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THE IMPACT OF POSITIVE POLITICAL THEORY ON OLD QUESTIONS OF CONSTITUTIONAL LAW AND THE SEPARATION OF POWERS

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Two of the oldest and most frequently recurring constitutional questions are: to what extent should courts defer to the other branches of government, and what is the best judicial philosophy? These two normative questions are subsumed within the broader issue of the role of the judiciary within the separation of powers system. Scholarly conceptions of the role of the judiciary have been shaped by three key approaches: traditional theories, such as legal formalism, conceive of judges as impartial law discoverers; attitudinalists and legal realists see judges as partisan law creators; positive political theorists perceive judges to be strategic actors who maximize utility within a constrained environment. This Essay explores the contribution of positive political theory, an important new political science technique, to the study of judicial politics. Positive political theory allows scholars to address the broader question of judicial role without requiring resolution of the normative questions underlying it.

Traditionally, fundamental questions of judicial deference and philosophy were answered through heavy reliance on assertions regarding inherent judicial character and normative directives regarding judicial responsibility and ideal behavior. Judicial impartiality and "judicial restraint," which encompasses various methods of judicial minimalism and avoidance of conflict with the elected branches, were seen as the primary limitations on judicial discretion and power.[1] Attitudinalists and legal realists provided evidence that judges do not always fit such idealized conceptions; rather, judges commonly follow their policy preferences.[2] Attitudinalists and realists have typically gone to the opposite extreme, assuming that judges are entirely unconstrained. But these scholars have been unable to show that judges always act in a way consistent with their apparent policy preferences.[3] Judges may often act in accordance with their own policy prefer-

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[1] *See, e.g.*, Lon Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393 (1978).

[2] *See infra* notes 21 and 18, respectively.

[3] Regarding judicial decisions of whether to grant certiorari, for example, attitudinalists have hypothesized that judges will "defensively deny" certiorari to cases, i.e., vote not to hear cases if they expect the side they support to lose. It has been shown that judges are much more likely to vote for certiorari when the court is likely to decide in favor of their preferred litigant or outcome. *See, e.g.*,

ences, but judges also make rulings that defy their general ideological leanings. Further, judges do sometimes defer to legislatures and administrative agencies, thus limiting their own reach.

Reconciling the extremism of attitudinalist and realist theory requires two modifications: first, recognizing that judges are constrained not only by their self-imposed limits but also by their institutional limitations; and second, recognizing that judges, like other intelligent decisionmakers, will behave strategically by balancing principle with practicality, rather than pursuing their preferred policy outcomes when doing so is too costly. Positive political theory ("PPT") provides a means of specifying when these two conditions are met.

PPT applied to the courts provides a means of analyzing legal and judicial dilemmas and simultaneously captures the expected behavior of extrajudicial actors. It does so by incorporating the motivations, powers, and limitations of all relevant actors in a condensed form. In doing so, PPT elucidates first, the effect of constitutional rules, such as the President's nomination power and the Senate's advice and consent power, upon the judiciary;[4] second, the impact of judicial decisions on other actors, such as the deference given to administrative agencies;[5] and third, the effect of internal judicial norms, such as the Rule of Four, on case outcomes and intracourt relationships.[6]

The judiciary's institutional limits and costs, which in turn define the extent of judicial freedom to act, are determined by the position of the judiciary relative to the other separation of powers actors: the President, Congress, administrative agencies, and other relevant institutions. The formal constraints that operate on the judiciary force it to consider the likely responses of the other institutional players to its decisions. For instance, being overturned by Congress is institutionally costly to the courts, as overrides make the courts appear weak, lower their legitimacy, and waste judicial resources. As such, we expect courts to make their decisions in a

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Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-keeping in the Supreme Court*, 15 J.L. & ECON. 549 (1999). Notwithstanding these tendencies, judges do commonly grant certiorari in cases where attitudinalists expect them to defensively deny. *See* Robert L. Boucher & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 832 (1995).

[4] *See, e.g.*, Tonja Jacobi, *The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in "Advice and Consent" Nominations*, 30 LEGIS. STUD. Q. 193 (2005); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999); Jeffrey A. Segal, Charles M. Cameron & Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992).

[5] *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

[6] The Rule of Four is the norm that only four votes are required to grant certiorari to the Supreme Court. *See* Jeffrey Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61 (2003).

way that avoids congressional override. Understanding the powers and preferences of the elected branches provides central information in predicting judicial actions.

Three aspects of judicial structure make PPT particularly apt for judicial analysis. First, the judiciary's role is partially self-defined. The courts have developed many principles, such as standing, rules of jurisdiction, mootness, ripeness, and self-restraint, to define their own role. Second, the judiciary is vulnerable to the other branches of government. The elected branches control the federal courts' jurisdiction, composition, and budget. Third, the judiciary is institutionally weak: it possesses the power to make decisions but lacks the ability to enforce those decisions. These three factors make the judiciary acutely sensitive to the elected branches' likely responses to its actions, and consequently the constraints of the other branches are directly effective in defining the bounds of judicial action.

These separation of powers effects, however, are not unidirectional. The cliché that the judiciary simply interprets law that has been created separately by Congress ignores two central aspects of the policymaking process. This view ignores that, first, the judiciary's "discovery" of many legal principles creates law as well as applies it; and second, the potential for judicial review will be taken into account by Congress, the President, and bureaucratic agencies during the lawmaking process, and will consequently shape these parties' behavior on the issue before it even reaches the courtroom. The reason for this anticipation is similar to those previously noted as setting bounds for judicial action: just as courts prefer not to be overruled by Congress, Congress prefers not to have its legislation struck down or altered by the courts because of the costs and political capital involved. Since institutional actors each accommodate the anticipated actions of the others, judicial interactions with the other branches of government shape the application of law and delineate the powers of Congress and the executive.

This Essay outlines the contribution of PPT to the study of judicial politics. Part I discusses the state of judicial politics literature prior to the application of PPT. Part II describes the application of PPT to the courts, and outlines some of the theory's central contributions. Part III explores why the insights that PPT is able to make to our understanding of the courts are unique to PPT methodology.

I. PRIOR APPROACHES

The application of PPT to the courts was initially at odds with the intellectual history of both legal scholarship and political science. Earlier institutional analysis of the courts can be distilled down to two central questions: what is the appropriate judicial role and what is the appropriate judicial philosophy? The first question involved a largely jurisprudential debate concerning the legitimacy of the judiciary: given that the courts are

not democratically accountable, must judges defer to the elected branches?[7] Or is judicial tenure safeguarded in order to free judges from the yoke of popularism, enabling judges to protect the rights of minorities and disadvantaged groups?[8] Both of these questions relate to the separation of powers in two ways. Each question is driven by the concern that the judiciary not breach the separation of powers by acting as a super-legislature and by the concern that the judiciary not be harmed by the other branches in retaliation for such encroachment. Although both questions are driven by separation of powers concerns, traditional theories typically addressed them in a solely court-focused way.

Traditional legal analysis maintained that courts could avoid such dangers by deciding cases according to the law, regardless of judicial preference. This mandate implicitly assumed two things: first, that deductions from first principles will produce a certain result, i.e., that objective legal decisionmaking is possible;[9] and second, that the institutional dangers resulting from nonformalist analysis would be such that judges will want to refrain from policymaking.

Most of the analysis on the second point was informed by preconceptions of judicial motivations, character, and inherent capacity. Judicial behavior was perceived as formally limitless, bounded only to the extent to which judges voluntarily choose to exercise judicial restraint.[10] A few scholars did recognize the significance of institutional, particularly meta-constitutional, constraints, but they typically concluded that the resultant vulnerability of the courts only reinforced the need for individual jurists to uphold the legitimacy of the courts.[11] As a result, even the most pragmatic arguments in favor of self-restraint implicitly adopted a platonic ideal of judges as guardians who could choose to be above politics and other such influences. But this view is contrary to the design of the separation of powers, wherein each branch is checked by at least one other branch, rather than solely relying on the noble character of those who serve within any single branch.[12]

Traditional answers to the question of the most appropriate judicial philosophy also involved urging judges to "do the right thing," namely, to

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[7] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

[8] *See, e.g.*, Richard Hodder-Williams, *Six Notions of "Political" and the United States Supreme Court*, 22 BRIT. J. POL. SCI. 1 (1992).

[9] This is the central tenet of Legal Formalism. See most famously William Blackstone's *Commentaries on the Laws of England* (1765–1769).

[10] *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976); Fuller, *supra* note 1; Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 44 (1979).

[11] *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

[12] *See, e.g.*, THE FEDERALIST (Alexander Hamilton, John Jay & James Madison) (Terence Ball ed., 2003).

choose a mode of judicial interpretation that best promoted the legitimacy of the courts. Promoting legitimacy has led jurists to promote the relative merits of originalism,[13] textualism,[14] and living constitutionalism (as epitomized by the Warren Court),[15] to name a few.

Both legal scholars and political scientists came to question whether it is possible to have an objective procedure in judicial interpretation. There were two basic prongs to this challenge. The first, led by legal scholars, combated the traditionalists on their own terms by arguing that it is logically impossible to construct a methodology that is free from subjective interpretation. Judicial interpretation is unavoidable. Originalism does not constrain interpretation, because the Framers' intentions are not "self-declaring," but instead must be constructed from evidence that is ambiguous and requires interpretation.[16] Similarly, textualism does not guarantee objectivity, as the level of generality of a question influences the type of answer that results.[17]

The second prong of the attack on the traditionalist ideal of judicial decisionmaking was challenging the assumption that judges voluntarily refrain from pursuing their own policy preferences. This challenge was also begun by legal scholars, then further developed by political scientists. The legal realists questioned whether the application of the law led to scientifically certain outcomes; they argued that the law consists of what judges in fact do with their discretion.[18] Indeterminacy lies at the heart of the law, and legal rules do not strictly determine the results of cases. It follows that there is room for individual judicial choice, which ultimately suggests that judicial decisions might even be determined by "what the judge had for breakfast."[19]

In legal scholarship, the insights of legal realism bred the various "critical" schools, most famously Critical Legal Studies. These schools

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[13] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[14] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

[15] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[16] STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); *see also* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

[17] Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

[18] H.L.A. HART, THE CONCEPT OF LAW (1961); OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., Little, Brown and Company 1963) (1881); KARL LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (1921).

[19] This phrase is often used to summarize the views of the Legal Realists, and is often ascribed to Jerome Frank, whose most famous work is JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

were highly theoretical and ideological in nature, associated with left-wing politics and the development of postmodern legal analysis.[20]

In contrast, political science's attitudinalist school took the interdisciplinary empirical lessons from legal realism and set out to comprehensively establish that judicial decisions are significantly shaped by individual judicial characteristics, such as party of the appointing President or a judge's socioeconomic status, and not just the adoption of norms such as judicial self-restraint.[21]

The attitudinalists' results offered stark evidence of the influence of judicial ideology on judicial decisionmaking; their research revolutionized notions of judging. But there were four limitations that kept this approach largely bound by the paradigm of the traditional analysis of the courts and thus unable to develop knowledge of the influence of other institutions on judicial behavior. First, the attitudinalists still expended much of their time on the notion of self-restraint, albeit arguing that restraint did not typically occur due to the political nature of judicial decisions. Second, most of this scholarship still studied the courts in isolation, considering for example judicial appeals but not congressional retribution. A few early empirical works on the courts provided important exceptions,[22] but attitudinalists dominated this era of scholarship and concentrated on an inherently intra-court-focused view of how judges make decisions. Third, the analysis conceptualized judges as unconstrained last movers, particularly in constitutional interpretation, and thus saw policy outcomes as purely the product of judicial preferences, as opposed to also being influenced by other actors' decisions. Fourth, the attitudinalist theory could not explain cases where judges did not follow their apparent policy preferences, and so could not explain variation in judicial behavior.[23]

The attitudinalist contribution was nevertheless central to the developing application of PPT to the courts, as it initiated a revolution in conceptions of judicial behavior that then inspired the strategic understandings which are central to PPT.[24] A natural question arose from attitudinalist

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[20] *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

[21] The attitudinalist literature is vast. Founding works include C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 (1948); Glendon Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958). For more modern applications, see, for example, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Jeffrey A. Segal & Harold J. Spaeth: *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 4 AM. J. POL. SCI. 971 (1996).

[22] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

[23] *See supra* note 3 and accompanying text.

[24] Ironically, Jeffrey Segal, a key scholar of the attitudinalist school, initially argued vehemently that the strategic and attitudinalist models were mutually exclusive, though there is no reason why judges cannot pursue policy ends strategically. Jeffrey Segal, *Separation of Powers Games in the Posi-*

findings: if judges are policy-motivated individuals, why would they not pursue those policies in a sophisticated manner? Sophisticated decision-makers consider the likely responses their actions will provoke, and tailor their strategies to best achieve their goals, based on those expected responses. In addition, sophisticated decisionmaking typically involves accepting short-term losses for long-term gains.[25]

The emergent strategic school has provided an account of how judges ensure that their preferences become policy, given the internal institutional constraints faced by the judiciary. For example, Epstein and Knight identify four types of strategic activities judges engage in at significant levels: bargaining, forward thinking, manipulating the agenda, and sophisticated opinion writing.[26] One of the primary areas of analysis that combines attitudinalist-style empirical models with a recognition of the strategic nature of judicial behavior is the literature on judicial agenda setting. The literature has documented the means that judges exploit to circumvent their institutional inability to initiate their own agendas. This work reveals that judges exercise certiorari voting strategically,[27] considering both probable outcomes[28] as well as which cases will most influence lower courts, so as to maximize the proportion of total decisions favorable to their policy preferences.[29] Other judicial studies include analyses of the effect of court composition on judicial decisions[30] and the old question of how judges decide cases.[31] Overall, the literature on strategic judicial decisionmaking provides

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tive Theory of Congress and Courts, 91 AM. POL. SCI. REV. 28 (1997).

[25] Note that sophistication is not dependent on policy motivation; a judge can pursue a jurisprudentially motivated rule with the same strategic foresight. PPT of the courts has expanded beyond its attitudinalist roots, and continues to develop in its approach to judicial analysis. For instance, Pablo Spiller and Emerson Tiller conceive of judicial motivation in two dimensions: judges are concerned with policy outcomes, but also have preferences over judicial rules. Furthermore, in their model, Spiller and Tiller envision that judges may be willing to sacrifice their preferred policy outcome in order to preserve the integrity of their favored judicial rule. Pablo Spiller & Emerson Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996). PPT is also useful for determining the effect of legal doctrine. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155 (1998); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control* (Northwestern Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper No. 05-11, 2005), *available at* http://ssrn.com/abstract=752284. Ultimately, unlike much of the literature that preceded it, PPT did not rely on one essentialist notion of judicial nature. PPT instead allowed for the possibility of variation across judicial behavior and attempted to account for that variation. Most PPT models assume that relevant players are policy-driven, utility-maximizing individuals; however, the important element is the assumption of sophisticated utility maximization, however that utility is defined.

[26] LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

[27] *See* Caldeira, Wright & Zorn, *supra* note 3.

[28] *See* Boucher & Segal, *supra* note 3.

[29] Glendon Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962).

[30] Cross & Tiller, *supra* note 25.

[31] H.W. PERRY, DECIDING TO DECIDE (1994).

novel insights into judicial behavior. However, while the early strategic school examined internal institutional constraints, it failed to consider external separation of powers constraints. To the extent that the strategic school considers the courts in isolation, it does not fully describe the judiciary's operation. PPT has begun the process of filling that void.

II. POSITIVE POLITICAL THEORY AND THE COURTS

Over the last two decades, political science has developed new tools to better understand judicial decisionmaking in the separation of powers context, in the form of positive political theory.[32] PPT uses rational choice methods, including game theory and spatial modeling, to analyze the simultaneous interactions of all branches of government. The analysis involves formally representing two mechanisms: first, the constitutional and other institutional constraints that operate on each branch of government via the powers and actions of the other branches of government; and second, the formally predictable reactions of each governmental actor to the actions of the others.

This Part presents a few of the fundamental works of PPT applied to the courts. The works have been chosen because they are both influential and illustrative. They have been simplified somewhat to show spatial modeling in its most basic form, using a one-dimensional representation of ideological preferences of the various players. We can think of this single dimension as the liberal-conservative, or left-right, ideological spectrum, though it can involve other preferences, as discussed later. Players are modeled as preferring outcomes that are closer to their ideal points than those further away. Often, these preferences are assumed to be symmetrical—that is, players equally prefer an outcome equidistant to the left or right. However, this assumption is not always necessary or appropriate. When considering an institution such as the Senate, which is governed by multiple players, we can simplify our analysis by examining only the preferences of the median senator, as the "pivot" on any given issue, rather than representing a hundred individual players' preferences.[33] By definition, if a policy has the support of the median player, it has at least a bare majority. When not using majority rule, a different pivot player will be represented, such as the filibuster pivot—the 60th vote in favor of a given proposal.

We can represent, in highly stylized form, the approach of the traditionalists and attitudinalists, to illustrate how these approaches failed to give adequate consideration to the operation of extrajudicial constraints on courts. Figure 1 uses a line to represent a range of possible policy choices

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[32] Rui J.P. de Figueiredo, Tonja Jacobi & Barry R. Weingast, *The New Separation of Powers Approach to American Politics*, *in* HANDBOOK OF POLITICAL ECONOMY (Barry R. Weingast & Donald Wittman eds., forthcoming 2006).

[33] KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998).

and judicial outcomes. *C*, *P*, and *J* represent the locations of the ideal policies for Congress, the President, and the judiciary, respectively.

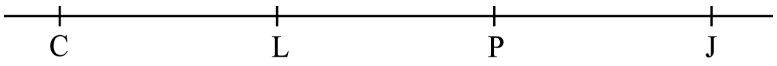

Figure 1

According to traditional legal scholarship, judges will do their best to make determinations at point *L*, the exogenously determined "best" legal outcome, regardless of its relationship to *J*. *P* and *C* may be somewhat informative as to the limits of public acceptability, which informs judicial legitimacy, but not in a formally predictable way. According to the attitudinalists and the realists, cases will be decided at *J*, the point that represents the preferences of the judiciary. For these scholars, the other points, *C* and *P*, are relevant only in terms of the correlation that can be anticipated between the President, the Senate and the judiciary, due to the appointment power. So while the debate between the traditionalists on one side and the realists and the attitudinalists on the other was informative about what determines judicial preferences, it told only little about how these constraints actually operated on the judiciary.

PPT analysis was initially developed by scholars of Congress. These PPT scholars formally examined and rendered the effects of institutional constraints within Congress, such as committees, rules, and voting mechanisms.[34] Assuming legislative actors maximize their utility, whether that utility is policy oriented or simply reelection driven, congressional scholars were able to systematically predict legislative behavior based on the institutional limitations of Congress. Because many of the institutional constraints operative on Congress are driven by the preferences of the President, executive agencies, and the courts, these scholars applied PPT to analyze Congress in terms of general separation of powers constraints. Such constraints include avoiding presidential veto of legislation, ensuring effective execution by agencies, and avoiding judicial override.

As well as applying PPT analysis to the presidency[35] and the bureaucracy,[36] PPT scholars began articulating models of judicial behavior as part

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[34] *See, e.g.*, Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

[35] *See, e.g.*, Gary J. Miller, *Formal Theory and the Presidency*, *in* RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 289 (George C. Edwards et al. eds., 1993); Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985); Terry M. Moe, *Presidents, Institutions, and Theory*, *in* RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES, *supra*, at 337.

[36] *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION

of the political lawmaking process, including the judiciary in Congress-President-bureaucracy models. PPT analysis was thus extended to predict judicial behavior given interbranch constraints, and to include judicial action as a constraint on the other branches.

The first work to formally analyze the effect of interbranch constraints on the courts was an unpublished manuscript by Brian Marks. Marks ascertained the conditions that establish a range of structurally induced equilibria—that is, stable outcomes that occur given the institutional constraints the other branches place on the judiciary. Marks showed that structural equilibria arise in which Congress cannot change judicially introduced alterations to legislative policy, even when a majority of legislators do not support the judicial alteration. Marks showed, too, that congressional committees and the bicameralism system expand the range of stable equilibria.[37] Figure 2 illustrates his findings.

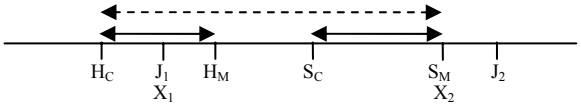

Figure 2: The Effect of Committees and Bicameralism on Congress's Ability to Overturn Judicial Policy Changes

H_M and S_M are the median House and Senate pivots, respectively. H_C and S_C are the median House and Senate committee members. J_1 and J_2 are two possible court positions. The solid arrows illustrate the effect of the House and Senate committees. The distance between the preferences of the House median and the House committee median prevents any proposal from being agreed upon that would change a judicial ruling that lies within that range. For example, a court at J_1 could effectively entrench a policy X_1. Similar analysis applies to the Senate. The dashed line indicates the added effect of bicameralism, which encompasses all four pivots, and thus expands the range of policy outcomes that Congress is unable to dismantle.[38]

Marks theorized that judicial decisionmaking occurred independent of legislative structure, and so assumed that judges did not act in a sophisticated fashion. In his analysis, Marks concluded that only judicial rulings that occurred within the legislative gridlock range, such as X_1, could have a

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COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Mark J. Moran & Barry R. Weingast, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

[37] Brian A. Marks, *A Model of Judicial Influence on Congressional Policymaking:* Grove City College v. Bell (Hoover Institution, Working Paper No. P-88-7, 1988).

[38] *Id.* at 17.

lasting effect. However, it follows from his analysis that a sophisticated court positioned outside the equilibrium range, such as J_2, will shift its ruling from its ideal point to X_2, the point closest to J_2 that lies within the gridlock range and thus the closest stable equilibrium.[39] This analysis began the process of defining the effect of congressional structure on judicial action, a process that continued to be aided by PPT through its developments in two distinct directions.

A. The Effect of Courts on Separation of Powers Games

Recognizing the incompleteness of PPT models of Congress and the executive, analysts began to include the courts in separation of powers models. An early, yet still influential, example was Ferejohn and Shipan's study of telecommunications policy, which examined the interaction of Congress, the courts, and an administrative agency.[40]

Ferejohn and Shipan's model shows why legislative monitoring of agency action will often fail to force an agency to change policy. According to the model, once Congress has delegated power to an agency, the agency can often exploit its first mover advantage and make a decision that will not have the support of a majority of the legislature. Nonetheless, neither Congress nor the President can alter the agency's decision. This bar exists because, by having the power of making the first move, the agency can find a position that the congressional median and the committee median will not be able to overturn, as found in Marks's model of judicial decisionmaking. Ferejohn and Shipan also showed that the overall effect of judicial review of administrative decisions is to move policy outcomes back toward the preferences of the congressional median. This is illustrated in Figures 3A and 3B.

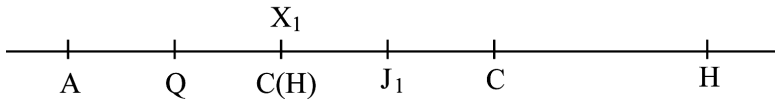

Figure 3A

[39] This development was explored in an important work that extended Marks: Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263 (1990).

[40] John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990).

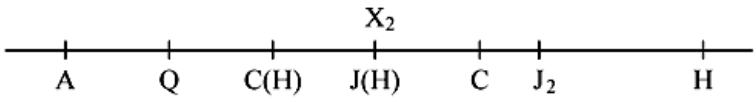

Figure 3B

A is the position of the agency, *C* is the position of the congressional committee median, and *H* is the position of the House median. For simplicity, the model assumes that each of these actors prefers policies closer to its position than farther away from its position, regardless of the direction of policy. Using this assumption, *C(H)* is the point to the left of *C* that is equidistant from *C* as *H* is to the right of *C*. Thus *C(H)* is the point at which *C* is indifferent between it and *H*.

When $A < C(H)$ (i.e., *A* is to the left of *C(H)*), if *A* sets policy at its own ideal point, then Congress is able to enact new legislation; under an open rule, the ultimate outcome of new legislation would be *H*. However, *A* has discretion to set policy in the range *C(H)* to *H*, in which Congress cannot agree on new legislation to overrule the policy. In the absence of judicial review, then, *A* will set policy $X_1 = C(H)$, because this is the stable outcome that is closest to *A*'s ideal position.

With judicial review, *J* can choose between accepting policy X_1 or striking it down. If the policy is struck down, then the rule reverts to the status quo, *Q*. If the status quo is outside the legislative equilibrium range, again legislation will be enacted at point *H*. Thus, depending on where *Q* is, *J* chooses between X_1 and *Q*, or X_1 and *H*. However, *A*, knowing *J*'s preferences, will set policy in a way that will not be overturned. In Figure 3A, *Q* lies outside the range from *C* to *H*, in which Congress cannot agree on any change. Since $J < C$, the equilibrium outcome will remain at $X_A = C(H)$, as *J* prefers the agency outcome, *C(H)*, over *H*. Thus if *A* sets its policy at *C(H)*, then both Congress and the judiciary will leave it at that point. But when $J > C$, as in Figure 3B, the agency knows that *J* prefers *H* to *C(H)*, and so will strike down any legislation to the left of *J(H)*, the point at which *J* is indifferent to *H* (because *J(H)* is the point to the left of J_2 that is equidistant from J_2 as *H* is to the right of J_2). Thus, in Figure 3B, the equilibrium outcome will be *J(H)* because that is the point most favorable to *A* that Congress and the judiciary will not overturn.

Ferejohn and Shipan showed that in every possible permutation, judicial review either has no effect or draws the equilibrium outcome away from *A* and toward *C*. This illustrates how the potential for judicial review influences the interactions between agencies and Congress.

Ferejohn and Shipan's model also showed how judicial review can draw the policy outcome back towards congressional preferences by mitigating the influence of the presidential veto. Because the President can veto congressional amendments of agency action, the President can basically

choose between supporting congressional action and allowing the outcome to revert to the agency's decision. This constrains Congress's choice of actions, which in turn broadens the agency's discretionary range. The threat of the judiciary overriding an agency's action has the effect of reducing the agency's broad range of discretion, thereby drawing the equilibrium policy outcome back toward the congressional median.

These results show how the analytical power of PPT spatial models applies to the courts. Using PPT, Ferejohn and Shipan demonstrate not only how judicial action determines policy outcomes, but also how it shapes congressional-bureaucratic relations and congressional-presidential relations.[41] It enables them to challenge the common assertion that judicial review is antidemocratic.

Another archetypal example of the inclusion of courts within separation of powers games is the Article I, Section 7 Game.[42] This model considered the effect of a single court decision on the federal balance between Congress and the presidency. The case was *INS v. Chadha*,[43] in which the Supreme Court held that single-chamber legislative vetoes of administrative decisions are unconstitutional. Continuing where Ferejohn and Shipan left off, Eskridge and Ferejohn showed that the effect of agencies drawing policy outcomes away from congressional preferences can be mitigated by single-chamber legislative vetoes. This occurs when agencies exercise discretion within the range in which the various legislative veto players cannot compromise or negotiate. The effect of agencies drawing policy outcomes away from congressional preferences cannot be fully prevented; by acting within the non-negotiable range, agencies can still bias outcomes in the direction of their own preferences. But single-chamber legislative vetoes can *reduce* the range of an agency's discretion by reducing the number of players that must approve an action. Returning to Figure 2, the single-chamber veto reduces the equilibrium range from the dashed range to one of the solid-line ranges. Thus Eskridge and Ferejohn used PPT to show that, since agencies strongly reflect presidential preferences, the *Chadha* decision affected the fundamental balance between the two elected branches in

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[41] Other PPT models of the relationship between judicial review and agency decisionmaking include: Pablo T. Spiller, *Agency Discretion Under Judicial Review*, MATHEMATICAL & COMPUTER MODELING, Aug.–Sept. 1992, at 185 (illustrating the effect of decision costs of judicial review on administrative agencies); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997); Mat McCubbins, Roger Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mat McCubbins, Roger Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (showing that judicial alignment with Congress determines the effectiveness of administrative procedure legislation in limiting the discretion of administrative agencies). These works contribute to the prior PPT literature on congressional-bureaucratic and presidential-bureaucratic relations. *See* de Figueiredo, Jacobi & Weingast, *supra* note 32.

[42] Eskridge & Ferejohn, *supra* note 5.

[43] 462 U.S. 919 (1983).

the separation of powers system by removing some latitude in congressional action.

The above examples of the inclusion of courts in separation of powers games illustrate the value of the first direction of PPT analysis of the courts, including courts in separation of powers games. It provides new and at times surprising answers to old questions, such as the democratic effect of judicial review, as well as answers to new questions, such as how judicial review changes the balance of power between extrajudicial actors.

B. The Effect of Separation of Powers Games on Judicial Decisionmaking

The second direction of the judicial application of PPT analysis came when court specialists began to formally analyze how judicial decisions are affected by Congress and the President. The new contribution of PPT analysis in this regard came from elucidating judicial anticipation and responses to the institutional constraints imposed by the powers of the other branches of government.[44]

McNollgast's positive theory of judicial doctrine, for example, determined when electoral changes will result in the reversal of judicial doctrine, and when they will not.[45] The Supreme Court's limited resources force it to be selective about which lower court decisions it overrules when they run contrary to Supreme Court preferences following exogenous "shocks," such as partisan realignments. McNollgast showed that the Supreme Court will have to define a doctrinal rule with some tolerance of noncompliance; a doctrine of zero tolerance cannot credibly be enforced. With Supreme Court reversal as a looming threat, lower courts have an incentive to choose a point within the tolerated range closest to their own ideal points. They will not choose a point outside the tolerated range because while the probability of being overruled may be low, if the Supreme Court does overrule, it will set the outcome at its own ideal point.

Although in McNollgast's model the probability of appellate judicial override determines the level of compliance, the probability of override is itself endogenous. The probability of override depends on the level of lower court noncompliance. The Supreme Court can control the degree of noncompliance by changing the width of the doctrinal interval, that is, by redefining noncompliance. Further, the President and the Senate can exploit this mechanism by expanding the lower courts. An increased number of lower court cases decreases the probability of being overturned, thus increasing the expected value of noncompliance. This leads to the conclu-

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[44] See, for example, Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992), for a PPT analysis of when the Supreme Court will prefer to use constitutional interpretation instead of statutory interpretation in a strategic game with Congress.

[45] McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995).

sion, contrary to orthodoxy, that increases in the judicial caseload actually reduce Supreme Court power.[46]

In addition to illustrating how the Supreme Court can control the lower courts and in turn how the elected branches can control the Supreme Court, this model represents a novel approach to understanding doctrine, one that has been developed further by other scholars.[47] These subsequent works contend that doctrinal stability does not depend on the altruistic character of judges, but is instead a self-enforcing equilibrium because judges benefit from adhering to established precedent. This nascent literature also illustrates how the two directions of application of PPT to the courts combine to provide specific insights about the traditional questions regarding the nature of judicial decisionmaking, as well as more broadly about the relations between all branches of the American political system.

The next Part more systematically examines the benefits of PPT applied to the courts, with particular emphasis on how the insights gained from PPT are unique to this approach.

III. POSITIVE POLITICAL THEORY'S UNIQUE CONTRIBUTION

PPT expands understandings of the nature and effect of judicial decisionmaking, including its effect on nonjudicial actors, as well as providing insight into how congressional, presidential, and bureaucratic actions constrain the judiciary, and so shape judicial behavior. This approach enables scholars to account for variation that occurs even without intrajudicial change, by expanding ex post explanations of judicial behavior beyond essentialized debates over judicial nature alone, and by enabling ex ante predictions of both judicial conduct and the actions of extrajudicial players that affect the courts.

The essential lesson is that judicial behavior cannot be fully understood by focusing only on the courts. Because the powers and limitations of the other branches define the boundaries of tenable judicial action, the interdependence of the branches of government necessitates examining the interaction between these institutions in order to understand the actions taken by each of them. This is not to imply that specialization in judicial scholarship is inappropriate, merely that in order to so specialize, scholars must also possess a grounded understanding of extrajudicial actors.

That conclusion raises the question of why PPT is the best means of gaining an understanding of inter-institutional interactions. Essentially,

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[46] For other PPT analyses of congressional manipulation of federal court jurisdiction, see John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Judicial Expansion*, 39 J.L. & ECON. 435 (1996), and Spiller & Tiller, *supra* note 41.

[47] *See, e.g.*, Northwestern University School of Law, Law and Positive Political Theory Conference: Legal Doctrine and Political Control (Apr. 29–30, 2005); Symposium, *Developing PPT Understandings of Doctrine*, 22 J.L. ECON. & ORG. (forthcoming 2006) (containing selected papers from Northwestern's conference).

PPT offers two distinctive advantages over other methods. First, PPT is uniquely capable of capturing the sequence of separation of powers interactions. Second, PPT solves a number of methodological problems common in alternative approaches.

A. Capturing the Sequence of Play of Separation of Powers Games

By formally analyzing the sequence of play in constitutional games, PPT captures the importance of the ordering of decisionmaking steps in the constitutional system. Actors that move first can forestall the actions of decisionmakers who act later in the process. As we have seen, administrative agencies can make their determinations in such a way as to avoid later court override, by choosing a policy that the court either will not overturn, because of judicial preferences, or cannot overturn, because of legislative preferences.[48] On the other hand, actors that move last are often advantaged by knowing and being able to choose from a range of potential stable equilibria. PPT provides a means of formalizing the effects of these institutional factors.

Ironically, although PPT has developed understandings of the last mover advantage, it has also revealed that the last mover advantage of the courts was often overestimated prior to PPT. As discussed, attitudinalists typically treated judges as unconstrained, ideological utility-maximizers. PPT improves judicial decisionmaking analysis by embedding judges in a political environment that imposes systematic constraints on them. In doing so, PPT elucidates the effect of constraints that previously appeared inoperative. For example, many concluded that the infrequency of congressional override of judicial decisionmaking implied that the threat of override as an institutional check on the courts was ineffective. PPT models suggest the opposite may be true: because the threat of congressional override is powerful and credible, it does not need to be exercised to affect judicial actions.[49] Although legislative override occurs infrequently, the possibility of its exercise nevertheless shapes judicial interpretation.[50] This view also illustrates how PPT analysis of judicial decisionmaking can explain aspects of congressional behavior. We should not expect to see frequent congressional override, not because Congress is docile, but because the power of congressional override mandates that its preferences be taken into account by the judiciary prior to determining case outcomes.

PPT is uniquely adapted to capturing the sequence of play dictated by the constitutional structure because the theory reduces that structure to its

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[48] *See* Eskridge & Ferejohn *supra* note 5.

[49] *See* Spiller & Tiller, *supra* note 25.

[50] The likelihood of congressional override will vary with such factors as the heterogeneity of the Supreme Court, and whether the losing party before the court is a governmental actor. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretations*, 101 YALE L.J. 331 (1991).

key elements. When applied to the courts, PPT yields novel insights into both judicial and extrajudicial behavior.

B. The Methodological Advantages of PPT

The second central advantage of PPT applied to the courts is methodological. Four methodological benefits warrant particular mention: incorporating previously omitted variables, enabling comparative statics, solving "degrees of freedom" problems, and elucidating causation.

By allowing scholars to study interlinked phenomena simultaneously occurring in multiple institutions, PPT allows for the incorporation of previously excluded but significant variables. Previous analysis, by failing to consider the actions of other institutions, necessarily lost significant explanatory power. For example, PPT improves upon the attitudinalist model by combining hypotheses of ideological motivations for judicial decision-making with more nuanced theories of when those ideological preferences will be expressed.[51] It can predict when judges will and will not follow their policy preferences, thus providing greater structure and predictive power to the attitudinalist model. Similarly, the aforementioned agenda-setting literature is benefiting from PPT analysis by including the position of Congress in models of determining which cases will be granted certiorari.[52]

The second methodological advantage of PPT judicial analysis is that it is particularly apt to yield comparative statics. Because PPT games necessarily involve multiple actors and phenomena, equilibria typically arise that involve multiple moving parts. The PPT approach allows for an assessment of how each institution will act, by holding the actions of the other institutions constant. Such control enables the development of comparative statics of how each institution can be expected to behave in the multiple contexts created by variation of the control factors. This yields novel insights as to how one institution will behave when something in another institution changes. Previous models yielded simpler and potentially inaccurate predictions because they viewed the judiciary in isolation and so did not incorporate other actors into their studies.

In application, this has the advantage of generating formal predictions of effects, such as the effect of changes in the political administration on judicial behavior, predictions that can be tested empirically. But it has a more fundamentally important advantage too. Because some equilibria occur very frequently, empirical studies can suggest a consistency of outcome, when variation may nevertheless be possible, just unrealized. When only one of potentially many scenarios arises ordinarily, without rigorous theory scholars may conclude the outcome is inevitable. By formally modeling the

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[51] *See, e.g.*, Segal, Cameron & Cover, *supra* note 4.

[52] *See, e.g.*, Lee Epstein, Jeffrey Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002).

effects of an institutional role or relationship, scholars can use PPT to predict under what conditions that previous stability may erode. Otherwise, scholars' conclusions may be erroneous, due to insufficient prior variation.

The third methodological advantage of PPT is that it mitigates the "degrees of freedom" problem. "Degrees of freedom" refers to a common empirical difficulty generated by a lack of an adequate number of observations to make reliable conclusions about cause and effect. The classic example is the dilemma faced by presidential scholars, who have a study population of only forty-three presidents, but unlimited potentially relevant variables to consider. The difference between the number of observations and the relevant variables is known as the degrees of freedom, which if too low, makes analysis impossible. A similar difficulty arises, for example, in considering Supreme Court nominations. Anecdotal accounts of the 113 Supreme Court Justices can be insightful,[53] but the limited number of observations makes systematic predictions of causes of judicial behavior or performance difficult.

PPT solves this problem by reconceptualizing the independent variable, and so increasing the number of observations available. For example, in judicial nominations, instead of using the President or the judicial nominee as the unit of analysis, PPT uses President-Congress-nominee combinations. By incorporating multiple institutions, PPT allows scholars to study interactions that occur over and over again. Thus, rather than concluding that judicial nominations are hopelessly idiosyncratic, PPT scholars can ascertain systematic effects of the relationships between presidents, Senates, and potential judges.

The final methodological advantage of PPT that is examined here is its capacity to correctly identify causation and thus mitigate the effect of common confounding factors, such as selection biases, spurious correlations, and simultaneous causality. Many puzzles of judicial behavior involve an element that could either be cause or effect. For instance, are most Supreme Court nominees confirmed by the Senate because the President is powerful, and can persuade the Senate to agree to his choice; or because the Senate is strong, and the President will have already taken account of senatorial preferences in choosing a nominee? By formally modeling structure, PPT can model the sequence of play, and thus improve causation identification.

As previously discussed, PPT includes omitted variables and identifies potential but unrealized stable equilibria. Both of these benefits have the additional advantage of alleviating spurious conclusions as to causation. Including previously omitted variables avoids misidentification of causation due to reliance on findings of correlations that actually rest on an interven-

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[53] *See, e.g.*, HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS, REVISED: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (1999).

ing variable that is not the true cause. Identifying unrealized potential equilibria avoids overestimating the certainty of causation.

Essentially, PPT improves causation identification by including information, such as judicial politics, that lies outside the phenomenon being studied. In doing so, PPT provides insights into phenomena considered by prior theories, such as whether case outcomes were driven by ideology or law, which result in empirically indistinguishable effects. Previous theories overestimated the importance of the judiciary on judicial outcomes because they failed to incorporate extrajudicial information. By focusing solely on the judiciary, theorists often overlooked how judicial behavior may result from anticipation of other institutions' reactions.[54] By viewing courts in isolation, prior judicial scholarship either overestimated judicial power, conceiving judges as unconstrained last movers, or overestimated judicial self-restraint, assuming judges were constrained by internal norms. PPT advances understandings of causation, and judicial politics more generally, by looking outside the judiciary, formally capturing the effect of the powers and actions of other institutions, and anticipating judicial actors' strategic responses to those factors.

IV. CONCLUSION

PPT enables scholars to bypass arguments that have long fascinated judicial scholars, but had stagnated, including debates over such questions as the proper and actual motivation of judges in decisionmaking. PPT accepts as given that judges will choose an optimal strategy, given their preferences, regardless of whether those preferences are driven by law or politics. Starting with this basic assumption enables PPT scholars to assess the existence and boundaries of judicial discretion and analyze the institutional limitations that shape judicial actions. Bypassing the age-old debate, PPT has ultimately provided new information that allows fresh insights into these longstanding arguments. For example, PPT suggests that judicial deference arises not due to judicial nature alone, but as a result of institutional constraints operative on judges. This broader view provides a more nuanced answer of when deference is advisable for judges, rather than a pro forma expectation of deference.

PPT generally, and particularly as applied to the courts, is a young field that is continuing to evolve and improve, and can be expected to develop in new directions. For example, much current PPT is descriptive and predictive, but there is no reason that it cannot also be used for normative analysis. For example, Ferejohn and Weingast formally model the effect of different judicial approaches to statutory interpretation on congressional incentives to engage in detailed deliberation during the legislative process.[55]

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[54] *See, e.g.*, Moran & Weingast, *supra* note 36.

[55] John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992). Another example of PPT models yielding normative implications is Emerson H.

They argue in favor of the normative proposition that statutes should be interpreted to give maximum effect to the intent of the enacting Congress, and then model the effect of this interpretation in contrast to other approaches that are more favorable to the sitting legislature.

PPT can be expected to continue to develop new means of understanding one institution by examining its interactions with other institutions. The logical next step for PPT is to combine intra- and interbranch models. For example, PPT could be used to look at how courts respond to shocks outside of the judicial system, such as changes in congressional committee makeup or jurisdiction.

Understanding judicial responses to changes within Congress informs us not only about the judiciary, but also about how congressional actors are likely to anticipate judicial responses to such actions. Thus the benefits of expanding PPT from Congress to the executive to the judiciary also flow backward, to enrich models of those other institutions.

Tiller & Frank B. Cross, *A Modest Approach to Improving American Justice*, 99 COLUM. L. REV. 215 (1999), which elucidates implications stemming from their empirical findings set out in Cross & Tiller, *supra* note 25.