

THE *Pioneers* OF  
*Judicial Behavior*

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*Walter F. Murphy: The Interactive Nature  
of Judicial Decision Making*

Lee Epstein and Jack Knight

Since his days in the Marine Corps, Walter F. Murphy has conceptualized the world in strategic terms. Just as no military commander can expect to win a battle without taking into account the position and likely actions of his opponents, no jurist can expect to establish policy that members of society will respect unless he or she is attentive to the preferences and likely actions of those members. Or so Murphy has argued in now-classic works on the complex strategic situations confronting U.S. Supreme Court justices in their dealings with their colleagues (e.g., Murphy 1964) or with relevant members of the policy-making community (e.g., Murphy 1962b).

In this chapter we detail the major role Murphy's scholarship has played in initiating the strategic revolution that is now under way in the field of law and courts (see Cameron 1994; Epstein and Knight 2000). But to focus exclusively on those studies would be to miss Murphy's contributions to so many other areas of inquiry. Accordingly, we devote the first section to an overview of his research, with emphasis on its recent direction. Next, we turn to his work on strategic interactions between the Court and other political organizations and among the justices. We begin with a description of the central studies and then move to the question—puzzle, really—of why several decades elapsed before scholars begin to heed the lessons in those works. We end with a detailed discussion of their impact on contemporary thinking about law, courts, and judges.

AN OVERVIEW OF  
MURPHY'S SCHOLARSHIP

From the time she conceptualized this volume through the day she selected her authors, Nancy Maveety located Walter F. Murphy in this section on strategic pioneers. We agree with Maveety's choice: if there is a strategic pioneer—and we believe there is—it is Murphy. But,

frankly, as even Maveety would concede, she could have placed a chapter on Walter F. Murphy in almost any section. His contributions to the study of law and courts are that great and that varied.

Table 1 makes this crystal clear, depicting Murphy's work over time and across four substantive areas: judicial behavior, law and society, comparative law and courts, and constitutional interpretation.<sup>1</sup>

In perusing the table, at least two interesting patterns emerge. First, the great bulk of Murphy's work on judicial behavior came in the 1960s; indeed, with the exception of new editions of *Courts, Judges, and Politics* (Murphy and Pritchett 1961, 1974, 1979, 1986; Murphy, Pritchett, and Epstein 2001), he has moved away from this line of research, writing almost as much on the Pope—whether fiction or not (see, e.g., Murphy 1979, 1982, 1987a)—as he has on matters of legal process and politics. That Murphy is included in a volume on the pioneers of judicial behavior is thus a testament to the staying power of his early research.

Second, his interest in constitutional interpretation and jurisprudence, while present over the entire course of his career, has grown even stronger with time. Notice the four bottom cells in the table, representing Murphy's research during the 1990s: the two in the judicial behavior and law and society columns are empty; those reflecting his work on constitutionalism, here and abroad, are loaded with intriguing studies, published in a wide range of outlets.

That Murphy now spends the bulk of his time working on jurisprudence and doctrine is not particularly surprising to him or to his many students and colleagues. Quite the opposite: for Murphy, this stage of his career represents a return to his first love, political theory. In fact, he went to graduate school at the University of Chicago to study with Leo Strauss, perhaps the most prominent political theorist in the United States at the time, rather than with C. Herman Pritchett, the most prominent judicial specialist of his day. Or as Murphy puts it, "Pritchett was *a* reason I went to Chicago; Strauss was *the* reason."<sup>2</sup> Murphy took more courses with Strauss than with any other professor, including Pritchett, and would have wound up writing his dissertation with Strauss had he not been "the type who told you what to do, how to do it, and what you would find." Finding himself unable to work with the great theorist, Murphy turned to Pritchett, who moved Murphy in the direction of empirically grounded work on judicial politics.

Murphy may have found Strauss's approach to his dissertation students distasteful, but Murphy never lost his taste for political theory. He simply combined his interest in it and in judicial politics to make a

TABLE 1. Walter F. Murphy's Contributions to the Study of Law and Courts

Judicial Behavior/ Process	Law and Society	Comparative Constitutionalism	American Constitutional Interpretation/ Jurisprudence
<b>The 1950s</b>			
Murphy 1959a	Murphy 1959c		Murphy 1958, 1959b)
<b>The 1960s</b>			
Murphy 1961, 1962a, 1962b, 1962c, 1964, 1965b, 1966; Murphy and Pritchett 1961	Birkby and Murphy 1964; Murphy and Tanenhaus 1968; Murphy and Tanenhaus 1969b	Murphy and Tanenhaus 1969a	Murphy 1965a
<b>The 1970s</b>			
Murphy and Pritchett 1974; Murphy and Pritchett 1979; Murphy and Tanenhaus 1972	Murphy 1974; Murphy, Tanenhaus and Kastner 1973	Murphy and Tanenhaus 1977	Murphy 1978
<b>The 1980s</b>			
Murphy and Pritchett 1986	Tanenhaus and Murphy 1981	Murphy 1980	Lockard and Murphy 1980; Lockard and Murphy 1987; Murphy 1986; Murphy, Fleming, and Barber 1986
<b>The 1990s</b>			
	Murphy and Tanenhaus 1990	Murphy 1991, 1993a, 1993b, 1995b, 1998	Lockard and Murphy 1992; Murphy 1987b, 1990, 1992, 1995a; Murphy, Fleming, and Barber 1995

*Note:* Because Murphy maintains only an abbreviated vitae, we cannot be certain that this table lists all of his published research relating to law and courts. But searches of various electronic databases indicate that, at the very least, the table covers his major works.

“natural” move to jurisprudence. This is clear in his recent work, which is consciously theoretical, yet his concern with the doctrine is never far from the surface even in his earliest studies of judicial behavior. While many scholars writing in the 1960s—including Glendon Schubert and S. Sidney Ulmer—aimed their cannons at explaining justices’ votes, Murphy pointed his at understanding the law as articulated by the Court. This is a critical distinction, we believe, between Murphy and the attitudinal pioneers represented in this volume, and one to which we return shortly.

#### MURPHY AND THE STRATEGIC ACCOUNT

Without doubt, we could devote this chapter in its entirety to Murphy’s doctrinal and jurisprudential analyses. But, given the purpose of this volume—to illuminate contributions made by prominent scholars to the study of judicial behavior—we focus instead on Murphy’s role in moving the strategic account of judicial decisions from an intriguing idea to a rapidly expanding and influential form of analysis. We divide our discussion into three parts. The first two describe the initial rise and demise of the strategic account within the law and courts field. That rise began in the 1950s and reached its zenith with publication of Murphy’s *Elements of Judicial Strategy* (1964). Given the central role Murphy’s contributions played during this period, the discussion necessarily incorporates a description of them. After detailing the demise of the strategic account, which occurred in the early 1970s and persisted through the early 1990s, we consider solutions to the puzzle of why this demise occurred.

Before moving to these topics, we want to be clear about what we (e.g., Epstein and Knight 1998) and Murphy (e.g., 1964) mean by the “strategic account.” On this account (1) social actors make choices to achieve certain goals, (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors, and (3) these choices are structured by the institutional setting in which they are made (see, generally, Elster 1986). Defined in this way, the account belongs to a class of nonparametric rational choice explanations as it assumes that goal-directed actors operate in strategic or interdependent decision-making context.

It does not assume that the actors—including judges—pursue one particular goal. Under the strategic account, researchers must specify a priori the actors’ goals; researchers may select any motivation(s) that they believe particular actors hold. We emphasize this point because it

is the source of a great deal of confusion in the judicial literature, with some scholars suggesting that on the strategic account the only goal actors pursue entails policy.

We understand the source of this confusion: virtually every existing strategic account of judicial decisions posits that justices pursue policy—that is, their goal is to see public policy (the ultimate state of public policy) reflect their preferences. This includes Murphy’s work (e.g., 1964) as well as most of ours (e.g., Epstein and Knight 1998). But again, this need not be the case; under the strategic account, researchers could posit any number of other goals, be they jurisprudential or institutional.

Because this point becomes important in the concluding section of this chapter, where we discuss Murphy’s impact on contemporary scholarship, and because so much confusion exists over it, we drive it home even further with the simple example shown in figure 1, which depicts a hypothetical set of preferences regarding a particular policy—for example, a civil rights statute.<sup>3</sup> The horizontal lines represent a (civil rights) policy space ordered from left (most liberal) to right (most conservative); the vertical lines show the preferences (the most preferred positions) of the actors relevant in this example: the median member of the current Congress ( $M$ ) and of the key current committees and other gatekeepers ( $C$ ) in Congress that make the decision about whether to propose civil rights legislation.<sup>4</sup> We also identify the current committees’ indifference point ( $C(M)$ ) “where the Supreme Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber” (Eskridge 1991a, 381). To put it another way, because the indifference point and the median member of current Congress are equidistant from the committees, the committees like the indifference point as much as they like the most preferred position of Congress: they are indifferent between the two. Finally, we locate the status quo ( $X$ ), which represents the intent of the legislature that enacted the law.

Suppose the Court has a case before it that requires interpretation of a civil rights law: Where would it place policy? Under the strategic account, the answer depends on the goals of the justices. If they are motivated to see the outcome reflect as closely as possible their policy preferences, they will interpret the law in the  $C(M)$ - $C$  interval, with the exact placement contingent on the location of their ideal point. Placing policy there will deter a congressional attempt to overturn. Now, suppose instead that the justices’ goal is to interpret the law in line with the intent of the enacting legislature (that is, to follow a jurisprudence of

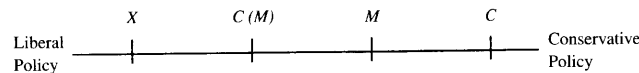


Fig. 1. Hypothetical set of preferences regarding civil rights policy. (Note:  $X$  is the status quo (intent of enacting Congress);  $C(M)$  represents the current committees' indifference point (between their most preferred position and that desired by  $M$ );  $M$  denotes the most preferred position of the median member of Congress;  $C$  is the most preferred position of the key current committees (and other gatekeepers) in Congress that make the decision about whether to propose legislation to their respective houses. Adapted from Ferejohn and Weingast 1992a.)

original intent) but also to avoid an override attempt by the current Congress. If the justices were so motivated (and assuming that the president and pivotal veto player in Congress are to the right of  $X$ ), the Court will place policy at  $C(M)$ .

#### THE RISE OF THE STRATEGIC ACCOUNT

The sort of model we use in figure 1 to demonstrate the flexibility (and importance) of goals within the strategic account has been invoked over the past decade or so by a group of (mainly) business school and legal academics who tout positive political theory (PPT) as an appropriate framework for the study of judicial decisions.<sup>5</sup> Though a survey of positive political theorists makes clear that "considerable" disagreement exists over the meaning of the term PPT, the theorists tend to coalesce around the following definition: "PPT consists of non-normative, rational-choice theories of political institutions" (Farber and Frickey 1992, 461). For us, the key point is that positive political theorists typically adopt the assumptions of the strategic account, as Walter F. Murphy originally set it out.

Yet, based on at least the early PPT writings, one would think that the injection of strategic analysis into the study of judicial politics began with them; in fact, they say that the field owes its origins to a 1989 dissertation written by Brian Marks, a student of economics at Washington University (see, e.g., Ferejohn and Weingast 1992a, 574).<sup>6</sup> This is not so. As we suggested previously, nearly thirty years before Marks produced his "locus classicus" (Cameron 1994), political scientists—including Murphy and several other of the founders of the modern-day study of courts and law—implicitly or explicitly invoked strategic approaches to studying judicial decision making.

Indeed, though Marks may be the starting point for modern-day

positive political theorists, Glendon Schubert, more typically associated with social-psychological theories of judicial decision making (see, e.g., Schubert 1965; Segal and Spaeth 1993, 67–69), was one of the first political scientists to apply rational choice theory to political problems. In his 1958 review of the field of law and courts, Schubert included a section he called "game analysis." He wrote that the "judicial process is tailor-made for investigation by the theory of games. Whatever may be their obligations as officers of courts, attorneys frequently play the role of competing gamesmen, and the model of the two-person, zero-sum game certainly can be applied to many trials . . . and to the behavior of Supreme Court justices" (1022). Schubert provided several examples, including one that applied game theory<sup>7</sup> to the voting behavior of two Supreme Court justices—Roberts and Hughes—during a crucial historical period, the New Deal (the "Hughberts" game). In so doing, he showed that the justices were strategic decision makers; only by recognizing their interdependency, Schubert argued, could they maximize their preferences.

Schubert's application may have been crude, but it was important in two regards. First, it demonstrated that approaches based on assumptions of rationality—specifically, game theory—could be applied to important political problems.<sup>8</sup> Although scholars working in most fields of political science (but not necessarily law and courts) now take this for granted, it was not so clear in 1958. Game theory was relatively new in the social sciences, and it was usually applied to social science problems by economists in pursuit of explanations of economic phenomena. Second, Schubert's work generated interest in other legal applications of the rational choice paradigm—or, at the very least, it encouraged scholars working in the field to think about the interdependent nature of judicial decision making. One of the most influential exemplars—if not the most influential—was Murphy's 1962 *Congress and the Court*.<sup>9</sup>

Prior to his work on Congress, Murphy of course had read Pritchett's research on the justices of the Roosevelt Court era (1941, 1948). These works, especially *The Roosevelt Court*, were seminal in many regards, not the least of which was that they moved legal realism from the sole province of law school professors to the realm of political scientists, who had previously been reluctant adherents. Like Holmes, Brandeis, and later adapters of sociological jurisprudence, Pritchett argued that justices are simply motivated by their own preferences, with rules based on precedent nothing more than smoke screens behind which to hide values and attitudes. Or, to put it in modern-day

language, he was perhaps the first political scientist to view justices as “single-minded seekers of legal policy” (George and Epstein 1992, 325).

This intuition about the goals of justices provided the basis for Murphy’s work (1962b) on Congress-Court interactions, but in that work he pushed the analysis one step further.<sup>10</sup> Working with interview data, Court cases, information collected from manuscript collections, congressional hearings, and the like, Murphy shows that if justices are single-minded seekers of policy, they necessarily care about the law, broadly defined. And if justices care about the ultimate state of the law, then they may be willing to modulate their views to avoid an extreme reaction from Congress and the president.<sup>11</sup> Murphy, in other words, tells a tale of shrewd justices who anticipate the reactions of the other institutions and take those reactions into account in making decisions. The justices he depicts would rather hand down a ruling that comes close to but may not exactly reflect their preferences than see Congress completely reverse the decision in the long run.

Murphy’s work on Congress and the Court thus clearly if implicitly adopted the strategic assumption of Schubert’s “Hughberts” game and, at the same time, underscored the importance of the policy goals brought to light in *The Roosevelt Court*. Still, Murphy’s *The Elements of Judicial Strategy* (1964), which came on the heels of the Congress-Court book, most fully embraced the notion of interdependent interaction and explicitly found its grounding in strategic accounts of politics.

The core arguments of *Elements of Judicial Strategy* are the same ones that Murphy and Schubert advanced earlier: (1) Supreme Court justices are policy oriented; (2) they act strategically to further their goals; and (3) their interactions are structured by institutions. The new contribution came in the blending of Schubert’s earlier focus on internal decision making with Murphy’s stress on the external constraints placed on the Court by Congress and the president. Under Murphy’s framework, strategic interaction exists not only between the Court and the other branches of government but also among the justices. As Murphy later described *Elements*, “It took as its point of departure the individual Supreme Court justice and tried to show how, given his power as one of nine judges and operating within a web of institutional and ideological restraints, he could maximize his influence on public policy” (Murphy and Tanenhaus 1972, 24). *Elements* supported this account in much the same way as did *Congress and the Court*, by culling (in this case, from various justices’ private papers) stylized stories that in one way or another reinforced the central thesis.

That Murphy arrived at these views is not terribly surprising. By 1964, the rational choice paradigm was beginning to take hold in the political science literature with publication of Downs’s classic work on political parties, *An Economic Theory of Democracy* (1957), and Riker’s *The Theory of Political Coalitions* (1962). Murphy surely was heavily influenced by some of this thinking. In the preface to *Elements*, he wrote, “Almost as jarring to some readers as quotations from private papers will be my use of terms which are familiar to economic reasoning and the theory of games but which are alien in the public law literature” (1964, x). In 2000, Murphy reiterated *An Economic Theory of Democracy*’s central role in helping him to “crystallize [his] ideas.” Indeed, in 1960, when he first started working in justices’ papers, he did not “know what [he] was doing.” He had read some of Schubert’s strategic work, but because of its emphasis on voting, it was less interesting to him than were various biographies, especially Mason’s *Harlan Fiske Stone* (1956). In those works, Murphy could see strategic behavior’s importance for the doctrine articulated by the Court rather than simply for its votes. Murphy thought that this was a critical distinction because both he and Pritchett believed that there were limits to the vote studies of the sort Schubert and others were then undertaking.

Still, not until a year later, in 1961, when he was reading Downs’s work on a train, did the *Elements* framework pop into Murphy’s head. He now knew to what use he would put the judicial papers he had been reading.

#### THE DEMISE OF THE STRATEGIC ACCOUNT

While Murphy was working on *Elements*, reactions from the scholarly community were not favorable.<sup>12</sup> Alpheus Mason thought that Murphy’s emphasis on behind-the-scenes maneuvering on the Court was “going to stir up snakes.” Schubert was dismayed that Murphy was not setting up hypotheses and systematically mining information from the justices’ papers to test these theories and was concerned about Murphy’s emphasis on process and doctrine rather than on votes.

But once *Elements* appeared, scholars found aspects of the work attractive—or at least attractive enough to continue in its path. Particularly noteworthy was Howard’s examination of “fluidity” (1968), which attempted to provide more systematic support for one of Murphy’s key observations: judges “work” changes in their votes and “permit their opinions to be conduits for the ideas of others” through “internal bargaining” (44). Howard’s methodology resembled Murphy’s in its reliance on a small number of important cases, but Howard

cast his argument in general terms: "it may come as some surprise to political scientists how commonplace, rather than aberrational, judicial flux actually is." He further claimed that "hardly any major decision [is] free from significant alteration of vote and language before announcement to the public" (44).

Howard's article was not the last of the post-*Elements* pieces. Into the next decade, analysts applied theories grounded in assumptions of rationality (especially game theory) to study opinion coalition formation and jury selection (see, e.g., Rohde 1972). In fact, by the 1970s, there had been enough work invoking game-theoretic analysis in particular that Saul Brenner wrote a bibliographic essay devoted exclusively to the subject (1979).

Perusal of the works on Brenner's list, however, reveals that most were not explicit applications of game theory or were conducted in the late 1960s. We do not have to search too long to explain this trend away from approaches that assume rationality: scholars eschewed strategic analysis in favor of four "determinants" of judicial behavior drawn from the social-psychological paradigm:

1. *The social background/personal attribute* hypothesis, which asserts that a range of political, socioeconomic, family, and professional background characteristics accounts for judicial behavior or at least helps to explain the formation of particular attitudes (see, e.g., Nagel 1961; Schmidhauser 1962; Tate 1981; Tate and Handberg 1991; Ulmer 1970, 1973; Vines 1964).
2. *The policy-oriented values (attitudinal)* hypothesis, which claims that political attitudes toward issues raised in cases explain judicial votes (see, e.g., Goldman 1966, 1973; Pritchett 1948; Rohde and Spaeth 1976; Schubert 1960, 1965; Spaeth and Parker 1969). Schubert's version of this theory came from the psychometric research of Coombs and Kao (1960) and Guilford (1961).
3. *The role* hypothesis, which suggests that judges' normative beliefs about what they are expected to do either act as a constraint on judicial attitudes or directly affect judicial behavior (see, e.g., Becker 1966; Carp and Wheeler 1972; Cook 1971; Gibson 1978; Glick and Vines 1969; Grossman 1968; Howard 1977; James 1968; Jaros and Mendelson 1967; Unga and Baas 1972; Vines 1969; Wold 1974). Judicial specialists adopted this theory from the work of Campbell (1963) and Rokeach (1968) (see Gibson 1978).

4. *The small-group* hypothesis, asserting that the "need to interact in a face-to-face context" affects the behavior of judges on collegial courts (Grossman and Tanenhaus 1969, 15; see also Atkins 1973; Danelski 1960; Snyder 1958; Ulmer 1971; Walker 1973). This hypothesis draws heavily on the work of experimental social psychologists studying conformity, deviance, and leadership in small groups (see Goldman and Sarat 1978, 491; Ulmer 1971).

To be sure, these approaches differ from one another at the margins. But because they draw from the same paradigm (social-psychological), they are complementary in their core beliefs about the way people make decisions. As Grossman and Tanenhaus put it, "these hypothesized determinants can be traced back to the simple action stimulus-response model. . . . This S-R model, of which there are now several variants, conceptualized the votes of judges as responses to stimuli provided by cases presented to them for decision" (1969, 10-11; see also Gibson 1978, 917).

Conceptualized in this way, the social-psychological paradigm is quite distinct from the economic approach offered by Murphy: while Murphy's justices are preference maximizers who make decisions to further their goals with regard to the preferences and likely actions of other relevant actors and to the institutional context, the stimulus-response justices are policy seekers who further their goals with reference to their own normative and policy-based preferences (see generally Barry 1978). Even small-group approaches, which seem to have more in common with strategic analysis than the other approaches do, lack clear-cut notions of interdependent interaction. At a minimum, most scholars invoking this approach in their empirical work rely less on rational choice logic and more on variants of the social-psychological paradigm. For example, they note that judges occasionally conform to the behavior of their colleagues but do not necessarily do so to further their goals; rather, the motivation seems to be the desire to retain friendly relations with colleagues (for a summary of this literature, see Goldman and Jahnige 1976).

In pointing out these differences, we do not mean to imply that strategic and social-psychological accounts of judicial decisions have nothing in common. Both certainly acknowledge the importance of goals, and small-group theory is obviously concerned with group context. But the fact that social-psychological approaches do not acknowledge a strategic component to decision making is a point of distinction

between the two approaches and one that we cannot stress enough, for it can lead to very different predictions about judicial behavior.

Return to figure 1, which depicts a hypothetical set of preferences regarding civil rights policy. Suppose justice A was confronted with the task of interpreting a law that fell in this policy space; further suppose that her most preferred position is *X*, the status quo. Theoretically speaking, if justice A is motivated in the way assumed by, for example, those personal attribute models that suggest a direct connection between background factors and voting, the prediction is simple enough: she would always choose *X* regardless of the positions of her colleagues or, more relevant here, of congressional actors. Even though she realizes that if she selects *X*, the current Congress will attempt to override her policy placement, it does not matter to her because she makes decisions that are accord with her background characteristics, which do not change after she has ascended to the bench. The strategic account, conversely and as noted earlier, supposes that justice A would choose *C(M)*, the point closest on the line to her most preferred position that Congress would not overturn.

#### EXPLAINING THE DEMISE

If there is any doubt that predictions from variants of the social-psychological model dominated thinking about law and courts by the 1980s, figure 2 should dispel it. The data on the number of judicial articles published between 1970 and 1989 in the *American Political Science Review* that invoked the social-psychological paradigm and others are clear: within a decade of the publication of *Elements of Judicial Strategy*, work adopting variants of that paradigm was pervasive, accounting for sixteen of the twenty-seven articles published in the discipline's flagship journal. During this period, only two essays attentive to any variant of choice approaches appeared, and one of them (Smith 1988) was a critical assessment.

In all of this, the question remains why scholars so fully embraced the social-psychological paradigm and so fully spurned the sort of strategic analysis Murphy conducted in *Elements*. Two answers come to mind. Schwartz contends that the primary answer lies in the notion of equilibrium predictions: Murphy "only identifies strategies that *might* be pursued under some circumstances. Often such a pronouncement is immediately followed by a disclaimer that the contrary strategy might be more appropriate in other circumstances. The problem is that he derives no tight predictions about exactly when we should expect to see certain behaviors as opposed to others" (Schwartz 1997).

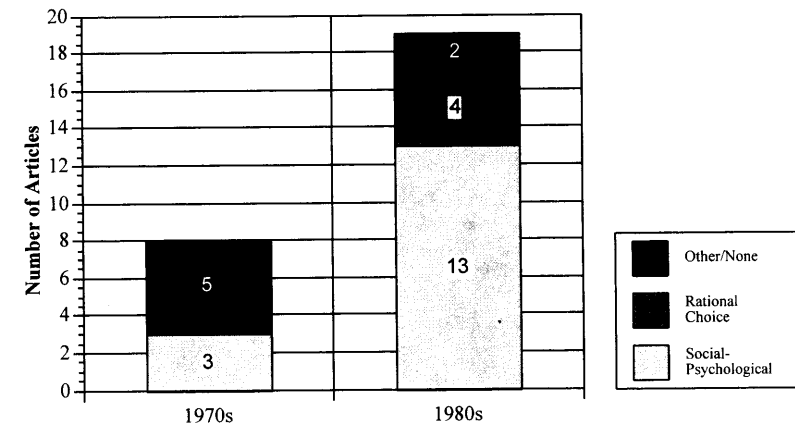


Fig. 2. Major theories invoked in articles published in the *American Political Science Review*, 1970-89. (Data from Epstein and Knight 2000, 633.)

There is certainly some merit to this view. In direct contrast to other early advocates of rational choice theory, such as Downs (1957) and Riker (1962), Murphy did not write down any models and derive equilibria that others could go out and test, as a multitude of scholars did with the predictions contained *An Economic Theory of Democracy* and *The Theory of Political Coalitions*. Even more to the point, Murphy's "predictions" were a good deal more ambiguous (as Schubert initially complained to Murphy) than those offered by early adherents of social-psychological approaches. Compare, for example, a Murphy hypothesis with one offered by Schubert:

Murphy: "When a new Justice comes to the Court, an older colleague *might* try to charm his junior brother." (1964, 49)

Schubert: "In accordance with modern psychometric theory, which generalizes the basic stimulus-response point relationship, Supreme Court cases are treated as raw psychological data. . . . Each case before the Court for decision is conceptualized as being represented by a stimulus (*j*) point. . . . The combination of the attitudes of each justice toward these same issues also may be represented by an ideal (*i*) point. . . . Obviously how the case will be decided will depend upon whether a majority or minority of the *i*-points dominate the *j*-point. If a majority of *i*-points dominate, then the value or values raised in the case will be upheld or sup-



ported by the decision 'of the court'; and if, to the contrary, the *j*-point dominates a majority of *i*-points, then the value or values raised will be rejected." (1960, 91)

Yet scholars gleaned predictions from Murphy's work and attempted to test them. This was certainly true of work on vote fluidity (see Brenner 1989; Howard 1968) and is true of the current crop of strategic work, much of which explicitly identifies *Elements* as its starting point (see, e.g., Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). In other words, Murphy may not have laid out predictions as boldly as did the other rational choice theorists or those who advocated variants of the social-psychological model, but his work contained sufficient intuitions of judicial behavior that other scholars could in turn write down models, solve them, develop behavioral predictions, and assess those predictions against data.

If it was not the lack of precise expectations that led scholars to dismiss the strategic account, why, then, did they do so? We believe the explanation lies in the nature of those tests and in the results they generated—an explanation, we and Murphy think, that is a more faithful representation of the tenor of the times. During the 1960s, as Murphy made clear to us, the great battles in the field of judicial politics were not between proponents of the rational choice and social-psychological models but between traditionalists and behavioralists; between those who believed that social scientists should develop realistic and generalizable explanations of social behavior and those who did not; and, increasingly, between those who believed scholars could quantify behavior and those who did not share such beliefs (Walker 1994). To be a scientist in the world of judicial politics by the 1970s was to value data and to believe in the power of statistics. It is thus hardly surprising that scholars working in the social-psychological tradition triumphed over their strategically minded counterparts. Beginning with Pritchett's *The Roosevelt Court* (1948) and culminating with Segal and Spaeth's *The Supreme Court and the Attitudinal Model* (1993), such scholars have claimed to gather a tremendous amount of systematic support for their theory. Unlike Murphy, they typically refrained from detailed analyses of particular litigation (the *modus operandi* of the traditionalists) and instead focused on large samples of Court cases, claiming to predict their dispositions with a good deal of success.

Furthermore, in addition to asserting that the key premises of variants of the social-psychological model held up against systematic, data-intensive investigations, scholars also argued that Murphy's strategic

view did not withstand similar scrutiny. A critical work here is Brenner (1989), which reassessed Howard's contention that voting fluidity was rampant on the Court. Brenner compared votes cast in conference with those in the published records for "major" and "nonmajor" decisions. Although he found minimal change in case disposition (about 15 percent), his results for vote shifts were rather dramatic: in 48 percent of the major cases and in 59 percent of the nonmajor cases, at least one justice changed his vote. Still, Brenner concluded that Howard (and, by implication, Murphy) was largely incorrect, that considerable stability exists in voting. And Brenner's interpretation became the prevailing wisdom among judicial specialists (Goldman and Sarat 1989, 466). With Brenner's rendition of his study, the massive amounts of data analysts have gathered to support the social-psychological model, and the significance that political scientists in this field attached to large-scale statistical studies, it is easy to understand why decision-making theories grounded in assumptions of rationality virtually failed to make any substantial showing in political science journals during the 1970s and 1980s.

#### THE (RE)EMERGENCE OF THE RATIONAL CHOICE PARADIGM

We would be loathe to write that the tide has fully turned, for surely that is not the case. Just a few years ago, scholars were still claiming that "the attitudinal model is a, if not *the*, predominant view of Supreme Court decision making" (Segal et al. 1995, 812). But just as surely a change is in the wind, with Murphy's more strategically oriented approach beginning to take hold. The signs are everywhere. At the outset, we noted the existence of a growing and influential group of law and business school professors who advocate use of the strategic account as Murphy set it out. And the approach is now reemerging in political science journals and conference papers (see Epstein and Knight 2000).

We do not, of course, mean to imply that these studies are a monolith: they are not. Rather, they typically focus on one of the two sets of strategic relations Murphy identified in *Congress and the Court* and *Elements of Judicial Strategy*, those between the Court and relevant political actors (especially Congress and the president) (e.g., Eskridge 1991a, 1991b, 1994) and those among the justices (e.g., Maltzman, Spriggs, and Wahlbeck 2000). Not only does the recent spate of studies parallel Murphy's work in this regard, but his fingerprints are all over these works as well. In reviewing these studies we make this point with force.

We also consider several voids and how a return to Murphy's work can help to fill them.

STRATEGIC INTERACTIONS BETWEEN THE COURT AND EXTERNAL POLITICAL ACTORS

In *Congress and the Court*, as we already have mentioned, Murphy sought to demonstrate that Supreme Court justices must keep their eyes on Congress to come as close as possible to attaining their policy goals. A large and growing body of research examining the constraints that the U.S. separation-of-powers system imposes on the political branches' ability to establish efficacious policy has embraced this insight.

These separation-of-powers studies come in many variants. Early ones formalized Murphy's ideas—consciously or otherwise<sup>13</sup>—using simple spatial models (of the sort depicted in figure 1) to develop implications about how justices might interpret statutes given their interest in maximizing policy preferences. These works then assess those implications through qualitative or doctrinal analyses. Among the most influential of these are studies by William N. Eskridge Jr., a professor at Yale Law School (1991a, 1991b, 1994). In considering the course of civil rights policy in the United States, Eskridge identified many U.S. Supreme Court decisions that would be difficult to explain if the justices voted solely on the basis of their policy preferences (e.g., instances of the relatively conservative Burger Court reaching liberal results).

Hence, the question emerged: If not straight preferences, then what? Eskridge's intuition was the same as Murphy's: the separation-of-powers system induces strategic decision making by Supreme Court justices. In other words, if the justices' goal is to establish national policy that is as close as possible to their ideal points, they must take into account the preferences of other relevant actors (here, Congress and the president) and the actions these others are likely to take. Justices who do not make such calculations risk congressional overrides and thus risk seeing their least preferred policy become law.

Eskridge formalized this intuition in his Court/Congress/president game (the SoP game), which unfolds on a one-dimensional policy space over which the relevant actors have single-peaked utility functions (see n.4). All these actors, Eskridge assumes, have perfect and complete information about the preferences of the other actors and about the sequence of play. As figure 3 depicts, the Court begins the game by interpreting federal laws. In the second stage, legislative gatekeepers (congressional committees and/or leaders) can introduce legislation to

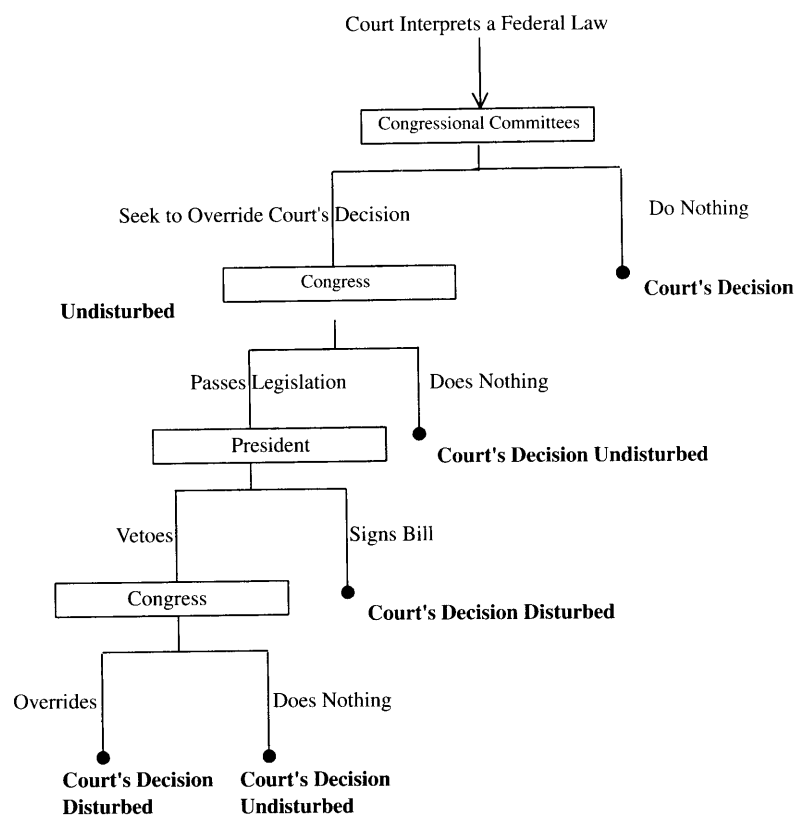


Fig. 3. The separation-of-powers system in action. (Adapted from Eskridge 1991a, 1991b.)

override the Court's decision; if they do so, Congress must act by adopting the committees' recommendation, enacting a different version of it, or rejecting it. If Congress takes action, then the president has the option of vetoing the law. In this depiction, the last move rests with Congress, which must decide whether to override the president's veto.

By invoking simple spatial models, Eskridge notes the existence of two different regimes with regard to the Court (illustrated in figure 4), one in which the Court is not constrained by one or more political actors and one in which it is. Based on the ideal points depicted in figure 4a, the equilibrium result is  $x = \bar{f}$ . In other words, the Court is

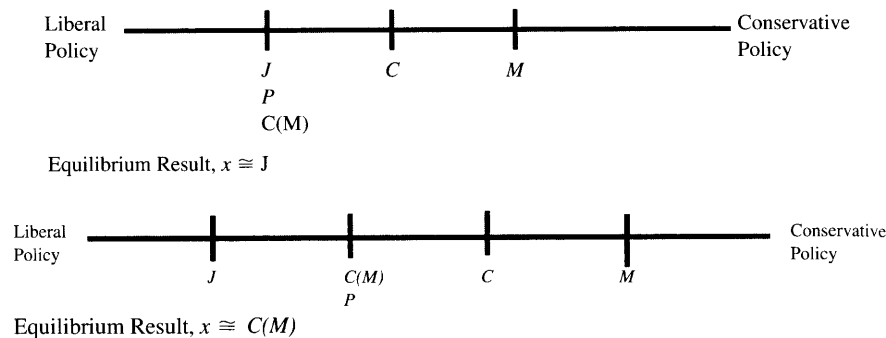


Fig. 4. Hypothetical distribution of preferences. (Note:  $J$  is the justices' preferred position based on the attitudes of the median member of the Court;  $M$  and  $P$  denote, respectively, the most preferred positions of the median member of Congress and the president;  $C$  is the preferred position of the key committees in Congress that make the decision about whether to propose legislation to their respective houses; and  $C(M)$  represents the committees' indifference point (between their preferred position and that desired by  $M$ ). (Adapted from Eskridge 1991b.)

free to read its sincere preferences into law. Figure 4b yields a very different expectation. Because the Court's preferences are now to the left of  $C(M)$ , it would vote in a sophisticated fashion to avoid a congressional override; the equilibrium result is  $x = C(M)$ .

Eskridge explores these regimes in much the same way as did Murphy, providing a largely qualitative examination of particular Court cases. Eskridge also reached many of the same conclusions—for example, in interpreting legislation, we learn that the intent of the enacting Congress is far less important to policy-preference-maximizing justices than are the preferences and likely actions of the current Congress.

Eskridge is a legal academic. Beginning in about 1996, political scientists moved into the picture. Some followed in Murphy's and Eskridge's footsteps, conducting largely qualitative analyses of the constraints on the Court imposed by the separation-of-powers system (see, e.g., Epstein and Walker 1995; Knight and Epstein 1996). Others assessed their predictions with large-scale data sets (see, e.g., Martin 1998; Segal 1997). These studies and others undertaken by those identifying themselves as positive political theorists have reached mixed results, though, on balance, the findings support the Murphy-Eskridge perspective. Exemplary is work by Spiller (e.g., Bergara, Richman, and Spiller 1999; Spiller and Gely 1992), which concludes that it is difficult

to make sense of Court decisions without taking into account the preferences of the other political organizations. Conversely, Segal writes that "evidence of strategic behavior at other stages of the Court's decisions suggests that the justices can act in a sophisticated fashion *when they need to do so*. But the institutional protections granted the Court mean that with respect to Congress and the presidency, they almost never need to do so" (1997, 42–43).

Despite these mixed conclusions, the studies resemble one another in an important respect: virtually all the existing separation-of-powers literature asserts that the constraint is far more—or, at the extreme, exclusively—operative in cases calling for the Court to interpret statutes than in cases asking the Court to assess statutes' constitutionality.<sup>14</sup> The rationale behind this claim is straightforward: Congress has the power to overturn the Court's interpretations of laws, but, at least according to the U.S. Supreme Court (most recently in *Dickerson v. United States* [2000]), the legislature cannot overturn the Court's constitutional decisions (at least not by simple majorities; Congress must propose constitutional amendments). Given the infrequency with which Congress takes this action—and the frequency with which it disturbs the Court's statutory interpretation decisions<sup>15</sup>—many scholars have argued that the justices need not be too attentive (or, again at the extreme, at all attentive) to the preferences and likely actions of other government actors in constitutional disputes.

Is there thus any reason to suppose that the strategic account, as Murphy developed it, applies to cases involving constitutional questions? *Congress and the Court* suggests several such reasons, with a significant one being the weapons other actors can use to punish justices for their decisions in constitutional cases. Congress may not easily overturn these rulings, but, as Murphy notes, it can hold judicial salaries constant, impeach justices, and pass legislation to remove the Court's ability to hear certain kinds of cases. Although the legislature rarely deploys these weapons, their existence may serve to constrain policy-oriented justices from acting on their preferences.

Murphy provides examples of this phenomenon in action, but the most well known are perhaps the Court's decisions in *Watkins v. United States* (1957) and *Barenblatt v. United States* (1959). In these cases, the justices considered similar constitutional questions pertaining to the rights of witnesses to refuse to answer questions put to them by congressional committees investigating subversive activities in the United States. In *Watkins*, they ruled for the witness, but in *Barenblatt* they ruled against him. Figure 5, which provides an approximation of the

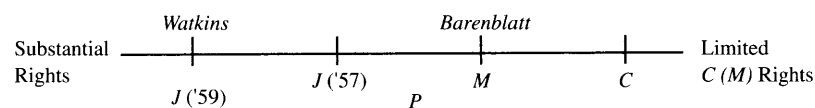


Fig. 5. Approximate distribution of preferences about the rights of witnesses in subversive activities cases, 1957–59. (Note: The policy, rights of witnesses, pertains to the right of witnesses to refuse to answer questions put to them by congressional committees investigating subversive activities in the United States.  $J$  (57) is the most preferred position of the Court in 1957;  $J$  (59) is the most preferred position of the Court in 1959;  $M$ ,  $C$ , and  $P$  are the most preferred positions, respectively, of the median member of Congress, the relevant congressional committees, and the president;  $C(M)$  denotes the indifference point of congressional committees.) (Adapted from Epstein and Knight 1998, 153.)

ideal points of the key players, depicts Murphy's explanation for the seeming shift. At the time the cases were decided, Murphy tells us, the Court was to the left of (more liberal than) Congress, the president, and key congressional committees. Given this configuration, the Court's decision in *Watkins*, which put the policy at its ideal point, provided the committees with incentive to take action to override its decision or to harm the Court in other ways. That is because the committees preferred any point on the line between  $C(M)$  and  $M/P$  to  $J$ ; Congress and the president would have been amenable to override proposals because these actors also preferred  $M/P$  to  $J$ . And, in fact, in response to *Watkins* and other liberal decisions, members of Congress offered up numerous Court-curbing laws, including some that would have removed the Court's jurisdiction to hear cases involving subversive activities. Therefore, in *Barenblatt*, the Court had every reason to misrepresent its true policy preferences to protect its legitimacy and reach a result to the right of the congressional median ( $M$ )—precisely the course of action that the Court took.

This is but one example; we could develop scores of others from Murphy's work. But the larger point should not be missed: Murphy's perspective is worth a hard look. We urge scholars to bring the same tools to bear on cases involving constitutional interpretation as on those requiring the Court to engage in statutory interpretation. Perhaps the effect of the separation-of-powers system is less, but we, like Murphy, do not believe it is nonexistent.

#### STRATEGIC INTERACTIONS AMONG THE JUSTICES

Since the early 1990s, scholars have produced a substantial amount of work that explicitly identifies *Elements of Judicial Strategy* as its starting point—work that considers strategic interactions among the justices. To the extent that it seeks to develop a conceptualization of judicial decisions, some of this new wave of research is actually quite close to Murphy's seminal book. Along these lines, we would point to our work, *The Choices Justices Make* (Epstein and Knight 1998), which attempts to follow the example set by *Elements*: we develop a picture of justices as strategic seekers of legal policy and explore how such justices make choices. Other research has stressed the importance of formal analysis, with the central idea as follows: if scholars want to explain a particular line of decisions or a substantive body of law as the equilibrium outcome of the interdependent choices of the judges and other actors, they must demonstrate why the choices are in equilibrium, and a formal model is an essential feature of such a demonstration (Caldeira 1999; Kornhauser 1992a, 1992b; Schwartz 1992). A third set of scholars has translated the strategic intuition into variables, which are explored in statistical models. We think here of Maltzman and his colleagues, Spriggs and Wahlbeck, who have investigated a wide range of strategic behavior, from the selection of a majority opinion writer to the decision to join a particular opinion coalition (see Maltzman, Spriggs, and Wahlbeck 2000; Maltzman and Wahlbeck 1996a, 1996b; Wahlbeck, Spriggs, and Maltzman 1998).

However varied the contemporary research, it, like the separation-of-powers studies, shares a common feature: as mentioned earlier, virtually all of this work assumes that justices pursue policy goals. We certainly understand why this is the case: a vast amount of empirical support exists for the importance of this motivation. Moreover, *Elements*, the starting point for so much of this research, treated this goal as paramount. Nonetheless, Murphy's work counsels that, while this may be the primary objective, it is not necessarily the only one. Another arena that *Elements* brings to light is institutional legitimacy, or the judicial motivation to ensure that the Court remains a credible force in American politics, in the eyes of both the public and public officials. Such a concern may manifest itself in a number of ways, such as selecting cases for review that have the potential to influence political, social, or economic policy—or avoiding such cases under particular political circumstances.

And Murphy's more recent return to questions of jurisprudence

reminds us of the role that doctrine and principle can play in judicial decision making. As our earlier analysis suggests, the oft-cited conflict between jurisprudential and strategic approaches to the courts is vastly overstated. If justices are motivated by doctrine and principle (rather than policy) and are concerned with effectively instantiating those doctrines and principles into the content of law, they will adapt their decisions both to the goals of other relevant actors and to the institutional context in which they make their choices. In so doing, justices act strategically and thus are a proper subject for the approach Murphy has advocated throughout his career.

But, again, the general point should not be missed: scholars invoking the strategic account perhaps ought devote more attention to considering other judicial motivations (see, generally, Baum 1997). That they can do so, as we noted earlier, is one of the nice features of the account; it is, simply put, flexible enough to accommodate a wide range of goals. That they should do so is a direct lesson from Murphy's important and prescient body of work.

#### NOTES

We are grateful to the National Science Foundation for supporting our work on strategic decision making (SBR-9320284, SBR-9614130). We adapt several passages in this chapter from some of that work (e.g., Epstein and Knight 1998, 2000).

1. The categories in table 1 are not and need not be mutually exclusive, as many of Murphy's studies themselves demonstrate (e.g., Murphy 1965a, 1995a; Murphy, Pritchett, and Epstein 2001). Nonetheless, for purposes of discussion and analysis, we placed each work—based on its predominant theme—into a single cell.

2. Unless otherwise indicated, all unattributed quotes from Walter F. Murphy are from an interview we conducted with him on February 19, 2000, in St. Louis, Missouri.

3. We adapt the discussion in this and the next paragraph from Ferejohn and Weingast 1992a.

4. In denoting these most preferred points, we assume that the actors prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, "beginning at [an actor's] ideal point, utility always declines monotonically in any direction. This . . . is known as single-peakedness of preferences" (Krehbiel 1988, 259, 263). We also assume that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policy-making unfolds as follows: the Court interprets a law; the relevant congressional committees propose (or do not pro-

pose) legislation to override the Court's interpretation; Congress (if the committees propose legislation) enacts (or does not enact) an override bill; the president (if Congress acts) signs (or does not sign) the override bill; and Congress (if the president vetoes) overrides (or does not override) the veto. These are relatively common assumptions in the legal literature (see, e.g., Eskridge 1991a, 1991b; see also fig. 3).

5. This group includes Eskridge (1991a, 1991b, 1994) of the Yale Law School; Farber (Farber and Frickey 1991, 1992) of the University of Minnesota School of Law; Kornhauser (1992a, 1992b, 1995) of New York University Law School; Rodriguez (1994) of the University of San Diego Law School; Spiller (Gely and Spiller 1990; Spiller and Gely 1992) of the Haas School of Business (Berkeley); Spitzer (Cohen and Spitzer 1994) of the University of Southern California Law Center; and Cross and Tiller (1998), both of the Graduate School of Business at the University of Texas. These law and business professors are joined by a few political scientists, most of whom developed their reputations as students of Congress (e.g., Ferejohn and Weingast [1992a, 1992b] and Cameron [Cameron 1994; Cameron Segal, and Songer 2000]). See, generally, Shapiro 1995.

6. More specifically, they claim that Marks (1989) gave rise to a major part of the PPT research program, the separation-of-powers games more fully developed in Eskridge 1991a, 1991b, 1994; Ferejohn and Weingast 1992a, 1992b; Epstein and Walker 1995, to name just a few. For a discussion of this line of inquiry and Murphy's role in it, see the subsequent section on "Strategic Interactions between the Court and External Political Actors."

7. Game theory provides a potent set of tools for examining social situations involving strategic behavior—that is, situations in which the social outcome depends on the product of the interdependent choices of at least two actors.

8. Other articles published around the same time also pointed to the promise of game theory in political science (see, e.g., Shapley and Shubik 1954).

9. Another was Pritchett 1961, which was published the year before Murphy's work. That both student and mentor were working on similar books at about the same time is something of a coincidence, though certainly reflective of the times, a period during which Congress was considering various Court-curbing measures. Pritchett's work grew out of a series of Minnesota lectures he delivered on the subject; Murphy's interest was piqued after he attended some congressional hearings and conducted interviews with several senators, including Lyndon Johnson.

10. To put it in contemporary terms, Murphy uses the intuitions of the attitudinal model (discussed in the next section) to study the relationship between Congress and the Court, but he extended those premises and demonstrated that the resulting behavior may differ from what attitudinalists postulate.

11. Reactions can vary from overturning decisions through legislation to holding judicial salaries constant to impeaching judges. Murphy's general point is that the lack of an electoral connection does not negate strategic behavior on the part of nonelected actors.

12. The information in this paragraph comes from our interview with Murphy (see n.2).

13. As we implied earlier, some of the initial studies, produced mainly by legal academics and business school professors—the positive political theorists—did not acknowledge their debt to Murphy primarily because they did not know of his research. That has changed, with virtually all PPT now regularly citing his books and articles.

14. Exceptions, to lesser and greater extents, are Epstein and Knight 1998; Fisher 2001; Martin 1998; Meernik and Ignagni 1997; Murphy 1964; Rosenberg 1992.

15. Between 1967 and 1990, Congress overrode some 120 Court decisions (see Eskridge 1991a).

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