The Political (Science) Context of Judging

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I. INTRODUCTION

For at least two decades now, the legal academy has made extensive use of the theories and tools of the economist. Though not all in the law world view this as happy development, few would deny its importance. Indeed, the integration of law and economics is so complete that nary a substantive area of law remains untouched; nary a law curriculum fails to house a course on the subject; and nary a law faculty lacks a specialist, if not a Ph.D., in economics.

The same could not be said of political science. In *recent* years, theories regularly bandied about by political scientists—such as "the attitudinal model" and "the strategic account"—and data sources that we regularly use—such as "The Spaeth Database"—are now making appearances in the law reviews, but "recent" is the operative word. It has been in only the last few years that law professors have shown much interest in political science approaches to judging; and that interest is spotty to say the least.[1]

That is why we so appreciate Professor Merrill's effort. From top to bottom, he consciously seeks to engage political scientists in ways that are virtually unknown in the law world.[2] He has gone to great lengths to

1. *See, e.g.*, Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

2. *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 572 (2003) ("[I]n discussing some recent developments on the Rehnquist Court . . . I hope to stimulate political scientists to take a closer look at the changing behavior of the Rehnquist Court, using their superior empirical and model-building skills."); *see also id.* at 573 ("Indeed, if I accomplish nothing else in this Lecture, I hope I can inspire political

understand (what is largely) our literature and to apply (what are largely) our tools to illuminate an intriguing phenomenon. Moreover, at the end of the day, he tells us something really fascinating about the current Supreme Court, "The Rehnquist Court(s)."

These are some of the many assets of Professor Merrill's lecture. As is probably the case for all pioneering efforts, however, it also has its share of deficits. Mainly, we think that in future research, he—and indeed, other legal academics—might make even better use of our theories and technologies by gaining a firmer grasp on the overall "political science" project, developing a more nuanced understanding of our leading theoretical accounts, and assessing the implications of those accounts against more reliable and valid data via more appropriate methodology.

That Professor Merrill's work could be improved with greater attention to these matters comes as no surprise. We need only think of the initial works invoking theories and methods of economics: many were less than adequate adoptions or adaptations, evincing a lack of understanding of even the basics of the prevailing paradigm in that field. Years later, perhaps as a result of more training, deep reading, and the influx of economists into the legal academy, that has changed. The law journals are now replete with enlightened and enlightening studies relying, in part or in whole, on the theories or tool of economics.

We believe, as does Professor Merrill, that political science has at least as much to add to our understanding of law-related phenomena, but we hope that it does not take as long for legal academics to develop an appreciation of our world, and that Professor Merrill's paper is only the first in what will, without doubt, be a long and fruitful dialogue between political scientists and legal academics.

Professor Merrill has done a great service by starting the conversation. We would like to push it even further by clarifying what it is that we political scientists do and by exploring our work within the context of Professor Merrill's Lecture. At times we are critical, but by no means do we wish to undermine his research. Quite the opposite: We only seek to demonstrate how he might bolster some of his claims with greater attention to theory and data.

II. POLITICAL SCIENTISTS AND JUDGING: THE NATURE OF OUR PROJECT

While it almost never comes as a surprise to political scientists that legal academics know a lot about judging, the converse does not always hold. In our many conversations with law professors, we have learned that a significant number do not realize that political scientists even study courts and law, much less know something about them.

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scientists to take up the differences in the Rehnquist Court before and after 1994 as an appropriate subject for further investigation.").

Professor Merrill is, of course, an exception, and there are some, perhaps even a growing number, of others. Their size, however, remains small, and even among the hardy few exist some misunderstandings about the nature of our project. In what follows, we undertake a clarification. We begin with a *bit* of history about disciplinary interest in the subject of judging and then *outline* the three primitives of work—questions, theory, and data—with some attention to how Professor Merrill's makes use of them.

Our emphasis on "bit" and "outline" is no mistake. We do not intend to provide a review of the vast literature political scientists have produced on judging; others already have done that.[3] Nor do we aim to offer a comprehensive guide to the rules and guidelines that govern our research program; this too has been produced.[4] Our goals are rather far more modest: to provide a flavor of our project just large enough to retain the interest of the Professor Merrills in the legal academy—those already familiar with some its features—and just ample enough to whet the appetites of others.

A.   *Some Historical Notes*

Interest in judging among political scientists is both quite old and relatively new. The regular appearance of articles with titles such as *Constitutional Law in 1909-1910: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1909*[5] is a testament to the long-standing tradition of scholarship in this area, as are the many books and essays produced

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3. *See, e.g*., LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749 (1994); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000).

4. *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (1994); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

5. Eugene Wambaugh, *Constitutional Law in 1909-1910: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1909*, 4 AM. POL. SCI. REV. 483 (1910). This article, published in an early volume of the discipline's flagship journal, the *American Political Science Review,* proved "so popular," as Thomas G. Walker writes,

   that the *APSR* decided to make it an annual event, a tradition that continued for the next forty years. A series of distinguished scholars were [sic] commissioned to write these pieces: Weinbaugh [sic] (1910-1912), Emlin McClain (1915), Thomas Reed Powell (1918-1920), Edward S. Corwin (1920-1924), Robert E. Cushman (1925-1928), Robert J. Harris (1950-1951), and David Fellman (1949, 1952-1961). The *Western Political Quarterly* published a similar annual review, for years written by Paul Bartholomew, which ran until 1972. In addition, a regular feature in every issue of the early volumes of the *APSR* was a compilation "Decisions of American Courts on Points of Public Law," edited by Robert E. Cushman.

Thomas G. Walker, The Development of the Field 1 (Nov. 11, 1994) (unpublished manuscript, on file with the authors).

by scholars such as Reed Powell, Edward S. Corwin, and Robert Cushman (all of whom served as presidents of the American Political Science Association).

Truth be told, however, there was nothing very political science-like about these early works; most were doctrinal pieces that could have—perhaps should have—been written by law professors of the day. In fact, the "political science" authors of some of these works went so far as explicitly to reject politics. Cushman's examination of the 1936-37 Term—one of the most volatile in Supreme Court history—is exemplary. After acknowledging that the "1936 term . . . will probably be rated a notable one," he enumerated some of the facts "one should bear in mind," such as the facts Roosevelt had won a landslide reelection and had submitted his Court-packing plan.[6] Rather than demonstrate how those "facts" might have affected Court decisions, however, Cushman simply noted that "[n]o suggestion is made as to what inferences, if any, may be drawn from them."[7]

Not until the 1940s did our scholarship begin to move from "law-like" to "politics-laden" (though, we must admit, some among us still churn out the former). That transformation came about largely as a result of the efforts of one scholar, C. Herman Pritchett, who may be virtually unknown in the law world but whose work remains a powerful presence in ours. What Pritchett did, in some sense, was to move legal realism from the sole province of law schools to the corridors of political science departments.[8] Like some proponents of socio-legal jurisprudence,[9] he argued that judges are "motivated by their own preferences."[10] To put this in today's parlance, he was probably the first political scientist to view judges as "single-minded seekers of legal policy"[11]—an assumption about jurists' goals that continues, as we describe later, to stand as a hallmark of the political science approach to judging.

In another sense, though, Pritchett did far more than transport legal realism, lock, stock, and barrel, to our discipline. For one thing, Pritchett, unlike most of the realists, was a conscious and quantitative empiricist.[12] Not

6. Robert E. Cushman, *Constitutional Law in 1936-37: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1936*, 32 AM. POL. SCI. REV. 278, 278 (1938).

7. *Id.*

8. *See* SEGAL & SPAETH, *supra* note 3, at 86-89.

9. *See*, *e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949); JEROME FRANK, LAW AND THE MODERN MIND (1930); K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951).

10. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947, at xii-xiii (1948).

11. Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992).

12. For classic examples, see PRITCHETT, *supra* note 10; C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court*, *1939-1941*, 35 AM. POL. SCI. REV. 890 (1941).

only did he assess his arguments against numerical data, but his research actually derives from a simple empirical observation (one that we depict in Figure 1): dissents were beginning, in the 1930s and 1940s, to accompany many Supreme Court decisions. It was that observation that led Pritchett to the obvious question: If precedent drives Court decisions, as many in political science and law maintained, then why did various Justices in interpreting the same legal provisions consistently reach different conclusions on important questions of the day? It was that question that led him to the same solution upon which the realists happened: rules based on precedent were little more than smokescreens behind which judges hide their values.

FIGURE 1

Percentage of U.S. Supreme Court Cases with at Least One Dissenting
Opinion, 1800-2000 Terms[13]
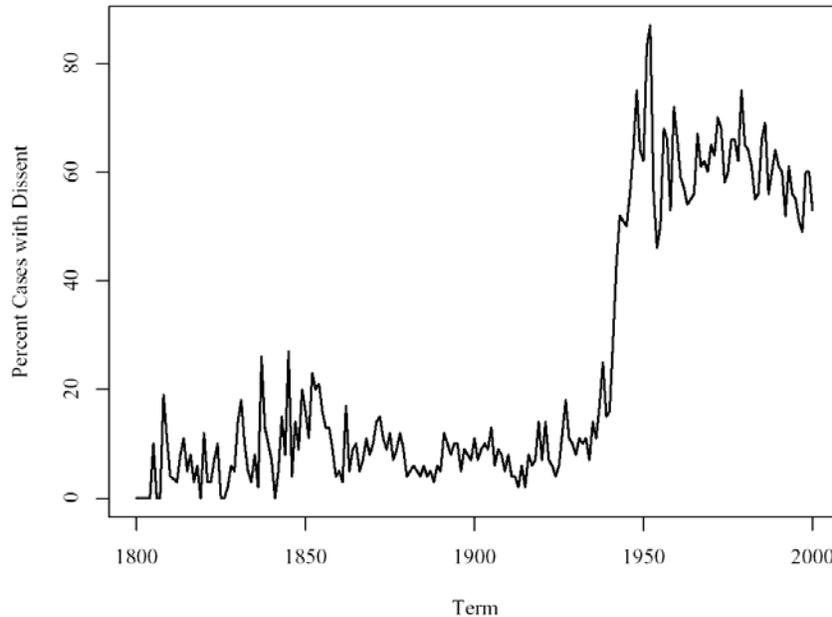
Unlike his colleagues in the law schools, however, Pritchett attempted to confirm this claim—the realists' intuition—with data he mined from the voting records of the Justices, which he analyzed with then-sophisticated methodological tools. It was Pritchett who first systematically examined dissents and voting blocs on the Court; he was also the first to invoke left-right

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13. The data underlying Figure 1 were taken from LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 211-15 tbl.3-2 (3rd ed. 2003).

voting scales to study ideological behavior. That Pritchett was able to place Justices of the Roosevelt Court on continuums, such as the one depicted in Figure 2, helped him substantiate his claim that political attitudes have a strong influence on judicial decisions.

FIGURE 2

Pritchett's Left-Right Continuum of Justices Serving Between 1939 and 1941[14]

Black	Douglas		Murphy	Reed	Frankfurter	Court	Reed	Stone		Hughes	Roberts	McReynolds

Left   Right
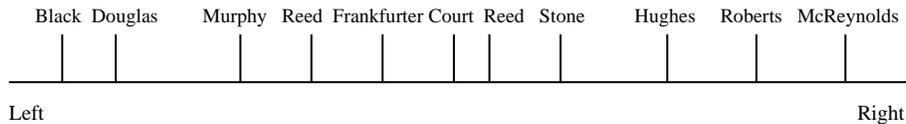
There is yet a second distinctive feature of Pritchett's work: while it may draw on the insights of the realists to make sense of dissents, it does not stop with their writings. To Pritchett (and, later, his student, Walter F. Murphy), if Justices are single-minded seekers of policy, they necessarily care about the "law," broadly defined. Furthermore, if they care about the ultimate state of the law, then they may be willing to modulate their views to avoid an extreme reaction from Congress and the President.[15] Pritchett (and, again, Murphy), in other words, tells a tale of shrewd Justices, who anticipate the reactions of the other institutions and take those reactions into account in their decision making. The Justices he depicts would rather hand down a ruling that comes close to, but may not exactly reflect, their preferences than, in the long run, see other political actors completely override their decisions.

Those who already have heard or read Professor Merrill's lecture can probably now understand one reason why Pritchett is such a towering figure in our discipline. He injected "politics" into the study of courts and, in so doing, provided the fodder for the two most influential contemporary political accounts of judicial behavior: the attitudinal model and the strategic account, both of which figure into Professor Merrill's narrative. However different these accounts may be—and they certainly are—both can be traced to Pritchett.[16]

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14. Pritchett, *supra* note 12, at 894. Reed appears twice because his dissents were divided between the liberal and conservative wings of the Court. *Id.* at 895.

15. *See* WALTER F. MURPHY, CONGRESS AND THE COURT (1962); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 (1961).

16. On the other hand, we do not want to overstate Pritchett's contemporary importance. While he is without doubt the founder of the modern-day political science project on judging, others more fully developed what he began. For their contributions, see THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2003).

We have more to say about these soon but we should not gloss over other reasons for Pritchett's influence that may be less transparent from Professor Merrill's work. Certainly one centers on what Pritchett studied: *judicial decision making*. Another concerns his use of *data* to assess the implications of his approach. These, along with theory, deserve some discussion—not solely because of the contributions Pritchett made, but also because they represent the primitives of the political science project of judging. To appreciate that project—as well as Professor Merrill's contribution to it—it is important to have a baseline appreciation of these three dimensions.

B.   *What We Study: Judicial Decision Making*

Pritchett was fascinated by the question of *why* judges reach the decisions that they do, and that question remains at the core of the contemporary political science project on judging. This is not to say that we ignore other features of judicial politics. Our ability to summon innumerable citations to research examining the selection of judges and Justices,[17] the views of the public about courts,[18] and the impact of judicial decisions[19] confirms that we do not.[20] It is, however, to say that studies of judicial decision making continue to dominate the disciplinary program.

In reporting this, we hope to convey two features of the political scientists' work. First, as our stress on *why* indicates, our research is largely non-normative. Many of us are not all that interested in debating questions of *how should* judges reach decisions; rather, we are interested in how and why they do reach decisions. Still, we hasten to note, our research is not wholly devoid

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17. *See, e.g*., DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992); Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990).

18*. See, e.g*., Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and* Lamb's Chapel, 58 J. POL. 1079 (1996).

19*. See, e.g.,* CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

20. Then again, all three of these subjects—judicial nominations, public opinion, and impact—have potential ties to judicial decision making. For essays making these sorts of connections, see Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2002); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996); Jeffrey A. Segal et al., *Buyer Beware?: Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557 (2000).

of normative implications.[21]   To see this, we need only consider studies that demonstrate the effect of ideology on judicial decisions; surely, such a finding has important implications for debates about the selection and retention of jurists.[22]   We could say the same of research investigating whether women judges bring a "different voice" to the bench,[23] whether jurists respond differentially to distinct classes of litigants,[24] and whether elected political actors exert some constraint on the decisions of non-elected judges[25]—to name just three others.

The second feature we want to convey is that our concerns, on some level, are fairly narrow. To be sure, there are handfuls of interesting (and even influential) studies of things other than judicial decision making—again, the selection of judges and the impact of their decisions come readily to mind. For the most part, however, the vast majority of serious theoretical and empirical research conducted by political scientists centers on judicial decision making.

Yet this focus, for several reasons, is less narrow than it might seem. First, to political scientists decision making encompasses questions covering a range of judicial behaviors: from why judges on discretionary courts make the case-selection decisions that they do;[26] to how judges interpret constitutional and

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21.   This holds whether we choose to develop them or not (as is too often the case).

22.   *See, e.g.*, SEGAL & SPAETH, *supra* note 3; Segal et al., *supra* note 20.

23.   This is a rather large literature. For relatively recent reviews, see Lee Epstein, *Beverly Blair Cook*, *in* WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK 51 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995).

24.   *See*, *e.g.*, Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal?: Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992); S. Sidney Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 AM. POL. SCI. REV. 902 (1978).

25.   *See*, *e.g.*, Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a* Strategic *National Policymaker*, 50 EMORY L.J. 583 (2001); Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, *in* CONTEMPLATING COURTS 315 (Lee Epstein ed., 1995); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) [hereinafter Ferejohn & Weingast, *Limitation of Statutes*]; John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. LAW & ECON. 263 (1992) [hereinafter Ferejohn & Weingast, *A Positive Theory of Statutory Interpretation*]; Andrew D. Martin, Public Policy, the Supreme Court, and the Separation of Powers (Sept. 1, 1998) (unpublished manuscript, on file with the authors).

26.   *See*, *e.g.*, Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, *in* JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963).

statutory provisions;[27] to reasons underlying their votes on the merits of cases;[28] to what attempts judges make to induce compliance with their specific rulings as well as to gain respect for their institution;[29] and just about everything and anything in between.

Second, our focus covers more actors than simply judges making decisions at a particular moment in time. To explain why jurists make the case-selection choices that they do, we must look beyond the petitions that come to them, to the actors who brought them and the interest groups that support them.[30] To understand why judges interpret statutes or the Constitution in particular ways, we cannot ignore the role played by contemporaneous Congresses and executives.[31] To appreciate votes on collegial courts, we can hardly neglect the role played by doctrine created by previous judges.[32] To investigate matters of compliance and legitimacy, we must contemplate the views of the public and the effects of those views on other political actors.[33]

Finally, our concentration on decision making encompasses more than political explanations. Politics may lie at the root of many accounts of judicial decisions, but as scientists (and not advocates) we more than appreciate other explanations; we realize that unless we contemplate rival accounts we cannot reach conclusions with any degree of certainty about our own.[34] What this

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27. *See, e.g.*, Ferejohn & Weingast, *Limitation of Statutes*, *supra* note 25; McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3 (1994); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) [hereinafter McNollgast, *Politics and the Courts*]; James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447 (1997); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

28. *See, e.g.,* SEGAL & SPAETH, *supra* note 3; C. Neal Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981).

29. *See, e.g.*, JOHNSON & CANON, *supra* note 19; Knight & Epstein, *supra* note 20.

30. *See, e.g.*, Caldeira & Wright, *supra* note 26; Caldeira et al., *supra* note 26.

31. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Epstein, Knight & Martin, *supra* note 25; Meernik & Ignagni, *supra* note 27. For a different view, see Segal, *supra* note 27.

32. *See* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996). For a different view, see HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

33. *See, e.g.*, Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 304 (John B. Gates & Charles A. Johnson eds., 1991); Caldeira, *supra* note 18; Epstein, Knight & Shvetsova, *supra* note 20.

34. If scholars ignore competing explanations, their work will suffer from what is known as "omitted variable bias," making any causal inferences they reach suspect. Specifically, scholars must take into account (that is, control for or hold constant) *variables designed to control for the implications of other theories that do not necessarily square with theirs (that is, rival explanations or hypotheses) if the rival variable meets one of the following conditions*: (1) it is

means, at least for the political science project on judging, is that we are not simply the "bean counters" or "reductionists" of which we are occasionally accused. If we want to say that the courts involved in *Bush v. Gore*[35] reached decisions on the basis of the partisan preferences, we cannot begin and end our research with counts of the number of Democratic judges who voted for Gore and the number of Republican judges who voted for Bush; we must also examine the existing state of precedent, as well as the many other factors, whether political or not, that may have come into play.[36] If we want to say that briefs filed by the Solicitor General increase the odds of the Supreme Court granting certiorari, we must control for all the other "variables" that we believe affect the Court's decision, again, whether political or not.[37] Likewise, to provide just one last example, if we want to say that political attitudes determine votes, we cannot stop with a demonstration of a correlation between attitudes and votes; we also must take into account the legal facts at issue.[38]

Seen in this way, Professor Merrill's research both does and does not fit comfortably within the political science project of judging. On the one hand, Professor Merrill is, as we are, concerned with various features of judicial decision making. Virtually none of the behaviors he identifies as altering between the first and second Rehnquist Courts have escaped the attention of political scientists. Vast bodies of literature exist on the Court's agenda,[39] coalition formation,[40] voting splits,[41] and so on.

On the other hand, and ironically enough, Professor Merrill pushes our emphasis on politics further than we do. Take, for example, his assessment of the separation of powers model, which considers whether or not the Court agreed with the position taken by the Solicitor General. When he finds, in

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related to (correlated with) the key causal variable; (2) it has an effect on the dependent variable; (3) it is causally prior to (for example, preceding in time) the key causal variable. For more details, see Epstein & King, *supra* note 4.

35. 531 U.S. 98 (2000).

36. *See, e.g.*, HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001).

37. *See, e.g.*, Caldeira & Wright, *supra* note 26.

38. *See*, *e.g.*, SEGAL & SPAETH, *supra* note 3.

39. *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); Caldeira & Wright, *supra* note 26; Caldeira et al., *supra* note 26; Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002).

40. *See, e.g.*, DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); David W. Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court*, 16 MIDWEST J. POL. SCI. 208 (1972).

41. *See, e.g.*, Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874 (1998); Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001); Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

contrast to the "prediction" generated by his version of the model, that the "conservative majority" on the first Rehnquist Court was not "especially deferential to the conservative administration," he suggests the possibility that "the Court was not being very strategic during this period."[42]

This conclusion—not to mention Professor Merrill's understanding and assessment of the model—is problematic in several regards, and we visit them soon enough. Most relevant here is Professor Merrill's failure to take into account other factors—especially *apolitical* factors—that might have caused the Court to reach the decisions that it did.[43] Without a consideration of these, not only does he fail to shed as much light on the phenomenon as he would like, he also opens himself up to precisely the same charges that have been leveled at political scientists: that we are mere "number crunchers" who focus too much on politics to the exclusion of law and "ideas."

C.   Theory and Its Observable Implications

If the political science project on judging is primarily aimed at answering questions pertaining to judicial decision making (broadly defined), then theory and its observable implications (sometimes called hypotheses or expectations) are crucial tools for enabling us to accomplish this goal. By "theory," we mean "*a reasoned and precise speculation about the answer to a research question*";[44] by "observable implications," we mean things that we would expect to detect in the real world if our theory is right. To assess a feminist theory of judging, say, one that holds that women judges speak in a different voice, we would need to write down all the observable implications of the theory—for example, women judges are more likely to strike down laws that categorize on the basis of gender—and then evaluate those implications against data. To assess a partisan theory of judging, we would likewise need to record all the possible implications—for example, Democratic judges are more likely to support positions advocated by Democratic candidates in litigation—and so too assess them against data. Only by comparing the theoretical implications with some relevant empirical observations can we learn whether the theory likely is to be correct.

The importance of theory and its observable implications has not been missed by political scientists who study courts. Indeed, theorizing about judging has, since the days of Pritchett, become something of a cottage industry. Prior to his research, the vast majority of studies lacked any. Many were simply doctrinal analyses of the products of judicial deliberations—that

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42. Merrill, *supra* note 2, at 626-27.

43. Exemplars are George & Epstein, *supra* note 11; Jeffrey A. Segal & Cheryl D. Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 W. POL. Q. 553 (1988).

44. KING ET AL., *supra* note 4, at 19 (emphasis added).

is, decisions and opinions—that were heavy on the doctrine, short on analysis, and devoid of theoretical underpinnings. As Thomas G. Walker has written, however, all that changed in the late-1950s and early 1960s: "Theoretical innovation exploded. Attitude theory, social background theory, role theory, fact pattern analysis, and others were used in attempts to explain judicial decision making."[45] To Walker's list, we—writing in 2003—could add dozens more that scholars now invoke to guide their work on courts and judges.

1.   A Simple Theory: The Attitudinal Model

Almost needless to write then, there is no "one" theory of judging, much less a unifying paradigm, to which all political scientists subscribe. Theories come in many types, levels of abstraction, and substantive applications. Some on Walker's list, for example, are simple, small, or tailored to fit particular circumstances, perhaps seeking to account for only one aspect of judicial decision making or but a single Court.

One that Professor Merrill invokes—the contemporary version of Pritchett's preference-based theory of judging, known as the *attitudinal model*—is such a theory. It simply says this: the votes of judges on the merits of cases will reflect their sincerely-held ideological (read: liberal or conservative) attitudes over particular matters of public policy if (1) those judges lack political or electoral accountability, (2) have no ambition for higher office, and (3) serve on a court of last resort that controls its own agenda.[46] The sole goal of this theory, then, is to explain the *votes Justices of*

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45. Walker, *supra* note 5, at 5.

46. See SEGAL & SPAETH, *supra* note 3, for the clearest account of the attitudinal model.

    As Professor Merrill notes, of all the accounts political scientists invoke to explain features of judicial decision making, this model has perhaps come under the most fire from legal academics. Merrill, *supra* note 2, at 591. While we do not subscribe to this approach, we do believe that some of this criticism is unwarranted, as it seems to stem from a lack of understanding of the model rather than a serious consideration of its merits. For example, the account is not as reductionist as some legal scholars have alleged: it does not merely say that liberal judges will always vote in the liberal direction or that all conservatives will always cast conservative votes; rather, it places emphasis on "the facts of . . . case[s] vis-à-vis . . . ideological attitudes." SEGAL & SPAETH, *supra* note 3, at 86; *see also id.* at 110. No adherent of the attitudinal model, in other words, would say that underlying left-right political attitudes *fully* explain votes or outcomes. They would instead say that case facts "juxtaposed against . . . [the] personal policy preferences [of judges]" determine how any particular judge reaches a decision in any particular case. *Id.* at 312.

    A simple example suffices to make the point. Let us suppose that we could order the facts in cases involving searches and seizures under the Fourth Amendment from the least to the most intrusive search, as illustrated in the figure below, adapted from Segal and Spaeth. *Id.* at 326. Further suppose that we could order Justices along that same continuum, from most liberal to most conservative according to their indifference points. Now, if we were to spin the attitudinal model in accord with much of the legal literature, we would simply say that Justice Brennan would vote to strike down all searches, Justice Rehnquist would vote to uphold all

the United States Supreme Court cast on the *merits* of cases. It does not attempt to account for votes made by judges on other American courts because no jurists other than United States Supreme Court Justices meet the conditions of the model. Moreover, it only attempts to account for votes cast on the merits of cases; no other judicial choices (even and including votes on certiorari) come under its reach.

That is why we are troubled by Professor Merrill's conclusion that the attitudinal model cannot explain many of the differences he identifies between the first and second Rehnquist Courts, including the "decline in emphasis on social issues," the "paucity of doctrinal innovations in cases involving social issues during the first Rehnquist Court," "the collapse in the size of the Court's docket," and so on. [47] The model was not designed to explain these things, as even its most ardent supporters readily admit.

This is not to say that the attitudinal account is useless to Professor Merrill in his quest to explore distinctions between the first and second Rehnquist Courts. Quite the opposite: It could be exceptionally helpful in aiding Professor Merrill to discern whether differences do in fact (or should) emerge in the *outcomes* of cases produced by the first and second Rehnquist Courts. Professor Merrill could pursue this in any number of ways.

A very simple one entails an examination of the median Justice over time. Assume, for a moment, that we can order the most preferred positions of the Justices over a particular policy area—whether federalism, "social issues," or any other—from left (most "liberal") to right (most "conservative") on a single

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searches, and Justice Breyer would sometimes uphold and sometimes strike down searches. This interpretation, however, misses a key variable in the attitudinal model: case facts. On the attitudinal model, Justices do not simply vote willy-nilly in accord with their policy preferences. They will rather vote to uphold any search with facts placing it to the left of their indifference points and strike any search to the right. Accordingly, yes, Rehnquist would have voted to sustain the searches at issue in *Mapp v. Ohio*, 367 U.S. 643 (1961), *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Leon*, 468 U.S. 897 (1984), but he would not have supported the search at issue in a case that was to the right of his point (labeled in the figure "more intrusive case"). Furthermore, yes, Brennan would have voted to strike the searches in the three cases, but not in the "less intrusive case." Finally, we need not guess about Breyer: he would uphold the searches in *Leon* and *Terry,* but not *Mapp.*

The Attitudinal Model: An Example

Degree of Intrusiveness of Search

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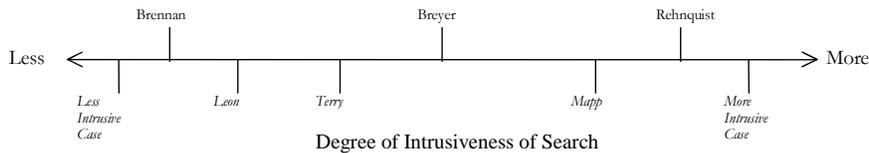
47. Merrill, *supra* note 2, at 601.

dimension, as we have done in Figure 3. Further assume, as the attitudinal model does, that all Justices vote in a non-strategic fashion, (that is, in line with their sincere policy preferences) and that those preferences are single-peaked.[48] Under these conditions, the outcome of a case should reflect the preferences of the median Justice (here, Kennedy). Hence, if we want to make a case for the existence of two Rehnquist Courts in terms of voting and outcomes—the *only* phenomena to which the attitudinal model speaks—we might examine whether we detect a change in the Court's median.

FIGURE 3

Hypothetical Distribution of Preferences

| Stevens | Ginsburg | Breyer | Souter | | Kennedy | O'Connor | Rehnquist | Scalia | Thomas |

Left   Right
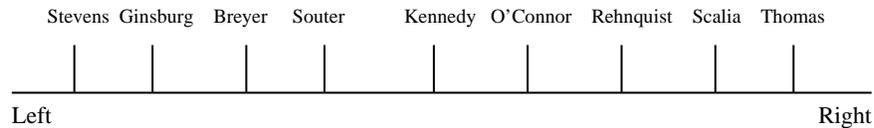
Do we observe such a change? The answer, as Figure 4 shows, is a qualified yes. This figure presents the Martin-Quinn estimated location of the median Justice, along with the identity of that Justice.[49] Using these preferences scores, we find a significant difference in the average median Justice between the first and second Rehnquist Courts (0.799 versus 0.616; p = 0.003). Moreover, that key median position, occupied by (relative moderates) Justices White and Souter for much of the 1986-93 term period, now appears to belong chiefly to (relative conservatives) Kennedy and O'Connor. Accordingly, under the attitudinal model, we might anticipate policies produced by today's Justices to reflect a more right-of-center orientation than they did some seven years ago.[50]

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48. In other words, we assume that the actors prefer an outcome that is nearer to their ideal points than one that is further away, or to put it more technically, "beginning at [an actor's] ideal point, utility always declines monotonically in any . . . direction. This . . . is known as single-peakedness of preferences." Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263 (1988).

49. Martin and Quinn use voting data for all Justices serving on the Supreme Court from 1937 to the present to estimate the preferred policy position, or revealed preference, of each Justice. The model is dynamic, in that the policy preferences of the Justices are allowed to evolve throughout time. By statistically controlling for different dockets, their data can be used to investigate the phenomenon of preference change. Their modeling strategy also allows computing other quantities of interest, such as the location and identity of the median Justice. *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).

50. For a qualification on this claim, see *supra* note 46.

FIGURE 4

Justice Occupying the Median Position (Martin-Quinn Scores),
1986-2000 Terms[51]

Estimated Location and Identity of Median Justice
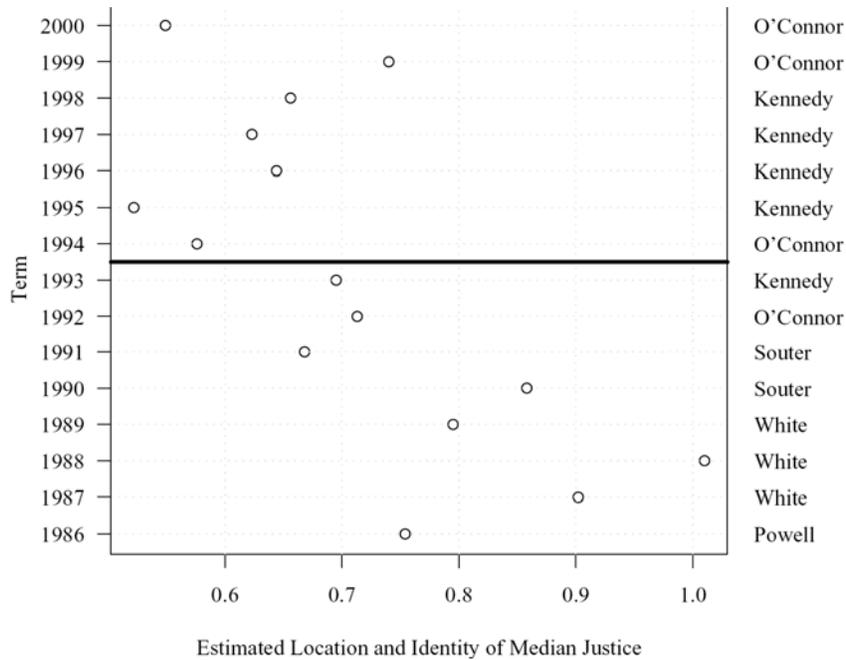
We respond with a qualified yes, however, because the onset of the move
to the right appears to come well before the 1994 Term, perhaps as early as the
1991 Term. Between 1986 and 1990, the median position, largely held by
Justice White, hovered around 0.865; for all subsequent Terms, it dropped by
0.206, to 0.659 (p = 0.027). This is a greater decline than that which occurred
between Merrill's first and second Rehnquist Courts, and may be directly
attributable to Justice Thomas's arrival and Justice Marshall's departure.

Seen in this way, Professor Merrill is exactly right to focus on Justice
Thomas in his discussion of the attitudinal model. He also seems right to
center his comparison on the pre- and post-1994 terms. While key alterations
in preferences began before that, the full movement toward the right stabilized

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51. The Martin-Quinn estimates of the policy preference for every Justice serving from 1937
to the present, as well as the location of the median Justice, are available electronically. *See*
Andrew D. Martin & Kevin M. Quinn, *Ideal Points for the U.S. Supreme Court*, *available at*
http://adm.wustl.edu/supct.html (last updated Oct. 14, 2002).

in 1994, with, as we noted above, Justices Kennedy and O'Connor vying for the median position rather than the more moderate Justices Souter and White.[52]

2.   A More Ambitious Approach: The Strategic Account

While the attitudinal model is not particularly ambitious, we cannot say the same about the other primary theory Professor Merrill invokes: the strategic account. This account—an increasingly common one in political science (as well as in legal) circles—belongs to a class of non-parametric rational choice models as it assumes that goal-directed actors operate in a *strategic* or *interdependent* decision making context. Specifically, and in the context of judging, it holds that: (1) judges make choices in order to achieve certain goals; (2) judges act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made.[53]

Notice several differences between this strategic account and the attitudinal model. One centers on goals. Under the attitudinal model, Justices pursue one and only one goal: policy. Under the strategic account, *it is up to the researcher to specify a priori the actors' goals; the researcher may select any motivation(s) she believes that the particular actors hold.* We emphasize this point because it is the source of a great deal of confusion in the literature, with some scholars suggesting that on the strategic account the only goal actors pursue entails policy.

We understand the source of this confusion. Virtually every existing strategic account of judicial decisions posits that Justices pursue policy, that is, their goal is to see public policy—the ultimate state of the law—reflect their preferences. This includes Pritchett's and Merrill's work, as well as most of ours. Again, however, this need not be the case; under the strategic account, researchers could posit any number of other goals, be they jurisprudential or institutional.

Because so much confusion exists over this point, let us drive it home with the simple example shown in Figure 5.[54] There, we depict a hypothetical set of preferences over a particular policy, say, a civil rights statute. The horizontal lines represent a (civil rights) policy space, here, ordered from left (most "liberal") to right (most "conservative"); the vertical lines show the preferences (the "most preferred positions") of the actors relevant in this

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52. This, of course, raises the question: To what extent did this change actually affect Court outcomes? Attitudinal advocates have several strategies for addressing this question, but one that would be relatively easy to deploy is the development of fact-pattern models. *See, e.g.,* SEGAL & SPAETH, *supra* note 3; *see also supra* note 46 and accompanying text.

53. *See* EPSTEIN & KNIGHT, *supra* note 31; *see also generally,* JON ELSTER, RATIONAL CHOICE (1986).

54. We adapt the discussion in this and the next paragraph from Ferejohn & Weingast, *A Positive Theory of Statutory Interpretation*, *supra* note 25.

example: the median member of the *contemporaneous* Congress (*M*) and of the key *contemporaneous* committees and other gatekeepers (*C*) in Congress that make the decision over whether to propose civil rights legislation to their respective houses.[55]   Note that we also identify the contemporaneous committees' indifference point (*C(M)*) "where the [Supreme] Court can set policy which the committee likes no more than the opposite policy that would be chosen by the full chamber."[56]   To put it another way, because the indifference point and the median member of current Congress are equidistant from the committees, the committees like the indifference point as much as they like the most preferred position of Congress; they are indifferent between the two. Finally, we locate the status quo (*X*), which represents the intent of the legislature that *enacted* the law.

FIGURE 5

Hypothetical Set of Preferences over Civil Rights Policy[57]

X	*C(M)*	*M*	*C*

Left   Right
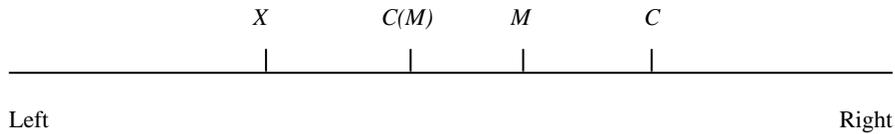
Note: *X* is the status quo (the intent of the *enacting* Congress); *C(M)* represents the *contemporaneous* committees' indifference point (between their most preferred position and that desired by *M*); *M* denotes the most preferred position of the median member of the *contemporaneous* Congress; and *C* is the most preferred position of the key *contemporaneous* committees (and other

55. In denoting these most preferred points, we again assume single-peaked preferences. *See supra* note 48 and accompanying text. We also assume, that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policy making enfolds as follows: the Court interprets a law, the relevant congressional committees propose (or do not propose) legislation to override the Court's interpretation, Congress (if the committees propose legislation) enacts (or does not enact) an override bill, the President (if Congress acts) signs (or does not sign) the override bill, and Congress (if the President vetoes) overrides (or does not override) the veto. These are relatively common assumptions in the legal literature. *See, e.g.,* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 377-87 (1991) [hereinafter Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*]; William N. Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging on History?*].

56. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 55, at 378.

57. Figure 5 is adapted from Ferejohn & Weingast, *A Positive Theory of Statutory Interpretation*, supra note 25.

gatekeepers) in Congress that make the decision of whether or not to propose legislation to their respective houses.

Now suppose a Justice has a case before her that requires interpretation of a civil rights statute. Where will she place policy? The answer, under the attitudinal account, is simple: she will place policy precisely where her sincere preferences lie. If her most preferred position is *X,* that is where she will vote; if it is *C(M),* she will choose that. The answer on the strategic account is that it depends—it depends on her goal. If she is motivated to see the outcome reflect as closely as possible her own policy preferences, she will interpret the law in the *C(M)-C* interval, with the exact placement contingent on the location of her ideal point. Placing policy there, for reasons we explain momentarily, will deter a congressional attempt to overturn. Now suppose rather that her goal is to interpret the law in line with the intent of the enacting legislature (that is, to follow a jurisprudence of legislative intent), but, at the same time, to avoid an override attempt by the current Congress. If she were so motivated,[58] then she will place policy at *C(M).*

Notice that regardless of whether the Justice is motivated by policy or intent, under the strategic account she makes a decision in such a way that avoids a congressional override. That is because she is driven to maximize her preferences (whatever they may be). If she is inattentive to Congress, she risks a legislative overruling that places the law far from her most preferred position; if she is attentive, she can establish a policy close to, but not exactly on, her ideal point without risking adverse congressional reaction.

This is the central intuition behind strategic behavior, and it brings us to yet another distinction between the attitudinal model and the strategic account. Simply put, the strategic account assumes that when goal-oriented Justices make their decisions they take into account the preferences and likely actions of other relevant actors—including their colleagues, elected officials, and the public. The attitudinal model, however, assumes no such thing. This is a crucial difference because it means, under the attitudinal model, that Justices always will behave in accord with their sincere preferences; under the strategic account, they will not necessarily do so. Rather, whether they behave sincerely or in a sophisticated fashion (that is, in a way that is not compatible with their most preferred position) will depend on the preferences of the other relevant actors and they actions they are likely to take.

To see why, let us return to Figure 5, and suppose that the median Justice's *policy* preferences are identical to *C(M).* The expectation, according to the attitudinal model, is that she will vote her sincere "attitudes," here *C(M).* The expectation under the strategic account is precisely the same but for a wholly different reason: she votes *C(M),* not exclusively because it is her most preferred position, but also because she has taken into account the

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58. This assumes that the President and pivotal veto player in Congress are to the right of *X.*

configuration of preferences and realizes that the relevant congressional committees would have no incentive to override her. Because their indifference point is the same as her most preferred position, they would be indifferent to the policy preferred by the Court. Our Justice, thus, has made a strategic calculation, and that calculation has led her to see that she can vote sincerely. Under the attitudinal model, even though she too votes sincerely, she has made no such calculation; she votes reflexively.

Now consider another median Justice—one whose most preferred position is identical to *X* (the enacting Congress) in Figure 5. How would this Justice vote? Again, under the attitudinal model she would cast a sincere vote. That such a vote would be to the left of the indifference point of the relevant committees, giving them every incentive to introduce legislation lying at their preferred point, matters not to her; actually, under the attitudinal model she never even bothers to make such a calculation. She votes her attitudes without regard to the other pertinent players in the interaction. Not so, however, under the strategic account. If the Justice is concerned with seeing her vision of public policy becoming the law of the land, then we would expect her—given the distribution of the most preferred positions of the actors in this figure—to behave in a sophisticated fashion, placing policy not on its ideal point but near the committees' indifference point. That is the rational course of action—the best choice for a Justice interested in policy—because the committees are indifferent between that point and the most preferred position of the median member of Congress. They would have no incentive to introduce legislation to overturn a policy set at the indifference point. Thus, once again she would end up with a policy close to, but not exactly on, her ideal point without risking congressional reaction.

There is yet one final distinction between the strategic account and the attitudinal model, and it is the one with which we started this section: the strategic account is the far more ambitious one. It is not limited to explaining votes, and it is not limited to the Supreme Court. Indeed researchers have used it to address a long list of diverse research questions: from why judges on discretionary courts review some cases and not others;[59] to whether the policy preferences of other political organizations (for example, the legislature and executive) influence judicial decisions;[60] to what circumstances lead lower

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59. *See*, *e.g.*, Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Caldeira et al., *supra* note 26; Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000).

60. *See*, *e.g.*, Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 55; Eskridge, *Reneging on History?*, *supra* note 55; Segal, *supra* note 27; Pablo T. Spiller & Rafael Gely, *Congressional Control of Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992).

courts to deviate from precedent established by higher courts.[61] It also can, unlike the attitudinal model, shed light on why jurists create and maintain particular rules, norms, and conventions[62]—a point that Figure 6 shores up. There, we depict three choices confronting a Justice over which standard of review to apply in abortion cases. Suppose a Justice was to select among the three possible alternatives; further suppose that she sincerely prefers "compelling interest" to "undue burden" to "rational basis." Which would she pick? The attitudinal model, of course, cannot address this question as it pertains to a non-binary doctrinal choice. The strategic account, however, can. It supposes that the Justice might choose "undue burden" if, depending on the preferences of the other players (for example, her colleagues), that would allow her to avoid "rational basis," her least preferred outcome.

FIGURE 6

Choices of Legal Standard in Abortion Cases

Compelling Interest	Undue Burden	Rational Basis

Less Restrictive   More Restrictive
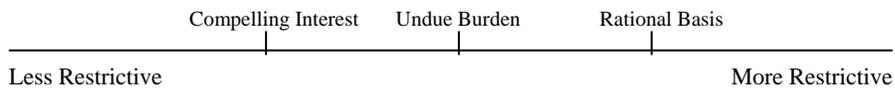
Accordingly, when Professor Merrill attempts to use the strategic account to explain the Court's agenda and doctrinal choices, its voting behavior, its support for the government, and so on, he is on firm ground—far firmer than his use of the attitudinal model. Where his use of the account becomes more problematic, as we explain in the next section, is in how he derives observable implications from it.

3.   Deriving Observable Implications

Among political scientists who study judges, the derivation of observable implications from theory is a controversial matter. One school of thought holds that we can and even should do so loosely and intuitively, via informal

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61. *See*, *e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); McNollgast, *Politics and the Courts*, *supra* note 27; Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

62. *See*, *e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000); Knight & Epstein, *supra* note 20; Lewis A. Kornhauser, *Adjudication By A Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995).

reasoning. Some of our examples above illustrate this sort of thinking. For example, if our theory holds that Justices reach decisions on the basis of their partisanship then it is not such a large leap to hypothesize that Democratic judges, controlling for all other relevant factors, should be more likely to support positions advocated by Democratic candidates. Similarly, observable implications flowing from the attitudinal model also illustrate the derivation of observable implications in an intuitive, informal manner. For example, if the model holds, we ought to find Justices voting in line with their sincerely held preferences over particular matters of public policy.

This approach may be fine for some theories but it does not work well for others—including, and perhaps especially, strategic accounts of judging. Too many studies invoking this account, in our estimation, develop their hypotheses through loose intuitions about strategy[63]—with Professor Merrill's study being exemplary. Via informal reasoning, Professor Merrill suggests that during the first Rehnquist Court we ought to see the Justices, if they are "strategic," interpreting law in line with the President's preferred positions (as expressed in briefs filed by the U.S. Solicitor General). Why? Because the President, however conservative he was, would modulate his views so as not to generate an override by Congress. The Court, as conservative as the President, would thus adopt the Solicitor General's positions because it would realize that those positions were about as far right as it could safely move without triggering a congressional override.

We are troubled by this sort of "informal reasoning" approach for one simple reason: If scholars are interested in explaining particular decisions as the *equilibrium* outcome of the interdependent choices of the relevant actors—as is Professor Merrill (along with so many other scholars who examine the "strategic" behavior of judges)—then they must demonstrate why the choices are in equilibrium. A formal model, with hypotheses derived as implications of it (rather than via loose intuitions), is an essential feature of such a demonstration.[64] Proceeding in this way also has its share of salutary byproducts, such as supplying a set of tight, internally consistent expectations,

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63. *See*, *e.g.*, FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT (2000); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief?: Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (1996); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996); Paul J. Wahlbeck et al., *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294 (1998).

64. This is not to say that strategic analysis is synonymous with formalization. Many different sorts of studies of courts can benefit from the mere incorporation of the logic of strategic action and can, in so doing, significantly enhance our understanding of judicial decision making. *See, e.g.,* Epstein & Knight, *supra* note 3. That does not, however, diminish the importance of formal analysis for attempts to explain a particular line of decisions or a substantive body of law as the *equilibrium* outcome of the interdependent choices of the judges and other actors.

which, in turn, may not sit comfortably with those derived on the basis of intuitive conjectures. They may stand in direct contradistinction to those yielded via loose intuitions, or even if they comport with casual conjecture, the underlying logic behind them may be quite distinct.[65]

To make these points, let us revisit Professor Merrill's "hypothesis," which, at bottom, suggests that we should see the first Rehnquist Court adopting the President's (Solicitor General's) position. While the underlying logic behind this prediction may seem plausible, it is easy to show, using the simplest of spatial models,[66] why it is problematic, or at best requires clarification. We do so in Figure 1, which depicts Eskridge's placement of the ideal points of key external actors over civil rights policy (Professor Merrill's empirical reference point) during (roughly) the first Rehnquist Court. Notice immediately that if the Court is composed of policy-oriented Justices (as Professor Merrill seems to maintain) it ought not place policy on its ideal point *or on that of the President's*.[67] Doing so would generate a congressional override because the key committees would see that they could introduce legislation at *V* (the ideal point of the pivotal veto player in Congress). And "[s]uch legislation," as Eskridge writes "would not only be approved by Congress but also would survive an expected veto."[68] Accordingly, we would expect the Court to act in a sophisticated fashion, placing policy not on its *or the President's* most preferred point, but on or to the left of *V*. In this light, Professor Merrill's empirical findings—that the Court adopted the position advocated by the Solicitor General in less than 50% of the cases and that its rejections were in a liberal direction—are hardly a surprise. *They are precisely what hypotheses derived formally, rather than intuitively, would predict.*

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65. For an interesting and pointed example, see Jeffrey R. Lax & Charles M. Cameron, *Opinion Assignment in the Supreme Court: Theory and Evidence* (Aug. 26, 2001), *available at* http://pro.harvard.edu/papers/026/026002LaxJeffrey.pdf (last visited Feb. 25, 2003).

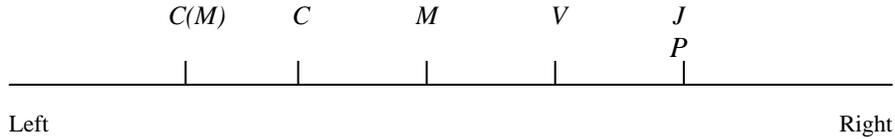66. Spatial models, as exemplified in Figures 7 and 8, help scholars investigate how the decisions of one actor may influence those of another (or others). For a good introduction, see PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION (1986).

67. For all the assumptions underlying our interpretation, see *supra* note 55.

68. Eskridge, *Reneging on History?*, *supra* note 55, at 653.

FIGURE 7

Eskridge's Civil Rights Preferences, 1981-1990[69]

```
        C(M)      C        M        V        J
                                             P

   |_____|_____|_____|_____|_____|_____
Left                                                 Right
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Note: *C(M)* represents the committees' indifference point (between their most preferred position and that desired by *M*); *C* is the most preferred position of the key *current* committees (and other gatekeepers) in Congress that make the decision of whether or not to propose legislation to their respective houses; *M* denotes the most preferred position of the median member of Congress; *V* represents the most preferred position of the pivotal veto player in Congress; *J* is the most preferred position of the median member of the Court; and *P* denotes the most preferred position of the President.

Now, we realize that Professor Merrill might object to our interpretation, claiming that the Solicitor General also would act in a sophisticated fashion and present positions that reflect *V,* not *P.* We know, however, of no contemporary account of the separation of powers system that adopts this position, and probably for good reason: it is easy to see what problems might ensue for the President (Solicitor General)—electoral or otherwise—if he presents insincere positions to the Court. Conversely, it is far less transparent to see what he might gain. Providing the Justices with information about congressional preferences so that their decision survives does not strike us as one such position. After all, presumably the Justices also have knowledge of the overall composition of Congress and, thus, already know how far they can go in making policy pronouncements.

Nonetheless, perhaps Professor Merrill is right. Here, too, however, we would insist on a formal demonstration of this proposition—one showing the relative costs and benefits of insincere and sincere behavior on the part of the Solicitor General. Were Professor Merrill to demonstrate the veracity of his intuition formally (and *empirically*), he would make a substantial contribution to literature on the separation of powers system.

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69. *Id*. at 653 fig.3.

D.   Data and Methodology

As our stress on "empirically" above suggests, once political scientists derive observable implications—whether loosely or informally—their next task is to assess them against data— whether those data are qualitative or quantitative in nature. This is a central feature of the political science project on judging, and one too that may trace directly to Pritchett: When he sought to assess his hypotheses against data, he set the tone for generations of political scientists who study courts.   We are now, as Pritchett was, consciously empirical, placing a great deal of emphasis on the degree to which data support our theories.

At the same time, our approach to assessing the implications of our theories has matured with time. Great bodies of literature have emerged to deal with crucial features of empirical research, be they the measurement of variables,[70] the tools for analyzing data,[71] and the techniques for depicting results,[72] to name just three.

What we focus on here is yet another area where we have made progress: the data themselves. When Pritchett and his immediate successors sought to explore political approaches to judging, they coded and collected their own data without fully evaluating their procedures or worrying too much about whether others could evaluate them. That would (or, perhaps more accurately, should) not fly today. Contemporary researchers must, at the very least, take all steps necessary to ensure compliance with the *replication standard*: Another researcher should be able to understand, evaluate, build on, and

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70. The literature on measurement is indeed immense, with entire fields of study devoted to measuring psychological well-being, health, income, education, happiness, survey responses, intelligence, and numerous others. For applications in the context of judging, see, e.g., Epstein & King, *supra* note 4; Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996); Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

71. Again, the number is immense. For interesting applications in the context of judging, see Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361 (2001); Martin & Quinn, *supra* note 49; James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091 (2001); Christopher J.W. Zorn, *Generalized Estimating Equation Models for Correlated Data: A Review with Applications*, 45 AM. J. POL. SCI. 470 (2001).

72. For a recent example, see King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 341 (2000); for applications in the context of judging, see Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience (and Its Consequences for the U.S. Supreme Court)*, 91 CAL. L. REV. (forthcoming July 2003); Martin & Quinn, *supra* note 49.

reproduce the research without any additional information from the author.[73] Why we insist on this standard is no great mystery. In a broad sense, its point is to ensure that a published work stands alone so that readers can consume what it has to offer and evaluate it without any necessary connection with, further information from, or beliefs about the status or reputation of the author. The replication standard keeps empirical inquiry above the level of ad hominem attacks on or unquestioning acceptance of arguments by authority figures.

Much is involved in meeting the standard, and frankly, few individual data-collection enterprises on judging fully succeed. Perhaps that is why political scientists working in this field have turned in droves to the so-called "multi-user" databases. The idea behind these is straightforward enough: Rather than collect data designed to answer particular research questions — such as those Professor Merrill raises (for example, how might we explain the decline in the number of opinions written by the Court, what accounts for the decrease in the number of judgments, why do we see a rise in the proportion of the docket devoted to federalism matters, and so on)—amass large databases so rich in content that multiple users, even those with distinct projects, can draw on them and amass them in accord with all the best scientific practices and procedures.[74]

Several multi-user databases pertaining to courts now exist[75] and others are in progress. Certainly the most important and influential, however, is "The Original United States Supreme Court Judicial Database"[76] or, as it is commonly called in political science circles, "The Spaeth Database." Actually, this is not one but a series of databases developed by Harold J. Spaeth, a Michigan State political scientist and University of Michigan law graduate, that contain many attributes of Supreme Court decisions handed down since 1946, ranging from the date of the oral argument to the identities of the parties to the litigation, to how the Justices voted.[77] Specifically, all Spaeth databases

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73. We derive this paragraph from Epstein & King, *supra* note 4, at 38-44; Gary King, *Replication, Replication*, 28 PS: POL. SCI. & POL. 444 (1995).

74. In addition to these benefits, large public-use databases have what is known a *combinatoric* advantage. *See* Epstein & King, *supra* note 4, at 21-23.

75*. See*, *e.g.*, The Program for Law and Judicial Politics, *Research Databases and Data Archives*, *available at* http://www.polisci.msu.edu/pljp/databases.html (last visited Feb. 25, 2003) [hereinafter *Research Databases and Data Archive*]. For more information about the databases, see Sara C. Benesh, *Becoming an Intelligent User of the Spaeth Supreme Court Databases* (2002), *available at* http://www.polisci.msu.edu/pljp/sctdata1.html (last visited Mar. 4, 2003).

76. The Program for Law and Judicial Politics, *The Original United States Supreme Court Database, 1953-2001 Terms, available at* http://www.polisci.msu.edu/pljp/sctdata1.html (last updated Feb. 11, 2003).

77. For a full list of attributes (variables) in the Spaeth database, see Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-2001 Terms: Documentation* (Sept. 25, 2002), *available at* http://www.polisci.msu.edu/pljp/sctdata1.html (last visited Mar. 4,

contain (at minimum) nearly 250 variables, grouped into six sets: votes and opinions, background, chronology, substance, outcome, and identification of the cases.

We list the basic variables in Table 1, even though any such listing cannot do justice to the richness of some of Spaeth's codings. Take, for example, his "issue" variable: It identifies "the subject matter of the controversy" as falling into one of scores upon scores of specific and discrete categories. In the area of criminal procedure alone there are well over hundreds of distinct issues, including "speedy trial," "right to counsel," and "cruel and unusual punishment" (with separate values for death and non-death penalty related cases). His "party" variable contains nearly two hundred categories from "accused person" to "witness" and just about everything in between. The database even houses a variable of particular value to Professor Merrill's project, "natural court," or the term political scientists use to describe periods, such as the one between 1994 and the present, during which no personnel change occurred on the Court. While the inclusion of such a variable may seem unnecessary—after all, it would appear simple enough to generate from existing variables (for example, "term") via a few commands in most any statistical software packages (for example, "compute" or "recode" in SPSS)— Spaeth, with characteristic care, explains why this is emphatically not the case:

> Scholars have subdivided [natural courts] into "strong" and "weak" natural courts, but no convention exists as to the dates on which they begin and end. Options include 1) date of confirmation, 2) date of seating, 3) cases decided after seating, and 4) cases *argued* and decided after seating. A strong court is delineated by the addition of a new justice or the departure of an incumbent. A weak court, by comparison, is any group of nine justices even if lengthy vacancies occurred. Thus . . . the first thirty months of the Burger Court comprise three strong natural courts, but only one weak one: the eight justices who sat during the 1969 term, the addition of Blackmun at the very end of the 1969 term, and the seven-member Court that sat from the retirements of Black and Harlan at the beginning of the 1971 term until the arrival of Powell and Rehnquist a few months later. These thirty months comprise a single weak natural court because only nine justices sat during this period, even though only six of the nine held membership from its beginning to its end.[78]

2003) [hereinafter *Supreme Court Judicial Database Documentation*]. The data themselves may be found at The Program for Law and Judicial Politics, *U.S. Supreme Court Databases*, *available at* http://www.polisci.msu.edu/plpj/sctdata1.html (last visited March 26, 2003). The listing in Table 1 is from the "original" Spaeth Database. *See Supreme Court Judicial Database Documentation*, at iv-vi. Since creating it, Spaeth (with various collaborators) has produced several others, which are also available at the Web site. *See Research Databases and Data Archive*, *supra* note 75.

    78. Supreme Court Judicial Database Documentation, *supra* note 77, at 30 (citations omitted).

TABLE 1

Outline of Variables in the Spaeth Databases

identification variables	19. reargument date	voting and opinion
1, 2, 3. case citations	20. decision date	variables
4. docket number	21. term of Court	39. declarations of
5. unit of analysis	22. chief justice	unconstitutionality
6. number of records per	23. natural court	40. the vote in the case
unit of analysis	SUBSTANTIVE	41. vote not clearly
background variables	VARIABLES	specified
7. manner in which the	24. legal provisions	42-70. the votes,
Court takes jurisdiction	considered	opinions, and
8. administrative action	by the Court	interagreements of the
preceding litigation	25. multiple legal	individual justices
9. three-judge district	provisions	71-99. the individual
court	26, 27, 28. authority for	justice's votes
10. origin of case	decision	100-128. the individual
11. source of case	29. issue	justice's opinions
12. lower court	30. issue areas	129-157, 158-186. the
disagreement	31. direction of decision	special opinion(s) with
13. reason for granting	32. direction of decision	which the individual
cert	based on dissent	justice agreed
14, 15. parties	OUTCOME VARIABLES	187-215. direction of
16. disposition of case	33. type of decision	the individual justices'
by court whose decision	34. multiple	votes
the Supreme Court	memorandum decisions	216-244. majority and
reviewed	35. disposition of case	minority voting by
17. direction of the	36. unusual disposition	justice
lower court's decision	37. winning party	245. majority opinion
chronological variables	38. formal alteration of	assigner
18. date of oral	precedent	246. majority opinion
argument		writer
		247. minimum winning
		coalition

These complications required Spaeth to make some decisions about precisely how to define a "natural court," settling ultimately on the following:

> I have divided the Warren, Burger, and Rehnquist Courts into strong natural courts, each of which begins when the Reports first specify that the new justice is present but not necessarily participating in the reported case.

Similarly, a natural court ends on the date when the Reports state that an incumbent justice has died, retired, or resigned.[79]

At the same time, however, he also provides users with an alterative: "In the description and listing of the natural courts below, I parenthetically designate the strong natural courts that constitute a weak natural court for those of you who prefer that focus."[80]

In short and taken collectively, Spaeth's databases are "a virtual compendium of 'anything anyone would ever want to know about the Court'— or at least anything that is amenable to quantification."[81]   Even so, this information, however comprehensive, would be nearly useless if it did not meet the replication standard—but it does. Over the years, Spaeth has hired various assistants to replicate samples of the data, and the rates at which they agree with his codings are remarkable. The reason, we suspect, is that he provides exhaustive definitions of the variables and their values. This holds even for those as seemingly plain and obvious as case citations, as this excerpt from Spaeth's documentation attests:

<p align="center">Variables 1, 2, 3
case citations (US, SCT, LED)</p>

The three variables in these fields provide the citation to each case from the official *United States Reports* (US) and the two major unofficial Reports, the *Lawyers' Edition* of the United States Reports (LED) and the *Supreme Court Reporter* (SCT). The volume number precedes the slash bar; the page number on which the case begins follows. When these citations appear in printed form, any zeros that precede any other cardinal number are dropped. Thus, the database LED citation, 086/0011, should be read as 86 L Ed 2d 11. Note that all LED citations are to the second series except for volumes 98, 99, and 100 which are cited without "2d." These three volumes cover the first three terms of the Warren Court (1953-1955). Note that the database does not distinguish between citations to volumes 98, 99, and 100 of the first series and volumes 98, 99, and 100 of the second series. The latter cover a portion of the 1987 term. This overlap should cause no trouble unless you use as a 'select if' command reference to these volumes of the LED.

All US and LED citations were copied directly from the published volumes. SCT citations were derived from the conversion table to the *United States Reports* which is located in the front of the various volumes of the *Supreme Court Reporter.*

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79. *Id.*

80. *Id.*

81. Lee Epstein, *Social Science, the Courts, and the Law*, 83 JUDICATURE 224, 225 (2000). We adapt this paragraph and several to follow from this piece. *Id.*

Citations to the *Lawyers' Edition* are current. Those to the other two Reporters are not. Because of the ready availability of case citations to the *United States Reports* and the *Supreme Court Reporter* I stopped entering these data a number of terms ago.

Not every record is cited to each source. I do not find either *Olin Mathieson Chemical Corp. v. N.L.R.B.*, 352 U.S. 1020 (1957), or *United States v. Louisiana*, 409 U.S. 17 (1972), in the *Lawyers' Edition*. On the other hand, the *United States Reports* do not contain those cases in which a justice dissents from the granting of an attorney's request for admission to the Bar of the United States Supreme Court. E.g., *In the Matter of Admission of Leda M.C. Hartwell, William Evans Benton, and Michael T. Rose*, 71 L Ed 2d 641, 859, and 862 (1982), respectively. Relative to the Court's formally decided cases, this sort of memorandum decision is trivial. Because citations to the Supreme Court Reporter are derived from a conversion table, as mentioned above, cases not cited in the *United States Reports* will have no parallel SCT citation, as will cases that the conversion table otherwise omits.

Pagination does not invariably proceed chronologically throughout the volumes. Hence, do not assume that because a given citation has a higher page number than that of another case it was decided on the same or a later date as the other case. The only accurate way to sequence the cases chronologically is by indexing or otherwise sequencing each case's date of decision (DEC), variable 20.[82]

At first blush, this level of detail may seem unnecessary, even fussy. On deeper reflection, however, it is critical for all users and consumers of the data. That is so for several reasons, chief among them is that the "fussy" details facilitate replication and reproduction; it also makes it possible to build on Spaeth's project. However comprehensive his databases may be, some scholars will inevitably desire to analyze a variable it does not contain in conjunction with a variable(s) that it does. Professor Merrill's analysis of support for the Solicitor General provides an example. While the Spaeth databases incorporate all the information Professor Merrill requires on issue areas and judicial votes, they fail to house data on the participation of the Solicitor General as an amicus curiae.[83] Nonetheless, so long as the researcher has in hand a citation, the docket number, or some other identifier of cases in which the Solicitor General filed an amicus curiae brief, it is easy enough to add the variable or variables of interest to the database.[84]

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[82]. *Supreme Court Judicial Database Documentation, supra* note 77, at 1-2.

[83]. It does, however, identify when the United States is a party to the suit. See Spaeth's party_1 and party_2 variables. *Id.* at 16-27.

[84]. Some scholars have already have taken this step. *See* Segal & Reedy, *supra* note 43, at 559.

By the same token, it is a trivial task to recategorize the *values* of Spaeth's variables. So, for example, if scholars take issue with the way that he has coded the direction of Court decisions (as liberal or conservative)—as some in the legal community have—they can correct whatever "problems" they perceive with simple commands common to virtually all statistical software packages (again, "recode" or "compute" in SPSS). That they can do so is, yet again, a credit to Spaeth: his detailed documentation makes completely transparent his definitions of concepts such as "liberal" and "conservative."

We could go on extolling the virtues of the databases, but it is the larger point that should not be missed: Spaeth's products meet all aspects of the replication standard. Without consulting their developer, researchers can reproduce, replicate, and build on them—and they have. The Spaeth databases are so dominating in our discipline that it would certainly be unusual for a refereed journal to publish a manuscript whose data derived from an alternate source.[85] Even in the law reviews, virtually no empirical study of the U.S. Supreme Court produced by political scientists fails to draw on them.

It is, thus, a mystery to us as to why the databases have not made greater inroads into the legal community; as to why law professors and their students, instead of relying on Spaeth's efforts in part or in full, proceed as political scientists did some decades ago: they collect their own data. Whatever the answers, we want to urge the legal community against continuing along this path. Not only is it time consuming and duplicative, but it almost inevitably leads to data that do not meet the replication standard.

We learned this when, for another project, we attempted to replicate a table in a source commonly used by legal academics (including Professor Merrill), the *Harvard Law Review*; specifically, the statistics it publishes in its annual reviews of the Court's term.[86] Even giving *Harvard* every benefit of the doubt—including focusing our replication efforts on a table we (and apparently *Harvard*[87]) thought would be the most straightforward to replicate—Table 1(A) which lists the "Actions of Individual Justices"[88]—we could not even

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85. Most empirical articles on judicial behavior, published over the last decade in the leading political science journals, avail themselves of one of the Spaeth databases. For example, of the nine papers in the *American Political Science Review* (appearing between 1991-2000), 78% (n=7) relied on Spaeth's data; that figure for the *American Journal of Political Science* over the same time is 88% (fifteen of seventeen). Those that did not utilize the Spaeth databases typically relied on survey data or focused on the decisions of courts other than the U.S. Supreme Court.

86. *See* Epstein, *supra* note 81.

87. In fact, in its review of the 1967 Term—which *Harvard* says provides "[a] complete explanation" of how it compiles its tables, *The Supreme Court, 2001 Term—The Statistics,* 116 HARV. L. REV. 453, 453 n.a (2002)—it claims that "the construction" of this table "is accomplished primarily through tabulations as mechanical and simple as counting." *The Supreme Court, 1967 Term—Business of the Court: The Statistics*, 82 HARV. L. REV. 301, 302 (1968).

88. *See*, *e.g.*, *The Supreme Court, 2001 Term—The Statistics*, 116 HARV. L. REV. 453, 453 tbl.1(A) (2002).

begin to reproduce it without serious detective work. Even then, we still could not replicate it; we certainly could not update it.

We faced similar problems with Professor Merrill's data. To provide but one example, consider his Figure 2, which contains information on the number of opinions written per Term, along with his description of the data-collection procedures:

> The numbers are taken from the statistics compiled in the annual Supreme Court volume of the *Harvard Law Review* published each November. They reflect a category that the *Review* calls "opinions written," which varies slightly from cases orally argued because it includes some per curium decisions in which the Court does not hear argument and excludes some cases that are dismissed after argument without a decision.[89]

Despite Professor Merrill's laudable efforts at explaining his research procedures, they are not replicable: another researcher could not understand, evaluate, build on, and reproduce them without talking to the students at the *Harvard Law Review*. To see why, think about what information an investigator would need to know, but that the authors do not provide, to replicate their work. A couple of the necessary questions would be:

What is the unit of analysis? That is, did the students at *Harvard* base their counts on docket numbers or case citations? This question arises because occasionally the Court will consolidate several cases (with different docket numbers) under one citation, making it possible for a Justice to join, say, the majority with regard to one case, but the dissent in another, even if the citation is the same. It is, however, not a question that *Harvard* explicitly answers.[90] This is unfortunate because, as Figure 8 shows, whether a researcher relies on docket numbers (that is, explodes cases within one citation) or citations can lead to different counts.

89. Merrill, *supra* note 2, at 579 n.21.

90*. Harvard* simply refers the reader to its review of the 1967 Supreme Court term for "[a] complete explanation of how the [table is] compiled." *The Supreme Court, 2001 Term—The Statistics,* 116 HARV. L. REV. 453, 453 n.a (2002). This did, in fact, provide more detail but did not contain information about the unit of analysis. It was only by going back to its review of the 1960 Term that we thought we found an answer:

> Table[] . . . IV deal[s] with those full opinions of the Court that dispose of the cases on the merits. Since it is not unusual for one opinion to dispose of more than one docketed case, the total number of full opinions, 118, is fewer than the number of cases listed [in a table dealing with the final disposition of cases].

The Supreme Court, 1960 Term—Business of the Court, 75 HARV. L. REV. 83, 87 (1961) (footnote omitted). While far from clear, this statement suggests that those compiling the 1960 data used case citation as the unit of analysis; whether more contemporary students followed suit, we can only guess.

FIGURE 8

Number of Supreme Court Cases by Citation and Docket Number[91]

Term
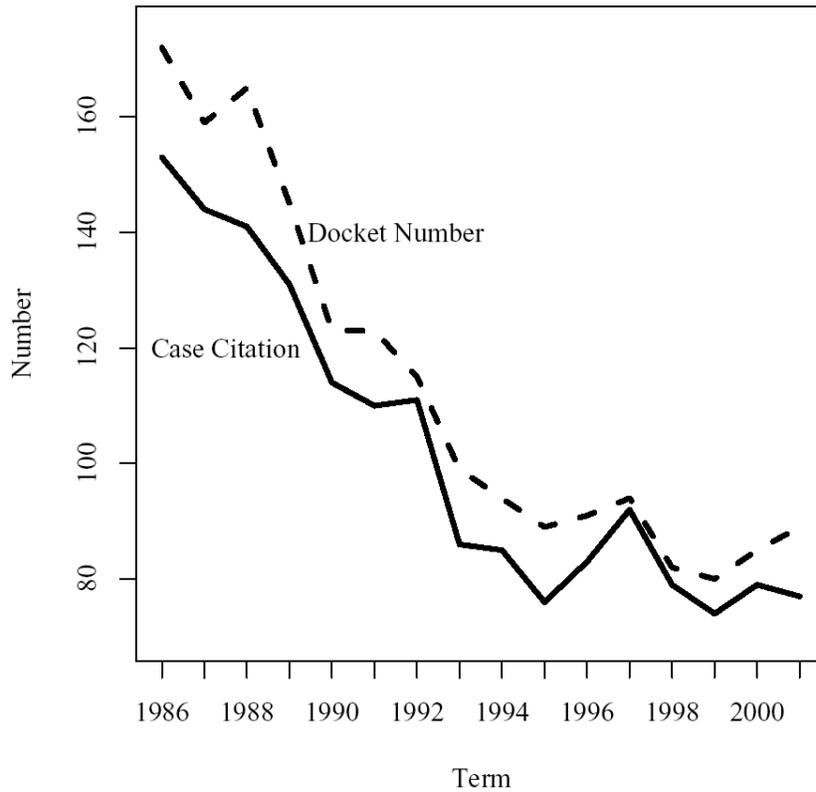
What per curiam decisions counted as "opinions"? The *Harvard Law Review* states that it includes only those per curiam decisions containing "legal reasoning substantial enough to be considered full opinions."[92] Almost needless to write, such a criterion does not meet any accepted or acceptable standards of scientific work with which we are aware. What "substantial" reasoning means to the editors of the *Harvard Law Review* may be quite different from what it means to readers of this essay or to us. It may even be the case that each class of *Harvard Law Review* students interpret it in distinct ways. Accordingly, we, our readers, and the compilers of the data themselves might all select *different* per curiam decisions to incorporate into our counts.

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91. We created this figure from the Spaeth database, using analu=0 (for case citations) and analu=0 or 1 (for docket number) and dec_type=1, 6, or 7.

92. *The Supreme Court, 2001 Term—The Statistics,* 116 HARV. L. REV. 453, 453 n.a (2002).

Perhaps out of recognition of this problem, *Harvard* provides a list of the per curiam decisions it includes. Frankly, however, this does not help matters much because, in all likelihood, investigators (including the students themselves) would be unable to recreate its list for earlier or update it for later periods; "substantial" legal reasoning seems too imprecise of a phrase to admit replication.

Worth noting is that neither of these issues would arise with the Spaeth database. As for the unit of analysis, Spaeth lets the reader choose among several options, with the most relevant here being (0) case citation or (1) docket number. As for the types of decisions (Spaeth's DEC_TYPE variable), he also provides alternatives (listed below) from which the researcher could choose one or all seven:

DEC_TYPE=1: Cases in which the Court hears oral argument and which it decides by a signed opinion. These are the Court's so-called formally decided full opinion cases.

DEC_TYPE=2: Cases decided with an opinion but without hearing oral argument; i.e., per curiam.

DEC_TYPE=3: Memorandum cases. These are summary decisions that deal with petitions for certiorari and appeals, requests of individuals and organizations to participate as amicus curiae, and various other motions, orders, and writs. These are segregated from the other types of decisions by their location in the back of the various volumes of the *United States Reports* beginning at page 801 or 901 or later.

DEC_TYPE=4: Decrees. This infrequent type of decision usually arises under the Court's original jurisdiction and involves state boundary disputes. The justices will typically appoint a special master to take testimony and render a report, the bulk of which generally becomes the Court's decision. The presence of the label, "decree," distinguishes this type of decision from the others.

DEC_TYPE=5: Cases decided by an equally divided vote. When a justice fails to participate in a case or when the Court has a vacancy, the participating justices may cast a tie vote. In such cases, the Reports merely state that "the judgment is affirmed by an equally divided vote" and the name of any nonparticipating justice(s). Their effect is to uphold the decision of the court whose decision the Supreme Court reviewed.

DEC_TYPE=6: This decision type is a variant of the formally decided cases (DEC_TYPE=1). It differs from type 1 only in that no individual justice's name appears as author of the Court's opinion. Instead, these unsigned orally argued cases are labeled as decided "*per curiam*." The difference between this type and DEC_TYPE=2 is the occurrence of *oral argument* in the former but not the latter. In both types the opinion of the Court is unsigned; i.e., per curiam.

DEC_TYPE=7: Judgments of the Court. This decision type is also a variant of the formally decided cases. It differs from type 1 in that less than a majority of the participating justices agree with the opinion produced by the justice assigned to write the Court's opinion. Except for those interested only in the authors of the opinions of the Court, DEC_TYPE=7 should be included in analyses of the Court's formally decided cases.[93]

We could summon other examples of barriers to replication within *Harvard*'s data work[94] but they would all lead to the same conclusion: If scholars want to collect their own data, then they must take as much care as Spaeth does to meet the replication standard. Spaeth provides precise definitions of all the variables included in his database; *Harvard* provides, at most, bare clues and at minimum subjective criteria. Based on Spaeth's definitions we or any could easily reproduce his data and the results they yield; based on *Harvard*'s, we could not.

Which, of course, leads us back to the question of why scholars—whether political scientists or law professors—working on the Supreme Court would collect their own data from scratch when so much of what they may require already is in Spaeth's product. Honestly, we cannot think of a single reason. Even if some of the variables of interest are not housed in Spaeth's, we would bet that many others are, or could be adapted to the researchers' requirements; whatever remains, as we suggest above, they could easily incorporate.

III. CONCLUSION

We want to end this piece much as we began it: We are all in Professor Merrill's debt for advancing, perhaps even starting, a conversation between political scientists and law professors. For, even though we may have been critical in spots, we truly believe Professor Merrill has performed a tremendous service for both communities of scholars.

Indeed, he has executed his task so competently that he has made our work all the more. It is now up to us, again whether in the law or political science world, to build on his foundation. We have attempted to do so, *briefly* highlighting some of the key features of the political science project on judging—and we do mean *briefly*. We have barely scratched the surface in terms of the overall project, leaving important topics nearly completely unaddressed. Moreover, we have only minimally touched on a key insight in Professor Merrill's paper—one centering on what he calls periods of

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93. *Supreme Court Judicial Database Documentation, supra* note 77, at 58-59 (emphasis added). Note that Spaeth provides (limited) advice on which to use. For more comprehensive guidance, see Benesh, *supra* note 76.

94. For example, *Harvard* does not reveal the source of the data (whether it is *U.S. Reports,* LEXIS, etc.). For why this is important, see *supra* pp. 810-12, which contains Spaeth's analysis of the citation variables in his data set.

membership "stasis" or what our colleagues in political science might deem as "natural courts"—preferring to set it aside for another paper in which we would have the space to do it justice.

The next steps seem obvious. First, we call on more political scientists to join the conversation that Professor Merrill has so ably and admirably moved forward. Those of us who systematically study judging are a varied lot, and undoubtedly some among us will take issue with aspects of our description of the disciplinary project. Law professors should hear their voices. Likewise, political scientists ought to hear the voices of legal academics. After all, if research is nothing else, it is a social enterprise: the advancement of knowledge depends on an active community of scholars working, not in isolation, but together in cooperation and competition. Professor Merrill's paper is a great example of this principle in action; we only hope that it will be the first of many more.