

Great Judges:  
Judicial Leadership in Theory and Practice

Charles M. Cameron

Department of Politics and Woodrow Wilson School, Princeton University

Mehdi Shadmehr

Department of Economics, University of Calgary

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## **Abstract**

We examine the practices of great judges who exercise leadership in common-law judiciaries like that of the United States. We advance a new theory that explains their ability to lead and other judges' willingness to follow. To do so, we leverage the "global games" revolution in modeling coordination games. Our theory of coordinative judicial leadership highlights the tension between innovating superior doctrine and maintaining consistency in the application of law – between good law versus the rule of law, two central concerns of judiciaries. On the substantive side, we scrutinize the practices – and the explanations offered for their practices – by such notable judges as Benjamin Cardozo, Roger Traynor, and Henry Friendly. The cases suggest some extensions to the theory and the need for new directions in the empirical study of judicial leadership.

# Introduction

Common law systems of law revere great judges. The great judges are hailed for their "comprehensive scholarship, sense of the 'right' result, craftsmanship, and versatility" (Judge Friendly on Justice Traynor), for their "analytic power, memory, and application" (Judge Posner on Judge Friendly), above all for their "innovativeness," "generativeness," "persuasiveness, and impact on the path of the law."<sup>1</sup> Citation analysis has become a cottage industry in the legal academy, undertaken not for the purpose of mapping networks of competing doctrinal schools as in White and McCann 1988, or uncovering the progression of doctrinal innovations across time and space – with some notable exceptions, discussed below – but instead for the explicit purpose of scoring individual judges on their impact and prominence within the judiciary (Landes, Lessig, and Solmine 1998). Compiling and comparing lists of "judicial saints" – Holmes, Brandeis, Cardozo, Hand and so on – is a source of never-ending effort and untiring pleasure for adherents to the "cult of the robe" (Schwartz 1997). Judicial biographies abound, a peculiar literary genre celebrating individuals who, almost by definition and certainly by choice, lead lives of probity, free from scandal, drama, rebellion, color or (one must say) much human interest. Top-notch judicial biographies include Mason 1968, Gunther 1994, and Dorsen 2012.

In contrast, the phenomenon of acknowledged great judges is virtually unknown in civil law systems. John Henry Merryman, in his famous book on civil law systems, makes the contrast explicit:

We in the common law world know what a judge is. He is a culture hero, even something of a father figure. Many of the great names of the common law are those of judges: Coke, Mansfield, Marshall, Story, Holmes, Brandeis, Cardozo. We know that our legal tradition was originally created and has grown and developed in the hands of judges ... But in the civil law world, a judge is

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<sup>1</sup>The latter criterion for assessing judicial greatness are specified by Judge Posner, particularly in reference to Judge Learned Hand, see

something entirely different. He is a civil servant, a functionary ... [Civil law] Judges of the high courts receive, and deserve, public respect but it is the kind of public respect earned and received by persons in high places elsewhere in the civil service. ... The great names of the civil law are not those of judges (who knows the name of a civil law judge?) but those of legislators (Justinian, Napoleon) and scholars ... The civil law judge is not a culture hero or a father figure, as he often is with us. His image is that of a civil servant who performs important but essentially uncreative functions. (Merryman 1969, pp. 34-36).

As Merryman explains, in civil law systems the official conception of law is a definitive statutory code produced by a democratically accountable legislature. Typically, civil law judges do not write long elaborate opinions. Instead, they merely announce case dispositions that supposedly follow from straight-forward application of the legislature's clear-cut code. So, in practice and often in literal fact, a civil law judge is a mid-level bureaucrat, essentially an "expert clerk," and hence no more likely to achieve greatness than, say, the administrator of the local motor vehicles department or a GS-10 working at the IRS.

In common law systems, though, much law has been and continues to be created by judges, not legislators. This is particularly true in critical areas of private law such as torts, contracts, and property. Much more judge-made law is derived from creative – in some cases, wildly creative – judicial interpretation of cryptic ambiguous or contradictory statutes, as well as through interpretation of the gnomic U.S. Constitution. In such a system, there is a real opportunity for individual judges to innovate new doctrine and then serve as judicial leaders, individuals whose innovations are cited, imitated, and adopted by other judges.

But this fact raises many questions. What allows one judge to lead, and – equally critically – what compels other judges to follow? What are the consequences of judicial leadership for the performance of a legal system? This essay begins to address these questions. To do so, we advance a novel theory of judicial leadership. Indeed, though there are many

studies of judges who were leaders, we are aware of no other *theory* of judicial leadership.<sup>2</sup> We distinguish our theory – a theory of coordinative judicial leadership – from theories of authority in judicial hierarchies. We also focus attention on a fundamental trade-off or tension in judicial leadership, between (on the one hand) creating new doctrine that reflects "the felt necessities of the times" and (on the other) maintaining settled law that allows a population of judges to administer justice consistently and predictably. The tension between innovation and consistency is a key element of our theory of coordinative judicial leadership. Flowing from this tension, the theory also highlights the perils of judicial leadership – unless the leader speaks with a loud enough "megaphone," her actions risk discoordination within the judiciary. This danger acts as a brake on judicial leadership. Finally, the theory suggests several empirical regularities. Though we do not submit these to tests with systematic data, we do offer a plausibility check by reviewing the actions of several acknowledged great judges, including what they themselves say they were trying to do. We focus on three acknowledged great judges, Benjamin Cardozo, Roger Traynor, and Henry Friendly. The case materials are (arguably) broadly consistent with the theory. But they suggest some valuable extensions to it. And, the theory points to important gaps in the empirical study of judicial leadership.

## What Is Judicial Leadership?

### *The Two Faces of Judicial Power: Hierarchical Authority and Persuasive Argument*

We begin with the classic definition of power: *Power is a causal relationship between preferences and outcomes* (Nagel 1975). Although there remain some conceptual issues with

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<sup>2</sup>Summarizing studies of presidential leadership in the legal academy, prominent legal scholar Eric Posner notes, "Legal scholars rarely discuss 'leadership' – of the president or anyone else." (Posner 2016 p.35). This is a bit harsh, neglecting the contributions of Judge Richard Posner (Posner 1990, Posner 1994). The latter in particular is extremely stimulating but the focus is on measuring influence rather than formulating a theory of judicial leadership. In contrast there are extensive literatures on leadership across the social sciences; Alquist and Levi 2011 provides an excellent overview. But none of these consider leadership within judicial systems.

this definition, it has become the standard approach in Political Science. Let's apply it to the judicial setting. There, we may say Judge A has power over Judge B's choice of doctrine, if A desired B to opt for or enforce doctrine X rather than doctrine Y, and A's preference for this outcome caused B to choose or enforce doctrine X.

In fact, power relationships like this are the subject of a substantial theoretical and empirical literature in the study of judicial politics. There, an apex court like the U.S. Supreme Court is conceived of as a "principal" and the lower courts as "agents" (Songer et al 1994). So, in terms of judicial power, Judge A = the U.S. Supreme Court, and Judge B = a lower court judge. The judicial Principal-Agent literature then analyzes the institutional devices that give bite to the power relationship. For example, the U.S. Supreme Court uses the certiorari process for selecting cases. And, it appears to use cert as a form of strategic auditing to target errant decisions by lower court judges (Cameron et al 2000, Spitzer and Talley 2000, Carrubba and Clark 2012). The rather strange "rule of four" employed during the cert process empowers passionate minorities on the Supreme Court, but this has the effect of boosting the doctrinal power of the majority since deviations by lower court judges are likely to trigger a review that moderate majorities favor but might not themselves invoke (Lax 2003). On the intermediate Court of Appeals, dissents allow minority factions allied with the majority on the Supreme Court to "blow a whistle" attracting a higher level review (Beim et al 2014, Beim et al 2015). En banc reviews on the U.S. Courts of Appeal allow the majority faction in the circuit to control ideologically out-lying three-judge panels, especially when that majority is aligned with the Supreme Court (ibid). And so on: many features of the federal judiciary give impetus to the authority vested in the U.S. Supreme Court, to enforce doctrinal uniformity throughout the judicial hierarchy.

As insightful as the principal-agent literature has been about power *within* a judicial hierarchy, it is crashingly silent about influence *across* judicial hierarchies. And, it is silent about influence within a hierarchy *across equivalent levels absent vertical direction*. To grasp these distinctions, consider Figure 1. Shown there are two judicial hierarchies, for

example, two state judicial systems, or the federal judiciary and a state judiciary. As is typical in judicial systems, each consists of three layers (see Cameron and Kornhauser 2006). The lowest layer is composed of single-judge trial courts. Above them are multi-member intermediate courts of appeal (denoted ICs in the figure). And above the intermediate courts is the apex court, a Supreme Court (SC in the figure). The power relations studied in the principal-agent judicial literature are *authority-based relations*, and are denoted by the solid line in the left of the figure (helpfully labeled "Authority"). As shown, these authority relations are top-down. But top-down authority relations are not the only avenue of influence at work in judicial hierarchies. Two other pathways are readily apparent, shown by the dark dashed lines in the figure.

The first pathway is apex-to-apex influence, for example, Judge A on the Supreme Court of a state writes an opinion that creates a doctrinal innovation, and then this judge's innovation is adopted by Judge B on the Supreme Court of another state. Obviously, judges in completely different state judicial systems are under no obligation whatever to conform to one another's doctrinal choices. Yet, this phenomenon frequently occurs, as several empirical studies show clearly (see inter alia Caldeira 1985, Graham 2015). Famous examples include cases authored by Benjamin Cardozo while a member of New York Court of Appeals (that state's apex court) and by Justice Roger Traynor while a member of the California Supreme Court (discussed below).

The second pathway concerns a judge on the intermediate court of appeals who creates a doctrinal innovation that is then adopted by other intermediate courts of appeal within the hierarchy. A critical feature of this pathway is that it does *not* lead through the apex court, in other words, the Supreme Court does not review the intermediate court's opinion, accept its doctrine, and then impose it on all the intermediate courts of appeal. (This process is studied in Clark and Kastellec 2013 and Beim 2016). Rather, the first judge's innovation is adopted voluntarily by other judges at the same level in the hierarchy. Again; in the American system of jurisprudence, the latter judges are under no obligation to respect the

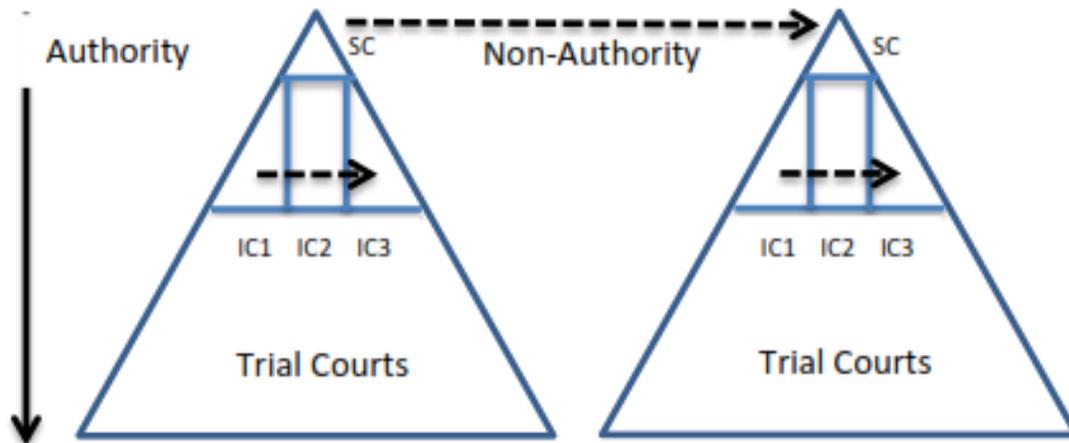


Figure 1: Authority Relations vs. Leadership Relations in a Judicial Hierarchy. In the figure, each triangle denotes a judiciary composed of an apex court the "SC" (Supreme Court), intermediate courts of appeal (IC1-IC3), and lower level trial courts. The authority relationship of the Supreme Court over lower courts in its hierarchy is denoted by the black solid line. A non-authority influence is denoted by a dashed line.

first opinion – but instead, they do, at least on occasion. Famous examples include opinions by Judge Learned Hand while a member of the Second Circuit and by Judge Henry Friendly while a member of that same circuit (discussed below).

What occurs in apex-to-apex influence and intermediate court-to-intermediate court influence? Here we follow economist Benjamin Hermalin who, reviewing studies of firms and corporate cultures, distinguishes the exercise of power through authority and the exercise of power through leadership:

Leadership should be seen as a phenomenon distinct from authority or the exercise of some office or title. The defining feature of leadership is that a leader is someone with voluntary followers. A central question is, therefore, why do they follow? What is that leaders do that makes followers want to follow? (Hermalin 2013: 435).

We return shortly to the vital issue of follower motivation, but focus first on Hermalin's initial point: leadership is defined by *voluntary* followership. In the apex-to-apex pathway,

the second state supreme court need not follow the first judge's lead – but it does, voluntarily. In the IC-to-IC pathway, the second intermediate court of appeals need not follow the first judge's lead — but it does, voluntarily. Thus, these two non-authority based pathways of influence involve judicial leadership. Obviously, judicial leadership is a type of power. But it is a type of power distinct from the authority-based power studied in the judicial principal-agent literature.

### ***The Big Trade-off: Innovation versus Consistency***

The reader may readily admit that judicial leadership exists and is distinct from the authority-based power studied in the principal-agent approach to judicial hierarchies. But is there anything actually to explain? Weren't the famous opinions of Cardozo, Hand, Traynor, and Friendly simply excellent opinions that should have been followed by other judges virtually automatically?

The answer is, "no." Or at least, "not obviously". The issue turns on what we call the great trade-off in doctrinal adjustment, a trade-off between the benefits of modifying doctrine and the benefits from not doing so, the tension between innovation and consistency.

This tension is well-captured in two of the most famous maxims about law, both formulated by great judges. The first maxim, due to Oliver Wendell Holmes Jr., addresses innovation: "The life of the law has not been logic; it has been experience." Holmes goes on to explain, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (Holmes 1881). Thus, Holmes asserts as a factual matter that law adapts to a changing society. But he seems to go beyond a purely positive point. He appears to make a normative one as well: Law adapts to a changing society *and its a good thing that it does*. The benefit of periodic adjustments of legal doctrine is rather obvious. Law acts as the scaffolding of commerce, industry, government, and many personal

relations. As society changes, that scaffolding must change too lest it become an impediment rather than an assistance to desired social relations.

Holmes is silent on *why* judges might want to improve doctrine. In other words, how do doctrinal innovations enter the utility function of the innovative judge? Perhaps new doctrine allows the innovator to correctly decide the cases before him, affording the satisfaction of a job well done. In other words, the judge's utility function includes a term "correct dispositions that I personally produce." Here, a doctrinal innovation is almost a private good for the innovator. Another possibility is that an innovative appellate judge receives satisfaction not only from deciding cases using good doctrine, but also when subordinate judges under his jurisdiction do so as well. So the judge's utility function includes a term, "correct dispositions under my responsibility." A final possibility is that an innovative judge receives satisfaction when his good innovation is adopted by others even if they are not his subordinates. In that case, the innovation (if adopted) resembles a public good created by the innovator, a public good – "good policy" – entering the utility function of the judge.<sup>3</sup> It would be hard to untangle these motivations simply by observing the behavior of judges. But as we shall see, great judges, when reflecting on their actions in their non-judicial writings, often seem sensitive to the third motivation.

The second maxim, due to Justice Louis D. Brandeis, addresses the virtues of continuity: "Stare decisis. is usually the wise policy, because in most matters *it is more important that the applicable rule of law be settled than that it be settled right.*" (Brandeis 1932, emphasis added). Stare decisis. – literally, "to stand by what has been decided" – is the legal principle that calls for adherence to precedent, to maintaining the doctrinal status quo. Brandeis's adage has such a ring of truth about it to the legal mind that it is frequently quoted without much reflection on the obvious rejoinder, Why? Why is it better to be definitely wrong than only probably right? Or even definitely right? On this question, Brandeis was silent. In other words, Brandeis's maxim should read, "It is more important that the applicable rule

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<sup>3</sup>Cameron and Kornhauser 2017 provides further discussion of these motivations, and how to incorporate them into formal models of courts.

of law be settled than that it be settled right *because of Factor X.*" Unfortunately, Brandeis offers us no "Factor X".

But other judicial analysts have not been so reticent. In fact, two formal models supply explicit rationales for Brandeis's adage. In Cooter, Kornhauser, and Lane 1979, a single immortal judge considers whether to alter existing doctrine in order to improve it (bring it more into alignment with social needs). Implicit in the model are many private actors who enter into agreements "in the shadow of the law." The structure of those agreements assumes current doctrine. If the judge alters existing doctrine, thousands of firms and individuals will need to renegotiate their existing contracts, alter their business practices, or change their private conduct. Doing so would be quite costly, perhaps immensely so. In the model, the court is sensitive to these social adjustment costs. If the adjustment costs are too high, the court maintains the status quo rather than adjust. Thus, social adjustment costs act as a brake on doctrinal change.

The answer offered in the second paper is rather different. In Bueno De Mesquita and Stephenson 2002, an appellate court – a principal – considers a new policy that will be implemented by a single mechanically faithful but possibly somewhat inept subordinate court, the agent. This creates the possibility of flat-out error by the subordinate – it simply misunderstands what the higher court wants. This chance for error by the agent in the principal-agent relationship induces the principal to proceed cautiously. If the subordinate is likely too ham-handed and the improvement from innovation rather modest, the principal may not adjust doctrine at all.<sup>4</sup>

These models surely capture some of the motivation behind doctrinal conservatism. But neither the adjustment cost model nor the subordinate error model address what many legal analysts would see as the real thrust of Brandeis's adage, namely, *the desirability of on-the-ground consistency in the administration of law.* Consistency in implementation is central

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<sup>4</sup>This summary does not do full justice to the model, which provides some informational foundations. In particular, the initial policy is supported by a series of signals (rulings) from the principal, so the subordinate has tight beliefs about the proper doctrine. The shift in doctrine negates the value of this string of signals, which must begin all over again.

to the very idea of "rule of law," one of the great desiderata of any legal system. Rule of law requires that the same case, if presented to any judge, result in the same disposition. Rule of law assures that judicial rulings depend only on the facts and the law, not on the luck of the draw of a judge. This consistency is important for simple fairness, which is essential if a legal system is to maintain the respect and allegiance of the citizenry. Consistency is also important if private agents are to make efficient arrangements in the shadow of the law.<sup>5</sup> Unfortunately, achieving consistency across a large number of trial judges isn't easy. Although clever institutional design can help, high levels of consistency may require trial judges to value consistency itself. And even if they do, high consistency demands implementers understand and agree on what doctrine is and what it demands each to do. But achieving common agreement on doctrine among a plethora of implementers is no easy task, particularly when doctrine becomes a moving target. Hence we may complete Brandeis's adage: "It is more important that the applicable rule of law be settled than that it be settled right *because settled law conduces to consistent administration of justice by a multitude of implementers, and the value of consistency even with less-than-perfect doctrine often trumps the value of a better rule with less consistent implementation.*" In this account, Factor X = consistent administration by many judges. In other words, coordination by many judges on common doctrine.

Just to be clear, neither the adjustment cost model nor the subordinate error model address this Factor X, nor can they. In the adjustment cost model, the court itself implements policy so "law on the ground" is completely consistent and perfectly responsive to the innovator's wishes. In the subordinate error model, "law on the ground" is administered by a single agent, consequently implementation is completely consistent though perhaps somewhat discordant with the high court's preferred doctrine. Only if one takes seriously a world of many implementers can one pursue the logic of coordination as Factor X, and then explore

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<sup>5</sup>Private agents may be able to contract around inconsistent judges, for example, by setting up private orderings or relying on third party mafias and the like (Gambetta 1996). But the need to do so imposes considerable transactions costs on the agents. As a result, one would expect many profitable interactions to go unfulfilled when official justice becomes little better than a lottery.

the big trade-off between doctrinal innovation and doctrinal consistency.

### *Just Judicial Activism?*

If judges face a trade-off between innovation and consistency, are leading judges just "judicial activists" who highly value some pet innovations over consistency? And are their followers just judges who share their ideological bias? In fact, in their writings many great judges do seem to value doctrinal innovation. But that does not make them "judicial activists" as that phrase is commonly used. Judicial activism is usually taken to mean, a court riding roughshod over perfectly adequate precedent or constitutionally valid legislation in pursuit of an ideological or partisan objective (see Cross and Lindquist 2006). Of the great judges we consider, only one – Roger Traynor – at all resembles a judicial activist in this sense. Instead, the fields of leadership commanded by the great judges often lack a pronounced ideological or partisan bent (the reader may wish to peruse Table 1, which lists ten doctrinal innovations in tort law). Instead, the motivation for leadership often seems less ideological than a desire to "tidy up" the law (in Karl Llewellyn's phrase) so that it is easier to understand, easier to implement, easier to follow, or just makes more sense.

To provide a concrete example, consider Judge Friendly's preferred statutory targets as identified in his essay "The Gap in Lawmaking – Judges Who Can't and Legislators Who Won't," included in Friendly 1967. One might expect an essay with such a title to extol the judicial activism favored by the later Warren Courts, or Judge Traynor's California Supreme Court, or Rehnquist-era conservative activists like Justices Scalia or Thomas. But that is not Friendly's brief. Instead he points to areas of the law where congressional action or inaction has created bizarre, contradictory, woefully incomplete or manifestly idiotic laws leading to judicial inequities, miscarriages of justice, or economic inefficiency. (Judge Friendly is able to identify many such instances). But even in those areas, Friendly eschews a call for wide-ranging judicial innovation, though he himself was a famous innovator. Instead, he suggests ways Congress could do a better job. We will return to Friendly's jurisprudence shortly, but

its worth noting his criticism of one the high-watermarks of Warren Court judicial activism, the *Miranda* decision requiring police officers to warn suspects against self-incrimination. In his essay "A Postscript on Miranda," Friendly argues the decision's constitutional justification was weak. But he does not blast the decision as unbridled activism, as one might expect from a committed conservative. Rather, his evaluation is conditional and pragmatic, essentially saying, "Let's see how this works out in practice."

Of course, some noted judicial activists take a temperate line in their official writings. But Friendly's jurisprudential writings do not come trailing the noxious odor of hypocrisy, unlike those of some notable Supreme Court activists. Though Friendly was an innovator and leader, neither in his actions nor his justifications does he resemble the stereotype of a liberal or conservative "judicial activist." Something other than ideology was at play, both in his leadership and in the followership of other judges. But what?

## **Toward a Theory of Judicial Leadership**

Return again to Hermalin's statement: "The defining feature of leadership is that a leader is someone with voluntary followers. A central question is, therefore, why do they follow? What is that leaders do that makes followers want to follow?" Hermalin identifies a crucial element of any theory of leadership: it must also incorporate a theory of *followership*. Accordingly, we sketch a theory of judicial leadership with two distinct components: first, a theory of followership explaining why potential followers – judges who value correct adjudications but also uniformity of implementation – would be willing to follow the lead of a great judge; and second, a theory of the behavior of a great judge anticipating the responses of potential judicial followers. We draw on recent developments in the game-theoretic analysis of coordination games, specifically the "global games" break-through in analyzing coordination games (Carlsson and van Damme 1993, Morris and Shin 2003). The global games approach renders tractable puzzling elements of coordination games that date back at least

to Rousseau and Hume's discussion of the stag hunt game. We argue that global games are particularly well-suited for studying social situations like that facing judges, in other words, a situation in which the actors care about a social fundamental (such as, what is the best doctrine for a particular set of cases) but also care about the choices of the other players (hence, the doctrine that best maintains judicial consistency across judges).

The essential features of a global game are the following. Within a coordination game setting, private signals about a social fundamental give rise to beliefs not just about the fundamental but also about the other players' beliefs about the fundamental. In turn, the beliefs about both entities – the fundamental and others' beliefs about the fundamental – affect individual choice. The remarkable findings are 1) incomplete information about the fundamental can break the standard multiplicity of equilibria in coordination games, leading to a unique equilibrium strategy for all players; and 2) in an environment with both public and private signals about the social fundamental, individuals in some sense "over-weight" public signals because they provide information about what other players are likely to do. The role of leadership in a global game setting is a topic of recent research, which we review below.

### ***Coordinate This! A Word About Judicial Rules***

Before we sketch our theories of judicial followership and judicial leadership, we need to say a few words about the object of coordination: judicial rules.

Broadly speaking, the most basic job of a judge is to resolve a conflict between litigants by applying a rule to the facts in the case, thereby rendering judgment. As an example, consider a tort case involving injury from a defective product. The possible judgments are: defendant is liable, defendant is not liable. Under some tort rules, the relevant fact in the case is the degree of care exercised in manufacturing the product. So, if the defendant exercised at least a certain level of care in manufacturing the product ("reasonable care") the defendant should be held not liable. But if the defendant exercised less care, she should

be (or at least could be) held liable. Thus, the legal rule has the general form:

$$r(x; y) = \begin{cases} 1 & \text{if } x \geq y \\ 0 & \text{otherwise} \end{cases} \quad (1)$$

where  $x$  denotes the facts in the case (e.g., level of care),  $y$  denotes a cut-point level of care (e.g., the level of care corresponding to "reasonable" care), 1 connotes one judgment (not liable) and 0 denotes the other judgment (liable). Another universally familiar example of a legal rule is a speed limit rule. In that context,  $x$  would denote the speed of the car,  $y$  the speed limit, judgment 1 would be "guilty of speeding" and judgment 0 would be "not guilty of speeding."

The reasonable care tort rule and the speed limit rule are examples of a larger class of legal rules, so-called cut-point rules. In fact many legal rules (though not all) have this general form. As in much of the formal literature on judicial politics, we focus on cut-point rules.<sup>6</sup>

In many cases, the "official" cut-point for a judge is set by statute or by a relevant apex court. But often no cut-point exists. In this instance, a court – often an appellate court – must create one in order to dispose of that case and similar ones. Given such a situation across a group of appellate courts (say, supreme courts in multiple states), coordination has a very simple meaning: *the courts employ the same cut-point  $y$  in rendering judgment in cases.* In fact, the closer the two implemented cut-points, the more closely the courts coordinate because they will decide almost all cases the same way. Conversely, the farther apart the two  $y$ 's, the less coordinated the courts.

In addition, without being too specific, one can imagine a normative evaluation of different possible cut-points. For example, one might imagine a cost-benefit analysis of different standards of care or different speed limits. Or, one might imagine a convincing philosophical or jurisprudential evaluation of rights and obligations. But in either case, one

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<sup>6</sup>For more on legal rules, see Cameron and Kornhauser 2017.

can say on some grounds that one standard of care is better than another, or one speed limit is superior to another. And, one can speak of the "best" standard or cut-point. Call the best cut-point  $\theta$ .

### ***Judicial Followership: The Global Games Approach***

We can now consider a theory of followership. Our analysis is based on Morris and Shin 2002 and Angeletos and Pavan b.

Consider two judges who make decisions in the absence of a definitive doctrinal cut-point. Index the two judges by subscript  $i \in \{1, 2\}$ . Judge  $i$  will set doctrinal cut-point  $y_i \in \mathbb{R}$ . In this action, he has two desiderata: set the cut-point as close as possible to the best possible cut-point  $\theta \in \mathbb{R}$  (which one can regard as the state of the world) and set  $y_i$  as close as possible to the other judge's chosen cut-point  $y_j$ . More specifically, Judge  $i$ 's payoff from choosing  $y_i$  is

$$u_i(y_i, y_j, \theta) = -(1 - r)(y_i - \theta)^2 - r(y_i - y_j)^2, i \neq j \quad (2)$$

where  $0 \leq r \leq 1$ . In words, the judge wants her chosen rule to be as good as possible (close to  $\theta$ ) but also to match the rule chosen by the other judge. Overall utility is a weighted average of the two distinct components.<sup>7</sup> So, if the judge cared only about setting doctrine correctly,  $r = 0$  and utility reduces to  $-(y_i - \theta)^2$ . Conversely, if the judge cared only about coordination, then  $r = 1$  and utility reduces to  $-(y_i - y_j)^2$ .

Critically, we assume the two judges do not know the best possible doctrinal cut-point (the state of the world)  $\theta$ . Rather, they have some initial beliefs about it and then receive noisy signals about it, e.g., from hearing a case and, perhaps, reading the opinion of a leading judge. The former signal is purely private to the judge since only she hears testimony and the arguments of counsel. But the latter is a public signal available to all. The public signal

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<sup>7</sup>It is possible to micro-found this utility function using a "dispositional" utility function and an expected distribution of cases, see Cameron and Kornhaser 2017. But we omit these technical details here.

opens the door to leadership by the prominent judge.

We first briefly consider two benchmark cases, 1) known  $\theta$ , then 2) uncertain  $\theta$  with private signals. Then we consider the scenario of principal interest, a private signal and a public signal together.

### Known Best Policy

As a benchmark, let's briefly consider what the two judges would do if they both knew the best cut-point  $\theta$  and this fact were common knowledge. Using Equation 2, It is easy to show that each judge's optimal choice is  $y_i = ry_j + (1-r)\theta$ . So, judge  $i$ 's best action depends on the other judge's doctrinal choice ( $y_j$ ) and on the value of the best possible cut-point ( $\theta$ ).<sup>8</sup> Solving simultaneously for both cut-points leads to  $y_1^* = y_2^* = \theta$ . In words, the two judges would both choose the same doctrinal cut-point, the best possible cut-point  $\theta$ .

As this benchmark indicates, the judges are in a strategic situation where coordination looms large. And, if there is a clear "best" coordination point, they will coordinate on that point.

### Unknown Best Policy: Purely Private Signals

Now suppose, more realistically, that the two judges are unsure about the best judicial doctrine. As is common in global games, we'll assume that they are quite unsure: they initially believe that the best cut-point could be any value at all, and that initially any one value is just as likely to be the best cut-point as any other.<sup>9</sup> Then, we imagine the judges receive private, noisy information about the best doctrinal cut-point. We imagine these private signals arise from information gleaned from hearing a case, listening to testimony and studying the arguments of counsel. Thus, the information is purely private to judge  $i$  – no other judge see  $i$ 's information. But any judge who hears a case receives her own

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<sup>8</sup>This is judge  $i$ 's best response function. Both best response functions are increasing in the other judge's action, so this game involves strategic complements.

<sup>9</sup>Technically, the two have improper uniform priors over the real line, and this is common knowledge.

private signal about good policy. We assume, following Morris and Shin 2003, that signals have the form  $s_i = \theta + \varepsilon_i$  where  $\varepsilon_i$  is a normally distributed random variable with mean 0 and variance  $\sigma_\varepsilon^2$ . In words, the signal is noisy but is at least somewhat informative about the best doctrine and is unbiased.

If a judge were just acting alone and received many such signals, her beliefs about the best doctrine would converge to the correct value as she learned more and more about the best doctrine (for a model with this flavor, see Bueno De Mesquita and Stephenson 2002, discussed earlier). However, a judge sensitive to the actions of other judges has a more complex strategic problem: not only does she wish to set her doctrine to the best value, she wishes to set her doctrine to the same value as that chosen by other judges. So, she has to ask herself, "Given the signal that I saw, most likely *what did the others judges see and what are they likely to do given their signal?*"

This added strategic component leads some analysts to call this type of game a "beauty contest," after a British newspaper competition made famous in a passage in John Maynard Keynes' *General Theory of Employment, Interest, and Money*. In the newspaper competition (according to Keynes), readers won a prize if they were able to select the "most attractive" person in photographs, as chosen by others. In other words, the point was not to pick the most attractive candidate, but the candidate that others found most attractive. Keynes claimed that the stock market is this kind of beauty contest since the value of a stock depends not only on its fundamentals but on the evaluations of those fundamentals by other investors. So stock-picking is not just about which stocks are actually good businesses but which ones other investors will see as good businesses. Our claim is that judicial policy-making across apex courts or across similar tiers in a judicial hierarchy has an element of a Keynesian beauty contest.

When private signals have the simple form  $s_i = \theta + \varepsilon_i$  with  $\varepsilon_i \sim N(0, \sigma_\varepsilon^2)$  the best behavior for a judge is fairly straight-forward: Judge  $i$ 's best estimate of the true  $\theta$  is just  $s_i$  (this is a well-known fact in statistical decision theory). And, given this belief about  $\theta$ , she

should believe that most likely the other judges saw a similar signal and will therefore have similar beliefs. Accordingly, following a logic similar to the known policy case, a judge who see private signal  $s_i$  should set  $y_i = s_i$ . On average, a judge can do no better than this.

### Unknown Best Policy: Private Signals and a Public Signal

Now consider the much more interesting case in which the judges hear cases and thus receive private signals about good doctrine, but also read the opinions of prominent judges like Cardozo or Traynor. The latter provide a public signal about good doctrine, a signal that many judges receive – and know that other judges receive as well. When judges receive both types of signal, how should they evaluate or weigh them?

Let's call the public signal  $z$  and assume it has the same general form as the private signals, that is,  $z = \theta + \eta$  where  $\eta$  is a normally distributed random variable with mean 0 and variance  $\sigma_\eta^2$ . And, we'll assume  $\eta$  is distributed independently of  $\theta$  and the  $\varepsilon_i$ s. It proves useful to re-write the variance of  $\eta$  and the  $\varepsilon_i$ s in terms of their precision, which is just the inverse of the variance. Call  $\eta$ 's precision  $a = \frac{1}{\sigma_\eta^2}$  and the  $\varepsilon_i$ 's precision  $b = \frac{1}{\sigma_\varepsilon^2}$ . Then from statistical decision theory, if judge  $i$  sees the pair of signals  $(z, s_i)$  she believes the expected value of  $\theta$  is  $\frac{az + bs_i}{a + b}$ . And, using the results in Morris and Shin 2003, one can derive that judge  $i$ 's optimal choice of doctrine is

$$\frac{az + b(1 - r)s_i}{a + b(1 - r)} \tag{3}$$

This remarkable result has the following interpretation. First, suppose the judges had no concern with coordination, but only wanted to set the best doctrine. Then  $r = 0$  and Equation 3 says, "Set doctrine to your expected value of  $\theta$  given all the information you have received." Conversely, suppose the judge cares only about coordination and is unconcerned about choosing the best doctrine per se. In that case,  $r = 1$  and Equation 3 says, "Ignore your private signal and set doctrine strictly according to the information in the prominent

judge's opinion." To the extent judge  $i$  cares about both the quality of the doctrine and coordinating with other judges, she will use both pieces of information in setting doctrine – but in some sense over-weigh the public information from the prominent judge, relative to her actual belief about the best doctrine.

Why this over-weighting of the public signal? The intuition is simple and clear: all the judges receive the common signal from the prominent judge, and they all know this. The common signal thus provides information not just about the best doctrine, but about the likely actions of the other judges. Because of the beauty-contest aspect of situation, this double-whammy gives the prominent judge's opinion tremendous impact.

### ***Judicial Leadership: The Decision to Send Public Signals about Doctrinal Innovation***

The potency of public signals raises interesting questions about the considered, deliberate diffusion of public information by aspiring leaders. When should a leading judge communicate her perception of the value of a doctrinal innovation, and when should she hold her peace?

Leadership in global games currently defines a research frontier in Political Science and Economics. For example, Bueno De Mesquita 2010 studies the signaling role of vanguards in revolutions. In this model, there is a vanguard and a continuum of citizens distinguished by their private level of "anti-regime sentiments." Vanguards exert costly efforts to foment violence, which is publicly observed. Then, the citizens decide whether to revolt. The intensity of violence is a noisy public signal of anti-regime sentiments in the population. Hence, a vanguard's effort reduces the strategic risk of revolting, thereby enhancing coordination among citizens. Shadmehr and Bernhardt 2016 also studies the leadership role of revolutionary vanguards, though in more complex strategic settings. In addition, these authors consider the endogenous emergence of revolutionary leaders. Landa and Tyson 2016 study leadership in bureaucracies.

A lesson from this literature is, leadership in a global game can be a two-edged sword. On the one hand, public signals can help individuals coordinate on a favorable equilibrium. But, on the other hand, they need not do so. In fact, attempts at leadership can actually make matters worse by mis-coordinating followers on the wrong outcome as they down-play their own information in favor of that of the leader.

In Shadmehr and Cameron 2017 we explore these points in some detail. We postulate a prominent judge who moves before the two follower judges, a judge who can send a public signal about doctrine. We do not assume the leading judge knows the best possible doctrine for sure. However, we assume he can reduce the variance of the signal he observes, by working harder. More specifically, we allow the prominent judge to choose " $a$ ", the precision of the public signal, by expending costly effort. So greater deliberation and care produce a more certain signal in the judge's opinion. Then, we assume the other judges observe the public signal  $z$ , as well as their private signals  $s_i$ . In essence, the follower judges read the leading judge's opinion. We assume the leader judge, just like the follower judges, values both correct doctrine and coherent doctrine. But he may not value these objectives to the same extent as the follower judges. For example, he may be more or less concerned with establishing the best doctrine, and more or less concerned about doctrinal coherence. And, we assume the leader judge is concerned about doctrine within the organization as a whole. Hence, we endow the leading judge with utility function  $U_L = u_L(y_1, y_2, \theta) - C(a)$  where

$$u_L(y_1, y_2, \theta) = -(1 - R) [(y_1 - \theta)^2 + (y_2 - \theta)^2] - R [(y_1 - y_2)^2 + (y_2 - y_1)^2] \quad (4)$$

and  $C(a)$  is the cost to the leader from setting the precision of his signal (the cost of judicial effort). Note that the leader's weight on coherence,  $R$ , need not be the same as the weight  $r$  on coherence employed by the follower judges.

Consider the incentives facing the leading judge. Suppose the leading judge cared only about judicial coherence and not at all about the quality of doctrine (so, in Equation 4

$R = 1$ ). In this case, the leader would just want the two followers to use the same doctrine. If the follower judges did not receive private signals they would immediately coordinate on the leading judge's signal, if it were at all informative. Of course, the follower judges do have private information but the more precise the leading judge's signal, the greater impact it will have on their choice. So, if the leading judge cares greatly about coherence and not so much about correctness, he has strong incentives to send a very precise, very powerful signal.

Conversely, though, suppose the leading judge cares exclusively about finding the best doctrine and not at all about coherence among judges (so in Equation 4  $R = 0$ ). Then the situation is more complicated. To maximize the chance of finding the best doctrine, the following judges should utilize both their own information and that from the leader. Of course, more precise information from the leader is helpful in discerning the best doctrine. However, because the follower judges are concerned about coordinating, they tend to overweigh the leader's public signal. And, greater precision in that signal actually makes the overweighing worse. So from the leader's perspective, greater precision in his own signal is a two-edged sword: on the other hand, it provides useful information to the followers; but on the other, it distorts their incentives and may lead them to coordinate on a worse policy than they would have if they had paid more attention to their own signals.

A full analysis of the model is somewhat involved, since the leader must anticipate the response of the followers to any message he might send. But Figure 2 illustrates one of the insights. The figure shows the leader's expected utility from increasing signal precision, neglecting the cost of action (the figure shows Equation 4, taking into account the followers' actions). Perhaps surprisingly, the leader's expected utility initially decreases in signal precision. This occurs because the public signal encourages the followers to ignore their private information. As the precision of the public signal increases further, the leader's expected utility increases. This occurs both because a powerful public signal helps coordinates the followers and because a highly precise signal likely points the way to good doctrine. However,

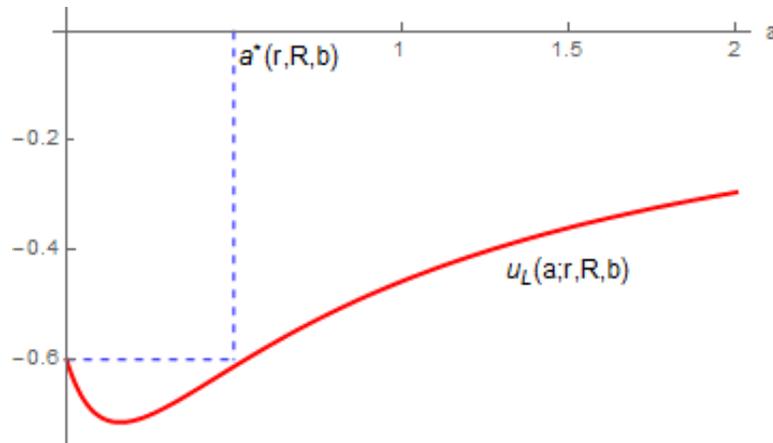


Figure 2: Signal Precision and the Leading Judge's Expected Utility. Shown is the judge's expected payoff as a function of the public signal's precision, ignoring the effort costs of producing that level of precision (see Equation 2). In the region indicated by the dashed line, no signal is better than sending a signal. The figure assumes  $b = 2$ ,  $f = .8$ ,  $R = .2$ .

if the cost of effort is sufficiently high for the leader, she may prefer to send no signal at all. This is more likely to occur when the leading judge cares more intensely about getting the policy right than about coordination and when increasing precision (writing a more insightful opinion) is particularly costly for the leader.

## Great Judges: What They Do, How They Think

We've elaborated a theory of judicial followership and judicial leadership but have yet to examine concrete examples of great judges in action. Let us do so! But first we need to clarify some ambiguous points.

### How Do You Tell a Great Judge When You See One?

Immediately: How do you tell a great judge when you see one? Answer: A great judge successfully innovates great doctrine. Lets unpack this seemingly straight-forward definition, examining "doctrinal innovation," "success," and "great."

First, what constitutes a *doctrinal innovation* in the law? Graham 2015 offers a close study of the diffusion of twenty innovations in tort law, with briefer analysis of seven more

<b>Doctrinal Innovation</b>	
1	Strict liability for product injuries due to defective products (the <i>Escola</i> doctrine)
2	Products liability not restricted just to contract holders (the <i>MacPherson</i> doctrine)
3	A right to privacy enforceable in tort
4	A cause of action for wrongful discharge (firing) in violation of public policy
5	Abolition of categories of invitee, licensee, and trespasser for liability of land occupiers
6	A claim for "loss of a chance" (of survival or recovery) in medical malpractice suits
7	Abrogation of parental immunity in motor-vehicle accidents occasioned by negligence
8	Privacy torts for putting a defamee in a "false light"
9	Overturn of the rule barring recovery for injuries suffered in utero
10	The "Connecticut Rule" for reasonable care when removing ice and snow from one's property

Table 1: Twenty Doctrinal Innovations in Tort Law

innovations. Tort law, the law of harms and compensation for harms, is a natural area for studying judicial innovation because much of the law is judge-created, typically by state court judges. Graham offers this definition of a doctrinal innovation: "An innovation is a change or complement to existing doctrine that is perceived as new by an individual or other unit of adoption" (p. 97). This definition emphasizes the subjective perception of novelty by informed members of a community of practitioners. Graham notes the difficulty of definitively scoring innovations, particularly since some doctrinal changes may be so incremental as to defy the term. Still, experts in tort law would probably feel comfortable with most of his examples, ten of which are displayed for illustrative purposes in Table 1. These examples include perhaps the two most famous tort innovations, the *MacPherson* doctrine in product liability cases, and strict products liability for defective products (the *Escola* doctrine). Other examples in the table are quite consequential, but some are rather quotidian, for instance, the "Connecticut Rule" requiring that a premises owner exercise reasonable care when removing natural accumulations of snow and ice from their property.

Second, when is a doctrinal innovation a "success"? The key points are persuasiveness and voluntary adoption by other judges. Thus, in his study of diffusion of tort innovations across the states, Graham treats a doctrinal innovation by one state as successful if it is adopted by another state. And, he views "adoption" as meaning, definitive endorsement of the doctrine by the adopting state's highest court or its legislature. He scores the adoption

decisions himself. Bird and Smythe 2012, in their case study of the diffusion across the states of the strict liability rule for manufacturing defects, employ a similar standard. Dear and Jessen 2007 employ a somewhat looser measure, viewing one state's cases as influential if another state's cases "follow" the first state's case. Here, "follow" has the specific meaning that a well-known legal service, Shepard's Citation Service, scores the second case as citing the first case and substantively adopting or relying on the first case. Both of these definitions could be extended to innovations by federal circuit judges. So, an innovation by (say) a judge in the 2nd Circuit is successful if adopted by judges in other circuits, absent a vertical command by the Supreme Court. An innovation by a circuit judge is also successful if adopted by the Supreme Court. Graham also notes the value of an innovation being incorporated into the "restatements" of law issued by the American Law Institute, a prestigious organization of legal academics, judges, and practitioners. The restatements are treatises intended to summarize the law in various areas such as torts, contracts, property, securities, and trusts. Inclusion of the innovation gives a kind of imprimatur to it.

Third, when is a successful doctrinal innovation a "great" innovation? Distinctions here may seem impossibly subjective, but one can discern two distinct lines of argument. The first – call it the legal significance criterion – purses the thought suggested by Posner in his interesting review of Gunther's biography of Learned Hand: "I believe that the test of greatness for the substance of judicial decisions, therefore, should be, as in the case of science, the contribution that the decisions make to the development of legal rules and principles rather than whether the decision is a 'classic' having the permanence and perfection of a work of art" Posner 1994. This legal significance or impact criterion leads to empirical measures such as, how many states "follow" a state's doctrinal innovation, the speed of adoption among potential followers, or the durability of a doctrinal innovation before its replacement with another. In general, the legal significance criterion can be addressed – at least in principle – using legal materials. The second line of thought – call it the social significance criterion – scores innovations by their social impact or consequence. So, for example, strict products

liability is enormously more consequential socially than the Connecticut Rule. Measuring social significance requires non-legal materials and might be extremely difficult to quantify in practice, though cost-benefit studies across adopting and non-adopting states might be feasible.

## Real Opinions, Judicial Rhetoric, and the Theory

Appellate court opinions play an important (perhaps disproportionately important) role in legal education, and their construction and interpretation have generated vast literatures by legal scholars. One strand addresses the rhetoric of judicial opinions, the art of constructing opinions in order to make them persuasive to practitioners in a common law legal system (see for instance Llewellyn 1960). Not surprisingly, the secondary literature on specific notable opinions tends to track the academic literature. So, much of it concerns the rhetoric of great opinions – the selective marshalling of facts, re-weaving of existing doctrine and manipulation of precedents, and the artful unveiling of an innovation. In contrast, our theory focuses on the strategic character of the players' interactions. Thus, in our theory a leading opinion is simply a truthful report on the value of new doctrine ( $\theta$ ) broadcast with a degree of precision, surely heard by a cohort of potential judicial implementers. An obvious question is, what is the relationship between actual opinions and this bare-bones abstraction?

Here it is helpful to know a little about the construction of judicial opinions.<sup>10</sup> In every case, the court must issue a disposition indicating which of the contending parties prevails. In addition, the court may issue an opinion explaining how the application of a legal rule to the facts in the instant case leads to the indicated disposition. Doctrinally innovative cases offer a new or modified rule for deciding the instant and similar cases. In our reading of cases and commentaries, the rhetoric supporting an innovative rule typically has two components: 1) an argument that the innovation actually has precedential roots in existing case law, and 2) an

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<sup>10</sup>A classic introduction is Levi 1949 while a standard textbook is Berch et al 2010.

argument that the innovation is an improvement over present doctrine and helps solve a social problem. The first component is a *doctrinal* argument, the second a *policy* argument. The appropriate balance between the two components is a matter of long-standing controversy in the legal academy and the bench, as are the standards for a "good" doctrinal argument and an "appropriate" policy argument. Roughly speaking and ignoring various subtleties, the school labeled "formalism" or "legalism" (sometime pejoratively) and the so-called "legal process" school of the 1950s and 1960s privilege rhetorical strategies that emphasize the doctrinal component and downplay the policy component. Conversely, the schools of "legal realism" and "judicial pragmatism" favor greater rhetorical scope for policy arguments and may in turn downplay the doctrinal component. However, we suggest an empirical regularity: great opinions usually include *both* components – they offer a precedential basis for the innovation (however tenuous or strained), and also argue that it is a good idea (however airily). The first component, which is essentially hermeneutics, helps practitioners view the judicial innovation as lawful and hence acceptable. The second component, which is essentially policy analytic, helps practitioners view the innovation as socially beneficial and hence attractive.

The theory includes an explicit representation of the policy component in the form of " $\theta$ ." We included a representation of the precision of the signal, which one might view as embedding or at least partially reflecting the quality of the leading judge's hermeneutics. And again one might imagine leading judges exerting costly effort in order to increase the hermeneutic acceptability of their signal. In sum, extension of the basic model can partly address recognizable aspects of judicial rhetoric.

In considering several great judges and their acts of judicial leadership we won't dwell at length on the details of their judicial rhetoric or the actual doctrinal innovations – for one thing, acute readings of this form are available, which we cite. Instead, we'll review examples of leadership looking for signs of " $\theta$ " and "precision", seek evidence of judicial motivation, and examine the reception of the innovation.

## *Benjamin Cardozo*

Benjamin Cardozo (1870-1939) served for 18 years on New York's highest court, the New York Court of Appeals, and then an additional eight years on the U.S. Supreme Court. His famous opinions date primarily from his service on the state court and deal with common law topics, notably tort and contracts. Posner notes, "His judicial opinions continue to be a staple of teaching and scholarly discussion in contracts, torts, and other fields; the passage of time has not dulled their luster" (Posner 1990: 21). Posner convincingly mounts a variety of citation-based empirics to back this claim.

Cardozo penned numerous landmark opinions, but two in particular stand out – they continue to play a prominent role in legal education and are studied by nearly all law students: *MacPherson v. Buick Motor Co.* and *Palsgraf v. Long Island Railroad*. Posner reports that these are Cardozo's most-cited cases. Both have generated extensive literatures including book length monographs. Both opinions ventured doctrinal innovations in tort law. The first vastly expanded the liability of manufacturers of defective products; the second offered a way to restrict the liability of companies whose employees negligently injure people.

How should we think about Cardozo's report on " $\theta$ " in these cases? If one takes a very literal approach to " $\theta$ " then one simply doesn't find much that looks like conventional policy analysis in *MacPherson*, *Palsgraf* or indeed in most of Cardozo's other famous opinions, like *Murphy v. Steeplechase Amusement Co.* For example, they offer no systematic empirical evidence of any kind, and one finds very little that leaps out as economic reasoning. In fact, in his treatise on Cardozo's reputation, Posner mildly criticizes Cardozo's opinions for being insufficiently policy analytic (Posner 1990:117). But this is to somewhat misunderstand Cardozo's persuasive strategy.

To grasp Cardozo's "public reports," one needs to understand a little about the logical structure of legal doctrine. As James Henderson notes in his study of *MacPherson*, "All rules of tort law call for liability to follow from delineated sets of facts, employing an **If-Then** format: "**If** *A* kicks *B* without sufficient reason, then *A* is liable in damages to *B*." (Henderson

2003:53, emphasis in original). More generally, one can formalize this logical structure, to wit, a rule is a mapping from a fact space into a disposition space (the formalism was created in Kornhauser 1992 and is explicated in a relatively non-technical way in Cameron and Kornhauser 2017). The formalism suggests two broad avenues for doctrinal innovation: broadening or restricting the fact space, and altering the treatment of cases (the mapping) in a fixed portion of the fact space. The former approach roughly corresponds to what William Riker dubbed "heresthetics," the art of political manipulation (Riker 1986). It is also closely related to "distinguishing" a case, a standard rhetorical maneuver taught in the first year of law schools.

The heresthetical manipulation of the fact space is Cardozo's favored *modus vivendi*, a point that has not escaped close students of the cases. For example, Henderson 2003 shows that Cardozo's summation of the facts in *MacPherson* was quite selective or perhaps even misleading. Rabin and Sugarman 2003 makes the same point about *Palsgraf*, an observation forcefully re-iterated in Posner 1990. Then, having artfully re-constructed the fact space, Cardozo moves in for the kill. Simons, in an analysis of Murphy, explains:

His opinions typically begin with a cinematic narration of the injury. Doctrinal standards [that is, Cardozo's doctrinal innovation] often first appear more as background props than as primary actors. But the technique is a sly one: when he tells a compelling story, he also insinuates that the legal standard is as compelling as the tale. In the end, the reader (or viewer) comprehends the facts and the law as one (Simons 2003:204).

In other words, having manipulated the fact space, Cardozo then suggests a doctrinal mapping which appears so natural, logically compelling, administratively feasible, commonsensical, and obviously in the public interest that much more policy analysis would just be over-egging the pudding. In essence, the typical Cardozo report is: "Given the fact pattern I just showed you, my doctrinal innovation obviously has a high  $\theta$ ." It is not logically necessary

to show that the old doctrine yields absurd results in the new fact space though Cardozo often offers some arguments along those lines too.

The heresthetical heavy lifting, which I am associating with a kind of report about " $\theta$ ", is analytically distinct from the hermeneutic component of the opinions. This component of the opinions typically tries to show that the actual innovation is not really an innovation at all, but rather merely a minor tweak on existing law. Again, legal commentators have had a field day showing how Cardozo "twisted 19th century doctrine inside-out", "re-named and enlarged" existing categories, cited minority opinions as if they were controlling majority ones, and engaged in much other hermeneutical legerdemain. This aspect of the cases has contributed to Cardozo's reputation as "tricky" and indeed one cannot work through a careful doctrinal analysis of, say, *MacPherson*, actually reading the preceding key cases, and fail to come to a similar conclusion (Levi 1949 Section II, remains evergreen). Again, one can see this aspect of the cases as boosting the likelihood of a positive reception, though this is somewhat outside the model we sketched.

What of the likelihood other judges would read his opinions and be exposed to his arguments? An obvious point is, the New York Court of Appeals was the leading state court of Cardozo's day. It heard a high volume of cases, and those cases reflected important changes in the economy and American society that were spreading elsewhere. So, in the phrase of Dear and Jessen, the New York Court had "depth of inventory" (Dear and Jessen 2007). In addition, the Court's bench included a number of extremely able judges, as documented in Posner 1990. The West legal reporter for the Northeastern United States made the Court's opinions readily available to other state judges in major population centers (Caldeira 1985). Finally, Cardozo was involved in creating the American Law Institute whose "restatements" of tort law featured Cardozo innovations. In short, in the 1920s and 1930s if you were a state judge interested in developments in tort law, you would naturally turn to the New York Court's opinions, which you could obtain relatively easily. Thus, when Cardozo offered his innovations, he could be confident he was facing a high " $r$ ".

Cardozo's writings embraced more than judicial opinions. Perhaps most notable is his book *The Nature of the Judicial Process* in which he elaborated his conception of the job of a leading appellate judge. The book is often taken to be an exemplar of legal realism or judicial pragmatism, and it is easy to see why:

One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey. If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself (Cardozo 1921:112-113)

One could hardly hope for a clearer statement about the value of "good" doctrine versus uniformity of administration, and the need for leading judges to innovate good doctrine. In cases like *MacPherson* or *Palsgraf*, we see Cardoso practicing what he preached.

Lastly, what was the response to Cardozo's bids for leadership? Did other courts actually follow, particularly other courts that need not have done so? Two recent studies specifically examine state tort law and the impact of *MacPherson* and *Palsgraf*. Investigating the impact

of *Palsgraf*, Cardi 2011 examines the contemporary negligence cause for action in all 50 states and the District of Columbia. His findings are complex, not least because subsequent analysts have identified several doctrinal bids in the case. Several of these fizzled. But Posner's reading of the case is somewhat blunter: "Cardozo's bottom line is that there is no liability to an unforeseeable plaintiff, however that status be defined in a particular case..." (Posner 1990:41). Cardi notes, "it is a more specific question whether courts condition the existence of a duty on the foreseeability of the plaintiff. On this score, Cardozo has clearly won the day. When faced with the issue, thirty-three (of fifty-one) courts hold with fair consistency that whether the plaintiff was a foreseeable victim is a question to be decided in the duty context." In the bulk of the remaining states, Cardi found the law unclear (Cardi 2011: 1892-93). To be fair, in most of the states unforeseeability – the key idea in *Palsgraf* – does not have pride of place but is merely one of multiple factors cited. Still, one would have to say that most states followed where Cardozo led, though not completely slavishly.

The reception of *MacPherson* is also somewhat more complex than one might imagine. Henderson notes, "Privity died a relatively slow death" (Henderson 2003:65). The diffusion rates calculated by Graham 2015 in his study of twenty successful judicial innovation provides some confirmation of Henderson's observation. For example, the average number of adopters after 10 years averaged 22 among the innovations Graham studies. The equivalent figure for *MacPherson* was 18. However, the average number of adopters after 20 years was 36, and this is exactly the number of adopters of the *MacPherson* doctrine. Similarly, *MacPherson*'s number of adopters after 30 years was at the average mark. So, after a slightly slow start, *MacPherson*'s impact caught up with that of the other successful innovations studied by Graham.

### ***Roger Traynor***

Roger Traynor (1900-1983) earned his law degree as well as a Ph.D. in political science from the University of California at Berkeley, where he subsequently became a law professor.

In his ten years on the faculty of the law school, he became a prominent legal scholar, briefly serving as dean of the law school. In addition, he was active in tax reform and administration in California and served as state Deputy Attorney General. He was appointed to the California Supreme Court in 1940 and became its Chief Justice in 1964. He served in that capacity for six years, retiring in 1970.

Often regarded as the leading state judge of his day, Traynor authored over 900 opinions, many of which were landmarks of liberal jurisprudence. However, perhaps his most famous opinion was actually a concurrence, in the 1944 case *Escola v. Coca Cola Bottling Co.* In this opinion, Traynor created what is known as the strict products liability doctrine. Indeed, strict liability for defective products is often dubbed the *Escola* doctrine even though not a single other judge in the majority joined Traynor's concurrence. It was not until 1963, in the case *Greenman v. Yuba Power Products* that the California Supreme Court adopted strict liability, as expressed in Traynor's majority opinion. *Greenman* is usually regarded as the "landmark" case for strict product liability.

In contrast to Cardoso's somewhat coy depiction of his innovation's policy value, Traynor in his opinions in *Escola* and *Greenman* is extraordinarily forthright about "θ": he argues that a switch in doctrine to strict liability would be an improvement in public policy. To be sure, he offers a doctrinal hermeneutic argument why his radical innovation is logically entailed by or at least consistent with earlier case law. Here his argument draws on *MacPherson* as well as some cases about contaminated foods. In essence, he breaks the link between implied warranties and contracts, instead reconceptualizing products liabilities as a field of torts (Geistfield 2003: 242). In retrospect, many legal scholars see this intellectual move as extremely clever. But asserting that this doctrinal innovation is arguably legal is not the same as showing that it is a good idea. For this he relies on arguments about deterrence and risk spreading. In other words, his argument is a model of law-and-economics style reasoning and indeed modern law and economics scholars find the arguments both sound and prescient (Ibid: 245-250). Impressively, the risk sharing arguments anticipate much later work in infor-

mation economics. Combining the hermeneutics with the policy analysis, Traynor famously concludes, "If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence, there is no reason not to fix that responsibility openly."

However clever Traynor's *Escola* opinion was, it fell with a thud: Traynor failed to persuade anyone on his own court, much less on others. This fact raises serious issues about "r". Evidently, Traynor's "r" was tiny. But this should come as no surprise for in 1944, Traynor was a relatively new arrival on the court, just a successful legal academic with very limited judicial experience. Thus, the true audience for his opinion was not other courts but the other members of his own court. As a result, he need not have feared that his opinion would undermine the consistency of legal administration since, after all, no other courts were listening to him.

In 1949, a case similar to *Escola* was again heard by the California Supreme Court. Traynor again made his argument for strict liability and again not a single member of his own Court found his opinion persuasive. In 1958, the Court again heard a similar case, again Traynor made his argument, and again no one on the Court joined him. But the sands began to shift. In 1960, the Court again heard a related case and began to move somewhat in Traynor's direction without fully endorsing his argument. In 1961, the American Law Institute adopted a draft rule applying strict liability to sellers of food products. In 1962, it extended the rule somewhat. Then in 1963 came Traynor's breakthrough, the *Greenman* case. Here, in a dramatic shift, the entire Court adopted Traynor's doctrinal innovation making it the law of the land in California.<sup>11</sup>

By 1963, California had replaced New York as the leading state supreme court in the sense that its opinions were the most frequently cited of all state courts by other state supreme courts (Dear and Jessen 2007, Friedman et al 1981). Already some of its cases were doctrinal landmarks and over the next decade and half, many would become so (Rabin 2003:74). And, Traynor was no longer an obscure jurist with academic leanings but a

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<sup>11</sup>This paragraph draws on Geistfield 2003 pp. 239-241.

national figure. The idea of strict products liability was no longer outlandish and outre but recognizable as an actual doctrinal option. Arguably, in 1963 Traynor's visibility was large and, with his assent to the Chief Justiceship the following year, became enormous. The visibility of the case was further boosted in 1964 when Traynor's friend, William Prosser, wrote its doctrine into the ALA's *Restatement (Second) of Torts*, adopting the *Escola* arguments lock, stock, and barrel and thus acting as a kind of megaphone for them.

As a successful academic and intellectually ambitious judge, Traynor laid out his philosophy of judging in many law review articles and there is no reason to doubt their candor. Like Cardoso, he was a legal realist and saw good policy as an important consideration in judging. But he went much farther than Cardoso. "The real concern [is] not the remote possibility of too many creative opinions but their continuing scarcity" so that "the growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar." Traynor thus concluded that true "judicial responsibility connotes ... the recurring formulation of new rules to supplement or displace the old [and the] choice of one policy over another" (quoted in Ursin 2009:1276). So, not only did Traynor practice judicial activism with a distinctly liberal orientation, he defended it intellectually. More than that, he attacked judicial process scholars as essentially dishonest for their reliance on "magic words" rather than forthright and clearly articulated policy analysis. In our model of judicial leadership, the leading judge weighs good policy and consistency equally; but if we take his words at face value, Traynor seems to have placed much heavier weight on good policy than consistency. Of course, such an evaluation would conduce to judicial activism.

Graham 2015 provides data on the diffusion of strict products liability across the states, in the wake of *Greenman*. In contrast to the long slow sell on the California Supreme Court itself, Traynor's innovation – once adopted in California – was clearly something of a thunderclap for other state courts. Of the 20 innovations studied by Graham, strict products liability spread the fastest, taking only 11 years to be adopted by 30 states. It has now been

adopted by all but five states (Bird and Smythe 2012:568).

## ***Henry Friendly***

Henry Friendly (1903-1986) is often regarded (with Learned Hand) as the greatest federal judge never to have served on the U.S. Supreme Court. (The sub-title of his biography calls him "the greatest judge of his era.") His background was unusual, for a federal judgeship was Friendly's second career. In his first he was a corporate lawyer, serving most notably as chief legal counsel for Pan American World Airways. In addition, he helped found a major international law firm, Cleary Gottlieb (originally Cleary, Gottlieb, Friendly, and Cox). Only after 32 years in private practice was he appointed to the federal bench, in 1959 by President Eisenhower. He then served almost 27 years on the U.S. Second Circuit – the New York-based circuit that hears most federal cases involving corporations and business law. There, he wrote more than one thousand opinions. In addition to this flood of judicial opinions, he was a prolific author of law review articles, essays, lectures, and other writings, some of which were collected as books.

What are examples of Friendly's "greatness"? The answer is somewhat different from doctrinal innovations announced in distinctive and famous high court cases a la Cardozo or Traynor. There are three reasons why this avenue for greatness was constrained for Friendly. First, he was a judge on the federal intermediate courts of appeal. A great deal of the business of these courts lies in reviewing dispositions from trial courts, which the circuit courts are obliged to take. Only a relative handful present provide plausible vehicles for doctrinal innovation. This is in notable contrast to the opportunities available to judges on apex courts like the New York Court of Appeals, the California Supreme Court, or the U.S. Supreme Court. Second, Friendly's greatest area of expertise was administrative law. But the Second Circuit hears only a small number of these cases, which is the specialty of the D.C. Circuit. So in the area where he had the most creative and valuable ideas, Friendly heard few cases (though he made the most of them). Third, a primary (but hardly sole) audience for

Friendly's doctrinal innovations was the Supreme Court. But Friendly was a conservative in a era in which the Supreme Court was actively liberal. So he faced a frequently rather unsympathetic audience. More than that, many of Friendly's innovative impulses were naturally directed at limiting the Warren court's more adventuresome departures or addressing the unintended consequences and unanticipated short-comings that resulted. Defying or contradicting the High Court is no easy job for a serving intermediate court judge; in fact, it is nearly impossible since "success" requires the Supreme Court to reverse course.

Friendly nonetheless found ways around these limits. First, many of his innovations lie in relatively technical and non-ideological areas of the law. Dorsen notes that he "helped rationalize, modernize, and promote fairness" in admiralty, antitrust, bankruptcy law, the law of punitive damages, and many other areas. These innovations are well-known and appreciated by specialists but hardly have the revolutionary character of an *Escola* or *MacPherson*. Still, they remain influential. Second, in the area of administrative law he substituted law review articles and books for the cases he did not have. Although his handful of administrative law cases made important points that the Supreme Court adopted, his biggest impact on the Supreme Court, on judges on the D.C. Circuit, and on the practices of federal agencies came from non-case writings like Friendly 1962. Many of the ideas in these writings made their way into law, just not from his cases. Third, his "anti-Warren" efforts addressed short-comings that even the High Court could see. And again, his preferred vehicle was law reviews. Two examples are oft-noted. In "Is Innocence Irrelevant?" Friendly criticized a Supreme Court case that had opened a floodgate of meritless habeas corpus cases, straining the resources of federal courts for no good purpose. Friendly suggested remedial moves, which the Supreme Court quickly adopted. Similarly, in "Some Kind of Hearing" Friendly suggested how to prioritize among the uses of hearings, thereby bringing some order to an area of law thrown into chaos by a Supreme Court case. Again the Supreme Court quickly adopted Friendly's innovations, which continue to be cited and used in related cases today (Friendly 1975).

Both in his cases and in his influential articles, Friendly employed policy-oriented argu-

ments – what we called " $\theta$ " is prominent. Though a master of case-law, he put much less emphasis on hermeneutic gymnastics. Because of Friendly's tendency to be a non-formalist eclectic who wasn't tightly bound by the legal materials before him, Judge Richard Posner has called him "something of a judicial buccaneer" (Dorsen 2012: xiii). In the same vein, Friendly's biographer notes that his attitude to Supreme Court precedent was "sometimes cavalier" (Ibid: 349). This was not because Friendly had a hobby horse constitutional theory that he rode on all occasions. Rather, notes Dorsen, he creatively used precedent, holdings, and dicta to support his policy arguments, and in some cases simply disregarded or over-ruled Supreme Court precedent outright. For example, in *Hudson Valley Freedom Theater, Inc. vs. Heimbach*, he not only over-ruled Supreme Court precedent but confidently predicted that, if given an opportunity to review his decision, the Court would follow him, not itself.<sup>12</sup>

But his willingness to be an innovator and leader was scarcely absolute. He recognized the desirability of clear rules for others to follow, writing in one particular case "We realize that, by deciding both phases of the case upon the particular facts here presented, we are not giving bankruptcy judges the guidance which they doubtlessly desire and it is our duty to provide if we properly can." But, he continues, "It is better to fail in this respect than to attempt to give guidance without having seen the variety of factual situations, having heard from the adversarial presentations, and having the benefit of the scholarly community which time will undoubtedly afford."<sup>13</sup> This expression offers an interesting alternative to our earlier stare decisis result: a highly influential judge may decline to strike off in a new doctrinal direction if he is not sufficiently certain the behavior of followers will be an improvement.

His opinions proved extremely influential on the Supreme Court, being cited more than 150 times by the High Court. Two studies have found him to be the second-most cited circuit court judge in law reviews, again behind Hand but far in the lead compared to his contemporaries.<sup>14</sup> More relevant to us is his influence on coordinate judges prior to the

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<sup>12</sup>672 F. 2d 702, 707 (2nd Cir 1982). For a discussion see Dorsen p. 350.

<sup>13</sup>In re B.D. International Discount Corp., 701 F.2 1071, 1077 (2nd Cir 1983)

<sup>14</sup>Dorsen p. 355 (Table 2), Posner Cardozo p. 77 Table 3.

adoption of his views by the Supreme Court, and on state courts not directly answerable to the U.S. Supreme Court. No study seems to have assessed his influence there quantitatively but there is little doubt he was a force.

In sum, the actual exercise of judicial leadership by an intermediate level federal judge is quite different from that of a high court state judge. But, one can still see the lineaments of the theory of coordinative leadership at work, at least arguably.

### *Lessons from the Cases*

One should be cautious in drawing lessons from a handful of cases. At best they provide a helpful plausibility check and offer some food for thought. But they are no substitute for systematic canvassing of appropriately gathered evidence. Moreover, our "research design" (to use a perhaps over ambitious term) has an important limitation: we examined successful bids for leadership but did not (and could not with available materials) examine failed bids or bids that did not come but could have. The latter is a painful lacuna since the theory makes an interesting prediction about the circumstances when a potential leader will decline to lead. Nonetheless, several points stand out.

First, the leading cases we reviewed not only offer formalistic arguments why the proposed innovation was legal; they argue that the innovation is a good idea on policy grounds. This is less pronounced in Cardozo's landmark cases since he goes to great lengths to downplay the innovativeness of his innovations, working mostly through heresthetical manipulation of facts. But the "policy" arguments are pronounced in Traynor's and Friendly's leading opinions. On this reading, a clear and convincing statement about " $\theta$ " – the value of the innovation – is a recurring element.

Second, at the time of their big innovations, the leading judges commanded big audiences. They faced a high chance of being read. To some extent, this fact is baked into the cases via our selection of great judges. But Traynor's failure to gain much traction as a relatively obscure novice judge, as compared to the "big bang" of his later efforts, is suggestive.

In addition, the recurring importance of "boosters" or "megaphones" like the restatements of torts is striking.

Third, in their extra-judicial writings, these great judges emphasized the necessity of doctrinal innovations in order to improve the law. At the same time, they clearly recognize the importance of administrative consistency, and the need to balance the two desiderata. So, a key assumption of the model finds some support in these materials. However, Traynor is a slight exception as he strongly emphasizes the value of innovation. Of the three great judges, he is clearly the only "judicial activist."

Fourth, the materials do not allow us to see cases where the great judges declined to lead because of uncertainty about the value of the innovation or fear that a bid for leadership would severely disrupt administrative consistency. The sole exception is Friendly's explicit refusal to lead in bankruptcy law because he was unsure where lay the best innovation. But, that example is suggestive.

Fifth, the available materials do not speak much to the motivations of followers. Why did the states rush to adopt Traynor's strict liability innovation following its 1963 adoption in California? When Friendly urged administrative agencies to use more rule-making and less adjudication, why did many of agencies start to do just that? Was it merely the force of the arguments, or did the followers (as the theory suggests) desire conformity with their peers and thus tended to "over-react" to the public signal from a leading judge? This is a vital question that, unfortunately, the case materials can't address. However, it seems to us that the observed patterns of adoption are at least consistent with the global games approach.

In sum the cases reveal complex elements not addressed by the theory, for instance, the value of legal hermeneutics for the acceptance of innovations, the role of non-case materials like law review articles and books, and the value of publicity boosters like the ALA's restatements of law. As the same time, we see the cases as relatively supportive of the basic "fit" between the theory and actual judicial leadership. In some sense, one value of the theory may

be to highlight what is absent in the traditional literature, for example, leadership failures and demurrals to lead and much consideration of the motivations of voluntary followers.

## **Conclusion: Leadership – Judicial and Otherwise**

The battlefield, the boardroom, the halls of Congress – these may seem the natural venues for the exercise of leadership, not the courtroom. Indeed the very notion of *stare decisis* and the widely understood obligation of judges to follow precedent argue against judicial leadership. "Follow me" is the motto of the U.S. Infantry; "Follow the law" is the equivalent for the judiciary.

So, it perhaps not so surprising to find that, though there are many studies of great judges, there is no existing theory of judicial leadership. In fact, though, the great judges so revered in common law systems do exercise leadership. They innovate and other judges follow and do so voluntarily. Great judges are perceived by other judges as leaders and, as we indicated, they see themselves that way too.

We argued that judicial leadership is an extreme or pure example of a special kind of leadership, leadership based on persuasion of followers whose obedience is entirely voluntary and based largely on a desire to undertake effective, coordinated action together. Taking this to be the essential strategic setting, we essayed a simple theory of judicial leadership incorporating these elements. To do so, we drew on recent theoretical advances in the analysis of coordination games, the theory of global games. We also incorporated strategic public signals by a potential leading judge. This move follows similar cutting edge efforts to model regime change, revolutionary action, and organizational leadership. As a simple plausibility check on the theory, we reviewed the actions of three acknowledged great judges, Benjamin Cardozo, Roger Traynor, and Henry Friendly. In our view, the case material is broadly consistent with the theory's assumptions about the motivations and behavior of judicial leaders. But, the cases also suggests some worthwhile extensions in the theory, for

example, allowing judges to exercise effort to gain larger and more receptive audiences. At the same time, the theory points to important gaps in current studies of great judges, in particular, a need to examine failed bids for leadership or demurrals in exercising leadership. And the theory suggests the need for a closer look at the motivations of voluntary followers, such as other state apex courts or legislatures.

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We examine the practices of great judges who exercise leadership in common-law judiciaries like that of the United States. We advance a new theory that explains their ability to lead and other judges'™willingness to follow. To do so, we leverage the "global games" revolution in modeling coordination games. Our theory of coordinative judicial leadership highlights the tension between innovating superior doctrine and maintaining consistency in the application of law —between good law versus the—| CONTINUE READING. View PDF.