

Essay

The Incentives Approach to Judicial Retirement

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The scholarly literature has not been kind to life tenure over the past fifteen years. Perhaps more than any other constitutional provision, the Good Behavior Clause¹ has been in the cross-hairs of conservative and liberal academics alike. Professor Sai Prakash has labeled life tenure as “imperial,”² arguing that it creates a “home-grown” judicial “aristocracy.”³ Likewise, Professor Scot Powe has stated that “[l]ife tenure is the Framers’ greatest lasting mistake.”⁴ Professor L.H. LaRue has called the Good Behavior Clause “stupid.”⁵ In all, thirteen academics and one distinguished federal appellate judge have argued for the end of life tenure.⁶ Articles in the popular press

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1. U.S. CONST. art. III, § 1.
2. Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 583 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).
3. *Id.* at 573.
4. L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 196 (1995).
5. L.H. LaRue, *Neither Force Nor Will*, 12 CONST. COMMENT. 179, 179 (1995).
6. See ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 247 (2003); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 15, 46–55 (Roger C. Cramton & Paul D. Carrington eds., 2006); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in *REFORMING THE COURT*, *supra*, at 467, available at

decriing life tenure have been appearing with greater frequency since the retirement of Justice Sandra Day O'Connor and the regrettable death of Chief Justice William Rehnquist.⁷

In this Essay, I do not attempt a principled defense of life tenure, which is the subject of considerable discussion in my forthcoming coauthored article.⁸ In that article, we make the case that life tenure helps to preserve the institutional legitimacy of the Court, both by producing more gradual change in the law and by reducing the risk that postjudicial service by Supreme Court Justices would jeopardize judicial independence.⁹

In contrast, this Essay has three chief purposes. First, through a discussion and examination of existing judicial decision-making models, I will demonstrate that Justices do in fact act rationally in maximizing their own utility, even when they are seemingly constrained by Congressional preferences or *stare decisis*. Second, by manipulating the judicial utility function introduced by Judge Richard Posner in his seminal 1993 article in the *Supreme Court Economic Review*,¹⁰ this Essay

<http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm>; David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1086 (2000); Sanford Levinson, *Contempt of Court: The Most Important "Contemporary Challenge to Judging,"* 49 WASH. & LEE L. REV. 339, 341 (1992); John J. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541-43 (1999); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1212 (1988); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800-01 (1986); Powe, *supra* note 4, at 197; Prakash, *supra* note 2, at 570-73; Laurence H. Silberman, *Term Limits for Judges?*, 13 J.L. & POL. 669, 687 (1997); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23.

7. See, e.g., Bruce Bartlett, *Fusillades . . . and Tenure Traps*, WASH. TIMES, July 6, 2005, at A14, available at <http://www.washtimes.com/commentary/20050705-092303-8036r.htm>; Ken Bell, *Lest Ye Be Judged*, AUSTIN REV., July 6, 2005, at 4, available at http://www.austinreview.com/archives/2005/07/lest_ye_be_judg.html; Barry Ellington, *Put Limits on Supreme Court Terms*, ARIZ. REPUBLIC, July 10, 2005, at B8, available at <http://www.azcentral.com/arizonarepublic/opinions/articles/0710sunlets103.html>; Stuart Taylor, Jr., *Life Tenure Is Too Long for Supreme Court Justices*, 37 NAT'L J. 2033, 2033-34 (2005).

8. See David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397 (2006).

9. See *id.* at 1421-26.

10. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 31 (1993).

will propose a judicial retirement function that can be used to model the retirement decision of Justices. The function will permit scholars to make predictions about changes in retirement behavior in response to a number of potential institutional reforms of the Supreme Court, such as increases in workload or pension income. Third, this Essay will demonstrate that scholars who advocate “command and control” measures to control tenure, such as a mandatory retirement age or term limits, have been focusing on the wrong parts of the judicial retirement function.

Most proponents of a mandatory retirement age or term limits claim that we should amend the Constitution in order to alleviate the problems associated with life tenure. Their proposals implicitly reject an incentives approach to retirement because they assume that Justices will not act rationally in response to institutional modifications. In other words, both proposals are not only radical in their scope and represent substantial constitutional change, but they also rely on the remarkable proposition that Justices are fundamentally different from the rest of us in the way they approach economic decisions. There is little evidence to commend this view, and there is considerable empirical research to the contrary that supports Judge Posner’s thesis that Justices maximize the same thing everybody else does: their own utility.¹¹ Put simply, legal scholars have not thought creatively about life tenure, shunning promising interdisciplinary approaches in favor of drastic constitutional change.

This Essay proceeds in two parts. Part I will summarize existing research, which reveals that Justices appear to act rationally in deciding cases. Political scientists have used the public papers of Justices to find support for the proposition that members of the Court decide cases based on their own policy preferences. In this Part, two models will be highlighted: the attitudinal model and the rational choice model. Predictably, these studies have sparked criticism from legal scholars, many of whom view the decisions of judges as substantially the product of legal reasoning, precedent, and text.¹²

11. *See id.* at 39.

12. *See, e.g.*, Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 288–89 (1997) (reviewing JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002)); Michael J. Gerhardt,

The theory that Justices act rationally in an area where they are arguably restrained—judicial decision making—supports the hypothesis that they will act rationally in making other unconstrained choices, such as the decision to retire. Part II, therefore, will answer the criticism that Supreme Court Justices cannot be influenced by retirement incentives. While it is no doubt true that Supreme Court Justices are an exceptional group, the uniqueness of the position does not mean that Justices are unresponsive to economic incentives. To the contrary, the prestige and social status associated with the office of Supreme Court Justice are nothing more than sources of utility that must be overcome by other incentives in order to induce retirement.¹³ As numerous studies have shown, judges are rational people who make decisions based on their own utility function.¹⁴ Thus, like other economic decisions, the retirement decision can be modeled using factors identified in the empirical literature.¹⁵ Moreover, the most important of the retirement factors—income and workload—are also the most manipulable by Congress. My hope is that this model will allow us to better understand the retirement decision and to make more informed policy choices with respect to retirement and life tenure.

I. THE RATIONALITY OF THE JUDICIAL DECISION

Beginning with the American legal realist movement of the 1920s, scholars have been searching for alternatives to legal

Attitudes About Attitudes, 101 MICH. L. REV. 1733, 1734–35 (2003).

13. See Posner, *supra* note 10, at 31; Stras & Scott, *supra* note 8, at 1452–54.

14. See Posner, *supra* note 10, at 31.

15. At least seven empirical studies have been conducted on the retirement decisions of federal judges, including three that focus solely on Supreme Court Justices. See Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987*, 52 J. POL. 457 (1990); Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25 (1993); David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458 (2000); James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573 (1995); Peeverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180 (1988); Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. & ECON. REV. (forthcoming 2006); Christopher J. W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies 1789-1992*, 22 POL. BEHAV. 145 (2000).

formalism to explain judicial decision making.¹⁶ Classical legal scholars viewed judges as “mechanical’ decision makers, who observe a similarity between cases, announce the rule of law inherent in the first case, and apply that rule to the second case.”¹⁷ In contrast, legal realists viewed precedent as “nothing more than [a] smoke screen[.]” because it was simply unrealistic to view judges as neutral arbiters of the law, unswayed by their political and personal policy preferences.¹⁸

In a 1948 book, political scientist Herman Pritchett attempted an empirical verification of the legal realist critique.¹⁹ Using data from 1937 to 1947, Pritchett examined dissents, concurrences, and voting blocs to determine why the norm of consensus had declined on the Supreme Court.²⁰ If judges are neutral and mechanical arbiters of the law, then why do they reach different conclusions and write separate opinions? The answer, he said, was that Justices were not strictly following precedent, but instead were “motivated by their own preferences.”²¹ For the last fifty-eight years, political scientists have attempted to empirically prove Pritchett’s claim.²²

A. THE ATTITUDINAL MODEL

One of the leading models among political scientists studying the Supreme Court is the attitudinal model.²³ It explains

16. See SEGAL & SPAETH, *supra* note 12, at 87.

17. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 23 (1998) (citing EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4–5 (1949)).

18. See *id.* at 25 n.6 (citing JEROME FRANK, *LAW AND THE MODERN MIND* (1930)).

19. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* (1948).

20. See *id.* at 25 tbl.1 (tracking the increasing number of nonunanimous opinions from eleven percent in 1930 to sixty-four percent in 1946, the rise of dissenting votes per opinion from .27 in 1930 to 1.71 in 1946, and the growing number of 5–4 opinions).

21. See *id.* at xiii. To be fair, Pritchett also identifies feuds among the Justices, the increasing number of “hard cases,” and review of novel and complex regulations as other reasons for the increasing divisions. See *id.* at 30–31. His work, however, is to be understood in the larger context of “acknowledging that the Supreme Court is a political institution performing a political function.” See *id.* at xiii.

22. See EPSTEIN & KNIGHT, *supra* note 17, at 24–25.

23. See Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 15, 15 (Cornell W. Clayton & Howard Gillman eds., 1999); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*,

judicial behavior by positing that judges decide cases in light of the facts of the case vis-à-vis their sincere ideology and voting preferences.²⁴ Judges will act to advance their preferred policy preferences, regardless of other constraints such as precedent, text, or legislative intent.²⁵ In other words, judges and Justices will act like any other political actor in pursuing their own policy goals.²⁶

Proponents of the attitudinal model argue that, because of judicial independence, judges have more room than other political actors to “base their decisions solely upon personal policy preferences.”²⁷ According to the theory, judges maximize their utility by deciding cases according to their own values and preferences.²⁸ One might argue that this model is merely intentionalist, but it also fits well within a rational actor framework because presumably Justices gain utility, or happiness, by maximizing their own policy preferences. For instance, Justices Brennan and Marshall seemingly gained utility by advancing the causes of underprivileged minorities.²⁹

Some legal scholars have responded to the attitudinal model cynically, either rejecting it outright or ignoring it all together. However, like the legal realists of the early twentieth century, many political scientists believe that the judicial opin-

2002 U. ILL. L. REV. 819, 836.

24. See Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 28 (1997).

25. See Keith E. Whittington, *Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 606 (2000).

26. See *id.*

27. DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 72 (1976).

28. See Cross, *supra* note 12, at 265.

29. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, J., concurring in part) (finding an affirmative action set-aside program for minorities to be constitutionally permissible); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”). Justice Marshall’s commitment was equally clear. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting) (arguing that a set-aside program for minority-owned businesses should be upheld, in part to “rectify the scourge of past discrimination”); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 469 (1988) (Marshall, J., dissenting) (“The intent of the Fourteenth Amendment was to abolish caste legislation. When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated.” (internal citation omitted)).

ion represents only an ex post method of justifying a decision based on the ideological proclivities of the judge.³⁰ Political scientists have observed that there is adequate room for judges to consider their policy preferences because the “Supreme Court has generated so much precedent that it is usually possible to find support for any conclusion.”³¹

It is insufficient, of course, for political scientists to claim merely that judges have the ability to maneuver within the constraints imposed by precedent and external actors such as Congress. Over the past twenty years, a number of studies have gone further, demonstrating that judges, and particularly Supreme Court Justices, decide cases on the basis of their policy preferences and values.³² In the most comprehensive study of the attitudinal model to date, Professors Jeffrey Segal and Harold Spaeth examined all 217 of the Supreme Court’s search and seizure decisions from 1962 to 1998 in order to test the validity of the model.³³

Using newspaper editorials representing judgments about a Justice’s views on civil rights and liberties at the time of their nomination, the authors gave each Justice a numerical score, with -1 being “extremely conservative” and 1 being “extremely

30. See Cross, *supra* note 12, at 267; see also Jerome Frank, *What Courts Do in Fact*, 26 NW. U. L. REV. 645, 653 (1932) (referring to opinions as “ex post facto”); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988) (stating that “[w]e should not be so naïve as to infer the nature of the judicial process from the rhetoric of judicial opinions”).

31. LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 21 (1995); see also Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1400 (1995) (echoing the sentiment of Epstein & Walker).

32. See, e.g., John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837–1964*, 31 AM. J. POL. SCI. 259 (1987); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Segal, *supra* note 24. I would argue that delegation of the opinion-drafting function to clerks has only increased the propensity of Justices to decide cases based on their own policy preferences. In the past, when Justices were solely responsible for the written product, they were aware of instances when an opinion just would not write, often causing a switch in votes. See, e.g., 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*, *supra* note 23, at 65. Now, with clerks doing much of the drafting, Justices do not become as familiar with the nuances of each case, including the difficulties of aligning a new case with prevailing doctrine and other lines of decisions.

33. SEGAL & SPAETH, *supra* note 12, at 314.

liberal.”³⁴ Predictably, Justice Scalia was the most conservative Justice according to their measure, earning a score of -1, while Justice Brennan was the most liberal, earning a score of 1.³⁵ With the facts of each case and the Justices’ attitudes as the independent variables, Segal and Spaeth measured the explanatory power of the independent variables on the dependent variable of the decision reached in each case.³⁶ The authors found that the predictive value of the independent variables on the dependent variable was strong, allowing them to predict 71 percent of the individual Justices’ decisions.³⁷ The results of their regression analysis led them to conclude that “the ideology of the justices drives their decisions.”³⁸ In a number of other areas, political scientists have found strong correlations between votes and the ideology of Justices, which appear to support the attitudinal model.³⁹ Simply put, the attitudinalists believe that “Rehnquist vote[d] the way he d[id] because he [wa]s extremely conservative [and] Marshall voted the way he did because he [wa]s extremely liberal.”⁴⁰

The strength of the attitudinal model is in its “ability to muster quantitative evidence in its support.”⁴¹ Nevertheless,

34. *See id.* at 322.

35. *See id.*

36. *See id.* at 323.

37. *See id.* at 325. Just because the model does not explain 100 percent of the decisions made by Justices does not mean that they are acting irrationally 29 percent of the time. Instead, it tends to demonstrate that other factors drive the decisions of the Court, including institutional constraints such as *stare decisis* and the preferences of Congress. As the rational choice model illustrates, Justices might also garner utility from pleasing the other branches of government or applying the law as written.

38. *Id.* at 433; *see also* Stuart S. Nagel, *Political Party Affiliation and Judges’ Decisions*, 55 AM. POL. SCI. REV. 843, 847 (1961) (finding that Democratic judges decided cases more liberally than Republican judges in the areas of criminal law, administrative law, civil liberties law, tax law, business relations law, and personal injury law).

39. *See* SEGAL & SPAETH, *supra* note 12, at 325.

40. *See id.* at 86. In another book, Spaeth and Segal concluded that “precedent rarely influences United States Supreme Court justices.” HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 287 (1999). Under the attitudinal model, Justices will rarely change their votes on the basis of precedent.

41. Whittington, *supra* note 25, at 606; *see also* Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 529 (1998) (reviewing EPSTEIN & KNIGHT, *supra* note 17) (“There is strong attitudinal model evidence which shows that Justices consistently vote their policy preferences.”); Tracey George, *Develop-*

legal scholars have identified several weaknesses of the model. One criticism is that it is difficult to create a model that measures legal variables, so it is possible that a decision that appears purely ideological at first glance may actually be based upon legal authority.⁴² Put another way, the attitudinal model cannot rule out the possibility that legal considerations and personal policy preferences are collinear variables in many cases. It would not be surprising, for example, if Justices who subscribe to originalism as an interpretive method reach conservative outcomes much of the time.

Further, even if the model does not overstate the explanatory power of personal values and preferences,⁴³ it fails to explain the other 29 percent of the cases that cannot be predicted by the facts of the cases or the policy preferences of the Justices. This failure is critical because much of the coding of the data was done in a subjective manner, including the characterization of a Justice's ideology.⁴⁴

A third, more fundamental, criticism of the attitudinal model is that Justices derive utility or happiness from sources

ing a Positive Theory of Judicial Decisionmaking on U.S. Courts of Appeals, 58 OHIO ST. L.J. 1635, 1653 (1998) ("The attitudinal model endures because empirical studies have demonstrated that it has substantial explanatory power.").

42. See SEGAL & SPAETH, *supra* note 12, at 291; see also Clayton, *supra* note 23, at 25 ("Segal and Spaeth's evidence that Justices consistently vote to support certain policy positions does not demonstrate that they do so because of personal policy preferences."); Gerhardt, *supra* note 12, at 1746 (stating that the data in Segal and Spaeth's book does not show that "legal variables are not factors in the justices' decisions"). Professors Cross and Clayton have also criticized the attitudinal model based upon political scientists' cramped view of legal variables. See Clayton, *supra* note 23, at 27-28; Cross, *supra* note 12, at 291.

43. Professor Heise has argued that the research design of many of these studies "may over emphasize [sic] the role of ideology as a predictor of judicial decisions." Heise, *supra* note 23, at 838. Because the Supreme Court tends to hear the hard, close cases on which the lower courts are divided, the "selection effect might skew findings of ideology's importance" at the Supreme Court level. *Id.* at 839; see also Cross, *supra* note 12, at 285 (stating that in the close cases heard by the Court, it is more likely that ideology will play a role); Gerhardt, *supra* note 12, at 1741 (reviewing SEGAL & SPAETH, *supra* note 12, and stating that Segal and Spaeth discount the fact that the Court decides hard cases).

44. See Gerhardt, *supra* note 12, at 1749. As Professor Gerhardt points out, there are problems with determining ideology from newspaper editorials, including the concerns associated with ideological drift of Justices over time. See *id.* at 1749, 1753; see also Clayton, *supra* note 23, at 25 ("To begin with, newspaper editorials and past voting records provide only indirect measures of the justices' personal policy preferences.").

other than satisfying their policy preferences. Justices may “try to maximize other interests, including preserving leisure time, desire for prestige, promoting the public interest, avoiding having their decisions overturned, or enhancing reputation.”⁴⁵ For Supreme Court Justices in particular, the intangible benefits from judging—including prestige and social status—are likely to be as significant as considerations of policy.⁴⁶ Professor Cross has recognized that judges might even derive utility from a “sense of duty” in applying the law fairly and faithfully.⁴⁷ Yet the attitudinal model only takes into account the influence of policy preferences on judicial decision making, ignoring many other relevant factors.

Thus, while “[t]he search for a single maximand . . . is probably fruitless,”⁴⁸ the attitudinal model supports the hypothesis that judges are rational actors who attempt to maximize their own utility.⁴⁹

B. THE RATIONAL CHOICE MODEL

Another theory about judicial decision making that is perhaps more realistic, yet less empirically verifiable, is the rational choice model. Under that model, judges are assumed to be seekers of legal policy, but they are also “strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.”⁵⁰ In other words, the decisions of Justices can best be

45. Gerhardt, *supra* note 12, at 1751. For example, a Justice that is concerned about enhancing her own prestige or reputation may decide a case that is contrary to her own policy preferences in order to show that she is independent from her colleagues that subscribe to a similar ideology.

46. See Stras & Scott, *supra* note 8, at 1454.

47. Cross, *supra* note 12, at 296.

48. *Id.* at 302.

49. See Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING, *supra* note 23, at 43, 45 (describing the influence of “rational-choice analysis” on the attitudinal model).

50. EPSTEIN & KNIGHT, *supra* note 17, at xiii. Although Epstein and Knight are among the most prominent rational choice theorists today, the model has its beginnings in a 1964 book by Walter Murphy and a 1958 article by Glendon Schubert. See WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Glendon A. Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958).

explained as the choices of strategic actors attempting to maximize their utility, not simply as Justices maximizing utility through reactive, nonstrategic ideological responses to a set of facts.⁵¹ One of the major advantages of the rational choice approach is that it does not rule out the possibility that judges are motivated by goals other than policy.⁵²

The strategic considerations include not only the predicted actions of colleagues, but also the views of external bodies such as the executive and legislative branches of government.⁵³ If Justices are concerned about seeing their policy preferences or other goals prevail, then “goal-oriented justices [must] concern themselves with the positions of Congress, the president and the public.”⁵⁴ If Congress, for example, disapproves of the Court’s decisions, then it can overturn them through legislation or even implement a court-curbing measure.⁵⁵ The rational choice model also does a better job than the attitudinal model at explaining choices made by Justices at points other than the decision on the merits, such as at the certiorari and opinion-writing stages.

51. See EPSTEIN & KNIGHT, *supra* note 17, at 10.

52. To be sure, Professor Cross criticizes Epstein and Knight for illogically concluding that Justices are motivated *solely* by policy preferences. See Cross, *supra* note 41, at 533–34. While this is no doubt a valid criticism of their approach, Professors Cross, Epstein and Knight admit that rational choice theory can be based on maximizing goals other than policymaking. See EPSTEIN & KNIGHT, *supra* note 17, at 11–12; Cross, *supra* note 41, at 540–41.

53. See EPSTEIN & KNIGHT, *supra* note 17, at 13; Maltzman et al., *supra* note 49, at 46. Unlike the attitudinal model, the rational choice model takes into account the norm of *stare decisis*. Because it is an institutional constraint, *stare decisis* may require “judges to compromise on their preferences in order to make their decision consistent with existing precedent,” and violations of that norm can “be costly to a potentially rebellious judge.” Whittington, *supra* note 25, at 612.

54. EPSTEIN & KNIGHT, *supra* note 17, at 14.

55. See Stras & Scott, *supra* note 8, at 1460. On many occasions, Congress has applied informal pressure on the Court by entertaining various types of “Court-curbing legislation,” including, for example, withdrawing the Court’s jurisdiction over certain matters, requiring extraordinary majorities to strike down legislation on constitutional grounds, and removing the power of judicial review. Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376–78 (1992) (“Attacking the Court is an old congressional practice dating back to the early years of the nation.”); see also Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 926 (1965). The most infamous example is President Roosevelt’s Court-packing plan, but there have been dozens of more modest examples. See Nagel, *supra*, at 926.

Some of the most powerful evidence in support of the rational choice model can be found in the Justices' behavior at the certiorari stage. Professors Epstein and Knight discovered, for example, that "aggressive grants" and "defensive denials" can be explained by strategic behavior.⁵⁶ An aggressive grant occurs when at least four Justices vote to take a case that may not warrant review because the case will likely be decided in those Justices' favor, allowing them to shape the doctrine in a certain direction.⁵⁷ A defensive denial, by contrast, occurs when Justices deny certiorari on a case that may warrant review because they believe that their policy preferences will not prevail at the merits stage.⁵⁸ A study of the 1982 Term of the Supreme Court revealed strong evidence of policy voting and strategic behavior by Justices at the certiorari stage.⁵⁹

Strategic behavior, however, extends beyond the certiorari stage. Epstein and Knight discuss a number of examples where the opinion assignment decision can be determinative of the tenor and scope of the opinion.⁶⁰ One common strategy is to assign the opinion to the "most tentative member of the majority in hopes of avoiding a switch of that justice's vote."⁶¹ Other strategies include assigning the opinion to a strategically adept Justice or to one that has a position that is very close to the assigning Justice in order to avoid a weak opinion.⁶²

Once the opinion is assigned, coalition building becomes the next important strategic node. Epstein and Knight rely on the conference notes of Justices Brennan and Powell to show that the intermediate level of scrutiny that is applied to gender discrimination claims was a product of compromise among the Justices in the majority coalition.⁶³ In *Craig v. Boren*,⁶⁴ three

56. See EPSTEIN & KNIGHT, *supra* note 17, at 80.

57. See *id.* (citing H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 208 (1991)).

58. See *id.*

59. See Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J. LAW, ECON., & ORG. 549, 570 (1999); see also Robert L. Boucher & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 836 (1995) (finding that Justices during the Vinson Court engaged in aggressive grants but not defensive denials).

60. See EPSTEIN & KNIGHT, *supra* note 17, at 127.

61. Cross, *supra* note 41, at 517.

62. See *id.* at 518.

63. See EPSTEIN & KNIGHT, *supra* note 17, at 4-7.

Justices (Brennan, Marshall, and White) preferred to apply strict scrutiny, one Justice (Stevens) favored a standard above rational basis review, and the final Justice in the coalition (Stewart) desired rational basis review for claims of gender discrimination.⁶⁵ Because these were the only five Justices that believed there was standing at the time of conference, Justice Brennan assigned the opinion to himself and drafted it with the goal of persuading Justice Stewart.⁶⁶ By adopting intermediate or “heightened” review, “Brennan put together a majority behind a standard for gender discrimination that has survived to this day.”⁶⁷ Likewise, the opinion in *Baker v. Carr*⁶⁸ was shaped by the need to persuade Justice Stewart to join the majority opinion.⁶⁹ Under the strategic model, the “swing” or “fifth” Justice carries the most power on the Court.⁷⁰ Put another way, strategic Justices will adopt compromise solutions rather than risk losing a majority, resulting in a holding that could be further from their optimal policy choices.

Like the attitudinal model, the rational choice model is not immune from criticism. To the extent that Epstein and Knight focus almost exclusively on ideology and policy, the rational choice model suffers from some of the same weaknesses as the attitudinal model.⁷¹ For instance, with respect to the certiorari process, some scholars have discovered, after interviewing the Justices, that the “Court acts much less strategically” at that stage than many political scientists believe.⁷² Of course, much of this evidence can be discounted because the Justices have an incentive to make the process appear as impartial as possible to bolster the Court’s legitimacy and their own standing in the legal community.

64. 429 U.S. 190 (1976).

65. See EPSTEIN & KNIGHT, *supra* note 17, at 8 tbls.1–4.

66. Cross, *supra* note 41, at 520.

67. *Id.*

68. 369 U.S. 186 (1962).

69. Cross, *supra* note 41, at 521 (citing BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 222 (1996)).

70. See *id.* at 521; Whittington, *supra* note 25, at 611 (“A simple spatial model would indicate that Court decisions should reflect the preferences of the median justice on any given issue, the pivotal swing justice.”).

71. See *supra* notes 46–54 and accompanying text.

72. PERRY, *supra* note 57, at 144 (1991); see also DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 130 (1980).

Moreover, as a former Supreme Court clerk, I find it hard to believe that most Justices are motivated *solely* by their own policy preferences. Even if a Justice has little regard for stare decisis, most at least adhere to a particular interpretive methodology that requires some degree of legal precision. As Frank Cross notes, Justices should be at a “complete loss” to decide cases that “lack ideological or political import” if advancing policy is their singular focus.⁷³ In cases involving little ideological significance, most Justices apply precedent or their own interpretive method to reach a legally justified result.⁷⁴ Moreover, the “mere fact that the Court grants certiorari to review such nonideological cases demonstrates the power of legal concerns.”⁷⁵

I believe that policy plays a role in the decisions of the Supreme Court, but it combines with a number of other considerations, including legal constraints such as stare decisis, to shape the decision-making process. As Professor Cross states, “[r]ational choice analysis can apply where the actors pursue multiple goals.”⁷⁶ Elsewhere I have outlined a number of other goals for judges, labeled “the intangible benefits of judging.”⁷⁷ Prestige and social status are an important part of the utility function for Justices.⁷⁸ Of course, at a minimum, an ostensible commitment to legal analysis is an important part of maintaining the reputational prestige associated with the position. For instance, a Justice who writes his or her opinions without citation to legal authority would lose respect and status within the legal community, even if the legal analysis only serves as a façade to mask naked policy preferences.

73. Cross, *supra* note 41, at 542.

74. We must not forget that Justices are subject to institutional constraints and context that require them to adhere to certain norms and traditions of the Supreme Court. As Cornell Clayton and Howard Gillman have pointed out, “With respect to Supreme Court politics, . . . justices’ behavior might be motivated not only by a calculation about prevailing opportunities and risks but also by a sense of duty or obligation about their responsibilities to the law and the Constitution and by a commitment to act as judges rather than as legislators or executives.” Cornell W. Clayton & Howard Gillman, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in ROHDE & SPAETH, *supra* note 27, at 1, 5.

75. Cross, *supra* note 41, at 542.

76. *Id.* at 546.

77. See Stras & Scott, *supra* note 8, at 1453–54.

78. See Posner, *supra* note 10, at 13–15.

C. THE IMPLICATIONS OF THE DECISIONAL MODELS

The strong empirical support for the attitudinal and rational choice models substantiates Judge Posner's claim that "[j]udges are rational, and they pursue instrumental and consumptive goals of the same general kind and in the same general way that private persons do."⁷⁹ As the foregoing discussion shows, Justices act rationally in deciding cases, which is the area most subject to internal and external institutional constraints such as congressional preferences, rules of the Court, and stare decisis. In contrast, Justices are almost entirely unrestrained in the decision of when and whether to retire,⁸⁰ which suggests that Justices are free to maximize their own utility in making that decision.

To many law and economics scholars and political scientists, the assertion that Justices act rationally in making judicial decisions is entirely unexceptional, possibly even tautological. But some legal scholars believe that rational actor models have no place in the study of the Supreme Court, perhaps because of the perceived idiosyncrasies of Justices or devotion to the legal model.⁸¹ Although there are admittedly some problems with the attitudinal and rational choice models, as I explain above, political scientists have been applying those models to judicial decision making for about half a century, and in so doing, have made some important discoveries.

My goal in this Essay is to take that research a step further by showing that an economic or incentives approach to the retirement decision of Supreme Court Justices is likely to succeed. If Justices act rationally in deciding cases, it appears that, *a fortiori*, they would act to maximize their utility in making inherently personal decisions such as whether to write a

79. *Id.* at 39.

80. One informal institutional norm is that Justices tend to retire so as to avoid two simultaneous vacancies on the Supreme Court. See WARD, *supra* note 6, at 21 ("[T]wo justices rarely depart at the same time."); Eric Black, *The O'Connor Retirement: The Battle Ahead*, STAR TRIBUNE (Minn.), July 2, 2005, at A6. Nonetheless, the only decision placed squarely within the prerogative of a judge under Article III is the decision of when and whether to retire by virtue of the Good Behavior Clause.

81. See, e.g., Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 912 (2005) ("Some law professors . . . have leveled a number of critiques of the . . . rational choice model."); E-mail from David J. Garrow to author (Aug. 25, 2005) (on file with author).

book,⁸² accept speaking engagements, and, of course, whether and when to retire.

II. UNDERSTANDING THE RETIREMENT DECISION

In recent years, a number of political scientists have looked to the rational choice model to explain the retirement behavior of Justices.⁸³ Although there is not, as of yet, any uniform model to explain the factors influencing the retirement decision of Justices, a number of empirical studies have identified the most important historical considerations. Elsewhere I have highlighted some of them, emphasizing in particular the role of economic factors.⁸⁴

In this Part, I will take the existing research one step further by synthesizing the most important factors identified in these empirical studies. Judge Posner's approach in his 1993 article identifying and analyzing the principal elements of the judicial utility function will provide the blueprint for my analysis.⁸⁵ Using Judge Posner's analysis as a guide, I will algebraically model a Justice's retirement function, and then describe the most influential considerations in the decision of an average Justice. Of course, each Justice will weigh the relevant factors differently, but a better understanding of the considerations influencing judicial retirement will allow us to make better policy choices about judicial tenure and institutional reform.

A. THE JUDICIAL UTILITY FUNCTION

In 1993, Judge Richard Posner wrote an influential article in which he modeled the utility function for "federal appellate

82. Chief Justice Rehnquist wrote several books during his time on the Court, as did Justice O'Connor. *See, e.g.*, SANDRA DAY O'CONNOR, *CHICO* (2005); SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002); SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* (2003); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992); WILLIAM H. REHNQUIST, *THE SUPREME COURT* (2002).

83. *See supra* note 15.

84. *See Stras & Scott, supra* note 8, at 1447–49.

85. *See Posner, supra* note 10, at 31–39.

judges.”⁸⁶ He first analogized the federal appellate judge to various other types of actors: to managers of nonprofit enterprises, voters in political elections, and spectators at theatrical performances.⁸⁷ These analogies led him to “present a simple model in which judicial utility is a function mainly of income, leisure, and judicial voting.”⁸⁸ He then used the model to explain various judicial behaviors, ranging from adherence to *stare decisis* to the phenomenon of “go-along voting” observed on many three-judge panels.⁸⁹ The model yielded some interesting insights.⁹⁰

Posner’s judicial utility function is represented by the following equation:

$$U = U(t_j, t_l, I, R, O)$$

. . . [where] t_j is the number of hours per day that a judge devotes to judging, t_l is the time he devotes to leisure, . . . I is pecuniary income, . . . R is reputation, and O represents the other sources of judicial utility . . . besides that of judicial voting itself—popularity, prestige, and avoiding reversal.⁹¹

According to Judge Posner, rational judicial actors will allocate their time so that the last hour devoted to judging will yield the same utility as the last hour devoted to leisure.⁹²

Of far more interest, however, at least for purposes of this Essay, is Judge Posner’s manipulation of the judicial utility function to model the decision of whether to accept an Article III judgeship in the first instance.⁹³ He begins with the obvious proposition that an individual will accept a nomination if the change in net expected utility for the career change is positive.

86. *Id.* at 4.

87. *See id.* at 2.

88. *Id.*

89. *Id.*

90. Some scholars have criticized the variables selected by Judge Posner for his judicial utility function because they are not supported by empirical evidence. *See* Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law & Economics*, 64 MD. L. REV. 24, 58 n.130 (2005); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 988–994 (1995). In contrast to Judge Posner’s approach, my retirement function is a product of the empirical literature, so the criticisms of Benforado, Hanson, and Cass are inapposite here.

91. *See* Posner, *supra* note 10, at 31.

92. *See id.* Otherwise, judges would increase their utility “by reallocating time from the less to the more valuable activity.” *Id.*

93. *See id.* at 34–36.

In other words, a person will accept an Article III judgeship if the following inequality holds:

$$U_j(t_j, t_l, I_j, R_j, P_j) - U_L(t_L, I_L) - C > 0$$

Assuming that a prospective judicial candidate is coming from private practice, “ U_j is the utility from being a judge, I_j is the judicial salary, P_j is the prestige of being a judge, U_L is the utility of practicing law, t_L is the time a lawyer spends working, [and] C is the cost of becoming a judge.”⁹⁴ The cost of becoming a judge would include, among other considerations, the inconvenience and the loss of privacy in undergoing an investigation by the FBI and a hearing before the Senate Judiciary Committee.⁹⁵ A judicial candidate will accept the nomination if the utility from judging is greater than the utility from private practice plus the costs of becoming a judge.

The inequality is useful because it allows us to better understand the relevant decisional considerations for a prospective judicial nominee. For instance, the more a candidate values leisure (assuming that being a judge provides more leisure than private practice), prestige, and judging, the greater the probability the individual accepts the judgeship. Likewise, the more the candidate values money and lawyering, the greater the probability the individual remains in private practice.⁹⁶

B. THE JUDICIAL RETIREMENT FUNCTION

A judge’s decision whether to retire is largely the converse of the decision of whether to accept a judgeship.⁹⁷ Instead of gaining prestige and social status, for example, a retiring judge is in part forfeiting those accoutrements of office. However, the two decisions are not precisely symmetrical. For instance, there are few nonopportunity costs associated with making the tran-

94. *Id.* at 35.

95. *See id.* Judge Posner’s model focuses only on the decision to become a federal judge straight from private practice. Of course, many federal judges served in other roles prior to their elevation, including as state court judges or academics, so the relevant factors may be weighed differently in those cases.

96. Judge Posner makes a number of additional interesting observations about the decision of whether to accept a judgeship, which are too numerous to recount here. *See id.* at 34–36.

97. Some federal judges retire completely, but the vast majority of them choose to continue on in a limited capacity as a senior judge. *See* Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 497 (2005).

sition from active to senior status, unlike the case for accepting a judgeship.⁹⁸ In addition, the empirical literature has identified a number of other factors in the retirement decision that are nowhere to be found in Judge Posner's judicial utility function, including health and strategic considerations.⁹⁹ Using the approach employed by Judge Posner, a judge will take senior status if the following inequality holds:

$$U_S(t_j, t_l, I_S, P_S, S, H_S, O_S) - U_A(t_j, t_l, P_A, H_A, O_A) > 0$$

Although each of the factors will be discussed in greater detail below, U_S is the total utility from senior status, which includes hours per day devoted to leisure (t_l) and to judging (t_j), pension income from senior status (I_S), prestige from serving as a senior judge (P_S), strategic benefits from electing senior status (S), health status as a senior judge (H_S), and other factors relating to senior status (O_S). Meanwhile, U_A is the total utility from active status, which includes time devoted to leisure (t_l) and to judging (t_j), salary income from active status (I_A), prestige from serving as an active judge (P_A), health status as an active judge (H_A), and other factors relating to being an active judge (O_A).

1. Time Constraints

The first set of factors in both utility functions is the time spent on judging and leisure, which in large part depends on the workload associated with both positions. Due to the modest workload requirements for senior judges, judges who value their leisure time will find senior status attractive.¹⁰⁰ Senior judges may work as little or as much as they wish, subject only to the constraint that they must perform the equivalent of at least three months of the work of "an average judge in active service" during a calendar year.¹⁰¹ Thus, judges who seek

98. For instance, the transition from active to senior status is not accompanied by the loss of privacy associated with an FBI investigation and a Senate hearing.

99. See *supra* note 10 and accompanying text.

100. Federal judges may elect to take senior status or fully retire with a pension once they satisfy the "rule of eighty," which is "a sliding scale of age or service, beginning at age sixty-five and fifteen years of service, and ending at age seventy with ten years of service." Stras & Scott, *supra* note 8, at 1444.

101. 28 U.S.C. § 371(e)(1)(A) (2000). Congress introduced a certification process for senior judges in 1989. See Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705(a), 103 Stat. 1716, 1770. There are other ways to satisfy the

greater flexibility in their work schedules will also be more likely to elect senior status immediately upon becoming eligible.

As Judge Posner has acknowledged, judges receive pleasure from the act of judging as well as the time they spend on leisure activities.¹⁰² It might be argued that Justices enjoy the act of judging so much that they are hesitant to retire. The judicial retirement function demonstrates, however, that the decision to retire is more complex than simply asserting that Justices must really like judging. There are a number of other factors to consider, including income, strategic considerations, workload, and prestige. Indeed, if Justices received disproportionate utility from the process of voting and deciding cases, then the Supreme Court's docket would continue to grow and a higher workload would be a *disincentive* to retire. And if the attitudinal model is correct, Justices should have a particular desire to see their policy preferences prevail. Yet the Supreme Court's docket has been shrinking precipitously over the past fifteen years, and retirements have been sparse during that period.¹⁰³

Although less research exists about workload than other factors influencing the retirement decisions of federal judges, at least one study has concluded that a higher workload increases the probability of retirement.¹⁰⁴ Using each month on the appellate bench as a separate observation,¹⁰⁵ Professors Nixon and Haskin used regression analysis to model the retirement decision. The study defined workload "as the number of case filings per judge."¹⁰⁶ Both individual and longitudinal analysis confirmed that "personal factors such as workload . . . are the most substantively and statistically significant factors affecting

certification requirement apart from purely judicial work, including performing "substantial duties for a Federal or State governmental entity," which demonstrates the flexibility of senior status. See David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. (forthcoming Mar. 2007) (manuscript at 9, on file with author) (discussing 28 U.S.C. § 371(e)(1)(D)).

102. See Posner, *supra* note 10, at 16, 18–20.

103. See Margaret Meriweather Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 738 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403–04.

104. See Nixon & Haskin, *supra* note 15, at 471–72.

105. See *id.* at 465.

106. *Id.* at 466.

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aggregate retirements.”¹⁰⁷ At least two other studies of lower court judges have confirmed the positive impact of increased workload on judicial retirements.¹⁰⁸

These studies suggest that increasing the workload of Justices, which in turn increases the amount of time spent on judging rather than leisure, will make retirement more attractive for the average Justice.¹⁰⁹ Rather than abolishing life tenure, as many academics have proposed, increasing the workload of the Court is a modest, tailored reform that holds substantial promise.¹¹⁰

2. Income

Unlike the decision to accept a judgeship, income is essentially an offsetting variable in the judicial retirement function, meaning that there is little economic advantage (or disadvantage) in retiring from active status. In most cases, judicial pensions are approximately equal to the salaries earned by active

107. *Id.* at 480. Case filings per judge tends to be the most accurate measure of the “true monthly workload” of appellate judges. *See id.* at 486 n.8. In contrast, other studies of Supreme Court retirement behavior have either omitted the workload variable entirely or used measures such as the number of majority or dissenting opinions, which might be more of a proxy for physical or mental infirmity than the true workload of an average Justice. *See, e.g.*, Squire, *supra* note 15, at 186; Zorn & Van Winkle, *supra* note 15, at 156.

108. Spriggs and Wahlbeck’s 1995 study found that “expansion in workload . . . affects judicial retirements,” but that the “estimate is statistically significant [only] for Republicans . . . not for Democrats.” *See* Spriggs & Wahlbeck, *supra* note 15, at 590. Similarly, Barrow and Zuk concluded that “the cumulative effect of caseload on retirement from the circuit court [wa]s substantial.” *See* Barrow & Zuk, *supra* note 15, at 469.

109. In a future paper, I will argue that one of the most important benefits of increasing the workload of the Supreme Court is its potential to encourage mentally or physically infirm Justices to retire, before they become a substantial burden on the Court and their colleagues. I will argue that workload should be increased by: (1) reinstating circuit riding during the summer months; and (2) restoring nondiscretionary jurisdiction for certain types of cases.

110. Modifying the jurisdiction of the Supreme Court is among the powers vested in Congress by the Constitution. U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*” (emphasis added)); *see also* Edward Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649–57 (2000) (explaining Congress’s role in the evolution from mandatory appellate jurisdiction to certiorari jurisdiction for the Supreme Court).

judges, except that the pensions of senior judges are exempt from FICA taxes and the income taxes of many states.¹¹¹ Indeed, senior judges continue to share in any raises given to their active colleagues by Congress.¹¹² In other words, income plays an insignificant role in the *current* retirement decision.¹¹³

It is true that Justices have an opportunity to make substantial income after retiring from judging. For example, several current Justices have signed lucrative book deals and others, such as Justice Scalia, earn extra money by teaching classes.¹¹⁴ Meanwhile, some hypothesize that fully retired Justices have an opportunity to enter into private practice and make millions of dollars as experienced advocates,¹¹⁵ even though none have done so in recent memory.¹¹⁶ While I do not dismiss these potential income streams, they are highly unpredictable. For instance, an active Justice is probably better equipped to sign a profitable book deal than a senior or retired Justice that has left the public spotlight. Likewise, neither active nor senior Justices can practice law while continuing to decide cases.¹¹⁷ Thus, while I do not dismiss these possibilities,

111. See Stras & Scott, *supra* note 8, at 1453.

112. See Act of June 25, 1948, Pub. L. No. 80-713, § 371, 62 Stat. 869, 869 (codified as amended at 28 U.S.C. § 371 (2000) (mandating that any Justice who retires from active service after reaching the age of seventy and after serving ten years continuously shall receive the salary of the office)).

113. Early in this nation's history, a number of Justices remained on the Supreme Court, despite suffering from incapacitating physical or mental disabilities, due in large part to the absence of a pension for retiring Article III judges. See Stras & Scott, *supra* note 8, at 1439–40. Justices Baldwin and Cushing, for example, both stayed on the Supreme Court in order to continue drawing a salary. See *id.* at 1440. In other words, income plays a role in the retirement decisions of Supreme Court Justices, but that role is not as significant under the *current* retirement regime.

114. See, e.g., Gina Holland, *Five Justices Worth Millions: New Financial Reports Detail the Supreme Court Members' Book Deals and Other Assets*, PHILA. INQUIRER, June 6, 2004, at A10; Tony Mauro, *Book Club*, LEGAL TIMES, June 7, 2004, at 4.

115. For example, one participant in this symposium, Dean Kenneth Starr, left his judgeship on the D.C. Circuit and eventually entered private practice with the law firm of Kirkland & Ellis after four years as Solicitor General. See Tony Mauro, *Pepperdine Law School's Newest Star*, LEGAL TIMES, April 12, 2004, at 19.

116. Even lower court judges, who have less prestigious positions than Supreme Court Justices, are “reluctan[t] to seek work outside the judiciary.” Yoon, *supra* note 97, at 538.

117. See Federal Ethics Reform Act of 1989, Pub. L. No. 101-194, § 601, 103 Stat. 1716, 1760 (codified as amended at 5 U.S.C. app. § 502 (2000) (prohibit-

they are difficult to measure in the judicial retirement function.

Even though Justices have been reluctant to fully retire from the judiciary and the income received by senior and active Justices is approximately the same, I do not remove the income variable from the retirement function because Congress has the power to create substantial monetary retirement incentives through pension reform. In a recent coauthored article, we examined the strong relationship between financial considerations and the retirement decision.¹¹⁸ Nearly every study focusing on Supreme Court Justices has found that pensions were among the most important predictors of retirement.¹¹⁹ Professor Squire's study demonstrated that the two most important variables affecting a Justice's decision to retire are health considerations and pension eligibility.¹²⁰ Meanwhile, in Zorn & Van Winkle's study, "pension eligibility increased the baseline hazard for retirement by an astounding 393 [percent]."¹²¹

In other words, "judges appear to recognize—at least implicitly—the judicial compensation structure and how best to maximize it."¹²² Elsewhere I have proposed that Congress enact a "golden parachute" for Supreme Court Justices upon satisfying the rule of 80.¹²³ The pension annuity offered to senior Justices would be double the salary of active Justices, providing a substantial financial incentive to retire.¹²⁴ For instance, the present value of the retirement incentive for a sixty-five year old Justice under our plan is over \$1.5 million, assuming current life expectancies.¹²⁵ Indeed, the "golden parachute" can even imitate a mandatory retirement age or term limits by exempting the pension income from all federal income taxes if Justices elect senior status within a short window after having served for a certain term of years or upon reaching a certain

ing judges from providing professional services that involve a fiduciary relationship).

118. See Stras & Scott, *supra* note 8, at 1447–52.

119. See Squire, *supra* note 15, at 186–87; Yoon, *supra* note 15, at 40–41; Zorn & Van Winkle, *supra* note 15, at 154–55.

120. Squire, *supra* note 15, at 186.

121. Stras & Scott, *supra* note 8, at 1448 (citing Zorn & Van Winkle, *supra* note 15, at 155).

122. Yoon, *supra* note 15, at 43.

123. See Stras & Scott, *supra* note 8, at 1458–59.

124. See *id.*

125. See *id.* at 1457–58.

age.¹²⁶ Like workload modifications, increasing judicial pensions would have a demonstrable effect on the retirement decision of the average Justice.

3. Prestige and the Intangible Benefits of Judging

The least empirically measurable variable in the retirement decision of Supreme Court Justices is the prestige and social status associated with the position.¹²⁷ As Professors Steven Calabresi and James Lindgren have recently explained, the “social status associated with being a [Supreme Court Justice]” has improved over time, encouraging many Justices to stay on the bench for longer periods of time.¹²⁸ Professor Albert Yoon recently conducted a survey of senior judges, in which many explained that being a judge was prestigious, intellectually stimulating, and an important factor in their continued happiness.¹²⁹

The implications of Professor Yoon’s research are obvious. When Supreme Court Justices transition into senior status, they lose much of the prestige and social status associated with the position. Unlike senior judges in the lower federal courts, senior Justices can no longer participate in the Court’s business: “[t]hey do not vote on certiorari petitions, sit by designation on the Court, or even dine with the other Justices with any regularity.”¹³⁰ Instead, senior judges are relegated to sitting in the lower federal courts by designation and performing special

126. *See id.* at 1458.

127. Another potential variable is the utility that judges receive from thinking of themselves as judges. Economists have recently begun considering how a person’s identity affects utility. *See, e.g.*, George Akerlof & Rachel Kranton, *Economics and Identity*, Q.J. ECON. 715, 715 (2000); Claire A. Hill, *What the New Economics of Identity Has to Say to Legal Scholarship* (forthcoming 2006) (manuscript at 2–4, on file with author). I do not consider identity separately in this Essay because it largely tracks prestige. Moreover, as with the personal factors I discuss *infra* in Part II.B.6., the influence of identity on the utility function of judges can be highly idiosyncratic.

128. *See Calabresi & Lindgren, supra* note 6, at 34.

129. *See Yoon, supra* note 97, at 536–38.

130. Stras & Scott, *supra* note 8, at 1465. In a famous example of testing the limits of the powers of a senior Justice, Justice William Douglas attempted to participate directly in the work of the Court after he had stepped down as an active Justice. *See Garrow, supra* note 6, at 1055–56. The active members of the Court, however, ordered him to “cease and desist” his activities. *Id.*

projects at the behest of the Chief Justice.¹³¹ In the judicial retirement function, therefore, P_A is much larger than P_S .

To alleviate some of the disparity between P_A and P_S , Congress could permit all senior Justices to take on important duties in the administration of justice in the federal judiciary, such as the role assigned to Byron White in investigating a split of the Ninth Circuit.¹³² They could also serve as special masters in cases arising under the original jurisdiction of the Supreme Court, or serve on committees considering revisions to the federal procedural rules.¹³³ Congress should also explore whether senior Justices can be better integrated into the work of the Court by sitting in place of recused or absent Justices on occasion.¹³⁴ In sum, Congress should think more creatively about assigning substantial roles within the judiciary to senior Justices.

Moreover, an increase in the number of Justices participating in the Court's business might also lower P_A . Indeed, "the thirst for prestige is manifested primarily in opposition to any large increase in the number of judges, at least high-level judges, and to extending the title "judge" to lower-level judicial personnel."¹³⁵ By increasing the number of actors that have at least some direct authority over the Court's work, it could increase the probability of retirement by potentially decreasing the prestige associated with being one of the nine active Justices of the Supreme Court.¹³⁶ As with workload and income, understanding the interaction of P_A and P_S in the judicial retirement function will allow Congress to enact narrowly tailored reform measures that influence the retirement decision.

131. Stras & Scott, *supra* note 8, at 1464.

132. *See id.* at 1464–65 & n.397. We also recommend that, at the conclusion of the modernization project, senior Justices should once again be given offices in the Supreme Court building. *See id.* at 1465.

133. *See id.* at 1465.

134. *See id.* The constitutionality of any such proposal would have to be closely examined by Congress. *See id.* at 1466 n.399.

135. Posner, *supra* note 10, at 13.

136. It is possible, of course, that being a Justice of the Supreme Court is so inherently prestigious that increasing the number of Justices will have a negligible marginal influence on the retirement decisions of Justices. However, I tend to believe that the prestige is attributable, at least in part, to the small number of positions available, similar to the reason why membership in the Senate might be viewed as more prestigious than membership in the House of Representatives.

4. Strategic Considerations

According to the empirical studies, strategic considerations (S) and health status (H) are less significant variables in the judicial retirement function. The strategic variable S is placed in the utility function for senior judges because they might gain some utility from acting strategically to ensure a nominally like-minded successor, or at least one that is named by a president of the same party. Unlike the other three variables already discussed, however, Congress has almost no ability to influence S and H because they are inherently personal considerations in the retirement decision.

There are numerous stories about strategic retirement behavior by Supreme Court Justices. Justice Douglas, for instance, delayed retirement so that his political enemy, Gerald Ford, would not have the luxury of naming his replacement.¹³⁷ Likewise, Chief Justice Taft remained “to prevent the Bolsheviks from getting control” of the Court.¹³⁸ With a Nixon presidency looming, Chief Justice Warren retired in an attempt to give President Lyndon B. Johnson the opportunity to name his successor.¹³⁹

Nonetheless, “strategic retirement is a chameleon claim,”¹⁴⁰ and numerous empirical studies have “rejected the hypothesis that Justices retire for strategic reasons.”¹⁴¹ For instance, Professor Squire found no statistically significant relationship between voluntary retirements and the presence of party unity between a president and a Justice.¹⁴² Likewise, Professor Albert Yoon concluded that political factors “do not

137. See WARD, *supra* note 6, at 186 (describing Douglas’s obvious physical and mental deterioration and his declaration that he would not retire until there was a Democratic president).

138. Letter from William Howard Taft to Horace D. Taft (Nov. 14, 1929), *quoted in* 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 967 (1939).

139. See Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court’s Pursuit of Equal Justice Under the Law*, 59 WASH. & LEE L. REV. 1203, 1249–50 (2002).

140. See Stras & Scott, *supra* note 8, at 1435.

141. *Id.* at 1432.

142. See Squire, *supra* note 15, at 184–85. Coding Justices as conservative and liberal rather than by party affiliation, Professor Saul Brenner concluded that “possibly two of the thirty-three Justices (6.5 percent) who left the Court in the post-1937 era might have strategically retired.” Saul Brenner, *The Myth that Justices Strategically Retire*, 36 SOC. SCI. J. 431, 436 (1999).

meaningfully explain judicial turnover.”¹⁴³ While I acknowledge that strategic retirement exists,¹⁴⁴ it is a small component of the overall retirement decision of Supreme Court Justices.¹⁴⁵

Moreover, the claim of strategic retirement must be balanced against the strategy of remaining on the Court. If the attitudinal or rational choice models explain the decisions made by Justices, then Justices may elect to stay on the Court for strategic reasons.¹⁴⁶ For instance, perhaps Justice Scalia has decided to remain on the Court, despite dissenting in a number of cases, because he believes that he is uniquely situated to advance his method of interpreting the Constitution through textualism and originalism.¹⁴⁷ Recent events certainly do not undermine this conclusion as nominees are becoming increasingly hard to gauge due to their short or nonexistent paper trails.¹⁴⁸ On the other hand, Justices may grow tired of losing important cases, and may prefer others to do the work. Again, because these considerations are relatively unpredictable and lack empirical support, Congress’s attention should be directed elsewhere in the judicial retirement function.

143. Yoon, *supra* note 15, at 44.

144. See Charlie Rose: Interview with Chief Justice William H. Rehnquist, United States Supreme Court (PBS television broadcast Jan. 13, 1999), *quoted in* WARD, *supra* note 6, at 218.

145. As we have previously argued, the lack of empirical evidence for strategic retirement undermines at least one rationale in favor of term limits or a mandatory retirement age. See Stras & Scott, *supra* note 8, at 1401.

146. Under the attitudinal and rational choice models, there will almost always be a strategic benefit to remaining on the Court because a successor will never *exactly* match the preferences of the Justice he or she is replacing.

147. An even more compelling example of strategic nonretirement could be Justice Stevens’s decision to remain on the Court, despite his advanced age of eighty-five, because perhaps he hopes that a Democratic president will name his successor.

148. Chief Justice Rehnquist may have been reluctant to retire because he feared that his seat would be filled by a nominee without stated views on prominent constitutional issues. Indeed, a common criticism of John Roberts and Harriet Miers was that their records were too bare to give any hints about how they would rule in important cases. See, e.g., Todd J. Zywicki, *A Great Mind? Miers Might Vote Right, but What the Court Truly Needs is Intellectual Leadership*, LEGAL TIMES, Oct. 10, 2005, at 44 (arguing that neither Roberts nor Miers promised intellectual leadership); David Stras, *The Supreme Court Road to Mediocrity*, STAR TRIBUNE (Minn.), Oct. 7, 2005, at A17 (arguing that ideology has become the primary factor considered in appointing Justices).

5. Health Status

Infirmity, both mental and physical, is the single greatest disadvantage associated with life tenure. Professor David Garrow has done an admirable job of cataloguing the instances of severe mental disability among Supreme Court Justices over the course of American history.¹⁴⁹ The numbers are disheartening: eleven Justices have suffered from mental infirmity and four others from incapacitating physical disability during the twentieth century alone.¹⁵⁰

Poor mental and physical health also presumably plays a role in the utility function for active judges. For example, Justice Ginsburg reportedly pondered retirement after being diagnosed with colon cancer.¹⁵¹ Although health conditions falling short of total incapacity have not been studied empirically, Professor Squire found that “major physical disability, like a stroke . . . increases . . . [a Justice’s] mean probability of leaving the bench in any year by 28 [percent].”¹⁵² Professor Squire’s conclusion is compelling because Justices should be much happier performing some judicial duties competently as a senior Justice rather than struggling to keep a full workload as an active Justice. Nonetheless, because Justices are so resistant to retirement even after they have become mentally or physically infirm, other variables in the retirement function must be more significant, particularly the prestige associated with active status.

In contrast, at least some Justices believe that continuing to remain an active member of the Court can prolong their lives. In Professor Yoon’s study of senior judges, for example, some judges stated that they elected senior status over full retirement because deciding cases and continuing to serve as a judge provided them with intellectual stimulation.¹⁵³ Accord-

149. See generally Garrow, *supra* note 6 (outlining the history of mental decrepitude on the Supreme Court).

150. Eleven Justices suffered a serious mental decline during their final years: Chief Justices Fuller and Taft and Justices McKenna, Holmes, Murphy, Minton, Whittaker, Black, Douglas, Powell, and Marshall. Stras & Scott, *supra* note 8, at 1437. In addition, another four Justices suffered incapacitating physical disabilities before retiring: Justices Gray, Brewer, Moody, and Pitney. *Id.*

151. Angie Cannon, *The Supremes’ Future*, U.S. NEWS & WORLD REP., May 15, 2000, at 18, 20.

152. Squire, *supra* note 15, at 186.

153. See Yoon, *supra* note 97, at 537–38.

ingly, some older members of the Court might be persuaded to delay retirement because of the numerous anecdotes about early death brought on by retirement. For instance, Justice Powell believed that Justice Stewart's early retirement from the Court led to his premature death only four years after he left the Court in good health.¹⁵⁴ Moreover, even a senior Justice must perform a quarter of the work of an active Justice without the benefit of four clerks,¹⁵⁵ which may render it fruitless to retire from a health standpoint.

The foregoing discussion demonstrates that further research on the relationship between health and retirement is needed in order to better understand the retirement decisions of Justices.

6. Other Factors

Although there is no easy way to measure this variable, it is clear that other, often uniquely personal factors occasionally influence the retirement decisions of Justices. For instance, Justice Goldberg retired to become Ambassador to the United Nations after his friend, President Lyndon Johnson, asked him to serve his country in that role.¹⁵⁶ Justice Clark was induced to retire when President Johnson nominated Clark's son to become Attorney General.¹⁵⁷ And more recently, the diminishing health of Justice O'Connor's husband contributed to her decision to retire from the Court.¹⁵⁸

Moreover, some Justices might be influenced by the retirement decisions of their colleagues. For example, Justice Thurgood Marshall's decision to leave the Court in 1991 must have been influenced by the retirement of Justice William Brennan, his "closest friend,"¹⁵⁹ just one year earlier. Likewise,

154. See DAVID N. ATKINSON, *LEAVING THE BENCH* 150 (1999).

155. Senior Justices get one clerk to assist them with their work. See Tony Mauro, *It's Business as Usual for O'Connor's New Clerks*, *RECORDER*, July 25, 2005, at 3.

156. See WARD, *supra* note 6, at 169.

157. See Michael Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 *GA. L. REV.* 65, 94 (1998).

158. See Michael Kiefer, *O'Connor Ex-Clerks Surprised by Move*, *ARIZ. REP.*, July 2, 2005, at A21; Richard W. Stevenson & Sheryl Gay Stolberg, *Bush Promises to Move Quickly on Chief Justice*, *N.Y. TIMES*, Sept. 5, 2005, at A1.

159. U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 *ALA. L. REV.* 959, 981 (2003); see also Owen Fiss, *A Tribute to Justice Thurgood*

it is possible that the future retirement of either Antonin Scalia or Ruth Bader Ginsburg could have an impact on the retirement decision of the other.¹⁶⁰

Like other inherently personal considerations, however, such factors are difficult to anticipate, differ among the members of the Court, and thus are of little help to policymakers in influencing the retirement decisions of Justices.

CONCLUSION

The proponents of a mandatory retirement age and term limits have underestimated the degree to which the rational actor model applies to Justices. In making many decisions, as the empirical evidence demonstrates, Justices attempt to maximize their own preferences, whether based on policy considerations or other factors. The retirement decision is no exception. Scholars who dispute the applicability of the rational actor model to Justices have either not focused on the persuasive empirical evidence advanced by political scientists or have failed to consider all of the variables that touch upon judicial utility.

In addition to allowing us to better understand the retirement decision, the judicial retirement function and the empirical studies on which it is based support my hypothesis that economic incentives can change the behavior of Justices, particularly with respect to retirement. Simple initiatives, such as increasing retirement pensions and the workload of active Justices, can change the incentive structure facing Justices contemplating retirement. This Essay is just an initial step along that path. I encourage my colleagues and policymakers in Congress to take the incentives approach to retirement seriously as it holds substantial promise for future reform.

Marshall, 105 HARV. L. REV. 49, 50 (1991) (describing Justice Brennan as Justice Marshall's "beloved friend and colleague").

160. See Charles Lane & David Von Drehle, *Scalia's Bluntness May Thwart His Effectiveness*, SEATTLE TIMES, Oct. 19, 2003, at A12 (describing Justices Scalia and Ginsburg as "longtime friend[s]"); Tony Mauro, *Scalia Rumored to Be Chief Justice Should Rehnquist Retire*, TEXAS LAW., Nov. 18, 2002, at 6 (stating that Justice "Scalia's best friend on the [C]ourt is Justice Ruth Bader Ginsburg").