STACKING IN CRIMINAL PROCEDURE ADJUDICATION

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I. INSTITUTIONALISM

The academic field of "Law and Courts" has its conventional narrative. In the beginning, the important questions—both in the law schools and the political science departments—were asked and answered within the four-corners of formalism.[1] Then a group of legal scholars known as the American Legal Realists demonstrated that law was indeterminate and that judges (robed though they may be) use their office to advance their individual policy preferences.[2] This sustained emphasis on judicial attitudes and ideology transformed the study of courts. The Realist critique was employed by political scientists to examine traditional descriptive questions (*i.e.*, how constitutional law was made, how Justices behave).[3] And it spurred many leading legal academics, concerned about the role of courts in liberal democracies, to turn toward normative questions regarding judicial legitimacy, integrity, and restraint.[4]

The "Law and Courts" narrative, in its more recent chapters, divides political scientists into competing factions of attitudinalists and institution-

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1. *See generally* WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW 16 (1972).

2. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935); Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 17 (1931); *see generally* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 2 (1995); Thomas Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 517 (1996). Walter Murphy later defined the "policy-oriented" judge as one "who is aware of the impact which judicial decisions can have on public policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims"). WALTER F. MURPHY, THE ELEMENTS OF JUDICIAL STRATEGY 4 (1964); *see also* LEE EPSTEIN & JACK KNIGHT, THE CHOICE JUSTICES MAKE 23 (1996) ("[M]ost justices, in most cases, pursue policy; this is, they want to move the substantive content of law as close as possible to their preferred positions.").

3. *See generally* MARTIN SHAPIRO, LAW AND THE POLITICS OF THE SUPREME COURT 15 (1964).

4. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 2-3 (1962); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 343 (William N. Eskridge, Jr. & Philip P. Frickey, eds., The Foundation Press 1994); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10 (1959).

alists.[5] Sharing the Realist premise that judges seek to advance their policy preferences through adjudication, these groups are defined by their respective views on judicial strategy.

The attitudinalists understand a judicial vote (at least that of a U.S. Supreme Court Justice) to be a direct reflection of the judge's policy preferences.[6] Justices vote "sincerely," the thinking goes, because their court is one of last resort, they hold life tenure, and their docket, by its very design, emphasizes ambiguous legal issues.[7]

Institutionalists, on the other hand, see Justices as constrained (by forces both internal and external to the Court).[8] And so a typical, though perhaps subconscious, element of institutional adjudication is the gauging of relevant constraints, and, if need be, the "gaming" of judicial votes.[9] It is said that, through the institutionalist's lens, Justices are "frequently willing to move from their ideal position based on the dynamics of the decisional setting in which they operate."[10]

Institutional constraints, as the narrative goes, manifest from a variety of sources. But a particular focus of the institutionalist literature (attributable in no small part to the legal academy's counter-majoritarian concerns) is how, if at all, Congress constrains Justices in their exercise of judicial review. Such constraints can come in one of two forms: "Court-curbing" or "decision-reversal."[11] Court-curbing measures limit the Court's

5. *See, e.g.*, LAWRENCE BAUM, THE PUZZLES OF JUDICIAL BEHAVIOR 74-75 (1997); EPSTEIN & KNIGHT, *supra* note 2, at 23; Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 240 (2000). *But see* Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR 5 (2003) (adding a third group: the "historical interpretivists").

6. *See, e.g.*, Segal, *supra* note 5, at 237, 240. This is alternatively referred to as the "behavioral" or "judicial process" school. *See* Maveety, *supra* note 5, at 9.

7. *See, e.g.*, Segal, *supra* note 5, at 238.

8. *See, e.g.*, BAUM, *supra* note 5, at 89; Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES, *supra* note 5, at 43, 46.

9. BAUM, *supra* note 5, at 89. Professors Epstein and Knight define the "strategic account" as follows: "(1) social actors make choices to achieve certain goals; (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made . . . ." Lee Epstein & Jack Knight, *Walter F. Murphy: The Interactive Nature of Judicial Decision Making*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 5, at 200.

10. EPSTEIN & KNIGHT, *supra* note 2, at 10.

11. *See, e.g.*, Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 378 (1992); Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 382 (1965); *see also* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. L. REV. 1437, 1460-71 (2001) (labeling these two constraints as the "institutional" and "implementation" effects).

formal power or independence.[12] Examples include impeachment, salary freezes, and jurisdiction limits. Decision-reversals, on the other hand, are more particularized. These measures (alternatively referred to as "overrides") occur where Congress, without the Court's acquiescence, operates on its own interpretation of the Constitution.[13]

It is at this point, however, that the conventional "Law and Courts" narrative seems to breaks down. Contrary to the current literature, there is a third, heretofore ignored, Congressional constraint on judicial review. Take the public-policy oriented Justice who holds a preference (X) regarding a legal issue before the Court. Even with no fear of curbing or decision-reversal measures, might not this Justice still be constrained by Congress from casting an X vote? I'm thinking of a situation where an X vote is perceived as likely to prompt Congress to alter an "insulated base rule" in a way that disrupts the Justice's larger policy agenda. An "insulated base rule" is a Congressional policy decision that cannot, as a legal or practical matter, be modified by the Court. Examples include decisions to appropriate funds, to enact certain types of mitigating laws, or to orient legislation in particular constitutional clauses.[14]

A Justice's consideration of this third constraint (*i.e.*, how a decision will affect the stability of a particular "insulated base rule") is a process I call "stacking." To illustrate adjudicative stacking, and help rehabilitate the conventional narrative of "Law and Courts," the following paragraphs analyze the Supreme Court's recent opinions in *Virginia v. Moore*.[15]

12. *See, e.g.*, Rosenberg, *supra* note 11, at 378 (stating that such measures "are intended to limit the independence of the Court and ensure that future decisions will be in accord with congressional preferences"); Stumpf, *supra* note 11, at 382 (defining Court-curbing as "any congressional bill having as its purpose or effect, either express or implied, an alteration in the structure or functioning of the Supreme Court as an institution within the context of legislative-judicial conflict").

13. *See, e.g.*, Stumpf, *supra* note 11, at 382 (defining a "decision reversal" measure as "proposed congressional legislation the intent or effect, or part of the intent or effect, of which is to modify the *legal* result or impact, or perceived *legal* result or impact of a specific Supreme Court decision" (emphases added)); *see also* J. MITCHELL PICKERELL, CONSTITUTIONAL DELIBERATION IN CONGRESS 153 (2004) (stating that Congressional reaction to *INS v. Chadha*, 464 U.S. 919 (1983), is an example of an "override" because "Congress substituted its own constitutional interpretation for that of the Court.").

14. This phenomenon has been touched upon, albeit not in the context of institutional constraints, by a few legal scholars over the past decade. *See* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 1 (1996) (discussing the ways in which Congress "signals" its preferences to the Court); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999) (explaining the ineffectual role of form in the context of campaign finance laws); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 62 (1997) (emphasizing a causal relationship between the Court's right to counsel cases and decreased funding for public defender units).

15. 170 L. Ed. 2d 559 (2008).

II. A CASE STUDY: *VIRGINIA V. MOORE*

Local police in Virginia had reasonable suspicion that David Lee Moore was operating an automobile without a license.[16] Moore was promptly pulled over and arrested for the offense of "driving with a suspended license," a misdemeanor under Virginia law.[17] Upon his arrest the officers searched Moore's person and found 16 grams of crack cocaine and a large amount of cash[18] The items were seized and Moore was later indicted for possession of cocaine with intent to distribute.[19]

Moore eventually moved to suppress the drugs and cash from his trial on the ground that the officers' search of his person was unreasonable pursuant to the Fourth Amendment.[20] The Commonwealth's position was that the search fell within the longstanding "search incident to lawful arrest" exception to the warrant requirement.[21] Moore countered that Virginia law prohibits arrests for the offense of "driving with a suspended license,"[22] that therefore his arrest had been illegal, and that therefore the "search incident to lawful arrest" exception was unavailable to the government.[23] On appeal the Virginia Supreme Court agreed with Moore.[24]

The U.S. Supreme Court granted certiorari on the following issue: Pursuant to the "search incident to lawful arrest" doctrine, is a "lawful" arrest one that is consistent with the federal constitution, or, on the other hand, one that is consistent with constitutional *and* positive law? It is not surprising that in our federalist system the two are not always one and the same. The Court, for example, has made clear that warrantless arrests are "reasonable" pursuant to the Fourth Amendment so long as the arresting officer has probable cause that the suspect committed a felony (or a non-felony violation in his presence).[25] Yet, with that said, governments are of

16. *Id.* at 564. The officers had heard over the police radio that Moore was driving with a suspended license. Moore was recognized by the officers when he drove past them. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 567.

20. *Id.*

21. The search-incident-to-arrest exception is the product of a relatively straightforward calculus. After a lawful arrest, the state's interests in officer safety and preventing the destruction of evidence outweigh the privacy interests of an arrestee. *See* Arizona v. Gant, No. 07-542, slip op. at 18 (U.S. Apr. 21, 2009); New York v. Belton, 452 U.S. 454, 464 (1981); Chimel v. California., 395 U.S. 752, 768 (1969).

22. VA. CODE ANN. § 19.2–74 (West 2007). There are exceptions to this general rule, but the government stipulated that the exceptions did not apply to Moore's case. *Moore*, 170 L. Ed. 2d at 571.

23. *Id.* at 571.

24. Moore v. Virginia, 636 S.E.2d 395, 400 (Va. 2006).

25. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); United States v. Watson, 423 U.S. 411, 418 (1976). Of course an arrest can also be "unreasonable" pursuant to the Fourth Amendment if

course free to enact laws to limit arrest powers beyond the Fourth Amendment. These sub-constitutional protections are commonplace. Examples include rules relating to jurisdiction, conduct, and subject-matter. It is not hard to understand how an arrest can fall within what I term a sub-constitutional interspace—constitutional yet contrary to positive law.[26]

A. Stacking in Moore

The Court issued its opinions in *Moore* two Terms ago. The Justices held unanimously that the Fourth Amendment is not violated by a search incident to an arrest that falls within sub-constitutional interspace.[27] To put it another way, a warrantless search is constitutional so long as it is incident to a *constitutional* arrest—even if the arrest is violative of positive law. Because the officers had probable cause that Moore had committed a crime, his arrest was constitutional, and thus the search incident to that arrest was "reasonable" under the Fourth Amendment.[28]

The reasoning of the Justices in *Moore* was multi-layered.[29] Yet a close reading of the opinions suggests that the Justices engaged in adjudicative stacking. The government, for one, pressed a stacking argument in explicit terms. It argued that pegging the exclusionary rule to sub-constitutional rules "would ultimately discourage state legislatures from enacting measures that benefit the public at large."[30] And, as it turned out, all nine Justices seemed to agree on this point. Justice Scalia, writing for an eight-Justice majority, explained:

> Moore would allow Virginia to accord enhanced protection against arrest only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which often include the exclusionary rule. *States unwilling to lose control over the remedy would have to abandon restrictions on arrest altogether.* This is an odd consequence of a provision designed to protect against searches and seizures.[31]

improperly *executed*. *See* Hudson v. Michigan, 547 U.S. 586, 591 (2007) (discussing the knock-and-announce requirement); Tennessee v. Garner, 471 U.S. 1, 10 (1985) (restricting the use of deadly force).

26. Probably the best example is *Whren v. United States*. 517 U.S. 806 (1996). There the Court upheld the constitutionality of an arrest, which was based on probable cause, even though the arrest violated municipal arrest restrictions. *Id*. at 815 (stating that the Fourth Amendment should not "be made to turn upon such trivialities").

27. *Moore*, 170 L. Ed. 2d at 569.

28. *Id.*

29. The majority opinion emphasized that its holding cohered with precedent. *Id.* at 567–69 (citing United States v. Di Re, 332 U.S. 581 (1948)).

30. Petition for Writ of Certiorari, *Moore*, 170 L. Ed. 2d 559 (No. 06-1082), at 19.

31. *Moore*, 170 L. Ed. 2d at 569 (emphasis added).

And Justice Ginsburg, writing alone in concurrence, observed that

> The Fourth Amendment, today's decision holds, *does not put States to an all-or-nothing choice* in this regard. A State may accord protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police deny to persons they apprehend the extra protection state law orders.[32]

The Justices in *Moore*, it seems clear, looked beyond the precedent, and beyond the risk of a Court-curbing or decision-reversal measure, to consider how legislatures might, in response to a given ruling, alter an "insulated base rule." In this case the relevant "insulated base rule" was the legislative restriction of arrest powers beyond that required by the Fourth Amendment.

B. Stacking and the Exclusionary Tax

To better demonstrate the stacking phenomenon in the *Moore* opinions, it is helpful to frame the relevant arrest restrictions within a "marketplace of legislation." The Fourth Amendment sets a floor on search and seizure rights. All commentators, no matter their judicial philosophy, envision that legislatures, which are well-positioned to gauge the particular privacy and security interests of their citizens, are free to enact sub-constitutional legislation to protect privacy rights beyond those guaranteed by the Fourth Amendment. Sub-constitutional legislation is more likely to be enacted, all things being equal, by legislatures with unfettered authority to select remedies (*e.g.*, exclusion of evidence, civil liability, administrative sanctions, or, for that matter, no remedy at all). If the Court had, as Moore argued, pegged the "search incident" doctrine to positive law rather than constitutional law, the Fourth Amendment (which is generally bound to the costly remedy of exclusion) would effectively impose an exclusionary tax on all search and seizure legislation. One might envision a bloc of legislators which (1) seeks to curtail arrest powers in a particular way, (2) is willing to create a remedy of administrative sanctions or civil liability, but (3) is unwilling to create a remedy of exclusion. Under such circumstances, the legislature would be willing to "produce" the sub-constitutional legislation at natural costs—but not when saddled with a constitutionally-imposed exclusion tax. The marketplace for search and seizure legislation, the *Moore* Court in effect held, should not be distorted

32. *Id.* at 573 (Ginsburg, J., dissenting) (emphasis added).

in this way.

The Justices' unanimous agreement on a seemingly neutral standard (*i.e.*, that the Fourth Amendment imposes no exclusionary tax on sub-constitutional search and seizure restrictions) might give one the impression of a Court aligned on the basic issues underlying *Moore*. Such an impression would be mistaken for two reasons. First, an exclusion tax does not offend any principle of constitutional law shared by all nine Justices. The Justices, after all, regularly join opinions that force other branches into similar all-or-nothing predicaments.[33] Second, the neutral standard, when understood as a product of adjudicative stacking, was likely perceived by both the liberal and conservative Justices as a common means to different policy ends. The following paragraphs illustrate this point.

A stacking Justice faced with the constitutional questions raised in *Moore* would likely reflect on the prevailing legislative preferences regarding three issues: (1) value of criminalization; (2) value of arrest restrictions; and (3) value of the exclusion remedy. And so, with these three issues in mind, the stacking Justice would view legislatures as being comprised of the following blocs:[34]

> *Bloc 1 ("Libertarians")*: Criminalization unnecessary, arrest restrictions necessary, exclusion remedy necessary.
>
> *Bloc 2 ("Liberals")*: Criminalization necessary, arrest restrictions necessary, exclusion remedy necessary.
>
> *Bloc 3 ("Moderates")*: Criminalization necessary, arrest restrictions necessary, exclusion remedy unnecessary.

33. *See, e.g.*, United Reporting Publ'g v. City of L.A. Police Dep't, 528 U.S. 32, 44 (1999) (Ginsburg, J., concurring) ("But it does suggest that society's interest in the free flow of information might argue for upholding laws like the one at issue in this case rather than imposing an all-or-nothing regime under which 'nothing' could be a State's easiest response."); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998) ("[W]e encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all."); Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Commc'n Comm'n, 518 U.S. 727, 769 (1996) (Stevens, J., concurring) ("At this early stage in the regulation of this developing industry, Congress should not be put to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas."); Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 349–50 (1992) (Rehnquist, J., dissenting) ("Nor do I see any significance in the fact that Alabama has chosen to adopt a differential tax rather than an outright ban. Nothing in the Commerce Clause requires Alabama to adopt an 'all or nothing' regulatory approach to noxious materials coming from without the State."); Bowen v. Owens, 476 U.S. 340, 347 (1986) ("When Congress decided to create some exceptions to the remarriage rule, it was not required to take an all-or-nothing approach."); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 783 (1982) ("[T]here is nothing 'cooperative' about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority.").

34. *See* Segal, *supra* note 5, at 247 (using similar classifications to analyze strategic adjudication).

Bloc 4 ("Conservatives"): Criminalization necessary, arrest restrictions unnecessary, exclusion remedy unnecessary.

Interestingly, a stacking Justice would presume that *any* decision in *Moore* would disrupt the legislative equilibrium.[35] If the Court sided with Moore, and commandeered exclusion for arrests that violate sub-constitutional law, the "moderate" legislative position would become untenable, and its members would be flushed into the "liberal" or "conservative" bloc. If, on the other hand, the Court sided with the Commonwealth, and effectively barred exclusion for sub-constitutional violations,[36] the members of the "liberal" bloc would be flushed into either the "libertarian" or "moderate" bloc.

Framing the legislative responses in this way allows us to see how both the liberal and conservative Justices could find value in the neutral standard of "no exclusion tax for sub-constitutional restrictions." The more conservative Justices might have speculated that, once the "liberal" bloc was eliminated (through a ruling for the Commonwealth), the majority of liberals would slide into the "moderate" bloc rather than the "libertarian." This shift would advance the judicial conservative's policy agenda as it would give them a clear legislative victory on the issue of the exclusion remedy. And even if in a worst-case scenario (from the judicial conservative's position) a majority of "liberals" became "libertarians" (to check police through decriminalization) it would remain doubtful that the "libertarians" could outvote the "moderates" (old and new) and the "conservatives" on the threshold issue of criminalization. This demonstrates how stacking offers a strategic explanation for what otherwise appears to be a conservative Justice's attitudinal vote.[37]

Perhaps even more interesting is the use of stacking by the more liberal Justices. In ruling to eliminate the "liberal" legislative bloc, the liberal Justices were not necessarily expressing anti-"liberal" sentiment. Rather, they likely concluded that saving the "liberal" bloc at the expense

35. Stacking Justices would likely understand that a certain degree of equilibrium exists amongst legislative blocs.

36. Although the state legislature could continue to legislatively mandate exclusion for arrest violations, this action would nonetheless leave large swaths of cases with no exclusion remedy. The state exclusionary rule would not apply to violations of sub-constitutional regulations by federal agents, *see, e.g.*, State v. Mollica, 554 A.2d 1315, 1325 (N.J. 1989), or if the evidence were sought in a federal prosecution. *See, e.g.*, United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987) (noting that seven circuits have held that federal, not state, law controls the admissibility of evidence in federal court).

37. Unlike the liberal Justices, the conservative Justices have the plausible claim that the reference to an "all-or-nothing" dilemma is not stacking. They can claim that such a predicament violates core federalism principles.

of the "moderate" bloc would pose greater risks to their overall policy agenda. The liberal Justices were probably not prepared to issue a ruling which would force the legislative "moderates" to choose between "liberals" and "conservatives." After all, a shift of a critical mass of "moderates" to the "conservative" bloc would jeopardize the future of the exclusionary rule *and* arrest restrictions. And so by eliminating the "liberal" bloc, the liberal Justices seem to have effectively sacrificed the exclusionary rule for the greater good of preserving the "insulated base rule" of sub-constitutional arrest restrictions.[38] Judicial preferences subordinated, not to the fear of a Court-curbing or decision-reversal measure, but rather to the likelihood of a legislative alteration of a valued "insulated base rule."

C. Final Thoughts on Moore

If a stacking liberal Justice speculated that eliminating the "moderate" bloc would impair a liberal policy agenda, then one might ask why a stacking conservative Justice did not vote to eliminate the "moderate" bloc.[39] Does this establish that the conservative Justices were not in fact stacking in *Moore*? Not necessarily.

One straightforward explanation for the stacking conservatives' vote is that the conservative and liberal Justices gauged the mood of the "moderate" bloc differently. Presume that the liberal Justices believed there was a 75% chance that "moderates," upon elimination of their position, would be captured by the "conservative" bloc, but that conservative Justices believed there was a 75% chance that "moderates" would be captured by the "liberal" bloc. Under such circumstances both stacking liberals and conservatives would vote with the Commonwealth in order to preserve the stability of the "moderate" bloc.

The stacking conservatives' vote can also be explained through risk-aversion.[40] Presume that all the stacking Justices believed there was a 75% chance that the "moderate" bloc would defect to the "conservative" bloc (leading to the elimination of arrest restrictions). But the stacking conservatives, if sufficiently risk-averse, would be unwilling to give up a

38. The "liberals," who value arrest restrictions, would not slide into the "conservative" bloc once the "liberal" bloc was eliminated by the Court. The "liberals" would instead be captured by either the bloc of "moderates" or "libertarians," both of which support arrest regulations.

39. The stacking conservative, if confident that the "moderate" bloc would slide into the "conservative" bloc, would rule for Moore and thereby eliminate the "moderate" bloc in the hopes that the new "conservative" bloc would eliminate the exclusionary rule and arrest regulations.

40. I do not mean to suggest that the Justices are "risk averse" due to the known perils of anticipating the product of public choices. Instead I mean "risk aversion" in a general sense that would apply even absent judicial awareness of public choice theory.

guaranteed policy win (*i.e.*, elimination of the exclusionary rule) for the chance of two policy wins (*i.e.*, elimination of the exclusionary rule and arrest restrictions).

The conservatives' vote in *Moore* can be further attributed to preference ordering. One can imagine a scenario where judicial liberals value the preservation of arrest restrictions more than the preservation of the exclusionary rule, and where judicial conservatives value the elimination of exclusionary rule more than the elimination of arrest restrictions. Under these circumstances (even if we presumed expectations parity and risk-neutrality), the stacking conservative would be unwilling to risk losing on the exclusionary rule issue (a high-value good) for the opportunity to eliminate arrest restrictions (a low-value good).

One last explanation for the stacking conservatives' vote is the expressive element inherent in decisions. The Justices are thought to be engaged in a colloquy with the other branches of government, the states, and the public at large.[41] As part of this dialogue conservative Justices criticize liberal polices in their opinions, books, and speeches. And so the stacking conservative would have to be attuned to what one might call a "feedback" dilemma. When a Justice doubles as a leader on a political issue (as many Justices no doubt do), it matters not only how she rules, but how she is *perceived* to rule. And so even if the stacking conservative recognized the high strategic value of siding with Moore and effectively eliminating the "moderate" legislative bloc, she must be careful to not project sympathy for the liberal policy (in this case the exclusionary rule). Any such projection could dampen anti-exclusion sentiment, embolden pro-exclusion blocs, and thus possibly undermine the Justice's very strategy of bolstering the conservative legislative bloc.

III. STACKING IN A FORMALIST PARADIGM

Moore offers a good illustration of how Justices can stack in order to preserve "insulated base rules." While I leave for another time questions regarding the legitimacy of stacking,[42] I want to just briefly highlight some of the more obvious concerns with stacking (or at least with stacking in a formalist judicial paradigm).

Judges have long been required to incorporate expectations about

41. *See* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 29 (2003); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 11 (1988).

42. At the very least stacking would be criticized by those, like Professor Segal, who believe that institutional constraints are insufficiently common or predictable to affect the behavior of the rational jurist. *See* Segal, *supra* note 5, at 237.

human behavior into their decisions. In the area of criminal procedure many examples come to mind. We demand our judges to speculate whether the application of the exclusionary rule in a given context will "deter future police misconduct?"[43] And, in the seizure context, they must consider whether "a reasonable person" would have "believed that he was not free to leave?"[44] Yet it is important to emphasize that these everyday doctrinal inquiries tend to focus on the behavior of only one (or occasionally two) persons. Stacking, however, is different in that it demands that Justices anticipate *group* choices. One of the main attributes of individual rationality—the assumption of transitive preference orderings—should not be assumed for groups of three or more persons.[45] And even if a Justice had perfect information regarding party-caucus preferences, he would still need to account for preference outliers, transaction costs, and opportunity costs.[46]

Herein lies the problem: the information deficit. Our Justices operate within a formalist adjudicative paradigm,[47] where they claim (and are expected to claim) to apply law rather than create it. As a result of this paradigm the Justices (I would bet) are left unaware of the special challenges that come with anticipating group choice.[48] Just who exactly is going to inform them (and, later, remind them) that their musings on the reasonable legislature are far less reliable than their musings on the reasonable man? It seems that neither the litigants nor *amici* are particularly well positioned to educate the Justices on the differences.[49] It would be like a teacher advising

43. *See, e.g.*, United States v. Leon, 468 U.S. 897, 901 (1984).

44. *See, e.g.*, Mendenhall v. United States, 446 U.S. 544, 554 (1980).

45. *See* Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219, 226-27 (1997).

46. Segal, *supra* note 5, at 246 ("[R]ecent models of congressional law-making provide theoretical and empirical evidence that policy-making typically represents neither independent leadership preferences nor independent leadership preferences, but the preferences of the majority party caucus.").

47. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 1, 1–2 (1997) (stating that judges "*always* aim to generate a particular rhetorical effect through this work: that of the legal necessity of their solutions without regard to ideology," and that "they seem often to engage in a form of denial of their own strategic behavior that puts them in bad faith").

48. *See generally* Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING, *supra* note 5, at 220 ("This is not to say that justices need know with certainty where other political actors stand on particular issues; it is just to say that they must be able to make some calculation about the nature of the political context in which they are operating."); Segal, *supra* note 5, at 242 (characterizing the literature on the separation of powers model as typically assuming that the Supreme Court has complete and perfect information over the preferences of Congress such that the Court knows whether Congress would vote to override any decision the Court made).

49. *See* EPSTEIN & KNIGHT, *supra* note 2, at 146 (1998) ("[T]he majority of briefs filed in constitutional and nonconstitutional cases attempt to define the preferences of other political actors."); Epstein & Knight, *supra* note 48, at 220 (arguing that *amicus* briefs and the media are the most reliable sources of information about legislative preferences); Gregory A. Caldeira & John R. Wright, *Organ-*

his students that they should never cheat on an exam because, heck, you never know who's got the right answers. From the speaker's perspective, any marginal gains from such "reminders" are likely to be outweighed by their marginal costs (which would include the animus directed at the speaker for his perceived cynicism).[50] And so judicial formalism reveals yet another flaw: it fails to prevent adjudicative stacking, and, yet, at the same time, it perpetuates judicial ignorance about its unreliability.[51]

CONCLUSION

Institutionalist scholars have traditionally emphasized two types of Congressional constraints on judicial review: court-curbing and decision-reversal measures. This essay suggests that legislatures also constrain the Court by altering (or, to be more exact, by being perceived as likely to alter) certain "insulated base rules."

Manifestations of this third constraint (once one starts to look) are not uncommon. Take, for instance, Justice Black's dissent in *Goldberg v. Kelly*: "While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls."[52] Or take Justice Powell's warning in *Argersinger v. Hamlin* that "if the question of assigned counsel in misdemeanor cases resolves itself into an 'all or nothing' proposition, then . . . limited funds and lawyer-manpower and the need for judicial economy [will] dictate that it be 'nothing.'"[53]

Leaving more sophisticated theoretical and large-scale data studies for another paper, this essay's objective is a modest one. Through close study of the *Virginia v. Moore* opinions, it seeks to illustrate how a Justice will peer beyond the two recognized legislative constraints—Court-curbing and decision-reversals—to reflect upon a different, perhaps more common, connection between his judicial vote, the legislative branch, and his larger policy agenda.

ized Interests and Agenda Setting in the U.S. Supreme Court, 82 AM. POL. SCI. REV. 1109 (1988) (concluding that *amicus* submissions provide information about the economic, political, and social significance of a case).

50. To the contrary, stacking is a widely recognized, even celebrated tactic in other contexts (say, in legislative and corporate decisonmaking.)

51. *See, e.g.*, Thomas Miles & Cass Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 850–51 (2008) (discussing ways to correct judges' reliance on bias).

52. 397 U.S. 254, 279 (1970) (Black, J., dissenting).

53. 407 U.S. 25, 60 n.27 (1972) (Powell, J., concurring) (quoting Yale Kamisar & Jesse H. Choper, The *Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 68 (1963)).