seek approval from audiences that tend to promote "the values held by elites in American society" (p. 163) provides grist for constitutional populists who see judicial power as structurally biased toward the politically powerful. "If," as Baum suggests, "an orientation toward the legal profession strengthens the legal element in judges' thinking about cases," then those who wish to strengthen "the legal element in judges' thinking" ought to implement the institutional reforms that will encourage justices to orient more toward the legal profession and less toward more partisan interest groups.

Judges is nevertheless not entirely innocent of the charges humanists levy against behavioral research. The work is organized around problems in political science, not problems in the political world. Baum proposes to "improve our collective efforts to gain a better understanding of judicial behavior" and complains that existing "models rest on a conception of judges' aims that does not comport well with what we know about human motivation" (p. 174).

The reasons why we must better explain judicial behavior are taken for granted. Baum rarely distinguishes between judicial practices that seemingly have no normative significance, judicial practices that might have normative significance, and judicial practices that clearly do have normative significance. Most theories of the judicial function are indifferent to the wittiness of judicial opinions. Legal purists who oppose any manifestation of value voting do not care whether judicial value choices are influenced by their social peers. While Baum is well aware of the ongoing normative stakes in positive theories of judicial behavior, the same may not be said for graduate students studying judicial behavior, who are reading less and less legal and democratic theory. They might benefit from more jurisprudential guidance than the book provides. By failing to highlight when the influence of judicial audiences has normatively relevant consequences, *Judges* may generate much scholarship that will not help students and citizens evaluate the functioning of judicial institutions.

Public law scholarship should provide scholars and citizens with tools for assessing judicial performance. Political scientists who do normatively significant empirical work on judicial behavior best contribute to this endeavor when they ask whether actual judicial motivations, including judicial desires to be liked and respected, promote or hinder desirable judicial practice. *Judges* promises to be a classic in this constitutionalist enterprise. Citizens who wish to improve judicial performance must recognize that judges are human beings who respond to the same incentives as other human beings and are not, as Baum points out, "Spocks who lack emotion and eschew self-interest" (p. 174). Future public law scholarship elaborating on this vital insight is likely to better constitutional practice, however, only if the focus is redirected from our models to our politics.

Response to Mark Graber's review of *Judges and Their Audiences*

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— Lawrence Baum

I appreciate Mark Graber's review of *Judges and Their Audiences.* The review is generous, but it is also perceptive about the book's argument and its implications. As the author, I learned from Graber's thoughtful discussion of what I did and did not do in the book.

Graber emphasizes something I did not do: give explicit attention to the normative implications of my depiction of judges. In his view, the normative issues in judging are considerably more important than the issues of explanation on which I focused. Whether or not that view is correct, it may be advisable for those of us who are less qualified to assess normative issues than scholars such as Graber to stick to explanation. Nonetheless, I would like to discuss briefly what I think is the primary normative issue raised by my book.

Legal realists and behavioral scholars strongly challenge the view that judges seek only to interpret the law correctly—that is, to make good law. This challenge, of course, has important normative implications. If judges act on their policy preferences and not just their reading of the law, that fact raises questions about the legitimacy of some roles they play in government and society.

In a sense, however, the belief that judges are committed to achieving good policy is as idealistic as the belief that they want only to make good law. In both conceptions, as developed by scholars, judges act without self-interest or emotion to advance their visions of the public good. The strategic judges who populate the most influential models of judicial behavior today expend great effort to achieve their policy goals, even though they gain no direct benefit by doing so. That depiction of judges may be comforting.

The reality of judicial behavior is more complicated. Judges are human beings, and self-interest and emotion do affect their choices. That is true even of the Supreme Court, despite institutional attributes that reduce the relevance of the justices' self-interest to their work. In my book, I argue that the universal interest in approval exerts a powerful impact on Supreme Court justices, as it does on other judges.

This nonidealistic depiction of judges might be disturbing. Yet recognition that judges have the same motivations as other people should combat a misunderstanding that has unfortunate effects. When we conceptualize judges as either law-oriented or policy-oriented, some people (including some judges) find it easy to conclude that a judge who is sufficiently virtuous and strong-minded will eschew policy considerations for the pursuit of good law. But if we recognize that judges pursue law, policy, or other goals on the basis of motives, such as the need to be liked

and respected, we will also recognize that judges cannot simply will themselves to pursue only good law. As Graber suggests, we might think about how to channel judges' basic motivations in ways that foster the kind of judging we prefer. In any event, evaluation of judges' behavior will be most meaningful if it starts with a realistic conception of the bases for their choices.

Dred Scott and the Problem of Constitutional Evil.

By Mark A. Graber. New York: Cambridge University Press, 2006. 276p. $40.00.
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— Lawrence Baum, *Ohio State University*

Scott v. Sandford (1857), the *Dred Scott* decision, is the consensus choice as the worst decision in the Supreme Court's history. Legal scholar David Currie summarized the conventional view: *Dred Scott* was "bad law," "bad policy," and "bad judicial politics" (cited in *Judges,* p. 15). In this conventional view, Chief Justice Roger Taney's opinion for the Court misinterpreted the Constitution, and it took the morally indefensible position of disallowing citizenship and the rights of citizens for slaves and their descendants. The decision was also a political blunder: The Court intervened in the slavery issue in an effort to resolve it and prevent war, but instead inflamed passions and made war more likely.

Mark Graber quotes Currie's judgment in *Dred Scott and the Problem of Constitutional Evil,* but he questions the conventional view. Graber is a provocative scholar, and in this book he takes some very provocative positions. Evil as slavery was, he argues that the *Dred Scott* decision was not as clearly mistaken as most scholars think. And before the book is over, he has asked readers to consider whether a vote for the racist also-ran John Bell in the 1860 presidential election might have been preferable to a vote for the sainted Abraham Lincoln.

Graber's scholarship reflects the perspective of historical institutionalism as applied to law and courts. This book is written most directly for constitutional theorists and students of political development. My own perspective on the courts and my substantive interests are quite different from Graber's, and scholars whose work is closer to his are better qualified to evaluate the empirical and normative claims that he makes here. But the distance between Graber's concerns and my own allows me to consider the relevance of his book for scholars who are not part of his primary audience.

More than anything else, I want to emphasize that relevance: This book merits the attention of political scientists with a wide range of substantive interests and theoretical orientations. Graber writes about *Dred Scott,* slavery, and the Civil War, important enough in themselves. But he also uses this episode in American constitutional history to raise broad questions about law, politics, and public policy, and a brief review can convey only a small part of what he contributes to our thinking about those issues.

"The problem of constitutional evil," Graber writes, "concerns the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil" (p. 1). The evil of slavery was woven into the Constitution that the Supreme Court interpreted in *Scott v. Sandford.* Graber asks to what extent people in this and other situations should accept evil as the price of creating and maintaining political communities.

The author begins his analysis of *Dred Scott* by assessing it as an interpretation of the Constitution. He concludes that by any theory of interpretation, the Court's decision was as defensible as the position of the justices who dissented. He goes on to assess the decision in other terms. His analysis of constitutional politics emphasizes what he sees as the intent of the Framers to force bisectional negotiation over slavery by giving both the North and the South an effective veto in national government. In his analysis of constitutional authority, Graber argues that the Constitution can be seen as a relational contract in which the parties work out compromises over time.

Graber's ultimate argument is practical or consequentialist. This argument is most fully developed in the final chapter on the 1860 election. The choice between Lincoln and Bell is like other choices "between candidates committed to pursuing constitutional justice and candidates committed to preserving the constitutional peace" (p. 241). The pursuit of justice may exact an enormous price: The Civil War produced massive carnage, and in the author's assessment, it was hardly certain that the North would win and that Lincoln's choice would end slavery rather than entrenching it. Here, he generalizes far beyond *Dred Scott.* In other situations as well, he argues, it might be preferable to accommodate what we consider to be evils in the short run as the price of peace or even political civility, and accommodation ultimately may be the best means to eliminate those evils.

The book is an impressive work of scholarship. Graber supports his analysis of *Dred Scott* and the controversy over slavery with evidence from a wide array of primary and secondary sources, and he musters that evidence very effectively in making incisive arguments. As a result, he is likely to convince readers that a proper assessment of *Dred Scott* is more complicated than the conventional view has it. And even if readers continue to cast their retrospective votes for Lincoln, they may see the choices in the 1860 election in a different light. More broadly, the author's argument shows the need to rethink other choices that voters and political leaders have faced, and continue to face, in conflicts over constitutional values. He makes a strong case that we should wrestle with the question he raises about how much we should accommodate constitutional evil.