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## Active Virtues

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## ACTIVE VIRTUES

MICHAEL D. GILBERT\* & MAURICIO A. GUIM\*\*

### ABSTRACT

*Constitutional theory has long been influenced by the idea that the Supreme Court exercises “passive virtues,” avoiding politically divisive cases that threaten its legitimacy. The Article inverts the logic. Supreme Court Justices (and other judges too) do more than avoid divisive cases that could weaken the Court. They seek “unity” cases—meaning cases where law and politics align—that could strengthen the Court. When judges seek unity cases to enhance their legitimacy, they exercise active virtues.*

*We develop the theory of active virtues and demonstrate its use. Our case studies come from the U.S. Supreme Court and tribunals worldwide, and they involve issues like voting, piracy, and police. Following the case studies, we situate active virtues in a broader theory of judicial power. According to our theory, courts balance divisive and unity cases like investors balance stocks and bonds. This portfolio theory of judicial power illuminates a range of topics, including docket control, activism, the counter-majoritarian difficulty, and the rule of law. Recognizing active virtues may have implications for today’s Supreme Court, which faces a legitimacy crisis.*

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## INTRODUCTION

The Supreme Court is mired in controversy. According to critics, Justice Gorsuch occupies a “stolen” seat,<sup>1</sup> Justice Kavanaugh’s testimony was “nakedly partisan,”<sup>2</sup> and Justice Barrett was confirmed only eight days before a presidential election.<sup>3</sup> Commentators have advocated

1. See Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html> [https://perma.cc/HB7L-634D].

2. Matt Ford, *Brett Kavanaugh Is the Point of No Return*, NEW REPUBLIC (Oct. 6, 2018), <https://newrepublic.com/article/151597/brett-kavanaugh-confirmed-supreme-court-point-no-return> [https://perma.cc/XXG3-DWVK].

3. See Morgan Chalfant, *Barrett Sworn in as Supreme Court Justice by Thomas*, THE HILL (Oct. 26, 2020, 9:48 PM), <https://thehill.com/homenews/administration/522889-barrett-sworn-in-as-supreme-court-justice-by-thomas> [https://perma.cc/SYJ7-2TVH].

impeachment, court packing, term limits, and other reforms.<sup>4</sup> Chief Justice Roberts defended the judiciary, stating, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”<sup>5</sup> But that did not stop the bleeding. President Trump fired back: “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges[.]’”<sup>6</sup> The Court’s approval ratings have dropped,<sup>7</sup> Justices fret,<sup>8</sup> and the controversial cases keep coming.<sup>9</sup>

But not every case divides the Justices or inflames politics. Consider *Timbs v. Indiana*.<sup>10</sup> Decided in 2019, *Timbs* involved the constitutionality of some asset forfeitures. In brief, states had been seizing valuable, personal property that was connected, sometimes only tangentially, to relatively minor crimes.<sup>11</sup> In a unanimous decision, the Supreme Court invalidated this state practice and issued an opinion grounded in law and popular among politicians, interest groups, and the public.<sup>12</sup>

What explains the persistence of cases like *Timbs* on the Court’s small and often-acrimonious docket? One possibility is that these cases are leftovers. The Court practices “passive virtues,” avoiding cases (or at least *some* cases) that are especially politically fraught.<sup>13</sup> If the Justices screen out enough controversial cases, there are bound to be some uncontroversial ones left in the stack. But this may not be the whole story. We offer a

4. See Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240–41 (2019) (book review) (describing recent criticisms of the Court and proposals for reform).

5. Robert Barnes, *Rebuking Trump’s Criticism of ‘Obama Judge,’ Chief Justice Roberts Defends Judiciary as ‘Independent’*, WASH. POST (Nov. 21, 2018, 5:21 PM) [https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09\\_story.html](https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html) [<https://perma.cc/WV5J-D2NR>].

6. Matthew Choi, *Trump Hits Back at Chief Justice Roberts, Escalating an Extraordinary Exchange*, POLITICO (Nov. 21, 2018, 7:29 PM), <https://www.politico.com/story/2018/11/21/supreme-court-chief-justice-john-roberts-calls-out-trump-for-his-attack-on-a-judge-1011203> [<https://perma.cc/6XRV-EU7U>].

7. See Grove, *supra* note 4, at 2251 n.43 (reporting an 11-point drop in the Court’s approval since 2001).

8. At a public event, Justice Kagan wondered if people “realize how precious the [C]ourt’s legitimacy is” and worried that the Court fails to “look . . . impartial and neutral and fair.” Daniel Politi, *Justice Kagan Fears Supreme Court Could Lose Legitimacy Without a Swing Justice*, SLATE (Oct. 6, 2018, 11:08 AM), <https://slate.com/news-and-politics/2018/10/justice-elena-kagan-fears-supreme-court-could-lose-legitimacy-without-a-swing-justice.html> [<https://perma.cc/G5SV-X9Y5>].

9. See, e.g., *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018) (prohibiting by a 5–4 vote public sector unions from requiring non-union members to pay fees); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding by a 5–4 vote the travel ban); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding by a 5–4 vote that partisan gerrymandering claims are non-justiciable).

10. *Timbs v. Louisiana*, 139 S. Ct. 682 (2019).

11. See generally *id.*

12. See *infra* Section II.C.

13. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (developing the theory of passive virtues). For examples of the Court avoiding cases, see *infra* notes 80–94 and accompanying text.

different account of *Timbs*, one that transforms it and similar disputes from leftovers to crucial players in the judicial enterprise.

Legitimacy is central to courts' power. Judges rely on other actors to comply, often voluntarily, with their decisions. Nebulous though it may seem, legitimacy drives that compliance.<sup>14</sup> To build and sustain their legitimacy, courts exercise passive virtues, avoiding some "divisive" cases where law and politics collide.<sup>15</sup> But they do not stop there. Courts also attract "unity" cases, meaning cases where law and politics align. When courts seek unity cases to enhance judicial legitimacy, they exercise *active virtues*.<sup>16</sup>

*Timbs* is a recent example of a unity case. The Justices resolved a dispute about an unpopular state practice in a way that cast the Court in a positive light. Now consider a second unity case, *Harper v. Virginia Board of Elections*.<sup>17</sup> Decided in 1966, *Harper* involved the constitutionality of state poll taxes. By the time of the case, federal poll taxes had been banned, most state poll taxes had been eliminated, and Congress had indicated its opposition to those that remained.<sup>18</sup> Yet a few recalcitrant states refused to give. The Supreme Court invalidated all poll taxes, issuing (as in *Timbs*) an opinion grounded in law and popular among officials and voters.<sup>19</sup>

*Timbs* and *Harper* are unity cases, and we believe deciding them grew the Court's legitimacy. However, we are not certain the Court took them for that reason.<sup>20</sup> Recent controversies notwithstanding, the modern Supreme Court may have enough legitimacy that deliberately practicing active virtues is unnecessary. But things were different for the early Supreme Court. While riding circuit in the 1800s, Justice Story manufactured

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14. See *infra* Part I.

15. See generally BICKEL, *supra* note 13.

16. Other scholars have used this term, but not with this meaning. See, e.g., Richard A. Epstein, *The Active Virtues*, REGULATION (Jan. 1985) at 14, 18 (endorsing judicial activism to protect economic interests); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1043 (2008) (arguing that courts should exercise "active virtues" and engage in constitutional showdowns when the gains from clarifying law outweigh the losses from institutional conflict); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 890 (2004) (labeling efforts to address the merits of a case "active virtues"); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 358 (2011) (labeling as "active virtues" the "forthright confrontation of merits issues raised by common law litigation"); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 927-35 (2005) (labeling the unnecessary resolution of constitutional questions "active virtues"); Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 COLUM. HUM. RTS. L. REV. 167, 185 (1994) (describing as "active virtues" quick, pre-enactment judicial review in countries undergoing political transitions).

17. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

18. See *infra* Section II.C.

19. See *infra* Section II.C.

20. In fact, the Court had mandatory jurisdiction in *Harper*, so it had no choice in taking the case. For a discussion, see *infra* Section II.C.

disagreements in lower courts to push cases to the Supreme Court.<sup>21</sup> We will argue that some of these were unity cases and that Justice Story deliberately practiced active virtues.

Active virtues are not confined to the United States. This strategy of legitimation is a global phenomenon. The Supreme Court of India converted a newspaper article into a petition and a popular decision on bonded labor.<sup>22</sup> In Mexico, the Supreme Court bypassed an intermediate court and seized a high-profile case involving women mistreated by police.<sup>23</sup> We present these case studies and others, categorizing and uniting seemingly disparate court practices under the heading of active virtues.

In addition to describing active virtues, we situate their exercise in a theory of judicial power. Legitimacy depends on how courts decide cases.<sup>24</sup> Judges' decisions can be faithful or unfaithful to law, popular or unpopular with the public, acceptable or repugnant to state actors, and so on. Alexander Bickel argued that courts avoid cases that poison the mixture—cases like *Naim v. Naim*, which involved miscegenation in 1950s Virginia and pit law against politics.<sup>25</sup> We argue that courts attract cases that get the mixture right. Under our theory, judges balance divisive and unity cases like investors balance stocks and bonds. Thus, we call this the *portfolio theory* of judicial power. A good portfolio preserves the court's legitimacy by offsetting divisive cases with unity cases.

These ideas may have implications for today's Supreme Court. They point to a strategy that the Justices could follow (and, perhaps, that they are trying to follow already) to promote the institution's reputation. But the ideas have broader reach. The legitimacy problem is not limited to Roberts's Court—lower courts and state courts struggle with it too—and nor is it confined to the United States. Courts everywhere struggle to establish their legitimacy.<sup>26</sup> Scholars have shown that foreign courts practice the passive virtues.<sup>27</sup> Similarly, we show that foreign courts—in India, Mexico, and elsewhere—practice active virtues.<sup>28</sup> Thus, active virtues and the portfolio theory are not idiosyncratic features of the U.S. Supreme Court. They are general strategies of judicial power.

The idea of passive virtues is old and influential. Why did it take decades to develop its inverse and combine the two halves into a comprehensive

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21. See *infra* Section III.A.1.

22. See *infra* Section III.A.4.

23. See *infra* Section III.A.2.

24. For a discussion, see NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY 14–49 (2015) (arguing that compliance depends on judges' reputations, which depend in part on judicial decisions). Legitimacy depends on other factors too. See *infra* Part I.

25. See *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam). See generally BICKEL, *supra* note 13.

26. See *infra* Section I.D.

27. See *infra* Section I.D.

28. See *infra* Section III.A.

theory of judicial legitimation? We believe the explanation lies in rushed logic. Bickel concluded that passivity promotes legitimacy, so scholars have concluded that behaving actively must undermine legitimacy. But that is not necessarily true. Scholars have held the mirror to Bickel at the wrong angle. We changed the tilt to reflect Bickel's *premise*, not his conclusion. His premise was that cases in the stormy seas of law and politics weaken courts. The inverse is that cases in calm waters empower courts.

The Article proceeds as follows. Part I reviews literature on judicial legitimacy and connects it to avoidance. Part II presents the theory of active virtues. Part III develops a typology of case attraction strategies and provides examples from the United States, Mexico, and elsewhere. Part IV situates active virtues in a broader conceptual and normative theory of courts.

### I. LEGITIMACY AND AVOIDANCE

"The judiciary," Hamilton wrote, "has no influence over either the sword or the purse."<sup>29</sup> Thus, it "depend[s] upon the aid of the executive arm even for the efficacy of its judgments."<sup>30</sup> Hamilton's short phrase identifies a deep predicament. Courts act in the name of the law. They tell others, including powerful presidents and legislators, what they can and cannot do. Yet courts have no mechanism for actuating their decisions. They cannot arrest, imprison, or collect fines. President Jackson captured it with a famous quip about Chief Justice Marshall: "[he] has made his decision; now let him enforce it!"<sup>31</sup>

Notwithstanding President Jackson, many officials in many contexts comply with judges' orders. Why? Under what conditions will "people with money and guns ever submit to people armed only with gavels?"<sup>32</sup> Scholars have offered many answers.<sup>33</sup> We focus on one theme from this literature:

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29. THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

30. *Id.*

31. See, e.g., Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J.S. HIST. 519, 519 (1973) (emphasis omitted).

32. Matthew C. Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003).

33. See generally *id.*; ALEC STONE SWEET, GOVERNING WITH JUDGES 139–50 (2000); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 149–83 (2002); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC (Bruce Peabody ed., 2011); DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004); RAN HIRSCHL, TOWARDS JURISTOCRACY (2004); JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (2008); REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA

judicial legitimacy. This concept underpins our original claims, which we develop beginning in Part II.

### A. *The Meaning of Legitimacy*

What is legitimacy? The term is loaded, and scholars use it in different ways.<sup>34</sup> We focus on one particular form of legitimacy: sociological.<sup>35</sup> Institutions have sociological legitimacy when people accept them and obey their decisions.<sup>36</sup> Sociological legitimacy is closely tied to public support.<sup>37</sup>

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(2004); CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 207 (Tom Ginsburg & Tamir Moustafa eds., 2008); Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, in *RULE BY LAW*, *supra*, at 180; Silvia Inclán Oseguera, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?* 62 *POL. RSCH. Q.* 753 (2009); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Judicial Review?*, 30 *J.L. ECON. ORG.* 587 (2014); F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 *AM. ECON. REV.* 712 (2004); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *LAW & SOC. INQUIRY* 91 (2000); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875 (1975); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. LEGAL STUD.* 721 (1994); Keith E. Whittington, *“Interpose Your Friendly Hand”*: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 *AM. POL. SCI. REV.* 583 (2005); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 *AM. J. POL. SCI.* 84 (2001); Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 *KYKLOS* 289 (2002); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 *INT’L REV. L. & ECON.* 349 (1993); Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 *INT’L ORG.* 553 (2011); Juan F. González-Bertomeu, *Judicial Politics in Latin America*, in *ROUTLEDGE HANDBOOK OF LAW AND SOCIETY IN LATIN AMERICA* (Rachel Sieder, Karina Ansolabehere & Tatiana Alfonso eds., 2019); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 *AM. J. POL. SCI.* 346 (2001); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

34. In brief, “legal” legitimacy means an institution makes decisions grounded in law, while “moral” legitimacy means an institution makes morally correct decisions. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1794–1800 (2005) (contrasting legal and moral legitimacy). Fallon also distinguishes sociological legitimacy. See *id.* See generally RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018).

35. See Fallon, *supra* note 34, at 1794–1800 (distinguishing sociological legitimacy from other forms of legitimacy). Sociological legitimacy traces to Weber. See generally MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1964).

36. See Fallon, *supra* note 34, at 1795–96 (defining sociological legitimacy).

37. *Id.* at 1795 (“[Sociological] legitimacy signifies an active belief by citizens . . . that particular claims to authority deserve respect or obedience . . .”). Cf. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L.L. REV.* 373, 374 (2007) (warning against interpretations of the Constitution that diverge from convictions of the public).



Political scientists divide the sociological legitimacy of courts into two parts, “diffuse” and “specific.”<sup>38</sup> Courts enjoy diffuse legitimacy when citizens have a “reservoir of favorable attitudes or good will” towards them.<sup>39</sup> That reservoir is the product of fundamental values, like citizens’ commitments to democracy, judicial independence, and the separation of powers.<sup>40</sup> Courts also enjoy diffuse legitimacy when citizens perceive their judgments to be sincere and principled.<sup>41</sup> Courts enjoy specific legitimacy when citizens are satisfied with their performance.<sup>42</sup> Specific legitimacy depends on the fit between case outputs and public opinion.<sup>43</sup>

Some research suggests that diffuse and specific legitimacy are independent. If citizens value democracy, then courts enjoy diffuse legitimacy—even if they make unpopular decisions that undercut their specific legitimacy.<sup>44</sup> Other research finds connections between these forms of legitimacy. On one account, people keep a “running tally” of judicial decisions.<sup>45</sup> Popular decisions generate specific legitimacy that translates gradually into diffuse legitimacy.<sup>46</sup> On another account, the translation is immediate. Ideological disagreement with court decisions translates directly into lower diffuse legitimacy.<sup>47</sup> To illustrate, when the Supreme Court

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38. See, e.g., James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 204–05 (2014).

39. *Id.* at 204.

40. See *id.* at 206 (“[F]undamental political values—particularly support for democratic institutions and processes—serve as the most important predictors of diffuse support . . . .”); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992) (“[B]road political values—commitment to social order and support for democratic norms—do a good job of predicting attitudes toward the Supreme Court.”).

41. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court*, 45 LAW & SOC’Y REV. 195, 213 (2011) (arguing that a court’s legitimacy is not undermined if citizens believe that judges exercise their discretion in a principled manner).

42. See Gibson & Nelson, *supra* note 38, at 205 (defining specific legitimacy as “satisfaction with the performance of a political institution”).

43. See *id.*

44. See Caldeira & Gibson, *supra* note 40, at 636 (“[W]e find *no* connection between support for specific policies and diffuse support for the Supreme Court.”).

45. Gibson & Nelson, *supra* note 38, at 206.

46. For a summary, see *id.* at 206–07. See also Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RSCH. Q. 333 (2001) (developing this theory); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998) (studying judicial legitimacy worldwide and observing that “satisfaction [with individual decisions] slowly evolves into institutional legitimacy”); James W. Stoutenborough & Donald P. Haider-Markel, *Public Confidence in the U.S. Supreme Court: A New Look at the Impact of Court Decisions*, 45 SOC. SCI. J. 28, 29 (2008) (finding that individual decisions can impact confidence in the Supreme Court).

47. Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 197 (2013) (“[T]he Court’s legitimacy is significantly influenced by what the Court does in policymaking terms and whether individuals believe that what the Court is doing diverges from their own ideological preferences.”).

upheld the individual mandate in the Affordable Care Act, its diffuse legitimacy suffered among conservatives and grew among liberals.<sup>48</sup>

Judges sympathize with the latter view. They worry that individual decisions can affect their public standing. Consider *Bush v. Gore*.<sup>49</sup> Five conservative Justices—who tend to interpret the Fourteenth Amendment narrowly and defer to states—found an equal protection violation in Florida’s vote counting procedures.<sup>50</sup> They refused to give the state a chance to remedy the problem.<sup>51</sup> Their decision made Bush, a conservative, the next President.<sup>52</sup> In dissent, four liberal Justices waffled on the equal protection violation and would have given Florida flexibility—in other words, they would have given the liberal candidate Gore another chance.<sup>53</sup> Justice Stevens feared the decision would undercut “the Nation’s confidence in the judge as an impartial guardian of the rule of law.”<sup>54</sup> According to Justice Breyer, the decision “runs the risk of undermining the public’s confidence in the Court.”<sup>55</sup>

For a more recent example, consider again the Affordable Care Act. In *National Federation of Independent Business v. Sebelius*,<sup>56</sup> Chief Justice Roberts apparently switched his vote and upheld the individual mandate out of fear for the Court’s reputation.<sup>57</sup> In the Court’s most recent term, Roberts repeatedly forged bipartisan opinions on LGBTQ rights, DACA, abortion,

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48. See Dino P. Christenson & David M. Glick, *Chief Justice Roberts’s Health Care Decision Disrobed: The Microfoundations of the Supreme Court’s Legitimacy*, 59 AM. J. POL. SCI. 403, 415–16 (2015). For an opposing view, see James L. Gibson, Miguel M. Pereira & Jeffrey Ziegler, *Updating Supreme Court Legitimacy: Testing the “Rule, Learn, Update” Model of Political Communication*, 45 AM. POL. RSCH. 980 (2017).

49. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). For analysis of *Bush v. Gore* and judicial legitimacy, see Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE. L.J. 1407, 1450–58 (2001).

50. *Bush*, 531 U.S. at 100–11. The opinion is per curiam, but all four liberal Justices dissented. See *id.* at 123–58.

51. See *id.* at 110–11.

52. The Justices halted the recount while Bush was ahead. If they had permitted the recount, Bush likely would have won. See Wade Payson-Denney, *So, Who Really Won? What the Bush v. Gore Studies Showed*, CNN (Oct. 31, 2015, 10:06 AM), <https://www.cnn.com/2015/10/31/politics/bush-gore-2000-election-results-studies/index.html> [<https://perma.cc/G3DH-JB6V>].

53. See *Bush*, 531 U.S. at 123–58.

54. *Id.* at 129 (Stevens, J., dissenting).

55. *Id.* at 157 (Breyer, J., dissenting). Justice Breyer continued: “That confidence is a public treasure. It has been built slowly over many years . . . . It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.” *Id.* at 157–58. According to one study, *Bush v. Gore* did not affect the Court’s legitimacy. See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 535 (2003) (“Evidence from our survey, conducted in early 2001, suggests little if any diminution of the Court’s legitimacy in the aftermath of *Bush v. Gore* . . . .”).

56. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

57. See, e.g., Grove, *supra* note 4, at 2243 (describing a common view of Roberts’s vote).

and presidential subpoenas.<sup>58</sup> According to one observer, the Chief Justice “work[ed] with his colleagues to maintain the Court’s bipartisan legitimacy at a time when the other branches have lost their own.”<sup>59</sup>

We adopt the judges’ view. We assume that courts’ diffuse legitimacy depends in part on their individual decisions in individual cases.<sup>60</sup> To simplify language, we will henceforth use the term “legitimacy” to mean courts’ diffuse legitimacy.<sup>61</sup>

### B. *The Value of Legitimacy*

Justice O’Connor in *Planned Parenthood v. Casey* wrote that the “Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary.”<sup>62</sup> To translate, legitimacy breeds respect. People are more likely to comply with judicial decisions, including unpopular ones, when they consider the court legitimate.<sup>63</sup> Thus, legitimacy substitutes for the purse and the sword.<sup>64</sup>

The value of legitimacy is highest for courts that routinely hear cases against the most powerful authorities of a state. But legitimacy can also be an important asset for lower courts. Because supreme and constitutional courts hear a small fraction of filed petitions, most cases end in the lower courts. Operating as *de facto* courts of last resort, these courts face the same challenges that supreme and constitutional courts confront—including the challenge of securing compliance with their decisions. Thus, although most

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58. See Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, THE ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/> [<https://perma.cc/W4LF-SPJP>].

59. *Id.*

60. The language “in part” matters. We do not claim that judicial decisions explain diffuse legitimacy *in toto*. Factors like citizens’ commitment to democracy might matter, as might judicial elections. See, e.g., JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012) (connecting elections to legitimacy). Our claim is that judicial decisions matter *some* for legitimacy. The opposing view—judicial decisions, however bad, do not affect legitimacy—seems implausible.

61. Legitimacy in our sense relates to what others call reputation. See generally GAROUPA & GINSBURG, *supra* note 24.

62. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

63. See, e.g., Caldeira & Gibson, *supra* note 40, at 635 (“To persist and function effectively, political institutions must continuously try to amass and husband the goodwill of the public.”); Bartels & Johnston, *supra* note 47, at 184 (“For an institution like the Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy, or diffuse support, with the American public and the other branches of government.”). See generally WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 12 (1964).

64. We claim legitimacy *improves* compliance with some decisions, not that it *ensures* compliance with all decisions. Cf. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (describing impediments U.S. courts face in effectuating social change).

of the examples in this Article come from supreme and constitutional courts, legitimacy matters (and our claims about legitimacy hold) for many lower courts as well.

How exactly does legitimacy cause compliance? One mechanism is psychological. When people perceive an institution as legitimate, they feel obligated to comply with its decisions, even when they disagree.<sup>65</sup> Much research supports this claim.<sup>66</sup> A second, complementary mechanism is political. If the public perceives a court as legitimate, then defying it comes with a political price. When the Supreme Court ordered President Nixon to release his audiotapes,<sup>67</sup> Nixon could not refuse.<sup>68</sup> When the Court resolved the 2000 election in favor of Bush, Gore had to acquiesce.<sup>69</sup> In both cases the public pressure was too intense. Under this account “the public acts as an indirect enforcement mechanism.”<sup>70</sup>

### C. Legitimacy and the Passive Virtues

Legitimacy brings power: people comply with decisions from a legitimate court. Thus, judges have an incentive to maintain and grow their legitimacy.<sup>71</sup> Recall that legitimacy probably depends—and judges believe it depends—in part on individual decisions. This raises a question: how can judges resolve cases in legitimacy-enhancing ways?

Later we will address this question at length.<sup>72</sup> For now, consider just two broad and important factors: law and politics. When courts make

65. See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 377–78 (2006).

66. For a review, see *id.*

67. See *United States v. Nixon*, 418 U.S. 683 (1974).

68. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 64–65 (2006) (suggesting that the Court’s diffuse support discouraged Nixon from ignoring the Court’s decision); Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, *Conclusion* (same), in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 398, 402–03 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

69. See Kapiszewski et al., *supra* note 68, at 402 (discussing pressure on Gore).

70. Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. POL. 55, 56 (2009). For other work on the public as an enforcer, see JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 22–46 (2010); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 19–60 (2005); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379 (2004); and Vanberg, *supra* note 33.

71. We should be careful not to overstate the case. Collective action problems might discourage individual judges from working to enhance their court’s legitimacy. See BAUM, *supra* note 68, at 65 (observing that legitimacy is a collective benefit for a court, not an individual benefit that accrues to judges); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 964 (2005) (“Empire-building by judges is clearly far from a universal tendency.”). But see David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1 (2018) (arguing that institutional loyalty can be elicited through institutional design).

72. See *infra* Part II.

decisions grounded in law—legal sources and norms support their decisions, and lawyers and other observers know it—their legitimacy presumably grows. Likewise, when courts make decisions that enjoy political support their legitimacy again grows.

This gets us to Alexander Bickel. He lacked insights from contemporary social science, but he understood the importance of legitimacy.<sup>73</sup> In *The Least Dangerous Branch*, Bickel concentrated on cases that threatened the Supreme Court's legitimacy by making the Justices choose between law and politics. He used race discrimination to illustrate:

[Judicial review empowers the Supreme Court to] proclaim the absolute principle that race is not an allowable criterion for legislative classification. The principle as such permits no principled flexibility . . . . But at the same time, it cannot in our society constitute a hard and fast rule of action for universal immediate execution. This is nothing to be proud of. It is a disagreeable fact, and it cannot be wished away. . . . [H]ow does the Court, charged with enunciating principle, produce or permit the necessary compromises?<sup>74</sup>

We can restate Bickel's question in our language: how could the Supreme Court circa 1960 resolve a case on race discrimination without threatening its legitimacy? A legal decision would inflame politics. A political decision would undercut law.

The solution, Bickel argued, is to avoid the dispute.<sup>75</sup> Using standing, ripeness, mootness, and the political question doctrine, the Supreme Court can sidestep contentious cases.<sup>76</sup> This allows the Court to stand on principle—"we lack jurisdiction"—without taking a position on politically charged issues.<sup>77</sup> According to Bickel, avoidance is the "secret of [the

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73. BICKEL, *supra* note 13, at 30 ("Legitimacy, being the stability of a good government over time, is the fruit of consent to specific actions or to the authority to act . . . ."); *see also* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75, 77 (1961) (reflecting on the "inner vulnerability" of courts, which have "no earth to draw strength from" and suggesting that the court should use avoidance techniques to "guard its integrity"); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 90 (1978) ("The Supreme Court's judgments may be put forth as universally prescriptive; but they actually become so only when they gain widespread assent. They bind of their own force no one but the parties to a litigation. To realize the promise that all others similarly situated will be similarly bound, the Court's judgments need the assent and the cooperation first of the political institutions, and ultimately of the people.").

74. BICKEL, *supra* note 13, at 69.

75. Bickel, *supra* note 73, at 50 ("The Court exists in the Lincolnian tension between principle and expediency. . . . The Court is able to play its full role . . . because at least in modern time it nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither.").

76. *See generally* BICKEL, *supra* note 13 at 111–98.

77. We tie justiciability doctrines to jurisdiction. A recent paper argues that one of those doctrines does not limit jurisdiction. *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457

Court's] ability to maintain itself in the tension between principle and expediency."<sup>78</sup> He called avoidance techniques the "passive virtues."<sup>79</sup>

To demonstrate the passive virtues, consider *Naim*, which we mentioned above. The case involved Ruby Elaine, a white woman, and Han Say Naim, an Asian man.<sup>80</sup> They traveled from Virginia to North Carolina, got married, and then returned to Virginia.<sup>81</sup> When Ruby sought an annulment a year later, she had state law on her side. Virginia's code forbade interracial marriage.<sup>82</sup> Han Say opposed the annulment, and he had federal law on his side. The Supreme Court had just decided *Brown*, invalidating laws that segregated public schools by race.<sup>83</sup> If states could not separate races at school, presumably they could not separate them at the altar.<sup>84</sup> When *Naim* reached the Supreme Court, the Justices faced competing pressures.<sup>85</sup> Laws prohibiting interracial marriage were probably unconstitutional,<sup>86</sup> but they were widespread and popular.<sup>87</sup> Rather than inflame politics or undercut precedent, the Court simply avoided the case.<sup>88</sup>

Beyond segregation, the Supreme Court has avoided cases on many contentious issues, including the pledge of allegiance,<sup>89</sup> direct democracy,<sup>90</sup>

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(2017); see also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911, 1915–39 (2015) (explaining that historically the political question doctrine was factual, not jurisdictional).

78. BICKEL, *supra* note 13, at 69.

79. *Id.* at 111–98.

80. See *Naim v. Naim*, 87 S.E.2d 749, 750 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

81. See *id.*

82. See *id.* at 750–51.

83. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

84. See Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 525 (2012) (“[I]f school segregation is unconstitutional, separating the races on the marriage altar would appear to be so as well.”).

85. *Naim v. Naim*, 350 U.S. 891 (per curiam), *vacating* 87 S.E.2d 749 (Va. 1955).

86. Virginia's highest court upheld the law on grounds anathema to the principle, if not the precise holding, in *Brown*. Compare *Brown*, 347 U.S. at 483 (holding racial segregation in education to violate the Equal Protection Clause of the Fourteenth Amendment), with *Naim*, 87 S.E.2d at 756 (“We are unable to read in the Fourteenth Amendment to the Constitution . . . any words . . . which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.”).

87. See *Naim*, 87 S.E.2d at 755 (noting that over half the states had anti-miscegenation laws); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 321 (2004) (“[O]pinion polls in the 1950s revealed that over 90 percent of whites, even outside the South, opposed interracial marriage.”).

88. *Naim v. Naim*, 350 U.S. 891 (1956) (per curiam) (declining to decide the case on the merits and remanding to state court).

89. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (avoiding a decision on whether the expression “under God” in the Pledge of Allegiance endorses religion).

90. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (avoiding deciding whether Oregon's direct democracy violates the Guarantee Clause).

LGBTQ discrimination,<sup>91</sup> English-only laws,<sup>92</sup> abortion rights,<sup>93</sup> and the Vietnam War.<sup>94</sup> Sometimes the Court uses the avoidance techniques Bickel emphasized, like standing and ripeness, and other times it simply denies certiorari.<sup>95</sup>

Avoidance is not foolproof. Dodging a case, especially after years of litigation below, wastes resources and stunts the development of law.<sup>96</sup> It can undermine the Court's reputation for protecting constitutional rights and resolving salient problems.<sup>97</sup> Thus, avoidance might do more harm than good—it might shrink a court's legitimacy rather than grow it.<sup>98</sup> Furthermore, Bickel's theory is hard to prove. Courts might avoid cases for all kinds of reasons: to reduce their workload,<sup>99</sup> to concentrate on preferred issues,<sup>100</sup> to avoid setting a precedent in the absence of reliable

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91. *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing an appeal from a state court decision adverse to same-sex marriage “for want of a substantial federal question”).

92. See LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* 17–33 (2001) (describing the Court's refusal to hear a challenge to Arizona's English-only law).

93. *Stenehjem v. MKB Mgmt. Corp.*, 136 S. Ct. 981 (2016) (mem.) (denying certiorari).

94. See generally Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 *WASHBURN L.J.* 275, 278–303 (1994) (discussing passive virtues and the war).

95. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 *HARV. L. REV.* 4 (2006) (discussing how the Court sometimes denies certiorari in cases where officials and constituents have intense preferences).

96. See KLOPPENBERG, *supra* note 92, at 13–16 (summarizing arguments against avoidance).

97. See DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 56 (1980) (avoidance can “damage the Court's credibility because the Court is popularly perceived as a guardian of constitutional rights”); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 259–60 (1991) (describing a Justice's view that the Court must take certain cases because of the “public hue and cry” (internal quotation marks omitted)).

98. See Jan G. Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Interactions Between Law and Political Science*, 20 *STAN. L. REV.* 169, 217 (1968) (“[E]very decision not to decide, just like decisions on the constitutional merits, may result either in adding to the reservoir of public acceptance . . . or in depleting that accumulation.”); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1 (1964) (making the same point); Gretchen Helmke & Jeffrey K. Staton, *The Puzzling Judicial Politics of Latin America* (arguing that prudence may not be appropriate as it suggests “inaccurate beliefs about judicial preferences” and that the court is “unwilling to defend rights”), in *COURTS IN LATIN AMERICA* 306, 325 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

99. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *SUP. CT. ECON. REV.* 1, 20 (1993) (discussing “the influence of leisure-seeking on judicial behavior”).

100. See, e.g., RICHARD L. PACHELLE, JR., *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* 26 (1991) (“[T]he primary determinant for the selection of individual cases by individual justices is the values and attitudes of the members. Cases are normally accepted to pursue personal policy interests.”).

information,<sup>101</sup> and so on.<sup>102</sup> Bickel's theory holds when courts avoid cases for the specific purpose of preserving legitimacy.<sup>103</sup>

Despite these challenges, Bickel seems to have gotten it more-or-less right. At least some of the time, the Supreme Court avoids cases to protect its legitimacy.<sup>104</sup> Many observers favor this strategy.<sup>105</sup> As Justice Brandeis said, "The most important thing we do is not doing."<sup>106</sup>

#### *D. Passive Virtues Worldwide*

Bickel focused on the U.S. Supreme Court, but his argument applies elsewhere. Lower federal courts and state courts struggle to legitimize themselves.<sup>107</sup> In fact, Bickel's argument might have extra force in these settings and, especially, in foreign courts. In new and faltering democracies, where judicial independence and the rule of law are aspirational, judges walk a tightrope.<sup>108</sup> They could learn from Bickel.

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101. See generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (explaining that establishing precedents resembles drafting rules and that drafting rules is difficult when the future events those rules will govern are uncertain).

102. Courts might avoid cases to prevent adverse dispositions. See, e.g., PERRY, *supra* note 97, at 198–212 (describing "defensive denials" and "aggressive grants," where Justices deny/grant certiorari because they oppose/support the likely outcome); see also Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995) (finding evidence that the Supreme Court engages in "aggressive grants"). The Court might also avoid cases to discourage congressional action. See, e.g., Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574 (2009) (finding evidence that the Court is less likely to take a case when its preferred outcome deviates from Congress's).

103. That the Supreme Court avoids cases for many reasons may explain why its use of avoidance seems erratic. See KLOPPENBERG, *supra* note 92, at 272 (criticizing the Court's "inconsistent use of the malleable avoidance methods").

104. See Greg Goelzhauser, *Avoiding Constitutional Cases*, 39 AM. POL. RSCH. 483 (2011); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 82–85 (1998).

105. See generally BICKEL, *supra* note 13; CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

106. BICKEL, *supra* note 13, at 71.

107. Gibson & Nelson, *supra* note 39, at 202 n.3 ("[N]early every claim we make about the legitimacy of the Supreme Court applies with equal if not greater force to the lower federal courts. We note as well that concern for judicial legitimacy extends far beyond the US Supreme Court, with a great deal of contemporary interest in how state courts acquire and maintain legitimacy, for example.")

108. On the challenges foreign courts face in sustaining their independence, see generally NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* (1997); COURTS IN LATIN AMERICA, *supra* note 98; COURTS AND POWER IN LATIN AMERICA AND AFRICA (Siri Gloppen, Bruce M. Wilson, Roberto Gargarella, Elin Skaar & Morten Kinander eds., 2010); RULE BY LAW, *supra* at note 33; HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000); BEYOND HIGH COURTS: THE JUSTICE COMPLEX IN LATIN AMERICA (Matthew C. Ingram & Diana Kapiszewski eds., 2019).



Consider the First Russian Constitutional Court. Established in 1991, the court formally enjoyed independence and broad jurisdiction.<sup>109</sup> However, the court had no reservoir of goodwill.<sup>110</sup> Citizens and officials were unaccustomed to an independent, powerful judiciary.<sup>111</sup> The court immediately waded in to the political thicket, making controversial decisions on executive power and federalism.<sup>112</sup> Two years after the court's creation—and after some of its decisions were ignored—President Yeltsin suspended it.<sup>113</sup>

The Second Russian Constitutional Court fared better. Rather than “itching for a political fight,” the court in its early years avoided the contentious issue of executive power.<sup>114</sup> Instead, it focused on “safer” issues.<sup>115</sup> As one Justice put it, the court had to “find a stable niche in the state machinery” by developing its “prestige and status.”<sup>116</sup> The court has operated continuously since 1995.<sup>117</sup>

Scholars have generalized this idea.<sup>118</sup> Many courts around the world lack legitimacy.<sup>119</sup> To be effective they must change that, and passive virtues can help. David Fontana argues that docket control is “crucial”<sup>120</sup> for new courts and helps older courts endure.<sup>121</sup> Courts in countries like Brazil, Germany, Israel, Australia, Hungary, Poland, and Canada have used passive virtues to avoid “polarizing” cases that generate “political toxins.”<sup>122</sup> Under this account, avoidance techniques are not handy but idiosyncratic tools of

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109. See Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 135–36 (2001) (describing the court's features).

110. In a 1993 survey, only ten percent of Russians trusted the court. See *id.* at 144.

111. See *id.* at 135.

112. See *id.* at 135–52.

113. See *id.* at 136–37. Yeltsin said the court “has found itself in a deep state of crisis.” *Id.* at 137.

114. *Id.* at 153–54. The court avoided ruling on some issues of executive power, and on others it sided with the executive. See *id.* at 154 n.45.

115. See *id.* at 152–53.

116. *Id.* at 153.

117. See generally, *History of the Constitutional Court of the Russian Federation*, CONST. CT. RUSS. FED'N, <http://www.ksrf.ru/en/Info/History/Pages/default.aspx> [<https://perma.cc/8YN6-KHZ6>] (providing a history of the Constitutional Court of the Russian Federation from the Court's English version website). See also CARLA L. THORSON, POLITICS, JUDICIAL REVIEW AND THE RUSSIAN CONSTITUTIONAL COURT 156 (2012) (“This constitutional court has been continuously functioning since 1995 (at the time of writing, 16 years)[.]”).

118. See, e.g., Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016) (analyzing foreign courts' efforts to avoid some contentious cases); David Fontana, *Docket Control and the Success of Constitutional Courts*, in COMPARATIVE CONSTITUTIONAL LAW 624 (Tom Ginsburg & Rosalind Dixon eds., 2011) (same); Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT. J.L. CONTEXT 221 (2018) (same).

119. See Fontana, *supra* note 118, at 629–30.

120. *Id.* at 630.

121. *Id.* at 626–30.

122. *Id.* at 627–30, 632.

the U.S. Supreme Court. They are universal features of good judicial design.<sup>123</sup>

## II. LEGITIMACY AND ATTRACTION

The theory of passive virtues reduces to a sentence: courts can, do, and should avoid divisive cases to preserve their legitimacy. We accept that general argument, and our central claim grows from its inverse. If divisive cases, meaning cases where law and politics collide, tend to harm courts, then unity cases, meaning cases where law and politics align, should tend to help them. When courts draw in unity cases to burnish their legitimacy, they exercise active virtues. The following sections develop this argument.

### A. *Defining Active Virtues*

Avoidance occurs when a court evades a case, as the Supreme Court did in *Naim*. Case attraction is the opposite. It occurs when a court seeks a case. Simply “facing” cases, meaning resolving them as they come, does not constitute case attraction.

As discussed, courts avoid cases for different reasons: to reduce their workload, to concentrate on preferred issues, and so on. Likewise, judges might attract cases for different reasons. They might seek cases to clarify law, resolve important policy questions, and address matters that they find interesting. Promised anonymity, one U.S. Supreme Court Justice said the following:

I had spent several terms looking for a case that presented this issue pretty well. I think \_\_\_\_\_ was one of the most important cases we have done in the \_\_\_\_\_ years I’ve been on the Court. . . . I think that [doctrine as it developed] is extremely important. That’s the sort of thing I do sometimes. I look for cases.<sup>124</sup>

We do not focus on the kind of case attraction expressed by the Justice.<sup>125</sup> We do not focus on case attraction generally. Instead, we focus on active virtues, meaning case attraction with the goal of enhancing judicial legitimacy.

The word “goal” implies intent. Sometimes judges might choose cases with the specific intent to grow their legitimacy. To do so, judges might start by identifying relevant audiences, finding out their preferences, and making an informed prediction about whether a particular decision will satisfy

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123. *See id.* at 626.

124. PERRY, *supra* note 97, at 208 (alteration in original).

125. This is an aggressive grant. *See id.* at 207–12.

them.<sup>126</sup> When judges do this, of course they exercise active virtues. But the concept need not be so demanding. A judge need not formulate a plan. She might simply rely on intuitions, sensing that a case presents an opportunity for her court and so choosing to adjudicate it. This counts as an exercise in active virtues.

### *B. On Unity Cases*

For active virtues to work, judges must be able to identify unity cases. What makes a case unifying and therefore legitimacy-enhancing?<sup>127</sup> Earlier we gestured at two broad and important factors: law and politics. Here we put flesh on them.

For us, law and politics are scalar variables that characterize a judicial decision. “Scalar” means they have ranges, like weight and temperature. A decision ranks high on the law variable when grounded in legal sources, norms, and analysis that lawyers and other elites widely support. In other words, a decision ranks high when the legally informed audience concludes that it is legally correct. A decision ranks low when the legally informed audience concludes that it is legally incorrect. A decision takes an intermediate value when the audience splits, as when some lawyers support a decision as legally grounded and others reject it as an exercise in activism.<sup>128</sup>

What makes the legally informed audience conclude that a decision is correct? Substance matters, of course. The decision will seem correct if lawyers can follow and support the court’s legal reasoning. But form matters too. Judges can signal that they are applying law correctly. Judges can “display the trappings of judicial neutrality,” justifying their decisions in objective terms and “reinforcing the idea that they are merely mouthpieces

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126. See Terence C. Halliday, *Why the Legal Complex is Integral to Theories of Consequential Courts* (arguing that the power of courts relates to the legal complex), in *CONSEQUENTIAL COURTS*, *supra* note 68, at 337; EPP, *supra* note 33, at 2–3 (arguing that powerful courts are the fruit of advocacy, growth of financial and legal resources, and strategic planning).

127. On the general question of how courts can enhance their standing, see, for example, Patricia J. Woods & Lisa Hilbink, *Comparative Sources of Judicial Empowerment*, 62 *POL. RSCH. Q.* 745 (2009); Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 *THEORETICAL INQ. L.* 437 (2013); GAROUPA & GINSBURG, *supra* note 24, at 14–49.

128. Recall that legitimacy for our purposes is a subtype of sociological legitimacy. Support for the court is key. To see why this matters, suppose that all lawyers agree that A is the correct answer in a case, but they are wrong. Hercules, a judge of superhuman skill, realizes that B is correct. If Hercules decides B, his decision is legally correct, yet the decision ranks low on our law variable because lawyers conclude (erroneously) that Hercules made a mistake. Cases like this should be rare. The legal correctness of a decision should correlate highly with legally informed actors’ perceptions of legal correctness. Hercules is inspired by RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

of the law.”<sup>129</sup> As another signal, judges can issue unanimous opinions. Such opinions are often taken to evince a court’s commitment to legality.<sup>130</sup> Fractured opinions send the opposite signal. As Justice Story wrote in 1818, “the habit of delivering dissenting opinions . . . weakens the authority of the Court.”<sup>131</sup> Finally, judges can follow procedures perceived to be fair and principled.<sup>132</sup> The fairer and more principled the process, the more objective, legalistic, and support-worthy a court seems.

Now consider politics. A decision ranks high on this variable when it comports with the political or policy preferences in the relevant jurisdiction (state, nation, et cetera). When courts make decisions popular with different groups like ordinary citizens and elites, including academics and journalists, their legitimacy grows.<sup>133</sup> How high or low a decision ranks on this variable depends in part on how unified or fractured opinion within a given group is. For example, when ordinary citizens *unanimously* consider a decision correct, the politics variable ranks higher. On the other hand, if citizen opinion is fractured, the politics score ranks lower.

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129. Kapiszewski et al., *supra* note 68, at 403 (calling this the “classic technique” for building legitimacy); *see also* Gibson & Nelson, *supra* note 38, at 211 (“[L]egitimacy seems to flow from the view that [judicial] discretion is being exercised in a principled, rather than strategic, way.”); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RSCH. Q. 187, 197 (2005) (“[T]o the extent that the Supreme Court can present its decisions as grounded in legality, acquiescence is more likely.”); Lisa Hilbink, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007) (documenting the Chilean courts’ formalistic, legalistic and apolitical discourse during democracy and dictatorship).

130. *See, e.g.*, Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1359 (1998) (arguing that low dissent rates on D.C. panels provides “extremely strong *prima facie* evidence of consensus among judges about the correct judgment in a given case”).

131. G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 37–38 (1984).

132. On how procedural fairness increases the standing of courts, *see generally* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Baird, *supra* note 46. *See also* Fallon, *supra* note 34, at 1843 (proposing a theory of judicial legitimacy based in “good faith” in constitutional argumentation); Gibson & Caldeira, *supra* note 41, at 195 (arguing that a court’s legitimacy is not undermined by discretion as long as citizens believe that judges exercise discretion in a principled manner); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (arguing that legitimacy is a function of the fairness of judicial procedures); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621 (1991) (presenting evidence that perceptions of the fairness of Supreme Court procedures affect support for local and national institutions).

133. *See also* Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 768 (2000) (showing that the public’s appraisal of the Supreme Court depends on whether its decisions diverge from the “ideological preferences of the citizenry”); Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011 (2007) (arguing that the Supreme Court tries to present its decisions to satisfy its audience). *See generally* BAUM, *supra* note 68; BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Carrubba, *supra* note 70; Stephenson, *supra* note 70.

The government matters too. Courts tend to suffer when they enrage the state, as with Russia's First Constitutional Court. Thus, courts benefit when they make decisions favorable to the government, meaning popular with (or at least tolerable to) powerful actors like legislators and executives.<sup>134</sup> When the policy implications of a decision please everyone, the decision ranks high on the politics variable. The decision ranks even higher if the court can advertise, promoting its favorable work and making it salient.<sup>135</sup> When the policy implications of a decision, though favorable, are not salient, or when they are favorable to some but not others, the decision gets a lower politics score.

The passive virtues are about avoiding divisive cases, meaning cases where law and politics diverge. The court cannot make a decision that scores well on one dimension without scoring poorly on the other, as in *Naim*. We focus on unity cases, meaning cases where law and politics align.<sup>136</sup> The court can make a decision that scores well on both dimensions. Such a decision might have these features: unanimous, popular with the public, favorable to government actors, publicized effectively, and written and resolved legalistically.<sup>137</sup>

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134. See Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011) (finding that the U.S. Supreme Court, to protect its institutional authority, refrains from invalidating federal laws when it is ideologically distant from the House, Senate, and President); Matthew E.K. Hall & Joseph Daniel Ura, *Judicial Majoritarianism*, 77 J. POL. 818 (2015) (finding that the Supreme Court invalidates laws with little support from elected officials); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533 (2006) (finding that the Supreme Court is more likely to invalidate liberal laws when Congress is controlled by conservatives); see also Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002) (providing evidence that courts strategically defect against the government once it begins losing power); Kapiszewski et al., *supra* note 68, at 403 (arguing that judges can grow their “reservoir of goodwill” by “decid[ing] politically critical legal disputes in ways that favor new majorities rather than incumbents”).

135. See, e.g., JUSTICE AND JOURNALISTS: THE GLOBAL PERSPECTIVE (Richard Davis & David Taras eds., 2017) (compiling essays on the relationship between constitutional courts and the press); STATON, *supra* note 70; cf. Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986) (finding that increased public salience of the Supreme Court is associated with an increase in public support).

136. One can imagine a third type of decision that is unpopular *and* legally incorrect, or seemingly so. Presumably cases like this are rare.

137. These are ingredients, not recipes. We can identify the factors that make a case attractive to courts seeking legitimacy, but we cannot specify—in the abstract, and for all courts in all contexts—the mix of factors that works best. Cf. GAROUPA & GINSBURG, *supra* note 24, at 16 (“The reputation of the judiciary . . . determines its status in any given society . . . . We do not specify a universal reputation function for judges, and we recognize that judges in different systems will seek reputations for different qualities . . .”).

### C. *Examples: Timbs and Harper*

We have sketched the general features of a unity case. Now consider two examples mentioned above: *Timbs*<sup>138</sup> and *Harper*.<sup>139</sup>

Tyson Timbs, a recovering drug addict, sold about \$400 in heroin to undercover officers.<sup>140</sup> The police arrested him and seized his \$42,000 Land Rover, which Timbs had purchased with an inheritance following his father's death.<sup>141</sup> The case symbolized a growing and reviled practice: asset forfeiture, in which states seize property connected, sometimes only tangentially, to crimes.<sup>142</sup> As in Timbs's case, some forfeitures seem disproportionate to the offense. The question for the Supreme Court was whether the Eighth Amendment's prohibition on "excessive fines" applies to the states.<sup>143</sup> In a unanimous opinion, the Court said yes, protecting Timbs and limiting asset forfeiture.<sup>144</sup>

*Timbs* is a unity case. The Court reached what nearly everyone agrees is the right legal answer. Other provisions of the Eighth Amendment already apply to the states, so the language on "excessive fines" should too.<sup>145</sup> The correct legal answer was also the politically popular answer. Interest groups on the right and left aligned, submitting amicus briefs in support of Timbs's position.<sup>146</sup> For a court seeking legitimacy, *Timbs* is an appealing case.

Now consider *Harper*. Virginia required citizens to pay a poll tax before voting in state elections.<sup>147</sup> Appellants argued that the tax violated the

138. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

139. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966). *Harper* involved judicial review, but active virtues are not limited to such cases. *See id.* at 664.

140. *State v. Timbs*, 84 N.E.3d 1179, 1181 (Ind. 2017) (recounting the facts).

141. *Id.*

142. *See, e.g.*, Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/> [<https://perma.cc/B3S8-HWEP>] ("There have been 61,998 cash seizures . . . since 9/11 without search warrants or indictments . . . , totaling more than \$2.5 billion. State and local authorities kept more than \$1.7 billion of that while Justice, Homeland Security and other federal agencies received \$800 million. . . . Only a sixth of the seizures were legally challenged, in part because of the costs of legal action against the government.").

143. 139 S. Ct. at 686.

144. *See id.* at 687, 691.

145. *Cf.* Mark Joseph Stern, *Neil Gorsuch and Sonia Sotomayor Just Came Out Swinging Against Policing for Profit*, SLATE (Nov. 28, 2018, 5:09 PM), <https://slate.com/news-and-politics/2018/11/neil-gorsuch-sonia-sotomayor-tyson-timbs-civil-forfeiture.html> [<https://perma.cc/AC3M-HY9K>] ("And here we are in 2018, still litigating incorporation of the Bill of Rights," [Justice Gorsuch] said. "Really?").

146. Kimberly Strawbridge Robinson, *Business, Progressives Unite at Supreme Court Against Big Fines*, BLOOMBERG LAW (Nov. 21, 2018, 8:52 AM), <https://news.bloomberglaw.com/us-law-week/business-progressives-unite-at-supreme-court-against-big-fines> [<https://perma.cc/55YE-YSZK>] (reporting that liberal groups like the ACLU and conservative groups like the Chamber of Commerce supported Timbs).

147. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664 & n.1 (1966).

Constitution.<sup>148</sup> By the time the case reached the Supreme Court, the 24th Amendment banning federal poll taxes had passed,<sup>149</sup> and all but four states had eliminated their state poll taxes.<sup>150</sup> Enacted one year before, the federal Voting Rights Act declared that “the constitutional right of citizens to vote is denied . . . by the requirement of the payment of a poll tax.”<sup>151</sup> Congress specifically directed the Attorney General “to institute forthwith in the name of the United States such actions, including actions against States . . . , for declaratory judgment or injunctive relief against the enforcement of any . . . poll tax.”<sup>152</sup> Unlike *Naim*, which divided law and politics, *Harper* aligned them. The Justices could invalidate Virginia’s poll tax under *Reynolds v. Sims*<sup>153</sup> (in other words, they could write an opinion seemingly faithful to precedent) and be confident that their decision would bring applause from Congress and most of the country.<sup>154</sup> The Court did exactly that.<sup>155</sup>

In our view, *Harper* is a unity case. However, it is not a *perfect* unity case. Instead of issuing a unanimous opinion, the Justices fractured, with six voting to invalidate the poll tax and three voting to uphold it.<sup>156</sup> This leads to a clarification. The decision in a unity case need not have every feature mentioned above. It need not score maximally on both the law and politics dimensions. It need only score sufficiently high on both dimensions.

The Supreme Court had mandatory jurisdiction in *Harper*.<sup>157</sup> Thus, the Court did not and could not deliberately select the case to enhance its legitimacy. We do not claim that *Harper* represents active virtues at work. Instead, we claim that *Harper* provides a near-paragon example of a unity case. For a Court seeking legitimacy, a case like *Harper* is a welcome addition to the docket.

#### *D. Active Virtues and Information*

Unity cases are real. But are active virtues—the deliberate seeking out of unity cases—real? Practicing them seems difficult. Judges need good

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148. *See id.* at 664.

149. U.S. CONST. amend. XXIV.

150. *Taps for the Poll Tax*, N.Y. TIMES, Mar. 25, 1966, at 40 (explaining that four states had poll taxes at the time of *Harper*).

151. Voting Rights Act of 1965 § 10(a), 52 U.S.C. § 10306(a).

152. *Id.* § 10(b).

153. *Reynolds v. Sims*, 377 U.S. 533 (1964).

154. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (relying on *Reynolds* in refusing to sustain the poll tax).

155. The Court had mandatory jurisdiction in *Harper*. *See* 28 U.S.C. § 1253 (1964) (allowing an appeal from a district court of three judges, such as in *Harper*). Consequently, it could not intentionally select the case. Nevertheless, the case plausibly boosted its legitimacy.

156. *Compare Harper*, 383 U.S. at 664, *with id.* at 670 (Black, J., dissenting), *and id.* at 680 (Harlan, J., dissenting, joined by Stewart, J.).

157. § 1253.

information. They must know, or at least have a reasonable sense, that a dispute can be resolved in a way that will be sufficiently law-like and sufficiently popular. They must attend to questions like whether the panel of judges will unite behind one opinion or fracture, and whether the decision will please voters whom judges do not know.

The challenge runs deeper yet. The response to a case may vary over time. A decision considered lawful but unpopular today can become lawful and popular tomorrow. *Brown* might fit this category. That monumental decision might have diminished the Court at the time but greatly strengthened it later. Likewise, the response to a case may vary by context. Making popular decisions might benefit a court—unless members of the public believe the judges are pandering to them. Finally, active virtues might backfire. Judges are supposed to wait passively for disputes.<sup>158</sup> To exercise active virtues, they must seek disputes. The legitimacy loss from seeking a dispute could swamp the legitimacy gain from resolving it.

We appreciate these challenges, and later we will return to some of them. For now we make two points. First, we claim that active virtues *can* enhance judicial legitimacy, not that they always do. Judges trying to exercise active virtues might make mistakes. They might attract cases they should not, just like judges exercising passive virtues might avoid cases they need not. However, judges do not have to get every case right for active virtues to work overall. Second, while active virtues may seem daunting in the abstract, the practice may be simpler on the ground. Sensible judges who know the law and politics of their place may have a good sense of which cases unite law and politics, just as they might have a good sense of which cases are divisive. Part III provides evidence of this.

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To clarify and summarize our ideas, imagine a “legitimacy score” floating above every court. The score is an aggregate, an all-things-considered measure of the institution’s standing. Courts want the score to grow, or at least stay fixed. Deciding divisive cases can cause the score to shrink. Courts exercise passive virtues when they avoid divisive cases.

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158. Scholars have challenged this passive role. See, e.g., Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (presenting managerial aspects of judging and why they challenge traditional understandings); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that courts need to abandon traditional principles of adjudication to do justice); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (arguing that most state courts do not follow the passive model of judging); cf. David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501 (2014) (discussing democracy-improving theories of the judicial role); Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 218 (1999) (suggesting that in “rifted democracies” courts should implement the “shared commitments of society”).



Deciding unity cases can cause the score to grow. Courts employ active virtues when they seek unity cases.

### III. EXERCISING ACTIVE VIRTUES

This Part moves from theory to evidence. We show that judges in many settings use active virtues, or at least engage in behavior consistent with them. After presenting the examples we make some general observations, including about active virtues in the U.S. Supreme Court. Before presenting the examples, we categorize them into a typology of case attraction mechanisms. The typology enriches the theory by drawing out distinct techniques that courts employ.

#### *A. Typology and Examples*

Judges can exercise active virtues in different ways. Consider first the distinction between filtration and elevation. Filtration involves sorting. Judges pick and choose among cases presented to them. The U.S. Supreme Court can practice active virtues through filtration by granting certiorari in unity cases. Filtration requires some docket control.

Elevation is different. When elevating a case, judges do more than filter filings in their stack. They seize cases that otherwise might not reach their stack. To clarify, envision the Great Pyramid of Legal Order by Hart and Sacks.<sup>159</sup> The base of the pyramid represents all interactions in society. A higher layer reflects the fraction of interactions that become cases. Another layer up represents cases that get appealed, and the apex represents cases that reach the court of last resort. Focus on that court of last resort, and assume it controls its docket. As disputes percolate to the top, the court accepts unity cases and rejects others. This is active virtues by filtration.<sup>160</sup> Now consider a complementary option. Instead of waiting for cases to climb upward, the court can reach down, elevating cases from lower layers that otherwise might not ascend. This is active virtues by elevation.

To illustrate elevation, consider Colombia. A recent case involved an employee suing over a workplace injury.<sup>161</sup> The trial court awarded the employee medical costs but not disability benefits.<sup>162</sup> Neither the employee

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159. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 286 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing the pyramid).

160. Likewise, the court can exercise passive virtues by rejecting divisive cases.

161. Corte Constitucional [C.C.] [Constitutional Court], junio 12, 2017, M.P: Carlos Bernal Pulido, Sentencia T-380/17, Gaceta de la Corte Constitucional (G.C.C.) T-6.033.140 (Colom.), available at <http://www.corteconstitucional.gov.co/RELATORIA/2017/T-380-17.htm> [<https://perma.cc/77LN-JEC5>].

162. *Id.* at ¶ 13.

nor the employer appealed the trial court's decision.<sup>163</sup> Thus, no one asked the appellate court, let alone the Constitutional Court, to intervene. Nevertheless, the Constitutional Court seized the case and issued a landmark decision on the right to health.<sup>164</sup> The case gave the Court an opportunity to rule for a sympathetic plaintiff and defend the rights of vulnerable citizens. Elevation means attracting cases from elsewhere in the legal system.

Next we describe initiation. Initiation involves disputes *outside* of the legal system. It happens when courts reach to the base of the pyramid—when they take disputes from outside of the law and draw them in. When a court in Pakistan converted a social problem involving oil stoves into a legal dispute, it initiated a case.<sup>165</sup>

Figure 1 combines these distinctions into a typology of case attraction mechanisms:

Method	Examples
Filtration	United States, Mexico
Elevation	United States, Mexico
Initiation	Pakistan, India

Figure 1: Typology of Case Attraction

In the following pages we consider each box in the typology. We give examples consistent with active virtues from the listed countries. Two caveats are in order. First, our examples are not intended to be complete or representative. The list of countries where courts have attraction powers is long.<sup>166</sup> One could conduct a global survey, studying active virtues worldwide, but that is not our enterprise. We simply aim to show that active virtues are real and that courts practice them in innovative and surprising ways. Second, judges do not usually state that they have taken a case to

163. *Id.* at ¶ 17.

164. *Id.* at ¶¶ 37–50. To elaborate, Colombia has a procedure called *tutela*. See ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA 147 (2009). Any person can use *tutela* to request protection of her rights. See *id.*; MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 12 (2017) (explaining the *tutelas* can, among other things, be used to challenge judicial decisions). *Tutelas* begin in trial courts, and parties can appeal decisions to appellate courts. See BREWER-CARÍAS, *supra*, at 149 (providing more details); NELCY LÓPEZ CUÉLLAR, ESTUDIO DE LA SELECCIÓN Y REVISIÓN DE TUTELAS EN LA CORTE CONSTITUCIONAL 28, 31 (2005) (same). Colombia's Constitutional Court reviews *tutelas*, but not in a standard way. All *tutelas* get referred to the Court for review. See BREWER-CARÍAS, *supra*, at 151. The Court can choose any for review—or ignore them all. See CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991, July 4, 1991, art. 86; *id.* at art. 241(9).

165. See *infra* Section III.A.3.

166. The list includes the United States, Mexico, India, Colombia, Venezuela, Hungary, Serbia, Croatia, Austria, and Greece. See generally ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY (2011).

promote their court's legitimacy.<sup>167</sup> Thus, incontrovertible evidence eludes us. We have chosen examples consistent with active virtues, but we cannot say with certainty that they reflect active virtues. Here we join good company. Bickel gave examples consistent with passive virtues,<sup>168</sup> but he could not read the Justices' minds.

### 1. *Certificate of Division in the U.S. Supreme Court*

The Judiciary Act of 1925 gave the U.S. Supreme Court nearly complete control over its docket.<sup>169</sup> The Court has some original jurisdiction, but most of its cases arrive through writs of certiorari. Every year litigants file thousands of petitions for certiorari, and the Court grants less than 100 of them.<sup>170</sup> This structure requires the Court to filter, selecting cases from a large pool. The Court can exercise passive virtues by denying certiorari in divisive cases. Likewise, the Court can exercise active virtues by granting certiorari in unity cases. Earlier we described a modern case, *Timbs*, that might fit this category.<sup>171</sup>

Many courts in many places have discretion in their dockets, and they can use that discretion to practice active virtues by filtration, the top box in our typology. The point seems so elementary that we do not belabor it.

Consider a different and surprising aspect of the Supreme Court's docket. In the Court's earliest years, Justices had to "ride circuit." In addition to their duties in Washington on the high court, they traveled the country and heard cases as members of circuit courts.<sup>172</sup> Under the Judiciary Act of 1802, the circuit courts consisted of just two judges, the Justice and a local judge.<sup>173</sup> Two-judge panels created the possibility of a tie.<sup>174</sup> To resolve ties, the Act created the certificate of division.<sup>175</sup> When the two judges disagreed with one another about a legal question, they "certified their division," which sent the question to the Supreme Court.<sup>176</sup>

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167. Cf. Asher A. Qazi, *Suo Motu: Choosing not to Legislate, Chief Justice Chaudhry's Strategic Agenda* ("judges rarely spell out their intentions for social scientists"), in *THE POLITICS AND JURISPRUDENCE OF THE CHAUDHRY COURT, 2005–2013* 281 (Moeen H. Cheema & Ijaz Shafi Gilani eds., 2015).

168. See generally BICKEL, *supra* note 13, at 111–98.

169. For a discussion, see Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008).

170. See *id.* at 1.

171. See *supra* Section II.C.

172. For a pithy explanation, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, 162–63 (1988).

173. See 1 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY* 221 (2012) (describing the new procedure).

174. See *id.*

175. See *id.*

176. *Id.*

The Supreme Court was supposed to resolve just certified questions, but in practice it often wrote full opinions on the underlying case.<sup>177</sup> Moreover, all Justices participated. Today's Justices recuse themselves from cases that they worked on, including as lower court judges, prior to their appointment to the Supreme Court.<sup>178</sup> Not so in the early 1800s. The certificate of division "not only permitted justices to 'carry' cases up to the Court but assumed that when the cases arrived, those justices would participate in the Court's resolution of the certified questions."<sup>179</sup>

The certificate of division invited strategic behavior. Justices could manufacture ties on the circuit court to push cases to the Supreme Court.<sup>180</sup> According to Ted White, this was an open secret. Justices simply "inform[ed] district judges that they would be disagreeing with them" or "instructed the district judges . . . about the prospect of certifying up questions."<sup>181</sup> Sometimes Justices openly admitted that the division was *pro forma*, just a pretense to obtain Supreme Court review.<sup>182</sup> Correspondence among Justices suggests they were "routinely on the lookout for interesting cases on their circuits."<sup>183</sup> The Justices discussed points of law in their circuit cases with one another and "looked forward" to having the Supreme Court resolve them.<sup>184</sup>

Why did the Justices do this? They might have had multiple motives: clarifying law, concentrating on important issues, and so on. We posit that one motive was to grow the Court's legitimacy. This is consistent with White's research.<sup>185</sup> In his account, Chief Justice Marshall understood that

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177. *See id.*

178. *See id.* at 222.

179. *Id.*; *see also* Jonathan R. Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 9 (Univ. of Va. Sch. of L., Public Law and Legal Theory Research Paper No. 2020-13, 2020) (finding just one example of a Justice recusing himself after hearing the case on circuit).

180. ALFRED CONKLING, *A TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES* 715 (3d rev. ed. 1856) ("[T]his convenient method of obtaining an authoritative decision upon questions of difficulty and importance, is sometimes resorted to by agreement, without the actual expression or even formation of hostile opinions between the judges of the Circuit Court.").

181. WHITE, *supra* note 173, at 222.

182. *See* *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 910 (1824) (opinion of Johnson, J.) ("This cause is one in which, from the great importance of the questions it gave rise to, was certified to this Court, on a *pro forma* difference of opinion, that it might undergo the fullest investigation, and give time for the maturest reflection."). We discovered this quote thanks to Collins & Nash, *supra* note 179, at 9 n.57.

183. WHITE, *supra* note 173, at 222.

184. *Id.*

185. And others' research as well. *See, e.g.*, Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1429 (2006) ("[Marshall's] overriding concern during his first years as Chief Justice was to insure the judiciary's survival by directing a prudent retreat away from 'politics' and into the comfort zone of 'law.' Only in the safety of that refuge, Marshall recognized early on, could the judiciary . . . build up its institutional strength and elevate its status and authority.").

“for the Court to emerge as a branch of comparable stature to the other branches of the new American government, it would need to be an active participant in the resolution of important policy issues.”<sup>186</sup> The certificate of division helped. Justices used it to “expand their docket” and “make the most of their jurisdiction.”<sup>187</sup> “At this stage in the Court’s history, the more numerous and important the questions the better.”<sup>188</sup>

Between 1804 and 1864, over 200 cases reached the Supreme Court through certificate of division.<sup>189</sup> These included foundational cases that expanded national power—and featured strategic behavior. For example, “Justice Story, a regular user of the pro forma division procedure,”<sup>190</sup> cooperated with lawyers to bring *Trustees of Dartmouth College v. Woodward*<sup>191</sup> to the Court.<sup>192</sup> Many scholars consider that case central to American economic development.<sup>193</sup>

We focus on a different case: *United States v. Klintock*.<sup>194</sup> In the early 1800s, piracy presented a problem. A federal statute passed in 1790 addressed piracy, and the Supreme Court interpreted it in *United States v. Palmer*.<sup>195</sup> The Court read the statute narrowly, concluding that it did not authorize the United States to punish piracy against foreign subjects on a ship belonging to subjects of a foreign state.<sup>196</sup> The decision “appeared to cripple the federal Government’s power to punish pirates”<sup>197</sup> and drew fierce criticism:

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186. WHITE, *supra* note 173, at 220.

187. *Id.* at 222.

188. *Id.* White’s characterization—the Court aimed to raise its stature by seeking “numerous and important questions”—does not exactly match ours, but it is close. Also, the Justices may have had motivations that differ from but correlate with legitimacy, like prestige.

189. Nash & Collins, *supra* note 179, at 31–36.

190. White, *supra* note 131, at 22.

191. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

192. *See* White, *supra* note 131, at 22–30.

193. *See, e.g.*, Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1145–46 (2001) (reciting the view that *Dartmouth College* was foundational).

194. *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820).

195. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

196. *See id.* at 628–34. Different scholars characterize the case differently. Compare G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727, 731 (1989) (summarizing the holding: “Congress, in using the phrase ‘any person’ in the statute, had not intended to extend the jurisdiction of the federal courts to crimes committed by foreign nationals on foreign ships”), with Justin L. Sieffert, *United States v. Klintock: Reconsideration of United States v. Palmer as to General Piracy as Defined by the Law of Nations Through the Applicable Standards of Political Action of Acknowledgement and Recognition and the Status of Statelessness*, LEGAL HIST. PUBL’NS, Dec. 2016, at 1, 28, [http://digitalcommons.law.umaryland.edu/mlh\\_pubs/69](http://digitalcommons.law.umaryland.edu/mlh_pubs/69) [<https://perma.cc/NHG7-NHPY>] (“[T]he United States does not have jurisdiction under the Act of 1790 [to] punish robbery on the High Seas of foreign subjects on a ship or vessel belonging exclusively to subjects of a foreign state by person of unknown citizenship.”).

197. White, *supra* note 196, at 731.

A year after the decision, [Secretary of State] John Quincy Adams wrote in his diary that the Court had “cast away the jurisdiction which a law of congress had given.” The decision, Adams suggested, had been “founded on captious subtleties”: the Court’s “reasoning [was] a sample of judicial logic—disingenuous, false, and hollow.” Later, Adams remembered finding the decision in *Palmer* so “abhorrent” that “it gave me an early disgust for the practice of law . . . .”<sup>198</sup>

In a sign of discontent, Congress responded to *Palmer* with a new law: an Act to Protect the Commerce of the United States and Punish the Crime of Piracy.<sup>199</sup>

In 1820, just two years after *Palmer* and one year after Congress’s new anti-piracy act, the Court used a certificate of division to draw another piracy case, *Klintock*. The facts are somewhat confusing.<sup>200</sup> For our purposes, the important point is that the Court backtracked,<sup>201</sup> offering a “reconsideration of the opinion given . . . in *Palmer*’s case.”<sup>202</sup> The Court concluded that the statute enacted in 1790—the same statute that it interpreted narrowly in *Palmer*—should in fact be interpreted broadly. Piracy, the Court wrote, by “a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States.”<sup>203</sup> Scholars interpret *Klintock* as a reaction to the criticism of *Palmer*.<sup>204</sup>

In our typology, certificate of division places the Supreme Court in the middle box. The Justices elevated cases that might not otherwise have reached the Supreme Court.

## 2. *Amparo in Mexico*

As mentioned above, active virtues are not confined to the U.S. Supreme Court. Courts worldwide engage in this practice, or at least behavior consistent with it. This is a global phenomenon, as the following case studies from other countries demonstrate.

198. *Id.* (second alteration in original) (internal citations omitted).

199. See Sieffert, *supra* note 196, at 29.

200. See *id.* at 9–18.

201. White, *supra* note 196, at 732 (the Court in *Klintock* “backtrack[ed] from its earlier intimations”).

202. *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 150 (1820).

203. *Id.* at 152; see also White, *supra* note 196, at 732 (summarizing the holding) (“Robbery on the high seas, after *Klintock*, was general piracy. As such, it could be punished in the federal courts without regard to the nationality of the offender or the ship. This was because general piracy was an offense ‘against all nations.’”).

204. See, e.g., Sieffert, *supra* note 196, at 2, 37.

The Constitution of Mexico establishes a procedure called *amparo*.<sup>205</sup> Introduced in 1847, *amparo* aims to protect fundamental rights from abuses by authorities.<sup>206</sup> *Amparo* operates in different ways, and the procedure has changed over time.<sup>207</sup> We need not canvass all details, just a few. *Amparo* involves review by a federal court, often of a decision by a state court or administrative body.<sup>208</sup> Mexico's Supreme Court played a central role in *amparo* proceedings for many years.<sup>209</sup> This created a heavy workload. The number of cases was large, leading one commentator to call *amparos* the "impossible task" (*imposible tarea*) of the court.<sup>210</sup>

In 1986, a constitutional reform transferred jurisdiction in *amparo* proceedings from the Supreme Court to the federal district and circuit courts. Importantly, the reform gave the Supreme Court power to review *amparo* proceedings that merit a Supreme Court decision.<sup>211</sup> This is called the Court's "*facultad de atracción*," or "attraction power."<sup>212</sup> This power lets the Supreme Court hear *amparos* that are "important" and "transcendent"—in other words, significant cases.<sup>213</sup>

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205. BREWER-CARIAS, *supra* note 164, at 122; *see also* Francisca Pou Giménez, *The Constitution of Mexico*, in THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA (Conrado Hübner Mendes & Roberto Gargarella eds., forthcoming Oct. 2020) (describing the *amparo* procedure).

206. *See* JOSÉ MARÍA SERNA DE LA GARZA, THE CONSTITUTION OF MEXICO: A CONTEXTUAL ANALYSIS 114–15 (2013) (explaining that the *amparo* procedure in Mexico was inspired by American judicial review and the French "cassation" system designed to ensure the "correct" application of statutes).

207. *See, e.g.*, EDUARDO FERRER MACGREGOR & RUBÉN SÁNCHEZ GIL, EL NUEVO JUICIO DE AMPARO: GUÍA DE LA REFORMA CONSTITUCIONAL Y LA NUEVA LEY DE AMPARO (2013); DANIEL BARCELÓ ROJAS, FRANCISCA POU GIMÉNEZ JOSÉ MARÍA SERNA DE LA GARZA, FRANCISCO TORTOLERO CERVANTES 195 (2018); Bruce Zagaris, *The Amparo Process in Mexico*, 6 U.S.–MEX. L.J. 61 (1998) (describing the *amparo* process); BREWER-CARIAS, *supra* note 164, at 122–29 (summarizing some of *amparo*'s components).

208. For an overview, *see* sources cited *supra* note 207.

209. *See generally* Héctor Fix-Fierro, *El Amparo Judicial y la "Imposible Tarea" del Poder Judicial de la Federación. Perspectivas en el Centenario de la Constitución de Querétaro*, in EL JUICIO DE AMPARO EN EL CENTENARIO DE LA CONSTITUCIÓN MEXICANA DE 1917: PASADO, PRESENTE Y FUTURO 477–82 (Eduardo Ferrer Mac-Gregor & Alfonso Herrera García eds., 2017).

210. *See id.*

211. *See* SERNA DE LA GARZA, *supra* note 206, at 122 ("[T]he reform of that year established the power of attraction of the Supreme Court which basically means that at its discretion, the Court can attract and hear *amparos* . . . that in principle should be heard by the Circuit Courts, when it considers that a case involves an issue of special national relevance."); Alberto Abad Suárez Ávila, *Usos e Interpretación de la Facultad de Atracción en el Juicio de Amparo por la SCJN* (describing the same transfer of jurisdiction), in EL JUICIO DE AMPARO EN EL CENTENARIO DE LA CONSTITUCIÓN MEXICANA DE 1917, *supra* note 207, at 460.

212. *See* SERNA DE LA GARZA, *supra* note 206, at 122.

213. *See* Constitución Política de los Estados Unidos Mexicanos [CP], Art. 107 § VIII(b) (flush language), Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.) ("The Supreme Court of Justice may, by its own motion or by motion of the collegiate circuit court or the Attorney General in the issues that concern to the Public Prosecution Service, or by the Federal Executive through its Legal Government Counselor, hear constitutional adjudications in review process that are considered important or transcendent.") (translated by author Mauricio Guim)).

Attraction does not work through a standard appellate procedure. Instead, a limited number of parties have standing to request that the Supreme Court attract a case. Those parties include the attorney general and—here is the interesting part—the Supreme Court Justices themselves.<sup>214</sup>

When the attorney general asks the Court to attract a case, the Court engages in filtration, the top box in our typology. It filters cases presented to it from inside the legal system, taking some and rejecting others. When the *Justices* request that the Court take a case, they engage in elevation.<sup>215</sup> They scrutinize lower court proceedings and, regardless of whether anyone has appealed or has standing to appeal, seize a case for resolution by the Court.<sup>216</sup>

To elevate cases, the Justices must know the business of lower courts. They must be able to identify desirable *amparos*. They have several means for doing so. First, they use a tracking mechanism that lets them browse lower court *amparos*.<sup>217</sup> Second, the Justices have asked circuit judges to inform them of novel and potentially important constitutional cases.<sup>218</sup> Finally, the Court has enlisted the public. The Justices have encouraged citizens, scholars, and public interest lawyers to call the Court's attention to important cases.<sup>219</sup>

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214. *Id.*

215. The court has attracted a case at the request of a Justice 191 times. *See* Suárez Ávila, *supra* note 211, at 471.

216. *See* ALBERTO ABAD SUÁREZ ÁVILA, LA PROTECCIÓN DE LOS DERECHOS FUNDAMENTALES EN LA NOVENA ÉPOCA DE LA SUPREMA CORTE 73, 80 (2014) (“Los sujetos legitimados para solicitar la facultad de atracción son de dos tipos: de oficio, los Ministros de la SCJN y, a petición de parte, el Procurador General de la República y los Tribunales federales. Ni la Constitución ni la legislación secundaria contemplan ningún otro tipo solicitante con personalidad distinta a la de los anteriores, y la SCJN sostuvo el criterio de no discutir aquellas solicitudes presentadas por sujetos distintos a los legitimados, tales como las partes del juicio, los jueces de Distrito, Presidentes de los Tribunales Colegiados de Circuito o de cualquier otro sin la calidad requerida por la Constitución. Los Tribunales Colegiados de Circuito se posicionaron como los solicitantes más asiduos con un 52.08% del total de las solicitudes. En segundo lugar se encontró un sujeto no legitimado: el quejoso con un 25.06% de las solicitudes, de las cuales en su inmensa mayoría fueron desechadas al momento de resolverse. *En tercer lugar aparece la solicitud de oficio de la SCJN con un 18.10%, resultado de la suma de un 12.67% de los casos por los ministros de la SCJN de forma invidual y un 5.43% solicitado a través del Presidente del Pleno o de la Sala.*”).

217. *See* Mónica Castillejos-Aragón, *The Transformation of the Mexican Supreme Court into an Arena for Political Contestation*, in CONSEQUENTIAL COURTS, *supra* note 68, at 138, 152–53; José Ramón Cossío Díaz & Luz Helena Orozco y Villa, *La Activa Suprema Corte*, NEXOS, (Jan. 1, 2012) <https://www.nexos.com.mx/?p=14628> [<https://perma.cc/88MC-HUJ7>] (“Ahora bien, ¿cómo identificar y atraer los asuntos ‘importantes y trascendentes?’ Desde 2007 los integrantes de la Primera Sala de la Suprema Corte de Justicia de la Nación han generado condiciones institucionales para, primero, identificar y atraer los asuntos específicos y, segundo, generar a partir de ellos criterios y tesis jurisprudenciales de aplicación obligatoria en todo el país.”).

218. Cossío Díaz & Orozco y Villa, *supra* note 217.

219. *Id.*; Suárez Ávila, *supra* note 211, at 471; Castillejos-Aragón, *supra* note 217, at 155.



Mexico's Supreme Court has used its attraction power to make landmark decisions in cases involving the freedom of speech, due process, domestic violence, health, children's rights, privacy and data protection, and transgender rights.<sup>220</sup> Here is one example.

In 2006, three indigenous women were prosecuted for "kidnapping" six police officers in Queretaro, Mexico.<sup>221</sup> The women were informal street vendors, and the officers had visited their market to conduct an "anti-piracy" operation, during which they destroyed the vendors' property and extorted them for bribes.<sup>222</sup> Normally the vendors paid the bribes, but this time the community confronted the corrupt officers and denounced them to their superiors.<sup>223</sup> The superiors came to the market, paid the vendors for the damage the officers had caused, and left.<sup>224</sup> Five months later, three vendors—Jacinta Francisco Marcial, Alberta Alcántara Juan, and Teresa González Cornelio—were arrested for kidnapping the officers.<sup>225</sup>

The case against the women featured many due process violations. The women bore the burden of proving their innocence.<sup>226</sup> The proceedings were conducted in Spanish, which the women did not speak.<sup>227</sup> No translator was provided.<sup>228</sup> The state's main witness was not cross-examined.<sup>229</sup> The women were condemned to twenty-one years in prison.<sup>230</sup> During her imprisonment Teresa had a daughter, Jazmín, who lived the first years of her life behind bars.<sup>231</sup>

The case created a domestic and international backlash.<sup>232</sup> Amnesty International called one of the women a "prisoner of conscience" and

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220. Castillejos-Aragón, *supra* note 67, at 153; Cossío Díaz & Orozco y Villa, *supra* note 217; SUÁREZ ÁVILA, *supra* note 216, at 102.

221. *Dossier de prensa de Doña Jacinta Francisco Marcial*, CENTRO PRODH (Dec. 12, 2017), <http://centroprodh.org.mx/2017/12/12/dossier-de-prensa-de-dona-jacinta-francisco-marcial/> [<https://perma.cc/3K27-6EP2>].

222. *Id.*; see also Ricardo Homs, *Mentir sin Consecuencias . . . Jacinta, Alberta y Teresa*, EL UNIVERSAL (Feb. 25, 2017, 1:37 PM), <http://www.eluniversal.com.mx/blogs/ricardo-homs/2017/02/25/mentir-sin-consecuencias-jacinta-alberta-y-teresa> [<https://perma.cc/44BC-FHFC>].

223. *Dossier de prensa de Doña Jacinta Francisco Marcial*, *supra* note 221

224. *Id.*

225. Rosalía Solís, *El caso por el que la PGR se disculpó*, MILENIO (Feb. 21, 2017), [http://www.milenio.com/policia/disculpa\\_publica-pgr-indigenas-alberta-teresa-jacinta-secuestro-afi-milenio\\_noticias\\_0\\_907109325.html](http://www.milenio.com/policia/disculpa_publica-pgr-indigenas-alberta-teresa-jacinta-secuestro-afi-milenio_noticias_0_907109325.html) [<https://perma.cc/EBJ3-FJUW>].

226. Luis Arriaga Valenzuela, *Jacinta y la procuración de justicia en México*, EPIKEIA: REVISTA DE DERECHO Y POLÍTICA, Fall 2009, at 1, 4.

227. *Id.*

228. *Id.* at 9.

229. *Id.* at 19.

230. *Jacinta, una mujer incómoda para la justicia*, PROCESO (Sept. 16, 2009), <https://www.proceso.com.mx/118743/jacinta-una-mujer-incomoda-para-la-justicia> [<https://perma.cc/XN2J-TYP6>].

231. Jacobo García, "No solo queremos perdón, exigimos respeto como indígenas", EL PAÍS (Feb. 21, 2017, 9:24 PM), [https://elpais.com/internacional/2017/02/21/mexico/1487681298\\_217747.html](https://elpais.com/internacional/2017/02/21/mexico/1487681298_217747.html) [<https://perma.cc/QJL8-AABL>].

232. See Homs, *supra* note 222.

accused Mexico of systematically discriminating against indigenous people.<sup>233</sup> The World Organization Against Torture said the case is “symptomatic of the vulnerability of indigenous people, particularly indigenous women, who suffer most intensely the phenomena of discrimination, exclusion and marginalization” in Mexico.<sup>234</sup> Domestic human rights organizations joined the campaign.<sup>235</sup> Mexico’s Senate created a committee to investigate the case.<sup>236</sup>

Three years after their imprisonment, Teresa and Alberta appealed their sentence to a circuit court.<sup>237</sup> Meanwhile, Justice Juan Silva Meza of the Supreme Court asked his fellow Justices to use the *facultad de atracción* and seize the case.<sup>238</sup> In a “historical” move, the Court did just that, taking the case from the circuit court before it had concluded its proceedings.<sup>239</sup> In

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233. Press Release, Amnesty Int’l, Mexico: Woman Accused of Kidnapping Six Agents Named Amnesty Prisoner of Conscience (Aug. 13, 2009), <https://www.amnesty.org.uk/press-releases/mexico-woman-accused-kidnapping-six-agents-named-amnesty-prisoner-conscience> [https://perma.cc/56QJ-HNF6]; Press Release, Amnesty Int’l, Mexico: Freedom for Indigenous Women Wrongly Imprisoned for Three Years on Fabricated Charges (Sept. 17, 2009) (<https://www.amnesty.org/en/press-releases/2009/09/mexico-freedom-indigenous-woman-wrongly-imprisoned-three-years-fabricat-0/> [https://perma.cc/WKX2-9EWW]). Amnesty International stated, “Jacinta’s story shows that Mexican criminal justice system is being misused to prosecute the most vulnerable. She has been targeted because of her ethnicity, gender and social status.” Amnesty Int’l, Mexico: Woman Accused of Kidnapping Six Agents Named Amnesty Prisoner of Conscience, *supra*.

234. *Cuestiona organismo internacional proceso de Jacinta Francisco*, ZÓCALO, [http://www.zocalo.com.mx/new\\_site/articulo/cuestiona-organismo-internacional-proceso-de-jacinta-francisco](http://www.zocalo.com.mx/new_site/articulo/cuestiona-organismo-internacional-proceso-de-jacinta-francisco) [https://perma.cc/G6YH-W59K] (translated by author Mauricio Guim) (“Esta organización consideró que los casos de las tres mujeres ‘son sintomáticos de la vulnerabilidad de los indígenas, en particular de las mujeres indígenas, quienes sufren con mayor intensidad los fenómenos de discriminación, exclusión y marginación del sistema de justicia mexicano.’”).

235. *Cronología. El caso Jacinta Francisco Marcial*, EL UNIVERSAL (May 29, 2014), <https://archivo.eluniversal.com.mx/nacion-mexico/2014/impreso/cronologia-el-caso-jacinta-francisco-marcial-215930.html> [https://perma.cc/67SA-XHLX]; Carlos Avilés, *SCJN pide liberar a Teresa y Alberta, por irregularidades*, EL UNIVERSAL (Apr. 27, 2010), <http://archivo.eluniversal.com.mx/primera/34838.html> [https://perma.cc/NZ89-PR7A].

236. Isabel Longhi-Bracaglia, *El Supremo mexicano exculpa y ordena liberar a dos indígenas encarceladas desde 2006*, EL MUNDO (Apr. 28, 2010, 3:48 PM), <http://www.elmundo.es/america/2010/04/28/mexico/1272484111.html> [https://perma.cc/AV52-Z5DL].

237. See Press Release, Centro Prodh, Alberta y Teresa apelan contra la injusta sentencia de 21 años de prisión ordenada por el juez cuarto de distrito de Querétaro (Feb. 25, 2010), <https://centroprodh.org.mx/2010/02/25/alberta-y-teresa-apelan-contra-la-injusta-sentencia-de-21-anos-de-prision-ordenada-por-del-juez-cuarto-de-distrito-en-queretaro/> [https://perma.cc/8Q7W-CFXU]. The other defendant, Jacinta Francisco Marcial, was released in 2009. See Amnesty Int’l, Mexico: Freedom for Indigenous Women Wrongly Imprisoned for Three Years on Fabricated Charges, *supra* note 233.

238. Supreme Court of Mexico, *Recurso de Apelación 2/2010 Derivado de la Facultad de Atracción 3/2010* (“FIFTH. In writing of sixteen of March of two thousand and ten, the Minister Juan N. Silva Meza, asked his fellow Ministers who are members of the First Chamber of the Supreme Court of Justice of the Nation, ex officio to exercise the faculty of attraction to hear the appeal . . .”).

239. Jesús Aranda, *Atrae la Corte casos de indígenas a acusadas de secuestrar a seis afis*, LA JORNADA (March 18, 2010), <http://www.jornada.unam.mx/2010/03/18/politica/018n1pol> [https://perma.cc/2XHQ-2BM7]. The Court accepted the request and justified its decision on the “great interest” that the case had created and the opportunity to establish clear standards on women’s rights and discrimination. *Id.*

a unanimous opinion, the Court absolved the women and ordered their immediate freedom.<sup>240</sup> International and domestic organizations, including the UN High Commissioner for Human Rights, celebrated the decision.<sup>241</sup>

This case supports Justice José Ramón Cossío Díaz's explanation of the *facultad de atracción*. It not only offers a mechanism to develop the principles established in the Constitution. It empowers Mexico's Supreme Court to make the decisions that "society demands."<sup>242</sup>

When the Justices seek the cases, the Mexican Supreme Court's *amparo* process fits in the middle box of our typology. The Court elevates cases from lower tribunals in the legal system. Active virtues provide a plausible explanation for the Court's actions.

### 3. Pakistan's *Suo Motu* Jurisdiction

In Pakistan, *suo motu* jurisdiction allows courts to initiate cases external to the legal system. The *suo motu* power has been defined as "taking notice or cognizance of a matter by a court . . . upon its own initiative."<sup>243</sup> This fits in the bottom box of our typology. Judges convert problems in society into cases in their courts.

The *suo motu* powers appear in Article 184(3) of Pakistan's Constitution.<sup>244</sup> That article empowers the Supreme Court to direct a person

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240. Supreme Court of Mexico, *Recurso de Apelación 2/2010 Derivado de la Facultad de Atracción 3/2010* ("Finally, regarding the last of the requirements set forth in Article 105 of the Constitution, consisting in the fact that the relative issue covers the characteristics of 'interest and transcendence', it must be equally satisfied.").

241. The High Commissioner of United Nations for Human Rights recognized the "importance" of the judgment. *ONU pide investigar caso de Teresa y Alberta*, EL UNIVERSAL (Apr. 29, 2010, 4:38 PM), <http://archivo.eluniversal.com.mx/notas/676799.html> [<https://perma.cc/FJF3-NJCV>]. The World Organization Against Torture considered the release "very important" and "a fundamental step in the realization of complete justice." *México: Liberadas las Sras Alberta Alcántara Juan y Teresa González Cornelio en México*, WORLD ORG. AGAINST TORTURE (Apr. 30, 2010), <https://www.omct.org/es/urgent-campaigns/urgent-interventions/mexico/2010/04/d20669/> [<https://perma.cc/8SV2-BEZN>] (translated by author Mauricio Guim). The National Commission for Human Rights said, "justice has been done." *Supremo mexicano ordena liberar a indígenas acusadas de secuestrar a policías*, PAN. AM. (Apr. 28, 2010, 4:05 PM), <https://www.panamaamerica.com.pa/node/552211> [<https://perma.cc/N2FR-PYRE>].

242. Cossío Díaz & Orozco y Villa, *supra* note 217 ("La razón que subyace al ejercicio de la facultad de atracción no es que la Suprema Corte deba conocerlo todo, sino que el mecanismo permite que el órgano construya adecuadamente su agenda, limitada en tiempo y recursos. Hablar de 'agenda' no debe conducirnos a suponer que la Corte habrá de hacer política en el sentido ordinario de la expresión. Se trata de una cuestión más profunda: a partir de las competencias otorgadas la Suprema Corte puede pronunciarse sobre temas que la sociedad exige.")

243. WERNER MENSKI, AHMAD RAFAY ALAM & MEHREEN KASURI RAZA, PUBLIC INTEREST LITIGATION IN PAKISTAN 200 (2000).

244. PAKISTAN CONST. art. 184, § 3 ("Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved have the power to make an order of the nature mentioned in the said Article."); *see also* JONA RAZZAQUE, PUBLIC

or authority to refrain from doing anything she is not permitted to do or to do anything she is required to do.<sup>245</sup> The Court can issue such a directive regardless of whether a person with standing brought the case.<sup>246</sup> Initially, the provision was interpreted to relax standing so “any *bona fide* representative could bring a petition on behalf of an affected group or class.”<sup>247</sup> Later the Court held that the provision empowered it to initiate cases of its own accord.<sup>248</sup> Any Justice of the Supreme Court can propose the exercise of *suo motu* jurisdiction.<sup>249</sup>

Scholars argue that Pakistan’s Supreme Court has used *suo motu* as a legitimizing tool.<sup>250</sup> To understand this argument, consider this pattern in Pakistan. When the military overthrows a democratically elected government, the Supreme Court validates the new regime. This guarantees the Court’s institutional survival, but it costs the Court public support.<sup>251</sup>

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INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH 205 (2004) (“[A]ny person can give a Magistrate information of the existence of any state of affairs, but when the magistrate is acting on that information, he is acting *suo motu*. The person who gives the information has no right in the matter and is not a person who may be described as a party to the proceedings.”).

245. PAKISTAN CONST. art. 184, § 3 (“[T]he Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights . . . is involved, have the power to make an order . . .”).

246. Two requirements limit the Court’s *suo motu* jurisdiction. First, the case must be related to a question of “public importance,” and second, the purpose of the action must be to protect a “fundamental right.” See Moeen H. Cheema, *The “Chaudhry Court”: Deconstructing the “Judicialization of Politics” in Pakistan*, 25 WASH. INT’L L.J. 447, 479 (2016). To satisfy the first requirement, the case “must affect people at large and not just identifiable groups or classes.” *Id.* Regarding the second requirement, “fundamental rights” have been held to include social and economic rights, or what we might call positive rights. See, e.g., Shehla Zia v. WAPDA, (1994) PLD (SC) 693 (Pak.).

247. Cheema, *supra* note 246, at 478; see also MENSKI, ALAM & KASURI, *supra* note 243, at 74 (“The Article does not even make the powers of the Supreme Court dependent on an ‘aggrieved party’, thus dispensing with the traditional rule of *locus standi* altogether, allowing the Supreme Court not only to entertain petitions at the behest of any person but to act *suo motu* as well.”).

248. See, e.g., Masih v. State, (1990) PLD (SC) 513 (Pak.) (Supreme Court case initiated *suo moto* on behalf of bonded brick kiln laborers).

249. However, all *suo motu* actions must be approved by the Chief Justice. See Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 LAW & SOC. INQUIRY 985, 991 (2010) (“As the assignment of cases to particular justices can shape the outcome, the chief justice plays a defining role in the jurisprudence of the Court. The chief justice can also approve *suo motu* actions taken by the Supreme Court justices.” (internal citations omitted)); see also Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyer’s Movement* (“The fact that *suo motu* powers are centrally vested with the Chief Justice, and that there are no established and publicly known parameters and filtering mechanisms regulating its use, make them completely ad hoc . . .”), in UNSTABLE CONSTITUTIONALISM 159, 178 (Mark Tushnet & Madhav Khosla eds., 2015).

250. See Maryam S. Khan, *Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*, 28 TEMP. INT’L & COMPAR. L.J. 285, 352 (2014) (“The Supreme Court’s assertion of autonomy grows out of its need for self-legitimation at the beginning of every cycle of democratic transition, including at opportune moments of such transition in military led ‘guided-democracy.’”).

251. See, e.g., OMAR NOMAN, *THE POLITICAL ECONOMY OF PAKISTAN 1947–1985* 140–50 (1988) (recounting the Supreme Court’s support for a dictator, General Zia-ul-Haq, who eventually abrogated

When the dictatorship starts to lose power, the Court actively uses *suo motu* to regain its lost public support.<sup>252</sup> As Maryam Khan explains, heavy *suo motu* usage has occurred during interludes between decaying dictatorships and popularly elected governments.<sup>253</sup> During these periods, the Court buries the shame of having validated a military coup.<sup>254</sup>

An example of this strategy occurred in 2005 when Iftikhar Chaudhry became the Chief Justice. As a lower court judge, Chaudhry had “validated the military takeover by General Musharraf, his referendum, the legal framework order that prevented non-Muslim minorities from participating in elections, and the constitutional amendment that gave the president extraordinary powers[.]”<sup>255</sup> However, after assuming the role of Chief Justice, Chaudhry changed course.<sup>256</sup> He created a “cell” to receive “applications relating to human rights violations either through post, fax, telegram, e-mail, court box, or on the basis of print and electronic media reports.”<sup>257</sup> Based on the information provided by the cell, the Court decided to initiate *suo motu* cases.<sup>258</sup> The Court decided hundreds of these cases,<sup>259</sup> receiving media attention and making the “Chief Justice as well as the

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the constitution); Tasneem Kausar, *Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court* (“In short, Pakistan’s Supreme Court has followed the path of least resistance and least fidelity to constitutional principles . . . the courts have been the military’s handmaiden in extra-constitutional assaults on the democratic order.”), in *PAKISTAN’S STABILITY PARADOX* 28, 30 (Ashutosh Misra & Michael E. Clarke eds., 2013).

252. See Khan, *supra* note 250, at 307–08 (arguing that the Supreme Court created public interest litigation to bury its undemocratic past).

253. See *id.* at 344.

254. See *id.*

255. SADAF AZIZ, *THE CONSTITUTION OF PAKISTAN: A CONTEXTUAL ANALYSIS* 62, 136 (2018).

256. *Id.* at 136–37 (“In a turnaround from this early record, Chaudhry was reborn as an activist judge upon becoming Chief Justice. Early in his tenure a human rights cell was set up at the Supreme Court. A novel innovation, it receives applications related to human rights violations through post, fax, telegram, email, or through the use of court box available in the Supreme Court or on the basis of print and electronic media reports. A staff of intermediaries then prepares a fact sheet on the basis of which the court can initiate *suo motu* cases. The process enabled over 6,000 human rights cases . . . to be decided for affected parties without, often, the expenses involved in retaining counsel themselves.”).

257. *Id.*

258. *Id.* (“A staff of intermediaries then prepares fact sheets on the basis of which the court can initiate *suo motu* cases.”).

259. FAQIR HUSSAIN, *THE JUDICIAL SYSTEM OF PAKISTAN* 9–11 (2015) (“To provide an expeditious and inexpensive remedy, in matters related to the infringement of fundamental rights, a human rights cell was established in the Court . . . . The cell is mandated to expeditiously process the complaints received from the general public . . . . In this way relief is provided . . . without going through the traditional protracted litigation process. As a consequence there is always huge number of pending cases before the Court. As per latest data available, on 31st December 2013, a total of 20,480 cases were pending before the Supreme Court. Approximately 14000–16000 cases are annually filed in the Court. The current backlog is about 2200.”).

institution of the Supreme Court increasingly popular amongst a broad swathe of Pakistani society.”<sup>260</sup>

In 2007, when General Musharraf suspended Justice Chaudhry, a massive number of people took to the streets.<sup>261</sup> Inspired by this support, the Supreme Court ordered a dramatic restoration, declaring General Musharraf’s acts illegal and affirming that Chaudhry was the rightful Chief Justice.<sup>262</sup>

Here is a more granular example of active virtues in Pakistan. Household oil stoves routinely exploded, injuring or killing women as they cooked for their families.<sup>263</sup> In most cases, the explosions resulted from a manufacturing defect.<sup>264</sup> Inspired by press reports of this problem, Justice Munir Khan of the Lahore High Court initiated a *suo motu* action against manufacturers.<sup>265</sup> He justified the action on the ground that “the whole episode . . . had remained unobserved, unchecked and uncontrolled by the authorities concerned.”<sup>266</sup>

The Court remade the law in this area. It established comprehensive procedures to be followed by police and doctors in cases of stove explosions; ordered the government to force manufacturers to register and guarantee the “fitness and quality” of the stoves; required public hospitals to provide free aid to victims of stove explosions; and forced the government to pay for the funeral and burial expenses of victims killed by explosions because “families cooking food on oil stoves do not have cash

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260. *Id.* The cases decided by the Court were popular and, legally speaking, uncontroversial. “[T]he Supreme Court frequently targeted situations in which the local political elites were implicated. These included the recovery of kidnap victims in which politicians had been involved. Additionally, cases of police brutality, as well as of violence against women, were taken up.” *Id.*; see also Khan, *supra* note 250, at 323–24 (“With Musharraf’s eye turned away . . . the time was ripe for the court to try to restore its legitimacy and regenerate public confidence in its capacity to deliver justice to the common man. . . . The Supreme Court specially mobilized its *suo motu* power to take cognizance of newsworthy human rights abuses.”); Siddique, *supra* note 249, at 189 (describing the Court’s use of *suo motu* and efforts to “ensure that its interventions were widely publicized and celebrated” as a strategy to grow judicial power); Qazi, *supra* note 167, at 308 (“Justice Chaudhry highlighted issues which resonated with the public; he also avoided issues which may have attracted widespread disapproval”); *id.* at 311–12 (suggesting that Chaudry’s use of *suo motu* grew the Court’s legitimacy).

261. See Tom Ginsburg, *The Politics of Courts in Democratization: Four Junctures in Asia* (“Justice Chaudhry responded by resisting the attack and framing it as directed against the judiciary as a whole. The attack prompted broad demonstrations from the bar, which took to the streets to protest the decision and was joined by broad coalition of supporters . . . . The legal complex was mobilized. The legal controversy ended in the courts, and featured the remarkable spectacle of the Supreme Court reinstating Chaudhry on the grounds that his dismissal violated the law.” (internal citation omitted)), in CONSEQUENTIAL COURTS, *supra* note 68, at 45, 61.

262. See *id.*

263. See MANSOOR HASSAN KHAN, PUBLIC INTEREST LITIGATION: GROWTH OF THE CONCEPT AND ITS MEANING IN PAKISTAN 72 (1993).

264. See *id.*

265. See *id.*

266. *Id.*

ready to meet the compulsory expenses of sudden demise.”<sup>267</sup> Finally, to encourage lawsuits against stove manufacturers, the Court encouraged the government to eliminate filing fees.<sup>268</sup>

The Court justified its decision as follows: when authorities “do not discharge their obligations toward citizens or if they are not prepared to realize their duties towards the Nation then the High Court must come to the rescue of the citizens by assuming *suo motu* jurisdiction.”<sup>269</sup>

*Suo motu* fits in the bottom box of our typology. Pakistani courts initiate cases.

#### 4. India's Epistolary Jurisdiction

The Supreme Court of India's epistolary jurisdiction fits in the bottom box of the typology. By eliminating all standing requirements and allowing plaintiffs to approach the Court through letters, postcards, and telegrams, the Court has empowered itself to initiate disputes.<sup>270</sup>

Like most common law jurisdictions, India long followed traditional principles of adjudication.<sup>271</sup> To sue, plaintiffs had to show that their rights had been violated and that they were directly affected by the challenged government action.<sup>272</sup> The case had to be ripe for judgment and brought within a reasonable time.<sup>273</sup>

These principles prevailed until the 1980s, when the Indian Supreme Court decided a series of important cases that practically eliminated standing requirements and procedural formalities.<sup>274</sup> The Court achieved this by reinterpreting Article 32 of the Indian Constitution, which states: “The right to move the Supreme Court by appropriate proceedings for the

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267. *Id.* at 74.

268. *Id.*

269. *Id.* The Court also wrote: “women in hundreds have died by stove bursts leaving behind thousands of orphan children, but the negligent and criminal action of the manufacturers of oil stoves enjoys immunity because of inaction on the part of authorities.” *Id.*

270. See generally Shyam Divan, *Public Interest Litigation*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 662 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

271. S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 *WASH. U. J.L. & POL'Y* 29, 63 (2001) (describing the transformation of India's judicial process from private law adjudication to public interest litigation).

272. S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 197 (2003) (explaining that, under English influence, India followed traditional rules of private law adjudication).

273. *Id.* at 199.

274. Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 *B.U. INT'L L.J.* 169, 178 (2015) (“In 1981, a seven-judge constitutional bench of the Court, in *S.P. Gupta v. Union of India* (the ‘Judges’ case’) formally incorporated the liberalization of standing for PIL claims into law.”); see also Shylashri Shankar, *The Embedded Negotiators: India's Higher Judiciary and Socioeconomic Rights* (“In *S.P. Gupta v. Union of India*, the court relaxed the rules of *locus standi* and opened the doors of the Court to public spirited persons . . . .”), in *CONSTITUTIONALISM OF THE GLOBAL SOUTH* 95, 97 (Daniel Bonilla Maldonado ed., 2013).

enforcement of the rights . . . is guaranteed.”<sup>275</sup> The new interpretation made access to the Court simple and almost cost-free.<sup>276</sup> In the Court’s words:

[W]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons . . . and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction.<sup>277</sup>

The last phrase is the key. Any person can approach the Court and request its protection for the poor or other disadvantaged groups.<sup>278</sup> These reforms opened the Court’s doors to millions of plaintiffs.

The standing revolution allowed people to petition the Court on others’ behalves. However, the Justices thought it unfair for a person acting *pro bono publico* to incur the expenses of paying a lawyer to prepare a formal petition.<sup>279</sup> Thus, the Justices simplified matters further. A public-spirited plaintiff could simply write a letter to the Court, which could convert it into a public interest case.<sup>280</sup> When the Court converts a letter into a case, it exercises its epistolary jurisdiction.

275. India Const. art. 32, cl. 1.

276. In addition to relaxing standing, the Court restricted waivers of rights that could impede litigation: “A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State organizations and institutions, nor can they meet them on equal terms.” *Nath v. Comm’r of Income Tax*, (1959) 1 SCR Supl. 528 (1958) (India). The Court transformed statutes of limitation into loose standards: “The principle of laches is based on a sound policy of protecting public interests. Where, however, not entertaining a petition caused greater harm to public interest than the harm caused by entertaining it, it must be entertained.” *Jalmi v. The Speaker*, (1993) 2 SCR 820 (India). Finally, it eliminated strict pleading doctrines. “The Court [will] not stand on the formality of the petitioner’s having asked for a specific remedy. If the petitioner establishes the case of violation of his right, the court would issue an appropriate remedy irrespective of what remedy has been prayed for.” *Basappa v. Nagappa*, (1955) 1 SCR 250 (1954) (India).

277. *Gupta v. President of India*, (1982) 2 SCR 365 (1981) (India).

278. As Justice Bhagwati said in *People’s Union for Democratic Rights v. Union of India*, (1983) 1 SCR 456, 466 (1982):

[P]ublic interest litigation . . . is a totally different kind of litigation from the ordinary traditional litigation . . . . Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law . . . .

279. SATHE, *supra* note 272, at 205.

280. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM J. COMPAR. L. 495, 499–500 (1989) (“There are reports of actions begun by postcard, and even one judge converting a letter to the editor in a newspaper into a PIL [public interest litigation] writ. Judges have been known to invite and encourage public interest actions.”); Marc Galanter & Jayanth K. Krishnan, “*Bread for the Poor*”: *Access to Justice and the Rights of the Needy*



The first letters were addressed to individual judges who could convert them into formal petitions.<sup>281</sup> In *Sunil Batra v. Delhi Administration*, a prison inmate wrote a letter to a Justice calling his attention to the torture of a fellow inmate by authorities.<sup>282</sup> The Court converted the letter into a public interest case that contributed to the judicial discourse on prisoners' rights.<sup>283</sup> Another case, *Hussainara Khatoon v Bihar*, started with a letter denouncing long pretrial detentions.<sup>284</sup> The Court gathered information about a large number of people who suffered from such detentions and ruled that the legal process must proceed faster.<sup>285</sup>

Between January 1987 and March 1988, the Court received around 23,000 letters.<sup>286</sup> The Court created a special office to review and filter them.<sup>287</sup> This office culls through the letters, passing some to the Chief Justice for review.<sup>288</sup> Sometimes the Court asks public interest lawyers to act as *amicus curiae* and convert a letter into a regular petition.<sup>289</sup>

For our purposes, the main point should be clear. The Court's epistolary jurisdiction allows it to initiate cases. An enormous number of disputes, many of which are not pending (and unless the Justices select them never will pend) in any court, are submitted, and the Justices convert some into cases. Through this process the Court has set landmark precedents on prison

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*in India*, 55 HASTINGS L.J. 789, 795 (2004) ("These included relaxation of requirements of standing, appointment of investigative commissions, appointment of lawyers as representatives of client groups, and a so-called 'epistolary jurisdiction' in which judges took the initiative to respond proactively to grievances brought to their attention to third parties, letters, or newspaper accounts."); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 39 (Neelan Tiruchelvam & Radhika Coomaraswamy eds., 1987) (describing litigation that has "arisen out of letters written by individuals to Justice P.N. Bhagwati . . . . The letters usually rely on newspaper and periodical investigative reportage. More often than not, the Justice brings them on the board of the Court, converting this letters into writ petition. Justice Bhagwati has gone so far as to invite members of the public and especially public spirited citizens to bring to his notice violations of basic human rights, as embodied in the Constitution, for suitable judicial action.").

281. P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 572 (1985) ("I may point out that this innovative use of judicial power began in a rather informal way. One or two justices of the Supreme Court started entertaining letters written by or on behalf of disadvantaged people. A few of these letters were treated as petitions and . . . relief was granted to a large number of persons belonging to the exploited sectors of the economy.").

282. *Batra v. Delhi Admin.*, (1978) 2 SCR 557 (India); see Mate, *supra* note 274, at 178 n.28; SATHE, *supra* note 272, at 203.

283. Mate, *supra* note 274, at 178.

284. *Id.* at 180–81.

285. *Id.* at 181; see also MANJULA BATRA & UPENDRA BAXI, PROTECTION OF HUMAN RIGHTS IN CRIMINAL JUSTICE ADMINISTRATION: A STUDY OF THE RIGHTS OF ACCUSED IN INDIAN AND SOVIET LEGAL SYSTEMS 91 (1989).

286. See Cassels, *supra* note 280, at 508.

287. Menaka Guruswamy & Bipin Aspatwar, *Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH, *supra* note 274, at 329, 352.

288. Cassels, *supra* note 280, at 508 ("The PIL cell cull through the letters, winnowing out frivolous and inappropriate matters and prepare files for the Chief Justice.").

289. SATHE, *supra* note 272, at 206.

conditions, due process, the right to counsel, pollution, industrial hazards, and the right to livelihood and human dignity.<sup>290</sup>

The Court did not stop with accepting letters and converting them into formal petitions. Some Justices have requested letters.<sup>291</sup> These Justices did not just open the Court's doors; they invited specific cases to come in.<sup>292</sup>

Consider this example. In 1976, India enacted the Bonded Labor Act, abolishing bonded labor.<sup>293</sup> Enforcement was imperfect. In 1981, over two million laborers remained in bondage.<sup>294</sup> Vidhayak Sansad, an advocacy group, met with Justice P.N. Bhagwati of the Indian Supreme Court and told him about the struggle to enforce the Act.<sup>295</sup> Justice Bhagwati encouraged the advocates to send letters to the Supreme Court, which they did, one asking for the identification of bonded laborers and the other requesting their release.<sup>296</sup> Soon the Court received more letters from across the country.<sup>297</sup> The Court converted the letters into formal petitions, and they resulted in one of the Court's most celebrated cases.<sup>298</sup> Reflecting on these changes, Justice Bhagwati wrote:

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290. See Cassels, *supra* note 280, at 497.

291. ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* 35 (2017) ("A Judge of the Supreme Court asked a lawyer to ask me to ask the reporter to go to these areas, get affidavits from some of the victims . . . . The affidavits were got, compiled, sent and he entertained a writ. Eight months later some one came to me saying that the same judge had sent him . . . . to ask me to ask the correspondent to file such and such information in a letter through so and so . . . . A third time a civil rights activist asked that the same thing be done. He said that the same judge had asked him.").

292. See Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary*, 19 POL'Y STUD. J. 140, 142 (1990) ("The earliest epistles were addressed to individual members of the Supreme Court, and reports abound of individual judges soliciting petitions . . . ."); see also S.K. AGRAWALA, *PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE* 16–17 (1985) ("Some judges have been strong protagonists of PIL on the Bench and outside it. In fact they have also been mentioned as soliciting such petitions. The letters were, therefore, directly addressed to them . . . . A well-known journalist . . . remarked, 'the point that the opponents of the case were making was that the litigants were choosing a judge. As it turns out, some judges were choosing their litigants.'").

293. See GYAN PRAKASH, *BONDED HISTORIES: GENEALOGIES OF SERVITUDE IN COLONIAL INDIA* xi (2003).

294. Monika Sangeeta Ahuja, *Public Interest Litigation in India: A Socio-Legal Study* 180 (Aug. 1995) (Unpublished Ph.D. Dissertation, London School of Economics & Political Science) (on file with the London School of Economics), available at <http://etheses.lse.ac.uk/1417/1/U084680.pdf> [<https://perma.cc/JTS2-CHJD>].

295. *Id.* at 182 ("Unable to mobilise adequately the administration and labourers . . . visited Justice Bhagwati, then a sitting judge of the Supreme Court, in May 1983.").

296. *Id.* at 182–83 ("After meeting with Justice Bhagwati again, two letters were sent to the Court on his advice - one asking for the identification of bonded labourers and the other for their release.").

297. *Id.* at 184.

298. *Morcha vs. Union of India*, (1984) 2 SCR 67 (1983) (India). The Supreme Court's decisions on bonded labor are credited with helping to implement the will of Parliament in the Bonded Labor Act of 1976. See Ahuja, *supra* note 294, at 187 ("It is certainly true that without the courts, the 1976 Act would not have been implemented at all, nor would its provisions have become known."). The Court's judgments added "to the growing force of national opinion against bonded workers." *Id.* at 189. After the Court's intervention many bonded laborers were released. See *id.* at 186.

[P]rocedures is just a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. . . . Today, a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning.<sup>299</sup>

What explains the Court's development and use of epistolary jurisdiction? According to scholars, the answer is a combination of justices' policy preferences and a "desire to rehabilitate and bolster the institutional legitimacy" of the Court.<sup>300</sup>

### *B. Synthesis: Attraction and Strategy*

From 19th century America to India today, courts worldwide engage in striking, strategic behavior. Some of this behavior appears to reflect active virtues. The examples supported that claim with details. Here we offer generalizations.

Perfection need not be the enemy of the good. The perfect case for exercising active virtues fully aligns law and politics. It presents an opportunity to make a unanimous, salient, popular, and legalistic decision. In reality, perfection is elusive. A case might present some but not all of these opportunities, as the examples demonstrate. In Mexico, freeing the indigenous women supported due process rights and generated support for the court among politicians, interest groups, and the public. But it must have embarrassed the police. Improving oil stoves must have been popular among consumers, but not stove manufacturers. Our theory does not require perfection. If a court attracts a reasonably unifying case with some expectation that its legitimacy score will grow, it has exercised active virtues.

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299. BHUWANIA, *supra* note 291, at 30 (emphasis omitted).

300. Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, in CONSEQUENTIAL COURTS, *supra* note 68, at 262, 264; *see also* BHUWANIA, *supra* note 291, at 25 ("The axiomatic explanation for the rise of PIL has been that it was an attempt by the post-Emergency Supreme Court to restore its image in the public eye . . ."); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 107, 113 ("Judicial populism" in India was partly "an attempt to refurbish the image of the Court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power."); Divan, *supra* note 270, at 678 ("Indian courts have set apart judicial resources to foster PIL to a point where this jurisdiction defines public perception of the higher judiciary. . . . Their decisions generally add to the prestige of the judiciary. . . .").

Imperfection requires courts to balance. In contemplating a case, judges must decide whether the legitimacy gains from one corner will more than offset the losses from another. Sometimes courts will make mistakes. This is true with active virtues and its twin, passive virtues. Consider Bickel's tools for passive virtues: justiciability doctrines like standing and ripeness. The Supreme Court uses these tools *after* it grants certiorari, and that suggests a mistake. If the Court had foreseen the difficulties in the case, it would have denied certiorari.<sup>301</sup>

Mistakes in active and passive virtues might sometimes connect. Active virtues cause courts to take cases that appear unifying. Passive virtues offer a lifeline for the subset of those cases that turn out to be divisive. If this is right, then the passive virtues we have observed are relics of the active virtues we have missed.

Whether the virtues are active or passive, judges should make fewer mistakes as their information improves. Think again of India. Private actors, divorced from pending litigation, can scratch a plea on a postcard and mail it to the Supreme Court. A similar system operates in Pakistan and to a lesser extent Mexico. These mechanisms do more than empower courts to initiate cases. They feed information to courts so they know which cases to initiate. Thousands of notes on exploding stoves or bonded labor tell judges that thousands of people suffer from a common problem and seek redress.<sup>302</sup> For courts seeking politically favorable cases, this is helpful input.

As discussed, courts can exercise active virtues through filtration, elevation, and initiation. The mechanism courts choose presumably relates to barriers to litigation. The easier it is to sue—loose standing and other justiciability rules, low filing fees, active legal cultures—the more courts can rely on filtration. Many cases arrive at their doorsteps, and they can pick the unifying ones. Conversely, the harder it is to sue, the more judges must rely on the other tools.

Another factor must affect the choice between filtration, elevation, and initiation: settlement. If parties settle, then courts cannot resolve their dispute.<sup>303</sup> Broad standing rules open the door to court, but they do not help if litigants never enter. Failure to appeal presents a similar problem for

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301. This assumes denying certiorari is an option. When jurisdiction is mandatory, the Court cannot exercise this option.

302. Cf. Tom S. Clark & Jeffrey K. Staton, *An Informational Model of Constitutional Jurisdiction*, 77 J. POL. 589 (2015) (arguing that resolving many low-stakes cases provides courts with information necessary for formulating appropriate rules).

303. See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that the settlement decision fails to account for the benefits to third parties of precedents); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (suggesting that precedents can be a public good); Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99, 111 (1999) (recognizing that precedent has social value).

appellate courts. If litigation is structured in a way that unity cases do not move upward, then appellate judges lack the main ingredient of our recipe.<sup>304</sup> To exercise active virtues, courts in these circumstances must preserve disputes. This may help explain why Colombia's Constitutional Court can take a case even if no party has appealed. More generally, it may explain why some courts combine filtration, elevation, and initiation.

A final factor must affect the choice between filtration, elevation, and initiation: legal culture. Judges in India and Pakistan attract cases in ways anathema to American legal norms. Perhaps the U.S. Supreme Court could, without loss of legitimacy, openly elevate cases in the 1800s, but it is nearly impossible to imagine the Court doing that now. In today's United States, the norm of judicial modesty (or professed modesty) favors avoidance over attraction and, to the extent attraction occurs, filtration over elevation<sup>305</sup> or initiation.<sup>306</sup> This observation enriches our analysis. Earlier we wrote that the ideal unity case is unanimous, popular with the public, favorable to government actors, publicized effectively, and written and resolved legalistically. That last criterion should be understood to capture culture. A court will score poorly on that criterion if it violates the local legal culture.<sup>307</sup>

Our examples involve courts that one might characterize as developing, not established. Even our discussion of the U.S. Supreme Court fits this picture. Surely, the power of the Court was not unshakeable in Justice Story's era. This makes sense. Courts use active virtues to build legitimacy, which developing courts in particular need. However, we do not think active virtues are confined to developing courts. Justices on the U.S. Supreme Court still worry about legitimacy today. Justice O'Connor expressed this worry in *Casey*<sup>308</sup>; Justices Breyer and Stevens expressed it in *Bush v.*

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304. Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (arguing that the incentives of litigants filter easy cases out of the appellate process); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988) (suggesting that cases that reach courts are a skewed sample of disputes).

305. Although rarely used, the U.S. Supreme Court has the power to elevate by using a procedure called certiorari before judgment. See generally James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 SUP. CT. REV. 259, 262-63.

306. Unlike lawyers, non-lawyers probably do not know or care about the American tradition of judicial modesty. Cf. David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 758 (2012) (presenting evidence that people's perceptions of the Supreme Court depend on the fit between their policy preferences and the Court's decisions).

307. See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1042 (2004) (explaining that the legitimacy of judicial review depends on the constitutional culture of non-judicial actors). For an overview of cultures of legality, see CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2010).

308. See *supra* Section I.B.

*Gore*<sup>309</sup>; and by many accounts Chief Justice Roberts expressed it by upholding the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.<sup>310</sup> After the controversy over Justice Kavanaugh's nomination, some observers predict that the Supreme Court will "lower the temperature" by focusing on low-profile cases instead of "fiery social issues."<sup>311</sup> Even powerful courts seem to worry about maintaining their stature. Thus, even powerful courts might practice active virtues.

Today's Supreme Court seems especially well-positioned to exercise active virtues. Not only does the Court get thousands of appeals from which to select, it has a small docket. The Court decides only about eighty cases per year, half as many as it decided in the 1980s.<sup>312</sup> Perhaps this is part of the problem; the Court focuses on a few, divisive cases. The Justices have the capacity to decide many more cases, and perhaps they should. They could grow the Court's docket with unity cases.

One final observation is in order. Case filtration, elevation, and initiation might reflect a conscious institutional decision. Designers might expressly permit courts to engender cases. In this respect, there is an interesting difference between the passive and active virtues. To avoid a case, courts usually do not need an explicit power. Instead, they can just invoke general

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309. See *supra* Section I.A.

310. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). On Roberts's worries about legitimacy, see, for example, Jeffrey Rosen, *Big Chief*, THE NEW REPUBLIC (July 12, 2012), <https://newrepublic.com/article/104898/john-roberts-supreme-court-aca> [<https://perma.cc/SQ6D-8D7F>] ("Roberts set aside his ideological preference to protect the Court from a decision along party lines that would have imperiled its legitimacy.")

311. Adam Liptak, *A Quiet Docket May Be Just the Right Medicine for the Supreme Court*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/politics/supreme-court-new-term.html> [<https://perma.cc/SNL4-TZC4>]; see also Grove, *supra* note 4, at 2242, 2253–54, 2269–76 (discussing the legitimacy challenges facing today's Supreme Court); Mark Sherman, *Supreme Court's Low-Profile Approach to Be Tested*, ASSOCIATED PRESS (Dec. 29, 2018), <https://apnews.com/a1e2459a374e4bae9e54b404d5e7f0a3> [<https://perma.cc/SV5G-KYUC>] ("The Supreme Court began its term with the tumultuous confirmation of Justice Brett Kavanaugh, followed by a studied avoidance of drama on the high court bench—especially anything that would divide the five conservatives and four liberals."); Melissa Quinn, *Cautious After Kavanaugh Furor, Supreme Court Braces for Controversy*, WASH. EXAM'R (Dec. 13, 2018, 10:32 AM), <https://www.washingtonexaminer.com/policy/courts/cautious-after-brett-kavanaugh-furor-supreme-court-braces-for-controversy> [<https://perma.cc/7PMA-K95A>] ("[T]he court, after the bruising battle over Justice Brett Kavanaugh's confirmation, has spurned cases that touch on hot-button issues . . ."); Pete Williams, *New Justice on the Bench: Kavanaugh's First Supreme Court Cases*, NBC NEWS (Oct. 8, 2018, 11:11 AM), <https://www.nbcnews.com/politics/supreme-court/new-justice-bench-kavanaugh-s-first-supreme-court-cases-n917811> [<https://perma.cc/H4XK-EU92>] ("[T]he justices undoubtedly worry that the sharply partisan confirmation fight could undercut the Supreme Court's reputation . . . Chief Justice John Roberts may urge the court's other members to avoid taking up highly controversial cases this term, hoping to allow the climate to cool."); *Panel 1: Abortion and Gay Rights*, 35 GA. ST. U. L. REV. 871, 896 (2019) (predicting that the Supreme Court will not, after Kavanaugh's confirmation, decide cases that appear to "hurt the interests of women").

312. See Oliver Roeder, *The Supreme Court's Caseload Is on Track to Be the Lightest in 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/> [<https://perma.cc/Y7DS-ST7P>].

procedural rules, or they can just engage in strategic delay.<sup>313</sup> The same might not be true for case attraction. To filter or elevate cases, courts might need some form of docket control, and to initiate cases they might need some *ex-officio* powers. Our examples gestured at some of these underlying design decisions, but we will delay fuller exploration of them for later work.

#### IV. JUDICIAL POWER AND VALUES

So far, we have emphasized descriptive claims. We have argued that courts exercise active virtues in fact and that the practice is a means to an end—it can promote legitimacy. This Part situates those claims in a broader framework. We propose a portfolio theory of judicial power. According to our theory, courts earn and spend legitimacy by deciding unifying and divisive cases. They do not maximize their power; they optimize their effectiveness given pragmatic constraints. The portfolio theory is both a tentative description and an ideal. It might help explain courts' actions, and it can justify those actions. After developing the theory, we address concerns over impartiality and activism.

##### *A. The Portfolio Theory of Judicial Power*

We have argued that courts exercise active virtues to grow their legitimacy. We feel confident about that claim and have evidence to support it. Here we make a broader but more tentative claim. Courts do not exercise active virtues to grow their legitimacy unendingly. Courts grow their legitimacy so they can spend it. Remember the imaginary legitimacy score that floats above every court. Under our account, judges do not attract some cases and avoid others to continually increase that score. Instead, they work to keep that score above the threshold required for effectiveness. As they decide unity cases, the score grows. As they decide divisive cases, the score shrinks. Courts balance cases like investors balance safe and risky investments. This is the portfolio theory of judicial power.

The portfolio theory fuses active and passive virtues in a single strategy. Courts do not attract or avoid in isolation. They do both, sequentially or even simultaneously, as part of a unified effort. Whether a court decides a divisive case today depends on whether it decided a unity case yesterday, and vice versa. Consider some plausible examples. The U.S. Supreme Court decided *Harper*, the unity case that invalidated Virginia's poll tax, in 1966.<sup>314</sup> That increased the Court's legitimacy score. One year later the

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313. Cf. Saul Levmore, *Strategic Delays and Fiduciary Duties*, 74 VA. L. REV. 863, 875–76 (1988) (discussing the costs and benefits of strategic delay in many areas of litigation).

314. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

Court spent some of that legitimacy on *Loving v. Virginia*,<sup>315</sup> which invalidated prohibitions on interracial marriage. *Harper* made *Loving* possible. Similarly, the Court avoided cases on segregation in the years following *Brown*. It had spent its capital on a divisive case—the legitimacy score was low—and it required replenishment. The Court needed unity cases before lining up another divisive case.

Now consider a modern example. We discussed *Timbs*, the case on asset forfeiture that plausibly increased the Court's legitimacy. The Court granted certiorari in that case in June 2018<sup>316</sup>—the same month that it decided controversial cases on discrimination against same-sex couples, President Trump's travel ban, and public sector unions.<sup>317</sup> As discussed, we are not certain the modern Court seeks out unity cases. But if it does, *Timbs* was a welcome addition to the docket during a tense time.

The portfolio theory is a generalization. Courts need not behave this way at all times for the account to have merit; they need to behave this way sufficiently often. Do they? We cannot say with absolute confidence. Nevertheless, we think the theory has value. First, it offers a mnemonic. The label “portfolio theory” provides an intuition about active virtues, their conceptual link to passive virtues, and why courts might attract and avoid cases. Second, we think the portfolio theory resonates with intuitions. Many people have a sense that courts build legitimacy with some cases and burn it with others.<sup>318</sup> Our theory just pushes the intuition. We argue that courts are conscious of this dynamic and use active virtues to manage it. Third, portfolio theory illuminates the key normative question that we have finally reached: should courts exercise active virtues?

### B. *The Case for Active Virtues*

Some readers might argue (perhaps reflexively) that courts should not exercise active virtues. Judges might exercise them in fact—in Mexico, Pakistan, and elsewhere—but they are wrong to do so. Active virtues are simply inconsistent with the judicial function, the argument might go, and so courts should not practice them. We respectfully disagree. The passive, conservative sense of the judiciary that motivates this position dominates in

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315. *Loving v. Virginia*, 388 U.S. 1 (1967).

316. *Timbs v. Indiana*, 138 S. Ct. 2650 (2018) (granting certiorari on June 18).

317. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n.*, 138 S. Ct. 1719 (2018) (permitting a baker to discriminate against a same-sex couple); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding by a 5–4 vote the travel ban); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (prohibiting by a 5–4 vote public sector unions from requiring non-union members to pay fees).

318. See, e.g., Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1139 (1997) (“Individuals who are vehemently opposed to a decision this year may back the Court next year when memory of the case fades, and either value-based regeneration or a favorable ruling wins them over.” (emphasis added)).



places like the United States, but it is not universal. Active virtues are a widespread phenomenon.

We disagree for a second and more fundamental reason. If one places *any* weight on judicial effectiveness—on the power of courts not only to apply law but to secure compliance with their decisions—then courts need legitimacy (which, remember, for our purposes is a sociological concept tied to support). We think nearly everyone places weight on effectiveness. Few people would celebrate a court that eschews all strategy to make correct but pointless decisions. Few would stand by a court that resolves no disputes, restrains no government, and guides no behavior. It follows that nearly everyone sees the value of legitimacy, and so nearly everyone ought to take active virtues seriously. Their practice, we believe, can promote legitimacy.

To conclude that active virtues can promote legitimacy, however, does not end the inquiry. Courts can follow a wide variety of strategies to cultivate their legitimacy. Instead of the judges themselves, other actors or institutions could bring legitimacy-enhancing cases to court.<sup>319</sup> To justify active virtues requires rejecting those alternatives as insufficient.

We do not reject those alternatives across the board. The practice of active virtues cannot be optimal everywhere. If alternative institutions and strategies can generate enough legitimacy for courts to be effective, then active virtues might not be necessary.<sup>320</sup> Likewise, if courts have already mustered enough legitimacy to function as a co-equal branch of government, continuing to attract cases might be unjustified and even detrimental. Active virtues are justifiable when these alternative institutions and strategies are insufficient.

Even when justifiable, the practice of active virtues needs boundaries. No one supports a program of legitimation that primes courts for activism or unbalances the branches of government. Thus, support for active virtues is conditional. Under what conditions are active virtues laudable? We cannot provide a comprehensive answer. For now, we sketch two conditions necessary to justify active virtues.

The first condition we call *legalistic ends*. If judges seek power to aggrandize themselves, to supplant elected officials, or to impose their policy visions on citizens, then of course they should be restrained. For judges like these, active virtues should be forbidden. But suppose judges are not so avaricious. They might occasionally take liberties on jurisdiction, as when they avoid or attract cases for prudential reasons not explicitly

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319. Cf. Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 955–60 (2007) (documenting the establishment of independent institutions charged with investigation and advice-giving functions).

320. Cf. Grove, *supra* note 4, at 2272–76 (discussing effects of other political actors on judicial legitimacy).

countenanced by law. But mostly they abide by the rules, jurisdictional and substantive. They usually try to resolve cases objectively, interpret law correctly, and exercise discretion reasonably. This account is hopeful but not naive. We do not envision perfect judges but realistic, well-intentioned judges. They try to do right in the main. When judges behave this way, the legalistic ends condition is met.

The second condition we call *minimalist means*. If judges seek to maximize their legitimacy, then we object. Judges do not need maximum legitimacy. Like independence, legitimacy beyond a certain threshold can lead to trouble.<sup>321</sup> But suppose judges simply seek effectiveness. They need a threshold level of legitimacy to pursue legalistic ends, and they use active virtues to generate and sustain it. Judges under this account follow the portfolio theory, which we now present as a normative ideal instead of a description of actual behavior. When judges satisfy this ideal—when they balance unity and divisive cases, but only as needed to pursue legalistic ends—the minimalist means condition is satisfied.

When courts use minimalist means to pursue legalistic ends, there is at least a prima facie case for active virtues.

These conditions have an analogue in avoidance. Bickel and other proponents of avoidance do not support its use on all occasions. Clearly, they would object to a judge avoiding a case out of laziness. Presumably they support avoidance when it promotes legitimacy that judges use to do their jobs properly.

Notwithstanding this analogue, the normative analysis of passive and active virtues differs in an important way. When courts avoid cases, they leave something undecided. Litigants burn time and resources on motions, briefs, oral arguments, and fees, only to have the court close the door. This hurts litigants and can stymie the development of law. Active virtues are not vulnerable to this criticism. With active virtues, cases get decided.

### *C. Objections: Activism and Impartiality*

Active virtues will raise concerns about activism. To support active virtues, one might argue, is to support a robust, aggressive judiciary. Instead of waiting passively and ruling cautiously, we envision judges behaving actively, attracting the cases they want rather than accepting the cases they

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321. Cf. Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 595–606 (2014) (analyzing optimal judicial independence); see also Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIA. INTER-AM. L. REV. 57, 60 (1993) (arguing that removing courts from popular control interferes with democratic values). A legitimacy-maximizing judge might, in cases presenting discretion, always act to grow his or her legitimacy at the expense of other important values.

have.<sup>322</sup> Instead of making decisions faithful to law, we envision judges trespassing on the terrain of other branches and making decisions faithful to their institutional desires.

We can deflect this line of criticism with two reminders. First, our analysis is confined to active virtues, meaning case attraction for the purpose of enhancing judicial legitimacy. Judges might like to attract cases for all kinds of reasons. Some reasons, like clarifying law, might seem admirable, but many others, like overseeing a friend's case, do not. Case attraction in general raises many questions that we do not explore. Second, the normative case for active virtues hinges on satisfaction of the legalistic ends and minimalist means conditions. Those conditions preclude the kind of activism that many people fear.

A critic might respond as follows. Conceding, at least for the sake of argument, that judges *can* and *should* use attraction to build legitimacy does not mean we should endorse the practice. Regardless of any conditions we might like to attach, judges *will* use attraction for activist ends.

This is an argument about unintended consequences. The claim is not that active virtues are problematic *per se* but that the mechanisms required for active virtues can and will be used nefariously. Of course, this could be correct, but we have no way of knowing. Nor does anyone else—and that supplies our first defense. Permitting active virtues could do more harm than good, but the scales could tilt the other way. The question is empirical, and so far the only tool for sorting this out is intuition. We would not dismiss active virtues, which we believe to be common and potentially beneficial, because of conflicting intuitions.

Consider a related but distinct concern: impartiality. By most accounts, impartiality is central to the judicial function and the rule of law. Active virtues might threaten impartiality.

Scholars have long considered case initiation incompatible with impartiality.<sup>323</sup> Lon Fuller, for example, asked if courts should initiate cases,

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322. Consider MURPHY, *supra* note 63, at 21 (“The first of the more important technical checks [on the power of the judiciary] is that the Supreme Court lacks a self-starter. The Justices cannot initiate action. They can make policy only by deciding individual cases . . . which litigants must bring to the Court. Furthermore, Justices are supposed to decide only the issues which the litigants themselves raise.”). See also EPSTEIN & KNIGHT, *supra* note 104, at 57, 161 (expressing similar ideas); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979) (same); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121, 122 (1982) (same); Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845 (1996) (same); Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 943 (1989) (same). One might argue that to support active virtues is to support giving courts a self-starter.

323. Daniel Klerman and Greg Reilly have argued against case attraction in their work on forum selling, but their research focuses on courts competing against other courts. See Daniel Klerman & Greg

and his general answer was no.<sup>324</sup> He worried that initiation would undermine impartiality or its appearance.<sup>325</sup> In his view, judges should have an “uncommitted mind,” especially in cases involving private agreements between parties.<sup>326</sup> The initiation of cases usually implies a committed mind—a theory of what occurred and its proper resolution.<sup>327</sup> Fuller wrote, “it is clear that the integrity of adjudication is impaired if the arbiter not only initiates the proceedings but also, in advance of the public hearing, forms theories of what happened and conducts his own factual inquiries.”<sup>328</sup>

For similar reasons, Martin Shapiro considers initiation detrimental. His argument begins with the genesis of adjudication:

[W]henver two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance . . . . So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere.<sup>329</sup>

The key phrase is “call upon a third.” In Shapiro’s view, courts function best when parties voluntarily approach a neutral “third” to resolve their dispute. If parties bring the case to the judge, and if the judge is neutral, then the parties can hardly complain when the judge rules for one and against the other.<sup>330</sup>

When courts initiate cases, Shapiro’s triad breaks down. Judges do not initiate cases solely to resolve conflicts between parties. They initiate cases to achieve some broader social goal. “When we move from courts as conflict resolvers to courts as social controllers, their social logic and their independence is . . . undercut. For in this realm, while proceeding in the guise of triadic conflict resolver, courts clearly operate to impose *outside* interests on the parties.”<sup>331</sup>

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Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016); see also Stefan Bechtold, Jens Frankenreiter & Daniel Klerman, *Forum Selling Abroad*, 92 S. CAL. L. REV. 487 (2019).

324. See Lon L. Fuller, *The Forms and Limit of Adjudication*, 92 HARV. L. REV. 353, 385 (1978).

325. *Id.* at 387.

326. *Id.* at 386.

327. *Id.* at 385–86.

328. *Id.*

329. SHAPIRO, *supra* note 33, at 1.

330. See *id.* at 1–8.

331. *Id.* at 37 (emphasis added); *id.* at 2 (“A substantial portion of all behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad form breaking down into two against one.”); see also J. Woodford Howard, Jr., *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. L. 339, 344 (1969) (describing the adversarial process as an instrument to provide information to judges).

Fuller and Shapiro might be right about case initiation in general. However, initiation to practice active virtues might escape their concern. Legitimacy and impartiality must correlate. A court will enjoy greater legitimacy when people perceive it as impartial, and vice versa. Thus, the kinds of cases that courts seeking legitimacy want to attract should tend to be cases that do *not* threaten their impartiality.

To elaborate, Fuller and Shapiro worried most about courts hijacking private disputes. The danger peaks when courts have a “committed mind” and impose “outside interests” on private parties. But consider the examples of initiation from Part III. Mexico’s Supreme Court attracts “transcendent” cases.<sup>332</sup> Pakistan’s court initiates cases of “public importance” and to protect “fundamental rights.”<sup>333</sup> The Supreme Court of India’s epistolary jurisdiction applies to “public interest cases” concerning “poor and disadvantaged groups.”<sup>334</sup> None of this sounds like courts hijacking private disputes. It sounds like jurisdiction to resolve cases on public controversies. The litigants in these cases may suffer from collective action problems, meaning that but for initiation their cases would not get heard. Fuller recognized that concerns for impartiality fade where “the facts themselves speak eloquently for the need of some kind of inquiry” and where “initiation of the proceeding implies nothing more than a recognition of this need.”<sup>335</sup>

Notwithstanding these arguments, suppose Fuller and Shapiro have it right. Initiation to practice active virtues, at least some of the time, undermines judicial impartiality. In that event we face a tradeoff. Courts can grow their legitimacy at the expense of impartiality. Which of these fundamental values should courts prioritize? The answer cannot always be impartiality. In some circumstances, courts must pursue legitimacy first. What good is impartiality when judicial decisions have no force? Who will use an ineffective court?

#### *D. Coda: The Counter-Majoritarian Difficulty*

Bickel is famous not for his work on legitimacy *per se* but on the counter-majoritarian difficulty. The “difficulty” arises when unelected judges review the constitutionality of popular laws, striking some down and thus frustrating the will of the majority.<sup>336</sup> Legitimacy and the difficulty go hand-

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332. See *supra* Section III.A.2.

333. See *supra* Section III.A.3.

334. See *supra* Section III.A.4.

335. Fuller, *supra* note 324, at 386.

336. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201 (2002). For the sake of argument, we assume the “difficulty” is real, but some evidence suggests it is not. See, e.g., Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 158.

in-hand. Invalidating laws can put political pressures on courts, whereas upholding laws might not. Because of this connection, we have already addressed the difficulty implicitly. Here we address it explicitly by arguing that active virtues do not make matters worse.

If legitimacy depends in part on popularity, which depends in part on behaving in pro-majoritarian fashion, then judges are unlikely to use active virtues to behave in counter-majoritarian fashion. Simply put, a judge seeking legitimacy will not routinely frustrate democracy. We do not predict that judges always behave in pro-majoritarian fashion, just that judges exercising active virtues tend to.

Suppose a court exercises active virtues and rules against the majority. If the court's objective is legitimacy, and unless it miscalculates, then the decision must boost its legitimacy. Counter-majoritarian acts that grow judicial legitimacy do not seem like the kinds of acts that Bickel feared. Note that even as it rules against the majority, a court can mitigate the resulting pressure by avoiding a specific remedy.<sup>337</sup> This a common approach in countries like New Zealand, Canada, and the United Kingdom where courts regularly let the government decide how to remedy an unconstitutional action.<sup>338</sup> Softening remedies could be part of an active virtues strategy. In sum, we do not believe that the counter-majoritarian difficulty dooms active virtues in either its descriptive or normative sense.

#### CONCLUSION

Courts, Alexander Hamilton wrote, “have neither force nor will, but merely judgment.”<sup>339</sup> This fits the traditional picture of (1) judges who wait passively for cases to arise and (2) resolve them by applying law to facts. Scholars have long challenged the second half of this characterization. They argue that judges do not (and often cannot) simply apply law to facts; they must exercise discretion.<sup>340</sup> We challenge the first half of the characterization. Judges do not passively wait—they seek out cases and initiate them. They use formal and informal mechanisms to do so. This is not necessarily a violation of the judicial ideal. On the contrary, by promoting courts' legitimacy, active virtues make that ideal possible.

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337. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 708–09 (2001) (describing a model of constitutionalism that decouples judicial review from judicial supremacy, giving legislatures the final word); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT. J. CONST. L. 167 (2010).

338. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2009) 24–33 (reviewing the weak-form judicial review in some countries).

339. THE FEDERALIST NO. 78, *supra* note 29, at 392.

340. See, e.g., EPSTEIN & KNIGHT, *supra* note 104.