SYMPOSIUM: POSITIVE APPROACHES TO CONSTITUTIONAL LAW AND THEORY

UNDERSTANDING COLLEGIALITY ON THE COURT

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While the merits of collegiality are often invoked, it is not a perfectly clear term. Collegiality has been defined as "a form of social organization based on shared and equal participation of all its members. It contrasts with a hierarchical, pyramidal structure . . . ."[1] By this definition, it is merely an organizational form, such as the Supreme Court, but takes no note of interactions among the members of that structure. The more common understanding, though, considers the relationships among the members of the collegial body. Villanova University, for example, has declared: "Collegiality entails mutual understanding, respect, and trust among all these groups, based upon their shared sense that it is in the common interest of all to cooperate in promoting the general welfare and the mission of the academic community."[2] In this vision, collegiality involves people cooperating in the interest of some greater group interest, rather than pursuing their self-interest.

Academics typically put great importance on this sense of collegiality. In hiring decisions, we commonly evaluate whether an individual would make "a good colleague." In research, collaboration is common in order to take advantage of varied strengths and diverse insights. All this presumes that group production of a good is preferahle to atomistic individual production. At least one study has con-

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1 Trent University Department of Indigenous Studies, Key Terms, http://www.trentu.ca/academic/nativestudies/courses/nast305/keyterms.htm (last visited Sept. 18, 2007) (defining "collegiality" as used in the discourse of some educators).

2 Q CHUNG, VILLANOVA UNIV. FACULTY CONG., WHERE WE ARE REGARDING THE DEFINITION OF "COLLEGIALITY" 3 (2006), http://www.villanova.edu/facultycongress/docs/collegiality.pdf.

firmed this presumption, finding that academic nurses operating in collegial environments were more productive in research.[3]

In the context of the judiciary, Judge Harry Edwards of the D.C. Circuit has suggested that collegiality is the manner in which "appellate judges overcome their individual predilections in decision making."[4] He criticized those who would capture judicial decision making solely through ideology, contending that they ignored this collegiality effect and its moderation of individuals' ideological preferences. For Judge Edwards, collegiality means "that judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[5] It is borne of "(a) experiences of duty and professional obligation, (b) understandings of shared purpose, (c) concerns about the maintenance of corporate authority or legitimacy, and (d) participation in a routine—each of which suggest the presence of a kind of motivation [that is] something other than rational, self-interested, strategic, and calculating."[6] In this view, collegiality is juxtaposed against ideology or strategy as a decision-making influence.

Judge Frank Coffin of the First Circuit takes a very similar approach to collegiality, describing it as judges working closely together with "respect for the strengths of the others," with restraint on "one's pride of authorship," with value placed on "understanding and compromise," and with engagement in the pursuit of "excellence in the court's decision."[7] For Judge Coffin, collegiality requires open-minded responsiveness to the opinions of panel colleagues. It may be chilled by comments such as, "Nothing's going to change my mind."[8] In the Edwards/Coffin conceptualization, collegiality is a rather "warm and fuzzy" concept of sensitive, collaborative production aimed at optimizing the result.

Much of the existing discussion of collegial courts has involved the circuit courts, and the Supreme Court may not be the situs of much

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3 *See* Virginia Henderson International Nursing Library, The Effects of Collegiality and Collegial Networks on Research Productivity, http://nursinglibrary.org/Portal/main.aspx?pageid=4024&sid=1014 (last visited Sept. 20, 2007).

4 Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639 (2003).

5 *Id.* at 1645 (footnote omitted).

6 Howard Gillman, *The New Institutionalism: More and Less than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics* (pt. 1), LAW & CTS. (Law & Courts Section of the Am. Political Sci. Ass'n, Newark, Del.), Winter 1996–1997, at 6, 8.

7 FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994).

8 *Id.* at 218 (internal quotation marks omitted).

collegiality of this type. Oliver Wendell Holmes described the Court as "nine scorpions in a bottle."[9] The Court has surely seen interpersonal conflict over the years, and disagreement is frequent. The Edwards/Coffin collegiality process, though, operates to some degree. After a majority opinion author is assigned, he or she circulates a draft opinion, after which other members of the Court circulate bargaining statements, agreeing to join the opinion if certain changes are made.[10] Subsequently, a Justice may circulate a dissenting or concurring opinion in hopes of persuading other members of the Court, or affecting the content of the majority opinion, and this action is not infrequently successful.[11]

Some features of the Supreme Court could encourage greater collegiality among the Justices than the level found in circuit courts. All the Justices sit together for each case, unlike circuit courts where panels vary widely. They all deliberate over the same cases, which they themselves have selected on certiorari. There is necessarily some collegial interaction on the Supreme Court, as "the justices are locked into intricate webs of interdependence where the impulse to speak in a personal voice must always be balanced against the need to act collectively in order to be effective."[12]

Jan Crawford Greenburg's recent book on the Court reports that Justice O'Connor was put off in her first Term by Justice Brennan, but later unsettled by Justice Thomas.[13] By contrast, O'Connor felt some affinity for and was influenced by Justice Marshall.[14] Greenburg

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9 Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 13–14 (1990) (attributing this phrase to Justice Holmes).

10 These may be quite collegial and accommodating. In one conference memorandum, Chief Justice Rehnquist wrote:

> I prefer the position taken in the most recent circulation of my proposed opinion for the Court, but want very much to avoid a fractionated Court on this point. . . . If a majority prefers Nino's view, I will adopt it; if I can get a majority for the view contained in the present draft, I will adhere to that. If there is some "middle ground" that will attract a majority, I will even adopt that.

BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 21 (1996) (internal quotation marks omitted).

11 *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 78 (1998) (reporting that these types of opinions influenced a quarter of the landmark decisions they examined).

12 Linda Greenhouse, *The Court: Same Time Next Year. And Next Year*, N.Y. TIMES, Oct. 6, 2002, at C3.

13 *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 82–83, 122–23 (2007) (detailing the harsh rebukes that Justice Brennan directed at Justice O'Connor early in her Supreme Court career, and the ideological distance she felt from Justice Thomas).

14 Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217–20 (1992).

reports more collegial relationships among other Justices, such as Breyer and Kennedy,[15] and Thomas reportedly influenced the decisions of Scalia.[16] Jeffrey Rosen reported that Justice Breyer could persuade Justice O'Connor through collegial discussion.[17]

Tools are available to analyze the possible collegiality effects of Supreme Court Justices. Lee Epstein and others have examined the change, over time, in voting patterns of Supreme Court Justices, using Martin-Quinn scores. They demonstrate that the voting patterns of Justices have changed over time, some quite significantly. Some Justices have become more liberal (Blackmun, Souter, Stevens), while others have become more conservative in their voting patterns (Black, Frankfurter, White).[18]

While there are a variety of reasons why a Justice's personal ideological preferences may change, one explanation would be the composition of the Justice's colleagues. Thus, a persuasive and collegial Justice, as Brennan was reputed to be, might exert a certain centripetal pull on the other Justices. A more antagonistic Justice might have the opposite effect. This effect might be tested. The Epstein et al. research on voting patterns is consistent with Greenburg's theory that Justice Thomas pushed Justice O'Connor away—her leftwards turn dates from about the time that he joined the Court.[19] Justice Kennedy, by contrast, did not become more liberal after this time.[20] Thus, research on voting patterns may reveal collegiality effects. The data regarding change in voting patterns over time also considered only the direction of the vote, and evidence of collegiality (or lack thereof) could be found in the willingness to issue separate opinions, such as concurrences, even in the event of outcome agreement.

Another possible tool for measuring collegial interaction on the Court would be the examination of voting fluidity, i.e., instances where a Justice changed his or her mind over the course of Court deliberation. While there is no universal record of such fluidity at the Court, there are conference notes of retired Justices that record the

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15 *See* GREENBURG, *supra* note 13, at 174 (noting that Breyer and Kennedy "liked to talk things out").

16 *Id.* at 117, 124–25.

17 JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 200 (2007).

18 Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

19 *See id.* at 1506–07 fig.6 (illustrating that O'Connor was more liberal in 1991 and beyond than in all her previous years on the Court).

20 *See id.* (illustrating that Kennedy's degree of liberalism did not consistently increase after 1991).

changes for some past time periods. Justice Burton's notes revealed that twelve percent of the votes changed between conference and the final decision.[21] Some very important decisions can be explained by post-conference vote changes.[22] Perhaps this is evidence of collegial persuasion at the Court.

The nature of voting fluidity has been empirically analyzed. The conventional vision of collegiality would have judges drawn away from their ideologies with persuasive legal arguments. Thus, there is a story of Justice Brennan telling Justice Stewart, "I voted the other way at conference but you've convinced me."[23] Walter Murphy proclaimed that "intellectual persuasion can play an important role" in getting Justices to shift their positions.[24] While this story is consistent with the Edwards/Coffin theory of collegiality, the research shows that the degree of ideological voting did not decline significantly between the time of the initial and final vote on the merits.[25] When Justices do shift, it is generally to a position that is ideologically proximate.[26] Most of the switching that occurs is by a Justice in a minority position at conference, who changes to join the majority.[27] This has been called conformity voting, and it was more likely to occur in rela-

21 Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526, 528 (1980). The Warren Court saw a similar rate of votes that changed between conference and the final decision, thirteen percent. Saul Brenner, Research Update, *Fluidity on the Supreme Court: 1956–1967*, 26 AM. J. POL. SCI. 388, 388 (1982).

22 *See generally* SCHWARTZ, *supra* note 10, at 178–225, 244 (identifying *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lochner v. New York*, 198 U.S. 45 (1905), in this group).

23 Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 581 (1996) (internal quotation marks omitted).

24 WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 44 (1964).

25 *See* Saul Brenner, Research Note, *Ideological Voting on the Vinson Court: A Comparison of Original & Final Votes on the Merits*, 22 POLITY 157, 164 (1989) ("[T]he final vote was less ideological than the original vote, but the differences between the votes was not substantial . . . .").

26 *See* Timothy M. Hagle & Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 W. POL. Q. 119, 122 (1991) (finding that Warren Court Justices who switched to the minority were ideologically closer to the dissenting Justices over seventy percent of the time).

27 *See* Robert H. Dorff & Saul Brenner, *Conformity Voting on the United States Supreme Court*, 54 J. POL. 762, 764 (1992) ("Justices . . . are 12.1 times more likely to switch in the direction of conformity (minority-majority) than in the direction of counterconformity (majority-minority)."). This tendency could be explained by the added costs of writing a dissenting opinion or a "bandwagon" psychological effect at the Court. *See* Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 556 (1998) [hereinafter Cross, *Justices*] (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998)).

tively less significant cases.[28] A more sophisticated multivariate study found that a variety of features appeared to explain voting fluidity. Central to these features was ideological closeness to the author of the opinion joined in the switch, and other factors, including the complexity of the case and the conformity voting tendency.[29] The authors concluded that voting fluidity could be attributed to "policy preferences and their strategic calculations."[30] This evidence does not provide much support for the Edwards/Coffin collegial reasoning theory's operation at the Supreme Court level.

The papers at the Symposium do not employ the Edwards/Coffin "warm and fuzzy" notion of collegiality. Instead, they adopt a more hardheaded rational choice model of the Court's functioning. The Articles do analyze collegiality in its broader definition, simply involving the interaction of (rough) equals in decision making. To the extent that they accurately describe reality, they call into at least some question the descriptive reality of the Edwards/Coffin conceptualization.

The claim of Staudt, Friedman, and Epstein—that homogeneous coalitions yield more dramatic legal outcomes—is a very plausible one and supported by their empirical evidence. Given the well-known influence of ideological predispositions on the votes of the Justices,[31] one would expect this tendency to carry over into their opinions. If so, the ideological makeup of the opinion's coalition would be salient. Presumably, the motive for ideological voting is to create an ideologically desired "law of the land." It is therefore quite plausible that more ideologically consistent coalitions would produce more ideological opinions that, in turn, are more significant, as measured by their press coverage scale. A more heterogeneous majority coalition would be expected to require more compromise, compel-

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28 *See* Dorff & Brenner, *supra* note 27, at 772 (reporting tbat increased saliency reduces by 68% the likelihood of a conformity switch).

29 *See* Maltzman & Wahlbeck, *supra* note 23, at 588–89 (describing the effect of different variables on the probability of vote changes).

30 *Id.* at 591.

31 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISTED 357 (2002) (contending that the votes of Justices are driven by ideologies). Ideology appears to better explain voting patterns than any other dimension. *See* Andrew D. Martin & Kevin M. Quinn, *Patterns of Supreme Court Decision-Making, 1937–2000* 1 (Ctr. for Statistics & the Soc. Scis., Univ. of Wash., Working Paper No. 26, 2002), *available at* http://www.csss.washington.edu/Papers/wp26.pdf (describing a statistical model, based on the "preferred policy position (or ideal point) of each justice," that correctly classifies prior Court votes over 75% of the time).

ling a more minimalist decision, which is of less obvious political salience.

The implications of these findings are quite murky. Although the authors suggest that more ideological coalitions are the source of more significant rulings, the directionality of the relationship is unclear. It is distinctly possible that ideologically salient cases, of the sort that create rulings warranting press coverage, are precisely the sort of cases that induce ideologically homogeneous alignments of Justices. News coverage is generally not triggered by legal breakthroughs so much as by political salience. To the extent this is true, the independent and dependent variables are simply measuring the *same thing*, the ideological component of the opinion.

Another related possibility is that news coverage is cued by the ideological alignment of the decision. When ideological Justices present a solid front, that very fact may signal to reporters that the decision is worthy of coverage. There is some "disordered voting" on the Court, when a more conservative Justice votes for a more liberal outcome, while a more liberal Justice opts for a more conservative outcome.[32] These will produce less homogeneous majority coalitions and—according to Staudt, Friedman, and Epstein—less press coverage.[33] One might expect these decisions to be more legalistic in significance (turning on, say, the proper standard for granting summary judgment) and thus of less interest to newspaper readers. While a decision on the standards for summary judgment could be extremely consequential as a practical matter, it may lack the political interest that motivates news coverage. Hence, it would be premature to conclude that ideological homogeneity is the *cause* of significant decisions, insofar as press coverage is just an indirect proxy for decision significance, and the proxy may be a biased one.

Another question about the research lies in its operationalization. The authors' conclusions make much of the fact that the key to opinions is found in the minimum majority. Five votes are all that is needed to make law, as the authors themselves emphasize. They use as their independent variable the ideological diversity of the entire

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32 For a recent example of "disordered voting," in which Justices Stevens, Souter, Ginsburg, and Breyer voted for a more conservative outcome and Chief Justice Rehnquist and Justices O'Connor and Thomas voted for a more liberal outcome, see *Gonzales v. Raich*, 545 U.S. 1 (2005), which upheld the Controlled Substances Act as a valid exercise of Congress's Commerce Clause authority.

33 *See* Staudt et al., *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 363 (2008) ("[T]he greater the homogeneity of the majority, the higher the likelihood of a consequential decision.").

majority coalition, rather than that of the five necessary core votes. Yet, the ideological homogeneity of the five core Justices seems to be the more appropriate measure.

Suppose a case is before the Court, and there are five conservative Justices who wish to issue a dramatic ruling that substantially alters the law. They, of course, will prefer the company of more moderate Justices, thereby creating a larger majority behind their opinion. However, they have little reason to water down the content of their conservative opinion in order to attract the votes of the more moderate additional Justices. Additional Justices may in fact join the opinion, possibly to avoid the time and effort required to compile their own concurrence or dissent, but it is not obvious that they have any real influence on the content of the opinion, as the majority has little incentive to compromise.[34] The five-Justice core majority will prevail, regardless of the actions of any of the other Justices. If this scenario is true, the measure of the homogeneity of the entire coalition will not capture the appropriate effect; the key to the opinion lies in the homogeneity of the five core Justices.

The authors control for majority coalition size, so their findings are essentially that, as among seven-person coalitions, the more homogeneous the seven, the more likely the decision will be a significant one. Yet, for any given seven-person coalition, there would be a still-more-homogeneous five-person subset of the coalition that could have produced an even more significant opinion, under the authors' theory that heterogeneity compromises decisional significance. The seven-person coalition might be explained by the minimum winning coalition's willingness to compromise their opinion in order to gain more votes. But this answer would require a theory of why the additional votes were so valuable as to warrant a watering down of a five-person majority opinion.[35] Alternatively, the two might join the five-person minimum coalition opinion without compromise, in which case the true measure of homogeneity would be that of the core five,

34 *See, e.g.*, FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 134 (2000) (finding that "once the majority opinion author achieves a majority, a Justice's bargaining leverage diminishes drastically").

35 The value of a greater opinion coalition is unclear. Walter F. Murphy suggests that a smaller majority "may encourage resistance and evasion," while "[t]he greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases." MURPHY, *supra* note 24, at 66. Recent empirical examination, though, has called this presumption into question. *See* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 126 (2006) (finding that the size of a majority coalition is unrelated to whether a decision receives positive or negative treatment).

rather than of the full coalition. If so, the authors' measure of homogeneity contains a built-in bias against larger opinion coalitions.

This effect raises interesting implications. Take an opinion coalition of seven, ranging from the most conservative Justice to a moderately liberal one. If the most cohesive core group of Justices is the most conservative five, one could expect to see a very different opinion than if the more cohesive core five Justices are clustered around the median, with the most conservative Justices being relative outliers. This possible effect should be testable with the authors' data and could reveal some interesting information. For example, it could suggest whether more ideological or more moderate core coalitions produce more significant opinions. Also, it could illuminate the question of why opinion coalitions are often greater than five members, by identifying which Justices are outside the "core" of the decision's majority coalition.

While it is plausible that ideologically cohesive majority coalitions write more significant opinions, it is also possible that the findings are the product of a certiorari-level selection effect. Presumably, the Justices have a good *ex ante* idea of their colleagues' preferences. The certiorari decision is influenced, at least in part, by the Justices' expectation of case outcome, should the case be taken.[36] Thus, Justices who dislike a lower court opinion might vote against certiorari, in what is known as a "defensive denial," because they fear that the Court might affirm.[37] Conversely, Justices who are more confident that the Court is aligned with their preferences will engage in "aggressive grants" of certiorari in an attempt to move the law.[38]

When there is a core of five closely aligned Justices, they should have more confidence about case outcomes and consequently be more likely to accept the review of highly significant cases. One would expect those Justices to engage in more aggressive grants of salient issues, due to this confidence about the outcome. Staudt, Friedman, and Epstein account for this effect in their introduction, where they observe that the Court taking a case in a significant issue

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36 *See* Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 829, 839 (1989) (concluding that one of the three strategies Justices use in deciding whether to grant certiorari is the "prediction strategy," which takes into account the prospects of a favorable decision on the merits).

37 Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 825–26 (1995).

38 *Id.* at 826.

area, such as the nature of *Miranda* rights, does not always yield a significant decision.[39]

Yet another variable, not analyzed by the authors, may help explain the results on opinion salience. The central significance of the Court's opinion lies in its doctrinal power. This in turn relies on its implementation in the future, primarily by lower courts. While we presume that lower courts are largely obedient to Supreme Court decisions,[40] they also have ideological preferences that influence their decisions.[41] Lower courts may engage in "shirking," which avoids the true holding of the Supreme Court. They may frame the facts, so as to avoid the Court's opinion content, or perhaps find ways to distinguish the Court's opinion to limit its power. A rational Supreme Court would attend to the probability of faithful implementation of its opinion.[42]

The composition of lower courts should therefore influence the content of the Court's opinion.[43] Suppose that the Supreme Court is primarily conservative in its ideological attitudes. If the lower courts are likewise conservative, the Supreme Court should be relatively emboldened in its opinions, pronouncing more salient conservative opinions. However, if the lower courts are relatively liberal, the Court might adopt a more cautious opinion that would be more

39 *See* Staudt et al., *supra* note 33, at 361–62 (discussing how the Burger Court gradually narrowed the scope of *Miranda* rights, yet ultimately reaffirmed *Miranda* in *Berkemer v. McCarty*, 468 U.S. 420 (1984)).

40 There is ample evidence that the lower courts are largely faithful to Supreme Court precedents. *See generally, e.g.*, Charles A. Johnson, Research Note, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325 (1987) (reporting that lower courts followed the holding and reasoning of Supreme Court opinions); Richard L. Pacelle, Jr., & Lawrence Baum, *Supreme Court Authority in the Judiciary: A Study of Remands*, 20 AM. POL. Q. 169 (1992) (finding that most lower courts reversed their decisions and ruled in favor of the Supreme Court winner on remand).

41 The ideological content of circuit court opinions is well established. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (revealing patterns of ideological circuit voting on different issues); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 536 (2002) (finding that significant Supreme Court decisions have been influenced by the preferences of the implementing circuit); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1482 (2003) ("The weight of the empirical evidence clearly reveals some role for ideology in judicial decisionmaking.").

42 *See* Cross, *Justices*, *supra* note 27, at 561–65 (discussing how a strategic Supreme Court would show concern for lower court implementation of its rulings).

43 For a theoretical analysis of this effect, demonstrating that higher court decisions should depend in part on the composition of lower courts, see generally Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 333–40 (2007).

faithfully applied in future decisions. An unpublished study suggests that the Court is in fact influenced by circuit court opinions.[44]

Similarly, the Court may be influenced by the preferences of other institutions, such as Congress.[45] Congress possesses a variety of tools to punish the judiciary for opinions it considers undesirable, and there is some evidence that the Supreme Court responds to this concern.[46] It would be interesting to add variables for contemporary lower court and congressional preferences to see if they have affected the Supreme Court's willingness to issue ideologically salient opinions.

Landa and Lax tackle the collegiality question from an entirely different perspective.[47] Their Article recognizes that cases present a series of distinct legal issues for judges to address. At a minimum, every case presents at least one issue of fact and one of law, and judges may disagree on either or both. Moreover, the typical case has multiple factual issues, and each legal issue may have multiple dimensions to be applied to the facts. They analyze how these dimensions cumulate to produce an outcome, though they do not focus on the nature of the resulting opinion.

The implication of the multiple dimensions is a recognition that some measure of collegial agreement is necessary for there to be a majority opinion. While a majority of judges might agree on the outcome, it is unlikely that they would agree precisely on the exact state of the law or every word written in an opinion. Hence, the judges joining such an opinion must surely make some compromise of their preferences.

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44 *See* Jeffrey A. Berger & Tracey E. George, *Judicial Entrepreneurs on the U.S. Courts of Appeals: A Citation Analysis of Judicial Influence* 2 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 05-24, 2005), *available at* http://ssrn.com/abstract=789544 ("Appeals court judges can . . . influence the Supreme Court and in turn the development of law and policy." (citation omitted)).

45 *See generally, e.g.*, EPSTEIN & KNIGHT, *supra* note 11, at 138–45 (discussing how Justices factor in whether subsequent congressional legislation will merely defy a ruling of the Court).

46 *See, e.g.*, Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1491–92 (2001) (arguing that the Supreme Court defers strategically to certain institutions in its own decision-making process); Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT'L REV. L. & ECON. 433, 443–44 (1996) (indicating that Supreme Court decisions are affected by congressional financial allocations).

47 Landa and Lax developed a case-space approach to distingush different types of judical disagreement. Dimitri Landa & Jeffry R. Lax, *Disagreements on Collegial Courts: A Case-Space Approach*, 10 U. PA. J. CONST. L. 305 (2008).

In this approach, some collegiality plays an important role in the opinion, even when the judges all agree on the outcome. In theory, each judge might write a separate opinion, setting out his or her views on both the facts and the law. There is considerable pressure, however, for the judges to make some compromise on their underlying dimensional preferences, and not to issue *seriatim* opinions, in order to create a clearer governing legal standard (and to avoid the considerable work associated with consistently writing separate opinions). A judge will be better off compromising on some issues in order to join a majority than in refusing to compromise and issuing a lonesome opinion.

In the conventional, one-dimensional model, it is the median voter that governs the content of the opinion.[48] For judicial opinions, this is presumed to be the ideological median judge. However, there are various reasons to believe that the median voter does not universally prevail, one of which is addressed by Landa and Lax—the multiplicity of dimensions associated with writing a judicial opinion.[49] As the authors note, judges may favor the same outcome in a given case for very different reasons. If all of the dimensions are monotonic in the same direction, the median voter might still control, but this is not necessarily the case. In the ideal, at least, factual disputes would not have any such ideologically monotonic orientation. Rather than the outcome being controlled by the median voter, it may be a product of unique case circumstances. In addition to case facts, those circumstances could include the coincidental nature of the legal rules.

One other complicating feature to be considered by the model is the judiciary's ability to control the dimensions they address in an opinion. Although the legal issues in a case are defined in the first instance by the litigants and their briefs, the judiciary is able to alter or go beyond these choices. This notion has been called "issue fluidity."[50] Appellate judges have some discretion in picking and choosing

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48 The median voter theorem is a political science classic that declares that, in democratic decisions where opinions lie on a single dimension, such as liberal to conservative, the preference of the median voter will rule the day. *See, e.g.*, Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 29 (1948) (suggesting that if members of a committee vote in accordance with their own preferences, the committee's decision will move towards the median).

49 *See* Landa & Lax, *supra* note 47, at 314 (noting that in some models, "policy does not reduce to the median voter's ideal rule because of costs and agenda-setting").

50 *See* Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691 app. at 699 (1995) ("Issue fluidity reflects the extent to which the U.S. Supreme Court, in making decisions on the merits, provides authoritative answers to legal questions that have not been asked . . . .").

the issues they will address in a given case. This manipulation of issues at the Supreme Court level "occurs quite often."[51] The Justices engage in "issue creation" of questions not presented in the briefs and "issue suppression," whereby they ignore some of the questions presented to them.[52]

Landa and Lax also model judicial preferences on particular dimensions as immutable and un-amenable to persuasion, which is contrary to the evidence on voting fluidity at the Court and assumes away the possibility of Edwards/Coffin persuasive collegiality, as well as ignoring possible strategic decision making by the Justices.[53] An interesting documented example of the latter fact is found in *Craig v. Boren*.[54] The case involved the constitutional standard for gender discrimination as one dimension, and Justice Brennan's initial position argued for a strict scrutiny standard. Unable to cobble together a majority for this position, though, he moderated his view on this standard in order to gain a majority for a lowered standard of scrutiny.[55] Although such dimensional fluidity may not be common, it probably occurs more often as an anticipatory manner; for example, opinion authors moderate their dimensional preferences with knowledge of the reaction from other Justices.

Landa and Lax do not analyze the creation of precedential rules, but they do scrutinize the application of such precedents, and how different sorts of rules should yield different results, even when the deciding judges' preferences are the same. For example, a rule requiring that a plaintiff satisfy standards *A* and *B* and *C* will often yield different results than a rule simply requiring a plaintiff to satisfy standards *A* or *B* or *C*. This intuitive finding reveals the importance of opinions and legal rules, as distinct from mere case outcomes.

The Article assumes a certain level of judicial sincerity that may be unrealistic. Suppose a judge, operating under the former rule, *wants* to vote for a plaintiff, out of some sense of fairness. Perhaps the judge honestly does not believe that the plaintiff satisfied standard *C*. Such a judge might nevertheless find that standard *C* was met, in order to rule for the plaintiff. The judge could do this by dishonestly presenting the facts of the case, to make it appear that standard *C* was

51 *Id.* at 699.

52 VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 25 (2007).

53 *See generally* Landa & Lax, *supra* note 47.

54 429 U.S. 190 (1976).

55 This tale is summarized in EPSTEIN & KNIGHT, *supra* note 11, at 1–13.

satisfied. Alternatively, the judge might write an opinion that waters down the requirements of standard *C*, making it an easier threshold to satisfy.

Indeed, it is not obvious that Justices attend to the dimensions in isolation, as the theory propounds. To the extent the Justices are ideologically oriented to outcomes, they would begin by choosing an ideologically preferred outcome or party.[56] This result could then be rationalized via an opinion addressing the separate dimensions, as projected by the attitudinal model. To the extent that the majority outcome incorporates significant differences on the underlying dimensions, the disagreement may be finessed through issue fluidity and suppression, or simply by taking an inconclusive approach to an underlying dimension.

The Landa and Lax theory might also be influenced by lower court compliance issues or congressional reactions. It presumes that Supreme Court Justices' opinions on the content of particular issues in the opinion are driven by the Justices' own sincere preferences, such as ideological desires. Yet the Justices may be driven to adopt a contrary position on these issues, out of concern for the effective implementation of their opinion.

The two very different Articles reviewed contribute to the theory and practice of collegial decision making on multimember courts. Staudt, Friedman, and Epstein demonstrate how ideology is an important component of collegial interaction at the Supreme Court, and how it affects the ultimate product of the Court. Landa and Lax add the important understanding of multiple legal issue dimensions in the collegial balance, a factor overlooked by much of the existing literature.

In an important way, Landa and Lax and Staudt, Friedman, and Epstein converge on a similar point: to the extent that collegiality is about consistency and durability of legal policy over time and across courts, it is unlikely to happen if the court that originates the decision is ideologically or otherwise fractured on important dimensions of the broader subject matter at dispute. Landa and Lax illustrate, theoretically, that a legitimate collegial legal rule may be impossible when individual judges on a panel disagree about anything more than the facts of the case. Landa and Lax argue that the most fun-

56 This corresponds to the Supreme Court's practice, which begins with a preliminary vote on the merits taken at conference, before any of the underlying dimensions are analyzed. Of course, it is possible that the role of the dimensions has already been analyzed at the time of this vote.

damental features of legitimate legal rules—predictability, stability, consistency, and non-arbitrariness—may not exist at the collegial level when judges have differences over such things as the relevance of various case dimensions or thresholds for application of rules in those dimensions. This is so even when they come to an agreement on the individual case outcome. The process of aggregating the preferences of individual judges over various policy dimensions, legal dimensions, and thresholds within those dimensions inevitably leads to an unstable statement of legal policy. Staudt, Friedman, and Epstein illustrate a similar result empirically. They find that court majorities that have few differences across legal and policy goals—that is, an ideologically homogeneous court—can produce a more "consequential" decision, essentially a decision that produces a consistent legal analysis that will have greater longevity and legitimacy, than can a court that is more heterogeneous on legal and policy goals.

Neither Article truly comes to grips with the more conventional "warm and fuzzy" Edwards/Coffin concept of collegiality. This is entirely understandable, if only because this Edwards/Coffin concept is much more difficult to measure or model. Perhaps this collegial concept does not indeed apply in practice, and judges may be single-minded seekers of their preexisting preferences (whether ideological or legal). Although there are some clear examples of the collegial practice, its use may not be common, and the evidence of ideological voting at the Supreme Court calls the concept into some question at that level of the judicial hierarchy. Still, we do not really know much about this practice, and the dispute illustrates a shortcoming of social science research practices, which focus on that which is more readily measurable, and may overlook features less amenable to measure using social scientific methods.