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Dean's Lecture Series

Supreme Court Justices as Human Decision Makers

LAWRENCE BAUM[*]

Both within and outside the academic world, decision making by justices on the U.S. Supreme Court has been the subject of great interest. Explanation of the justices' choices is a major concern of legal scholars, and political scientists who study the courts devote more attention to that task of explanation than to any other issue.

Research in law and political science has done much to illuminate decision making in the Court, and the body of scholarship on this issue has become increasingly strong over time. Even so, we are a long way from having a full understanding of why justices do what they do. The most fundamental reason is the complexity of the forces that shape judicial behavior, complexity that creates formidable challenges for scholarly inquiries. But a second reason is that scholars have not fully taken that complexity into account, so that they tend to analyze the justices on the basis of assumptions that are not fully realistic.

In this article, I argue that scholarship on the Supreme Court should adopt a more realistic picture of the justices. Put another way, I think we can best understand decision making on the Court by thinking of the justices as human decision makers. I seek to show how that perspective can illuminate why the justices choose some case outcomes and legal doctrines over others.

Section I describes the predominant models of decision making in the scholarship on the Supreme Court and identifies some assumptions that

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underlie this scholarship. The three sections that follow examine the distance between these assumptions and the reality of Supreme Court decision making.

In the article, I give particular attention to scholarship in cognitive and social psychology. This body of research is valuable for my purposes because it offers perspectives that contrast with the key assumptions in research on the Supreme Court. As a number of scholars have demonstrated, research in psychology can do much to broaden our understanding of judicial decision making.[1]

I. MODELS OF SUPREME COURT DECISION MAKING

In the body of scholarship on Supreme Court decision making, two motivations of the justices receive far more attention than any others. The first is an interest in making good law by applying the relevant body of legal rules to cases appropriately and effectively.[2] The second is an interest in making good policy by choosing outcomes and doctrines on the basis of individual policy preferences.[3] The three predominant models of decision making reflect differing judgments about the relative weight of these two motivations and about the ways that they manifest themselves in the justices' choices.

In political science, the model that was most widely accepted for a considerable time has been labeled the attitudinal model.[4] This model is a relatively simple conception of decision making on the Court, one in which the justices vote for the outcomes and doctrines that accord with their policy preferences.[5] Adherents to a pure attitudinal model see the justices as using law only as a justification for their decisions, not as a basis for their choices.[6] Most of these scholars believe that the world outside the Court may affect the justices' choices under certain circumstances.[7] For the most part, however, they see the justices as autonomous, free to reach their own judgments on the basis of their conceptions of good public policy.[8]

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1. *See* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING (David Klein & Gregory Mitchell eds., 2010).
2. EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 19-29 (2009).
3. DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 70-74 (1976).
4. For the most definitive presentation of the attitudinal model, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).
5. *Id.* at 86.
6. *Id.* at 48-85, 279-311.
7. *Id.* at 411-12.
8. *Id.* at 326-51.

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Over the past two decades, strategic models of the justices have been a strong rival of the attitudinal model within political science.[9] In these strategic models, justices are still typically viewed as acting on policy considerations rather than law.[10] But these models depart from the attitudinal model in their assumption that justices do not simply take positions that reflect their policy preferences. Rather, justices take into account the potential reactions of other justices and of people outside the Court to their own choices.[11] If a justice calculates that the Court's collective decision will be closer to her own preferred policy on an issue if she compromises with other justices than if she adheres to that preferred policy, she will compromise. Similarly, justices may deviate from their preferred policies in order to avoid negative results outside the Court, such as congressional override of a decision interpreting a statute or a loss of public support that the Court needs in order to maintain its effectiveness as a policy maker.[12] One possible result, seemingly paradoxical, is that policy-oriented justices act as if they were motivated by concern for making good law as a means to maximize their legitimacy with the general public.[13]

Some legal scholars offer conceptions of Supreme Court decision making that are similar to the attitudinal and strategic models.[14] Indeed, the attitudinal model can be considered an adaptation of legal realism, which gained a foothold in legal scholarship in the first part of the twentieth century.[15] For that matter, many legal scholars have been sensitive to the potential impact of the larger political system on the Court's collective choices.[16]

The logical counterpart of the attitudinal and strategic models is a model in which the justices act solely to make good law. But this explanation of Supreme Court decision making is difficult to find in the current era except in expressions by the justices themselves—most

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9. *See* Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. SOC. SCI. 341 (2010).

10. *But see* John A. Ferejohn & Barry R. Weingast, *Limitation of Statutes: Strategic Statutory Interpretation,* 80 GEO. L.J. 565 (1992); Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. POL. SCI. 131 (2011).

11. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 18-36 (1964); *see* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

12. EPSTEIN & KNIGHT, *supra* note 11, at 138-77.

13. *Id.* at 163-77.

14. For a conception that treats the justices' positions in constitutional cases as primarily the product of their policy preferences, see Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 39-60 (2004).

15. WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 1-2 (1968).

16. *See, e.g.*, JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

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prominently in statements by nominees to the Court at their confirmation hearings before the Senate Judiciary Committee.[17] Rather, the primary alternative to models that emphasize policy considerations is a conception in which justices seek to make both good law and good policy.[18] What might be called mixed models of decision making are probably the most widely accepted in legal scholarship on the Court, whether they are explicit or implicit.[19] These models also receive support from some political scientists,[20] especially those whose approach has been labeled historical institutionalism.[21]

There have been long and fierce debates among adherents to different models, with the most heat generated over the question of whether law plays a substantial role in Supreme Court decision making.[22] But the fervor of these debates obscures the extent of agreement among these models: viewed from a broader perspective, the three models are more similar than they are different. Most important, they share three basic assumptions.

The first assumption is that justices as decision makers care only about the content of legal policy, whether as policy or as a combination of law and policy.[23] All the other motivations that people typically bring to their work are set aside as irrelevant. To a degree, this setting aside is explicit. In particular, some scholars point out that the justices' life terms and their general lack of ambition for other positions in the current era make considerations related to the justices' careers more or less irrelevant.[24] But

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17. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009); *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010).

18. *See* Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 3, 4-5 (David Klein & Gregory Mitchell eds., 2010) [hereinafter Baum, *Motivation and Judicial Behavior*].

19. *See, e.g.,* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 98-123 (2007); MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT xiv-xvii (2013).

20. *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC'Y REV. 135 (2006).

21. Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601 (2000); Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making,* 26 L. & SOC. INQUIRY 465 (2001).

22. *See* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE (CHARLES GARDNER GEYH ed., 2011).

23. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 615-17 (2000).

24. SEGAL & SPAETH, *supra* note 4, at 95-96.

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other motivations that seem more relevant to the justices, such as interest in personal reputations and the quality of life at work, are simply not discussed in the preponderance of scholarship on Supreme Court decision making.

Not all students of the Court adopt this assumption. Economists are inclined to focus on self-interest, and that focus has led some economists and legal scholars with an economic perspective to posit a wide range of motivations that might affect judges' choices.[25] Some of these scholars have applied this broader perspective specifically to the Supreme Court.[26] Some other legal scholars and political scientists have gone beyond law and policy in their inquiries into the forces that shape the justices' choices.[27] But these scholars are distinctly in the minority.

The second assumption is that justices are something close to perfect decision makers.[28] In other words, whatever may be the justices' mix of goals, they pursue those goals in a way that advances them to the greatest extent possible. Both errors in calculation and emotion as a factor that complicates decision making are left out of the picture.

This assumption of near-perfect decision making is seldom made explicit. However, the predominant models of Supreme Court decision making implicitly incorporate an approximation of perfection in finding the course of action that best serves the justices' goals by giving little or no attention to imperfections.[29] That assumption is especially evident in some of the research based on strategic models, which treats the justices as capable of taking into account and analyzing complicated bodies of information regarding the effects of potential actions from which they choose in deciding cases.[30]

The final assumption is one of homogeneity: the justices are pretty much alike in the considerations that shape their choices as decision

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25. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469 (1998); Gordon R. Foxall, *What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function*, 25 LIVERPOOL L. REV. 177 (2004); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 25-63 (2013).

26. EPSTEIN, LANDES & POSNER, *supra* note 25, at 101-51.

27. Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749 (1994).

28. Baum, *Motivation and Judicial Behavior*, *supra* note 18, at 8.

29. *See, e.g.*, GLENDON A. SCHUBERT, THE JUDICIAL MIND: ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963, 37-41 (1965).

30. *See, e.g.*, Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247 (2003); Brian R. Sala & James F. Spriggs II, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197 (2004).

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makers.[31] It is true that scholarship in both law and political science emphasizes differences among justices, differences that are reflected in the frequency of non-unanimous decisions.[32] But these differences are generally regarded as the product of divergent policy preferences or disagreements over appropriate ways of interpreting the law rather than variation among the justices in the criteria that lead them to their choices.[33] Adherents to the attitudinal model, for instance, typically see all the justices as acting on policy considerations in the same ways.[34] For their part, strategic models generally portray all the justices as thinking in similar strategic terms.[35]

Adoption of these assumptions certainly can be justified as a way of making theoretical and empirical analysis of the justices more tractable. Still, it seems to me that research based on these assumptions can capture only part of the reality of judging. In the sections that follow, I examine what I see as the benefits of departing from these assumptions.

II. JUSTICES CARE ABOUT MORE THAN LAW AND POLICY

It is understandable that scholars emphasize legal and policy considerations as bases for justices' choices as decision makers. Leaving aside the heated disagreement that exists about the relative strength of these two kinds of considerations, it seems clear that they are powerful

31. This assumption is reflected in statistical analyses of decision making in which the factors that are posited to affect decision making are modeled as having uniform effects across the justices. *See, e.g.*, C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460 (1991); Jeff Yates, *Presidential Bureaucratic Power and Supreme Court Justice Voting*, 21 POL. BEH. 349 (1999); Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006).
However, there is a significant number of studies that depart from this assumption. *See, e.g.*, Jeffrey A. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938 (1986); Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008). Of course, biographies by scholars and other writers give attention to individual elements in decision making. *See, e.g.*, ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946); H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005); JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA (2009); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).

32. *See* C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court*, 35 AM. POL. SCI. REV. 890 (1941).

33. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); SCHUBERT, *supra* note 29, at 22-43.

34. For instance, that perspective appears to be implicit in the exposition of the attitudinal model in SEGAL & SPAETH, *supra* note 4, at 86-97, 312-26.

35. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 11. For one exception, see Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089 (2013).

motivations for the justices and that, in combination, they explain a great deal about the process of reaching decisions.[36]

From a broader perspective, however, models of decision making that are based solely on law and policy as goals for the justices seem quite narrow. Like other people, Supreme Court justices undoubtedly have a variety of goals that they pursue in their lives. It would be remarkable if two goals related to the content of legal policy, neither of which involves self-interest in the ordinary sense of the term, fully explain the justices' choices as decision makers.

Some other goals that are quite important to many people might be set aside on the ground that they are not very relevant to the justices' work on the Court in the current era.[37] As noted earlier, that seems true of an interest in career advancement. It also appears that the justices' interest in their personal economic status has no meaningful effect on their decision making.[38] But some other goals cannot be dismissed so quickly.

One of those goals, preserving time, is nearly universal. Economists like to say that people value leisure, and leisure is a useful term so long as it includes working hard at something other than one's job.[39] Undoubtedly, at least the great majority of justices have strong commitments to their jobs. Even so, they can be expected to value time for other pursuits. This goal may help to explain the Court's tightening of the criteria for acceptance of cases during the Rehnquist Court, a tightening that was largely responsible for a reduction of about half in the number of cases the Court decides on the

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36. LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 70-83 (1997) [hereinafter BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR].

37. On the unimportance of some forms of self-interest in the task of judging, see Richard A. Epstein, *The Independence of Judges: The Uses and Limits of Public Choice Theory*, 1990 BYU L. REV. 827, 833-40.

38. Justice Abe Fortas' efforts to recover from nonjudicial work some of the income that he had lost by joining the Court in 1965 helped to bring about his defeat when a Senate filibuster prevented his elevation to chief justice in 1968 and caused him to resign from the Court under pressure in 1969. *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 322-27, 351-53, 355, 359-75 (1990). But there appears to be no evidence that financial considerations affected his decision making as a justice in any way.

39. For the potential impact on judges of an interest in leisure, see BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR, *supra* note 36, at 44-47; EPSTEIN, LANDES, & POSNER, *supra* note 25, at 36-43; Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1 (2004).

merits.[40] This reduction has given the justices more time to spend on what is for many a substantial set of activities outside the Court.[41]

Especially intriguing, I think, is another goal: maintaining and enhancing reputations. Everyone wants to be liked and respected, and one of the major themes in social psychology is the strong impact of this goal on human behavior. People engage in self-presentation to the individuals and sets of people whose regard they care most about, those who are part of their social identities. In doing so, they seek to foster favorable impressions of themselves.[42]

People who are willing to accept nominations to federal judgeships probably have a greater than average interest in what other people think of them. Most of those people sacrifice income to become judges, and many sacrifice a great deal of income.[43] Further, judgeships create constraints on activities that do not apply to lawyers in most other positions. Those lawyers who accept those negatives must identify positives that outweigh them. One of the strongest positives is the honor and prestige that attach to positions on higher courts.[44]

It is clear that some Supreme Court justices—and probably most—enjoy the acclaim that their position provides them. That enjoyment is indicated by the frequency of their appearances before audiences that they know will be appreciative and laudatory. Justices Antonin Scalia,[45] Sonia Sotomayor,[46] and (in recent years) Ruth Bader Ginsburg[47] exemplify that

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40. In the 1982-1986 terms of the Court, the mean number of signed opinions per term was 146. In the 2005-2009 terms, the mean was 70. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS 89-90 (4th ed. 2012). For discussions of the sources of this decline, see David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134 (2005); David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010).

41. *See* Linda Greenhouse, *David H. Souter: Justice Unbound*, N.Y. TIMES, May 2, 2009, http://www.nytimes.com/2009/05/03/weekinreview/03greenhouse.html (discussing the growth in public activities of the justices).

42. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); MARK R. LEARY, SELF-PRESENTATION: IMPRESSION MANAGEMENT AND INTERPERSONAL BEHAVIOR 1-2 (1996); Barry R. Schlenker and Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133 (1992).

43. RICHARD A. POSNER, HOW JUDGES THINK 163 (2008).

44. On reputation as an interest of judges, see RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 32-33 (1994); Drahozal, *supra* note 25, at 475; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 9 (2006) [hereinafter BAUM, AUDIENCES].

45. Two analyses of the justices' financial disclosure reports show that Justice Scalia ranked first among the justices in the number of public appearances for which he received reportable reimbursements—essentially, appearances outside the Washington, D.C. area. BAUM, AUDIENCES, *supra* note 44, at 166 (for 1998-2004); EPSTEIN, LANDES, & POSNER, *supra* note 25, at 39 (for 2002-2009).

46. A year after Justice Sotomayor joined the Court, a friend and former judicial colleague reported that she estimated spending about forty percent of her time on what he called "her celebrity."

tendency. Justice David Souter made it clear that he did not enjoy public appearances,[48] and he maintained a low profile throughout his tenure on the Court. More or less the same was true of Justice John Paul Stevens, who put himself forward as a public figure only after his retirement.[49] But in the current era, Souter and Stevens are exceptions to the rule.

Once on the bench, judges have good opportunities to build on the positive regard that their positions provide them.[50] This is especially true of Supreme Court justices, because of their high visibility compared with other judges. Justices receive considerable attention in the legal community and other segments of the political and social elite.[51] Some gain a degree of attention from the general public as well. Thus, they have reason to expect that what they do will affect how people think of them in their own close circles of friends and acquaintances and in wider circles as well.[52] The security of their positions also gives them freedom to pursue favorable reputations as a goal.

Outside their work as decision makers, justices engage in several types of efforts to enhance their reputations. Today, in contrast with past eras, justices frequently speak with reporters and participate in broadcast interviews.[53] In these forums and other public appearances, they depict themselves in ways intended to gain favorable responses. Understandably, the memoirs written by Clarence Thomas and Sonia Sotomayor were crafted to depict their authors in a positive way.[54]

FREDERIC BLOCK, DISROBED: AN INSIDE LOOK AT THE LIFE AND WORK OF A FEDERAL TRIAL JUDGE 186 (2012).

47. *See* Dahlia Lithwick, *Justice LOLZ Grumpycat Notorious R.B.G.: How a gentle Supreme Court justice became a badass gangsta Internet meme*, SLATE (March 16, 2015), http://www.slate.com/articles/double_x/doublex/2015/03/notorious_r_b_g_history_the_origins_and_meaning_of_ruth_bader_ginsburg_s.html.

48. *See* Philip Rucker, *Quiet N.H. Home is Where Souter's Heart Has Always Been*, WASH. POST, May 3, 2009, http://www.washingtonpost.com/wp-dyn/content/story/2009/05/02/ST2009050202 2 50.html.

49. Two analyses of the justices' reimbursed public appearances found that Justices Souter and Stevens ranked last and next to last, respectively, in the number of appearances per year. BAUM, AUDIENCES, *supra* note 44, at 166; EPSTEIN, LANDES, & POSNER, *supra* note 25, at 39. Justice Stevens's post-retirement activity is reflected in his speeches, archived at the Supreme Court's website, see http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx, and in his books, see JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR (2011); JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

50. BAUM, AUDIENCES, *supra* note 44, at 34-39.

51. Richard L. Hasen, *Celebrity Justice: Supreme Court Edition* (UC Irvine Sch. of Law, Res. Paper No. 2015-61, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611729.

52. BAUM, AUDIENCES, *supra* note 44, at 41-42.

53. RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 172-181 (2011).

54. SONIA SOTOMAYOR, MY BELOVED WORLD (2013); CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

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Now that transcripts and audio of oral arguments are available to the public, arguments have become another attractive opportunity for justices to engage in self-presentation to the small but relevant audience that pays close attention to the Court. Some justices clearly make use of that opportunity, and Justice Scalia is the most prominent example.[55] His primary goal in oral argument may be to strengthen the case of the side that he favors.[56] But he also engages in flamboyant behavior—frequently humorous in form[57]—to enhance his reputation with people who pay attention to arguments. As one Supreme Court advocate suggested, Justice Scalia "plays to the crowd."[58]

Justices' interest in their reputations would be a matter of interest even if it had no impact on their choices as decision makers. But that interest does have the potential to affect the votes that justices cast and the opinions they write.[59] Although it is impossible to ascertain any specific effects with confidence, some possible effects can be suggested.

First, in an era in which the justices are widely viewed as acting chiefly on the basis of ideology tinged with partisanship, justices may seek to show that they actually act on the basis of legal principle. Justice Scalia's interviews and public presentations make it clear that he wants to be seen as reaching judgments on a non-ideological basis; he frequently cites his vote to uphold the free speech rights of a flag burner in *Texas v. Johnson*[60] and his pro-defendant votes in some types of criminal cases.[61] Justice Scalia's concern for this element of his reputation may have an impact on his positions in certain cases.

55. Justice Scalia asks more questions at oral argument than do any of his colleagues. Cynthia K. Conlon & Julie M. Karaba, *May It Please The Court: Questions About Policy at Oral Argument*, 8 NW. J. L. & SOC. POL'Y 89, 99 (2012); Kedar S. Bhatia, *Stat Pack for October Term 2014*, SCOTUSBLOG 38 (Jun. 30, 2015 11:23 AM), http://sblog.s3.amazonaws.com/wp-content/uploads /2015/07/SB_Sta t_Pack _OT14.pdf.

56. Conlon & Karaba, *supra* note 55, at 99-100.

57. Counts of references to "laughter" in transcripts of oral arguments consistently find Justice Scalia far ahead of his colleagues. *See* Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2D 59, 60 (2005) (Scalia ranking first in the 2004 Term); Jay Wexler, *Justice Scalia Tops Oral Argument Yuks Ranking Once Again*, PRAWFSBLAWG (August 13, 2012, 2:43 PM), http://prawfsblawg.blogs.com/prawfsblawg/ 2012/08/justice-scalia-tops-oral-argument-yuks-ranking-once-again.html (Scalia ranking first in the 2011 Term).

58. Adam Liptak, *So, Guy Walks Up to the Bar, and Scalia Says. . .*, N.Y. TIMES, Dec. 31, 2005, http://www.nytimes.com/2005/12/31/politics/so-guy-walks-up-to-the-bar-and-scalia-says.html (quoting Pamela S. Karlen).

59. BAUM, AUDIENCES, *supra* note 44, at 33.

60. 491 U.S. 397 (1989); *see* Erin Fuchs, *Justice Scalia Says He Would Jail This 'Bearded Weirdo' if He Were King*, BUS. INSIDER (Mar. 26, 2014 3:38 PM), http://www.businessinsider.com/scali a-talks-texas-v-johnson-at-brooklyn-law-2014-3.

61. Jerry De Jaager, *Justice Scalia Comes Home to the Law School*, THE RECORD ONLINE (Spring 2012), http://www.law.uchicago.edu/alumni/magazine/spring12/scalia.

https://digitalcommons.onu.edu/onu_law_review/vol41/iss3/2

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Second, justices who have attracted support with their stance on certain issues might be reluctant to jeopardize that support by departing from the positions they have established. Justice Ginsburg's personal commitment to women's rights is so strong that it seems unlikely she needs any reinforcement of that commitment from the people who praise her for it.[62] But that may not be true of Justice Anthony Kennedy, who has won admiration for his opinions favoring gay rights.[63] When Justice Kennedy wrote the Court's opinion holding that state prohibitions of same-sex marriage violate equal protection,[64] his interest in maintaining that admiration likely was one factor—conscious or unconscious—in his decision process.

Two broader possibilities have been suggested, each specific to one time period.[65] Consideration of the first possibility arose from the conjunction of two circumstances in the period that centered on the 1960s to the 1980s. One circumstance was that elites in the legal profession,[66] the portion of the mass media that covered the Supreme Court,[67] and Washington social circles[68] arguably leaned in a liberal direction in that

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62. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157 (2002).

63. Adam Liptak, *Surprising Friend of the Gay Rights Movement in the Highest of Places*, N.Y. TIMES, Sep. 1, 2013, at A10; Sheryl Gay Stolberg, *Justice's Tolerance Seen in His Sacramento Roots*, N.Y. TIMES, June 22, 2015, at A1.

64. *Obergefell v. Hodges*, 192 L. Ed. 2d 609 (2015).

65. *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L. J. 1515, 1574-79 (2010).

66. A study that estimated ideological positions on the basis of campaign contributions in the 1979-2012 period found that the legal profession as a whole leaned to the left and that those leanings were especially strong among elite subgroups: law professors, lawyers from the top fourteen law schools, and lawyers at large law firms. *See* Adam Liptak, *Why Judges Tilt to the Right*, N.Y. TIMES (Jan. 31, 2015), http://www.nytimes.com/2015/02/01/sunday-review/why-judges-tilt-to-the-right.html (reporting on research by Adam Bonica and Maya Sen); *see also* John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO L.J. 1167, 1172-73, 1176 (2005) (finding a strong leaning toward Democratic candidates in 1992-2002 contributions by professors at the twenty-one top-rated law schools in the 2002 rankings by *U.S. News & World Report*).

67. This judgment is impressionistic. However, some conservative commentators in the 1990s argued strongly that Supreme Court reporters leaned strongly to the left in their reporting. Linda Greenhouse, long-time Supreme Court reporter for the New York Times, was the major target of these commentators' criticism; indeed, two of them referred to the perceived leftward movement of Republican appointees to the Court as the "Greenhouse effect." *See Attacking Activism, Judge Names Names*, LEGAL TIMES (June 22, 1992), at 14, 16-17 (reporting views of federal court of appeals judge Laurence Silberman); Thomas Sowell, *Blackmun Plays to the Crowd*, ST. LOUIS POST-DISPATCH, March 4, 1992, at 7B. In the broader "elite" news media, studies have documented a leaning to the left. DAVID H. WEAVER & G. CLEVELAND WILHOIT, THE AMERICAN JOURNALIST: A PORTRAIT OF U.S. NEWS PEOPLE AND THEIR WORK 28-29 (1991); Stanley Rothman & S. Robert Lichter, *Personality, Ideology and World View: A Comparison of Media and Business Elites*, 15 BRIT. J. POL. SCI. 29, 31 (1985).

68. Of course, there is no systematic measure of the political leanings of Washington social circles. We do, however, have the testimony of President Richard Nixon about what he saw as the influence of liberal social circles in D.C. on the justices who associated with them. RICHARD REEVES,

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period. The other was that among the justices appointed by Republican presidents from the 1950s to the early 1990s, there were several whose votes and opinions in cases overall could be characterized as moderate or moderately liberal rather than conservative.[69] Some of those justices—most notably, Justice Harry Blackmun[70]—seemed to move to the left during their tenure on the Court.[71]

As some conservative commentators saw it, the two circumstances were related: justices became more liberal as a means of winning approval from liberal elites.[72] There is some reason to be cautious about accepting that hypothesis. The relative liberalism of some Republican appointees may have resulted primarily from appointment strategies,[73] and the number of Republican appointees whose voting records on the Court identified them as liberals or moderates may have been largely a matter of chance.[74] But it would be a mistake to dismiss out of hand the possibility that some justices' interest in their reputations moved them to the left. In Justice Blackmun's case, it is clear that the praise he received from liberal elites for "evolving" in a liberal direction pleased him considerably, and it seems likely that this praise reinforced that evolution.[75]

The other possibility is the product of the political polarization that has characterized American elite politics over the past two decades. One aspect

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PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 338 (2001) (referring to the "Washington-Georgetown social set"); JOHN W. DEAN, THE REHNQUIST CHOICE 171 (2001) (referring to "that [expletive deleted] Georgetown set"); GREENHOUSE, *supra* note 31, at 48 (referring to the "Georgetown crowd").

69. It is difficult to characterize justices' ideological positions in absolute terms. However, if justices are arrayed on an ideological continuum with the other justices who served with them, several Republican appointees who served in the 1950s or later were at the left or center of the Court and further to the left than some colleagues appointed by Democratic presidents. Among these justices are Justices Earl Warren, William Brennan, Potter Stewart, John Paul Stevens, Harry Blackmun (in the second half of his Court tenure), and David Souter. *See* Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999, 10 POL. ANALYSIS 134 (2002). The ideological scores calculated by Martin and Quinn for each justice for each Court term (commonly called "Martin-Quinn scores") are posted at http://mqscores.berkeley.edu/measures.php.

70. GREENHOUSE, *supra* note 31; Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

71. BAUM, AUDIENCES, *supra* note 44, at 147-48 (showing suggestive evidence of substantial leftward movement by Justices Earl Warren, Potter Stewart, Harry Blackmun, Anthony Kennedy, and David Souter after their first two terms on the Court).

72. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 150-51 (1994); Michael Barone, *Why America's House of Lords Seems to Tilt to the Left*, CHI. SUN-TIMES, July 13, 2005, at 55; David P. Bryden, *Is the Rehnquist Court Conservative?*, 109 PUB. INT. 73, 83-84 (1992); Sowell, *supra* note 67.

73. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 41-69 (Eisenhower appointments), 97-132 (Nixon and Ford appointments), 135-42 (Reagan appointment of Justice Sandra Day O'Connor) (1999).

74. On the appearance of causal effects in patterns of behavior that actually stem from chance, see Carol Mock & Herbert F. Weisberg, *Political Innumeracy: Encounters with Coincidence, Improbability, and Chance*, 36 AM. J. POL. SCI. 1023 (1992).

75. BAUM, AUDIENCES, *supra* note 44, at 151-55.

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of that polarization is "sorting" that has resulted in increased ideological homogeneity within the two major parties and increased ideological distance between them.[76] Another aspect, related to the first, is stronger identification with partisan and ideological camps and more negative affect between the camps.[77]

Partisan sorting has been the major factor leading to the alignment of the justices since 2010, an alignment in which one bloc of liberal justices appointed by Democratic presidents faces a bloc of conservatives appointed by Republican presidents.[78] Although that alignment seems natural, it followed an era in which ideological and party lines on the Court did not coincide, largely because of the relative liberalism of several Republican appointees.[79] But more relevant to the justices' choices is the development of more distinct partisan and ideological camps among political elites. To the extent that it was possible to speak of a single liberal-leaning elite in an earlier era, that is no longer true: today, liberal and conservative elites are largely separated from each other.[80] There are prominent blogs, legal scholars, and legal societies on both sides of the ideological divide, each available to provide support and reinforcement to justices on that side. On the conservative side, the development of the Federalist Society as a significant organization is especially noteworthy.[81] Of the current justices, Chief Justice Roberts and Justices Alito, Scalia, and Thomas all have ties to the Federalist Society.[82] For their part, liberal justices have developed ties

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76. On sorting in the general public, see MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS (2009); Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563, 577-82 (2008). On congressional sorting, see NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 15-70 (2006); SEAN THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

77. Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPIN. Q. 405 (2012).

78. Greg Stohr, *Roberts Court Partisan Split Shows New Justices are Predictable*, BLOOMBERG BUS. (Jul. 1, 2011 12:01 AM), http://www.bloomberg.com/news/articles/2011-07-01/roberts-supreme-court-s-partisan-split-shows-new-justices-are-predictable.

79. BAUM, AUDIENCES, *supra* note 44, at 140.

80. SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008); Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOWARD L.J. 661, 681-703 (2013).

81. MICHAEL AVERY & DANIELLE MCLAUGLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2013); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015). For a key legal blog on the conservative side, see THE VOLOKH CONSPIRACY, https://www.washingtonpost.com/news/volokh-conspiracy/. For the role of the Volokh Conspiracy in the development of arguments that the federal health care law of 2010 went beyond the constitutional powers of Congress, see RANDY E. BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE (2013).

82. HOLLIS-BRUSKY, *supra* note 81, at 3.

to the younger and less prominent American Constitution Society.[83] And the increased separation between conservative and liberal elites may strengthen any tendency for justices to orient themselves primarily toward people on their side of the ideological spectrum.[84]

The import of this development should not be exaggerated. To the extent that the justices seek a favorable reputation with people who share their liberal or conservative views, that interest might not affect the positions they take as decision makers. But it may be that justices' concern for their reputation reinforces their ideological leanings. In particular, a concern for reputation might deter departures by those justices from their usual leanings in cases of high salience to the two ideological sides. If the current era of polarization continues, as seems likely, the impact of ideologically distinct elites on the justices—or the lack of such an impact—will become clearer.

III. JUSTICES ARE IMPERFECT DECISION MAKERS

In psychological research, few findings are as well established as the weaknesses in decision making that stem from elements of human thinking.[85] Our capacity to process information effectively is limited, and unintentional biases distort our judgments.[86] Emotions also influence those judgments.[87] As a result, our capacity to choose the course of action that will best advance our goals is imperfect, often highly imperfect. Behavioral economists have demonstrated that even in the economic sphere, an area in which most scholars had assumed that people's decisions reflect a high level of rationality, decision making falls well short of that ideal.[88]

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83. Tony Mauro, *Ruth Bader Ginsburg 'Amazed' at Icon Status at 82*, BLOG OF LEGAL TIMES (Jun. 14, 2015 8:45 AM), http://www.nationallawjournal.com/legaltimes/id=1202729413008/Ruth-Bader-Ginsburg-Amazed-at-Icon-Status-at-82?slreturn=20150706084708; *Justice Stephen Breyer at the 2004 Annual Convention*, AMERICAN CONSTITUTION SOCIETY, http://www.acslaw.org/news/video/justice-stephen-breyer-at-the-2004-annual-convention; Andrew Hamm, *Justice Sotomayor speaks at ACS convention*, SCOTUSblog (Jun. 24, 2014 10:41 AM), http://www.scotusblog.com/2014/06/justice-sotomayor-speaks-at-acs-convention/.

84. Justice Scalia has noted and lamented the ideological narrowing of social circles in Washington, D.C., pointing out that he "can't even remember" the last party that had what an interviewer called "a nice healthy dose of both liberals and conservatives." Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, http://nymag.com/news/features/antonin-scalia-2013-10/.

85. For the classic presentation of those findings, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

86. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

87. George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619-42 (Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith eds., 2003).

88. ADVANCES IN BEHAVIORAL ECONOMICS (Colin F. Camerer, George Loewenstein, & Matthew Rabin eds., 2004); RICHARD H. THALER, MISBEHAVING: THE STORY OF BEHAVIORAL

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Judges could hardly be immune to these weaknesses. Indeed, a team of scholars has carried out a body of research demonstrating the similarities—as well as some differences—between judges and other people in this respect.[89] It is true that, compared with most other people (including most other judges), Supreme Court justices do their work under conditions that are unusually conducive to effective decision making: they hear a small number of cases,[90] each justice draws on the assistance of four law clerks who typically have very high levels of skill and commitment,[91] and justices enjoy considerable insulation from pressures and distractions. But these favorable conditions could be expected only to reduce the effects of the weaknesses that justices share with other people rather than eliminating those effects.

One factor that distorts human decision making stems from aversion to losses. Psychological research has made it clear that people tend to give potential losses greater weight than potential gains.[92] This tendency may help to explain a puzzling finding of some quantitative Supreme Court studies. These studies indicate that the Court collectively responds to the state of public opinion in order to maintain the Court's legitimacy and thus its ability to make its decisions effective.[93] In one sense that finding does not seem very plausible, in that the Court's legitimacy does not appear to be very fragile.[94] In other words, to the extent that justices pay attention to

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ECONOMICS (2015); Nicholas Barberis & Richard Thaler, *A Survey of Behavioral Finance*, *in* HANDBOOK OF THE ECONOMICS OF FINANCE VOL. 1B 1053 (George M. Constantinides, Milton Harris, & Rene M. Stulz eds., 2003).

89. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1227, 1229 (2006); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013).

90. *See* Bhatia, *supra* note 55, at 16.

91. *See generally* IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (Todd C. Peppers & Artemus Ward eds., 2012).

92. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Nathan Novemsky & Daniel Kahneman, *The Boundaries of Loss Aversion*, 42 J. MARKETING RES. 119 (2005).

93. TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 122-206 (2011); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011).

94. JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 36-62 (2009). In recent years there have been signs of declining support for the Court by some measures. *See* Andrew Dugan, *Americans' Approval of Supreme Court Near All-Time Low*, GALLUP (July 19, 2013), http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx. However, this decline appears to reflect a general decline in approval of government institutions rather than attitudes

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public opinion, they seem to be sacrificing other goals unnecessarily. But it is noteworthy that justices themselves often refer to their need to act in ways that maintain public support.[95] It might be that aversion to losses on the part of some justices causes them to respond to the public in ways that a truly rational justice would not.

Human weaknesses in decision making raise questions about the assumption in research on judicial strategy that justices make optimal or nearly optimal choices about how best to advance their goals. The ability of justices to forecast possible reactions from Congress to the Court's decisions is reduced not just by the complexity of the forces that shape congressional action, but also by limitations in the justices' own ability to assimilate and analyze relevant information.[96] Justices would seem to be in a very good position to maximize their influence within the Court, since they are highly familiar with their colleagues' reactions to efforts at influence from repeated interactions.[97] But the justices' imperfections as decision makers come into play even in that setting.

The Court's history provides a striking example of those imperfections in Justice Felix Frankfurter, who served from 1939 to 1962.[98] Justice Frankfurter was a renowned legal scholar who came to the Court with the expectation that he would be highly effective in persuading his colleagues to adopt his positions, and he worked hard at achieving influence.[99] But Justice Frankfurter proved to be quite unsuccessful in this effort. This outcome stemmed in part from his misjudgment about how his colleagues would react to his efforts to play a dominant role in the Court, in part because of personality traits that caused him to alienate many of his colleagues.[100] Justice Frankfurter's example underlines the impact of limitations in the justices' capabilities.

Justice Frankfurter might be considered an extreme case, and certainly other justices have been considerably more successful in interpersonal relations within the Court. But even Justice William Brennan, widely

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specifically toward the Court. *See* Nichole Zhao, *Chief Justice speaks at Rice*, THE RICE THRESHER (Oct. 19, 2012 12:00 AM), http://www.ricethresher.org/article_16232aeb-468f-5d5f-b237-a997446e3d0e.html (quoting view of Chief Justice John Roberts).

95. CLARK, *supra* note 93, at 68-71.

96. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 31 (1997); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 528 (1998).

97. *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 37-90 (1964).

98. DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 992 (2004).

99. HIRSCH, *supra* note 31, at 127, 138-41.

100. *Id*. at 155-200.

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perceived as highly effective in persuading his colleagues to his positions,[101] seemed to make some serious mistakes in his efforts to influence those colleagues.[102] In this arena, as in others, the justices may differ in the extent of their imperfections as decision makers. But the existence of such imperfections is universal.

One important attribute of human decision making is the gap that often exists between the goals that people consciously seek and those that their behavior actually serves.[103] Thus, Supreme Court justices may try to achieve certain goals, but actually act on other goals instead. If it is true that justices act on their interest in a favorable reputation, for example, they likely do not recognize that they are doing so. Rather, that consideration colors judgments that justices believe they are making on the basis of other considerations such as the weight of the law.

The same is true of the balance between legal and policy considerations in the justices' choices. There is good reason to conclude that most justices believe their votes and opinions are based primarily on their efforts to interpret the law well.[104] But so long as justices hold strong policy preferences, the ambiguity of the law on the issues that the Court addresses leaves considerable room for those preferences to come into play.[105]

Indeed, this effect closely tracks the theory of motivated reasoning in social psychology. In that theory, when people have the goal of reaching an accurate outcome (such as the best interpretation of the law), but face a situation of high ambiguity (such as the presence of strong legal arguments on both sides of a case), their directional goals (such as policy preferences) will play a large role in their judgments.[106] Justices who proclaim that their policy preferences do not affect their votes and opinions are not necessarily dissembling; they simply may not recognize how those values come into play.[107]

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101. *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 5 (judgment of Justice Thurgood Marshall), 9-10 (judgment of Judge Abner J. Mikva), 37-38 (judgment of Nina Totenberg) (1990).

102. STERN & WERMIEL, *supra* note 31, at 479-80, 492-94 (describing Justice Brennan's impact on Justice O'Connor).

103. DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL (2002); *see* Oliver C. Schultheiss, *Implicit Motives*, *in* HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 603 (Oliver P. John, Richard W. Robins & Lawrence A. Pervin eds., 2008).

104. Jeffrey A. Segal, *What's Law Got to do With It? Thoughts from "the Realm of Political Science," in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 17, 19 (Charles Gardner Geyh ed. 2011).

105. SEGAL & SPAETH, *supra* note 4, at 93.

106. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990). For an application of motivated reasoning to judicial decision making, see BRAMAN, *supra* note 2, at 13-79, 160-70 (2009).

107. BRAMAN, *supra* note 2, at 23-24.

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The theory of motivated reasoning can also help in understanding a phenomenon that is highly disturbing to some observers of the Supreme Court: the existence of decisions in which the justices take positions that seem to be direct products of their partisan preferences.[108] *Bush v. Gore*[109] is by far the most prominent example, but other decisions are at least as striking in this respect. For example, on a technical but consequential issue about methods of conducting the census, why would all nine justices support outcomes that accorded with the interests of the political party they presumably favored?[110] Such divisions among the justices seem unfortunate, but they do not necessarily stem from deliberate efforts to achieve desired political results. Rather, they can be explained primarily by the operation of motivated reasoning.

IV. JUSTICES DIFFER FROM EACH OTHER IN THE BASES FOR THEIR CHOICES

Research in social psychology emphasizes that the situations in which people find themselves exert a more powerful impact on their behavior than we usually think.[111] In fact, one psychologist labeled the "general tendency to overestimate the importance of personal or dispositional factors relative to environmental influences" the "fundamental attribution error."[112]

Yet people's situations leave considerable room for variation in how individuals respond to a particular situation. Research in the psychology of personality amply demonstrates the impact of individual traits on behavior.[113] Students of political psychology have identified ways that those traits shape the behavior of public policy makers,[114] including judges.[115]

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108. Some scholars have discussed such decisions under the rubric of "low politics," as distinguished from the "high politics" of decision making based on policy preferences. *See, e.g.*, HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 7 (2001); Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062 (2001).

109. 531 U.S. 98 (2000).

110. Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999). In the decision, the Court rejected the use of sampling methods in counting the population. *Id.* at 343-44. Justices Stevens, Souter, and Ginsburg dissented; Justice Breyer concurred with the Court's opinion on the issue of standing and dissented otherwise. *Id.* at 349-65. The partisan implications of the decision are discussed in Linda Greenhouse, *Jarring Democrats, Court Rules Census Must Be by Actual Count*, N.Y. TIMES, Jan. 26, 1999, http://www.nytimes.com/1999/01/26/us/jarring-democrats-court-rules-census-must-be-by-actual-count.html.

111. *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 173, 183 (1977).

112. *Id.* at 184. For a more extensive presentation of this perspective, see LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991).

113. *See* HANDBOOK OF PERSONALITY: THEORY AND RESEARCH (Oliver P. John, Richard W. Robins & Lawrence A. Pervin eds., 2008).

114. JAMES DAVID BARBER, THE LAWMAKERS (1965); JAMES L. PAYNE, OLIVER H. WOSHINKSY, ERIC P. VEBLEN, WILLIAM H. COOGAN & GENE E. BIGLER, THE MOTIVATION OF POLITICIANS (1984);

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These two strains of psychological theory suggest that we should expect to find both important similarities and substantial differences in the ways that Supreme Court justices do their jobs. On the one hand, the Court is a specialized setting with prescriptions (mostly implicit) about appropriate ways of acting and doing work. Justices are socialized into prescribed patterns of behavior both by the larger legal system in which they are trained and work and by their colleagues on the Court.[116] As a result, they act similarly in ways that observers of the Court do not always notice because those modes of behavior are taken for granted. One example is the prescription that justices' opinions should present their positions in cases and the Court's collective rulings primarily as a product of legal reasoning.

But justices enjoy a good deal of autonomy in carrying out their work, and that autonomy allows for variation in how they do that work. Indeed, simple observation of the justices suggests that they go about their jobs in somewhat different ways.[117] Of particular interest is the possibility of variation among justices in the mix of considerations that shape votes and doctrinal positions in cases.[118] To return to the two points on which the predominant models of Supreme Court decision making differ, it is not unreasonable to posit that justices differ in both the balance between legal and policy considerations in their choices and in the extent to which they act strategically on behalf of their goals. There has been relatively little research on such variation, both because of the widely shared assumption that little variation exists and because of the methodological difficulties involved in identifying it. Still, some speculation is possible.

David G. Winter, *Leader Appeal, Leader Performance, and the Motives Profiles of Leaders and Followers: A Study of American Presidents and Elections*, 52 J. PERSONALITY & SOC. PSYCHOL. 196 (1987). For an overview of this research, see David G. Winter, *Personality and Political Behavior*, *in* OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 110 (David O. Sears, Leonie Huddy & Robert Jervis eds., 2003).

115. HAROLD DWIGHT LASSWELL, POWER AND PERSONALITY 64-88 (1948); Greg A. Caldeira, *Judicial Incentives: Some Evidence from Urban Trial Courts*, 4 JUSTICIA 1 (1977); Austin Sarat, *Judging in Trial Courts: An Exploratory Study*, 39 J. POL. 368 (1977); Burton Atkins, Lenore Alpert & Robert Ziller, *Personality Theory and Judging: A Proposed Theory of Self Esteem and Judicial Policy-Making*, 2 L. & POL'Y Q. 189 (1980); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self-Esteem on Judicial Decision Making*, 43 J. POL. 104 (1981).

116. BRAMAN, *supra* note 2, at 25-29.

117. There are a few studies of the Court that systematically probe differences among the justices in relation to personality traits. The evidence from these studies is only suggestive as to the extent and form of the impact of those traits. *See* Philip E. Tetlock, Jane Bernzweig & Jack L. Gallant, *Supreme Court Decision Making: Cognitive Style as a Predictor of Ideological Consistency of Voting*, 48 J. PERSONALITY & SOC. PSYCHOL. 1227 (1985); Jilda M. Aliotta, *Social Backgrounds, Social Motives and Participation on the U.S. Supreme Court*, 10 POL. BEHAV. 267 (1988); Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making*, 68 J. PERSONALITY & SOC. PSYCHOL. 5 (1995).

118. Baum, *Motivation and Judicial Behavior*, *supra* note 18, at 14-16.

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Certainly, justices might differ in the relative importance of legal and policy considerations to their decision making. The strength of policy preferences and commitments to the task of legal interpretation may well differ from justice to justice, so that they approach their tasks as decision makers with different mixes of considerations.[119] But the most likely form of variation among the justices may be in the extent to which they act strategically, because the attractiveness of strategic behavior undoubtedly differs a good deal among people.[120]

Consider hypothetical justices who are devoted only to making good policy. Some might get satisfaction chiefly from doing the right thing as they see it, taking positions in each case that accord as closely as possible with their policy preferences. For such justices, whether their preferred policies prevail in the Court or in the larger policy arena is very much secondary. In contrast, other justices might get satisfaction chiefly from winning victories in the Court and in the larger policy arena and from the process of calculating how best to achieve such victories. Similar variation might exist among justices who were devoted solely to making good law. In all likelihood, such differences would stem primarily from differences in personality.

With caution, it is possible to identify justices who leaned toward one or the other of those types. Justice William O. Douglas seemed to resemble the justice of the attitudinal model to a considerable degree, taking the positions he most preferred and devoting relatively little effort to winning support for those positions.[121] One colleague observed, presumably with some exaggeration, that "Bill Douglas is positively embarrassed if anyone on the court agrees with him."[122] In contrast, his long-time colleague Justice William Brennan was openly strategic in relation to his colleagues, working hard to win support for his positions in specific cases and in the long term.[123] These two justices, like-minded on most policy issues, seemed largely to be playing two different games. Justice Brennan's apparent willingness to continue his strategic efforts even in the unfavorable

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119. The studies that analyze the behavior of individual justices separately provide evidence on similarities and differences among justices in the weights of different considerations in their judgments about cases. *See, e.g.*, Segal, *supra* note 31; Bailey & Maltzman, *supra* note 31. Notably, one study found variation among the justices in their willingness to accept precedents that they had originally opposed. HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 290-301 (1999).

120. Baum, *Motivation and Judicial Behavior*, *supra* note 18, at 23.

121. Howard Ball, *Loyalty, Treason, and the State: An Examination of Justice William O. Douglas's Style, Substance, and Anguish*, *in* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 7, 7-8 (Stephen L. Wasby ed., 1990).

122. *The Law: The Court's Uncompromising Libertarian*, TIME MAG., Nov. 24, 1975, at 69.

123. KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 120-282 (1993); STERN & WERMIEL, *supra* note 31, at 96-535 (2010).

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conditions of a conservative Court in the 1970s and 1980s might also be contrasted with Justice Thurgood Marshall's reaction to those unfavorable conditions. As reported by a former law clerk, Justice Marshall abandoned the task of "futilely trying to influence his colleagues."[124]

Even more caution is required in characterizing sitting justices, but there is evidence that Justices John Roberts and Antonin Scalia also differ in their use of strategy. Justice Scalia has spoken eloquently about the satisfaction of writing dissenting opinions only for himself, so that no compromise is necessary,[125] and he frequently employs language in opinions that carries with it the risk of alienating colleagues.[126] Chief Justice Roberts seems especially attuned to long-term strategic considerations, whether he is inserting language in opinions that he can use as a way to move the Court toward decisions he favors in the future[127] or stepping back from a decision that might embroil the Court in political controversy.[128]

If different justices are indeed acting on different mixes of considerations, that variation complicates what the Court does. For instance, collective decision making may involve interplay among justices who differ in their willingness to compromise and thus in their contributions to consensus. To take another example, the extent of the Court's responsiveness to its political and social environment may depend on the number and identity of the justices who are most inclined to be responsive.

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124. Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2109 (1992).

125. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (1994).

126. One study found that Justice Scalia opinions were described as "sarcastic" or "caustic" more often than those of all other justices who have served with him combined. Richard L. Hasen, *Essay: The Most Sarcastic Justice*, 18 GREEN BAG 2D 215 (2015). According to one account, Chief Justice Rehnquist responded to a Justice Scalia opinion that attacked Justice Sandra Day O'Connor's position in a case by phoning Justice Scalia to admonish him that he was annoying Justice O'Connor: "Nino, you're pissing off Sandra again. Stop it!" JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 129 (2007). However, Justice Scalia has stated his view that the tone of his opinions does not have a negative effect. Senior, *supra* note 84, at 80. Justice Scalia undoubtedly influences his colleagues' positions, and that influence is especially clear on the use of legislative history as a resource for interpretation of statutes. James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 160-71 (2008).

127. Richard A. Posner, *The Voting Rights Act ruling is about the conservative imagination*, SLATE (June 26, 2013 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html (on Chief Justice Roberts' opinion for the Court in Shelby County v. Holder, 133 S. Ct. 2612 (2013)); Linda Greenhouse, *The Cost of Compromise*, N.Y. TIMES OPINIONATOR (July 20, 2013 9:00 PM), http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise/?_r=0 (same).

128. Marcia Coyle & Tony Mauro, *Tough medicine: The health care decision may have been controversial, but it could push the Supreme Court out of the political spotlight*, NAT'L L. J., July 2, 2012, at 1 (on Chief Justice Roberts' vote to uphold the individual insurance mandate in Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012)); Linda Greenhouse, *Is it the Roberts Court?*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 188-90 (Nathan Persily, Gillian E. Metzger, & Trevor W. Morrison eds., 2013).

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In turn, scholars and other observers who treat the justices as homogeneous may miss significant elements in the process by which the Court reaches its collective judgments.

V. CONCLUSION

Theoretical and empirical research by legal scholars and political scientists has taught us a great deal about Supreme Court justices as decision makers. But like scholarship on other issues, this body of work can benefit from the infusion of alternative perspectives. In this article, I have sketched some perspectives that have not been fully incorporated into the scholarship on Supreme Court decision making.

These perspectives all point to the value of adding complexity to our conceptions of the forces that shape what justices do as decision makers. Certainly, taking that complexity into account is not necessary to make progress in understanding the justices. Indeed, the relatively simple models that have dominated scholarship on the Court, especially in political science, do much to facilitate analysis of the justices' behavior. Scholars who prefer relatively simple models can continue to make important contributions by applying those models. But research that takes into account the complicated reality of judging can do a good deal to advance our capacity to explain the justices' choices.

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