

Introduction: Positive Political Theory and the Law

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Over the last twenty-five years, positive political theory (PPT) has emerged as a powerful intellectual force in legal scholarship.¹ PPT originated in the field of political science as an explanatory rather than normative approach to the study of politics—one that treats policymaking as a game of strategy and focuses on the choices that rational actors make in pursuit of their goals.² This approach has been fruitfully generalized to the study of law. The PPT approach to the study of law—which might be called the positive political theory of law, or PPTL—is built upon the insight that law is simply a form of policy. Lawmaking, like policymaking, can therefore be modeled as a game of strategy, in which rational actors—members of Congress, the President, judges, administrators, political parties, ordinary citizens—seek to achieve their goals in the face of institutional constraints and imperfect information. The purpose of modeling lawmaking in this way is to explain and predict the content of the law and the course of its development. To that end, PPTL makes heavy use of sequential game theory to derive predictions about the outcome of the lawmaking game from information about the preferences of the players and the design of the relevant political institutions, including electoral processes and the legislative, executive and judicial branches.³

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1. For a recent survey of scholarship in the area of PPT and the law, see McNollgast, *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, in A. MITCHELL POLINSKY & STEVEN SHAVELL, *THE HANDBOOK OF LAW AND ECONOMICS* (forthcoming 2006).

2. For an introduction to the foundations of PPT in political science, see WILLIAM H. RIKER & PETER C. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* (1973); and DAVID AUSTEN-SMITH & JEFFREY S. BANKS, *POSITIVE POLITICAL THEORY I: COLLECTIVE PREFERENCE* (1999).

3. For an introduction to sequential game theory, see JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* (1994).

Whatever its explanatory or predictive power, no theory of lawmaking is likely to command the full attention of legal scholars unless it pays generous regard to the normative side of things.⁴ PPTL has correspondingly evolved from its origins in political science to feature a prominent normative and evaluative dimension. Like law and economics, PPTL scholarship exhibits a keen interest in the economic efficiency of legal institutions and policy outcomes. Equally significant, however, is the concern that PPTL also devotes to questions of distributive justice and democratic legitimacy. Like the Legal Process school of traditional legal scholarship,⁵ PPTL focuses upon the extent to which the structure and processes of legislative, bureaucratic and judicial decisionmaking serve principles of democratic legitimacy. However, whereas Legal Process scholarship tends to emphasize the extent to which governmental decisionmaking processes satisfy normative standards derived from moral and political philosophy, work in the PPTL vein is inclined to conceptualize political processes and institutions as the result of deliberate choice by political actors with the goal of influencing policy outcomes, and to judge the resulting institutional arrangements against the extent to which they produce policy outcomes that satisfy substantive criteria of democracy and justice. That is, PPTL takes a consequentialist view of the procedures by which government policy is fashioned: it is concerned more with the impact of procedure on the actual content of government policy than with the legitimacy of the policymaking process, and it builds a critical understanding of the policymaking process by illuminating the causal linkages between political institutions and policy outcomes.

The contributions to this symposium exemplify the intellectual breadth and methodological heterogeneity that increasingly define PPTL. Some fall within the well-established PPTL tradition of descriptive scholarship that seeks to extend our understanding of decisionmaking by Congress, the President, courts and agencies. Scholarship in this vein is often unified by a shared concern with recurring and important questions about the nature and extent of judicial independence and judicial power: what does it mean for a court to be independent or powerful, for

4. See, e.g., Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POL. 261, 262-63 (2006) (arguing that positive political science scholarship on judicial behavior risks irrelevance if it fails to address normative questions).

5. For an intellectual history of the Legal Process school, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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example, and under what conditions do courts enjoy these qualities? Other work in this volume employs the tools and insights of PPTL to undertake a critical examination of the premises underlying a range of normative arguments about political and legal institutions.

Mathew McCubbins and Daniel Rodriguez open this symposium with an article that falls squarely within this latter strain of PPTL scholarship. Their article, *When Does Deliberation Improve Decisionmaking?*, is an empirical study of deliberative decisionmaking with unsettling implications for the design and success of democratic institutions. The idea of deliberative decisionmaking is central to many conceptions of democracy, in part because the act of public deliberation is supposed to produce higher-quality decisions that improve the welfare of the community. McCubbins and Rodriguez test the notion that deliberation enhances social welfare by means of carefully designed laboratory experiments in which subjects were asked to solve math problems and were financially rewarded both individually and collectively for answering correctly. Participants were given the opportunity to deliberate by transmitting and receiving information, at varying cost to themselves. The resulting conditions for deliberation were ideal in a number of respects. Participants faced no conflict of interest, no opportunity cost for engaging in deliberation, and no distortion of their communications with one another. Perhaps most importantly, they were asked to resolve questions for which objectively correct answers exist: there was therefore no reason for the participants to view deliberation as potentially futile, as might be expected in the face of conventional policy questions capable of arousing normative disagreement.

Consistent with their expectations, the authors find that social welfare increases when participants can engage in costless communication, and also when participants are required to pay in order to transmit information, but not to listen. Under the more realistic conditions of costly speech combined with costly listening, however, social welfare actually *decreases* relative to what is attained by participants who are not allowed to deliberate at all. Moreover, social welfare also decreases as the size of the deliberative group increases to comprise more than four people. McCubbins and Rodriguez conclude on a theoretical note with the suggestion that it may be more appropriate and realistic for democratic theory to place its hopes in expertise-driven decisionmaking processes rather than in ordinary deliberation amongst undifferentiated equals.

David Law and Lawrence Solum contribute to this symposium a comprehensive and timely account of the process by which federal

judges are selected and, more importantly, the reasons for which this process so often becomes mired in intractable conflict. Their explanation of “appointments gridlock”⁶ seeks in particular to challenge the popular wisdom on the consequences of divided government, and to elaborate upon the likelihood and strategic implications of the so-called “nuclear option,” a procedural maneuver that would eliminate the use of filibusters against judicial nominees by a simple majority vote. At the core of their account is a simple formal model premised upon the insight that the judicial appointments process can be modeled as a game—one that bears fundamental similarities to the legislative game. Law and Solum observe that the judicial appointments process is, like the legislative process, highly prone to gridlock due to the number of political actors with the ability to block changes to the status quo. As a result, meaningful changes to the ideological balance of the federal bench are not necessarily possible even under conditions of unified government but instead require a more demanding ideological alignment of multiple actors against the status quo. The authors test their model against historical variations in the level of conflict over judicial nominations and find that it yields predictions that are consistent with actual patterns of appointments gridlock over the last three decades.

Law and Solum proceed to adapt their model to the threat of the nuclear option by introducing a new player, dubbed the “nuclear pivot,” who supplies the last vote needed to abolish the judicial filibuster, and whose identity is uncertain to all players. They identify a number of consequences that this innovation is likely to have for the outcome of the appointments process and the strategies of the relevant actors. First, the threat of the nuclear option curtails the extent of gridlock and makes possible a degree of change in the status quo, albeit less change than would be possible in the outright absence of the filibuster. Second, moderate members of the majority party have reason to compete for the influential role of nuclear pivot and may find it in their collective best interest to bargain as a group with the minority, lest they engage in the equivalent of competitive bidding against one another. Third, the uncertainty surrounding the location of the nuclear pivot, in combination with the diminishing longevity of the current administration, hinders the President from capitalizing fully upon the limited but real advantage conferred by the nuclear threat. The authors also consider the conditions under which the nuclear option is likely to be exercised and argue that

6. David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 52 (2006).

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there exists some optimal size of legislative majority—“neither excessively large nor excessively small”⁷—that maximizes this likelihood.

The subject of judicial selection is closely intertwined with the larger topic of judicial independence, which continues to attract well-deserved attention from PPTL scholars. The article on judicial independence by the ever-popular McNollgast collective expands upon their earlier groundbreaking work on the relationship between the content of legal doctrine, the compliance of lower courts with Supreme Court precedent, and the balance of power among the various branches of government. On this occasion, the authors extend their formal model to illustrate how judicial independence—defined as the capacity of the Supreme Court to “exercise meaningful independent discretion” over policy outcomes⁸—varies with the extent to which the elected branches are capable of aligning and coordinating with each other against the Court: divided government tends to bolster judicial independence, whereas unified government or an imbalance of power among the elected branches tends to undermine it. Their insights into the conditions for judicial independence are by no means specific to the United States but apply with equal force to other countries: the authors seek to explain why the relative subordination of the legislature to the presidency in a number of Latin American systems of government, for example, bodes poorly for the capacity of the courts in those countries to enjoy meaningful independence.

The contribution by Lydia Brashear Tiede explores, and attempts to resolve, the ambiguity surrounding the concept of judicial independence. Judicial independence cannot serve as a “useful” analytical or descriptive concept, she argues, unless it is first defined in such a way that the presence or absence of judicial independence can be measured in an objective and unambiguous way.⁹ To engage in empirical or comparative analysis of judicial independence requires a definition that is realistic, concrete, and capable of application across a range of countries. With these requirements in mind, she evaluates several competing definitional approaches and concludes that judicial independence can and should be defined as the ability of the judiciary to depart from the wishes

7. *Id.* at 100.

8. McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 107, 115 (2006).

9. Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 131, 135 (2006).

of the executive. Tiede also examines the relationship between judicial independence, on the one hand, and judicial accountability and the rule of law, on the other, and arrives at the striking conclusion that judicial independence and the rule of law are not always symbiotic but may in fact be mutually exclusive to some degree.

The remaining contributions to this symposium shift the intellectual emphasis from the question of judicial independence to that of judicial power. In a pair of companion articles,¹⁰ Jeffrey Lax and Mathew McCubbins tap the knowledge and sophistication of the financial markets to measure the power of the courts. Both articles employ an “event study” methodology that has long proven itself in the field of financial economics but has yet to receive much application in the political science or legal literature. At the core of this approach is the efficient markets hypothesis, which holds that the price of a company’s stock “reflects all relevant and available information as to future profits for that stock, given the decisions of well-informed and rational market traders” who have “very strong financial incentives” to avoid systematic error.¹¹ Assuming this hypothesis to be true, one can gauge the impact of particular events on the fortunes of a particular company or industry by referring to changes in the price of the corresponding stocks.

The first article by Lax and McCubbins tells the story of how, in the mid-1990s, the Food and Drug Administration adopted regulations that categorized nicotine as a drug and sought to impose various restrictions upon tobacco advertising and distribution. The FDA’s efforts to assert jurisdiction over the tobacco industry promptly became the subject of federal litigation that took a number of unforeseen turns before the Supreme Court’s final ruling against the FDA. Lax and McCubbins find that the financial markets responded significantly and in the expected direction to a number of judicial events, including an initial district court ruling in favor of the FDA,¹² the death of a member of the Fourth Circuit panel who was expected to vote in favor of the tobacco industry, the Fourth Circuit’s denial of rehearing en banc, and the Supreme Court’s grant of certiorari. The authors further observe that the price of tobacco stocks ought not to have changed materially if the market had been truly

10. Jeffrey R. Lax & Mathew D. McCubbins, *Courts, Congress, and Public Policy, Part I: The FDA, the Courts, and the Regulation of Tobacco*, 15 J. CONTEMP. LEGAL ISSUES 165 (2006) [hereinafter Lax & McCubbins, *Part I*]; Jeffrey R. Lax & Mathew D. McCubbins, *Courts, Congress, and Public Policy, Part II: The Impact of the Reapportionment Revolution on Congress and State Legislatures*, 15 J. CONTEMP. LEGAL ISSUES 203 (2006).

11. See Lax & McCubbins, *Part I*, *supra* note 10, at 176-77.

12. See *id.* at 172.

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confident that Congress could be relied upon to rescue the tobacco industry, no matter what the courts might do. Movement in the price of tobacco stocks thus reflected the aggregate judgment of sophisticated observers that judicial decisionmaking does, in fact, erect significant barriers to policymaking by other political actors.

In their second article, Lax and McCubbins examine the impact of a different set of judicial decisions—namely, the landmark legislative reapportionment decisions of the Warren Court that established the constitutional principle of “one person, one vote” and, in so doing, transformed the balance of political power between rural and urban interests. The authors find that these decisions had a significant impact on legislative politics in three ways. First, the amelioration of urban underrepresentation shifted government policy in favor of urban interests, to the detriment of rural interests. Once again employing the event study approach, they point to the movement of stock prices in urban and rural sectors of the economy as evidence of this shift in political fortunes. Second, Southern Democratic members of the House of Representatives were forced by redistricting to represent increasingly urban constituencies and, as a result, began to behave more like Northern Democrats, who were already reliant upon urban support. Third, redistricting contributed to the increasingly partisan character of political conflict in the California legislature. The authors observe that, prior to the Court’s reapportionment decisions, the primary dimension of political conflict within the legislature had been an urban-rural divide that cut across party lines. By tipping the balance of power decisively in favor of urban areas, however, reapportionment reduced the significance of urban-rural conflict in the legislature and substituted conflict along party lines.

Our symposium concludes with an article by Tonja Jacobi that offers a PPTL perspective on the interaction among competing actors that culminated in the adoption of same-sex marriage in Massachusetts. Jacobi argues that the manner in which the Massachusetts Supreme Judicial Court initially approached the issue was a strategic success, insofar as it triggered a moderating legislative reaction that minimized public backlash and ultimately helped the court to adopt an even stronger position in favor of same-sex marriage. The ambiguity surrounding the court’s initial decision in *Goodridge v. Department of Public Health*,¹³ and the six-month stay of execution that accompanied the judgment,

13. 798 N.E.2d 941 (Mass. 2003).

gave the state legislature an opportunity to propose an intermediate policy of same-sex civil unions. By proposing this policy, the legislature transformed the policy agenda from a stark choice between same-sex marriage and no legal recognition of same-sex relationships at all, to a less drastic choice between civil unions and same-sex marriage. This transformation of the policy agenda softened public opposition to same-sex marriage by making it appear less extreme; that softening, in turn, improved the court's ability to insist upon same-sex marriage in a subsequent ruling. In Jacobi's view, the deliberate use of "remedial delay"¹⁴ enabled the court to achieve its preferred outcome at reduced cost to itself by attenuating potential opposition from powerful competing actors—namely, the legislature and the public itself.

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14. Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 203, 228, 244 (2006).