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Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal

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ESSAY

JUDGING AND SELF-PRESENTATION: TOWARDS A MORE REALISTIC CONCEPTION OF THE HUMAN (JUDICIAL) ANIMAL

REVIEWING:

LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR

Bradley W. Joondeph*

INTRODUCTION

For many years, three models of judicial behavior have dominated the field of political science: the legal model, the attitudinal model, and the strategic model. As their names imply, these models posit three different determinants of judges' decisions: (1) their understandings of what the law requires, (2) their attitudes (or preferences) about sound public policy, or (3) the strategic moves they perceive necessary, in light of various constraints, to best further their legal or policy preferences. Over the past half century, scholars have spilled a great deal of ink skirmishing over which of these models best explains judicial decision-making,

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especially that of the Supreme Court. And obviously, these models differ substantially in their conceptions of judicial behavior. But it is worth recognizing that each model proceeds from a common premise: A judge's principal motivation in decision-making is to see her vision of sound law or policy adopted. Indeed, all three models presume that this is a judge's *exclusive* goal.

Lawrence Baum's *Judges and Their Audiences* challenges this basic premise.[1] Baum readily admits that judges care about legal policy (whether we characterize it as law, public policy, or both), and that this interest explains much of their decision-making, especially at the Supreme Court. But he argues it is extraordinarily unrealistic to assume that legal policy is the *sole* motivation for their behavior. Even at the Supreme Court, where judges probably enjoy the greatest latitude to pursue their policy preferences, other powerful motives come into play, motives common to all human beings.

Relying on a wealth of research from social psychology, Baum contends that human beings are strongly driven to maintain and enhance their self-esteem. Moreover, our self-esteem depends on our social interactions, such that our perceptions of ourselves turn largely on how others view us (or, more accurately, how we perceive others view us). As a result, humans constantly engage in a process of "self-presentation," consciously and subconsciously managing the impressions we make on others. And the opinions of those people with whom we strongly identify—our salient audiences—are critical to our self conceptions. Baum therefore argues that a judge's interest in the regard of salient audiences influences her behavior, including the content of her decisions.

The basic thesis of *Judges and Their Audiences* is well grounded in what psychologists have long known about the human animal and thus seems unassailable. Of course, one might nit-pick about some details. For instance, in a certain sense, Baum may not take his perspective of psychological realism quite seriously enough. Part of his argument as to why the dominant models of judicial behavior are unrealistic is that, because judges can only have a marginal impact on

1. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

legal policy, it would be irrational for them to spend much time pursuing their policy preferences, especially in a strategic manner. But research in social psychology demonstrates that human beings generally have an inflated sense of control over events in their lives, and that this illusion of control strongly influences their behavior. Moreover, many of the shifts in positions that judges might make in response to various political constraints, as predicted by the strategic model, could occur subconsciously, rendering the effort less of a hassle than Baum suggests.

But these are minor quibbles. The essential idea that Baum advances seems indisputable: Judges, like all human beings, are endowed with a powerful desire to maintain an affirming self-concept, and this aspect of their humanity affects their behavior. Indeed, it seems fantastic to think that judges are somehow immune from psychological forces that apparently occupy all of our interiors.

While *Judges and Their Audiences* offers several insights important to the field of constitutional politics, two particular contributions stand out. First, Baum's explanation of how judges play to certain audiences provides an additional reason that the prevalent views at the Supreme Court tend to mirror those of the ascendant national political coalition. Since Robert Dahl's seminal 1957 article, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,"[2] many scholars have contended that the Supreme Court's decisions generally reflect the values of the governing political regime. They have pointed to two institutional arrangements—the process by which justices are appointed to the Court, and the Court's institutional dependence on the elected branches—as the mechanisms supporting this relationship. *Judges and Their Audiences* alerts us to a third: Regardless of the ideological preferences the justices bring to the Court, or any strategic reasons they might have to mind the views of Congress, the President, or the general public, the justices' desire to impress their salient audiences will nudge the Court in the direction of currently ascendant political values, especially those of the nation's elites.

Second, and more generally, Baum's book points us in the

2. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

promising direction of bringing greater psychological realism to the study of American constitutional development. Social psychology and related fields can teach us a great deal about judicial decision-making. In particular, they have demonstrated that the situational influences on human decision-making are far more important than we tend to realize, and that our typical, dispositionist conceptions of human agency are highly misleading.[3] We are psychologically primed to attribute decisions to individual preferences, attitudes, and autonomous choices. But much of what drives human behavior is unfelt and unseen, forces lurking in our invisible interiors and in overlooked external situations. All things considered, the human animal is more of a "situational character" than a "rational actor."[4] *Judges and Their Audiences* marks a significant step towards the incorporation of these insights into our understanding of judicial decision-making. It expands our field of vision beyond judges' personal attitudes and preferences about legal policy to the significant situational influences, both internal (judges' largely unfelt yearning for self-esteem) and external (the views of various audiences quite removed from constitutional adjudication).

Judges and Their Audiences should open a new research frontier in the field of public law, one devoted to examining the various situational influences on judicial decision-making. And this new agenda should lead us to a much more realistic, finely grained understanding of judicial behavior.

I

A basic premise of the dominant models of judicial behavior is that a judge's only goal is to shape the content of

3. *See, e.g.*, SUSAN T. FISKE, SOCIAL BEINGS: CORE MOTIVES, IN SOCIAL PSYCHOLOGY 7 (2004) ("Social behavior is, to a larger extent than people commonly realize, a response to people's social situation, not a function of individual personality."); PHILIP ZIMBARDO, THE LUCIFER EFFECT 8 (2007) ("Most of us have a tendency both to overestimate the importance of dispositional qualities and to underestimate the importance of situational qualities when trying to understand the causes of other people's behavior."); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 22 n.69 (2004) ("We are moved far more by forces that we do not appreciate than we realize and far less by forces to which we attribute behavior than we realize.").

4. *See* Hanson & Yosifon, *supra* note 3, at 22.

the law, public policy, or some combination of the two. (Baum refers to these three possibilities collectively as "legal policy."[5]) Of course, most scholars who defend these models would readily admit that, at least on some occasions, other motives come into play, such as career advancement.[6] But such episodes are generally considered exceptional and intermittent, at least for unelected judges. Thus, the dominant models ignore them and assume that judges act single-mindedly—sincerely or strategically—to pursue their visions of sound legal policy. This assumption would seem particularly apt for Supreme Court justices, who apparently have little else to pursue.

Judges and Their Audiences challenges this conception of judicial motivation, arguing that it is highly unrealistic. To Baum, common sense reveals that even the fairly mundane considerations of everyday life must affect judicial behavior, even at the Supreme Court. For example, the justices probably value a pleasant working environment in which they generally get along with each other. As Baum notes, they "would be an unusual group indeed if most of them did not prefer to minimize conflict."[7] This felt need to avoid friction in their professional interactions almost certainly affects their decision-making, if only in small ways.[8] Moreover, judges must consider their workloads in making various choices.[9] For instance, each Supreme Court justice might conceivably author her own opinion in every merits case decided by the Court. But no justice since the time of John Marshall has ever come close to doing so. Why? Even when the majority opinion or the principal dissent fails to capture a justice's exact views (as must typically be the case), they

5. *See, e.g.*, BAUM, *supra* note 1, at 9.

6. For instance, most observers of the United States Court of Appeals for the Fourth Circuit would concede that the behavior of judges J. Harvie Wilkinson and Michael Luttig was affected by their ambition to win appointments to the Supreme Court. *See, e.g.*, JAN CRAWFORD GREENBERG, SUPREME CONFLICT 200 (2007) (discussing the rivalry between Wilkinson and Luttig in connection with possible appointments to the Court); Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 40.

7. *See* BAUM, *supra* note 1, at 12 (citing Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003)).

8. *See id.*

9. *See* RICHARD POSNER, OVERCOMING LAW 123–26 (1995) (describing such practices as "going-along" voting and the "live and let live" joining of opinions as prominent examples of behavior that reduces judges' workloads).

usually decide that writing separately is not worth the effort. Even the most dedicated justice has other things to do, and she must draw some line that allows her to pursue those other objectives.

In the grand scheme of things, judges' interests in minimizing conflict with their colleagues and managing their workloads are probably not critical to the Court's role in the development of American law. But the existence of these motives nicely illustrates two of Baum's basic points: Judges necessarily have *some* goals other than shaping legal policy, and those goals inevitably influence their behavior. Of course, if certain influences are trivial or sporadic, there would be little reason to include them in parsimonious models of judicial behavior. As Baum acknowledges, a model must ignore many of the real world's complex details in order to provide any generalizable explanatory power. A model's "simplification of reality can be a virtue, because it makes analytic problems more tractable."[10] At some point, though, the costs of simplification become too great, and the accuracy of a model suspect. Hence Baum's essential thesis: By ignoring judges' desire to be liked and respected by various salient audiences, the dominant models are too unrealistic. They "implicitly treat one of the most fundamental human qualities as irrelevant to judges' choices."[11]

Judges and Their Audiences is built around three basic propositions. The first is that "[p]eople want to be liked and respected by others who are important to them."[12] As Baum explains, humans are highly motivated to maintain and enhance their self-esteem. We have a basic need "to feel good about ourselves,"[13] a need that may be "the most fundamental" aspect of our humanity.[14] Moreover, "an individual's self-concept does not develop in isolation from

10. BAUM, *supra* note 1, at 19.

11. *Id.* at 22.

12. *Id.* at 25.

13. BAUM, *supra* note 1, at 26 (quoting JONATHAN D. BROWN, THE SELF 193 (1998)).

14. *Id.* at 26. As two psychologists have explained, "in a discipline with few universally accepted principles, the proposition that people are motivated to maintain and enhance their self-esteem has achieved the rare status of an axiom." Mark R. Leary & Deborah Downs, *Interpersonal Functions of the Self-Esteem Motive: The Self-Esteem System as a Sociometer*, *in* EFFICACY, AGENCY, AND SELF-ESTEEM 123 (Michael H. Kernis ed., 1995) (quoted by BAUM, *supra* note 1, at 26).

other people."[15] Instead, a human being's identity is shaped by the perceptions of others and her sense of those perceptions: "Even a person's most basic sense of his or her own existence seems to depend on interactions with others."[16] And this fundamental "need for others to validate people's self-conceptions does not end at some point."[17] Instead, "it continues throughout life."[18]

As one might expect, our self concepts are most affected by the opinions of people with whom we strongly identify. As Baum explains, people have an innate "need to belong to some groups and to feel distinctive from other groups,"[19] and our membership or affiliation with these groups shapes our social identities. We define ourselves largely by the groups to which we belong (even if those affiliations are quite informal), such that our identifications with these groups are critical to our self-concepts.[20] These social identities, in turn, influence our self-esteem, as the regard of these salient groups affects our views of ourselves. That is, human beings are highly motivated to win the respect and admiration of the people with whom they identify—the people important to their social identities.[21]

Baum's second basic premise is that this desire to be admired and respected by our salient audiences affects our behavior.[22] Consciously and unconsciously, human beings behave in ways geared toward making favorable impressions on others. Psychologists call this "self-presentation" or "impression management," and it pervades our social interactions. Some self-presentation is plainly instrumental, intended "to gain something concrete from an audience," such as a reward or promotion.[23] But much of our self-presentation—and probably most of it—is personal in nature,

15. BAUM, *supra* note 1, at 26.

16. RICK H. HOYLE, MICHAEL H. KERNIS, MARK R. LEARY & MARK W. BALDWIN, SELFHOOD: IDENTITY, ESTEEM, REGULATION 31 (1999) (quoted in BAUM, *supra* note 1, at 26).

17. BAUM, *supra* note 1, at 26.

18. *Id.*

19. *Id.* at 27.

20. *Id.* at 28.

21. *See id.*

22. *Id.* at 25.

23. BAUM, *supra* note 1, at 28. This description would capture the behavior of Judges Wilkinson and Luttig in their rivalry on the Fourth Circuit. *See supra* note 6 and accompanying text.

performed for the sake of "popularity and respect as ends in themselves, not as means to other ends."[24] It is an essential part of our drive for self-affirmation: "When people perceive they have achieved a favorable image with others, that perception tends to boost their self-esteem."[25] What is more, people tend to internalize the images they present to others, such that "self-presentation helps people to create their identities."[26]

Third and finally, Baum asserts that, in these important respects, "judges are people."[27] The drive to maintain and enhance our self-esteem—and our reliance on social interaction to accomplish this goal—appears to exist in all of us, particularly in a relatively individualistic society like the United States.[28] As a result, appointment to the bench, even with life tenure, cannot inoculate judges from these features of our psychological interiors. Thus, the essential argument of *Judges and Their Audiences* is straightforward: The desire to be liked and respected, particularly by salient audiences, affects the choices that judges make. They "care about the regard in which they are held for its own sake," and this "interest in the esteem of others can be expected to influence their work as judges."[29]

To be clear, Baum flatly rejects the notion that judges' preferences about legal policy are irrelevant. He readily concedes that judges care deeply about legal policy, particularly at the Supreme Court; "[p]olitical scientists have amassed a large body of evidence indicating that Supreme Court justices seek to make good policy."[30] Baum also concedes that the justices (and other judges) often act strategically; "[i]ncreasingly [scholars] are amassing evidence of strategic action by the justices to secure good policy, especially in their interactions with other justices."[31] Rather, Baum's point is that the assumption that judges care

24. BAUM, *supra* note 1, at 29.
25. *Id.*
26. *Id.*
27. *Id.* at 25.
28. *See id.* at 26 n.1; *see also* FISKE, *supra* note 3, at 189–90 (discussing differences between European-American cultures and East Asian cultures in their ideas about the self).
29. BAUM, *supra* note 1, at 32.
30. *Id.* at 19.
31. *Id.*

exclusively about legal policy is too unrealistic.[32] Consequently, although "the leading models of judicial behavior teach us a great deal about why judges do what they do,"[33] their perspective is too narrow. By failing to consider judges' personal reasons for engaging in self-presentation, these accounts "miss much of the motivation that underlies judges' choices."[34]

To be fair, the existing models do not uniformly ignore the potential impact of audiences on judicial behavior. In fact, one could argue that the strategic model *is* an audience-based account, at least in important respects. The strategic model's critical insight is that sophisticated judges will consider the constraints of their institutional environment in pursuing their legal policy goals.[35] These constraints, in some sense, are no more than salient audiences, groups of people that have the power to frustrate a judge's legal policy goals. At the Supreme Court, for instance, they comprise a justice's colleagues, the Congress, the President, and the general public. A strategic justice is motivated to please these audiences, or at least to avoid alienating them, because each could potentially derail the justice's ultimate policy objectives.

To Baum, the problem with the strategic model's attention to audiences is that it assumes the justices' motives are purely *instrumental*: Judges take into account the views of various groups only "as a means to advance their goal of achieving good legal policy."[36] In contrast—and this is probably the book's most distinctive claim—Baum contends the justices "care about the regard in which they are held *for its own sake*."[37] They like being liked because it makes them feel good about themselves, regardless of the impact it might

32. *Id.* at 20 (the empirical evidence "does not establish that justices are motivated solely (or even overwhelmingly) by policy goals").

33. *Id.* at 21.

34. *Id.* at 29.

35. For some classic works in this tradition, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, *in* CONTEMPLATING COURTS 315 (Lee Epstein ed., 1995); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

36. BAUM, *supra* note 1, at 22.

37. *Id.* at 32 (emphasis added).

have on their capacity to shape legal policy.[38]

And if judges seek admiration for its own sake, the audiences that matter—and how much they matter—will differ from what the strategic model predicts. An audience's influence will turn not just on its capacity to frustrate a judge's policy goals, but also on its importance to the judge's social identity. In fact, Baum argues that a judge's purely personal interest in the approval of audiences will likely hold *more* influence than a judge's instrumental motives, at least if they are not subject to election.[39] Thus, Baum contends that Congress, the President, and the general public likely have a smaller impact on judicial decision-making than scholars generally presume.[40] While these audiences "are significant reference groups for some judges,"[41] "the most consequential audiences are likely to be those with the greatest relevance to judges' social identities, audiences whose bases for influence are chiefly personal rather than instrumental."[42]

One audience important for both strategic and personal reasons is a judge's colleagues on the same court. As a strategic matter, they are critical for the obvious reason that, at least on multi-member courts, a judge needs to win the votes of her colleagues for her legal position to prevail. But colleagues also "function as a true peer group, people who share the same position and work in the same situation,"[43] and they are the people with whom a judge typically interacts on a daily basis. Colleagues are thus a critical audience for assessing a judge's professional acumen and personal likeability. As a result, judges are apt to behave in ways that promote favorable impressions with their colleagues, even when doing so might sacrifice aspects of their legal policy goals. "Judges who deal regularly with their co-workers and professional colleagues are unlikely to treat those people solely as votes to be won."[44] For instance, if the stakes are low enough, a Supreme Court justice might join a majority

38. Of course, this behavior is still apt to produce results that judges generally find amenable, as they are likely to share the policy views of their salient audiences, a point Baum readily acknowledges.

39. *See id.* at 87.

40. *Id.* at 86.

41. *Id.* at 163.

42. *Id.* at 87.

43. BAUM, *supra* note 1, at 54.

44. *Id.* at 56.

opinion (or refrain from writing a separate concurrence or dissent) to avoid annoying a colleague. As Baum concludes, judges "want colleagues to perceive them as cooperative, as good team players,"[45] and their desire for such esteem can eclipse their interest in getting a decision that completely reflects their legal policy preferences.

Another audience Baum believes exerts a strong influence on judicial behavior—an audience entirely ignored by the strategic model—is a judge's social groups. By this, Baum means the people a judge associates with in her personal life: family, close friends, and personal acquaintances. These people are typically the most significant to a person's social identity and self-concept.[46] And because these groups "are so integral to people's sense of themselves, people have strong incentives to please members of these groups and to avoid alienating them."[47] Furthermore, given the frequency and intensity of judges' interactions with them, "family, friends, and acquaintances have ample opportunity to influence a person's ways of thinking about the world, including politics and public policy."[48]

As Baum acknowledges, the influence of a judge's social groups suggests that judicial decisions may disproportionately reflect the values of America's social and cultural elite. Judges generally, and federal judges particularly, tend to come from affluent, highly educated backgrounds, and they "usually have highly educated spouses, friends, and acquaintances."[49] For instance, Baum notes that nearly half of the federal judges appointed between 1993 and 2004 were millionaires.[50] If the opinions of these judges' social groups influence their thinking, judicial decisions will reflect the views of a cross-section of America quite different from the nation's population as a whole. (Consider, in this regard, the Supreme Court's relatively recent decisions in *Texas v. Johnson*,[51] holding that laws

45. *Id.* at 57.

46. *Id.* at 117 (a person's "self-esteem depends heavily on their perceptions of what these audiences think of them").

47. *Id.* at 89.

48. *Id.*

49. BAUM, supra note 1, at 90.

50. *See id.*

51. 491 U.S. 397 (1989).

prohibiting the burning of the American flag violate the First Amendment, and *Santa Fe Independent School District v. Doe*,[52] which invalidated a school policy permitting student-led prayers at high school football games.) Baum therefore argues that there was more than a grain of truth to Justice's Scalia's complaint in *Romer v. Evans*[53] that, by invalidating Colorado's anti-gay Amendment 2, the majority "impos[ed] upon all Americans the resolution favored by the elite class from which the Members of this institution are selected . . . ."[54]

Still another important judicial audience is fellow lawyers: other judges, law professors, and the practicing bar. Lawyers matter to judges because, as research shows, "[p]eople within any occupation orient themselves toward others in the same occupation."[55] Some of this is likely due to the frequency of their interaction; judges often speak with lawyers face-to-face, inside and outside the courtroom. But more of it is probably attributable to "the sense of a shared situation and a shared expertise."[56] As Baum explains, their common occupation means that "[l]awyers are the most regular and most expert critics of the judges' work, a role that enhances the importance of their esteem to judges."[57]

This is especially true of lawyers who have become fellow judges. Though a judge's immediate colleagues on her own court are likely her most salient professional audience, judges on other courts are probably next on the list. They share the judge's special status, and they do the same work. What is more, "judges have good opportunities to assess the work of other judges, especially because written opinions provide a basis for assessment that is readily available and widely read."[58]

Also significant, says Baum, are the opinions of legal academics. Law professors are "prominent evaluators of judges' work," and because of their prestige, "their evaluations of judges carry considerable weight."[59]

52. 530 U.S. 290 (2000).
53. 517 U.S. 620 (1996).
54. *Id.* at 636 (Scalia, J., dissenting).
55. *See* BAUM, *supra* note 1, at 97.
56. *See id.*
57. *See id.* at 98.
58. *See id.* at 103.
59. *See id.* at 100.

Professors' law review articles, books, and other commentary can strongly influence the enduring perceptions of a judges' reputation. Further, "law professors control sources of judicial satisfaction such as publication of opinions in casebooks and opportunities to lecture at law schools"—items that, at least for some judges, "constitute significant rewards."[60]

Baum contends that these social and professional audiences are typically the most important to judges, and thus most likely to influence their decision-making. But he argues at least two other audiences are worth considering: policy groups and the media. Baum defines policy groups as "sets of people who share particular policy positions or ideological orientations."[61] These groups might be organized as formal organizations, such as the Federalist Society or the American Constitution Society, or they may be "informal and less clearly defined,"[62] people who generally share certain political beliefs or ideological commitments. In either case, they can operate as important reference groups for a judge, such that "the judge has an incentive to take actions that those people approve."[63] Often judges have developed ties to groups before taking the bench; Justice Ginsburg, for instance, worked for the ACLU's Women's Rights Project for several years before her appointment to the Court of Appeals for the D.C. Circuit.[64] And judges frequently interact with policy groups after joining the judiciary; Justice Thomas, for example, has spoken at events sponsored by groups like the Federalist Society, the American Enterprise Institute, the Heritage Foundation, and the Eagle Forum.[65] Of course, because judges can pick the policy groups with whom they associate, these groups' independent influence on judges' choices might be small. But, as Baum explains, they may well work to "reinforc[e] judges' preexisting tendencies, so that judges support a group's interests more consistently than they would otherwise."[66]

60. *See id.*
61. BAUM, *supra* note 1, at 118.
62. *See id.*
63. *Id.* at 119.
64. *Id.*
65. *See id.* at 134.
66. *Id.* at 121.

The last audience Baum considers is the news media. Baum contends that the media's opinion might be personally important to judges for two reasons. First, the media is a conduit to other important groups.[67] Other than the judges' families and close friends, people learn about their work through coverage in the press. Thus, media portrayals of judicial decisions are critical to the impressions judges can make on many of the groups important to their social identities. Second, "what the news media say can be important to judges in itself, so that the media constitute a distinct judicial audience."[68] Media coverage typically provides judges immediate feedback on their work, and they must derive some enjoyment from reading positive performance reviews, regardless of the impact those reviews have on other audiences. These two different motives for garnering favorable press coverage will usually be intertwined, and "[t]his intertwining magnifies the impact of judges' concern with their portrayals in the media."[69] It is unsurprising, then, that archival research has uncovered evidence that Supreme Court justices have been keenly interested in media portrayals of the Court, or that justices have made various efforts to ingratiate themselves with journalists.[70]

This apparent interest in laudatory press coverage, particularly among Supreme Court justices, has not gone unnoticed. Indeed, many commentators claim that some of the justices have grown more liberal over their tenures on the Court due largely to their thirst for the admiration of a left-leaning national media. Thomas Sowell termed this the "Greenhouse effect," named after the longtime *New York Times* correspondent, Linda Greenhouse.[71] Scholars have generally scoffed at a supposed Greenhouse effect, perhaps because it sounds like a scapegoating of the media by disappointed conservatives. But Baum takes the idea seriously. For if the basic thesis of *Judges and Their*

67. BAUM, *supra* note 1, at 135.
68. *See id.* at 136.
69. *See id.* at 139.
70. *See id.* at 137.
71. Thomas Sowell, *Blackmun Plays to the Crowd*, ST. LOUIS POST-DISPATCH, Mar. 4, 1994, at B7; *see also* Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U.L. REV. 197, 199–200 (2005).

Audiences holds water, the existence of a Greenhouse effect would be unsurprising. That is, if the national media is indeed a salient audience for some justices, and if the media is generally liberal in its political orientation, we would expect a justice's interest in the media's approval "subtly to move the judge to the left."[72]

Baum therefore examines the question empirically. In fine, the Greenhouse effect hypothesis is that Republican Supreme Court appointees—and specifically, those who are newcomers to Washington, D.C.—will become more liberal over their time on the Court. Baum therefore divided the universe of justices appointed between 1953 and 1995 into three groups: (1) Republican appointees who were new to Washington, (2) Republican appointees with significant experience in Washington before joining the Court (and thus not expected to drift ideologically under the Greenhouse effect hypothesis), and (3) Democratic appointees (who were presumably already liberal at the time of their appointments). He examined the justices' votes in civil liberties cases, coding them as either liberal or conservative, and compared their records in their first two terms on the Court to those in periods later in their tenures.[73] If the Greenhouse effect is real, the Republican newcomers should have voted more liberally in the later periods than in their first two terms on the Court, and the change in their voting records should have been more pronounced than that of the other two groups.

Sure enough, Baum's findings were consistent with the existence of a Greenhouse effect: "In each analysis the Republican newcomers as a group showed substantial increases in their support for civil liberties claims between their first two terms and the later periods, about ten percentage points on all measures."[74] In addition, the change for Republican appointees new to D.C. differed from that for established D.C. Republicans or Democratic appointees, both of whom remained more consistent ideologically.[75] "Thus the Republican newcomers as a group stand out, and the

72. BAUM, *supra* note 1, at 142.

73. Specifically, Baum used terms five through ten and seven through ten of the justices' tenures on the Court. *See id.* at 143–44 & n.23.

74. *See id.* at 146.

75. *See id.* at 147–48.

differences between them and the other justices are highly significant statistically."[76] To be sure, these findings alone do not establish the existence of the Greenhouse effect.[77] But, as Baum concludes, "the hypothesis of a Greenhouse effect should not be dismissed out of hand. Judges want the approval of individuals and groups that are salient to them, and their interest in approval may affect their judicial behavior."[78]

What are the ultimate implications of this audience-based approach to judicial behavior? Baum identifies four. First, it can provide much of the motivational basis for the existing models of judicial decision-making. That is, the desire to win favor with a variety of salient audiences helps account for why judges actually care about legal policy, a fact the dominant models assume without explaining.[79] Second, it offers a new perspective from which to evaluate the ongoing debates in law and political science about the respective influences of legal doctrine, the judges' policy preferences, and the strategic calculations dictated by institutional constraints.[80] For instance, concern for the respect and admiration of fellow judges, legal academics, and the practicing bar could explain why judges often appear to care so much about legal doctrine, even to the detriment of their apparent policy preferences.[81] Third, an audience-based perspective might explain judicial behavior that does not fit well within the existing models, such as writing books and articles or sitting for interviews.[82] Though we could conjure some strategic rationales for these actions, the more straightforward explanation is that they are acts of personal self-presentation. Finally, taking audiences into account

76. *See id.* at 146.

77. For instance, these justices' ideological drift might have been the product of influences other than the media, their votes alone may not accurately capture their true ideological positions, or Baum's findings might be the product of random chance. *See id.* at 151.

78. BAUM, *supra* note 1, at 151.

79. *See id.* at 22–23, 158–59.

80. *See id.* at 23.

81. *See id.* at 160.

82. *Id.* at 175 ("Judges write books and articles that do not advance a policy agenda. They talk about pending cases in ways that jeopardize their participation in those cases. They write colorful opinions to attract attention, and they write opinions announcing they are unhappy with the decisions they have reached.").

"points to some new lines of inquiry into judicial behavior," such that "the scope of empirical research on the bases for judges' choices can be expanded."[83]

Of course, attempting to measure the impact of audiences on judicial behavior presents some methodological challenges, as Baum readily concedes. The salient audiences for each judge will likely differ,[84] so it will be difficult to identify the relevant groups, their substantive viewpoints, or their relative significance. This is particularly true for the groups Baum contends are the most consequential: a judge's family, friends, and personal acquaintances. Moreover, isolating the independent impact of audiences will be challenging, as the views of a judge's most salient audiences are apt to be quite similar to her own preexisting ones. [85] But these empirical hurdles do not warrant abandoning the effort. As Baum puts it, "eschewing the study of personal audiences for more tractable issues would be something like the choice of the man in the old joke who searches for his car keys not where he lost them but where the light is better."[86] In the end, "a conception of judging as self-presentation can help in our progress toward a better comprehension of judicial behavior."[87]

II

On balance, it is hard to find much fault in Baum's argument. Social psychologists have amply demonstrated that human beings are motivated to maintain and enhance their self-esteem or the possibility of self-improvement, a motive sometimes called "self-enhancement."[88] As a leading text in the field explains, "[a]ll else being equal, people basically like to feel good about themselves; they like to feel

83. *Id.* at 23.
84. BAUM, *supra* note 1, at 48.
85. *Id.*
86. *Id.* at 49.
87. *Id.* at 175.
88. *See* FISKE, *supra* note 3, at 22; *see also* David Dunning, *On the Motives Underlying Social Cognition*, *in* BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTRAINDIVIDUAL PROCESS 348, 354 (Abraham Tesser & Norbert Schwarz eds., 2001) ("If there is any theme that emerges again and again in social psychology it is that the [human being] is a prideful one."); Roy F. Baumeister, *The Self*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 680, 695 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998) ("it is clear that self-esteem is quite important to people").

that they are good and lovable."[89] Positive feedback gives us an instant sense of gratification.[90] Thus, as Susan Fiske and Shelley Taylor have concluded, people "are heavily influenced by the need to feel good about themselves and to maintain self-esteem."[91]

Moreover, the regard we have for ourselves depends heavily on our social interactions and our sense of how others perceive us.[92] As Mark Leary has written, "the primary determinants of self-esteem involve the perceived reactions of other people, as well as self-judgments on dimensions that the person thinks are important to significant others."[93] Consequently, "the self-esteem system is inherently sensitive to real and potential reactions of other people."[94] Indeed, events that are either known (or potentially knowable) by others "have much greater effects on self-esteem than events that are known only by the individual."[95] And this relationship between self-esteem and social interaction is nested within another, even more fundamental human motive: the need to belong.[96] The drive for belonging (or, conversely, for avoiding social exclusion) underlies the need for approval from others, and it seems to constitute an essential evolutionary adaptation.[97] As Susan Fiske has

89. FISKE, *supra* note 3, at 22 (citation omitted); *see also* ERNEST BECKER, THE STRUCTURE OF EVIL 328 (1968); JONATHON D. BROWN, THE SELF 193 (1998) (there is "a basic human need to feel good about ourselves"); Hanson & Yosifon, *supra* note 3, at 94–95; Jennifer Crocker & Lora E. Park, *Seeking Self-Esteem: Construction, Maintenance, and Protection of Self-Worth*, *in* HANDBOOK OF SELF AND IDENTITY 291 (Mark R. Leary & June Price Tangney eds. 2003); Mark R. Leary & Deborah Downs, *Interpersonal Functions of the Self-Esteem Motive: The Self-Esteem System as a Sociometer*, *in* EFFICACY, AGENCY, AND SELF-ESTEEM 123 (Michael H. Kernis ed., 1995).

90. *See* FISKE, *supra* note 3, at 22.

91. SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 212 (2d ed. 1991).

92. *See, e.g.*, Roy F. Baumeister, *The Self*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 88, at 682 ("the self is an interpersonal being"); Kristin Renwick Monroe, *A Paradigm for Political Psychology*, *in* POLITICAL PSYCHOLOGY 399, 400 (Kristen Renwick Monroe ed. 2002) ("it is the actor's perceptions of self *in relation to others*" that matters).

93. Mark R. Leary, *Making Sense of Self-Esteem*, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE (1999); *see also* FISKE, *supra* note 3, at 188 ("people (many Americans at least) seem to strive for self-enhancement in the sense of wanting to see themselves and be seen in a positive light").

94. *See* Leary, *supra* note 93.

95. *Id.*

96. *See* FISKE, *supra* note 3, at 17.

97. *See id.* at 10–11.

explained, people "seek social acceptance precisely because of social motives that have evolved to help them survive in groups—and to survive more generally."[98]

Because these are essential features of the human animal, people are more or less constantly engaged in a process of presenting themselves to others, consciously and unconsciously,[99] in ways intended to make favorable impressions.[100] This self-presentation is the means by which people "convey their preferred self-concept."[101] Most prominently, people present themselves in ways that seek ingratiation ("behavior to promote being liked") and self-promotion ("the goal to be seen as competent"),[102] modes that directly serve the motives of self-enhancement and group belonging. In general, it is the rare circumstance when human behavior is wholly unaffected by a concern for the perceptions of others, particularly along the dimensions of likeability and competence. We are "social to the core."[103]

To be sure, human beings vary in the attention they devote to the perceptions of others. Some of us are "high self-monitors," people who "are much more likely to do, not what they personally prefer, but what is necessary in the situation: what other people need for them to do or what is appropriate."[104] Others are "low self-monitors," people whose "attitudes guide their behavior more than for other people because they do what they believe in, what they want to do, and what they like."[105] The judiciary surely includes a range along this spectrum. While Justice O'Connor always seemed well attuned to her reputation and image,[106] for instance, Justice Souter often seems oblivious.[107] Still, these

98. *Id.*

99. *See* Tanya L. Chartrand & John A. Bargh, *Nonconscious Motivations: Their Activation, Operation, and Consequences*, *in* SELF AND MOTIVATION: EMERGING PSYCHOLOGICAL PERSPECTIVES 13–41 (Abraham Tesser, Diederik A. Stapel & Joanne V. Wood, eds., 2002).

100. *See generally* MARK R. LEARY, SELF-PRESENTATION: IMPRESSION MANAGEMENT AND INTERPERSONAL BEHAVIOR (1995).

101. FISKE, *supra* note 3, at 206.

102. *Id.* at 206, 208.

103. *Id.* at 13.

104. *Id.* at 211–12.

105. *Id.* at 211.

106. *See* JOAN BISKUPIC, SANDRA DAY O'CONNOR 298 (2005) (describing how O'Connor "managed her public image carefully").

107. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE

differences are matters of degree. Every person's self-concept "depend[s] in part on the people around them,"[108] such that we all perform various acts of conscious and subconscious self-presentation.[109] Indeed, even the apparent decision to ignore the perceptions of others is itself a form of self-presentation. (Consider Justice Thomas's quite conscious decision not to ask any questions at oral argument.) Thus, "[w]ith varying degrees of self-consciousness, people perform in ways intended to give other people the impression they seek."[110]

And because these are core aspects of our being—the product of evolutionary adaptation—there is little reason to think judges are somehow immune from their influence. In fact, as Baum suggests, judges may rate well above average in their desire for esteem and respect.[111] In general, "those who seek and accept public positions are especially interested in the esteem that winning and holding prestigious positions provides."[112] To become a judge, candidates must either campaign for an elected position or ingratiate themselves with various power brokers for an appointment, and those who take the bench have typically traded a higher earning potential for a public position with greater deference and prestige. It would therefore be unsurprising if, as a group, judges are higher self-monitors than the average person.

Most important, Baum's argument seems to provide a better explanation than any of the existing models for a range of judicial behaviors. Consider, for example, how judges often state publicly that they find the policy implications of their own decisions distasteful, as on these three recent occasions:

* In *Lawrence v. Texas*,[113] Justice Thomas voted to uphold Texas's law prohibiting gay sodomy. But he noted in his dissent that the law was "uncommonly silly," that were he "a member of the Texas Legislature, [he] would vote to repeal it," and that "[p]unishing someone for expressing his sexual preference through noncommercial consensual conduct with

SUPREME COURT 43 (2007) (describing some of Souter's eccentricities).

108. BAUM, *supra* note 1, at 27.

109. *See id.* at 30.

110. *Id.*

111. *See id.* at 30–32.

112. *Id.* at 31.

113. 539 U.S. 558 (2003).

another adult does not appear to be a worthy way to expend valuable law enforcement resources."[114]

* In *Gonzales v. Raich*,[115] Justice O'Connor voted to invalidate the federal Controlled Substances Act as applied to persons who grow marijuana at home for their own medicinal use, conduct recently made legal under state law by a California ballot initiative and a statute enacted by the state legislature. Yet, she wrote in her dissent that, had she been "a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act."[116]

* Justice Stevens authored the Court's majority opinions in *Raich* and *Kelo v. New London*,[117] both of which the Court handed down in June 2005. But in a speech before a county bar association only three months later, he stated that the government's actions in each case produced "results that I consider unwise," and that "the law compelled a result I would have opposed if I were a legislator."[118]

The question is not why these justices voted as they did, or why they decided to write dissenting opinions or speak outside the Court, actions that might have several explanations. Rather, the question is why they went out of their way to disavow the policy consequences of their decisions. Could these statements have somehow been strategic, aimed at furthering their long-term legal policy objectives? Perhaps. But it seems highly improbable, at least as a complete account. For instance, how would the public's knowledge of O'Connor's policy preference to illegalize all marijuana possession actually have affected her ability to shape legal policy, particularly when she knew she would retire within a year? The more straightforward explanation is that O'Connor considered this information important to the image she thought most attractive. To her, the statement said something significant about her commitment to federalism as a constitutional principle, and her willingness to reach results that she believed the law dictated, even when they contradicted her policy preferences.

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114. *Id.* at 605 (Thomas, J., dissenting).
115. 545 U.S. 1 (2005).
116. *Id.* at 57 (O'Connor, J., dissenting).
117. 545 U.S. 469 (2005).
118. Matt Labash, *Evicting David Souter*, WEEKLY STANDARD, Feb. 13, 2006.

As a second example, consider the willingness of several Supreme Court justices to speak with journalists about the inner workings of the Court. As an institution, the Court guards its secrets jealously. Leaks are almost unheard of, and clerks are required to sign oaths of confidentiality forbidding them from disclosing any non-public information.[119] Yet, in interviews not for attribution, the justices themselves have shed light on some of the Court's most private details. For instance, several justices were important sources for Bob Woodward and Scott Armstrong in writing the book *The Brethren*.[120] And just recently, several justices spoke to Jeffrey Toobin for his book *The Nine*.[121] Both books revealed unflattering information about the justices, and thus diminished the Court's mystique, an importance source of its power. Though the authors may not have gathered the embarrassing information from the justices themselves, the justices' participation plainly lent credibility to the books' accounts. Why, then, did the justices agree to be interviewed when doing so could only serve to undermine the Court's authority? Again, we might conjure some strategic rationales, but they seem rather far-fetched. The most logical explanation is that the justices sought to impress various audiences—to spin some of the defining events of their judicial careers in ways that promoted certain impressions.

As a third example, consider judges who express their views in particularly flamboyant or colorful ways. Exhibit A would be Justice Antonin Scalia. Scalia is wont to use his written opinions, opinion announcements, and questions at oral argument to mock his colleagues' views, often in a biting, sarcastic tone. Of course, Scalia is highly intelligent, and surely he understands, at least on some level, that this behavior does more to alienate his colleagues than to build prevailing coalitions.[122] But being recognized as the smartest

119. *See* Peter B. Rutledge, *Clerks*, 74 U. CHI. L. REV. 369, 370–71 (2007) (book review); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 959 (2007) (book review).

120. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 3 (1979).

121. TOOBIN, *supra* note 107, at 342.

122. Indeed, there is evidence that Scalia's bullying drove away his most important potential ally in creating winning coalitions, Justice O'Connor. *See* GREENBERG, *supra* note 6, at 82 (reporting that Scalia's personal attacks

kid in the room often seems more important to him than winning cases.[123]

Many (including Baum[124]) have made this point before, pointing to some of Scalia's more famous dissenting opinions, such as those in *Webster v. Reproductive Health Services*[125] and *Planned Parenthood v. Casey*,[126] as exemplars. But high-profile decisions addressing politically charged issues like abortion may be unrepresentative. More telling, I think, is Scalia's behavior when the stakes are relatively low, such as in *Crosby v. National Foreign Trade Council*.[127] At issue in *Crosby* was a Massachusetts law that forbade all state entities from contracting with any person (including business organizations) that did business with or in the nation of Myanmar.[128] The Supreme Court unanimously decided that the existing federal sanctions against Myanmar preempted the Massachusetts law, with most of the justices finding the legislative history behind the federal sanctions quite instructive.[129] Chief Justice Rehnquist assigned the majority opinion to Justice Souter. Knowing Scalia would object to the use of legislative history, Souter relegated his discussion of it to the opinion's footnotes.[130]

But this effort at accommodation was not enough to avoid a rather belittling, disrespectful concurrence from Scalia. The first five paragraphs of Scalia's brief, four-page opinion were structured nearly identically, almost like a grade-school lesson repeated on a chalkboard. Each paragraph began with a sentence that started, "It is perfectly obvious on the face of the statute that . . . ," and concluded with a point relevant to the opinion.[131] The second or third sentence of each paragraph then stated, "I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition

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"push[ed] . . . O'Connor away by offending her"); *see also* BISKUPIC, *supra* note 106 at 279 (reporting that "Scalia's comments got under O'Connor's skin").

123. Scalia's willingness to join the Court's *per curiam* opinion in Bush v. Gore, 531 U.S. 98 (2000) (per curiam), stands as an obvious counter-example.

124. *See* BAUM, *supra* note 1, at 37.

125. 492 U.S. 490 (1989).

126. 505 U.S. 833 (1992).

127. 530 U.S. 363 (2000).

128. *See id.* at 366–68.

129. *See id.* at 373–74.

130. *See id.* at 375 n.9, 376 n.11, 377 n.12, 378 n.13, 380 n.15, 381 n.16, 382 n.17, 385 n.23.

131. *Id.* at 388–90 (Scalia, J., concurring).

that . . . ," and finished with an observation that the legislative history corroborated the relevant point.[132] Following these five paragraphs, Scalia summed up his argument with this:

> In a way, using unreliable legislative history to confirm what the statute plainly says anyway (or what the record plainly shows) is less objectionable since, after all, it has absolutely no effect upon the outcome. But in a way, this utter lack of necessity makes it even worse—calling to mind St. Augustine's enormous remorse at stealing pears when he was not even hungry, and just for the devil of it ("not seeking aught through the shame, but the shame itself!").[133]

Again, it is conceivable that Scalia's approach contains some strategic logic, part of a broader scheme to move the Court towards his legal positions. But the more likely explanation is that these sorts of rhetorical flourishes have cultivated a particular reputation among certain audiences, one Scalia very much enjoys.

Of course, none of these episodes involved matters central to the Court's mission. But that is beside the point. Each illustrates that impressing various audiences motivates the justices—so much so that, in some instances, this drive for personal approval will apparently overshadow their interests in shaping legal policy. And if this motive can occasionally trump the justices' other goals, there is every reason to believe it affects how the Court discharges its other, more significant responsibilities. Indeed, the most logical inference is that the motive to win the approval of important audiences is a pervasive influence on the justices' decision-making.

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132. *Id.*

133. 530 U.S. at 391 (quoting The Confessions, Book 2, ¶ 9, *in* 18 GREAT BOOKS OF THE WESTERN WORLD 10-11 (1952) (E. Pusey transl. 1952).

III

In the main, then, the thesis of *Judges and Their Audiences* seems spot on: Judges are highly motivated to be liked and respected by others, and this desire inevitably influences their decision-making. That said, a few parts of Baum's argument are not entirely persuasive. Again, one of Baum's essential points is that judges care about more than the content of legal policy. But in making this point, Baum may portray the existing models of judicial behavior as less realistic than they actually are. Interestingly, and perhaps ironically, Baum may have overlooked some important insights from research in social psychology, the field on which *Judges and Their Audiences* heavily relies. This research gives us reason to believe that judges are more apt to adjust their views in response to various political constraints than Baum suggests.

In laying the groundwork for his audience-based perspective, Baum contends that we should be skeptical about the strength of legal policy goals as a motive for judicial behavior, and particularly about judges' willingness to engage in strategic behavior.[134] First, Baum notes that judges face several collective action problems in their attempts to shape legal policy. Appellate judges cannot act alone, but instead require the collaboration of their colleagues (whose support they need for their favored outcomes) and judges on other courts (on whom they must rely to abide by the court's precedent).[135] What is more, judges depend on a variety of actors outside the legal system for their decisions to have any force, something that is hardly guaranteed. As Baum observes, "research on the implementation of judicial decisions has underlined the central role of nonjudicial actors in shaping the ultimate impact of decisions."[136] Thus, Baum concludes, "[w]hatever benefit judges derive from the state of public policy in a particular field, the choices of a single judge ordinarily have only a marginal impact on the totality of policy."[137]

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134. BAUM, *supra* note 1, at 17.

135. *Id.* at 15 ("An appellate judge faces limits imposed by the actions of colleagues and other courts.").

136. *Id.* at 15–16.

137. *Id.* at 15.

At the same time, argues Baum, strategic behavior can require a nearly Herculean effort from judges.[138] As an example, Baum describes the task of a fully strategic Supreme Court justice in a case of statutory interpretation:

> To estimate whether the current Congress would override a prospective decision is an intricate task, and some of the intricacy is reflected in the complex ideological models that scholars have used to make their own estimates . . . . [Moreover,] Congress can reverse a court decision at any time. So the justice who is committed to avoiding overrides must estimate the ideological composition and political environment of future Congresses. . . . Another complication is obvious but sufficiently daunting that students of judicial behavior generally ignore it: since individual justices differ in their policy preferences, they need to consider each other in developing strategies aimed at Congress. . . . Finally, because the Court can respond to congressional overrides and shape their effects, the conscientious justice needs to calculate outcomes in a multistage game.[139]

As Baum explains, a person's willingness to act strategically is generally a function of two variables: (1) the strength of her incentives, and (2) her capacity to identify and follow an appropriate strategy.[140] To Baum, the incentives here are relatively weak; the benefits that redound to a judge from good legal policy are merely "symbolic or psychic,"[141] and judges have only a "limited capacity to affect outcomes."[142] And given the complexities described above, a judge's ability to identify and follow the appropriate strategy is highly questionable. Consequently, the assumption that judges act strategically "is better treated as a possibility rather than a certainty."[143] Indeed, Baum argues that the strategic model assumes judges are "more Vulcan than human,"[144] akin to the character Mr. Spock from Star Trek:

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138. *See id.* at 18 & n.16. The reference is to the name given to the ideal judge by Ronald Dworkin in his classic work of legal theory, LAW'S EMPIRE (1986).

139. BAUM, *supra* note 1, at 16–17 (citations omitted).

140. *See id.* at 15.

141. *Id.* at 11 n.10.

142. *Id.* at 16.

143. *Id.* at 160.

144. *Id.* at 20.

> These judges court exhaustion with their arduous and often futile efforts to advance their conceptions of good policy, efforts they expend only for the personal satisfaction of trying to improve public policy. This is a lot to expect of them. People often behave in ways that are not strictly self-interested. Even so, by standards of ordinary behavior the fully strategic judge seems enormously altruistic.[145]

In essence, Baum argues that it is typically *irrational* for most judges to make the effort to act fully strategically. And he has a point. It may be irrational, at least in traditional economic terms, for judges to spend much time and energy in the strategic pursuit of their preferred legal policies. But there are some important complications here.

First, even if courts have a limited institutional capacity to effectuate major social change, their decisions have a significant impact on legal policy. In the United States, the judiciary is the final arbiter on most questions of legal interpretation. Other power holders have effectively delegated these questions to the courts, and elected officials are generally content with whatever results the judiciary produces. From the scope of ERISA's preemption provision to the proper application of the dormant Commerce Clause, judges typically have the final say. Granted, courts are constrained in important ways. The judiciary depends institutionally on the elected branches of government, and therefore lacks the power to resolve highly salient questions on its own. Some examples include the Supreme Court's futile attempts to protect the Cherokee Indians in Georgia, to prohibit Congress from regulating slavery in the territories, and to force the South to desegregate its public schools. But such issues are hardly the ordinary diet of American law. In the typical run of cases, judges—and particularly Supreme Court justices—have more than a marginal impact on American legal policy.

Second, even if the judiciary's impact on legal policy were only marginal, as Baum contends, judges almost certainly would still *believe* their impact was more substantial. Social psychologists have long known that human beings tend to have an exaggerated sense of their control over events around

145. BAUM, *supra* note 1, at 18.

them. Research demonstrates that the motive to control, much like the needs to belong and to enhance one's self-esteem, constitute a core aspect of our beings.[146] "Needing control, wanting to be effective, is an early, basic motive even in young infants."[147] This motive for control relates to our need to feel good about ourselves, as the feeling of efficacy or making an impact is quite self-affirming.[148] "[T]he motive to control encourages people to feel competent and effective in dealing with their social environment and themselves."[149] Indeed, people who "consistently feel that they are in control . . . may be healthier, feel happier, and live longer."[150]

This basic motive to control leads human beings to believe that they "exercise more control over their environments than they actually do."[151] That is, the drive to maintain a sense of control "is so powerful, and the feeling of being in control so rewarding, that people often act as though they can control the uncontrollable."[152] Countless experiments demonstrate the point. Consider these results from experiments involving coin tosses: Subjects who believed they correctly predicted a series of coin tosses tended to see themselves as good (rather than just lucky) guessers; forty percent of subjects believed they could improve the accuracy of their guesses through practice; and twenty-five percent of subjects stated they would guess more accurately if they were not distracted.[153] Or consider this: People are more confident that they will win a dice toss when they are allowed to throw the dice, and people will wager more money on dice that have not been tossed than on dice that have been tossed but have not been revealed.[154] Or this: People are more confident that

146. FISKE, *supra* note 3, at 20.

147. *Id.* at 21.

148. Hanson & Yosifon, *supra* note 3, at 91.

149. FISKE, *supra* note 3, at 20.

150. *Id.*

151. Hanson & Yosifon, *supra* note 3, at 96.

152. DANIEL GILBERT, STUMBLING ON HAPPINESS 22 (2006).

153. *See* Hanson & Yosifon, *supra* note 3, at 96–97 (discussing Ellen J. Langer & Jane Roth, *Heads I Win, Tails It's Chance: The Illusion of Control as a Function of the Sequence of Outcomes in a Purely Chance Task*, 32 J. PERSONALITY & SOC. PSYCHOL. 951 (1975)).

154. GILBERT, *supra* note 152, at 22 (discussing D.S. Dunn & T.D. Wilson, *When the Stakes Are High: A Limit to the Illusion-of-Control Effect*, 8 SOC. COGNITION 305 (1990), and L.H. Strickland, R.J. Lewicki & A.M. Katz, *Temporal Orientation and Perceived Control as Determinants of Risk Taking*, 2

they will win the lottery when they choose their own numbers.[155] Obviously, none of this is rational. But it demonstrates the power of our motive to control—or, more accurately, to maintain a feeling of control—and how that motive distorts our perceptions of reality.

Hence, regardless of what political scientists might demonstrate through regression analyses or historical case studies, judges surely *believe* their decisions have more than just a marginal impact on legal policy. The core motive to maintain a feeling of control or efficacy will generally cause judges to have an exaggerated sense of their own impact. And if judges believe their decisions shape the law, they will have a stronger incentive to act strategically than Baum presumes, even if their beliefs are empirically unfounded.

Finally, the behavior predicted by the strategic model—judges' adjusting their positions to those more likely to prevail in light of various political constraints—may be less laborious than Baum suggests. Baum is surely right that strategic action is "more difficult and time-consuming than acting sincerely."[156] By definition, strategic behavior involves conscious calculations about political possibilities, both current and future. But the institutional constraints highlighted by the strategic model might also cause judges' sincere preferences to change, if only subconsciously. Consider again a Supreme Court justice in a case of statutory interpretation. The justices are politically aware; they read the newspapers and generally have a sense for the political winds. Moreover, like all people, they do not enjoy seeing their views publicly rejected—by their colleagues, Congress, the President, or the general public. Part of this aversion, as Baum argues, relates to their self-esteem. But part of it probably relates to an attachment to their preexisting preferences and a desire simply to win. Seeing one's views prevail is another way in which people can feel efficacious.

Consequently, a justice may subconsciously abandon aspects of her views she realizes have no chance of adoption, and subscribe to views that she believes more likely to prevail. She need not consider the precise ideological pivot

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J. EXPERIMENTAL SOC. PSYCHOL. 143 (1966)).

155. *See* Hanson & Yosifon, *supra* note 3, at 97 (discussing Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975)).

156. BAUM, *supra* note 1, at 160.

points in Congress or the Executive Branch, or predict several steps ahead in a multi-stage game. Her legal policy preferences could shift only subtly, and outside her cognition, to incorporate her rough sense of changing political realities. Such behavior would not technically be strategic, as there would not be a gap between her "true," conscious preferences and her observable actions. But her behavior would nonetheless track what the strategic model would predict: Her choices would be shaped by the constraints posed by the surrounding political environment, and they would be driven by the justice's desire to see the closest approximation of her original policy preferences adopted into law.

In each of these respects, then, the expectation that judges will act in ways consistent with the strategic model may be more realistic than Baum contends. But again, this is a rather minor criticism. Baum's larger point rings true: A desire to shape legal policy surely does not exhaust judges' motivations. We know people care about the approval of important audiences, and we know judges are people. It thus stands to reason that the motive to gain the admiration of salient audiences affects judges' decision-making. As Baum asks rhetorically, "[w]hy would judges' interest in approval *not* affect their choices?"[157]

IV

The final matter to address is the ultimate significance of Baum's argument. What contributions does *Judges and Their Audiences* make to the field of constitutional politics? Though there may be several, I believe two stand out. First, Baum has identified another explanatory mechanism that bolsters the "political systems" or "regime politics" approach to understanding Supreme Court decision-making. That is, *Judges and Their Audiences* presents another reason that, as an empirical matter, the Supreme Court's decisions tend to reflect the views currently ascendant on the national political scene. Second, and more fundamentally, *Judges and Their Audiences* marks a significant step in the direction of bringing greater psychological realism to the study of judicial decision-making. Specifically, it recognizes the importance of situational influences on human behavior, influences

157. BAUM, *supra* note 1, at 22 (emphasis added).

facilitated by features of the human mind that are largely unfelt and unseen. In this respect, Baum may have launched a promising new research agenda in the field of public law, one that will lead to host of fresh insights into judicial behavior.

A

In his pathbreaking 1957 article, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," Robert Dahl wrote that, "the policy views dominant on the [Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[158] Recently, a number of scholars have modified and refined Dahl's basic thesis, loosely forming a school of thought known as the "government systems" or "regime politics" approach to Supreme Court decision-making. The basic idea—reflected in the work of political scientists like Terri Peretti, Mark Graber, Howard Gillman, and Keith Whittington, and law professors like Michael Klarman, Barry Friedman, L.A. Powe, and Mark Tushnet—is that the Court is embedded *within* the nation's political system, not above or outside it. Though the Court certainly exercises independent judgment on a case-by-case basis, developments external to the Court shape its ideological direction.[159] Stated differently, those forces that currently dominate American politics typically construct the Court's power and substantive views. As a result, the Court tends to function more as a policy-making partner of the ascendant political majority—or at least an influential segment of that majority—than as an independent check on the political process.

History is replete with examples. To oversimplify a bit, the Taney Court's jurisprudence, and particularly its decision in *Dred Scott*,[160] was a direct extension of the values animating the Jacksonian political regime that had

158. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

159. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6 (2004) ("Judges are part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion.").

160. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

dominated American politics since the 1830s.[161] The Supreme Court of the late 1930s and 1940s effectively cemented the central priorities of FDR's New Deal coalition into constitutional doctrine, particularly in its federalism and Due Process Clause decisions, which virtually eliminated the judiciary's role in reviewing the propriety of economic regulation.[162] The Warren Court's decisions of the 1960s in the areas of race discrimination, civil liberties, voting rights, and criminal procedure generally reflected the consensus of political elites during the Great Society, a coalition comprised of non-southern Democrats and liberal Republicans.[163] And the Rehnquist Court's recent spate of federalism decisions seemed to reflect the commitment of the post-Watergate Republican Party to limit the breadth of Congress's regulatory powers, at least at its margins.

Of course, the point should not be overstated.[164] As Howard Gillman has explained, the evolution of constitutional law "never quite works out as a simple story of judges merely acting as faithful 'agents' in service of their 'principals.'"[165] There are several points of slippage between the constitutional views of the governing regime and those of the justices, and a variety of circumstances can create the political space for the Court to act independently. For instance, the nation's governing coalition is often fractured, either because different political parties hold control of Congress and the presidency, or because the majority party, though controlling both elected branches, is split internally.[166] And because of the lengthy tenure of the justices, there may

161. *See* Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923 (2006).

162. *See* Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 117, 118 (Ronal Kahn & Ken I. Kersch eds., 2006).

163. *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, at 145-58 (Ronal Kahn & Ken I. Kersch eds., 2006); Tushnet, *supra* note 162, at 121–24.

164. For some insightful, cautionary points about the regime politics approach, see Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law School*, 32 LAW & SOC. INQUIRY 511 (2007).

165. Gillman, *supra* note 163, at 141.

166. *See* Keck, *supra* note 164, at 517; Tushnet, *supra* note 161, at 131.

be a substantial time lag between a political movement's electoral victories and its ideological control of the Court. For these reasons and others, the Court rarely moves in lockstep with the partisan agenda of any political party.[167] Still, the basic institutional arrangements of American government make it unlikely that the Court will diverge too far from the views currently ascendant in American politics, at least on issues of high salience.[168] Stated differently, the constitutional views of the governing coalition are more likely than any others to be embraced by the Court, even when other results may be possible.

To date, scholars have generally identified two explanatory mechanisms that account for this relationship, at least during ordinary periods of constitutional development. The first is the appointments process: nomination by the president and confirmation by the Senate.[169] Presidents

167. *See* Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 70 (Cornell W. Clayton & Howard Gillman eds., 1999) ("while there are some notorious examples of the Court retreating in the face of external pressure from other powerholders, there is still reason to believe that the justices are not particularly concerned with the possibility that their decisions might be overturned or that their jobs might be in jeopardy"); Keck, *supra* note 164, at 533 ("In most cases that reach the Supreme Court, every conceivable decision would be supported by some powerful political actor, and we could always then conclude that the decision happened because the actor demanded it.").

168. *See, e.g.*, KLARMAN, *supra* note 159, at 449 ("the Court's constitutional interpretations have always been influenced by the social and political contexts of the times in which they were rendered"); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH? HOW THE COURTS SERVE AMERICA 185 (2006) ("the Supreme Court has followed the public's views about constitutional questions throughout its history, and on the rare occasions that it has been even modestly out of line with popular majorities, it has gotten into trouble"); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POLITICS 233, at 236 (the Supreme Court's "decisions are influenced by specific patterns of party politics, partisan electoral realignments, and control of national electoral institutions," such that "even when the justices adhere to 'principled' jurisprudence and follow constitutional norms, the meaning of such principles will, over time, reflect changes in the substantive values of the national political regime"); Richard Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1021–25 (2004).

169. *See, e.g.*, LEE EPSTEIN AND JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 132 (2005); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 100 (1999); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–70 (2001).

select Supreme Court nominees based largely on their perceived constitutional ideology, and Senators cast their confirmation votes for much the same reason.[170] Thus, the constitutional views represented on the Court tend to match those that recently prevailed in national elections. No doubt, the translation is imperfect. Openings at the Court are often the result of serendipity, so national elections do not always count equally; the presidential election of 1936 gave FDR the opportunity to appoint five new justices, for example, while Jimmy Carter did not appoint a single justice.[171] Moreover, regardless of where they start, justices can drift ideologically, either because their views evolve or because the relevant issues change, presenting questions that the appointing president could not have anticipated in evaluating the nominee's views.[172] As a general matter, though, "most justices, most of the time, satisfy the ideological and policy expectations of their appointing presidents."[173]

The second mechanism tending to affiliate the Court with the governing regime is that highlighted by the strategic model: the Court's institutional dependence on other constitutional actors for its effectiveness.[174] Stated simply, the Court is impotent in the face of determined political opposition—from Congress, the President, the lower courts, or the general public. Without at least the tacit cooperation of these other actors, the Court's decisions are largely irrelevant. To cite just one example, the Court in 1954 held in *Brown v. Board of Education*[175] that racial segregation in public education was unconstitutional. But eleven years later, ninety-nine percent of African-American children in the

170. *See* PERETTI, *supra* note 169, at 84–101.

171. *See* LEE EPSTEIN, JEFFREY SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 253–54 (3d ed. 2003) (Table 4–1).

172. *See* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

173. PERETTI, *supra* note 169, at 130; *see also* LEE EPSTEIN AND JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 132 (2005) ("More often than not, [justices] vote in ways that would very much please the men who appointed them.").

174. *See* PERETTI, *supra* note 169, at 133–51; Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295–329 (2005).

175. 347 U.S. 483 (1954).

deep South still attended completely segregated schools.[176] Not until Congress enacted major civil rights legislation, and the Justice Department began suing school districts for noncompliance, did meaningful desegregation start to occur.[177]

The Supreme Court's vulnerability is a product of the basic institutional arrangements of American government. Congress can adjust the Court's jurisdiction, alter the number of justices, reduce the Court's appropriations, or even propose constitutional amendments to overrule the Court's decisions.[178] The President can disregard the Court's decisions or choose to enforce them only half-heartedly.[179] Lower courts can effectively disobey the Court, stretching and squeezing its precedent in ways that suit their own ends.[180] And the general public can decide to ignore the law or to find ways to undermine it.[181] Granted, such acts of defiance or retribution against the Court are relatively infrequent. But they all have happened, and the justices know this history.

To be clear, the Court clearly exercises a great deal of power. As discussed earlier, the other branches have delegated most matters of legal interpretation to the judiciary, leaving the Court a wide swath of autonomy to resolve these issues however it pleases. But on matters of high political salience, the Court's institutional position prevents it from straying too far from society's prevailing views. Moreover, the appointments process generally ensures the justices will not be inclined to stray, and instead will be ideologically disposed to embrace the governing regime's constitutional vision.

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176. *See* GERALD ROSENBERG, THE HOLLOW HOPE 50 (1991) (Table 2.1).

177. *Id.* at 42–57.

178. *See* PERETTI, *supra* note 169, at 137–44.

179. *See id.* at 144–47.

180. *See* Friedman, *supra* note 174, at 295–308; Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819 (2003).

181. Consider the Court's relatively recent decision in Santa Fe Independent School District v. Doe, 530 U. S. 290 (2000), in which the justices held that a public high school's policy of permitting student-led prayers before football games violated the Establishment Clause. Two months later, thousands of people were openly praying at high school football games throughout the South, some in a manner that was probably permissible under the letter (but not the spirit) of the Court's ruling, some in open defiance. *See* David Firestone, *South's Football Fans Still Stand Up and Pray*, N.Y. TIMES, Aug. 27, 2000.

Judges and Their Audiences makes a critical contribution in supplying a third explanatory mechanism—in addition to the appointments process and the Court's institutional dependence—to support the political regimes theory. Namely, because the justices care about the approval of various audiences, and the views of those audiences will tend to reflect current political sentiments, the justices' views will naturally move towards the nation's prevailing values, especially those of the country's political and cultural elite. Regardless of the justices' constitutional ideologies when they take the bench, the desire to maintain and enhance their self-esteem will generally push them towards the views of their salient audiences, views that will reflect the current political mores of American society. And because the justices' most influential audiences are disproportionately affluent and well educated, these views will often reflect the values of the nation's socioeconomic elites.

By way of example, consider Justice Thomas's views with respect to the constitutional issues raised by the so-called "war on terrorism." In the cases thus far decided by the Supreme Court, such as *Hamdi v. Rumsfeld*[182] and *Hamdan v. Rumsfeld*,[183] Thomas has taken an expansive view of the President's executive and commander-in-chief powers, the broadest on the Court.[184] Most participants likely did not consider Thomas's views on executive power at the time of his nomination and confirmation to the Court, and Thomas himself probably had not thought about the issues in great detail before recently. Imagine, then, that Vice President Gore won the presidential election in 2000, and it was the Gore administration that claimed an expansive set of executive powers in response to the attacks of September 11, 2001. Imagine that a Republican Congress resisted some of these claims, and issues like the appropriate use of Guantanamo Bay or the designation of American citizens as "enemy combatants" carried a very different partisan valence.

Under these circumstances, would Thomas have adopted such a strongly pro-executive interpretation of the Constitution? Of course, there is no way of knowing. But it

182. 542 U.S. 507 (2004).

183. 126 S. Ct. 2749 (2006).

184. *See Hamdan*, 126 S. Ct. at 2823–49 (Thomas, J., dissenting); *Hamdi*, 542 U.S. at 579–99 (Thomas, J., dissenting).

seems plausible that Thomas would have approached the issues differently, that he would have seen the relevant sources of constitutional law through a slightly different lens. In other words, it is conceivable that Thomas was subtly drawn to the positions he embraced because they reflected the constitutional vision of several groups important to his identity, such as the Federalist Society, the Republican Party, and cadres of conservative lawyers in the Bush Administration, including some of his former law clerks.[185]

In any event, the larger point is that the justices' interest in the approval of salient audiences should generally operate to push the Court towards the currents of the prevailing political mainstream. More specifically, *Judges and Their Audiences* explains how the views of the justices are apt to evolve in ways that reflect the emerging political priorities of the groups with whom the justices most strongly identify. And over time, like the appointments process and the Court's institutional dependence, this should generally move the Court closer to the nation's ascendant political views, or at least an influential aspect of them.

B

Judges and Their Audiences also makes a more foundational contribution to our understanding of constitutional politics: It points us in the direction of bringing greater psychological realism to the study of judicial decision-making. The major intellectual contribution of social psychology has been to identify the significance of social situations to human behavior.[186] As Susan Fiske has explained, "[s]ocial behavior is, to a larger extent than people commonly realize, a response to people's social situation, not

185. It is probably worth noting that John Yoo, the lawyer in the Department of Justice's Office of Legal Counsel responsible for shaping much of the Bush Administration's legal positions with respect to the "war on terrorism," and Steven G. Bradbury, who has headed the Office of Legal Council since 2005 and who authored a series of legal opinions authorizing harsh C.I.A. interrogation techniques, both clerked for Justice Thomas. *See* University of California, Berkeley, School of Law – Boalt Hall, Faculty Profiles, John Choon Yoo, http://www.law.berkeley.edu/faculty/profiles/facultyProfile.php?facID=235 (last visited Feb. 11, 2008); Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

186. FISKE, *supra* note 3, at 6.

a function of individual personality."[187] When we observe the behavior of others, we tend to attribute their actions to their individual dispositions—their attitudes and preferences—a tendency that is a product of our core motives to understand and control.[188] "As long as people can believe that behavior represents people's intentions, goals, attitudes, and personalities, then we can believe that people are predictable, which makes them more understandable, as well as more open to our influence."[189]

But this automatic, intuitive mode of causal attribution is "in important ways and to significant degrees, wrong."[190] It reflects what social psychologists have termed the *fundamental attribution error*: the "general tendency to overestimate the importance of personal or dispositional factors relative to environmental influences."[191] Human behavior is often much more the product of situational forces than an individual's attitudes or preferences.[192] Consider a study David Yosifon called "canonical" in illustrating the phenomenon.[193] Experimenters asked three groups of seminary students to deliver a sermon on a selected topic at a location on the other side of the seminary's campus.[194] They told one group to hurry, as they were already late; one group that they were expected in just a few minutes; and one group that they were not expected for some time but should arrive early.[195] On the walk to deliver the lecture, each of the seminarians was confronted with a man lying on the ground (an experimental collaborator) who appeared hurt and in need of assistance.[196] Only ten percent of the seminary students in the first group (the "high hurry" condition) and

187. *Id.* at 7.
188. *Id.* at 114–19.
189. *Id.* at 115.
190. Hanson & Yosifon, *supra* note 3, at 20–21.
191. FISKE, *supra* note 3, at 112.
192. *Id.* at 112–13.
193. Posting of David Yosifon, *Thinking the Situation into Legal Theory: The Promise of Experimental Parable*, to The Situationist, http://thesituationist.wordpress.com/2007/02/08/thinking-the-situation-into-legal-theory-the-promise-of-experimental-parable/ (Feb. 8, 2007).
194. *See* John M. Darley & C. Daniel Batson, *"From Jerusalem to Jericho": A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. PERSONALITY SOC. PSYCHOL. 100, 100-08 (1973).
195. *Id.* at 103–04.
196. *Id.* at 104.

only forty-five percent in the second group ("medium hurry" condition) stopped to help.[197] But sixty-three percent of the students in the last group ("no hurry") stopped to offer assistance.[198] The situation (how hurried the students felt) was far more important in determining their actions than their individual attitudes or personalities.[199]

Other well-known experiments have similarly documented the dramatic impact of social situations, often in unsettling ways. In Philip Zimbardo's Stanford Prison Experiment, several otherwise normal and well-adjusted college students became sadistic and abusive when cast in the role of prison guards, so much so that Zimbardo was forced to cancel the experiment after less than a week.[200] In an elaborate series of experiments, Stanley Milgram showed that, under certain conditions, more than ninety percent of his subjects were willing to administer dangerously high electric shocks to fellow subjects as punishment for missing questions on a meaningless quiz, merely because the person conducting the experiment instructed them to do so.[201] What is more, by simply tweaking a few aspects of the situation, Milgram saw the percentage of persons willing to administer such shocks dwindle to ten percent.[202] Indeed, so many studies have established the point that it is beyond serious question. "[S]ocial psychology shows, over and over, that the social situation, not just unique personality, dramatically controls people's behavior."[203] And as observers of human behavior, we underestimate the importance of the situation and mistakenly attribute others' conduct to their perceived preferences, attitudes, and personalities.

The reason social situations can be so powerful, and that we systematically underestimate their significance, is that, contrary to our conscious experiences, we are often moved by

197. *Id.* at 105.

198. *Id.*

199. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PENN L. REV. 129, 171–72 (2003) (discussing the Darley & Batson study and its implications).

200. *See generally* ZIMBARDO, *supra* note 3, at 194–228.

201. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974); *see also* ZIMBARDO, *supra* note 3, at 266–76 (discussing Milgram's experiments); Hanson & Yosifon, *supra* note 199, at 150–53.

202. *See* ZIMBARDO, *supra* note 3, at 272.

203. FISKE, *supra* note 3, at 7.

unfelt features of our cognitive interiors. Jon Hanson and David Yosifon have termed this the *interior fundamental attribution error*: We tend "to 'see,' and to attribute a powerful causal role to certain salient features of our interior lives that actually wield little or no causal influence over our behavior, while simultaneously failing to see those features of our interiors that are in fact highly influential."[204] We subjectively experience our own behavior as a product of our thinking, our preferring, our willing, and our choosing. For instance, we feel ourselves reading various sources of the law, thinking about their implications, preferring a particular interpretation, and acting on that interpretation. But "our thinking is not what we experience it to be."[205] Our "cognitive processing is not simply the stuff of conscious thinking"[206]; instead, it is highly influenced by a broad range of unseen features of our mental interiors, influences of which we are entirely unaware, and which are often highly responsive to aspects of the social situation.

Indeed, this is precisely the process that *Judges and Their Audiences* describes. An important cognitive feature of the human animal is the need for self-affirmation, and specifically the need for approval from people who are important to one's social identity. This core motive, in turn, makes an aspect of the external situation—the views of various people in our lives—far more important in determining our behavior than we tend to appreciate. These situational influences constantly shape our behavior, but we remain largely oblivious to their impact. We *experience* our actions as the product of thinking, preferring, and choosing, but our conscious experiences are highly misleading.

Critically, the motive to maintain and enhance one's self-esteem is only one of many features of our cognitive interiors that profoundly affect our behavior. Another powerful drive—and one that may be particularly relevant to judicial behavior—is the need for "system justification." Human beings desperately want to see their world as a just place, where people "get what they deserve." As Marvin Lerner has explained, people yearn for "a pattern to events which

204. Hanson & Yosifon, *supra* note 3, at 25.
205. *Id.* at 33.
206. *Id.* at 32.

conveys not only a sense of orderliness or predictability, but also the compelling experience of appropriateness expressed in the typically implicit judgment, 'Yes, that is the way it should be.'"[207] Thus, we tend to blame people for unfortunate circumstances or events (for instance, those accused of crimes, people living in poverty, racial minorities, and even the victims of sexual assault), and to believe that those who fare well deserve their positions. As Hanson and Yosifon have noted, "we tend to attribute bad outcomes to individual dispositions, because it is generally more comforting to presume that it is the person who was bad, rather than the situation."[208] Or, as John Jost and Orsolya Hunyady have explained, human beings have a strong desire to "justify and rationalise the way things are, so that existing social arrangements are perceived as fair and legitimate, perhaps even natural and inevitable."[209] We are strongly motivated to "affirm the status quo,"[210] and we will subconsciously alter our attitudes and perceptions of events to conform to that desire. In fact, this motivation is so strong that it often overcomes our desire to affirm ourselves.[211] For example, experiments have shown that disadvantaged groups, such as low-income Latinos and African-Americans, tend carry enhanced levels of system justification—that is, they are more likely to believe that the government is run for the benefit of everyone, and that existing income inequalities are "legitimate and necessary."[212]

Yet another important motive is to cohere, or to avoid cognitive dissonance. Many studies have demonstrated that human beings will alter their attitudes or preferences to produce a consonant view of the world or of themselves. For example, a classic experiment involved subjects who performed a mindless task of moving pegs around a board.[213]

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207. MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION vii (1980).

208. Hanson & Yosifon, *supra* note 3, at 102.

209. John T. Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111, 119 (2002).

210. Hanson & Yosifon, *supra* note 3, at 103.

211. *Id.* at 103–04.

212. *Id.* at 104 (quoting Jost & Hunyady, *supra* note 209, at 143).

213. *See* Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203 (1959), *available at* http://psychclassics.yorku.ca/Festinger.

After completing the task, some of the subjects were paid $1 and others were paid $20. Ironically, the subjects paid only $1 described the peg-moving as being much more interesting than did those who were paid $20.[214] For those paid only $1, the money could not justify the time they spent on a tedious task. To eliminate the incongruity, then, they changed their attitudes about the task.[215] "People change their attitudes and reduce their dissonance specifically by adding consonant or subtracting dissonant cognitions, as well as minimizing the importance of dissonant ones."[216] And they tend to do so without any awareness that their beliefs or attitudes have actually changed. More broadly, our dispositionist tendencies prime us to see human actions (including our own) as the product of preexisting, coherent attitudes or preferences—the expressed will of the actor. But often our actions come first, automatically, with our attitudes or preferences shifting to accommodate our actions.[217] Thus, a justice might subjectively experience his vote in a particular case as the inexorable product of his constitutional theory, the conscious application of his theory to the facts at hand. But the vote may well occur first, with the constitutional theory subtly (and subconsciously) modified to fit the result.

These are just a few examples. Many other aspects of the human mind undoubtedly influence judicial decision-making, and in ways that we generally have not appreciated. We are highly motivated to control, to belong, to understand, and to trust. We rely on a range of heuristics, or mental short-cuts, that are often highly misleading. We depend on biased knowledge structures and stereotypes in our perceptions of new events and in our recollection of old ones. The list goes on.

And again, what makes these features of the human

214. *Id.* at 203.

215. *See* Hanson & Yosifon, *supra* note 3, at 108–09.

216. FISKE, *supra* note 3, at 232.

217. As Daniel Wegner has explained, "the brain structure that provides the experience of will is *separate* from the brain source of action." DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL 47 (2002). As a result, "the experience of consciously willing an action is not a direct indication that the conscious thought has caused the action." *Id.* at 84; *see also* Hanson & Yosifon, *supra* note 3, at 133 ("our *experience* of will—our familiar experience that our will is responsible for our conduct—is often not a reliable indicator of the actual cause of our behavior").

animal much more powerful than we appreciate is that they generally operate outside our consciousness. For example, if we asked Justice Thomas whether the views of his friends in the Bush administration influenced his votes in *Hamdi* and *Hamdan*, he assuredly would say no.[218] And there would be no reason to doubt his sincerity, at least in terms of how he experienced his decision-making. But Justice Thomas, like all of us, is largely blind to how his mind actually works; he has no way of knowing whether these groups may have affected his choices. We are blind about what moves us to action, and because we feel ourselves being moved by our conscious thinking and preferring, "we are blind to our blindness."[219]

For too long, the dominant strands of scholarship on judicial behavior have largely ignored these insights.[220] Both the attitudinal and strategic models effectively assume that judges are rational actors, individuals who pursue their legal policy objectives, sincerely or strategically, through conscious choices that reflect their personal preferences or attitudes. But the human animal is not really a rational actor.[221] Individual attitudes and preferences about law and policy are undoubtedly relevant to predicting judicial behavior, but so is

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218. As evidence, consider Thomas's claim that politics had "[z]ero" influence on the justices in their decision of Bush v. Gore, 531 U.S. 98 (2000). *See* HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 172 (2001).

219. Hanson & Yosifon, *supra* note 3, at 34.

220. Of course, there are some important exceptions. *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); C. K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996); LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT (2006); Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey A. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938 (1986). Particularly noteworthy was a recent conference organized by David Klein (a political scientist) and Greg Mitchell (a psychologist and law professor) at the University of Virginia entitled "Exploring the Judicial Mind: A Workshop on Psychology and Judicial Decision Making." *See* http://faculty.virginia.edu/judging/index.htm. Discussion papers from the conference—including one authored by Baum on judicial motivation—are available for download at the following web site: http://faculty.virginia.edu/judging/papers.htm.

221. *See* Hanson & Yosifon, *supra* note 3, at 22.

the situation. And in many cases, situational influences may be far more important in determining judges' actions than their personal dispositions.

This is what makes *Judges and Their Audiences* such a valuable contribution to the field of judicial politics: It rejects the dispositional premises of the dominant models and moves us into a realm of greater psychological realism. By demonstrating how a judge's motive to enhance her self-esteem can affect her behavior, Baum has pointed us towards an exploration of how the mind's unseen interior can move judges to action in ways we have traditionally overlooked. This is a critical advance. For if we seek a more realistic account of judicial behavior, we need a more a realistic account of human beings.

CONCLUSION

On December 12, 2000, the Supreme Court handed down its decision in *Bush v. Gore*,[222] declaring unconstitutional the process for recounting ballots that had been ordered four days earlier by the Florida Supreme Court. In holding the recount unconstitutional, and that, as a matter of Florida law, the time for further recounts had run out, the Court's decision ensured that George W. Bush would receive Florida's electoral votes.[223] A day later, Vice President Gore announced the end to his ongoing legal challenges and conceded the presidential election to Bush.[224] Thirty-eight days later, Bush was sworn in as the forty-third president of the United States.[225]

Throughout the 2000 presidential campaign, commentators speculated about the election's importance to the future of the Supreme Court.[226] Given the advancing age of several justices, there was a significant possibility of some

222. 531 U.S. 98 (2000) (per curiam).

223. Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

224. *See* Richard L Berke & Katharine Q. Seele, *Bush Pledges to Be President for "One Nation," Not One Party; Gore, Conceding, Urges Unity*, N.Y. TIMES, Dec. 14, 2000, at A1.

225. *See* Frank Bruni & David E. Sanger, *Bush, Taking Office, Calls for Civility, Compassion and "Nation of Character,"* N.Y. TIMES, Jan. 21, 2001, at A1.

226. *See, e.g.*, Anthony Lewis, *Why It Matters*, N.Y. TIMES, Oct. 28, 2000, at A15; Jeffrey Rosen, *The Next Court*, N.Y. TIMES MAG., Oct. 22, 2000.

retirements. Among the Court's conservatives, the most likely to step down were Chief Justice Rehnquist and Justice O'Connor. Both had already served lengthy tenures on the Court, both were in their seventies, and both had faced some significant health problems. Thus, when Bush won the election, most people thought Rehnquist and O'Connor would retire in the next four years.

But they did not. They may have concluded that, given their personal roles in determining the outcome of the 2000 election, it would have been unseemly to retire before an intervening presidential election, a stain on their legacies. Or they may have believed that continuing to work full-time was beneficial for their health and longevity. Or they may have simply enjoyed being a justice more than whatever else they would have done with their time in retirement. We can only speculate.

But one point seems clear: Rehnquist's and O'Connor's decisions to remain on the Court past 2004 were *not* motivated by their legal policy goals. The outcome of the 2004 presidential election was quite close, turning on roughly 135,000 votes in the state of Ohio.[227] And had Senator Kerry prevailed, there was no guarantee that Rehnquist and O'Connor could have continued to serve until 2009, as Rehnquist's unfortunate passing in 2005 showed. Thus, if they wanted to ensure that a Republican president appointed their successors—the obvious strategy for best realizing their legal policy preferences—both would have retired before 2004.

This is the critical insight of *Judges and Their Audiences*. Contrary to the assumptions of the dominant models of judicial behavior, goals unrelated to legal policy often motivate judges, even at the Supreme Court. Judges are human beings, and an extraordinarily complex array of motives shape their behavior. What is more, we often misunderstand the causes of their behavior because we are predisposed to attribute others' actions to their attitudes, preferences, or personalities. Frequently, and perhaps even typically, the social situation exerts more influence on a person's conduct than her individual disposition.

In *Judges and Their Audiences*, Baum alerts us to an

227. *See* Adam Liptak, *In Making His Decision on Ohio, Kerry Did the Math*, N.Y. TIMES, Nov. 4, 2004, at P10.

important situational influence on judges' decisions: their motive to maintain and enhance their self-esteem, and their dependence on the approval of important audiences in that endeavor. This is a significant insight, one that should alter our conceptions of how courts actually work. But in many respects, it is just a start. We know that several other features of our cognitive interiors are likely to affect judges' choices. In this sense, Baum has charted the course. The task for the rest of us is to examine and document the myriad other underappreciated aspects of the judicial situation. If we succeed, we are apt to develop a much more realistic understanding of why judges act as they do.