of the costs of review must not exceed the Supreme Court's budget. Thus we get the following Lagrangian:

$$\mathcal{L} = \sum_1^K W_k R_k E_k - \lambda (B - (\sum_1^K R_k C_k) \qquad (2)$$

The first order condition for a constrained maximum, $\partial \mathcal{L} \partial R_k = 0$ is

$$W_k E_k + \lambda C_k = 0 \qquad (3)$$

We can therefore characterize the *optimal reviewing strategy* for the Supreme Court as follows: first, rank order $W_k E_k + \lambda C_k$ for all k. This yields the per unit marginal expected net payoff of reviewing a case on each dimension. Review all, or as many as the Supreme Court's budget will allow, of the cases of the highest-ranked set (the set with the highest-ranked marginal payoff). If the Supreme Court has not exhausted its budget, it can then move on to the next highest-ranked set, and so on until its budget is exhausted.

The strategy just described, however, may produce several action sets that solve the Supreme Court's constrained maximization problem. Thus, as is typical in spatial models, we must add a tie-breaking assumption so that we can identify a unique maximum to the Supreme Court's problem at stage three. Assume first, without loss of generality, that the dimensions are ordered so that the dimensions the Court accords the lowest weight, W_k, are given the lowest number from 1 to K (if two or more dimensions have the same weight, then the ties are broken randomly). Second, and more restrictive, among optimal strategies, the Court picks the one where the sum of the dimensional rankings is greatest.

What all this implies is that the Supreme Court not only picks those cases to review that yield the highest expected marginal net payoff, but, if there are ties among the choices, then it chooses the dimensions it cares the most about (where W_k is the greatest). Having defined a tie-breaking rule for the Supreme Court, it is now clear that the above described strategy will always yield a unique optimal choice among R_k in the third stage.

2. *The Second Stage*

Each lower court, by its choice of D_{ik}, tries to minimize the following:

$$\sum_1^K W_{ik} \mid F_{ik} - L_{ik} \mid \qquad (4)$$

Notice, F_{ik} is either D_{ik}, if the case is not reviewed by the Supreme Court in stage three, or it is S_k, if it is reviewed. Given what each lower court knows, it can predict R_k for each dimension.

What sorts of actions will the lower courts adopt? Since the lower courts' decisions on each dimension are separable, we can examine their strategy one dimension at a time. It turns out that the lower courts will either *stick* with their ideal points in deciding their cases (in other words, $D_{ik} = L_{ik}$), or they will *switch* to the point in the range $[S_k - r_k, S_k + r_k]$ closest to L_{ik}. No other actions can make the lower courts better off. To see this, consider the following: If a lower court's ideal point is such that $L_{ik} \in [S_k - r_k, S_k + r_k]$, then the court has no reason to choose any point but its ideal for its decision D_{ik}. If $L_{ik} < S_k - r_k$, for example, then court i will stick if and only if:

$$R_k/NC_k \mid L_{ik} - S_k \mid \leq \mid L_{ik} - S_k + r_k \mid, \qquad (5)$$

otherwise it will switch. That is, court i will stick when the difference between sticking and switching is greater than the expected value of being reviewed and overturned. We can of course identify the same inequality for lower courts such that $L_{ik} > S_k + r_k$. The strategy defined by the above inequality yields a unique decision, stick or switch, for lower courts. The above strategy was designed to be optimal, on each dimension, for each lower court.

An important lemma that follows from the above inequality is that, on any dimension k, for any given set of parameters and any chosen doctrine, there will exist a tipping point for lower courts with ideal points $L_{ik} < S_k - r_k$, such that all lower courts with ideal points $L_{ik} \leq TL_k$ (where TL_k denotes the lower tipping point) will have a dominant strategy to stick in stage two ($D_{ik} = L_{ik}$), and all lower courts with ideal points $L_{ik} > TL_k$ will have a dominant strategy to switch ($D_{ik} = S_k - r_k$). The proof of this lemma can be seen by constrnction. Pick any set of parameters for the lower courts' decision problem. There will exist some lower courts for whom it is preferable to stick (whose ideal points are far enough distant from $S_k - r_k$ so that the above inequality points to sticking) and for whom it is preferable to switch (where the reverse is true). It is possible for the tipping point to be outside of [0, 1], in which case all lower courts either stick or switch. A similar proof can be given for the existence of an upper tipping point, TU_k.

Our first proposition follows from this lemma. The proposition has two parts.

Proposition 1. (1) Lower court compliance with legal doctrine results not from a preference for stability or an adherence to a norm; rather, it results from the Supreme Court's threat to enforce the doctrine. When the Supreme Court punishes lower courts, the punishment meted out is not a loss of prestige or reputation; rather, the punishment consists of the loss in utility to the lower courts from the substitution of the lower court's decision with the Supreme Court's ideal point. (2) The greater the resources the Supreme Court possesses, on a dimension of choice, relative to the number of cases it must review, the greater the number of lower courts on that dimension who will choose to switch to, and thereby comply with, legal doctrine.

3. *The First Stage*

Finally, at the first stage of the game, the Supreme Court must pick a doctrinal interval $[S_k - r_k, S_k + r_k]$. Thus, looking ahead the Supreme Court is able to choose a doctrinal strategy $[r_1, r_2, \ldots, r_k]$ so that it can minimize the following:

$$\sum_1^K \sum_1^{Nk} W_k \mid F_{ik} - S_k \mid \qquad (6)$$

The optimal strategy at stage one is thus to pick a doctrine on each dimension that induces lower court responses at stage two, and a reviewing strategy at stage three, that yield the highest utility. This sets up a large linear programming problem over the choice of doctrine. The problem, however, is that the Supreme Court has incomplete and uncertain information relative to its decisions.

We can see how the Supreme Court solves this programming problem. On each dimension k it has beliefs Θ_k about the distribution of lower court ideal points. Further, for any choice of r_k, the Supreme Court can use Θ_k to calculate the tipping points, TU_k and TL_k. This implies that, for any r_k and any set of beliefs Θ_k the Supreme Court can estimate NC_k and E_k. Thus, the Supreme Court can anticipate the ranking it will come up with at stage three, and ultimately, the payoffs it will receive at the end of the round. Since there exists a unique response by the lower courts and, in stage three, by the Supreme Court, to any choice of doctrine, we know each choice of doctrine at stage one yields a unique payoff. With this information, the Supreme Court is able to calculate a doctrinal strategy r_k, so as to find a unique minimum for equation (6). That is, there exists a unique doctrinal

strategy for each dimension such as it maximizes the Supreme Court's payoff.[74]

Thus, we have shown that there is a unique optimizing strategy for every player at every stage in the game. Proposition 2 follows:

Proposition 2. There exists a unique perfect Bayesian equilibrium for each play of the game.

C. Comparative Statics

We can now derive our main propositions concerning predictions of doctrinal change. This result is based on changes in the areas (defined over [0,1]) of the above defined terms. The specific integrals follow straightforwardly from our result.

We are concerned with how changes in the number of noncomplying cases, NC_k, on a dimension lead to a change in legal doctrine, r_k.[75] First, notice that an increase (decrease) in NC_k is equivalent to a decrease (increase) in the Supreme Court's budget. For example, if the current budget allows the Court to review ten cases and there exist ten noncomplying cases, the Court can review all of the cases. If the Court's budget decreases such that the Court can only review five cases, then it will only review half of the cases. Equivalently, if, instead, the number of noncomplying cases doubles to twenty (and the budget stays constant), then the Court can only review half of the cases. Thus, the effect of a change in budget on the change in doctrine (and on the other choice variables) is equivalent to the impact on doctrine of a change in NC_k. That is ∂ {equilibrium}/$\partial NC_k = \partial$ {equilibrium}/∂B where {equilibrium} includes all of the choice variables, r_k, D_{ik}, and R_k.

As we have discussed, an increase in the budget allows the Supreme Court to review more cases. Thus, $\partial R_k/\partial B \geq 0$. As more cases are reviewed (because of an increased budget), the lower courts' expected value of sticking decreases, and thus more lower courts will

74. Note that that the Supreme Court will not always, if ever, set $r_k = 0$, as we have assumed that C_k, the average cost of reviewing a case on dimension k, is a decreasing function of r_k. Thus, setting $r_k = 0$ would lead to very costly reviews.

75. By assumption, the Court knows whether a decision by a lower court complies with its doctrines, and within the context of the model this assumption implies that the Court only reviews noncomplying decisions. We do not quarrel with the view that in some cases, especially when the precedents of district courts conflict, the Supreme Court will pick a complying case when it decides to resolve the dispute; however, for ease of exposition we have set forth a model that is too simple to accommodate this kind of behavior.

switch. This leads to $\partial D_{ik}/\partial R_k \geq 0$ for $L_{ik} < S_k$ and $\partial D_{ik}/\partial R_k \leq 0$ for $L_{ik} > S_k$. This gives $\partial D_{ik}/\partial B \geq 0$ for $L_{ik} < S_k$ and $\partial D_{ik}/\partial B \leq 0$ for $L_{ik} > S_k$.

Thus, as the number of cases reviewed by the Court, R_k, increases, the lower court decisions, D_{ik}, will move closer to the Supreme Court's ideal, S_k. This results in more complying lower courts which in turn increases the probability of review for the remaining noncomplying lower courts. This leads to an increased incentive to switch; that is, more lower courts will switch, implying that $\partial TL_k/\partial B \geq 0$ and $\partial TU_k/\partial B \leq 0$. As the tipping points collapse toward the Supreme Court's ideal, the Court will pull the doctrine closer to its ideal in order to maximize the value of the switchers, so that $\partial r_k/\partial TL_k \leq 0$ and $\partial r_k/\partial TU_k \geq 0$.

From this, we know that $\partial r_k/\partial B = (\partial r_k/\partial TL_k)\ (\partial TL_k/\partial B)$. Both of these functions are differentiable and we have shown that $(\partial r_k/\partial TL_k)$ is negative and $(\partial TL_k/\partial B)$ is positive. This gives $\partial r_k/\partial B \leq 0$. In words, this implies that as the budget increases (decreases), the judicial doctrine will decrease (increase). As explained, this is equivalent to showing an increase in the number of noncomplying cases, NC_k, leads to an expanding judicial doctrine $(\partial r_k/\partial NC_k) \geq 0)$. Proposition 3, 4, and 5 follow straightforwardly from this logic.

Proposition 3. An increase in lower court cases on dimension k, all else constant, causes: (1) the Supreme Court to expand the doctrinal interval around its ideal point on dimension k; (2) the Supreme Court to skip choosing doctrine on dimension k or some other dimension(s); or (3) no change in doctrine or enforcement of doctrine.

Proposition 4. An increase in C_k, all else constant, causes: (1) a decrease in enforcement on dimension k or some other dimension; (2) a change in doctrine on dimension k or some other dimension(s), where doctrine on dimension k is changed to be farther from S_k than previously; or (3) no change in enforcement or doctrine.

Proposition 5. A decrease in W_k, all else constant, causes: (1) a decrease in enforcement on dimension k or some other dimension(s); (2) a change in doctrine on dimension k or some other dimension, where doctrine on dimension k, if changed, is farther from S_k, or (3) no change in enforcement or doctrine.