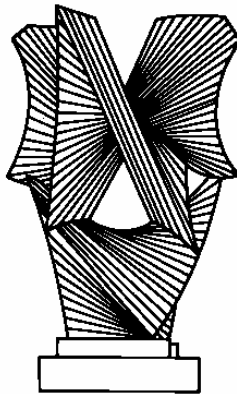


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DOES POLITICAL BIAS IN THE JUDICIARY MATTER?: IMPLICATIONS OF JUDICIAL BIAS STUDIES FOR LEGAL AND CONSTITUTIONAL REFORM

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Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reform

Eric A. Posner¹

January 3, 2007

Abstract. Recent empirical scholarship that shows that judges decide cases in a manner that is consistent with their political biases has motivated a stream of proposals for reform, including judicial term limits, limitations on judicial review of statutes and agency actions, revision of the judicial appointments process, and mandatory mixed party representation on judicial panels. However, these proposals incorrectly assume that judicial bias is necessarily harmful, and do not fully consider the costs to other values even when reduction of judicial bias is justified. To evaluate proposals for reform, one needs a theory of judicial review, one that explains how bias and other characteristics of judicial behavior result in socially good or bad outcomes. This paper supplies such a theory, drawing on rational-choice accounts of the role of the judiciary in the legislative process. It argues that judicial bias is not harmful in a broad range of circumstances, and that the merits of the reform proposals depend on many factors, including, among others, the degree of supermajoritarianism of the legislative process, the magnitude of legislative bargaining costs, judicial competence, and the extent to which the judicial appointments process and party competition result in an ideologically diverse judiciary.

Introduction

This volume attests to the increasing significance of the empirical study of judges and judicial decisions. The two new empirical articles² are just the latest in a cataract of studies that show that the political biases of judges, and other legally irrelevant characteristics of judges (such as race and sex), influence the voting patterns of judges and the outcomes of cases.³ Miles and Sunstein are right that this movement deserves a

¹ Kirkland & Ellis Professor of Law, University of Chicago. Thanks to Jake Gersen, Todd Henderson, Daryl Levinson, Tom Miles, Matthew Stephenson, Adrian Vermeule, and participants at a workshop at the University of Chicago Law School, for helpful comments.

² Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, [this volume]; Max. M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, [this volume].

³ See, e.g., Jeffrey Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002). In the legal literature, see, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *Va. L. Rev.* 1717 (1997); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *Yale L.J.* 2155 (1998); Emerson H. Tiller and Frank B. Cross, *A Modest Proposal for Reforming American Justice*, 99 *Colum. L. Rev.* 215 (1999); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 *Cal. L. Rev.* 1457 (2003); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A New Window into the Behavior of Judges?* NYU Law and Economics Research Paper No. 06-29, available at: <http://www.ssrn.com/abstract=913663> (2006); Cass Sunstein et al., *Are Judges Political?* 141 (2006); Adam

name, and “The New Legal Realism,” in its invocation of the aspirations (but not the actual research) of the original legal realists, is an apt one.⁴

In the legal literature, perhaps more than in the political science literature, research into judicial behavior is justified by the dividends it pays for legal reform. And, indeed, many legal scholars who have written about judicial bias have proposed legal reforms that are designed to minimize it. Some reformers focus on the appointments process, arguing that elected officials should avoid appointing or confirming partisans. Critics of recent appointments to the federal judiciary urge the Senate to refuse to confirm nominees who lack substantial nonpolitical qualifications.⁵ Many states have gone farther and limited the role of elected officials in appointing judges: nonpartisan commissions screen or nominate judges.⁶ Miles and Sunstein, following an earlier proposal made by Emerson Tiller and Frank Cross, argue that three-judge appellate panels should always have judges from both parties: even though the two judges from one party can outvote the third, the presence of a different perspective moderates the thinking of the majority.⁷ Schanzenbach and Tiller similarly argue that an ideologically diverse panel should review sentencing decisions of trial judges.⁸ Concerns about bias have also influenced debates about doctrine and judicial deference, with some scholars arguing that judges should take deferential stances toward agency regulation, legislation, or political-branch interpretations of the Constitution, because otherwise judges will just substitute their own political views for those of elected officials or more qualified appointees.⁹ More ambitiously, modifying judicial voting rules could reduce the influence of bias that infects judges’ efforts to apply deference rules.¹⁰ And fears about bias have played a role

B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, unpub. m.s. (2007), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977271.

⁴ Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, [this volume]. See also Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *Nw. U. L. Rev.* 251 (1997).

⁵ See Sunstein et al., *supra* at 141 (2006) (describing this position).

⁶ For a discussion of merit plans and the politics behind them, see F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and the State Campaigns for the Merit Plan*, 110 *Pub. Choice* 79 (2002) (finding that merit plan states have more litigation, benefiting the lawyers who dominate the merit commissions).

⁷ Miles & Sunstein, *Real World*, *supra*; Sunstein et al., *Are Judges Political?*, *supra* at 135-39; Tiller & Cross, *supra*.

⁸ See Schanzenbach & Tiller, *supra* at 39.

⁹ Miles & Sunstein, *Real World*, *supra*; Miles & Sunstein, *Do Federal Judges Make Regulatory Policy?: An Empirical Analysis of Chevron*, 73 *U. Chi. L. Rev.* 823 (2006).

¹⁰ Jacob E. Gersen & Adrian Vermeule, *Chevron As a Voting Rule*, 116 *Yale L.J.* 676, 699 (2007) (arguing that replacing the *Chevron* doctrine with a supermajority rule might reduce the effects of judicial bias).

in recent proposals to eliminate life tenure on good behavior for federal judges, and replace it with term limits.¹¹

Many of these proposals seem sensible, but there are two problems, one normative and one empirical.

The normative problem is that judicial bias is not the only thing that matters. If a legal reform reduces judicial bias but also damages other values, it is not necessarily advisable. Everyone understands, for example, that limiting hard look review will not only reduce the influence of judicial bias on agency behavior; it will also enhance the freedom of agencies to err, to shirk, to please interest groups, and to pursue ideological agendas. How do we weigh these costs and benefits? We need a theory that identifies socially desirable outcomes and that explains how judges, agencies, and other legal institutions contribute to those outcomes. With such a theory in place, we can make at least a rough guess as to how differing legal regimes—in this case, hard look versus “soft look”—would produce different types of behavior by agencies, courts, and others, and thus different levels of social welfare.

Indeed, there is a reasonable argument—one I will explore—*that judicial bias (within limits) does not matter at all, and could even be beneficial in a system, such as ours, where judges are expected to block or restrict government actions, including statutes and regulations, that are themselves likely to reflect “bias.”* When legislators themselves are inclined to enact biased legislation, they might refrain from doing so if they expect a biased response from the courts. Further, one biased judge can counteract another, so people (including legislators) planning their behavior with the expectation that litigation is possible in the future will expect that, *on average*, the judicial response will be unbiased. This argument will help make sense of an otherwise puzzling fact: despite a towering pile of studies showing political bias in the federal judiciary, the American justice system is one of the best in the world.

The empirical problem is that, as Miles and Sunstein recognize, the New Legal Realism lacks a theoretical framework. Without such a framework, scholars run the risk of piling up facts that have little relevance for understanding the legal system, or neglecting needed areas of research. Consider Miles and Sunstein’s call to study judicial behavior in EPA and NLRB cases before 1996, and judicial behavior in cases involving other regulatory agencies. There are diminishing returns from testing a hypothesis using new data sets, and surely there is much else we need to learn. A theoretical framework would help identify new avenues for empirical research.

¹¹ See, e.g., Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 Harv. J.L. & Pub. Pol’y 769, 809-13 (2006).

Consider, for example, the proposal to limit hard look review. To evaluate this proposal, one needs to know more than the extent of judicial bias. One would also need to understand how different levels of judicial review affect the behavior of agencies. Suppose that agencies are relatively professional, impartial, and efficient: if they are, then reducing judicial review would straightforwardly improve social outcomes. But if agencies are biased or incompetent, if biased judges are *less* biased than agencies, and if agencies dislike losing in court, then limiting or eliminating review by biased judges could well be undesirable. Researchers need to direct their attention away from judicial bias, for which we now have a great deal of evidence,¹² and toward the behavior of regulatory agencies, about which we have little information. In particular, researchers should examine how agencies change their behavior (if they do) in response to changes in the personnel of the courts that review their actions.

This paper sketches a theory intended to guide both legal reform and further empirical research by New Legal Realists. The theory draws on rational actor theories of the legislative process and judicial review.¹³ Suppose that legislative majorities enact statutes that create public goods or redistribute wealth, or both. It is costly for the majority to enact a statute; part of this cost involves the bargaining process that ensures that everyone in the majority is made better off. The judiciary consists of judges who share the majority's partisan bias and judges who share the out-of-power minority's partisan bias. Judges decide cases entirely on the basis of their biases. The basic tradeoff we will explore is that review by biased judges can counter legislative bias, forcing legislatures to enact fairer and more socially beneficial statutes than they would otherwise; but review by biased judges also raises legislative bargaining costs, thereby

¹² With the important qualification that the magnitude of judicial bias remains largely unknown. The studies do not take account of the fact that agencies and affected individuals can avoid a judicial decision by adjusting their underlying behavior and settling disputes; thus, the cases that reach courts are not a random sample of actual cases. If the cases that reach the courts are unusually difficult or controversial, then the fact that judges exhibit bias in deciding those cases, or some of them, does not tell us whether judges would exhibit bias in deciding easier cases. If they do not, then the problem of judicial bias may be relatively trivial. Unfortunately, the methodological problems created by selection effects may well be insurmountable, at least in the near term.

¹³ Of particular value is a recent paper by James R. Rogers & Georg Vanberg, *Resurrecting Lochner: A Defense of Unprincipled Judicial Activism*, 23 *J. Law, Econ., & Org.* 442 (2007). See also Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *Amer. Pol. Sci. Rev.* 245 (1997); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 *Georgetown L.J.* 565 (1992); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 *J. Law, Econ., & Org.* 1 (1990); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 *Amer. J. Pol. Sci.* 346 (2001); Matthew Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 *J. Legal Stud.* 59 (2003); Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 *Amer. Econ. Rev.* 1034 (2004); Matthew C. Stephenson, *The Price of Public Action: Judicial Doctrine, Legislative Enactment Costs, and the "Efficient Breach" of Constitutional Rights*, unpub. m.s. (2007); Robert D. Cooter, *The Strategic Constitution* (2000). This is a fraction of a literature that is too large to cite.

blocking some desirable statutes that would otherwise be enacted. Reform proposals must be understood in the context of this tradeoff.

This paper takes a distinctive approach to judicial review, and a few words about this approach are appropriate at the outset. First, I examine judicial review from an *ex ante* perspective (in common with political scientists and economists) rather than from an *ex post* perspective (the usual method of law professors). From an *ex post* perspective, judicial review presents the “countermajoritarian difficulty” that unelected judges block democratic outcomes.¹⁴ From an *ex ante* perspective, judicial review, undertaken by agents appointed by prior or current elected officials, is just a form of supermajoritarianism, which is a pervasive feature of our constitutional system. Whether this feature is justified and what form it should take are important questions, but judicial review, in principle, is no more in tension with democracy than is the rule that two thirds of senators must consent to a treaty.

Second, I examine judicial review from the perspective of its effects on efficiency and distribution of resources rather than from the perspective of fundamental values, the protection of minority rights, democratic principles, and the other perspectives used by legal scholars. Here, I also depart from most political scientists and the legal scholars they have influenced, who use the median voter as their normative baseline¹⁵ or some notion of the Constitution’s original allocation of powers.¹⁶ The median voter’s preferences are not normatively attractive, as this hypothetical person will happily approve socially costly legislation that transfers resources from the minority to the majority, and the Constitution’s eighteenth-century allocation of powers is unlikely to be optimal today, or so I will assume.

Third, I mostly take the perspective of the reformer (including the legislature) rather than the judge. Most legal scholars focus on doctrine, implicitly assuming that judges will disinterestedly consider implementing doctrinal changes that are normatively desirable. In a discussion of reform proposals motivated by concerns about judicial bias, this assumption obviously is questionable. Nonetheless, I will also consider the possibility that judges will design doctrine to limit the impact of their own biases or those of judges on lower courts.

¹⁴ For a recent discussion, see, e.g., Barry Friedman, *The Countermajoritarian Problem and the Pathology of Constitutional Scholarship*, 95 *Nw. U. L. Rev.* 933 (2001).

¹⁵ See, e.g., Ferejohn & Weingast, *supra*.

¹⁶ See, e.g., William N. Eskridge & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 *J. Law, Econ., & Org.* 165 (1992).

Part I lays out the theory in more detail. Although my focus is judicial review of statutes for constitutionality, the theory can be easily extended to all types of judicial review—for example, of agency actions or any case involving statutory interpretation. Part II uses the theory to evaluate the proposals for legal reform that have been motivated by concerns about judicial bias. Part III explains the relationship between the theory and traditional theories of judicial review. The Conclusion suggests future directions for empirical work, and argues that judicial bias—at least, of the type found in studies so far—probably does *not* justify legal or constitutional reform.

I. Does Bias Matter?

A. What Is Bias?

Contrast “political bias” and “personal bias.” Political bias refers to partisan or ideological bias: the desire for an outcome to the left (or right) of a (stipulated) impartial outcome. This outcome could be the “correct” interpretation of a statute or common law doctrine or clause of the constitution. Personal bias refers to the tendency to decide cases for personal financial gain, to help family and friends, and so forth. The problem of personal bias has received little attention in the literature, and lies outside the scope of this paper.

The “correct” interpretation of a legal document is often unknowable, and there is even dispute about what it means for an interpretation to be correct. For present purposes, we can simply distinguish judges who allow their political biases to influence their decisions and judges who do not. As the empirical literature shows, this distinction is often easy to make. When Republican and Democratic judges vote the same, their political biases do not influence their vote in a measurable way. When they vote differently, and other possible variables are controlled for, political bias must play a role—for judges of one party, judges of the other party, or judges of both parties.

Next, distinguish “implicit” and “explicit” bias. Explicit bias refers to the conscious desire to produce an outcome that the judge knows to be “wrong” but that pleases a party or other constituency. Consider a liberal judge who strikes down a capital punishment statute that, the judge knows, does not violate the Constitution, according to the conventional interpretation. The judge strikes down the statute simply in order to advance a policy view. By contrast, judges may decide cases differently because of implicit bias: they see the world in different ways. One judge thinks it obvious that the death penalty deters, another judge thinks that the death penalty obviously does not deter. The first judge might be more inclined to uphold a death penalty statute than the second, given that Eighth Amendment doctrine instructs judges to take account of the utility of

the punishment. Empirical evidence does not resolve the disagreement; the judges simply depend on how they view the world.

The studies do not distinguish between the two types of bias, and so it is not clear which type accounts more for observed outcomes. Many people are more troubled by explicit than by implicit bias; I will ignore this distinction, however, except where it is relevant to my argument.

B. The Legislative Process and Judicial Review

Consider the following highly stylized timeline of the political process.

1. Legislators are selected.
2. Judges are selected.
3. Legislature enacts law.
4. Judges review law.

At time 1, the public elects legislators. There is no president; the legislature is assumed to have executive powers, as in a parliamentary system. At time 2, some or all judges are selected. Those who are not selected are sitting judges who were appointed prior to the election of the legislators; otherwise, at time 2 judges might be appointed by the legislature (as I will generally assume) or elected (as in many states). At time 3, the legislature enacts a law. At time 4, a randomly selected group of judges upholds or strikes down the law. The sequence repeats indefinitely.

For simplicity, assume that the two parties, Democrats and Republicans, capture the votes of everyone to the left (in the first case) and the right (in the second case) of the median voter. The parties compete for the vote of the median voter, and obtain it half the time on average. Thus, the parties will on average alternate in power each term, but one party may enjoy a run of luck and control the legislature for multiple terms.

The legislative majority grants judgeships to members of its party. We will generally assume that judges have lifetime tenure. If the parties exchange power, this means that the judiciary will be divided between members of each party. If the parties do not routinely exchange power, the party in power will eventually dominate the judiciary. We will also consider the possibility that judges have term limits. Judges can be chosen on the basis of ideology, judicial competence, or both. Neither ideology monopolizes competent judges; hence, if judges are selected on the basis of ideology, the pool of competent judges will be limited.

The legislature enacts laws that have two characteristics of interest.¹⁷ First, they increase (or reduce) social wealth by creating public goods (or deadweight costs): $B > C$. Second, they have a distributional impact. We will say that the distributional impact is “fair” when everyone gains: $B_{\text{majority}} > C_{\text{majority}}$, and $B_{\text{minority}} > C_{\text{minority}}$. Efficiency, as defined, is an uncontroversial goal. One might argue that fairness should not be a concern as long as parties exchange power frequently enough. If that happens, people who lose when their party is out of power will gain when their party is in power. However, when power is not frequently exchanged, then fairness is a serious concern; and even when power is frequently exchanged, there are strong political and moral reasons for disapproving policies that systematically benefit one group and burden another.

When the legislative majority enacts a law, it can decide how the benefits and the costs are allocated. It can distribute the benefits to everyone, or only to voters who support the majority party, or only to voters that support the out-of-power party. It can also allocate the costs to both parties, or mainly to one party or the other. For example, imagine that a statute authorizes the construction of a road. The road could benefit only constituents of one party (because it passes through the area in which they live), or it could benefit the constituents of both parties (because it passes through areas in which everyone lives). The road could be financed with taxes imposed on the constituents of one party or the other, or on the constituents of both parties. There is a deadweight cost of enacting statutes—time and resources that could be used for other things.

When judges review a law, they can uphold the law or strike it down.¹⁸ In the course of upholding or striking down the law, judges will interpret the law and other legal materials, and resolve a dispute in a manner that other people will take note of and that will influence the way they conduct their lives. These interpretations can be more or less competent. Competent interpretations will, regardless of the outcome, make the legal system more predictable, thus lowering the cost of using the legal system.

Suppose, first, that judges are highly deferential: they never strike down statutes in stage 4. In effect, there is no judicial review. How will the legislature behave? The legislature will enact statutes whose benefits go to the legislature’s faction, while as much of the cost as possible is allocated to the opposing faction. In some cases, the legislature will enact inefficient statutes; such statutes benefit the majority as long as most of the costs can be allocated to the minority. In other cases, legislatures will enact efficient but unfair statutes that allocate most of the costs to the minority.

¹⁷ This portion of my argument follows Rogers & Vanberg, *supra*.

¹⁸ In the context of statutory interpretation, they can similarly interpret the statute in a biased fashion without striking it down.

With judicial review, judges have the power to overturn statutes that do not advance their faction's interest. The judiciary is assumed to include judges from both factions; thus, there is some chance that a statute will be reviewed by a judge or panel that belongs to the faction that is out of power and burdened by the legislation.¹⁹

If a legislature passes a statute that imposes excessive costs on the opposing faction, it takes a risk that a judge from that faction will end up reviewing that statute. (Judges of the same faction as the legislative majority will cheerfully uphold its statutes.) The opposite-party judge will strike down the statute as long as the benefits to her faction are less than the costs. For the majority party in the legislature, this outcome is costly: legislative enactment costs are wasted. The majority would have done better by enacting a less unfair statute that survived judicial scrutiny.

To reduce the risk of reversal, the legislature will alter its behavior. It will continue to enact efficient statutes (where the benefits are greater than the costs), and will ensure that the benefits and costs are more evenly distributed, so that the expected cost of the statute being struck down is minimized. If enough opposite-party judges exist, the legislature may well ensure that the costs are fairly distributed between the factions. Even if only a few opposite-party judges exist, the legislature will distribute costs more fairly than it would without judicial review. And the legislature will enact fewer inefficient statutes. The magnitude of these beneficial effects might not be large, but they will be positive. The more opposite-party judges in the judiciary, the larger the social benefit—in terms of efficiency and fairness—will be.²⁰

The reasons for these results are straightforward. The legislature will continue to enact efficient statutes because those statutes always generate gains and the majority faction can allocate at least some of those gains to itself. The risk of judicial review by minority party judges does not change this decision to enact efficient statutes; but it does cause the legislature to allocate fewer of the costs of efficient statutes to the minority party. Hence efficient statutes will be fairer. The legislature will enact fewer inefficient statutes because when a statute produces low benefits and high costs, it benefits the majority party only if most of the costs are allocated to the minority party. This becomes harder to do if there is a risk of review by opposite-party judges. It follows that all statutes, whether efficient or inefficient, will be fairer, in the sense that the minority party will be allocated less of the cost.²¹

¹⁹ One party might control a majority of the Supreme Court, in which case judicial review by that court can influence the legislature only when the other party is in power. However, the Supreme Court has only limited control over the lower courts, where the partisan composition of panels will depend on chance.

²⁰ See Rogers & Vanberg, *supra*.

²¹ *Id.*

It is worth noting that judicial bias is not an unqualified good, in the sense that we should prefer biased judges to unbiased judges in an ideal world. Suppose we could ensure that all judges had a preference for approving efficient statutes or statutes that do not burden members of the minority (or that equal numbers of biased judges exist on each side, with a tie-breaking unbiased judge). These judges would be superior to a system of ideologically diverse judges, as the latter will occasionally strike down efficient and fair statutes and approve distributively unfair statutes. Although it is doubtful that such a system is possible, one should keep in mind that appointments processes could, in principle, be modified so as to favor such “neutral” judges. The argument advanced in this paper, which assumes otherwise, is thus in the nature of a “second-best” argument for judicial reform.

C. Bargaining Costs

The discussion so far has assumed that legislative bargaining costs are zero. By “bargaining costs,” I refer to the cost to legislators of reaching a legislative bargain, that is, obtaining votes from a majority by crafting a bill that the majority prefers to the status quo.

Recall that there are two bodies: the legislature and the judiciary. At time 3, a majority of the legislature enacts a bill. At time 4, the judiciary exercises a veto. The veto is exercised with a certain probability by a judge who belongs to the out-of-power party. Analytically, this is the same thing as saying that the system as a whole (including the legislature and the judiciary) is supermajoritarian. In a probabilistic sense, bills need more than the majority: they need a majority plus, with probability greater than 0, an additional vote in the judiciary.²²

For example, imagine that the legislative majority is considering two bills, a moderate bill and an extreme bill. Both the majority and the minority prefer the moderate bill to the status quo, but only the majority prefers the extreme bill to the status quo; the majority also prefers the extreme bill to the moderate bill. The moderate bill would thus obtain consent of a supermajority (indeed, everyone), whereas the extreme bill would obtain the consent only of the majority. Without judicial review, the legislature would enact the extreme bill. With the risk of judicial review by an opposite-party judge, the

²² The point is not that a judge or panel has a “vote” that must be added to the votes of the legislators, so if there are 100 legislators and majority rule, then the supermajority rule is de facto 52 (51 legislators plus a judicial panel) rather than 51. The judicial vote is akin to a veto. If the judicial vote (with some probability) is the same as that of someone in the minority of the legislature, that person’s vote becomes decisive.

legislature would enact the moderate bill as long as the cost of legislating is high enough, the risk of reversal is high enough, and the differences between the bills is relatively low. Thus, judicial review in this instance transforms majority rule into supermajority rule.

Supermajority rule has some attractive characteristics. To see what these characteristics are, consider the strongest form of supermajority rule—unanimity. If the rule is unanimity, the legislature will pass only those statutes that make all legislators better off—so distributive fairness is satisfied. In addition, the only statutes that make all legislators better off must generate a surplus—so efficiency is satisfied as well. In the discussion above, the gains from judicial review are the same as the gains from moving from majority rule to supermajority rule.

But if supermajority rule is so beneficial, why is majority rule so common? This question was addressed by Buchanan and Tullock.²³ If the benefit of supermajority rule is that it enhances fairness (in their terms, reducing “exploitation costs”) while allowing efficient statutes to pass, it creates significant bargaining costs. The problem is that voters who benefit from a bill have a strong incentive to hold out for a larger share of the surplus. With asymmetric information, voters can often make credible threats to vote down an efficient bill, and will find it in their interest to bluff and delay in order to obtain what they seek.

The optimal rule (from dictatorship to majority, and any degree of supermajority up to unanimity), then, depends on the tradeoff between exploitation and bargaining costs. Thus, converting a legislative majority rule into a supermajority rule through judicial review does not necessarily improve efficiency. We would need to take account of the fact that a possible judicial veto reduces the “bargaining space”—the set of possible legislative outcomes—with the result that it becomes more difficult for legislators to craft a bill that satisfies the legislative majority. In short, biased judicial review reduces exploitation costs but increases bargaining costs, and there is no reason to think that on balance social welfare is increased.

The lesson, for our purposes, is that the social cost of judicial bias depends on these two factors. The greater the supermajority requirement that already exists in the legislative process, the lower the value of judicial review. Judicial review adds legislation costs without significantly improving the fairness or efficiency of legislation. Judicial review is most beneficial when legislatures use majority or weak supermajority rule, and least costly when legislative bargaining costs are low.

²³ See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 63-91 (1962). Supermajority rules have other costs aside from decisions costs; for an overview, see Dennis C. Mueller, *Constitutional Democracy* 155-57 (1996).

D. Judicial Diversity and Political Competition

Suppose that the legislature is Republican and the judiciary is (entirely) Republican. Judicial review has no benefit, though it does no harm, either. Suppose that the judiciary is (entirely) Democratic. Putting aside bargaining costs, judicial review has a great deal of benefit because the legislature can enact only fair and efficient statutes. If the judiciary is divided equally between the two parties, it produces an intermediate level of benefit when the legislature is Republican and when the legislature is Democratic.

The ideal appointments process, then, would ensure that the judiciary is always uniform and always belongs to the opposite party of the legislative majority. In practice, there is no way to ensure that a uniformly opposite-party judiciary exists. It seems likely that a diverse judiciary—ideally, equally divided between the parties—is the best that one can hope for. With such a judiciary, there will be at least some opposite-party judicial review regardless of which party happens to be elected at time 1, as long as that party does not have the power to replace existing judges with its own judges at time 2.

Under the current system of appointments for federal courts, the best guarantee of a diverse judiciary is vigorous political competition, so that the parties alternate in power. Whichever party then happens to be in power at a given time knows that its legislation and other government actions face opposite-party judicial review with substantial likelihood. Judicial review is most valuable when the judiciary is diverse.

However, political competition has a cross-cutting effect. If vigorous political competition exists, then the party in power knows that it will not last long. In order to enact legislation that will not be immediately repealed as soon as the opposite party comes into power, it will restrain somewhat its redistributive impulses. Highly unfair laws have little chance to survive repeal; fair laws will survive repeal, most likely. Thus, it may be that political competition renders judicial review unnecessary even as it creates a judiciary that is more appropriate for judicial review.²⁴

There is a further problem, which is the assumption that judicial preferences are the same as those of the faction that appoints the judges.²⁵ The problem with this assumption is that popular opinion can change over time. Because the electoral cycle is so short, the parties' preferences will change with popular opinion, or lag it only slightly, because parties can obtain and retain power only by enacting policies that most voters

²⁴ Compare Stephenson's argument that judicial independence (and hence judicial review) requires political competition. See Stephenson, *When the Devil Turns*, *supra*.

²⁵ Rogers & Vanberg, *supra* at 452.

approve. However, for judges with lifetime tenure, at any given time their policy preferences may well lag those of the public and of existing parties. Indeed, that was the case in the *Lochner* era. Public opinion had shifted radically to the left as a result of the Depression; the Democratic party benefited from this shift in public opinion and indeed moved left itself; but the federal judiciary was mostly appointed at an earlier period, and thus was more conservative, and so resisted New Deal reforms that may well have been efficient or at least broadly socially desirable. Thus, judicial review can improve outcomes only if the politics of the judiciary is within the mainstream of the public, which in turn, given ordinary appointments practices, assumes that public opinion does not change radically in a short period of time.

E. Judicial Competence and Judges' Legislative Competence

The final issue concerns judicial competence. In the discussion above, judges act like legislators: judges, like legislators, evaluate the policy effects of statutes on the basis of their political preferences. They do not exercise any of the functions associated with judicial craft, specifically, the interpretation of legal materials and the discovery of facts (or the review of fact-finding by lower courts). Yet clearly judicial competence is a meaningful category of behavior distinct from legislative competence: if it were not, there would be no expectation that Supreme Court justices have legal education or experience. Longstanding debates about the competence of various judges, judicial quality surveys, studies that link judicial quality and economic outcomes—none of this would make any sense. Nor would the Senate's usual practice of taking into account the legal ability as well as the jurisprudential views of judicial nominees.²⁶ Ideologically reliable judges who lack competence may appropriately (from the perspective of co-partisans) veto harmful legislation, but they will also make a hash of desirable legislation that they uphold by issuing confusing, self-contradictory, or ambiguous interpretations and hence instructions to lower courts, litigants, and other affected persons and entities.

There is another aspect of competence, one that has played an important role in the legal literature. Judges who review statutes do not necessarily understand their effects.²⁷ In the model, they do not necessarily understand whether the statutes are efficient, nor whether they burden one faction more than the other. Because judges here play a legislative function, we can designate this aspect of their competence "legislative competence." If a judge lacks legislative competence, she may end up striking down statutes that benefit her faction and upholding statutes that hurt her faction. Judges' lack

²⁶ See Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. Pol. 296 (2006).

²⁷ See, e.g., Stephenson, *Price of Public Action*, *supra* at 4-8; Adrian Vermeule, *Judging Under Uncertainty* (2006).

of legislative competence adds noise to the system, reducing the beneficial aspects of judicial review.

Judges can be evaluated along three dimensions, then: ideology, judicial competence, and legislative competence. It is reasonable to assume that if those who appoint judges limit themselves to ideological considerations and legislative competence, then judicial competence will suffer. The most judicially competent judges will not necessarily belong to the majority party, and either they will not be appointed or they will be appointed only if elected officials care more about their judicial skills than their political disadvantages. The lesson is that if people who have legislative competence and people who have judicial competence are generally not the same, then judicial review involves a tradeoff between the two: courts that can effectively review statutes may gum up the legal system, and courts that keep the legal system running smoothly may interfere with socially desirable legislation. This conclusion might account for the existence in many countries of separate constitutional courts that evaluate or advise on the constitutionality of legislation only, and have limited or no power to adjudicate disputes.

F. Some Lessons

We can now gather together the strands of the argument. Legislative outcomes can be improved though the involvement of the judiciary, even one with biased judges, when:

1. Bills are enacted through simple majorities, or weaker rather than stronger supermajority rules;
2. The appointments process and party competition generate partisan diversity in the judiciary;
3. Public opinion is relatively uniform over time;
4. Legislative bargaining costs are low;
5. Judicial competence is relatively unimportant, or complementary with legislative competence;
6. Judges' legislative competence is high.

Not all of these conditions need to be satisfied in full for judicial review to be desirable; the desirability of judicial review depends on relative magnitudes. These

lessons will guide us as we evaluate the various reform proposals that have been motivated by concerns about judicial bias.

II. Reform

Scholars concerned about judicial bias have proposed numerous reforms that are designed to reduce the level of bias or limit its impact. Many of these reforms are addressed to legislatures or constitutional designers, but a few are addressed to judges themselves. For example, some scholars urge judges to exercise a higher level of deference when reviewing statutes and regulations so that their own biases will not affect outcomes.²⁸ This raises the question why biased judges would agree to limit the impact of their own biases.²⁹ The best answer draws on the distinction between explicit and implicit biases. Judges who lack explicit bias and are not aware that their implicit biases affect outcomes might agree, once their attention is drawn to this fact, to employ doctrines that limit the influence of their implicit biases. High courts judges might also adopt such doctrines in order to reduce the influence of the biases of lower court judges.

A. Appointment

Commentators worried about judicial bias have urged the president and the Senate to avoid using ideological filters and instead to appoint judges who have proven competence and ideological moderation. A similar debate has taken place at the state level. Critics of judicial elections argue that elected judges will implement partisan goals. Many critics advocate versions of the merit plan, where bipartisan or nonpartisan commissions vet or nominate judges.

One can immediately see that the debate puts excessive weight on the problem of judicial bias. If judicial bias can block socially undesirable statutes, then reform of the appointments process that reduces the partisan bias of judges will be unnecessary.

Of course, the problem is more complex. First, a preliminary question is whether the legislative process—in the federal government, or any particular state—lacks the optimal level of supermajoritarianism, such that efficient statutes are enacted and unfair statutes are blocked. If the legislative process is insufficiently supermajoritarian, and if it cannot be reformed directly, then a biased judiciary may well be desirable, in which case reform of the appointments process designed to reduce bias would be undesirable. If the legislative process strikes the right balance, then it may well be desirable to reduce

²⁸ See, e.g., Miles & Sunstein, *Do Federal Judges Make Regulatory Policy?*, *supra*.

²⁹ Often called the “determinacy paradox”; see Brendan O’Flaherty and Jagdish Bhagwati, *Will Free Trade with Political Science Put Normative Economists out of Work?*, 9 *Econ. & Pol.* 207 (1997).

judicial bias, but an even better reform would be to reduce or eliminate judicial review altogether.

Second, the merits of reform of the appointments process depend on the background of political competition. If political competition is healthy—as it is in the national government, but not in all states—then the ideological bias of particular judicial nominees is a matter of limited concern. Extremists appointed by the party in power will be balanced by extremists appointed by the other party once it takes power, and in the aggregate the judiciary itself will remain relatively moderate.

Third, one needs to understand whether ideological extremism “crowds out” judicial competence. Partisan judge-appointers presumably care not only about the ideological views of nominees, but also their legislative competence and judicial competence. If judges lack legislative competence, they cannot be depended on to exercise review in a manner that advances the party’s interest, and if they lack judicial competence, they will create unnecessary social costs. The question, then, is whether the pool of ideologues who have both judicial and legislative competence is large or small. If large, then judicial competence will not suffer, and reform intended to reduce the influence of ideology will produce few or no benefits.

To see why these factors matter, consider a series of “awards” that Miles and Sunstein have recently bestowed on four Supreme Court justices, based on their votes in cases involving the review of decisions of four agencies from 1989 to 2005.³⁰ According to their data, Justice Kennedy wins the Judicial Neutrality Award because his votes were least partisan, while Justice Thomas wins the Partisan Voting Award. Justice Breyer wins the Judicial Restraint Award because he was least likely to reverse an agency decision, while Justice Scalia wins the Judicial Activism Award. Although Miles and Sunstein refrain from making explicit normative judgments, it is clear that only two of the awards were ones that a judge would ever want, and they were so interpreted by their critics.³¹

However, it should now be clear that evaluating justices is more complicated than counting up their liberal and conservative votes. Suppose that Scalia and Thomas are simply exercising their quasi-legislative veto in a manner that protects Republicans from regulations that unfairly redistribute resources to Democrats. And suppose that Breyer has failed to protect Democrats in a similar way. Scalia’s activism and Thomas’s

³⁰ Thomas J. Miles & Cass R. Sunstein, *Who Are the Bench’s Judicial Activists?* (2007), available at: <http://www.aei-brookings.org/policy/page.php?id=299>.

³¹ See, e.g., Edward Whelan, *Judicial Activism Awards Fixed!*, L.A. Times, Oct. 24, 2007, available at: <http://www.latimes.com/news/opinion/la-oww-whelan24oct24,0,3706916.story?coll=la-opinion-center>.

partisanship force Democrat-controlled agencies to issue regulations in the public interest, whereas Breyer's passivity permits Republican-controlled agencies to issue partisan regulations. How one evaluates these justices must depend on a prior judgment about how agencies behave, how easily agencies and Congress can design rules that benefit both parties, and the other factors I have been discussing.

A final point concerns merit plans. Merit commissions are supposed to appoint non-ideological judges, but more plausibly they appoint people who share the ideology of the members of the merit commissions. We might expect this ideology to be "moderate," that is, in the middle of the distribution of political preferences, because merit commissions are often created through bipartisan cooperation or delegation to experts. The danger here is that the ideology of the professionals who dominate such commissions might, especially over time, drift away from that of the median member of the public. The benefit of appointments by elected officials, or direct election of judges, is that these processes ensure that preferences of the judiciary on average do not deviate too far from those of the public.

B. Procedures: Mandatory Mixing of Panel Membership

Observing that appellate panels issue more ideologically extreme judgments when their partisan composition is uniform, Miles and Sunstein argue that panel selection should be designed so that panels are, as much as possible, ideologically diverse.³² For example, if an appellate court has six Republicans and six Democrats, then it would be better if all the panels are RRD or DDR, than if some panels are RRR and others are DDD. Similarly, Schanzenbach and Tiller argue that ideologically diverse circuit court panels should review the sentences meted out by federal district judges.³³

From the perspective of the individual litigant, these proposals may make good sense. But their costs also need to be considered. Take Miles and Sunstein's proposal and consider an appellate court that has 3 Rs and 2 Ds. If panel assignments are random, and all judges serve on the same number of panels, then on average a panel will have a Democratic majority 30 percent of the time.³⁴ If panels must be ideologically mixed, then the RRR panels will have to be eliminated, and the Republican judges will have to sit more often with Democrats. On average, a panel will have a Democratic majority only 20

³² Miles & Sunstein, *Real World*, *supra*.

³³ Schanzenbach & Tiller, *supra* at 39.

³⁴ The formula is $n!/[k!(n-k)!]$, where n is the number of judges and k is the number of slots. In the example, there are 10 combinations, of which 3 can have a Democratic majority.

percent of the time.³⁵ A Republican legislature thus will expect less opposition in the judiciary under Miles and Sunstein’s proposal, while a Democratic legislature will expect more opposition in the judiciary. That is, holding constant the composition of the judiciary, Republican statutes would face judicial opposition 20 rather than 30 percent of the time, while Democratic statutes would face judicial opposition 80 rather than 70 percent of the time.

From the perspective of efficiency, this result is ambiguous. Republican statutes would be less efficient while Democratic statutes would be more efficient. But assume that there is an optimal level of de facto supermajoritarianism, and that this level will be invariant with respect to the party of the legislative majority; then it is troubling that the mixed panel system would widen the difference between the de facto rules for the different parties. From the perspective of fairness, the mixed system will injure whichever party has fewer judges. If the judiciary has more Republicans than Democrats, Republican statutes will fare better even with randomization; but this tendency will be magnified if panels must be ideologically mixed, as the latter results in fewer panels with a majority of Democrats than under the random system. In short, the problem is that if the judiciary has more members from one party than from the other—and it almost always will—the requirement of mixed panels would, on average, magnify the partisan bias by allowing the majority party to avoid “wasting” a judge as a third partisan on a panel that already has a two-judge majority from that party.³⁶

The model, then, highlights the costs of the mixed panel proposal. It does not, however, prove that the proposal is a bad idea. The benefit of mixed panels, according to Miles and Sunstein, is that they reduce the risk of polarized voting, which results in extreme outcomes. To evaluate this argument, one would need to know more about the nature of extreme outcomes. Suppose that an extreme panel strikes down any opposite-party statute that imposes costs on the panel’s party, while a moderate panel strikes down only opposite-party statutes that impose very high costs on the panel’s party. If this is the case, and if legislative bargaining costs are low, then extreme panels are actually better than moderate panels, and Miles and Sunstein’s mixed panel proposal would be perverse.

However, suppose that an extreme panel strikes down efficient opposite-party statutes that create benefits for the panel’s party, perhaps because these benefits are not

³⁵ If one eliminates the panel with RRR, then Democrats will serve on more panels than Republicans will. To fix this problem, one needs to create six more panels with two Republicans and one Democrat, yielding the figure in the text.

³⁶ To be sure, the strongest evidence of panel effects—where the difference between RRD and DDR is relatively small, while the differences between RRR and RRD, and DDD and DDR, are relatively large—implies that the gains from mixing exceed the costs. (See also Revesz, *supra*; Cross & Tiller, *supra*.) But, as I will momentarily discuss, extreme outcomes from both sides might be better than moderate outcomes.

high enough, while a moderate panel upholds any statute that creates benefits for the panel's party. If this is the case, then extreme panels are most likely undesirable. Even then, however, to evaluate the mixed panel proposal one would need to compare the benefits from reducing the frequency of extreme panels, and the costs of reducing the frequency of "majority-minority" panels. How these benefits and costs work out in the aggregate is by no means obvious.

The same point can be made about Schanzenbach and Tiller's proposal. Whenever a circuit has a majority of judges of one party, the minority-party judges will need to be spread more thinly in order to ensure ideological diversity in panels that review sentences. Either those judges will need to work more than the majority-party judges (which is unlikely), or there will have to be fewer "majority-minority" panels. In the latter case, the effective ideological diversity of the circuit will be reduced, with possibly negative effects on the sentencing practices of district judges.

C. Judicial Review of Statutes

Recent criticisms of judicial review focus on only two of the factors that we have discussed: the danger of judicial bias and judges' alleged legislative incompetence. Concerns about judicial bias are longstanding: critics of Lochnerism argued that the judges substituted their conservative policy preferences for the liberal preferences of the Roosevelt government and many state legislatures. In recent years, scholars have argued that judges lack the competence for evaluating legislation. Judges are lawyers, and however skilled in legal reasoning, they have limited knowledge of government, public opinion, and the tradeoffs that politicians must make.³⁷ And if judges are biased, the case for judicial review is further weakened.³⁸

As we have seen, however, bias by itself is not an argument for abolishing or limiting judicial review. And legislative incompetence on the part of judges would justify abolishing or limiting judicial review only if it is extreme. More realistically, judges' legislative competence is less than that of professional politicians, but it is not zero.

The case for abolishing or limiting judicial review must rest on a more comprehensive account of the political system. As we have seen, in a second-best world where the legislative process is insufficiently supermajoritarian, judicial review might supply the extra votes that compensate for this defect in the legislative process. To be sure, for judicial review to be desirable, other factors must be in place. Legislative

³⁷ Vermeule, *supra*.

³⁸ *Id.* at 257-58.

bargaining costs must be low enough; otherwise, judicial review would block some desirable statutes. And public opinion must change sufficiently slowly.

This case for judicial review is empirical, and more information is needed before it can be evaluated. Analytically, it will seem foreign to legal scholars, and I will discuss its relationship to conventional legal debates about judicial review in Part III.

D. Judicial Review of Regulatory Agency Action

Under current doctrine, courts defer to agencies' reasonable interpretations of relevant statutory authority and to agencies' fact-finding. Defenders of this doctrine invoke the agencies' superior expertise and accountability. Agencies are staffed with experts, whereas courts are generalists; therefore, courts should not second-guess judgments made by agencies within their expertise. And agency heads are appointed by the president and can be fired, whereas judges have lifetime tenure. Presidents (and Congress) pressure agencies to act in the public interest; courts have no incentive to do likewise. As evidence of judicial bias accumulates, the case for limiting the role of politically insulated courts strengthens. If judges are not impartial, then judicial review just substitutes the political preferences of insulated judges for those of the more politically accountable agencies. Hence, on the basis of their empirical research, Miles and Sunstein argue for greater deference to agencies' interpretations of their authorizing statutes and to agencies' fact-finding.³⁹

All of this is plausible but it is only part of the story. In terms of the model, the agency takes on the role of the legislature, and issues regulations while anticipating judicial review. Note an important difference between agency regulation (in the case of executive-branch agencies, not independent agencies⁴⁰) and congressional legislation. With divided government, agency action does not have to exceed a supermajority threshold: in the best case, the agency will serve the interest of the majority that elected the president. Congressional action, by contrast, does: it must satisfy enough people in the two parties that jointly control both houses of Congress and the presidency. Thus, the case for a judicial check on agency action is stronger than the case for judicial review of statutes. From this *ex ante* perspective, the agency is more likely to issue efficient and fair regulations if opposite-party judicial review is likely. So bias in judicial review is not necessarily bad; indeed, opposite-party bias can be good. Greater judicial deference would then be inadvisable.

³⁹ See *supra*.

⁴⁰ See below.

To be sure, there are arguments on the other side. One might question whether agencies are truly majoritarian because agency heads are appointed by the president. Congress exerts influence on agencies by requiring them to comply with a statutory framework, and through funding and oversight. And agency heads depend on the agency staff, which itself consists of many people with long tenures, hired over the years by elected officials with different partisan commitments. And if it is true that agencies issue highly biased regulations because the latter need not pass through a supermajoritarian process, then this might be corrected in other ways. The legislative veto is one such way, but has been declared unconstitutional.⁴¹ A legislative veto would deter agencies from taking biased actions when the congressional chamber that wields the veto is dominated by the opposite party.⁴² But supermajoritarian rules could be built into the agency's decisionmaking process; and when agencies are required to have bipartisan leadership, as is the case with independent agencies, bias is also reduced.

In addition, one needs to take account of the other factors identified by the theory. Suppose, for example, that "legislative bargaining costs" (here, the cost to the agency of producing regulations) are low. Because the agency can easily devise a fair regulation, it need not fear hostile judicial review, and regulatory outcomes are superior. Whether this is in fact the case is hard to say. On the one hand, issuing a regulation is surely less difficult than enacting a statute; on the other hand, agencies have fewer instruments (like cash transfers) than Congress to ensure that regulatory outcomes are fair. But if legislative (that is, agency) bargaining costs are low, then the judicial check is desirable.

On the other side, defenders of deference are right to point to the problem of relative competence. When agencies make policy, they have a clear advantage over judges who lack legislative competence. And when agencies sift facts, they also have an advantage over judges who lack familiarity with agencies' areas of expertise.

E. Statutory Interpretation

Courts interpret statutes in the course of constitutional adjudication and agency litigation, but they also interpret statutes in other contexts. In the literature on statutory interpretation, concerns about political bias again play a role. Justice Scalia, for example, defends textualism partly on the ground that if judges focus on the text of the statute and ignore more ambiguous sources such as legislative history, their political biases will have

⁴¹ *INS v. Chadha*, 462 U.S. 919 (1983).

⁴² Cf. Eskridge & Ferejohn, *supra*. They argue that the legislative veto constrains agencies and hence the president, to choose regulatory policy closer to the preferences of Congress (at least, the Congress in power, not the Congress that enacted the relevant statute), a result which, they claim, is closer to the original allocation of powers in the U.S. Constitution.

less influence on statutory interpretation.⁴³ Implicit bias has less room to operate; and judges motivated by explicit bias can be more easily criticized or reversed (by unbiased judges, if there are any).

The story should now be familiar. Biased statutory interpretation is not necessarily objectionable. If legislatures, anticipating such bias, design statutes so as to impose fewer costs on the minority, or refrain from issuing inefficient statutes, then legislative outcomes are improved. The case for textualism is weak when the legislative process is characterized by insufficient supermajoritarianism and low legislative bargaining costs, and judges have high legislative competence.

The point is not that one should choose a form of statutory interpretation that maximizes the scope of judicial bias. At the extreme, judges would not interpret statutes at all, and just substitute their policy preferences for those of the legislature. A great deal would be lost, including the predictability and efficiency of the legal system. Rather, the point is that when comparing different types of statutory interpretation that provide different amounts of room for judicial bias, one needs to understand that the costs of judicial bias depend on many different features of the legal system.

F. Judicial Term Limits

A number of scholars have criticized the system of lifetime tenure for U.S. Supreme Court justices, arguing that shorter terms would be more consistent with democratic values. In fact, high court justices in most states and foreign countries have limited terms. In the most comprehensive recent effort, Calabresi and Lindgren argue that term limits would enhance “democratic accountability,” but they also acknowledge that they would reduce “judicial independence,” and they do not explain why this tradeoff favors term limits rather than lifetime tenure.⁴⁴

Term limits have two main effects. First, they bring the average judge’s political preferences closer to that of the median voter when public preferences change over time. One avoids the situation where a judge appointed thirty years ago shares the preferences of people who lived 30 years ago rather than people alive today. This is essentially Calabresi and Lindgren’s concern about democratic accountability; what they omit is that the magnitude of this concern depends on how much preferences change over time (and

⁴³ Antonin Scalia, *A Matter of Interpretation* (1997).

⁴⁴ Calabresi & Lindgren, *supra* at 809-13. They also argue that term limits would reduce the politicization of the confirmation process by reducing the stakes, and minimize the problem of mental decrepitude on the court.

they might not change very much). One suspects that a judge with 30-year old preferences has more in common with the median voter in 2007, than in 1975 or 1935.

Second, term limits reduce the probability that the judiciary's preferences will diverge from those of the legislative majority. To see why, imagine that the legislature is in power for four years. If the judicial term is four years or fewer, and judges are appointed at the beginning of the legislature's term, then the legislative majority can ensure that all judges belong to its faction. If the term is longer, then the new legislature will face earlier appointed judges, some of whom may belong to the opposite party. Staggered terms can have a similar effect. Thus, with term limits, the judiciary will be less likely to block inefficient and distributively unfair statutes.

In sum, evidence of judicial bias should lead one to endorse term limits only if one already believes that judicial review is excessive—because the legislature operates through supermajorities, legislative bargaining costs are high, and judges' legislative competence is low. Otherwise, judicial bias is socially beneficial, and the case for term limits would depend on the further showing that judicial preferences lag public preferences significantly and public preferences change rapidly.

III. Theories of Judicial Review

Constitutional theorists have offered a smorgasbord of theories justifying and criticizing judicial review. Simplifying greatly, we can identify the following. (1) Originalism, which directs courts to strike down statutes that violate the original meaning of the constitution;⁴⁵ (2) common law constitutionalism, where courts strike down statutes that violate evolving constitutional values and norms;⁴⁶ (3) process-based theories, which direct courts to strike down statutes that discriminate against politically vulnerable groups;⁴⁷ (4) Thayerism, which directs courts to uphold statutes except in unusual cases;⁴⁸ and (5) minimalism, where courts uphold statutes by avoiding constitutional issues except when they are unavoidable.⁴⁹

The literature assumes a normative framework that, at first sight, appears entirely different from the one used here. Constitutional lawyers generally assume that the Constitution establishes the general structure of government, secures fundamental values,

⁴⁵ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

⁴⁶ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996). Related is perfectionism, see Ronald Dworkin, *Law's Empire* (1986), which, however, puts more emphasis on the role of external moral commitments in influencing legal development.

⁴⁷ See John Hart Ely, *Democracy and Distrust* (1980).

⁴⁸ See Vermeule, *supra* at ch. 8; Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

⁴⁹ See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

and protects vulnerable minorities. Scholars who favor aggressive judicial review believe that political agents would abuse their power, violate fundamental values, and exploit vulnerable minorities, unless they are restrained by courts. Critics of judicial review have, for the most part, argued that judges lack the power, motivation, or ability to serve this role, and that, in any event, public opinion and political competition ensure that serious constitutional violations are relatively unusual (or perhaps cannot be prevented). Cutting across these positions are significant disagreements about what the Constitution actually requires, and whether its meaning is fixed or evolves.

But there is another way of looking at judicial review, one more familiar from the political science and economic literatures but virtually unknown in legal scholarship. Courts are majoritarian institutions; their *raison d'être* is not to protect minorities *per se*,⁵⁰ but to ensure that political competition yields socially desirable legislation. The legislature has a simple role: that of enacting statutes that generate public goods. I define this term in the broadest possible sense, so as to include redistributive schemes that the public generally approves (for example, to the poor) and rules that reflect “values” (such as regulations of abortion, again as long as the public generally approves). However, legislators also have an incentive to enact statutes that are inefficient and unfair: rather than generating public goods, they transfer resources to politically influential people or to the majority. In the simplified world of the model, we distinguish the party that has a majority in the legislature, which passes the statutes, and the party that is in the minority, whose constituents suffer. The role of judicial review, if any, is to discourage legislatures from enacting inefficient and unfair statutes, without also blocking efficient and fair statutes.⁵¹

Once one makes this shift in analytic focus, the different assumptions of the various theories of judicial review come clearly into view.

Supermajoritarianism and legislative bargaining costs. The theories that recommend aggressive judicial review—originalism, process-based theories, and common law constitutionalism—implicitly assume that the legislative process is insufficiently supermajoritarian: hence, undesirable statutes are too frequently enacted. They also assume that legislatures can easily redesign statutes so that they do not impose excessive costs on the minority. Critics of judicial review—minimalists and Thayerians—assume that the legislative process is sufficiently supermajoritarian and/or

⁵⁰ See Vermeule, *supra* at 241; Michael Klarman, What’s So Great About Constitutionalism?, 93 *Nw. U.L. Rev.* 145, 160-63 (1998).

⁵¹ An overlooked problem with judicial review is clear in this context: that if the legislature compensates the minority in a separate bill, the court might well overlook it, and think a statute is more unfair than the overall legislative outcome was.

legislative bargaining costs are high. In the literature, this difference is reflected in the gloomy attitude toward legislatures one finds in the first group of scholars, and the sunny attitude of the second group.⁵²

Appointments and political competition. Supporters of judicial review have found themselves on the defensive as the evidence of political bias in the judiciary has mounted. They have reacted mainly by demanding that the appointments process be depoliticized. But it is not clear that this demand is realistic. It turns out, however, that political bias in the judiciary does not necessarily undermine the case for judicial review. If legislative bias yields inefficient and unfair statutes because the legislative process is insufficiently supermajoritarian, and if legislative bargaining costs are low, then review of statute by biased judges may be socially desirable—and efforts to depoliticize the appointments process, which, even if feasible will carry their own costs, are unnecessary.

Public opinion over time. Here, we can differentiate the theories further. Common law constitutionalism and process-based theories take seriously the existence of intertemporal variation in public opinion. Common law constitutionalism permits judges to update the constitution in light of changing norms, while process-based theories allow elected officials to take account of public opinion as long as procedural values are respected. Originalism either assumes (unrealistically) that the formal amendment process can address this problem or (even more unrealistically) that public interests and values have changed little since the founding. Hence the first two theories authorize courts to take such changes into account, while originalism does not. Minimalism and Thayerism also take seriously intertemporal variation in public opinion—but by giving more power to elected officials.

Competence—judicial and legislative. The theories all make different assumptions about judicial and legislative competence. Thayerians assume that judges' legislative competence is zero or close to it. Minimalists assume a higher level of legislative competence, but low enough that judges should draw on it only when evasion of constitutional questions is impossible. Originalists also assume that judges' legislative competence is zero: in relying on the Constitution, they (ideally) rely entirely on judicial competence. Although originalists often put this assumption in terms of minimizing the influence of judicial bias,⁵³ the better point is that originalism does not require appointment of legislatively competent judges who might lack judicial competence. A powerful criticism of originalism is that this type of competence is really legislative, not judicial, given that the remoteness of the Constitution and its ambiguity allow free rein to judges' policy preferences. Process-based theorists allow judges to use legislative

⁵² See, e.g., Jeremy Waldron, *The Dignity of Legislation* (1999).

⁵³ Scalia, *Originalism*, *supra* at 863.

competence only to evaluate procedural statutes, and inasmuch as judges are supposed to be good at understanding procedure, perhaps the claim here is that such legislative competence can often be found in people who are judicially competent. The common law constitutionalist also take a middle position, arguing that judges predominantly draw on (common law) judicial competence, though in practice (one suspects) allowing them to make legislative judgments.

Understood in this way, the debate about judicial review is, to a great extent, an empirical debate, not a philosophical or even doctrinal debate. Progress can be made through empirical research on the variables that have been identified.

Conclusion: An Empirical Agenda

As we have seen, the merits of the various judicial reform proposals that have been motivated by concerns about judicial bias turn out to depend on many factors aside from judicial bias. These factors—the degree of supermajoritarianism in the legislative process, the extent to which the appointments process results in an ideologically diverse judiciary, the uniformity of public opinion over time, legislative bargaining costs, judicial competence, and the legislative competence of judges—are all difficult to measure, and indeed little is known about them. This contrasts with the enormous empirical literature on judicial bias. If that literature is to be put to good use, then empiricists will need to refocus their attention to the other factors.

In fact, some work has already been done and some more work can be easily done. Political scientists have already developed ways to measure majoritarianism in the legislative process. There is also much work on the relationship between appointments processes and the diversity of the judiciary. Public opinion, and the extent to which it changes over time, are easily measured. There is an increasing literature on judicial competence; little has been done on the legislative competence of judges, however. Measuring legislative bargaining costs will be a challenge, but one can look at how statutes change (if in fact they do) in response to changes in judicial personnel; scholars have already investigated the related issue of how and whether legislatures enact redesigned statutes after earlier efforts are struck down by courts.⁵⁴ Finally, a rich empirical literature written by public finance economists traces variations in the fiscal policies of American states to different constitutional and institutional structures.⁵⁵ These studies could also be performed with additional variables for the factors described in this paper—such as the level of judicial review of state statutes and the degree of bias in the state judiciary.

⁵⁴ William Eskridge, *Dynamic Statutory Interpretation* (1994).

⁵⁵ [to come]

We could imagine this research taking us in two directions. Suppose the following story turns out to be true. The U.S. Constitution establishes a strict supermajoritarian system. As a result of political competition, the branches are usually divided among the parties, with the result that majorities in both parties must usually approve legislation, or a supermajority of the public at large.⁵⁶ As a matter of tradition, the Senate itself is supermajoritarian, of course. The appointments process and party competition does not ensure that the judiciary is diverse. Public opinion fluctuates rapidly. Legislative bargaining costs (and this is a wild guess) are high because of weak party discipline, the large number of legislators, and the diversity of the American public that elects them. Judicial competence is important in a country with a highly developed market economy, a federalist structure that results in overlapping legal systems, and a common law system. And people with judicial competence rarely have legislative competence. If all these things are true, judicial review produces few benefits and many costs, and there is a strong case for reducing judicial review of statutes and other government actions. The problem is not so much judicial bias, as judicial review, and reform should be directed toward weakening judicial review.

The other possible story is that the system of judicial review has served us well. The political system is insufficiently supermajoritarian without it, and judicial review has corrected this deficiency. Public opinion changes slowly and legislative bargaining costs are low. People with judicial competence often have legislative competence. The appointments process and party competition ensure that the judiciary is diverse. If all these things are true, then judicial review is justified, even if the judges have political bias. In fact, judicial bias is essential for ensuring that judicial review creates *de facto* supermajoritarianism. Reform of panel composition, appointments, and tenure could, in principle, create marginal improvements—mainly by increasing the ideological diversity of the judiciary—but the mere existence of judicial bias, as documented in the empirical studies, would not provide a sufficient basis for such reforms.

Whichever direction the research takes, it becomes clear that judicial bias is only a small issue. If the evidence suggests that judicial review is desirable, then judicial bias is not a problem. If the evidence suggests that judicial review is undesirable, then judicial review should be reformed, whether or not the magnitude of judicial bias turns out to be high or low.

⁵⁶ See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703 (2002) (describing supermajoritarian aspects of the U.S. Constitution).

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