

A Stream That Rises Above Its Source:  
Judicial Review from a Public Choice Perspective\*

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**Abstract**

A typical discussion of judicial review pits the view of Alexander Hamilton in Federalist 78 (protection from the “cabals of a representative body”) against the much more circumscribed view of Justice Owen Roberts (“lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former”). This tension between two views informs much of the current debate over judicial review. But the “tension” is illusory; the real problem can be analyzed as a two-dimensional spatial problem, with participants having preferences both over (1) the substantive issue being litigated, and (2) the principle of judicial review in the abstract. This paper presents a set of results based on such a spatial analysis, and considers an answer to the apparent paradox that judicial review may prevail against political majorities for long periods. Furthermore, the results from the model indicate that any purely issue-oriented “median voter” approach to court voting is misspecified, and will lead to incorrect predictions.

## A Stream That Rises Above Its Source:

### I.A. Introduction

[The Supreme Court] has no *general power* of declaring acts of Congress unconstitutional, and ... the source of that power lies in ... *the necessity of doing justice to individuals and of securing to them their rights* against the tyrannical acts of Congress and other legislatures. But the stream cannot rise above its source; the power cannot extend beyond the necessity which creates it. That much the Supreme Court...[must] vehemently assert. As they must, in order to escape the charge of usurpation. (Government By Judiciary, Louis Boudin, New York: William Godwin, 1932; p. 21. Emphasis original).

Courts check the elected branches of government. This check is often called the power, or obligation, of “judicial review.” The degree to which such a check is effective varies considerably in different constitutional systems (see, for a historical review, Tanenhaus 1968, Ramseyer, 1994, and Vanberg, 2011). In the U.S. system, where no check is absolute, judicial review is in some ways weakened by powers possessed by the other branches. Still, there is a difference in the check available to the courts, as identified by John Hart Ely (1980; pp. 4-5)<sup>1</sup>:

When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling judgment [of the Congress], and normally doing so in a way that is not subject to “correction” by the ordinary law-making process. Thus, the central function, and the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.

If unelected judges can prevent elected representatives from governing “as they’d like,” then doesn’t that empower judges to rule as *they* like? Just what is “judicial review,” and how does it apply to a constitutional system of checks and balances when all actors are acting in a self-interested fashion? In this paper I present a theoretical representation of preference, equilibrium, and outcomes in judicial oversight of the legislative and executive branches. Justices are motivated by two considerations: (1) their own political views, and (2) a desire to preserve the power and prestige of the court. The “public choice” approach is well-suited for employing a spatial model to represent trade-offs between these two considerations.

My conclusion is not very controversial, or insightful, but it is hoped that the clear means of representing the argument for that conclusion is of some value. It is likely that there are many people who have similar overall views of the value of policy and the value of stable institutions. What will vary is the attitude individuals have about the trade-off, with some favoring ideological victories and some favoring preservation of tradition and precedent. The name that we have given to those who favor precedent and the prestige—what one might call the “legacy” of the court—possess what is commonly called “the judicial temperament.” My paper argues that the judicial temperament is far more important than ideological conviction, and offers an explanation for why many judges surprise those who appoint them. The policy implication is clear: Senate hearings should spend less time on trying to divine ideological views—and nominees are quite right to decline to answer such queries—and more time investigating the commitment of nominees to the legacy of the court.

## **B. Defining Judicial Review**

The power of the judiciary is hard to limit explicitly, because it is hard to define precisely. But it is possible to offer some qualitative observations about the nature of judicial power. First, consider the types of actions themselves:

- Courts can **enjoin**, either by prohibiting future, or declaring void existing, *acts* of the legislature or *actions* of the executive.
- Courts can **command**, either (in effect) *writing legislation* through their decisions, or by forcing states or officers of the executive branch to *take specific actions*.

Second, there are the motivations of a court in contemplating these actions:

- The legislature, or executive, has acted in a way that violates the Constitution, or the body of existing precedent interpreting that Constitution.<sup>2</sup>

- The legislature, or executive, has acted in a way that violates the political preferences and beliefs of a majority of the justices that constitute the “court.”

This suggests a simple categorization of actions—and inaction—by a Court, as is depicted in Table 1.

The two most interesting cells in Table 1 are the northeast and southwest. If a judge thinks that a law, or action, is constitutional, but violates a personal preference, the judge “should” take no action, according to the classical view of judicial review. But.... Why *would* the judge forbear, just because he *should*?

Table 1: Judge Personal Preferences vs. Constitutional Consistency

	Personal Preference of Judge on Court Regarding Action / Inaction by Political Branch		
		Like	Dislike
Is the Action / Inaction of the Political Branch Consistent with the Constitution?	Consistent	Court Always Takes No Action	Classical Judicial Review: Judge Must Not Act, Even Though Inaction Violates Own Preferences
	Inconsistent	Classical Judicial Review: Judge Must Act, Even Against Its Own Personal Preferences	Court Always Acts, or This System Has No Judicial Review

Likewise, if a law or action *violates* the Constitution (and accumulated precedent interpreting that Constitution), but is consistent with the judge’s own political view of the good, that judge “should” nullify the law. But why not refuse to act, since that is the judge’s own preference?<sup>3</sup>

According to the classical account of judicial review, judges act, or forbear, because they serve the public interest. If courts did routinely pursue “review” that exceeded the hortatory mandates of consistency and constitutionality, then “the stream rises above its source.” But in no other arena of government do we rely primarily on personal forbearance as the mechanism for controlling self-interest. In the “public choice” approach, in particular, we normally start with the assumption of narrow, self-

interested policy actions if those are feasible. Can these views be reconciled? Why doesn't the stream flood its banks?

### **C. Public Choice, Public Interest, and Judicial Review**

The *sine qua non* of the “public choice” approach is the confrontation of self-interested action, subject to formal and informal constraints, with the (possibly unanticipated) aggregate consequences of those actions filtered through political and economic institutions. More simply, the starting point is the assumption that individuals act to further what they perceive as their own self-interest, even if collective benefits are left on the table. As Tullock (1984; p. 89) put it: “From the earliest work in Public Choice, scholars have tended to assume that the public interest is not a major theme in the operation of government, certainly in democratic government.”<sup>4</sup>

Consequently, human beings (be they consumers, workers, bureaucrats, elected officials, or judges) cooperate in producing public goods only when they perceive it as advancing their private interest. Forbearance, or a self-imposed willingness to sacrifice one's own interest for the public good, is not a useful starting point for theorizing about government, for public choice theorists.

This view did not originate with public choice, of course. As Madison and Hamilton famously observed in Federalist #51, “men are not angels,” and good institutional design should take full advantage of the self-interest of those in government, rather than relying on their good will or forbearance. Hamilton noted the power of an “absolute negative” on legislation could not be entrusted to the executive:

The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

...An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

The solution Hamilton focuses on is, as is well known, “ambition,” or what modern social scientists call self-interest. Nonetheless, contrary to the characterizations of the “public choice approach” in the literature (see, for example, Farber and Frickey, 1991; 11-37), one needn’t presume *egoistic* self-interest. “Rational” preferences imply nothing more than that weak orderings over alternatives are complete and transitive. But this means that groups of individuals, particularly in “communities,” might value some collective goal, yet be fully consistent with rationality.

Taylor (1976, 1982) analyzed the problem of community in a way that is very useful for present purposes. He argued that the notion of “community” is a name for a complex equilibrium of a long-term game we really don’t understand. His claim is that the sufficient conditions for “community” are characterized by the features (a) shared norms and beliefs, (b) reciprocal obligations, and (c) direct, complex, and long-term relations among members. It is not difficult to imagine that equilibrium behavior within a community of this type is the same as that implied by an iterated, institution-free prisoner’s dilemma. But how exactly might the difference be explored? And can we think of the court system, in which judicial review is embedded, as having the properties of one of Taylor’s “communities”?

At a conceptual level, the answer is yes. Reciprocal obligations and direct, complex, long-term relations among judges on a court, particularly on the U.S. Supreme Court, are clearly present. But these conditions are features of the interaction on the court itself. Where might the attitudes and preferences that satisfy the first condition, shared norms and beliefs, come from? It is possible that these shared norms might be inculcated on the bench, but it seems more likely that we look for these features in advance. More simply, then, how can we tell good judges from bad ones, and then pick the good ones?

## D. Cabals, Factions, and the Will of the People

Hamilton and Madison feared domination by faction, clearly invoked in Hamilton's call in Federalist #78 to protect the Constitution from the "cabals of a representative body." While this view may seem ordinary to American ears, it was novel at the time of the founding and still very controversial in other nations. In the political science of other nations, the "will" of the people is embodied in the *acts of the legislature*. It makes no sense to think of judicial review as serving democracy in such a context. Instead, restrictive judicial review of the legislature must by definition thwart the will of the people.

The American founders, of course, particularly Madison, viewed the will of the people as being embodied in the *Constitution*, not the emissions of the legislature. Once this perspective is understood, the place of the courts is clear: judicial review protects democracy and the will of the people, because it nullifies legislative acts that (would) violate the Constitution. We are brought back to Ely's paradox: the defense of the will of the people depends on a body that is in no way accountable to the people.

But if legislatures are really slaves to faction, should the judiciary be master? It would appear not, at least according to Hamilton, again from Federalist 78:

[This does not] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

It has been pointed out by many observers that this passage contains a whiff of anthropomorphism, or even mysticism.<sup>5</sup> Just what "will," and what "people," are we talking about? The people select legislators, and we must rely on the people speaking through their representatives for our laws. When the court nullifies a law passed by the assembly, it acts explicitly *against* this expression of the majority will. "Democracy" may be defined as having more to do with equal protection under the laws, or domain restrictions that put certain activities beyond the power of the law to regulate. But then the will of the majority may differ from what is demanded by "democratic" precedent.<sup>6</sup>

This all seems very difficult. We are left with a court that is only the equal of the legislature, which literally “checks” the legislature to ensure that laws are consistent with the will of the people, particularly as that will is embodied in the constitution and existing statutes. But Hamilton also recognizes that the judiciary is weak, as in the famous passage where he calls the courts the least dangerous branch.

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. ...[T]he judiciary is beyond comparison the weakest of the three departments of power; ... it can never attack with success either of the other two; and ... all possible care is requisite to enable it to defend itself against their attacks.... (Hamilton, Federalist #78).

The last phrase in the quote above suggests a way to escape the contradictions in the account (court is superior, court is equal, court is inferior). If the court routinely uses its power to nullify legislation or enjoin action, when the reasons it gives for doing so have more to do with ideological preference than with constitutional nonconformity, then the court forfeits its power. Importantly, the court would lose its power not only to legislate or command illegitimately, but it would also lose the power to carry out its core function, the “checking” of the legislature when laws really do contravene the Constitution.<sup>7</sup> This problem might be exacerbated precisely if the power becomes fully institutionalized. The reason is that legislators, and perhaps even the President, might try to “have it both ways,” passing laws that are politically popular under the assumption that the Court will bail them out. Then, when the law is declared (rightly) unconstitutional, elected officials can simply blame the court. Fox and Stephenson (2011) call this “political posturing,” and there is some evidence (Amar and Amar, 2002) of exactly this problem.<sup>8</sup>

## E. Public Interest

Given that it may be costly, both in terms of their political power and in terms of satisfaction of their own ideological preferences, why would judges act in the “public interest,” rather than their ideological self-interest, which they could disguise? Gordon Tullock suggested one possibility: Judges may often act in the public interest because the system insures that they have no private interest.

We make every effort to see to it that judges and juries have no material interest in the matters they try. The idea is that they should be completely unbiased. Granted that they have no interest, one might inquire how they make up their mind. The answer must, of necessity, be that they do what they think is right because they have no countervailing motive. (Tullock, 1984; p. 91).

In short, judges can have no private interest in matters they try, or decide. They might as well do what they think is right, because they can’t derive any benefit from the choice anyway.

But this solves only the problem of *material* interests. What of *ideological* interests? Suppose a judge tries an abortion case, in a state where abortion is legal, but the judge thinks that abortion is wrong and should be illegal. How could any externally imposed rule solve this problem? If the judge owned a majority interest in a private company that produced antiabortion bumper stickers, or that produced equipment used in abortion procedures, then he would have a material interest in the outcome and might be asked to recuse himself. But how can we require recusal of a judge who has an opinion?

## F. Sed quis custodiet ipsos custodes?’

The problem with judicial review, in terms of constitutional design, is that we want to “check” the legislature and executive, but we don’t want to endow the “custodes” (guardians) themselves with legislative or executive power. In the previous section, I agreed with Tullock (and most scholars of the courts) that divestment and recusal in matters of material interest might induce judges to act in the public interest, simply by a process of elimination.

But imagine: is it possible that someone so learned in the law as to be able to carry out the checking function will not also have strong *preferences*? That seems unlikely. And even if it were

occasionally true, it is unwise to assume that it is always true.<sup>10</sup> Yet some means must be found to encourage the judicial magistrates to forbear, and not simply enact their personal preferences into constitutional or statutory practice.

A mythology has grown up around judicial review: any judge will respect the necessity of necessity as a trigger for review. That is, power should (can) only be exercised to avoid a greater harm, or when the laws of the legislature or the actions of the executive threaten such harm. Since power can be used only in the face of such threat, and only to the extent that harm is to be avoided, the stream of judicial review can never rise above the harmful source that engenders its exercise. This mythology undergirds a considerable body of legerdemain; e.g.:

From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding upon no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply the necessary concomitant to the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and the measure of law.<sup>11</sup>

It may be perfectly true that this charge of checking the excesses (and correcting the mistakes) of the legislature is the charge given to the court system. Justice Owen Roberts is succinct: If (and this is an important “if”) someone formally challenges an act of Congress or the Executive as being unconstitutional, then “the judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside [the statute, rule, or action] which is challenged, and to decide whether the latter squares with the former.”<sup>12</sup>

Here, then, we come to the key point. The reason that judges and legal theorists must defend the proposition that there is no formal “substantive power to review and nullify acts of Congress” is this: if such a judicial power did exist, it could not be checked. So long as the power exists only provisionally, and contingently, then similarly informal checks may be enough to “guard the guardians.” Obviously, what is required is that the guardians guard themselves. How? Why would they do that?

## G. A law vs. *The law*

Judges may care about “a” law, and believe that there are better, and worse, versions, for ideological reasons. Judges may also care about “the” law. Either by natural predilection, or by a process of socialization (young people serve an apprenticeship as a clerk, then a lawyer, perhaps later a judge), a sense of reverence for the law is inculcated. One might be skeptical that such self-imposed constraint, bringing with it a deference toward other branches and reluctance to abuse review, will really solve the problem. Still, it is clear that members of the bar have this quality to greater and lesser extents,<sup>13</sup> and that one might consider this quality in deciding fitness to serve on the bench.

In terms of the discussion so far, this means that at least some judges might be expected to perceive a conflict, or trade-off, between their professional obligations and their own ideological preferences. In pointing out the potential for such conflict, Bickel was very explicit:

[M]any actions of government have *two aspects*: their immediate, necessarily intended practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest.... But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enumerated, and seen in relevant application....[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. *Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.* This is crucial in sorting out the enduring values of a society, and *it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears.* It calls for a habit of mind, and for *undeviating institutional customs.* (Bickel, 1962; pp. 16-17; emphasis mine)

The point is that judicial review allows judges to bring to bear preferences and beliefs on the prospect of nullifying legislation or enjoining actions. There is, in fact, no way that an external constraint could be brought to bear to prevent this. Furthermore, financial disclosure, divestiture, or recusal can be of no consequence, because one cannot divest beliefs.

This means that judges will use preferences in deciding cases. But the nature of these preferences and beliefs is always (at least) two-dimensional, divided between a concern for the matter at hand and a

larger concern for the effectiveness and legitimacy of the process. The weights attached to these two “goods” will vary, perhaps significantly, across prospective judges.

But that isn't a problem: in the U.S. federal system, we don't choose judges by lot, and we don't elect them. Instead, the President appoints federal judges. Further, the Senate is very specifically empowered to advise and consent in the appointment of judges to the federal bench generally, and most particularly to the Supreme Court.<sup>14</sup> Since Federal judges serve “during good behavior” (Article III, section 1), the process of selection is the key.

This raises a puzzle, one that is often discussed in the judicial politics literature. The puzzle is this: given the amount of information (in the form of public statements, commentaries, and written opinions) that is publicly available about a candidate for the higher judicial positions such as Circuit Courts or the Supreme Court, why is that Presidents so often appear to regret their choices? Are judges so changeable and inscrutable that their decisions should be modeled as having a random component? After all, President Eisenhower, who famously had the opportunity to make 5 appointments to the Supreme Court, should have been able to mold the Court to his will. Regardless of other considerations, after all, Eisenhower was able by himself to appoint a majority of the sitting justices.

But the results were unexpected. Eisenhower appointed, during his term (1953-1961) these five justices: Earl Warren (chief justice), John Marshall Harlan, William Brennan, Charles Evans Whittaker, and Potter Stewart. When asked, after he left office about his greatest mistakes, Eisenhower said (only partly joking) that “Two of them are sitting on the Supreme Court.” Eisenhower was referring to Warren and Brennan, justices who had seemed conservative in their ideological views but who, once on the bench, turned out drive substantial change on several dimensions, including civil rights.

What is needed is a model of judicial preferences, representing the trade-offs inherent in rendering decisions that have the force of precedent. In the following section, I investigate the implications of a model that accounts for the two-dimensional nature of the choice problem judges face in judicial review.

## II. A. Spatial Model of Judicial Review, With Preferences Over Policy and Efficacy

Quite a large number of political scientists have used spatial models to understand the Court, and to represent judicial review.<sup>15</sup> It is tempting to imagine that the “median voter theorem” rules, for example, on the 9-member U.S. Supreme Court, so that the preferences of the fifth justice, ranked from most to least disposed toward a position, commands the most powerful position.<sup>16</sup>

But, as I hope to show in the following pages, the median voter result, so useful in the application of “political” preferences, is misleading in considering the actions of judges, if only sincere preferences on policy are considered. In fact, the median voter result appears to have misled public officials, and its logic (if not its specific application) has distorted the confirmation process in Senate hearings. I will show that it is not ideological extremism, *per se*, that creates a problem for judicial review. In fact, it is far better to have an extremist who cares deeply about the court’s power than a moderate who is interested in policy.

It is important to insert one further comment, before I present the model. The results presented in this paper, and for that matter many portions of the model itself, are remarkably similar to another paper, Dharmapala and Schwartz (2000). Several of their results, including their Proposition 1, Proposition 3, and Proposition 5, are quite close to the results presented here. It is some testament to the power and consistency of the spatial modeling approach that such results can be derived entirely independently.<sup>17</sup>

Let us imagine that each justice has a spatial utility function of the following form:

$$U = f(D,L) \tag{1}$$

For simplicity, let the two arguments, policy *Distance* and *Loss* of court legitimacy, be defined as separable components of a loss function. That is, *D* grows larger as the decision the court publishes (*x*) deviates from the justice’s most preferred policy (*x*\*). And, *L* grows larger as *x* deviates from the established precedent on that policy (*x*<sub>p</sub>). (Let us assume, as a matter of definition, that *x*, *x*\*, and *x*<sub>p</sub> are

all strictly nonnegative, and continuous. In other words, the feasible policy choices are either positive or zero). Using quadratics as examples, the two arguments of the utility function might look like this:

$$D = (x^* - x)^2 \quad (2)$$

$$L = (x_p - x)^2 \quad (3)$$

The functional form specified in (1) is fairly general, since the only restrictions placed on the partial derivatives is strict negativity ( $f_D < 0$  and  $f_L < 0$ ).<sup>18</sup> For ease of exposition I will assume further that  $f_{LD}=0$ , meaning that the two effects on utility are separable.

It is worth noting, as an aside, that this assumption is too strong; I hope that relaxing it will be the subject of future work, as I discuss further in the conclusion. There are two problems with model as it stands. First, the claim that the cross-partial is non-zero actually has an important substantive meaning, one that can be described as “legacy.” In particular, the chances of an opinion being overturned figure into both the satisfaction of ideological preferences (judges may care about actual outcomes, rather than what they write in an opinion that does not survive appeal or future litigation) and satisfaction of precedent (the legacy of the judge is tied to the precedents that are set and not overturned). The reason I have chosen the simpler, but less realistic, assumption of zero interaction is that allowing an interaction makes my ultimate claim even stronger, because it is another mechanism by which the desire to satisfy purely ideological goals in opinion-writing might be tempered.

Second, there is another possibility for dynamics in the model that the current static approach simply cannot handle. There is a sense in which a judge, or a group of judges, might be concerned with their legacy in the future. The 1954 case “Brown vs. Board of Education of Topeka, Kansas” was sharply different from precedent, and yet ensured that the legacy of Earl Warren. Overturning a precedent in a way that becomes the new precedent could well cement the legacy of that/those judge(s). The point is that this paper equates conformity with precedent and “legacy,” but almost all the truly important opinions would, almost by definition, belong in a third category where legacy requires breaking precedent.<sup>19</sup>

If we do accept the restrictive assumption of separability, we can take the total derivative of (1):

$$dU = f_D D_x dx + f_L L_x dx \quad (4)$$

If we actually take the derivatives, using the definitions in (2) and (3), we get:

$$\frac{dU}{dx} = -2[f_D(x^* - x) + f_L(x_p - x)] \quad (5)$$

We are now in a position to state two minor results, which follow directly from (5).

**Result 1:** Each justice's utility-maximizing policy choice is a weighted average of the (possibly nonlinear) marginal utilities of policy distance and judicial legitimacy of that choice.

**Proof:** Setting the first order condition (5) equal to zero, and rearranging, we find the unconstrained ideal point of the justice:

$$x_{\max} = \frac{f_D x^* + f_L x_p}{f_D + f_L} = \frac{f_D x^*}{f_D + f_L} + \frac{f_L x_p}{f_D + f_L} \quad (6)$$

Since by assumption  $f_D < 0$  and  $f_L < 0$ , this ratio is always nonnegative.

What this means is that the justice trades off the disutility of policy distance against the disutility of loss of the court's legitimacy.

**Result 2:** Three related results on parameters also follow from (6).

(a) If a judge has policy preferences that exactly coincide with precedent, there is no "weighted average."

Instead, he follows precedent exactly, because any marginal utility weights cancel out.

(b) If a judge has no policy preferences, he follows precedent exactly.

(c) If a judge doesn't care about legitimacy, he implements his own policy ideal.

**Proof:**

(a) Let  $x^*=x_p$ , and substitute into (6)

$$x_{\max} = \frac{f_D x^* + f_L x^*}{f_D + f_L} = \frac{(f_D + f_L)}{f_D + f_L} x^* = x^* = x_p \quad (7)$$

(b) Let  $f_D=0$ , and again substitute into (6)

$$x_{\max} = \frac{f_L}{f_L} x_p = x_p \quad (8)$$

(c) Let  $f_L=0$ , and again substitute into (6)

$$x_{\max} = \frac{f_D}{f_D} x^* = x^* \quad (9)$$

### **Capturing Political Technology: Policy Choice Maps Into Legitimacy**

In the previous section, for the sake of exposition, quadratic loss functions were assumed to make up the arguments of the judge's utility function. Given that the utility function itself might be some complex mapping of the values of these loss functions into utility, this is a fairly general first step. But something important is missing: the mapping from policy choices into court legitimacy.

For deviations of policy choice from the judge's ideal point, it is sensible to use a variant of the standard quadratic, since these preferences are primitive. But the judge's preferences over policy as it affects legitimacy are derived, or induced. More simply, if the judge cares about legitimacy, but can only choose the policy outlined in an opinion, the judge needs an expectation about how opinions and changes in precedent will be viewed by the public.

For the sake of graphical exposition, it is useful to break out the "political technology" portion of the reaction to opinions, because it allows us to portray judges' decision-making as a constrained optimization problem: *choose policy  $x$  to maximize utility, given the location of precedent, and the technology that maps changes in that precedent into political legitimacy of the court.*

It will prove convenient to represent the space for choice as having two dimensions. The vertical dimension is defined as deviations from the status quo policy, or that policy consistent with existing precedent. This means that the origin or zero point is transformed to occur at the current policy. The horizontal dimension is legitimacy, ranging from zero (court slapped down, or ignored, for certain) to a maximum value of 1 if the position of the court is completely secure.

The legitimacy of the court is defined with reference to the status quo, or policy consistent with precedent. It is perfectly possible that the court might over time increase its legitimacy by always appearing fair and judicious, but for present purposes a more static conception of legitimacy is all that is intended. The mapping “g” from policy choices embodied in opinions into legitimacy is defined this way:

$$g: x \rightarrow L \quad (10)$$

$$L = g(x) = g(x | x_p, r, s)$$

As before,  $x$  is the policy choice of the court in its opinions, and  $x_p$  is the policy associated with adherence to precedent. The other two parameters of  $g$  are worth discussing, however. The reputation of the court,  $r$ , is the accumulated experience of the political actors in the society with the court. The salience parameter,  $s$ , is the political importance of the particular policy being considered.

One example of a functional form that would have these properties is a generalized quadratic.

$$L = r - s(x - x_p)^2 \quad (11)$$

On the dimensions I have described above, with  $x$  on the vertical axis and  $L$  on the horizontal, the political legitimacy constraint defined in (11) is a left-opening parabola with a maximum of  $r$  at the point where  $x = x_p$ . The rate at which legitimacy declines as the court chooses a policy different from that implied by precedent depends on the salience of the issue. As is obvious from (11), if  $x = x_p$  then legitimacy is maximized at  $r$ .

The political technology constraint is depicted in Figure 1. It is a kind of “feasibility set” for the judges. Any policy/legitimacy combination outside (above, below, or to the right) of the area within the parabola is feasible.<sup>20</sup> The *more nearly vertical* the technology curve, the greater the freedom the judges have to change policy with impunity. The more concave is technology, the more responsive and hostile the public or the legislature is expected to be. Different issues or policy problems are likely to have dramatically different associated political sensitivities. Assuming judges value legitimacy at all, the

constraint should always be binding, and we expect the actual policy choice by judges to be located somewhere on the political legitimacy frontier.

[Figure 1 about here]

Having isolated the exogenous technological constraint that maps policy choices into legitimacy for the court, we can now depict preferences graphically, in the same policy/legitimacy space as the constraint in Figure 1. Since the judge is assumed to value both court legitimacy and policy proximity, horizontal line at the policy ideal point is the inflection point in the indifference curves. To maintain the same level of utility (the definition of “indifference”), the judge will only accept deviations from his policy ideal if such deviations are compensated by gains in the court’s legitimacy. Consequently, the indifference curves are concave from the right (assuming diminishing marginal utility of legitimacy). To put it more simply, the slope of the indifference curves captures the trade-off between policy proximity and legitimacy in the judge’s utility function.

In the example in Figure 2, the judge is presented with a current precedent  $x_p$  that differs from his policy ideal point  $x^*$ . The solid indifference curve passing through the status quo in policy/legitimacy space describes the locus of points that the judge likes just as well as the status quo. He prefers any point to the right of this indifference curve, and would suffer a utility loss if forced to accept any point to the left, above, or below this indifference curve. The dotted indifference curves depict one possible “family” of utility function level curves, with the direction of increased utility being toward the right.

[Figure 2 about here]

We are now in a position to address the problem of choosing among judges. Which judge is best? As an illustration, I have presented four very different judges in Figure 3. Notice that each of the four judges has the same policy ideal point  $x^*$ . They differ only in their commitment to adherence to precedent, and the legitimacy of the court. The “flatter” the indifference curve (i.e., the closer to vertical), the more the judge values the court’s legitimacy, even if it means giving up policy proximity. By

Figure 1: "Technology" of Judicial Review

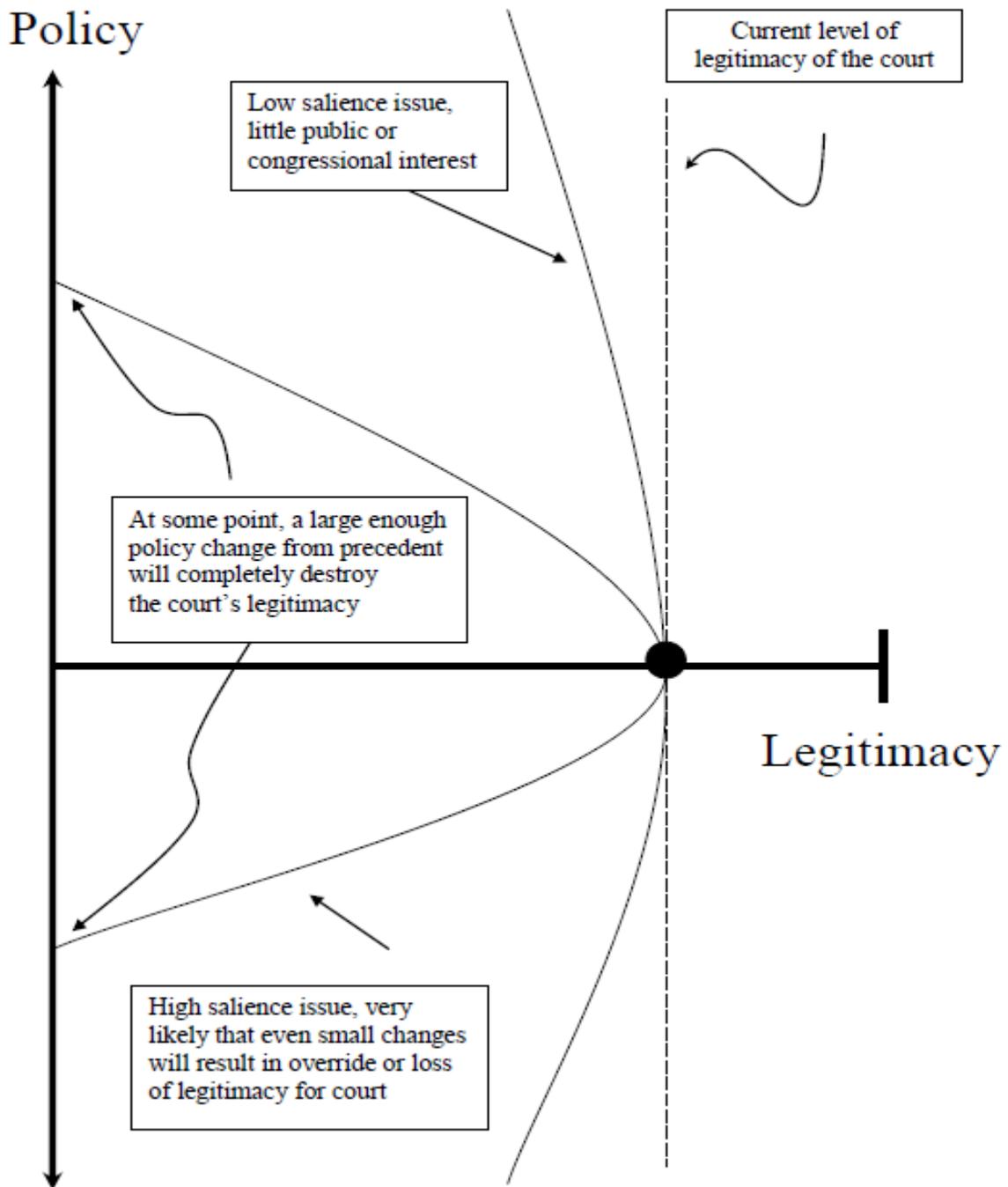
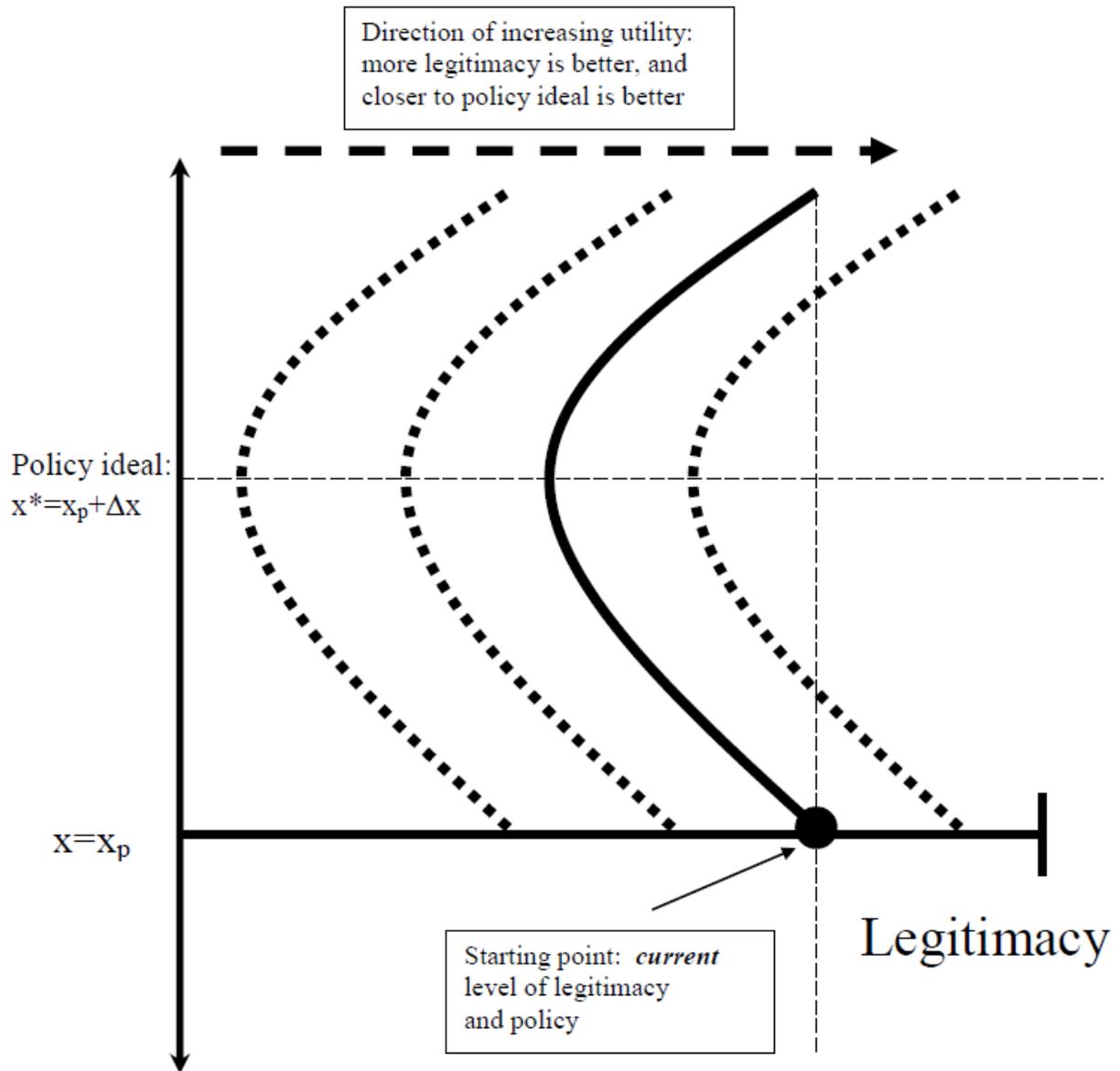


Figure 2: Representation of Preferences—A representative “family” of indifference curves.



contrast, the more concave the curve, the more the justice is willing to accept large decrements to the efficacy of the court over the long run in exchange for an immediate policy gratification.

[Figure 3 about here]

Judge A is included as an example of the representational function of the indifference curves. There is no reason to expect symmetry in preferences, as a general matter. Judge A is an extreme ideologue, with little concern about the court's legitimacy. Consequently, he is willing to accept large losses in legitimacy for gains (from his perspective) in policy, as is clear from the steepness of his indifference curve through the status quo point. Furthermore, he doesn't care much about "overshooting": policies even more extreme than his ideal point are not so bad, and do not require compensatingly large increases in legitimacy to preserve indifference. Having raised the possibility of preference asymmetry, however, I will ignore it for the rest of the paper.

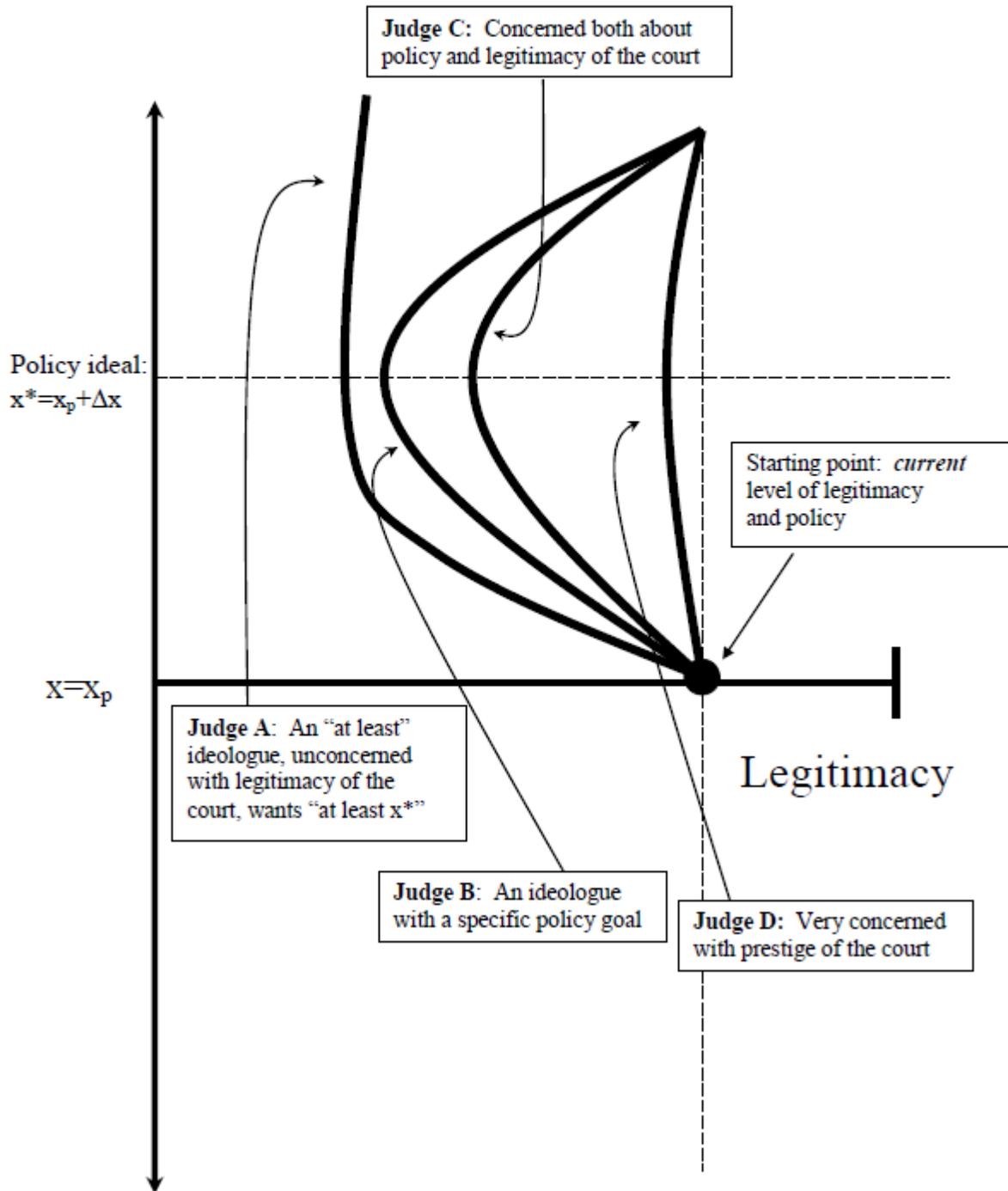
Judge B is highly ideological, though not to the extent of Judge A. His indifference curve through the status quo is highly concave to the right, reflecting a concern for policy that outweighs concern for the court's viability as a political institution. Judge C is more moderate, but still is willing to trade off the constitutional effectiveness of the court to achieve short term policy goals. Judge D, drawn here with a nearly vertical indifference curve, will tolerate only very small losses in legitimacy to achieve even large gains in policy proximity.

The key point is that these four judges would be literally indistinguishable if they answered a survey on policy preferences, or if one accurately inferred their policy views from previous writings. All four have a policy ideal located at  $x^*$ , after all. This is a larger question than the usual complaint about judges, when they refuse to answer policy questions at all.<sup>21</sup> Even if judges answered policy questions honestly and completely, these four very different judges would be indistinguishable.

Yet, as can easily be shown, the difference matters. To see why, we will need to combine the preference representation of a court with the constraint imposed by political technology. For each judge,

Figure 3: Representation of Preferences—Different Judges

(Note: these indifference curves are different judges, with the same policy ideal and different marginal utility of legitimacy, *not* a family of indifference curves for one judge)



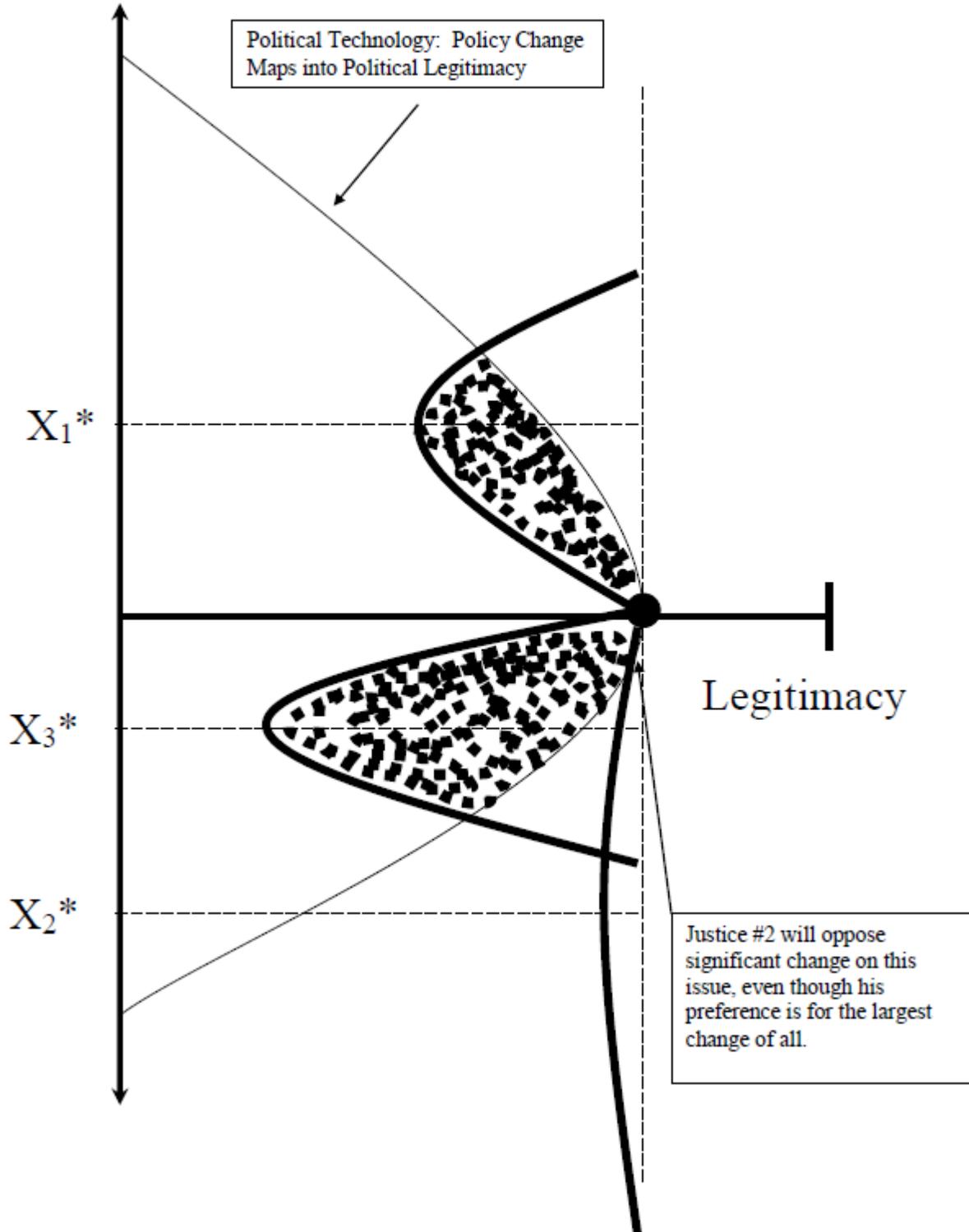
what we are looking for is some intersection between (1) the set of outcomes preferred to the status quo, and (2) the set of feasible decisions. We then aggregate up to a decision by the entire court, by asking whether there exists such an intersection, or overlapping basis for an opinion, for a majority of the court's members. Figure 4 presents a simple example of judicial review decision-making, with three judges.

[Figure 4 about here]

The example in Figure 4 illustrates the main result of this paper: preferences toward legitimacy of the court are far more important than preferences toward policy. Notice that justice #2 is a (relative) extremist in terms of policy, because his ideal policy point ( $X_2^*$ ) is far below the status quo implied by precedent. Thus, if justice #2 were a member of Congress, we might expect an extreme voting record. But #2 also has very strong preferences for preserving the court's legitimacy. Consequently, it is #2 who acts as the break on large-scale judicial nullification of existing statutes. The cross-hatched areas (indicating a politically feasible willingness to nullify precedent or write new policy) for justices #1 and #3 are quite large. But there is very little desire for change from justice #2, whose vote is required for a majority. On this three judge court, either no nullification of law would take place at all, or there might be some very small adjustments at the margins, with opinions written carefully and narrowly. And the judge preventing the overruling of precedent is the most ideologically extreme judge on the whole court!

What about a nine-judge panel? Figure 5 is one possible configuration of preferences and technology. Five judges prefer a change in the negative direction, and four judges would prefer the status quo to such a decision. They would still more prefer a decision that would increase the policy beyond the status quo, of course. But only the majority gets to write a decision, so the four judges write a dissent. Given the preferences of the five, the decision will be narrow and circumscribed, with little language that could be construed as making new law. But the dissenters will write an opinion that invokes larger principles, because they are willing (according to their preferences in this particular example) to accept more of a chance of political backlash.

Figure 4: Feasible and Preferred Changes for a Three Judge Court: Preference for Policy Change is Nearly Irrelevant



[Figure 5 about here]

The key thing to notice about Figure 5 is that the decision bears no resemblance to the “median voter” model of policy (ideological) preferences sometimes used in the courts literature in political science. The median ideological preference is not the center of gravity for actual decisions by the court. Instead, it is the induced preferences, accounting for (1) effects on legitimacy, and (2) preferences toward legitimacy, that matter. This is illustrated in Figure 6, which is adapted from Figure 5. Figure 6 shows only the policy dimension of choice. The top part of the figure illustrates the naïve “median voter” approach, assuming that judges have accurately and honestly revealed their policy preferences, either via a survey or through past writings. The bottom part of the figure shows the “true” (though possibly empirically unobservable) nature of decision-making, with *induced* rather than naïve preferences on the policy choices implied by written decisions.

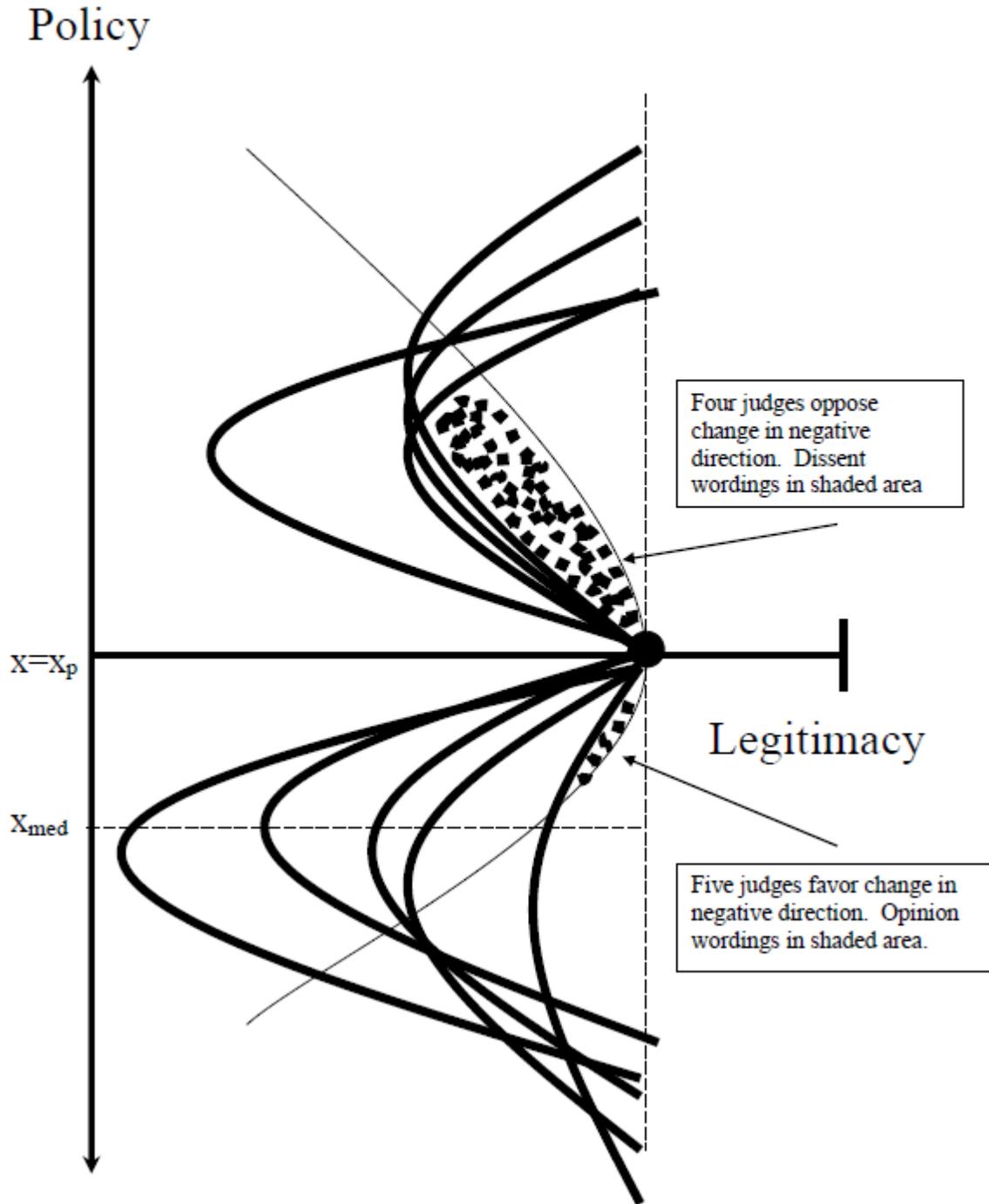
[Figure 6 about here]

The intuition presented in Figure 6 leads me to the final, and main, result of the paper.<sup>22</sup>

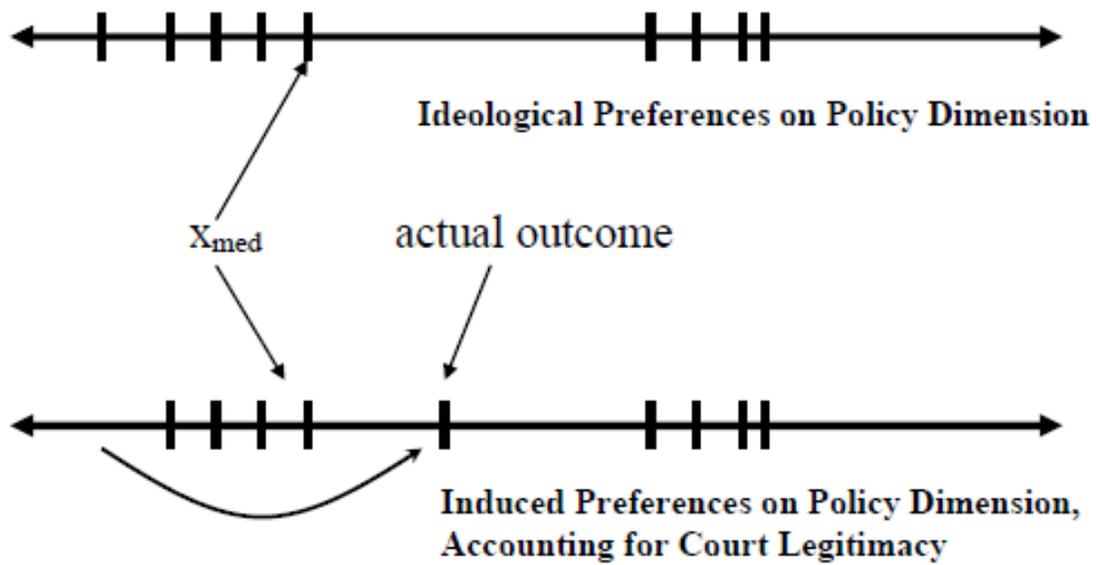
**Result 3: There is no necessary relation between the median pure policy preference and decision-making by a court, unless judges care only about policy.**

**Proof:** By Result 1, above, the induced (i.e., true) policy ideal of any judge is a weighted average of policy and legitimacy considerations. Depending on the weights (a function of the marginal utilities) on policy proximity and legitimacy, the induced policy preference is always no farther away from existing precedent than the naïve policy preference. If the utility weight on legitimacy is large, extreme ideologues in policy terms may be committed centrists on the court. Only if judges don’t care about legitimacy at all (as shown in Result 2c) does the induced ideal coincide with the naïve policy ideal.

*Figure 5: Feasible and Preferred Changes for Nine Justices: This is NOT a Median Voter Result. Any Outcome in the Shaded Area is Possible*



*Figure 6: Median Result and Actual Result—Ideological Extremists Can Be Moderators, and Moderates Can Be Extremists*



## **Empirical Evidence: Do Judges Think and Act This Way?**

Importantly, there is a considerable body of empirical literature that focuses on a question close to the matter that has occupied me in this section. This literature investigates the use of precedent, and the “norm” of *stare decisis*, in understanding the decisions rendered by judges. Knight and Epstein (1996) review this literature at some length, but it is worth summarizing the main conclusions here.

There are two very different ways of incorporating the idea of precedent into judicial decision-making, Knight and Epstein point out. The first is that judges rather mechanically internalize precedent, importing the set of precedents on a question into their preferences to such an extent that the two are indistinguishable. In this case, it makes no sense to distinguish between preferences and constraint imposed by preferences, because what the judge wants is what precedent dictates. The second approach, as Knight and Epstein put it, goes like this:

Precedent does not actually determine justices’ preferences, but it overrides such preferences when the two diverge. That is, if justices’ preferences dictate that they vote one way, but precedent dictates that they vote the other way, justices who believe in the importance of precedent should follow the precedent and not their preference. (p. 1020)

This claim goes too far; there is a third possibility. Even if judges do not simply and entirely internalize precedent as their own preferences, and they do not exhibit preferences that are lexicographic in adherence to precedent, precedent and *stare decisis* might well still “matter.” That is what I have illustrated in this section: judges may perceive there to be a trade-off between their own preferences and adherence to precedent.

This distinction is not important for the empirical approach taken by Knight and Epstein, however, since they focus on the explicit use of precedent by judges in making arguments and rendering decisions. While they freely admit that this evidence is only indirect, the case they make is compelling and comprehensive. Elaborating and extending work by Segal and Spaeth (1996), as well as Segal, et al. (1992), Knight and Epstein note that there are three quite different stages in the process of “deciding” a case. The first is the initial hearing, where attorneys file briefs and make arguments to induce the court to

decide to decide the case in the first place. As Knight and Epstein show, by far the most frequently used rhetorical tool in these hearings, and conferences among judges, is the appeal to precedent. Such invocations of precedent are far more numerous, in most cases, than use of scholarly authority or empirical evidence.

The second stage is the conference discussion, where justices meet privately to discuss the cases. Again, for the sample of cases that Knight and Epstein analyze, justices spend considerable time invoking, and discussing, the nature of the relevant precedents and their implications for the facts under consideration. The final stage is the circulation of drafts of the opinion, and the publication of the final decision. Perhaps not surprisingly, the very highest proportion of the use of precedent as a rhetorical and persuasive tool occurs at this level.

It is perfectly possible, as Knight and Epstein point out, that the use of precedent is nothing more than a fig leaf, used to disguise a naked power struggle over whose preferences will prevail. But they conclude that this is unlikely. For one thing, both justices and petitioners spend lots of time and resources investigating preferences. Second, they show that existing precedents are only rarely overturned. This is true across presidential administrations and regimes of party control of the Congress, showing that precedent often binds justices, restraining the application of ideological preferences.

## **E. Conclusion: Public Choice and Judicial Review**

What is the “public choice” view of judicial review? The hallmark of public choice is the examination of the preferences, incentives, and constraints facing actors, and consideration of the aggregate consequences of individual actions. The characterization of “public choice” in the legal literature has focused on the interest group model of public policy making. This is perfectly legitimate, because public choice theorists have been extremely skeptical of the capacity of legislatures to resist the blandishments of interest groups. If interest groups dominate the policy process, then the substantive

review of the courts might be required to balance the irresistible power of groups (Elhauge, 1991; Silver, 1993).

But there is nothing inherently unconstitutional about pork barrel politics, clientelism, or service to interest groups. To violate the Constitution, either some procedural rule must be violated, or the law passed by the Congress must infringe some fundamental right. If anything, the courts (civil and administrative) may well serve as the means by which corrupt bargains among powerful groups may be enforced, securing the new status quo against majority rule cycles or new attacks by interest groups (Crain and Tollison, 1979; McNollGast, 1995; Shughart and Tollison, 1998; Zeppos, 1993). But in order for courts to serve the function that this “interest group degeneracy” view has in mind, any notion of deference on substance and politics would have to be abandoned, or be rendered so elastic that abandonment is indistinguishable. Several legal scholars have argued that the usual standard of “deference” survives the attack of the public choice monsters quite well (Easterbrook, 1993; Eskridge, 1993).

It is silly to compare purity of “public choicer than thou” arguments, but I have argued that the *real* public choice argument about judicial review is the one made in the pages above. The real object of public choice is to explore the aggregate consequences of individually self-interested action, given the strategic context of incentives and constraints. What I have shown is that, if judges are assumed to be self-interested, certain consequences follow. A brief list of my claims is as follows:

- Ideologues on the court are of two types: those with extreme policy preferences, and those would serve their policy preferences, whatever they are, even at the expense of the efficacy of the judicial system. Of these, only the latter are dangerous.
- The power to “Advise and consent” embedded in the U.S. Senate is the single key provision in the judicial review process. But the Senate’s only proper concern is for a genuine preference by the judge-candidate to *stare decisis*, and the survival of the court.

- The courts may stand long against political majorities on questions that are core constitutional principles. The reason is that many citizens, like justices, have two-dimensional preferences, valuing both policy outcomes and judicial branch efficacy.<sup>23</sup>
- Decision making on the court is *not* an exercise in “median voter theorem” choice. The set of possible outcomes, and the nature of wording of decisions, is indeterminate with respect to a simple voting model. The existence of a non-empty bargaining space, or “win set” of a status quo policy, cannot be taken for granted, even if there is a clear majority who favor policy change *per se*.

Ultimately, what I have tried to do is place the judicial review problem within the broader context of the public choice approach. Preferences, incentives, and constraints combine to guide choices and behavior. In writing down a model that I think captures those features better than the “median voter” approaches of judicial review in political science, and the various approaches taken by legal theorists, I have tried both to narrow and broaden the debate.

It is useful to consider whether the issues I have raised ever come up explicitly in legal discussions. The answer is clearly “yes.” At the time of this writing, the U.S. Senate has just completed the extremely contentious confirmation process for (now) Justice Brett Kavanaugh. Separate from the concerns about youthful sexual misconduct, the American Bar Association reconsidered its previous endorsement of Kavanaugh’s qualifications in terms of judicial temperament. In particular, Kavanaugh had shown open disrespect for several of the senators who were questioning him, raising questions for some observers whether Kavanaugh appreciated the force of the “separation of powers” obligations of the Senate. The letter from the ABA (Moxley, 2018) said this:

Dear Chairman Grassley and Ranking Member Feinstein:

New information of a material nature regarding temperament during the September 27th hearing before the Senate Judiciary Committee has prompted a reopening of the Standing Committee’s

evaluation. The Committee does not expect to complete a process and re-vote prior to the scheduled Senate vote.

Our original report must be read in conjunction with the foregoing. Our original rating stands.  
Sincerely, Paul T. Moxley (Chair of ABA Standing Committee on Federal Judiciary)

More historically, consider this striking passage in the majority opinion written in *Dickerson v. US*, 529 US 1052 (2000), a case on “Miranda warnings.” Chief Justice William Rehnquist wrote the majority opinion:

Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 304, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (Burger, C. J., concurring in judgment) ("The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it, nor extend it at this late date"). While "*stare decisis* is not an inexorable command," particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" We do not think there is such justification for overruling Miranda. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture. See *Mitchell v. United States*, 526 U.S. 314, 331-332, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (SCALIA, J., dissenting) (stating that the fact that a rule has found " 'wide acceptance in the legal culture' " is adequate reason not to overrule" it). While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, we do not believe that this has happened to the Miranda decision. If anything, our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

My real conclusion can be summarized simply: the authority that resides in the U.S. Supreme Court, and on which the efficacy of judicial review depends, is one of many possible equilibria in a game we don't understand very well. But we recognize the Court's authority, and we have recognized it for a long time. I will close with a description of this equilibrium, from Bickel's famous account of the aftermath of the civil rights and segregation decisions of the 1950's.

The Supreme Court's law, the southern leaders realized, could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only. No doubt, in the vast majority of instances the Court

prevails—not just as a result of any sort of tacit referendum; rather it just prevails, its authority accepted more or less automatically, and no matter if grudgingly. (Bickel, 1962; p. 258).

The Supreme Court has the authority to review legislation and executive actions because we all want it to have this power, even if we sometimes disagree with the specific exercise of the power as regards some law we care about. It is therefore of the highest importance that we select justices who care about preserving this power. No other characteristic matters more.

My conclusion, then, is that what is required is a reconceptualization of the theoretical dimensions and empirical measures used to evaluate the fitness and performance of justices. I have tried to be honest about the limitations of the approach outlined in this paper, which essentially conflates attention to precedent, institutional legitimacy, and setting the legacy of a court. These considerations should be disentangled, using more complex measures than I have suggested. After all, the logic of the approach I suggest explains the actions of Warren and Brennan, whose concern for the legacy of the Court drove them to choose a radical course, overturning the existing precedent on civil rights and public accommodation that enabled the Jim Crow system. But the particular model I advance would not allow for such an explanation, because the concern for legacy aligns with concern for precedent. My defense is simply that my approach already adds an important element to previous studies which have ordered justices along an ideological dimension by treating judges voting behavior as being honestly revelatory of primitive preferences. An even more realistic and useful model, one that differentiates precedent and legacy, awaits future work.

Second, in addition to measuring the separate dimensions more accurately, it is important to recognize that the “preferences” expressed in votes are strategically contingent. The same judge who generally serves concerns for legacy by attending to precedent on some issues might, with perfect rationality, serve concerns for legacy by overturning precedents that have been superseded by political evolution or social change.

Clearly, this call for future research to address the manifest shortcomings in my own work is arrogant. But my defense is that I have tried to direct attention away from ideology as a primitive and as the sole consideration of judicial fitness. I have tried to bring judicial temperament, an old and hard-to-measure, concept, “back in” by suggesting a model in which its role is clear.

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## Notes

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<sup>1</sup> Cited in Riker and Weingast (1988).

<sup>2</sup> In either case, it would be necessary that the action, or inaction, has evoked a legally sufficient protest from a petitioner with legal standing.

<sup>3</sup> A much more comprehensive analysis of this notion of review, with comparative examples, can be found in Vanberg (2009). And the procedural issues are expanded in Vanberg (2011). Some counterarguments for evaluating the legitimacy of judicial review are discussed in detail in Doherty and Pevnik (2013).

<sup>4</sup> As Epstein and Knight (2017) rightly note, often the assumption of “rationality” is non-parametric, more of an organizing principle. I am using a parameterized approach, with all the false specificity and limitations entailed by such an approach.

<sup>5</sup> See, for example, Bickel (1962), pp. 16-17.

<sup>6</sup> The question of whether judicial review is inherently, accidentally, or potentially antidemocratic is complex. Ultimately, it comes down to the meaning and value of “democracy.” Chemerinsky (1984; p. 1209) lays out the issues well:

The contention that judicial review is undemocratic is disingenuous at best. None of the critics of the Supreme Court’s activism suggests that all judicial review should be eliminated. Yet, any judicial decision that overturns enacted by a popularly elected legislature is antimajoritarian; even judicial review based on the intent of the Framers is, by the critics’ criteria, undemocratic....The real question for debate is how much discretion the Court should have in interpreting the meaning of the Constitution. This is an inquiry that can be answered and that is much different from the question of whether judicial review can be reconciled with majority rule....A correct definition of American democracy must add to majority rule the protection of substantive values from tyranny from social majorities—an addition of crucial implications for the debate over the legitimacy of judicial review.

This is a rather old subject for public choice theorists, particularly for James Buchanan, who has taken up the question in several writings. In his book with Roger Congleton, the following point is made:

There have been frequent charges that law has been politicized, that modern jurists have overstepped traditional boundaries. This alleged politicization of law has, however, not often involved explicit departure from the rule of law as such in furtherance of social purpose. Instead, the politicization charges are levied against jurists who extend the range for the application of law beyond political proscribed limits. That is to say, jurists are accused of usurping the role of political decision makers by making changes in law rather than enforcing law that exists while remaining within the constraints imposed by generality norms. This judicial overreaching may, of course be motivated by social purposes. But jurists seemed to have remained reluctant to allow social purpose to subvert the constraints of generality directly, at least rhetorically. In civil rights

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cases, courts have often been willing to extend norms for equal treatment to interaction settings that have not, hitherto, been brought within previous interpretations of politically enacted statutes. Courts have, however, only rarely been willing to use overriding social purpose as an argument for providing support for unequal legal treatment. (Buchanan and Congleton, 1998; p. 10).

Other scholars have added public choice style approaches to interpretation, including Ferejohn and Weingast (1992) and Epstein and Knight (1997). Kieweit and McCubbins (1991) note that judicial review is a kind of delegation, though it is (nearly) irrevocable, save through replacement through the politics of the appointment process.

<sup>7</sup> There are not many historical examples of the U.S. Supreme Court being ignored or rejected if it chooses to act. But one would expect, in equilibrium, for this to be true, since the court would not. Further, the kind of example represented by President Jackson's rejection of the Court's decision in *Worcester v. Georgia* (1832, regarding Cherokee relocation) does show that the Court's power is contingent on political circumstance. I thank Dhammika Dharmapala for reminding me of this case, and its importance for my argument.

<sup>8</sup> As Amar and Amar (2002) note, it appears that George W. Bush expected to be bailed out on the Bipartisan Campaign Reform Act, or "McCain-Feingold," in 2001. As Amar and Amar put it (p. 4):

During the 2000 campaign, pundit George Will explicitly asked Bush whether he thought "a President has a duty to make an independent judgment of what is and is not constitutional, and veto bills that, in his judgment he thinks are unconstitutional." Bush's reply was an emphatic "I do."

When asked if he would therefore veto the version of McCain-Feingold then on the table, Bush did not equivocate: "Yes, I would. . . . I think it does restrict free speech for individuals."

How then, did the President justify signing a bill with such constitutional flaws? In the same way that political actors for decades have been dealing with constitutional matters-by punting to the judiciary: "I expect that the courts will resolve the legitimate legal questions as appropriate under the law."

<sup>9</sup> "But who will guard the guardians?" From Decius Junius Juvenal's *Satires*, VI. 347

<sup>10</sup> This is argued in Madison's *Federalist* #10:

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

<sup>11</sup> *Adkins v. Children's Hospital*, 261 U. S. 525, 544 (1923), quoted in Harris (1976; p. 174).

<sup>12</sup> *United States v. Butler*, 297 U. S. 1, (1936), quoted in Harris (1976).

<sup>13</sup> There has been some significant, but inconclusive, work on the effects of "attitudes" of judges on their behavior, particularly regarding the norm of *stare decisis*. See, for example, Spaeth (1995), Segal and Spaeth (1996), and Knight and Epstein (1996).

<sup>14</sup> U.S. Constitution, Article II, Section 2, Clause 2.

<sup>15</sup> Some recent examples include Rogers (1999; 2001), and Moraski and Shipan (1999). A useful review of the spatial and other literature addressing the judiciary can be found in Shipan (1997).

<sup>16</sup> For background on the median voter theorem, see Hinich and Munger (1997), pp. 21-37. One possibility, reviewed in Munger and Schaller (1997), is that voting expresses an intrinsic preference on the vote itself, as an act, rather than on an outcome. In the case of courts, this can be a problem, if it is known that a large majority of other justices are already committed to vote for, or for that matter against. But the possibility will be ignored here.

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<sup>17</sup> Dharmapala and Schwartz completed a draft of their paper in September 2000, and presented it at the Public Choice meetings in 2001. At the time of this writing, it is still unpublished.

<sup>18</sup> Using the convention that  $\partial f / \partial D \equiv f_D$ .

<sup>19</sup> I thank an anonymous reviewer, and my Duke colleague Georg Vanberg, for independently noting this problem, and for suggesting the solution to the first problem, which is noting that the current assumption understates the force of the results. The second problem awaits future research.

<sup>20</sup> It is important to point out that I am drawing a curve, but that curve represents a boundary on what could be a large area. The reason is this: any particular decision, with its compromises in wording and possible turns in the path of argument, is a blunt instrument. It is difficult to know in advance what phrases or lines of reasoning future judges, or political actors, will seize on in making decisions. Consequently, what I want to depict is the very best that the group of judges could possibly achieve, in terms of effecting a policy change of a certain magnitude and minimizing the political backlash. They might very well do worse, in any given instance, landing not on the boundary of the best decision it is technically feasible to write, but rather ending up inside (in Figure 1, to the left of) the boundary by an appreciable amount.

<sup>21</sup> For example, in her confirmation hearings before the Senate Judiciary Committee, on her way to the Supreme Court, Ruth Bader Ginsberg answered a query this way: “It would be wrong for me to say or preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide.”

<sup>22</sup> This point is one of the main claims of, and is based on a very similar model as that used by, Dharmapala and Schwartz (2000).

<sup>23</sup> Stephenson (2003) has made an interesting conjecture that might explain why citizens might value a deference to courts and the power of judicial review. The argument goes like this: if there are at least two (or more) factions that alternate in power, and these changes are repeated indefinitely, then an institution of judicial review may be a “folk theorem”-like equilibrium outcome of the iterated game. This result is only suggestive, but it is potentially important, because it explains why citizens might accept, and even support, judicial review, even if specific outcomes of the judicial review process violate the citizens’ own preferences. More simply, Stephenson gives a reason why citizen preferences might be two dimensional also, though for different reasons. A larger version of this argument, more abstractly arguing that institutions are means of solving commitment problems, is North and Weingast (1989). My thanks to Dhammika Dharmapala for calling my attention to this point.