Constraint in Legal Decision Making

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Introduction

This essay is about constraint in legal decision making: how we should conceptualize it, how we should study it and why psychological theory and methods provide such a promising avenue for doing so. The arguments I make are both normative and empirically based. As a believer in interdisciplinary approaches, I think work on legal decision making should have something to contribute to multiple fields of inquiry. In this essay I draw from ideas and research at the intersection of law, political science and psychology. I treat constraint as a “democratic good,” necessary to justify the distributional decisions of unelected judges and as an empirical question: Does meaningful constraint exist? If so, where are we likely to find it? What are the potential sources of constraint in legal decision making? Asking these questions should lead to what I hope will be the next generation of empirical research on legal reasoning involving a wealth of theoretically based questions of interest to scholars in numerous disciplines.

Constraint itself is defined as “something that limits the freedom to act spontaneously; or some physical, moral or ‘other’ force that compels somebody to do something or limits their freedom of action.” When legal types talk about constraint they are usually referring to professional norms and/or obligations that require judicial actors to use legal presumptions, rules and authority in reaching decisions.¹ Traditional legal approaches hold that the reasoned use of these tools will often compel particular outcomes.²

¹ There are, of course, also contextual sources of constraint in our legal system including the group nature of appellate review and accountability mechanisms. I will deal with these more fully later in the essay.
² Gillman and others have referred to the idea that law imposes an external constraint on decision makers’ ability to reach particular outcomes as “legal positivism” (i.e. Gillman 2001).
The argument for requiring that decision makers use and cite accepted sources of authority is at least twofold. First, where judges use their training to apply the logic set forth in sources of legal reasoning, they are encouraged to think about specific disputes in light of generally applicable rules and larger societal values legislative actors and other judges have deemed applicable in similar circumstances. In this way referencing legal considerations helps imbue judicial decisions with continuity and predictability. Second, judges utilizing tools of legal reasoning are prevented from calling on their own values, beliefs and preferences in making decisions between adverse parties; the fact that judges are engaged in seemingly objective task of legal analysis helps legitimate the distributive choices they make in our constitutional system.

Perhaps the logical place to start in an essay on constraint is with what we are worried about -- what seems so improper about unconstrained exercise of discretion in legal decision making? The answer is, at once, surprisingly simple and complex. It is simple because it involves some of the most basic aspects of our legal system that we are all taught to be concerned about in high school civics – including fairness, equity and the exercise of unelected authority in our constitutional system. It is complex these days, because not everyone is equally concerned about the lack of constraint in judicial behavior.

Building off the tradition of legal realism, and fueled by empirical evidence of extralegal influences in decision making, there has developed what scholars have referred to as to as a “post-realist” or “post-positivist” (Gilman 2001) jurisprudence where legal academics acknowledge that meaningful constraint imposed by law may not exist in all cases. In the absence of external constraint, prominent post-positivists including Ronald
Dworkin (1993) and Bruce Ackerman (1991) argue for a jurisprudence based on “fundamental” or “judicial” values to legitimate judge made law in “hard” Supreme Court cases or those involving abstract constitutional issues.

In what is perhaps an unfair characterization of these theories, Segal suggests that proponents of such jurisprudential approaches essentially argue that as long as judges can reasonably justify their decisions by couching them in some appropriate authority, they are by definition, legally justified. The implication is that, according to this school of legal thought, it does not matter whether the law is, in fact, the primary determinant of judicial decisions or whether decision makers are compelled to reach particular outcomes.

If Segal is right in characterizing post-positivist thought in this manner, and I believe he is, the concept of external constraint imposed by law has lost its luster, not only for empirically minded social scientists, but also for legal academics seeking to legitimate judicial decision making by other means. Here I argue that attempts to justify legal authority without reference to meaningful external constraint are fundamentally flawed. In the first section of this essay I show why such arguments fail to address the range of concerns posed by unconstrained judges in our system. I characterize constraint as a “democratic good” particularly important for legitimizing the distributive choices of unelected judges. As such, scholars in all disciplines, but particularly political science, should be deeply concerned with finding constraint in legal decision making. If we come up empty in this search, or even empty in some types of cases, we, as a discipline, will

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3Segal has referred to this line of thought several times on the law and courts listserv in this manner on several occasions (ex. 8/15/05). Segal and Speath also make this point in revisiting their attitudinal model (2002, 432-3).
need to do some very serious re-thinking about why judges are among those political officials that get to say “who gets what, where and how.”

In the second part of the essay I acknowledge that constraint has been elusive in empirical studies thus far. I believe this is, in part, because scholars have inadequately conceptualized the concept in studies of judicial decision making. Empirical investigators commonly look for evidence of constraint in the wrong place [for instance, looking at aggregated case votes rather than discrete decisions made by judges or at the highest level of our judicial system where constraint concerns are least likely to operate (see for instance, Brenner and Speath 1995; Segal and Spaeth 1993; 2002)]. Moreover, researchers often use unrealistic or exceedingly hard tests of the concept. Spaeth and Segal (1996, 1999).

Meaningful legal constraint may or may not exist – this is an empirical question that has yet to be adequately tested. Here I argue that constraint is not undiscoverable – and legal models of decision making are not unfalsifiable (cf. Segal and Spaeth 1993, 33-34). What we need are fair, theoretically based, tests of constraint. Specifically, judicial

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5 See, Braman and Nelson (forthcoming) for a detailed critique of extant operationalizations of the constraining influence of precedent:

For a variety of reasons, the Supreme Court is perhaps the least likely place to detect the powerful gravitational pull of cited authority. Because the Supreme Court sits atop our judicial hierarchy, justices are not subject to the constant threat of review that may serve to heighten accuracy goals for lower court judges. Moreover, the Supreme Court has the ability to overrule itself. Lower court judges must follow binding authority without explicit license to change or ignore higher court rulings. Many of the justices on the Supreme Court see themselves as high-profile representatives of a specific jurisprudential approach (Baum 2006), and are thus unlikely to back away from public statements about how the law should be applied in prior dissenting or concurring opinions. Thus, tests of constraint that have been applied to the Supreme Court set an exceedingly high bar, and may not be appropriate to assess the influence of precedent more generally.

6 Gillman (2001) writes “[f] some contemporary positivists are wiling to make empirical claims about the determinate influence of rules, then it is not unreasonable for scholars such as Spaeth and Segal to ask them
scholars need to be more explicit about competing goals and influences that act on judges in the process of decision making. This is where findings and theory from cognitive and social psychology have such great potential to inform our research. Knowledge of research on topics like persuasion, group decision making, accountability, analogical reasoning, and the role of motives in the evaluation of evidence can significantly aid in our theorizing about where judges are relatively free to make decisions and where they are constrained by norms of legal reasoning and/or the institutional context in which they act. In the second part of the essay I discuss various normative and contextual sources of constraint in legal decision making and what psychological theory suggests about how we should approach studying these aspects of decision making.

In the final section of this essay I talk about the role of psychology in theorizing about constraint more generally. I discuss three areas of psychological research that have, thus far, had varied influence in thinking and research on legal decision making: prospect theory, motivated reasoning and value pluralism models. I believe each has great potential to broaden our understanding of the way legal decision makers think about authority and outcomes in the context of normative and institutional constraint.

Clearly prospect theory has already made a substantial splash in legal academia because of the implications for how arguments and outcomes are framed. Less familiar to legal academics, but extremely useful in thinking about the interplay of legal and attitudinal factors in decision making, are theories of motivated reasoning. Arguably, the theory has the potential to resolve the disconnect between empirical evidence of ideological influence in judges’ outcome choices and their own subjective accounts of

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to formulate those claims in ways that allow for hypothesis testing.” (Gillman 2001, 486). That is what I attempt to do here.
legal determinants of their own decisional behavior (Braman 2004, 2006).

Understanding the mix of conscious and unconscious goals in the minds of legal decision makers and how norms and context operate to facilitate and frustrate these goals is, I believe, the key to understanding how constraint operates in legal decision making.

Finally, value pluralism models, concerned with how individuals negotiate competing interests and identities, have great potential to inform our research as we move from unidimensional models of decision making to more realistic models where multiple issues are present in light of complex real-world fact patterns. Also, as we come to realize judicial actors are human and potentially concerned with issues like self presentation (Baum 2006), value pluralism models can help us understand when they are likely to “court” certain constituencies and when their desire to do so may be a real limit on their decisional behavior.

With these goals in mind, I proceed. The first section is mostly normative; in it I ask and try to answer a question that, ironically, seems to have gotten lost in the vast sea of research and thinking on judicial behavior: why should we care about constraint in legal decision making? The second and third parts of the essay are more proscriptive in terms of suggesting a research agenda with the search for constraint as its central unifying goal. In those parts of the essay I ask: where should we look for constraint? And how should we think about it more broadly? The latter sections of the essay draw heavily from research in cognitive and social psychology. It is my object not to “lose” anyone in the weeds – but keep the attention and interest of scholars from various backgrounds so we can understand what the endeavor has to add to our mutual understanding of law, authority and decision making behavior.
**Constraint I: Why Should We Care?**

The trajectory of thinking and empirical research on legal decision making in the past century has been shaped by more realistic understandings of the influences on judges’ decisional behavior. Current scholarship in political science and legal academia each challenge conceptions of “legal formalism” in its strictest sense. However, neither political scientists nor legal theorists have sufficiently rectified these more nuanced understandings of legal behavior with a democratic theory that requires constraint of judicial actors in terms of the most basic functions they perform in our government system. Although legal scholars have attempted to create a jurisprudence that speaks to such concerns, these approaches fail to address the range of what judges do in our constitutional democracy. Ironically, political scientists who are supposed to care deeply about authority and distributive outcomes have been largely content with demonstrating the influence of extralegal factors in decision making without dealing with larger theoretical implications of their findings.

In fleshing out this argument, I would like to make two things clear. First, as I see it, any debates between “attitudanlists” like Segal and Spaeth and “post-positivist” legal scholars like Dworkin and Ackerman are debates about the degree and mechanism of extralegal influence in judges’ decision making, not debates about ultimate fact of such influence. For the purposes of this essay their conclusions are the similar: the law does not (and perhaps cannot) constrain legal decision-makers in all cases.\(^7\) Thus, I see these

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\(^7\) Of course, Dworkin (1993) and Ackerman (1991) go on to argue for the legitimacy of judicial decision making in the absence of constraint as long as judges rely on “fundamental” or “judicial” values. Segal and Spaeth (1993, 2002) do not attempt to legitimize judicial decisions in the absence of constraint. Indeed part of the power of their empirical investigation is their implicit (and explicit) critique of traditional conceptions of judicial authority.

This is not to say that political scientists are not interested in such issues. Gillman (2001) argues for a conception of legitimacy that involves whether or not judges act “sincerely” in their attempt to apply
litertatures as largely consistent, in contrast to other scholars who have characterized arguments made by attitudinal and post-positivist scholars as oppositional in one or more respects (Smith 1993, Gillman 2001).

Second, I do not mean to challenge the ultimate conclusions of prominent attitudinalists or post-positivists in the context those scholars have identified them. Segal and Spaeth’s model specifically applies to Supreme Court decision making. Dworkin and Ackerman are mainly talking about cases involving rather heady, abstract, constitutional issues. My concern in this essay is with identifying constraint in legal decision making at a broader level than it has been conceptualized and studied by these particular scholars (i.e. at lower levels of the court system and in more “ordinary” types of litigation). I am also concerned with the theoretical implications an identified lack of constraint has for judicial decision making more generally because this is the answer to the “why should we care?” question.

It is entirely possible (and, I think, quite honestly inevitable) that we will discover meaningful constraint exists in some cases but not others or with regard to some, but not all, decision making practices designed to curb individual discretion. This does not make the search for constraint futile. Indeed for those of us interested in the process of decision making this is what makes the endeavor so worthwhile. Understanding how stylized norms of appropriate behavior succeed and fail to shape legal decision making

legal principles to particular cases. While I am sympathetic to Gillman’s argument that a lack of volition in the application of values and/or ideology takes some of the “blame” off judges engaged in the exercise of unconstrained decision making (see discussion of “bottom-up” vs. “top down” mechanisms of extralegal influence Braman 2004), the subjective state of mind of decision makers can not resolve the ultimate issue of democratic legitimacy.

8 It makes sense to think of constraint as a “case specific” rather than “court specific” variable. Although the Supreme Court is likely to have a much higher proportion of “hard” cases relative to its workload – those cases must start somewhere and so they are present in our judicial system at all levels, albeit in different concentrations.
will go a long way in advancing our understanding of cognitive processes more generally. Moreover, knowing how norms and context operate in the minds of decision makers will only improve our understanding of where the requirements of democratic theory tax the boundaries of human capacity (Frank 1931a, 1931b) and where traditional conceptions of legal expertise as a legitimizing factor may yet have force in justifying court outcomes.

In thinking about why constraint is so fundamental to conceptions of judicial authority, in the best tradition of political science, I ask that we consider what judges do in our constitutional system. Here I am not referring to case votes as opposed to doctrinal explanations judges give for their decision making, but the actual functions judges perform in our democracy. Specifically, I focus on two relatively non controversial tasks judges perform: first, they “interpret” the law and in doing so create legal doctrine that itself has authoritative force. Second they make decisions that are the basis for distributive allocations between adverse parties in litigation. Each of these functions involves somewhat different democratic concerns and thus requires different justification. I argue, while the concept of external constraint may be dispensable with regard to the former function, it is not with respect to the latter.

The classic problem with justifying judicial authority in our constitutional system has always been the “democratic deficit.” Federal judges, and many state judges, are not elected but appointed by other political actors. They do not have the same democratic authority to act in accordance with their policy preferences. This raises a critical dilemma because judges are unavoidably human. The government officials so necessary to resolve disputes between citizens and say what the law requires in particularized circumstances are bound to have personal preferences (shaped by their ideology, attitudes
and experience) with regard to the cases before them. The dilemma is solved with reference to the unique knowledge judges acquire through their specialized training. We abide their substantial influence in our democratic system because of the expertise they possess as “interpreters of law.” On this account, judges are not free to decide cases according to their personal views because they are constrained by appropriate sources of legal reasoning and cannons of interpretation. Technical training in the tools of legal analysis enable judges to separate reason from personal biases in their deliberations; and it is the predominance of reason that endows judge-made law with legitimacy in our constitutional democracy.¹

The Framers saw, and specifically portrayed, the creation of an independent judicial branch that allowed judges the freedom to make decisions consistent with their expertise, as a democratic good unique to the system of government they created (Hamilton, Federalist 78). Although this may seem like a naive justification for an independent judiciary, it is the one that was given at the time of the framing, further demonstrating the close connection between expertise and notions judicial authority inherent in the American political framework. If there were widespread acknowledgement that judges were not actually constrained in the application of their

¹This notion of expertise as a source of judicial authority is uniquely reflected in our constitutional structure. Federal judges are insulated from politics. They serve for life during “good behavior.” The democratic justification for this protection is not to allow judges to pursue their policy preferences unchecked -- although notable judicial scholars have argued such behavior is the result of this particular institution – but rather, to allow judges to apply their expertise without having to worry about pleasing particular constituencies or government officials. Such concerns, it is assumed, interfere with judges’ expert interpretation of what the law requires in particular cases. As Alexander Bickel put it "judges have or should have the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government" (1986, 25-6).
expert knowledge, we would have to reassess the assumptions underlying some of our most basic and necessary governmental forms.

So based on the influence of legal realism and evidence of extralegal influences from empirical research what happens if we relax the assumption of constraint imposed by law? If we admit there is subjectivity inherent in legal interpretation where there are equally compelling interests at stake on both sides and “the law” is not necessarily clear about what outcome should obtain? If we acknowledge the best judges can do in some cases is rely on “judicial values” or their view of what is “fundamental” in closely contested political environments where reasonable decision makers can (and do) come to different conclusions?

Quite simply, the answer is more problematic for some aspects of judicial authority than others. Considering judicial actors as functionaries in “interpreting law” and saying what is required in particularized circumstances – relying on judicial values judges acquire through expertise and professional experience – may be the best we can hope for (and indeed all we can ask) of any individual. It makes sense that those who are trained in the law should get to say what it means as long as they are engaged in the sincere and circumspect application of their legal knowledge.

A lack of constraint is more problematic if we consider the role judges play as third party arbiters that distribute rights and resources. This is especially true where there are closely contested views about how to do so and/or the role of the state in such environments. Citizens who come to the court to adjudicate disputes have a right to expect fairness, predictability and equality before the law. The introduction of subjectivity into legal interpretation fundamentally alters the state’s ability to deliver on
such promises where the outcome has more to do with the individualized values (judicial or otherwise) of *who is on the bench* than what the law dictates.

Judicial decisions based on anything but the law are not legitimate unless and until someone can come up with a colorable theory about why judges, who are among the most unrepresentative of all political actors, get to make these distributive choices based on their attitudes, beliefs and values other than the fact that they are judges. Post-positivist legal theorists spend a great deal of time in debates among legal academics trying to justify departures from doctrine in favor of “fundamental” or “judicial” values where there is a lack of meaningful constraint. They would have a far more difficult time explaining to loosing litigants why jurists rendering decisions in their particular “hard” cases can only rely on personal ideology or their own idiosyncratic conception of what is “fundamental” in a contested socio-political environment – *and why this is all O.K.* Because really, when you get right down to it, it’s not. It comes down to arguing that judicial decisions based on decision makers’ personal beliefs and/or values are legitimate because they are made by judges.

The absence of meaningful constraint or objective criteria by which judges can make distributive choices calls the legitimacy of such choices into question and enlists state authority in the enforcement of what are essentially personal preferences about litigants or competing legal (or policy) arguments. Any expectation of objectivity or equality before the law becomes illusory in the absence of external constraint. This becomes exceedingly clear when we consider that judges with vastly different attitudes or judicial philosophies can (and do) decide similar cases in opposite directions. Arguing that judges understand how to “interpret the law” is not enough to justify judicial
authority where decisions are not legally determined. At base, these are value judgments; and there is no reason why any individual citizen’s beliefs and values are “better suited” than any other’s for making such determinations, number of years in law school notwithstanding.

Political scientists understand this; it is our life’s blood. Indeed, many scholars in the discipline have carved impressive careers for themselves taking an intentionally critical stance showing that judges are not meaningfully constrained by legal considerations. As I argue in the following sections of this essay, I think this is still largely an open question. The larger point, for now, is that if constraint does not exist, or it exists in some cases but not others, political scientists cannot be complacent or satisfied with identifying this state of affairs. It is time to ask (and start answering) some larger democratic questions given the crisis a lack of constraint poses for judicial authority and the legitimacy of distributive court outputs in our constitutional system.11

10The fact that more citizens are not especially bothered by this “crisis” of legitimacy I am suggesting does not solve the larger democratic problem for two reasons. First, legal decision making is a highly esoteric endeavor; judges always couch their decisions in seemingly objective legal authority. Thus, citizens are not in the best position to detect a lack of meaningful constraint in legal decision making.

Second, and more importantly, legitimacy itself is a multifaceted concept. It certainly involves public acceptance of judicial authority and decisions, but there is also a normative aspect to the concept, involving why judges should exercise the authority they do in our constitutional system. There is a good deal of excellent research in political science as to the former aspect of legitimacy (Gibson and Calderia 1992; Gibson, Caldeira and Spence 2005), but a surprising lack of attention to the latter.

11For example, quite honestly I have never been a fan of electing judges. And there are certainly problems with the way judicial elections actually work in our system [ex. they tend to be low information and low turnout affairs; See, Geyh (2003) for and especially biting critique of judicial elections.] Given the point I raise here, however, I can certainly see where a tenable argument could be made that elected judges have more legitimacy to make ‘judgment calls’ in contested socio-political environments.

This hybrid conception of legitimacy has some attractive qualities, although I have not seen this argument raised in the context of legitimizing judicial behavior given our current knowledge of the way decision making works. In the subset of cases where there is meaningful constraint judges can rely on expertise – where there is not they at least have some direct democratic authority to rule as their ‘judicial values’ dictate. Moreover, this sort of thinking suggests that elected democratic authority may be most important at the highest level of our federal court system where the greatest proportion of “hard” cases exist, rather than at the level of state trial courts where most judicial elections actually occur.
Constraint II: Where Should We Look?

I turn now to the question of how to find constraint in legal decision making. As I mentioned in the introduction, I think the search for constraint has been somewhat wrong headed in empirical studies thus far. Large N studies that correlate case votes with broad indicia of judicial preferences (like ideology, political party, or the party of a judge’s appointing president) tend to treat law “in the abstract” as a constraining force. Critics of these studies argue they fail to take account of individual case facts and circumstances. Behavioral scholars counter that these differences “wash out” in the aggregate. Still, where results obtain tending to demonstrate the influence of attitudinal factors in legal decision making – especially at the highest level of our legal system – we are left with debates about whether findings reveal the influence of attitudes and/or ideology in the raw or “ideologically influenced legal considerations” (Gillman 2001). For all our efforts collecting data and running regression analyses we still know very little about how decisional norms and institutional context operate to constrain (or fail to constrain) judges that are the subject of our investigations.

I argue here for a more theoretically focused search for constraint in our empirical studies. Researchers should ask, what are the sources of constraint in legal decision making? How do those sources operate to influence the choices of decision makers? What would a constrained decision look like opposed to one where decision makers are acting in accordance with their personal preferences? What specific decision contexts allow us to observe behavior where the law and preferences are in conflict? Under what
conditions should we expect decision makers to make choices consistent with the law? Under what conditions might preferences play more of a role? 12

Rather than perpetuate the all or nothing debate between legal and non legal determinants of behavior, we need to not only consider, but allow for, the interaction of legal and non legal influences in our hypothesis testing. 13 Although I am confident creative minds can think of ways to do this with regression analyses that judicial scholars have grown so comfortable with over the years, we should not be afraid of embracing methods cognitive psychologists have used to understand decision making processes. Indeed there already are studies employing content analyses (Tetlock, Bernzweig and Gallant 1985; Gruenfeld 1995) and experiments (e.x. Guthrie, Rachilinski and Wishtrich 2001) to understand aspects of legal decision making behavior. Also, we may have to move away from analyzing final case votes toward discrete choices judges make in the process of legal reasoning in order to get a realistic idea of how and where constraint operates their decision making. 14 Finally, we would do well to start analyzing the types of decisions made by judges on lower courts if we are serious about discovering how legal constraint does or does not operate to influence the vast majority of judicial decision makers in our legal system.

In thinking about the sources of constraint in legal decision making, two broad categories come to mind: (1) constraint imposed by legal authority and/or application of

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12 The last two questions are especially important in thinking about potential interactions between legal authority, case characteristics and norms of decision making in constraining decisional behavior.
13 I do not mean to imply that empirical studies have been blind to the influence of legal factors in models of decision making [Segal 1984 (search and seizure) Songer and Haire 1992 (obscenity cases); Gryski, Main and Dixon 1986 (sex discrimination)] but where such factors are treated as control variables that improve our attitudinal predictions (i.e. Segal and Spaeth 1993) their influence tends to be obscured.
14 Judges make many micro-decisions in the context of deciding a case. For instance: what issue is determinative? Does a statute govern? Is a particular precedent applicable or can it be distinguished from the current case?
appropriate rules of decision making and (2) constraint that results from the institutional context in which judges make decisions. I will refer to the first type of constraint as “normative constraint” and the second type as “contextual constraint.” Within each of these broad categories are aspects of legal decision making where our theorizing and hypothesis testing can be greatly informed by knowledge and findings from psychology.

As Professor Schauer cautions in his essay, however, not all of what we know may be directly applicable to the domain of legal decision making. Researchers will need to be careful to accommodate findings from psychology to the complex decision domains in which judges actually operate. Still there is much to gain from the endeavor.

Here I propose some answers to the first question: What are the likely sources of constraint in legal decision making? In thinking about each potential source of normative and contextual constraint I point to literature in cognitive and/or social psychology that should help our theorizing about how these constraints work (or fail to work) to limit individual discretion. I believe thinking along these lines will aid in the development of testable hypotheses that will help us discover where meaningful constraint exists in legal decision making and where it does not. This will help us to move the ball forward -- beyond all or nothing explanations of legal behavior -- toward a more complex understanding of how legal and non legal factors interact in the minds of decision makers.

15 The list I propose here is not exhaustive. Moreover, not all the sources of constraint I mention have easily identifiable correspondents in the psychological literature (or more accurately correspondents that I have been able to identify based on my, admittedly limited, knowledge of the psychological universe). It is meant as a starting point to help us start thinking about where psychological theory can inform our research and where we will need to make the sort of accommodations suggested by Professor Schauer to create a psychology of legal decision making.
Normative Sources of Constraint

Issues related to Argumentation

In thinking about the normative sources of constraint we have to start with what stylized norms of decision making require of judicial actors choosing between litigants in an adversarial context. One of the most basic assumptions is that disputes actually meet specific criteria that make them appropriate for judicial resolution: there must be a “case or controversy” involving a plaintiff who has suffered an “injury in fact;” moreover the conflict must be current and redressible by means of a judicial pronouncement. Where cases meet these criteria judges are supposed to follow certain rules in the context of decision making.

We assume that as long as a dispute meets criteria demonstrating the necessary averseness, litigants will have the incentives to fight hard and bring the best legal arguments bearing on their position to the attention of the court. As such, there is a norm that limits judges to the issues and arguments raised by litigants. In legal jargon the rule is that judges are not supposed to raise issues or arguments *sua sponte*. The rule is also important to maintain fairness in decision making so litigants are not surprised by having cases decided on the basis of facts and/ or arguments they have not briefed or considered in the context of their dispute. In this respect judges are constrained by relevant case facts and arguments raised by the parties to a dispute.

There is actually quite a lively debate in political science about the extent to which judges at the highest level of our judicial system comply with this norm in a number of articles on the subject of “issue fluidity” (McGuire and Palmer 1995, 1996; Epstein, Segal and Johnson 1996). One of the reasons the debate is so lively is because
of differences of opinion about how to operationalize compliance and deviation from this norm in the context of Supreme Court decision making. Studies commonly engage in a comparative content analysis of case briefs and opinions – but there is some controversy about which case briefs should matter (for instance, where there are participating amici) and whether the parts of the briefs analyzed (commonly argument headings) give a comprehensive idea of what issues/arguments are raised. This is one area where research on normative constraint that has already caught the attention of empirically minded scholars may be aided by research methods and ideas from psychology.

For instance one question that has not been adequately addressed in this literature is what motive(s) might raising additional issues and/or arguments serve for judicial decision makers? One could imagine a range of potential motives ranging from the altruistic (i.e. to help litigants with inadequate representation) to the downright strategic (i.e. to aid a decision maker in reaching the ideological outcome he/she prefers).\textsuperscript{16} To get at this question, one might be able to create an experiment with different legal briefs related to an identical factual scenario that vary in terms of their comprehensiveness. If the norm is violated by decision makers there may be systematic differences in the pattern of results that help reveal their reasons for doing so. For instance, are new issues or arguments more likely to be raised in conditions where legal argument is sparse (suggesting altruistic motives) or are they more likely to be raised by decision makers with certain ideological views or by decision makers who decide the case in a particular direction (suggesting more strategic motives). Identifying why decision makers may

\textsuperscript{16} Significantly, altruism (as I have defined it) may be less of a motivating factor at the Supreme Court where researchers have actually looked at this question -- especially if one assumes that litigants who get to our highest court are likely to be relatively well represented.
violate this particular constraining norm may help us to sharpen out statistical analyses by identifying the class of cases where such behavior is most likely to occur.

Another issue related to argumentation has been raised by Stone-Sweet (2002) who argues that we should reconceptualize our thinking about constraint to encompass the range of plausible arguments adversaries could raise in litigation rather than the more narrow attention extant research has paid to relevant choice sets created by selected arguments. On this view, argumentative choices themselves represent an important part of the constraining influence of law. Although I have not thought a great deal about how it would apply to this conception of constraint, framing literature from psychology and political psychology (Nelson and Kinder 1996; Nelson, Clawson and Oxley 1997; Druckman 2001) seems particularly relevant here.¹⁷ (See also, Nelson, Maruska and Braman 2002 for an analysis of how alternative argument frames can influence lay perceptions of important issues in litigation).

A final aspect of argumentation where we could benefit from psychological approaches to decision making is, of course, related to the ultimate goal of legal argument: persuasion. As there is an entire essay by Professor Wrightsman on the topic, I will not spend much time with it here, except to mention two points that seem especially relevant to the subject of this essay. First among the accepted tools of decision making legal text, statutory (or constitutional) intent and precedent there is what some consider a hierarchy of authoritative force – text is generally considered the most definitive statement of what the law is, and arguably the source that is least vulnerable to subjective interpretation (although admittedly text can be wrought with ambiguity). The

¹⁷ Stone-Sweet (2002) himself talks about this sort of constraint in more formal/economic terms – but its hard to imaging the psychological literature could not significantly contribute to our understanding of constraint in this respect.
interpretation of precedent and intent are considered by some to be somewhat more “suspect” because there is more subjectivity inherent in the endeavor (Bork 1990). Yet each is an accepted source of legal analysis. It would be interesting to know if the constraining force of one type of authority is stronger than the others. For instance, is a U.S. statute that declares a contested rule to apply in a certain class of cases more likely to constrain decision makers who disagree with the stated rule, than a controlling Supreme Court precedent declaring the same rule? It wouldn’t be hard to create an experiment to test this. One might even find existing cases to analyze, for instance, you could measure compliance with a court decision in subsequent cases before and after it was codified by some legislative body. Related to this question is how decision makers act in the presence of competing types of authority. Does text trump conflicting precedent? Can overwhelming evidence of intent convince decision makers that a specific outcome should obtain notwithstanding contrary legal arguments?

A final point related to persuasion and legal decision making is that several studies have evidence suggesting individual differences in how decision makers respond to constraining authority related to attitudinal/ideological traits of the decision maker (Braman 2006 findings suggesting differences in responses to controlling precedent; Randazzo, Waterman and Fine 2006, finding differences in responses to legislative authority). Until now legal scholars and political scientists have all assumed law constrained or (failed to constrain) uniformly across different types of decision makers. If findings of individual differences persist we will need to take this into account in our theorizing. Work in psychology and political psychology on individual differences in motivated reasoning (Jost et al. 2003) and motivated skepticism (Taber and Lodge 2006)
in evaluation of political arguments and evidence might be particularly helpful in this regard.

*Issues Related to Decision Rules*

A second sort of normative constraint involves the specific application of stylized rules of decision making in legal reasoning. Are individuals able to comply with norms concerning *how they should think* in the context of adversarial disputes? This is an especially interesting area of research as judges and legal academics often suggest anecdotally that decision makers are violating norms to reach decisions consistent with ideologically preferred outcomes. We can now bring our empirical skills to bear on important questions about the process of legal reasoning. How prevalent are violations of decision norms? Under what conditions are they most likely to occur? Do decision makers who are violating decision norms do so with self awareness or are unconscious mechanisms of influence at play in the process of complex decision making?

One norm I have gotten some leverage on with the use of experimental methods involves the ability of legal decision makers to think independently about distinct issues in litigation where multiple issues are raised (Braman 2006) Specifically, I did this in the context of testing how decision makers decide a “threshold question” in light of their views on policy questions related to the merits of a politically charged case. But there are certainly other domains where the violation of this particular decision norm can have important implications. For instance, in bench (and jury) trials can decision makers separate their reasoning about liability (or guilt in criminal matters) from potential penalties defendants are facing? If this is a problem, does bifurcation help, or would be do better to have separate decision makers at each stage? I have used intuitions about
separable preferences to theorize about these concerns, but there might be other theories that are equally (or more) appropriate.

Another very interesting question having to do with legal decision rules involves the “order of operations” legal decision makers are supposed to follow when considering arguments and authority. Akin to mathematics, there is a logical sequence decision makers are supposed to follow when reasoning through cases where certain types of grounds are available for a decision. The logic behind these rules (which are sometimes referred to as the Ashwander rules for a supreme court decision in 1936 that summarized them) is so judges cause as little disruption to existing democratic forms possible in deciding specific disputes. The most familiar rule is that decision makers should not “reach” constitutional issues unless absolutely necessary. This means if a matter can be determined on statutory (or other grounds) judges are required to do so without considering the constitutional questions that are potentially raised by the fact pattern.

Have judges been able to follow this norm? Do attitudinal factors come into play where judges reach different conclusions about the necessity of addressing constitutional concerns? I think an analysis of cases specifically citing Ashwander (1936) may help us answer some of these questions. Is it cited more often where judges choose to avoid or reach the constitutional issue? Where judges do find it necessary to address constitutional matters are decisions systematically liberal or conservative? Does it depend on the ideology of the judge(s) deciding the case in some respect? I think a study much like Speath’s (1964) classic critiquing Justice Frankfurter looking at the actual grounds of decision in such cases would shed significant light on whether there are ideological factors at play in citing this seemingly neutral decision rule.
In terms of empirical investigations researchers have been almost obsessively focused on outcomes. This ignores another potentially important source of constraint involving the ability to decision makers to apply required presumptions in their legal analyses. The ability to comply with rules about where reasoning should “start from” has important consequences for the administration of justice in our judicial system. One of the most important rules is, of course, the presumption of innocence in criminal trials. It is this presumption that creates a heavy burden of proof necessary for the state to take the freedom or lives of its citizens. If decision makers come to the table with preconceptions about the guilt of defendants the standard of evidence necessary for conviction is reduced. One could imagine that decision makers are more able to comply with this presumption in some types of cases (i.e. white collar vs. violent crime) or more skeptically, with regard to some type of individuals (class or race based differences in ability to apply the presumption). Experimental techniques might help us understand if decision makers fall short of making required assumptions and where they are especially likely to do so.

Presumptions are not just important in criminal matters – they are also used in more mundane, but important of legal reasoning. For instance in deciding motions for summary judgment where parties argue there is “no question of material fact” judges are required to decide the case as a matter of law, assuming all factual representations in the plaintiff’s portrayal of the dispute are true. We do not have a good idea of whether judges are able to do this -- or what role attitudinal factors play in deciding whether or not issues of material fact actually exist. It would also be good to know the relationship between factual and legal arguments in this sort of decision making (ex. if the law favors
the person who files the motion, are decision makers hostile that party’s claim more likely to find some factual question precluding summary judgment than decision makers who are not hostile to the claim – or are all decision makers constrained by interpretation of objective facts in the same way?).

Another issue regarding decision rules regards not so much the ability of decision makers to comply with normative expectations, but the constraining force of those rules themselves. This is a bit different than the relative constraining force of different types of authority mentioned above; it has to do with the level of discretion makers have in the application of specific decision rules that are supposed to govern their analyses. Perhaps the most commonly discussed issue in this vein is whether and to what extent decision makers are constrained by the application of precedent (e.x. Sunstein 1993, 1996; Sherwin 1999; Simon 2004).

Lots of the legal work on analogical reasoning in legal discourse borrows from disciplines like philosophy or linguistics. Psychological findings and theories of analogical reasoning (ex. Holyoak and Thagard 1995; Gentner 1998) have been vastly under utilized in this discourse. The clear exception to this rule is work done by Simon (with Holyoak and on his own) on the importance of coherence in similarity judgments (Simon 2004, Holyoak and Simon 1999), although I know others are starting to think carefully about applications in legal research (Spellman 200*). Tom Nelson and I have a forthcoming article that should be of particular interest to political scientists interested in the role policy preferences play in similarity judgments borrowing heavily from cognitive theory (Braman and Nelson, forthcoming). Clearly there is much more to learn about how
and whether decision makers are meaningfully constrained by precedential authority. Psychological research can greatly inform this important inquiry.  

A final (and perhaps obvious) question having to do with the differential constraining authority of decision rules has to do with oft made distinction between “rules” and “standards” in legal discourse. Conventional wisdom holds that “black-letter rules” confine decision makers to a greater extent than more flexible “legal standards” (see for instance, Schauer 1991; Schlag 1985; Sullivan 1992). I have argued elsewhere that this is actually an empirical question that has yet to be tested (Braman 2006b). One could do this experimentally by giving decision makers an identical factual scenario and asking them to make the same decision with different decision criteria. One condition would involve a decision rule; the other a legal standard. Decisions across conditions could then be compared with respect to the degree of attitudinal influence and variance across decision makers. If conventional wisdom is right decision makers in the rule condition should be less influenced by their attitudes and there should be less variance across decision makers within that condition. Regardless of how the findings come out in such an experiment it would tell us something very interesting and important about the confining influence of these different decision criteria that have long been a subject of substantial interest in legal discourse.

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18 Also research on more general categorization processes may help us understand where statutes that apply to a certain classes or behavior or litigants can work to constrain legal decision makers.

19 I have been trying to operationalize this for some time and have yet to come up with a psychological theory to express this expectation that seems almost intuitive to legally trained individuals (it might be the kind of decision domain where there is no psychological theory that neatly corresponds with conventional legal wisdom – but I am open to suggestions which is why I specifically mention it here).
Contextual Sources of Constraint

An essay on constraint in legal decision making would be remiss if it failed to mention contextual or “institutional” constraint on the ability of judges to decide cases as their preferences dictate (Gibson 1980). Rather than go through an exhaustive list of contextual sources of constraint I will mention two where research from cognitive and social psychology seem particularly relevant: the group nature of appellate decision making and the requirement that judges justify and be held accountable for their decisions.

Issues related to Group Decision Making

One very interesting aspect about group decision making in our legal system is that whether you take a “strategic” or “sincere” psychological approach to judicial policy motivations – the presence of others in the decision process acts as a constraint on the ability of judges to reach outcomes they most prefer. Both conceptions portray judges as posturing in the group context to reach predetermined outcomes rather than individuals open to reasoned arguments about why the decision should be different than they believe at the outset of discussions. One could argue that this is at odds with how decision makers themselves actually conceive of the process of appellate decision making. The democratic justification for having judges decide cases in groups is not so one judge can convince the others of the correctness of her point of view, but to avoid error and reach the “best” resolution of legal questions by having several decision makers come to a compromised agreement about what the decision should be.

Here I’d like to suggest a third conception of group decision making that has been ignored by political scientists who assume directional policy motivations on behalf
of judges, by raising a possibility more in line with legalistic conceptions of appellate
decision making and, as I will argue, more consistent with psychological research on
group decision processes (see, Morehead 1998, for review of literature related to “small
groups decision processes; Gruenfeld and Hollingshead 1993, for findings re: group
cognition). This is the idea that group decision making is more appropriately
conceptualized as a collective cognition process with its own unique properties.20

Extant empirical research treats group processes as the sum of individual
preferences, measuring for instance, how much traditionally liberal judges move
“toward” conservative positions in the process of appellate decision making (e.x. Epstein
and Knight 1998; Collins and Martinek 2007). I think part of this emphasis on discrete
individuals in the group context is due to path dependence in the way political science
research and operationalizations have evolved. Ideology is an individual trait. Separate
case votes are easy to count and analyze.

What such conceptualizations fail to recognize is that group decision making can
also be conceived of as a “gestalt” process with properties all its own. Moreover, legal
decision makers are fighting about more than case votes; they are talking about doctrine
and what the appropriate grounds of decision should be. Perhaps where decision makers
write separate opinions traditional notions from political science may be appropriate,
there judges refuse to accommodate beliefs or opinions. But when judges are part of
majorities I think political scientists should at least allow for the possibility that decisions
result from gestalt processes more akin to sincere compromise and reasoned
accommodation than strategic interaction. Creative research minds might even be able to

20 Here I’d like to thank and acknowledge Wendy Martinek for informal conversations and a couple of
recent papers on group decision making (Martinek 2006; Collins and Martinek 2007) that have prompted
more serious thinking about these matters by myself and others in the discipline.
come up with a way to test these competing conceptions of appellate group dynamics. My main point is that if we start looking into the psychology of group decision making rather than drawing almost exclusively from economics to understand group interactions we could benefit by having a model of group interaction that is more correct and more consistent with the subjective experience of the judicial decision makers we are interested in understanding.21

Issues related to Accountability

There is some excellent work on the psychology of accountability as a result of a research agenda of Tetlock and colleagues that spans over a period of over 20 years (See, Lerner and Tetlock 1999 for a cogent review of findings). Rather than go through the entire range of findings I will mention a few that seem particularly relevant to the behavior of judicial decision makers required to account for decisions via written opinions that justify their choices in adversarial disputes.22

First, though a series of very clever pre vs. post judgment experimental manipulations Tetlock (1983, 1985) and Tetlock, Skitka and Boettger (1989) have shown that accountability concerns do not only influence how decision makers justify their choices, but how they think about the decisions for which they may be held accountable. This is important and perhaps under appreciated the judicial literature where researchers sometimes talk as if judges are only concerned with coming up with

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21 Obviously there are lots of relevant literatures related topics like social influence (Sherif 1936; Ashe 1955) majority and minority influence (Moscovici 1980), group polarization (Moscovici and Zavalloni 1969), groupthink (Janis 1982) that could be relevant to appellate decision processes. Gruenfeld has done some very interesting work looking at the integrative complexity of majority vs. separate opinions on the Supreme Court (ex. Gruenfeld 1995). I reference them here only to acknowledge that I have not dealt with the potential contribution of literature on group decision processes as adequately as I might have in the body of this essay.

22 Although I do not treat it separately here the threat of review would, of course, serve to heighten accountability concerns for judges on lower courts.
explanations to satisfy (or perhaps pacify) external observers of court outputs (Epstein and Knight 1998).

Not all the effects of accountability on thought processes are positive. For instance, decision makers tend to over emphasize the importance of irrelevant information (commonly referred to as the “dilution effect”) but generally decision makers who understand they will be accountable for their choices tend to engage in more in-depth processing than decision makers who do not expect to have to justify choices. Moreover accountability tends to stimulate open minded, self critical thinking and attenuate biases under specific conditions including those where an audience (1) is interested in accuracy (2) is reasonably well informed and (3) has a legitimate reason for inquiring into the reasons behind particular judgments (Lerner and Tetlock 1999, 259). One could argue judicial decision makers operate under these conditions and, as such, accountability concerns should heighten their motivation to comply with norms of appropriate decision making described herein.

A second, but equally important, point is that who decision makers are accounting to is important. Judges have multiple audiences including litigants, attorneys, legal academics, other judges, members of ideological groups (Baum 2006). A judge’s desire to “court,” appease, or satisfy any one of these audiences can act as a real constraint on their decisional behavior. Moreover, where judges have a prior record of deciding cases in a certain way, memorialized in written opinions accounting for prior decisions, consistency motives (Abelson et al 1968) are likely to kick in and act as a further constraint on decisional behavior.
Constraint III: How Should We Think?

In this final section of the essay I want to take a step back and consider how broader psychological theories might help us to think about constraint in the context of legal decision making. As I allude to in the introduction the three literatures I talk about here related to prospect theory, motivated reasoning and value pluralism have had varied influence in scholarship on legal decision making thus far. I do not mean to cover the scope of each of these broad theories here. I would just like to highlight a few ways each can help us think about the tasks and thought processes of legal decision makers.

Of the three literatures I talk about here prospect theory has clearly made the biggest “splash” in legal academia. The challenge Kahneman and Tversky’s (1979) theory of decision under risk poses to purely rational models of decision making has been realized and acknowledged across multiple disciplines. Legal scholars have shown through their own experimental techniques that magistrate judges, like ordinary people, can be subject to framing effects in choosing between settlement options (Guthrie, Rachilinski and Wishtrich 2001).

For the purposes of this discussion I’d like to focus on aspects of the theory related to “status quo bias” and the difference between asking and selling prices experimental subjects are willing to accept to sell and purchase identical items – the “endowment effect” as it has been referred to by some scholars (Knetch 2000). These parts of the theory seem especially important to the aspect of legal constraint requiring decision makers to apply presumptions in the context of thinking about disputes. One of the most famous axioms in legal academia is the Coase theorem – in the absence of transaction costs it does not matter who a right is initially assigned to because the parties
will be able to bargain efficiently and it will wind up in the hands of whoever values it most (and is therefore willing to pay to get it). Introducing endowment effects may complicate matters significantly. Moreover, and more to the point of this discussion, one thing that is unclear is whether or not there are third party or “observer” endowment effects that might be relevant to judges adjudicating disputes concerning the allocation of rights and resources. Are judges able to do the mental acrobatics required of them if presumptions call for them to consider counterfactuals that are at odds with the status quo? How, if at all, does who currently possesses a right or resource influence their seemingly objective decision processes?

A second strand of psychological theory that I am particularly fond of for thinking about the interaction between legal and non legal factors in decision making is motivated reasoning (Kunda 1990; MacCoun 1998). As Professor Baum is writing an entire essay on judicial motivations, and I have already expressed my thinking on this matter in several other contexts (see all self promotional cites to myself) I will not say much about it here except I think this line of literature will be particularly useful to empirical scholars in specifying our assumptions, operationalizations and hypotheses. We should be thinking more about what decision makers are trying to achieve (ie. directional policy vs. legal accuracy goals) and how particular decision rules and institutional constraints facilitate and frustrate these decisional aspirations. Using motivated reasoning as an empirical framework will help us to be more explicit about all of this in theory building and hypothesis testing. I think it is a direction the discipline should be headed in anyway; using psychological understandings of motivated decision processes would certainly be a push in the right direction.
Finally I’d like to make a plea for the more serious consideration of value pluralism models (Abelson 1968; Tetlock 1986, Tajfel and Turner 1985) in our thinking about legal decision making. After all, what is legal decision making but a competition between competing values and interests? This literature in psychology helps us understand how people negotiate value conflict and think about themselves in light of multiple possible identities (see also, Brewer 1991). It has important implications for how judges think about themselves and the various identities that constrain their decisions related to the accountability issues I raised previously. More importantly this literature can help us move beyond the world of unidimensional theorizing toward a more realistic understanding of how judges operate where more than one issue is raised in litigation and multiple interests, each involving their own legitimate value choice, compete for attention and recognition.

After finishing this essay, I am more convinced than ever that this is a very exciting time in the development of our knowledge of legal decision making and the constraints that act upon judges engaged in the task. Part of this excitement is because of the important implications findings have for democratic notions of expert legitimacy and how we must accommodate our theories to recognize what we know and have yet to learn about how judicial actors decide cases in our constitutional system. More of the enthusiasm I feel is based on what we all have to gain from the endeavor. I hope I have made a convincing argument that understanding constraint in decision making will greatly contribute to our mutual understandings of law, authority and decision making behavior.

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23 I see this as very closely connected to the framing literature I discussed in the context of argumentative constraint.
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