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Law as Courtesy

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KEITH J. BYBEE, ALL JUDGES ARE POLITICAL EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW (Stanford Univ. Press 2010). Pp. 192. Cloth. $55. Paperback. $19.95.

Keith Bybee's *All Judges Are Political Except When They Are Not* deals with the controversy over law and politics in courts in an extraordinarily creative manner.[1] He suggests that the reliance on law is a hypocrisy, used as a courtesy. This is an inspired vision, and facially has a distinct whiff of truth. I believe that, upon investigation, the theory is fundamentally unsustainable as a broad matter but may have real meaning in a limited context. After reviewing the book's claims, I will analyze them on the available evidence.

While the book's theory is striking and carries an intuitive appeal, I believe it is not the true explanation of ideological judicial decision-making, as the author suggests. A more straightforward psychological explanation seems more likely. However, I think the book's vision of law as courtesy is likely true in cases where the court chooses to defer to the preferences of other political institutions.

LAW, POLITICS, AND COURTESY

The conundrum addressed by the book is that "many Americans acknowledge that the judicial process is infused with politics; on the other hand, almost everyone seems to believe that judicial decisions are determined on nonpolitical, purely legal grounds."[2] While Bybee does not extensively review the empirical evidence, it amply supports his claim. The problem is not simply one of the ignorance of Americans; it reflects a manipulation of the process by judges.

Bybee suggests that judges commonly engage in hypocrisy in their decisions but that this is not a purely bad thing. "[J]udges do not always mean what they say . . . ."[3] But, this is not true dishonesty on their part; they are courteously "observing the rules required by good manners."[4] Suppose you are asked: "How do I look in these pants?"

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1. KEITH J. BYBEE, ALL JUDGES ARE POLITICAL EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW (2010).

2. *Id.* at 4.

3. *Id.* at 36.

4. *Id.* at 39.

You might give a truthful, honest answer, but there is a possibility that such an answer could be negative and hurtful. Alternatively, you might give a courteous but somewhat dishonest answer. In typical circumstances, I suspect most would choose the latter approach. Bybee catalogues benefits of the courteous approach, especially as a tool for exercising hierarchical control.[5] Insincerity may thus be an adaptive and cost-beneficial response to circumstances.

The rule of law is conceived as a rule of etiquette. Legal procedures are useful pretenses. A judicial action is simply a form of decorum. As a result, judges can "clothe their claims in law's independent tests and procedures, lending their views an appearance of importance and impartiality that may not have much of a connection to underlying substance."[6] This strengthens their position, because the courts' legitimacy is grounded heavily in the reliance on law, rather than politics.

Although this picture of judicial decision-making might seem gloomy, Bybee emphasizes its functional value. Having a well-respected judiciary in place to resolve disputes is of considerable societal value. Even if that judiciary is not truly following the law, but exercising politics, much of the social value remains. Accepting the outcomes of court decisions produces peace, while rejecting them can only mean vigilantism. Using the law as courtesy strengthens the judicial power, which is generally beneficial to society as well as judges. Hypocrisy may have its benefits.

THE AUTHENTICITY OF LAW

While Bybee is not perfectly explicit on his position, the notion of law as courtesy or hypocrisy implies some intentionality. When I am courteous in describing how another person "looks in those pants" I am being consciously dishonest, to a degree, in order to protect a person's feelings. While being courteous may become a habit, I believe it implies a certain well-motivated but conscious dishonesty. Bybee's use of words like pretense and hypocrisy suggest conscious falsehood. In this respect, I do not believe that it accurately describes the judicial process.

Bybee does not discuss the actual study of judicial decision-making much, as the book simply lays out his perspective. The validity of that perspective, however, must be assessed based on the evidence. In this section, I will examine the theory in light of what we know about judicial decisionmaking.

EVIDENCE ON LAW AND POLITICS

While judges are supposed to be neutral arbiters, unaffected by their respective ideological policy preferences, we know this is not truly the case. There is ample empirical evidence, especially at the Supreme Court level, that judicial decisions break down along fairly predictable ideological lines.[7] Justices Thomas and Scalia are

5. Others have suggested that "if everyone suddenly stopped lubricating social interactions with politeness, the consequences for the institutions of daily life – families, schools, religious organizations, companies, governments – would likely be catastrophic." JENNY DAVIDSON, HYPOCRISY AND THE POLITICS OF POLITENESS 1 (2004).

6. BYBEE, *supra* note 1, at 87.

7. *See, e.g.*, Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004 (1996).

commonly conservative, while Justices Warren and Brennan were much more liberal.

Some have looked at this as evidence that the law doesn't matter, that the justices are purely ideological creatures. They maintain that the claim that justices decide cases according to law is mythical, like the story of St. George and the dragon.[8] Others claim, though, that the law does influence judicial decisions, even at the level of the Supreme Court, and they too have been able to present some empirical evidence.

In a majority of cases, judicial votes do not fall precisely upon predicted ideological lines.[9] The empirical evidence on ideological decision-making leaves a large number of votes unexplained. Because the cases that appear before the Court are not randomly selected, the study of ideological outcomes may be skewed.[10] One study hypothesized that the Court's opinions created "jurisprudential regimes" that directed future outcomes.[11] For example, after the Court changed the standards on testing governmental speech restrictions, subsequent opinions relied on the new standard. Studies of *stare decisis* have found that precedent is a partial determinant of the Court's outcomes.[12]

Bybee recognizes the ideological nature of the Court's decisions and the role of law in its opinions, and seeks to explain the latter as courtesy. The Court decides based upon its preferences, and then justifies its decision through legal materials. However, the book does not explicate much on the nature of this practice. One wonders if the need for courtesy and legal analysis ever constrains the ideological impulses of the justices, or as some claim, whether there is a supportive precedent for any outcome.

Bybee's account rings true for the famous Nuremberg trials. The victorious allies prosecuted representatives of Nazi Germany, and sought to do so in a neutral judicial tribunal. Yet the convictions have been tainted with allegations that "show trials" produced only "victor's justice" at Nuremberg.[13] After a war is won, the victors may wish to punish the leadership of the vanquished out of vengeance, desire to avoid resistance, or some other reason. In the modern world, this is accomplished by trying them for war crimes or other offenses. A judicial type proceeding is initiated, and the vanquished are commonly found guilty, according to supposedly legal principles. Even if

8. *See id.* at 1007.

9. *See* Paul H. Edelman et al., *Measuring Deviations from Expected Voting Patterns on Collegal Courts*, 5 J. EMPIRICAL LEGAL STUD. 819 (2008).

10. Suppose that the justices do not take cases that are clear on the law, as would be predicted by the position that the Court is not one of "error correction." In these circumstances, the law never clearly governs the facts before the Court, so one would not expect the decisions to be purely legal. It is possible that the law trumps other factors before the Court, but when the law doesn't govern in these cases at the margin, ideology comes into play.

11. *See, e.g.*, Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 AM. POL. RES. 33 (2005).

12. *See, e.g.*, THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721 (2000).

13. *See* William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010). Nuremberg reportedly "looked more like a sham trial put on for show than any attempt at real justice." Erin Hopkins, *From Nuremberg to Baghdad: How the Principles of Nuremberg, Created by the United States, Have Been Turned on Their Creator*, 9 WASH. U. GLOB. STUD. L. REV. 677, 687 (2010).

they were in fact guilty by some standard, the outcome of the "trial" is largely a foregone conclusion, and the victors go unpunished for any similar actions they undertook. The judicial enterprise, in such a case, is under considerable institutional pressure to reach a given conclusion.

In general, however, Bybee's creative attempt to join politics and the law does not seem plausible. His has a creative theoretical argument, but it is tied only vaguely to the considerable empirical evidence on judicial decision-making. In this section, I will argue that this evidence does not support the theory generally, but that Bybee's theory may be an appealing explanation for some decisions.

NOT JUST THE SUPREME COURT

Bybee's claims appear to be broad and not limited to the Supreme Court.[14] He believes all judges view the use of the law as a courtesy, covering up the hidden and political intentions behind their decisions. But the empirical evidence here belies his views. While the case is somewhat plausible at the Supreme Court level, it breaks down for lower courts.

Research at the circuit court level has found some apparent ideological decision-making.[15] However, the magnitude of the ideological effect is plainly much less than at the Supreme Court level.[16] My study of circuit court decision-making generally found some ideological effect, but that effect was dwarfed in significance by decision-making according to legal procedural standards.[17] Other research shows that an ideological minority dissenter can successfully use the law to persuade the contrary ideological majority to adopt his or her position.[18] Decisions at this level plainly illustrate the significance of the law, as opposed to politics.

I can find nothing in the theory of law as courtesy that would explain such devotion to law by circuit court judges. Additionally, "in large measure, it is the circuit courts that create U.S. law."[19] The Supreme Court takes very few cases, leaving the overwhelming majority of legal disputes in the country to be governed by the decisions of circuit courts. Because the Supreme Court takes so few cases, fear of reversal cannot explain the circuit court decisions. This is where the law is made, and it appears to be law as law, not law as courtesy.

Might the Supreme Court be different? Could "law as courtesy" explain the Court's decisions, even if it is inapplicable to lower courts? Perhaps, though one wonders why judges would change their practices on the Supreme Court. Moreover, there is a plausible inference why the Supreme Court is more ideological, even given a sincere commitment to the law, not a mere courteous one. The Supreme Court picks and chooses

14. BYBEE, *supra* note 1, at 15.

15. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

16. *See* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999).

17. FRANK CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007).

18. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L. J. 2155 (1988).

19. CROSS, *supra* note 17, at 2.

the cases that it will hear and commonly takes the most difficult ones, for which the law is most indeterminate. An indeterminate law leaves more room for other influences on decisions. And these influences are well explained by a psychological theory of motivated reasoning, which explains why justices searching for the correct legal answer would still show an ideological bias in their decisions.

MOTIVATED REASONING

Courtesy may become a habit, but it is regarded as a conscious act, as noted above. The judges are willfully acting ideologically, but covering their tracks with the materials of the law. Bybee expresses this as hypocrisy, defined as pretending "to have feelings or beliefs of a higher order than . . . real ones."[20] This is insincerity or pretense. Yet there is a more likely, unconscious explanation for the pattern of judicial decision-making.

Bybee notes that Judge Kazinski of the Ninth Circuit steadfastly claims that decisions are not intentionally political but acknowledges that it can be "difficult to tell the difference between how you think a case should be decided and how you hope it will come out" via a subtle shading of the process.[21]

Psychologists have identified a concept known as motivated reasoning.[22] This is apparently a natural human tendency to favor information that confirms one's preexisting beliefs. This also sometimes goes by the name of confirmation bias. One occasionally reads how eighty or ninety percent of people consider themselves "above average" at tasks such as driving, though this is obviously impossible. These people are not lying or engaged in courtesy, they are honestly expressing a belief, however incorrect it may be for some of them.

Motivated reasoning manifests itself in several ways that may appear as part of judicial decisions. For some, motivated reasoning results from the biased search for information. Individuals go to sources more likely to provide a basis for their preferred decision. In addition, even when presented with unbiased information, as one might expect from a well briefed opinion, people interpret that information very differently. They tend to selectively credit and interpret information that is congenial to their preferences.

Judges are supposed to resist these tendencies and rule on the law, but the bias is part of the "fundamental mechanics of the human thought process."[23] Different judges will report seeing different things, even when confronted by the same evidence.[24] This was starkly evidenced in the recent case of *Scott v. Harris*.[25] A fundamental question in this case was whether a fleeing suspect presented a risk to the public, thereby justifying a police officer's actions in a high speed chase.

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20. BYBEE, *supra* note 1, at 20.

21. *Id.* at 15.

22. The classic article on the concept is Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL.BULL. 480 (1990).

23. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 3 (2010).

24. *See* Dan M. Kahan et al., *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

25. Scott v. Harris, 550 U.S. 372 (2007).

The justices differed on the degree to which it posed a threat. For some it was obvious, but Justice Stevens dissented from this opinion. Video of the chase was displayed in a study, and the researchers found that responses to it differed sharply.[26] The distinctions were not random, and demographic differences among audience members colored their perceptions. The identical fact was interpreted quite differently by different audiences.

A follow up study revealed the effect of ideology. Researchers showed students a demonstration and told half of them that they were seeing a demonstration outside an abortion facility, while the other half were told the demonstration was occurring outside a military recruitment facility.[27] The students were told to resolve whether the actions were constitutionally protected or so intimidating that they could be regulated. The answers depended largely on the students' ideologies. Liberals tend to find the protest of the military facility more protected than the one of abortion clinics, while conservatives reached the opposite conclusions.

People tend to selectively credit information that fits their preferences and interpret information in the same manner. When confronted with evidence for both sides, as in a court case, "people tend to overweight positive confirmatory evidence or underweight negative disconfirmatory evidence."[28] Arguments of political import are commonly viewed through a lens of bias.

People evaluate arguments and evidence that support their preferred result as stronger and more compelling, and have a "disconfirmation bias" for contrary evidence, which they take efforts to discredit.[29] This same human tendency applies to judges rendering opinions. Guthrie, Rachlinski, and Wistrich have examined trial court judicial decision-making.[30] They found that "snap" judgments were common, but that judges sometimes overrode their initial intuition, thanks to reflection on the merits of the case.

Motivated reasoning is not all-powerful. While judges have directional goals (how they would like the case to turn out), they also have accuracy goals (how the law dictates that the case should turn out). Under some circumstances, the accuracy goal will overcome the desire to reach the directional goal. Some research evidences the relevant circumstances.

Kunda found that motivated reasoning was lessened when a decision had greater stakes, when the decision had to be justified, and when the decision would be made public.[31] All these are common features of judicial decisions. Accountability may also be an important factor. Accountable decision-makers use more complex procedures, process information in more detail, make more consistent decisions, and are more discriminating in their evaluation of evidence.[32] Judicial independence reduces this accountability but

26. *See* Kahan, *supra* note 24.

27. Dan M. Kahan et al., *'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction* (Cultural Cognition Project, Working Paper No. 63, 2011).

28. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 180 (1998).

29. Charles S. Taber et al., *The Motivated Processing of Political Arguments*, 31 POL. BEHAV. 137 (2009).

30. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

31. Kunda, *supra* note 22, at 481.

32. Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 229 (1985).

does not eliminate it.

Judges, like anyone, prefer that audiences like their work.[33] The audience for judges includes lawyers and professors of law, and this may constrain the directional motivated reasoning of judges.[34] Although the audiences have their own attitudinal biases, they create an external standard of legal correctness that judges wish not to ignore. Consequently, the law exercises a pull on what the justices might otherwise attitudinally prefer.[35]

The research on motivated reasoning also shows that the presence of stronger arguments, contrary to an individual's preferences, will reduce the influence of motivated reasoning.[36] Heterogeneity of opinions, as on panels that are ideologically divided, can also help counteract the process. Majority decisions may well be influenced by determined minority advocacy.[37]

All these means of reducing motivated reasoning are imperfect, though. They are especially weak when a case presents a very close call on the law, as is common at the Supreme Court, which selects the cases that it will hear. Consequently, conservative justices will commonly produce conservative legal outcomes, as liberal justices will commonly produce liberal legal outcomes. This is because they sincerely believe the law calls for that outcome, thanks to the biases of motivated reasoning, not out of conscious bias and courtesy. This is evident from the much weaker ideological effect at lower levels of the court, where cases are not commonly so close.

This more plausible view of judicial decision-making as motivated reasoning does not reflect judges treating the law as a courtesy, or as political vice paying hypocritical tribute to legal virtue. Instead, it suggests that judges are authentically committed to applying the law, not their politics. But their politics inevitably influence their reasoning processes, and seep into decisions. The evaluation of Supreme Court opinions and empirical experimental research confirms this fact.[38]

This view is much more consistent with the empirical findings. It explains why judges do not always pursue their political desires. When the law is clear, judges appear to place it ahead of the politics. This explains the not infrequent departures of Supreme Court justices from their ideologies. Moreover, it explains the much less ideological

33. *See generally* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

34. C.K. Rowland, Tina Traficanti, & Erin Vernon, *Every Jury Trial is a Bench Trial: Judicial Engineering of Jury Disputes*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 183 (David Klein & Gregory Mitchell eds., 2010).

35. Eileen Braman, *Searching for Constraint in Legal Decision Making*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 34, at 203 (noting that a judge's desire to court, appease, or satisfy litigants, attorneys, legal academics, and other judges can act as a real constraint on their decisional behavior).

36. Thus, "[e]ven a highly motivated decision maker will resist severely distorting information to support a desired conclusion." Lindsley G. Boiney et al., *Intrumental Bias in Motivated Reasoning: More When More Is Needed*, 72 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 4 (1997). *See also* Sahiendra Pratap Jain & Durairaj Maheswaran, *Motivated Reasoning: A Depth of Processing Perspective*, 26 J. CONSUMER RES. 358 (2000).

37. Marwan Sinaceur et al., *Accuracy and Perceived Expert Status in Group Decisions: When Minority Members Make Majority Members More Accurate Privately*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 423 (2010).

38. *See generally* EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING (2009).

decisions of judges further down the federal judicial hierarchy. The latter judges are more likely to see cases where the law is much more determinate on the facts and therefore governs the case. At the Supreme Court level, where cases are commonly taken on the indeterminate margin, the law is less clear, which allows room for greater motivated reasoning in trying to interpret unclear legal commands. The explanation for decision-making based on law, which conforms to political positions, is more likely due to simple motivated reasoning, not intentional hypocrisy or courtesy.

STRATEGIC DECISIONMAKING

There is one group of judicial decisions where Bybee's claims seem especially plausible, however. Ironically, these are cases that do not fit the legal realism vision he professes to explain via courtesy. The theories of courtesy and/or hypocrisy seem to fit opinions that do not reflect the justices' personal ideologies but instead conform to the desires of the other branches of government.

Recent political science research shows that justices may be strategically motivated by the desires of other governmental branches. The judiciary is at least somewhat deferential to the preferences of Congress or the Presidency. While our federal judiciary is independent, it is subject to certain paths of influence from the elected branches. And for the judiciary to be effective in advancing its ideological goals, it must be attuned to political circumstances.

Epstein and Knight have called for a strategic account of judicial decision-making.[39] Justices must be strategic internally, marshalling the votes necessary for a majority. However, they must also be strategic externally, writing opinions at least somewhat acceptable to society and the other branches of government. They found that, in conference, the justices paid attention to the preferences and likely actions of other government bodies.[40]

As Alexander Hamilton observed, the judiciary has neither the sword nor the purse. Its authority is contingent on the actions of people and the other branches, and it is potentially subject to punishment by the other branches of government. Judges may be impeached for their opinions. While actual impeachment is quite rare, the threat of impeachment may have an effect on what justices do.[41] When Judge Harold Baer issued an opinion suppressing cocaine as evidence and criticizing police practices, the vigor of his criticism produced bad press and impeachment threats. Baer subsequently reconsidered and vacated his opinion.[42]

Congress has various other powers to restrain the judiciary. It may strip jurisdiction from the courts, preventing them from hearing certain categories of cases. Congress has intermittently exercised this power over time, and analysis has shown that the Court has responded to such court curbing by issuing decisions evincing greater

39. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUDGES MAKE (1998).

40. *Id.* at 149.

41. *See generally* DAVID BARTON, IMPEACHMENT: RESTRAINING AN OVERACTIVE JUDICIARY (1996). Alexander Hamilton suggested that the mere power of impeachment would generally keep the judiciary in line. THE FEDERALIST NO. 81, at 484-485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

42. United States v. Bayless, 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

support for the government.[43] Congress might also create non-Article III court systems to remove topics from the life-tenured federal judiciary.

The most influential congressional power over the judiciary may be its control over resources. While Congress is prevented from cutting the salaries of judges, it may refuse them and deny the courts other important resources, such as funds for courthouses and equipment. The Chief Justice and others commonly go before Congress requesting more money. One study suggests that Congress can influence judicial decisions through this funding power.[44]

Finally, the other branches may be necessary to the implementation of judicial decisions. If the justices are ideological, that would mean that they wish to change public policy. However, they cannot change public policy by themselves, no matter how they rule. For example, it is well established that *Brown v. Board of Education*[45] itself had little influence on school desegregation, until Congress chose to act to advance the goal some ten years later

Political scientists and others have sought to study the effect of external preferences on the justices of the Supreme Court. A study of judicial invalidation of statutes found that the justices were somewhat constrained by the preferences of Congress.[46] A separate study found that the probability of invalidation of a federal statute between 1987 and 2000 was highly dependent upon the ideological composition of Congress.[47] A broader study of individual justice voting since World War II estimated the amount of institutional deference they gave to the elected branches.[48] The degree varied by individual justice, with some, such as Justice Douglas, showing no institutional deference and others, such as Justice White, showing a considerable amount of deference.[49] However, this same study showed that the justices were more deferential to legal rules.[50] These cases would seem to be likely candidates for law as courtesy. The Court backs down, in the face of institutional opposition, but justifies its outcome legally, not politically.

Such strategic decision-making is a bit like the victor's justice of Nuremberg. The court is under considerable institutional pressure to reach a given conclusion. The court is also expected to rationalize that conclusion with conventional legal methods. Recognizing both, the court complies. This is classical, hypocritical "law as courtesy" of the sort described in the book by Bybee.

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43. Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 LAW & SOC'Y REV. 309 (1980).

44. *See* Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT'L REV. L. & ECON. 433 (1996).

45. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

46. Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011).

47. Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings*, 1987-2000, 31 LEGIS. STUD. Q. 533 (2006).

48. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001).

49. *Id.* at 1488.

50. *Id.*

CONCLUSION

Perhaps judicial decisions appear to be grounded in the law primarily because this is expected of them. But this does not mean that the law is mere courtesy. It is possible that the justices sincerely believe they are deciding according to what the law dictates, even as the evidence suggests that their decisions are highly ideological. When liberal justices and conservative justices commonly disagree using the same law, it is tempting to say that the law doesn't matter. Because of motivated reasoning, however, it is quite plausible that all the justices are attempting to follow the law. The opinion is not courtesy, it is the authentic belief of the justices about what the law is, mistaken perhaps, but not some hypocritical deference to a legal standard. However, such motivated reasoning is a less persuasive explanation for judicial deference to Congress. Those decisions look far more like the justices papering over their fealty to a competing branch with legal analysis, out of a courteous concern for appearances. The book provides an important insight into the nature of the judiciary but overgeneralizes its applicability.