

The Role of Comparative Law in the Analysis of Judicial Behavior*

Lee Epstein, Urška Šadl, and Keren Weinshall**

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Abstract

Comparing and contextualizing what judges say about the law is the job of comparative legal analysis. Studying internal and external forces that explain the judges' choices and their societal effects is the core domain of comparative judicial behavior. Although walls may seem to separate these two projects in terms of their theoretical approaches and methods, the barriers—and the obstacles—are more illusory than real.

In an effort to highlight the complementarities between the two areas of studies—and issue what amounts to a standing invitation to comparative lawyers to contribute their specialized knowledge to the analysis of judging—the article turns first to the aspirations of the study of judicial behavior. Next, we introduce six core theories of judging, along with the methods and data used to assess their implications. Along the way, we flag opportunities for future research, emphasizing potential collaborations among all scholars with an interest in comparative legal analysis.

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** Epstein is the Ethan A.H. Shepley Distinguished University Professor at Washington University in St. Louis (United States); Šadl is Professor of Law at the European University Institute (Italy); Weinshall is the Edward S. Silver Chair in Civil Procedure at Hebrew University (Jerusalem). For helpful comments, we thank Tom Ginsburg, Francesco Parisi, and other participants at the Symposium on Comparative Law in the Social Sciences. For research support, we thank the U.S. National Science Foundation and the John Simon Guggenheim (Epstein), the Independent Research Fund Denmark (DFG Starting grant 8046-00019B) (Šadl) and the Israel Science Foundation (grant 1404/17) (Weinshall). Thanks also to Sara Hubaishi for excellent editorial assistance.

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I. Introduction

In 2018, the Supreme Courts of the United States and the United Kingdom decided cases pitting bakers against gays. In the U.S. case, *Masterpiece Cakeshop Ltd. v. Colorado Civ. Rts. Comm’n*,¹ a baker claimed that forcing him to make a cake for a same-sex wedding violated his speech and religious rights. A divided court ruled in the baker’s favor on the narrowest of grounds: a state commission had expressed hostility toward the baker’s faith. The cake at issue in the U.K. dispute, *Lee v. Ashers Baking Co.*,² was to bear a message—“Support Gay Marriage”—but otherwise the two disputes seemed nearly identical; and the U.K. court too ruled in the bakery’s favor.

Although the holdings were identical, the two courts handled the cases quite differently. When the U.S. justices heard oral arguments in their usual (rather small) courtroom in Washington, D.C., “people stood in line for days in hopes of seeing the proceedings.”³ The U.K. justices not only decamped to the bakery’s location in Belfast to hear the case but also live streamed the arguments “for everyone who cannot get to see [the justices] in person.”⁴ Contrast too the decisions: the U.K.’s was unanimous and clear—“drawing sharper distinctions between permissible and impermissible refusals to serve patrons”⁵—whereas the nine U.S. justices issued four separate opinions; and the question of whether and when bakers, florists, and other businesses could treat gay customers differently went unresolved.⁶

On both sides of the Atlantic, lawyers and scholars of comparative law dissected the decisions, juxtaposing legal facts and judicial reasoning.⁷ This is to be expected. Detailed and legally sophisticated analysis of case law across courts falls squarely in the traditional domain of comparative law.⁸ Those analysis, in turn, prove invaluable to lawyers, judges, and scholars—the “gay cake” cases not excepted. As apex courts worldwide struggle with the clash of anti-discrimination principles versus expression and religious rights, many judges will no doubt lean on the writings of comparative lawyers.

If careful study of what judges choose to say in their decisions is a core mission of comparative

¹ 138 S. Ct. 1719 (2018).

² [2018] UKSC 49.

³ Adam Liptak, *Across the Atlantic, Another Supreme Court Case on Cake and Gay Rights*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/politics/northern-ireland-court-case-cake-gay-rights.html>.

⁴ *UK Supreme Court bound for Northern Ireland*, THE SUPREME COURT OF UK (Nov. 27, 2017), <https://www.supremecourt.uk/news/uk-supreme-court-bound-for-northern-ireland.html>.

⁵ René Reyes, *Masterpiece Cakeshop and Ashers Baking Company: A Comparative Analysis of Constitutional Confections*, 16 STAN. J. CIV. RTS. & CIV. LIB. 113, 115 (2020).

⁶ Kennedy wrote for the majority. Kagan (joined by Breyer) and Gorsuch (joined by Alito) filed concurring opinions; Thomas issued an opinion concurring in the judgment; and Ginsburg (joined by Sotomayor) dissented.

⁷ Reyes, *supra* note 5; Rex Ahdar & Jessica Giles, *The Supreme Courts’ Icing on the Trans-Atlantic Cakes*, 9 OXFORD J.L. & RELIGION (forthcoming 2020).

⁸ Mathias Siems, *The Power of Comparative Law: What Types of Units Can Comparative Law Compare?*, 67 AM. J. COMPAR. L. 861 (2019). There is a less traditional branch of comparative law that seems more quantitative (“empirical comparative law”). See Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131 (2015). Based on an informal canvas of the field (including articles published in this journal), however, close reading of “law” remains far more common.

law, analyzing *why judges make the choices they do* is central to the study of comparative judicial behavior. Why did the U.K. and U.S. courts decide to hear the “cake cases,” considering that both have nearly complete discretion over their dockets?⁹ What prompted the U.K. Court to sit in Ireland and live stream the proceedings; and how could the U.S. Court fail to even acknowledge the groundswell of interest in the case? Why did the U.K. justices issue a far clearer decision than the U.S. justices; and why were they able to reach consensus? Did the use of panels play a role (versus the U.S. Court’s practice of sitting en banc), or were other factors at work? In none of their opinions did a U.S. justice even mention foreign or international law—save for a passing reference to the wedding cake “tradition from Victorian England.”¹⁰ The U.K. Court, in contrast, cited a U.S. Supreme Court decision from the 1940s and the Universal Declaration of Human Rights. Why the difference? And, ultimately, what effect did these choices—and many others along the way—have on the development of the law and on the public’s view of the decisions and the Court itself?

These questions are primarily the domain of comparative judicial behavior, with possible answers drawing attention to the many forces—internal and external—that influence the judges’ choices and the consequences of their decisions. To be sure, the same questions are not foreign in the study of comparative law; the field is hardly blind to their contemporary currency. But the two fields differ in more ways than one. While traditional comparative law frequently analyzes the content of law from a legal-internal point of view to find normatively justifiable rules, judicial behavior usually adopts a positive perspective, striving to describe and explain judges’ choices and their consequences. And while comparative law often explores legal structure, argument, and interpretation by applying doctrinal legal analysis, comparative judicial behavior mostly draws on empirical methodologies to achieve its goals.¹¹

In what follows, we outline these primary points of departure—aspirations, theories, and methods—from the perspective of the study of judicial behavior. This is a timely project because the field, once owned by US-based political scientists, has grown into a worldwide enterprise that draws on history, economics, law, and psychology to analyze and compare judging across the world. As articles in this journal¹² and in so many others attest, virtually no judicial system has

⁹ The U.S. Supreme Court has nearly complete discretion over which cases to hear and decide; in the UK Court about three-fourths of its docket is discretionary. See CHRIS HANRETTY, *A COURT OF SPECIALISTS: JUDICIAL BEHAVIOUR IN THE UK SUPREME COURT* 57-58 (2020).

¹⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring).

¹¹ New developments in comparative law may bring the two fields closer in their theoretical approaches and methodologies. See, e.g., the debate on “numerical” comparative law. Mathias M. Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 *CARDOZO J. INT’L & COMPAR. L.* 521 (2005); Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 *AM. J. COMPAR. L.* 765 (2009); Holger Spamann, *Large Sample, Quantitative Research Designs for Comparative Law?*, 57 *AM. J. COMPAR. L.* (2009). See also “empirical comparative law” referenced in *supra* note 8, and more specifically the “empirical constitutional studies” approach. E.g., David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 *CALIF. L. REV.* (2011).

¹² E.g., Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India’s Sodomy Decision*, 59 *AM. J. COMPAR. L.* 909 (2011) (considering whether judges (should) cite (or not) foreign law in domestic legal disputes); Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 *AM. J. COMPAR. L.* 187 (2017) (whether structural reforms, such as terms limits for judges or greater political involvement in their appointment, affect judicial decisions); Adem K. Adebé, *Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa*, 60 *AM. J. COMPAR. L.* 603 (2013) (how public opinion affects judicial determinations).

escaped systematic and rigorous attention, from Argentina,¹³ Brazil,¹⁴ and Chile¹⁵ up to Mexico¹⁶ and Canada;¹⁷ and from China¹⁸ and Taiwan¹⁹ across the globe to India,²⁰ Israel,²¹ and most of Europe,²² down to South Africa²³ and Australia.²⁴ Analysis extend not only to long-standing democratic societies but also to developing democracies and authoritarian regimes.²⁵ Likewise, judges serving on international and transnational courts, long of interest to scholars, are now more than ever the targets of sophisticated theoretical and empirical work.²⁶

Increasing attention to comparative judicial behavior is welcome news because the resulting studies add to the store of knowledge about law and legal institutions, provide guidance to policy makers about the possible effects of institutional change on judges and their decisions, educate the

¹³ Sergio Muro et al., *Testing Representational Advantage in the Argentine Supreme Court*, 6 J.L. & CTS. 1 (2018). These and other countries in *infra* notes 15-26 are recent examples. Many more papers and books than we could list here have been published in the last decade, and there are numerous cross-national/cross-court studies too. *E.g.*, NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* (2015); BENJAMIN ALARIE & ANDREW J. GREEN, *COMMITMENT AND COOPERATION ON HIGH COURTS: A CROSS-COUNTRY EXAMINATION OF INSTITUTIONAL CONSTRAINTS ON JUDGES* (2017); Sylvain Brouard & Christoph Hönnige, *Constitutional Courts as Veto Players: Lessons from the United States, France and Germany*, 56 EUR. J. POL. RSCH. 529 (2017); Santiago Basabe-Serrano, *The Judges' Academic Background as Determinant of the Quality of Judicial Decisions in Latin American Supreme Courts*, 40 JUST. SYS. J. 110 (2019).

¹⁴ Diego Werneck Arguelhes & Ivar A. Hartmann, *Timing Control without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda*, 5 J.L. & CTS. 105 (2017).

¹⁵ Lydia B. Tiede, *The Political Determinants of Judicial Dissent: Evidence from the Chilean Constitutional Tribunal*, 8 EUR. POL. SCI. REV. 377 (2016).

¹⁶ JEFFREY K. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (2010).

¹⁷ Benjamin Alarie & Andrew J. Green, *Policy Preferences and Expertise in Canadian Tax Adjudication*, 62 CAN. TAX J. 985 (2014).

¹⁸ John Zhuang Liu & Xueyao Li, *Legal Techniques for Rationalizing Biased Judicial Decisions: Evidence from Experiments with Real Judges*, 16 J. EMPIRICAL LEGAL STUD. 630 (2019).

¹⁹ Kong-Pin Chen et al., *Party Capability versus Court Preference: Why Do the "Haves" Come Out Ahead?—An Empirical Lesson from the Taiwan Supreme Court*, 31 J.L., ECON., & ORG. 93 (2015).

²⁰ GERALD N. ROSENBERG ET AL., *A QUALIFIED HOPE: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE* (2019).

²¹ KEREN WEINSHALL-MARGEL, *LAW AND IDEOLOGY IN SUPREME COURT DECISION-MAKING: A COMPARATIVE AND QUANTITATIVE ANALYSIS* (2016).

²² Jay N. Krehbiel, *The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court*, 60 AM. J. POL. SCI. 990 (2016) (Germany); Alessandro Melcarne, *Careerism and Judicial Behavior*, 44 EUR. J.L. & ECON. 241 (2017) (Italy); GUNNAR GRENSTAD ET AL., *POLICY MAKING IN AN INDEPENDENT JUDICIARY: THE NORWEGIAN SUPREME COURT* (2015) (Norway); Susana Coroado et al., *Judicial Behavior under Austerity: An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002–2016*, 5 J.L. & CTS. 289 (2017) (Portugal); HANRETTY, *supra* note 9 (UK).

²³ Kaitlyn L. Sill & Stacia L. Haynie, *Panel Assignment in Appellate Courts: Strategic Behaviour in the South African Supreme Court of Appeal*, 37 POLITIKON 269 (2010).

²⁴ Ingrid Nielsen & Russell Smyth, *What the Australian Public Knows about the High Court*, 47 FED. L. REV. 31 (2019).

²⁵ See generally Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281 (2014).

²⁶ Matthew J. Gabel et al., *Of Courts and Commerce*, 74 J. POL. 1125 (2012); Yonatan Lupu & Erik Voeten, *Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413 (2012); Rachel A. Cichowski, *The European Court of Human Rights, Amicus Curiae and Violence against Women*, 50 LAW & SOC'Y REV. 890 (2016); Jens Frankenreiter, *The Politics of Citations at the ECJ—Policy Preferences of E.U. Member State Governments and the Citation Behavior of Judges at the European Court of Justice*, 14 J. EMPIRICAL LEGAL STUD. 813 (2017); Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, 62 J. CONFLICT RESOL. 3 (2018); Erik Voeten, *Populism and Backlashes against International Courts*, 18 PERSP. ON POL. 407 (2020).

public about how their courts really work, assist practicing lawyers in developing winning strategies, and even prompt judges to rethink their choices in light of unearthed biases.²⁷ However, the sheer number of studies and the diversity of their questions and targets of inquiry, complicate our task to catalogue, systematize, and canvass the field. Not to put too fine a point on it: The field is now so expansive that we (with Gunnar Grendstad) are editing an Oxford Handbook,²⁸ *Comparative Judicial Behaviour*,²⁹ with nearly fifty chapters divided into ten parts.³⁰ We aim to cover all the bases, from approaches to (theories of) judging to data and methodologies to a range of substantive topics connected to judicial behavior, such as the appointment of judges, lawyering, opinion-writing, collegiality, and interactions between courts and their government.

Obviously, it would be foolish to attempt a soup-to-nuts approach here. Our goal rather is to supply an introduction to the exciting field of judicial behavior and invite comparative lawyers to learn more and, hopefully, contribute to the field with their own studies on courts or legal systems they study.

To facilitate the exchange, Part II provides a foreword to the field. It emphasizes the goals and the range of questions that come under the field's reach, as well as the aspects of judging that lend themselves to comparisons. Many comparative lawyers will recognize these questions and goals, and some even might be familiar yet uncomfortable with judicial behavior studies—either because of their methods or generalizations of the legal system under analysis (knowledge *of* the law). For these reasons, Parts III and IV further contextualize the studies and explain why such apparent generalizations can be useful, even necessary, to understand what judges choose to say in their decisions *and* why they make the choices they do. Concretely, Part III surveys the major approaches (theories) to which scholars turn to develop research questions and generate possible answers. Part IV delves into the range of data sources and methods used to assess the possible answers and evaluate findings. All parts flag opportunities for future research.

II. Aspirations of the Analysis of Comparative Judicial Behavior

Comparative judicial behavior seeks to illuminate the choices judges make and the

²⁷ See generally RICHARD A. POSNER, *HOW JUDGES THINK* (2008); LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings*, 93 TEX. L. REV. 855 (2015) (all listing the benefits of studying judicial behavior).

²⁸ Such handbooks are legion in comparative law (e.g., OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006)), as are comparative studies of judiciaries (John Bell's classic, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* (2006)), courts (MITCHEL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* (2009); JOHN DAWSON, *THE ORACLES OF THE LAW* (1968)), the legal process (MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986)) and legal reasoning (MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* (2013) (how courts in different countries use comparative reasoning), Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMPAR. L. 149 (2013); INTERPRETING STATUTES: A COMPARATIVE STUDY (Neil MacCormick & Robert S. Summers eds., 2016); INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (Neil MacCormick & Robert S. Summers eds., 1997). Nonetheless, comparative law scholars rarely engage with the field of judicial behavior or judicial politics, at least in explicit terms. One exception is Theunis Roux, *Interdisciplinary Synergies in Comparative Research on Constitutional Judicial Decision-Making*, 52 VERFASSUNG & RECHT IN ÜBERSEE 413 (2019).

²⁹ Oxford University Press prefers “behaviour” to the American English “behavior.”

³⁰ We will soon launch a website for the Handbook that will include a Table of Contents and a bibliography for each topic. For the URL, check Lee Epstein's CV page (<http://epstein.wustl.edu/research/cv.pdf>), under “Books.”

consequences of their choices for society. Elaboration of each key term in this definition—choices, consequences, illuminate, and comparative—opens a window into the field’s goals and domain.³¹

A. Choices

The modern-day study of judicial behavior owes its origins to U.S. political scientists working in the mid-20th century. At the time, the discipline was in the early stages of the “behavioral revolution”—a revolution tracing to studies of voting behavior, especially studies that used data to explore the role of partisanship in voters’ electoral choices.³² No surprise then that when political scientists turned to the judiciary, they equated the “choices judges make” with the “votes judges cast” (and, ultimately, the outcomes courts produce): to affirm or reverse the lower court’s decision, for or against the government, in the “liberal” or “conservative” direction, and on and on.³³

Contemporary scholars of judicial behavior no longer define “choices” so narrowly (we’ll get to that momentarily), but nor do they ignore votes and outcomes. Quite the opposite. Explaining these choices remains a mainstay of the field because the judges’ votes and the cases’ outcomes, like citizens’ voting choices, matter—and matter to many stakeholders.³⁴

Detailing the many “vote” and “outcome” studies is not necessary to demonstrate their value; a few examples suffice to make the point. Helmke’s path-marking research on the Argentine Supreme Court³⁵ shows that although both the Argentine and the U.S. Constitutions allow judges to “hold their office during good behavior,” in Argentina, that’s a parchment guarantee: “good behavior” does not mean life tenure as it is understood in the United States; it means tenure for the life of the appointing regime. As Helmke writes, “incoming governments in Argentina routinely get rid of their predecessors’ judges despite constitutional guarantees.”³⁶ Out of fear for their jobs or even their lives, Helmke theorized and empirically demonstrated that Argentine judges would rationally anticipate the threat and begin “strategically defect[ing],” that is, voting against the

³¹ We are aware that the understanding of these terms differs from the legal understanding where choice often implies a normative choice, and consequences often refer to the juridical consequences rather than behavioral consequences. See Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239 (1983).

³² See especially ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960).

³³ See, e.g., CHARLES HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947* (1948); GLENDON A. SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963* (1965); S. Sidney Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, 22 J. POL. 629 (1960); Harold J. Spaeth, *An Analysis of Judicial Attitudes in the Labor Relations Decisions of the Warren Court*, 25 J. POL. 290 (1963).

³⁴ E.g., When reporting on court decisions, journalists (and headline writers) prominently feature the vote and outcome, such as: “A Belfast bakery was not obliged to make a cake emblazoned with the message ‘support gay marriage’... The unanimous decision by the UK’s highest court was greeted as a victory for free speech.” Owen Bowcott, *UK Supreme Court Backs Bakery that Refused to Make Gay Marriage Cake*, *GUARDIAN* (Oct. 10, 2018), <https://www.theguardian.com/uk-news/2018/oct/10/uk-supreme-court-backs-bakery-that-refused-to-make-gay-wedding-cake>; see also Adam Liptak, *In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple*, *N.Y. Times* (June 4, 2018), <https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html>. This is the headline of Adam Liptak’s story on *Masterpiece Cake*. For this reason, the headline (and perhaps the vote if disclosed) is all the public usually knows about a court decision, and it’s typically the only part of a decision that concerns elected actors.

³⁵ Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002); GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* (2004).

³⁶ Helmke, *The Logic of Strategic Defection*, *supra* note 35, at 292.

existing regime once it began to lose power.³⁷

Even when the threat isn't as severe as it was in Argentina, the government's preferences might figure into outcomes. Carrubba and his co-authors demonstrate that the European Court of Justice relies on "observations" (briefs filed by EU institutions and member state governments in judicial proceedings) to assess the "balance of member-state preferences regarding the legal issue."³⁸ The more observations for one side, the higher the chances of that side winning, which makes sense. If the majority of member states favor one side and the Court rules the other way, those states could form a coalition to override the decision by passing legislation, thereby rendering it ineffective.³⁹

The above studies focus on how and why external forces affect votes and outcomes; other work is more internal looking. Sen, for example, finds that Black U.S. trial court judges are reversed on appeal more often than their white colleagues, a finding consistent with implicit bias.⁴⁰ Blanes i Vidal and Leaver's study of English courts shows that the judges' "collegial culture" artificially lowers the reversal rate as the judges "actively avoid public contradiction of their peers."⁴¹ These results are akin to findings in the United States indicating that justices tend to affirm cases coming from the appellate court on which they served.⁴²

The pages to come highlight other examples of vote-outcome studies, and no doubt by the time this article appears in print, many more will have been conducted. The explanation of these choices remains central to the study of judicial behavior. Nonetheless, the choices now also encompass a range of decisions, including (but not limited to):

- whether and how to encourage settlement⁴³
- which cases to select for "full-dress treatment"⁴⁴ and which to avoid⁴⁵
- to whom to assign the opinion of the court⁴⁶

³⁷ *Id.* at 291.

³⁸ Clifford J. Carrubba et al., *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 102 AM.POL. SCI. REV. 435, 440 (2008).

³⁹ See also DORTE SINDBJERG MARTINSEN, AN EVER MORE POWERFUL COURT?: THE POLITICAL CONSTRAINTS OF LEGAL INTEGRATION IN THE EUROPEAN UNION (2015).

⁴⁰ Maya Sen, *Is Justice Really Blind? Race and Appellate Review in U.S. Courts*, 44 J. LEGAL STUD. 187 (2015).

⁴¹ Jordi Blanes i Vidal & Clare Leaver, *Bias in Open Peer-Review: Evidence from the English Superior Courts*, 31 J.L., ECON., & ORG. 431 (2015).

⁴² Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009).

⁴³ Ayelet Sela & Limor Gabay-Egozi, *The Role of Judges in Adjudication, Settlement and Other Vanished Trials: Evidence from Civil Trial Courts*, (paper presented at Judicial Behavior Workshop, University of Chicago Law School, Oct. 2017) (on file with the authors); Christina L. Boyd, *She'll Settle It?*, 1 J.L. & CTS. 193 (2013).

⁴⁴ Arguelhes & Hartmann, *supra* note 14; Theodore Eisenberg et al., *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246 (2012); Raul A. Sanchez Urribarri et al., *Explaining Changes to Rights Litigation: Testing a Multivariate Model in a Comparative Framework*, 73 J. POL. 391 (2011).

⁴⁵ Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2002); Greg Goelzhauser, *Avoiding Constitutional Cases*, 39 AM. POL. RSCH. 483 (2011).

⁴⁶ Alarie & Green, *supra* note 13.

- how to approach opinion writing, including what sources to cite,⁴⁷ whether to dissent,⁴⁸ and how to frame opinions for different audiences⁴⁹
- strategies to enhance future job prospects (including promotion)⁵⁰ and the judges' reputation and legacy⁵¹
- ways to keep lower (or national) courts in line⁵² and ways to evade backlash from governments⁵³
- approaches to cement the court's legitimacy and encourage compliance with its decisions⁵⁴
- when to depart from the bench⁵⁵ and even when to avoid judicial posts altogether.⁵⁶

As the choice set has expanded, so have the number of topics that fall under the rubric of comparative judicial behavior. To note a few examples: Helmke's and Carrubba's studies, recall, embed the judges' choices in their regimes;⁵⁷ and now an entire branch of judicial behavior centers on the courts' relations with elected actors.⁵⁸ Work by Sen and Blanes i Vidal and Leaver illustrates the equal value of embedding courts within their legal system. This is also a large area of inquiry that goes under the name "The Hierarchy of Justice," which explores the interactions between judges on higher (or transnational) and lower (or domestic) courts.⁵⁹ Consider that judges' strategies to enhance their institution's legitimacy often draw attention to connections between courts and citizens. Some studies focus on how judges develop popular rights or incorporate public

⁴⁷ See Frankenreiter, *supra* note 26; Andrew Green & Albert H. Yoon, *Triaging the Law: Developing the Common Law on the Supreme Court of India*, 14 J. EMPIRICAL LEGAL STUD. 683 (2017); Lupu & Voeten, *supra* note 26.

⁴⁸ Tiede, *supra* note 15; Henrik Litleré Bentsen, *Court Leadership, Agenda Transformation, and Judicial Dissent: A European Case of a "Mysterious Demise of Consensual Norms"*, 6 J.L. & CTS. 189 (2018).

⁴⁹ Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504 (2008).

⁵⁰ Alessandro Melcarne, *Careerism and Judicial Behavior*, 44 EUR. J.L. & ECON. 241 (2017); J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001).

⁵¹ GAROUPA & GINSBURG, *supra* note 13; RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

⁵² Arthur Dyeve, *Filtered Constitutional Review and the Reconfiguration of Judicial Politics*, 61 AM. J. COMPAR. L. 729 (2013); Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535 (2011); Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, 5 J. EUR. PUB. POL'Y 66 (1998).

⁵³ Carrubba et al., *supra* note 38; Helmke, *supra* note 36.

⁵⁴ Krehbiel, *supra* note 22; see also GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

⁵⁵ Anibal Pérez-Liñán & Ignacio Arana Araya, *Strategic Retirement in Comparative Perspective: Supreme Court Justices in Presidential Regimes*, 5 J. L. & CTS. 173 (2017); Tajuana Massie et al., *The Politics of Judicial Retirement in Canada and the United Kingdom*, 2 J. L. & CTS. 273 (2014).

⁵⁶ Santiago Basabe-Serrano, *Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007*, 44 J. LAT. AM. STUD. 127 (2012).

⁵⁷ Helmke, *supra* note 36; Carrubba et al., *supra* note 38.

⁵⁸ Brouard & Hönnige, *supra* note 13; Epstein et al., *supra* note 45; BENJAMIN GERHARD ENGST, *THE TWO FACES OF JUDICIAL POWER: THE DYNAMICS OF JUDICIAL-POLITICAL BARGAINING*, (forthcoming 2021) (on file with the authors).

⁵⁹ See studies in *supra* note 52; see Vidal & Leaver *supra* note 41.

opinion into their decisions or procedures;⁶⁰ and others, on public relations campaigns mounted by courts to generate conditions favorable to the exercise of their power (perhaps explaining the UK Court's decision to bring the bakery case to the public).⁶¹

As a final example of subjects under study, a very extensive body of literature connects institutions (formal and informal rules) governing the selection and retention of judges to the judges' decisions. That literature tends to confirm what constitutional framers seem to understand: Assuming that law in books and law in action coincide, institutional arrangements for judicial appointment and tenure can affect the people selected to serve and, ultimately, the choices they, as judges, will make.⁶² Work on economic prosperity provides a classic example. The hypothesis, in a nutshell, is that when judges are independent from the government because they enjoy life tenure, they are more willing to choose to enforce contract and property rights, which, in turn, encourages economic investment and growth.⁶³ Scholars have validated this expectation against contemporaneous cross-national data (most famously, La Porta et al.⁶⁴) as well as historical data. For example, looking back to England in the 1700s, Klerman and Mahoney show that laws providing greater job security to judges increased the value of financial assets.⁶⁵

The comparative law literature has also explored various institutional factors, such as the range of judicial tasks that courts are called to perform, the type of state authority, and the historical experience that shapes courts' relationships with different branches of government and the public, especially any major political or social discontinuity (e.g. the French revolution).⁶⁶ Additionally, it has considered the effects of the organizational structure, the organization of the judicial system, as well as differences and similarities of legal education, training, and socialization into the corps. Finally, comparative law analysis have pinpointed the importance of internal relations within institutions (hierarchy, leadership, and personal contacts and influence) in explaining variation in argumentative structures and judicial writing styles.⁶⁷ These studies of comparative institutional analysis, in turn, supply a range of relevant factors that could play a role in shaping the choices judges worldwide must make to arrive at their decisions and authoritatively interpret the law in individual cases (including the gay cake cases).

Using these factors as points of departure, studies of comparative judicial behavior could assess the strength of each. The field has developed a rich and varied set of methods to effectively address

⁶⁰See generally Lee Epstein & Jack Knight, *Efficacious Judging on Apex Courts*, in *COMPARATIVE JUDICIAL REVIEW* (Erin F. Delaney & Rosalind Dixon eds., 2018).

⁶¹Staton, *supra* note 16 .

⁶² E.g., Varol et al., *supra* note 12 (showing how structural changes to the Turkish Constitutional Court affected the Court's decision); Keren Weinshall & Lee Epstein, *Developing High-Quality Data Infrastructure for Legal Analytics: Introducing the Israeli Supreme Court Database*, 17 J. EMPIRICAL LEGAL STUD. 416 (2020) (documenting an increase in the vote share of religious-Jewish justices on the Israeli Supreme Court following a change in appointment procedures); Amanda Driscoll & Michael J. Nelson, *Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections*, 3 J.L. & CTS. 115 (2015) (concluding that the change from legislative selection of national judges to direct elections led to "unprecedented diversity" on the courts but a decline in public confidence).

⁶³ Douglass C. North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989).

⁶⁴ Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445 (2004).

⁶⁵ Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth-Century England*, 7 AM. L. & ECON. REV. 1 (2005).

⁶⁶ MIRJAN R DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

⁶⁷ JOHN BELL, *supra* note 28.

the multiplicity of influences on decision makers. Such analysis could feed back into comparative legal studies, pointing scholars to less obvious causes and possible unexpected (but far reaching) consequences of judicial decisions. Providing an example is work by Gelter and Siems, which identifies factors influencing citations to foreign law that comparative lawyers would not normally consider, such as the country's wealth and level of corruption.⁶⁸

B. Consequences

Klerman and Mahoney's study of 18th century England draws attention not only to the relationship between institutions (tenure arrangements) and judicial choices, but also to a consequence of those choices: economic prosperity. Clever research by Mehmood runs along similar lines.⁶⁹ It shows that a change in Pakistan's method of appointing judges (from presidential selection to appointment by merit commissions) resulted in judges less inclined toward government expropriation, resulting in greater investment in the construction industry.⁷⁰

These examples focus on how institutions governing judicial appointments prompted particular judicial decisions that affected economic trends. However, the formal and informal rules shaping judicial choices are hardly limited to selection mechanisms, and the consequences, not cabined to economics. On almost all comparative legal analysis, constitutional provisions, statutes, treaties, case law, and the like serve to structure the judges' choices, thereby affecting the decision and its impact.⁷¹ Similar institutions figure into behavioral studies of the judges' choices, especially in studies exploring the relations between judges and external actors. Because constitutional arrangements usually provide a mechanism(s) for the people or their representatives to undo judicial decisions, studies demonstrate that judges can't afford to ignore the possible consequences of rulings against the regime's or the public's preferences. Carruba et al.'s analysis of the ECJ it is hardly alone in this category.⁷²

Other studies of judicial behavior consider the consequences of particular internal institutions—for example, rules that allow the chief justice to set the size and composition of panels (*e.g.*, Indian and Canadian Supreme Courts⁷³) or norms that permit, if not encourage, dissent (*e.g.*, U.S. and Australian Supreme Courts). Once again, the idea is to explore how institutions drive judicial choices and, ultimately, the effect of those choices for society or even the Court. An example is a court's perspective on dissenting opinions. Some courts (*e.g.*, the German Constitutional Court and especially the European Court of Justice) and judges (U.S. Chief Justice Roberts) disfavor dissents. Much more preferable, they argue, is a norm of consensus on the theory that it produces positive consequences: consensus "contributes to stability in law," reflects a more "cautious" approach, encourages deliberation, and promotes the court's legitimacy.

Research on international human rights judiciaries suggests that the dissent naysayers may

⁶⁸ Martin Gelter & Mathias Sims, *Citations to Foreign Courts -- Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMPAR. L. 35 (2014). The study also shows that cross-citations do not have the negative consequence of "undercutting national sovereignty," as is sometimes claimed.

⁶⁹ Klerman & Mahoney, *supra* note 65.

⁷⁰ Sultan Mehmood, *Essays on Judicial Independence and Development: Evidence from Pakistan* (2019) (Ph.D. dissertation, University of Paris Dauphine) (on file with the authors).

⁷¹ This also holds for the comparative analysis of judicial behavior. *See infra* Part III.E.

⁷² Carrubba et al., *supra* note 38.

⁷³ Alarie & Green, *supra* note 13, at 99.

have a point: in those courts, separate opinions lower compliance rates.⁷⁴ However, experimental research on domestic courts shows that dissents can actually boost support for courts because they amount to consolation prizes for people who disagreed with the decision: even losers get representation.⁷⁵

Whatever the studies' particulars, a focus on the relationship among institutions, judicial choices, and consequences highlights the importance of comparative analysis. It is one thing to claim that job security frees judges to act on their own preferences (rather than the government's) or that dissent produces good (or bad) consequences, but quite another to test those assertions. Only by comparing judges in societies with different jurisdictions and audiences and where particular institutions, such as life tenure, actually exist or don't exist (or where institutional change occurred) is it possible to determine whether and which rules matter for judicial choice and eventually for society.

C. Illumination of Choices and Consequences

The term “illuminate” refers to the aim of comparative judicial behavior to make the judges' choices and the consequences of their choices for society intelligible. This term, yet again, is purposefully broad, meant to convey the different motivations and methods scholars bring to the comparative analysis of judicial behavior. The range of goals is wide, from offering rich description of features of judging (such as norms governing dissent or the institutions structuring judicial selection and retention), to developing measures of crucial concepts (such as judicial independence), to making causal claims with implications for law and public policy (such as the effect of tenure arrangements on economic prosperity).

These varying motivations, in turn, lead scholars to different types of data (facts about the world) and methods. Some favor quantitative (numerical) data and the process of data collection, which allows for statistical inference. Others are more interested in non-numerical (qualitative) data that they can interpret, organize into categories, and use to identify patterns or understand particular legal phenomena; and still others produce narratives about particular features of the judges' choices. The data can be historical or contemporary, based on legislation, treaties, case law, the results of interviews, or the outcomes of secondary archival research or primary data collection. None of these is superior. All, in fact, have led to valuable insights, answered pertinent research questions, and addressed persistent societal puzzles—a point to which we return in Part IV.

D. Comparative Judicial Behavior

This leaves the term “comparative.” Lawyers and many legal academics, it seems, use that term as a synonym for the analysis of foreign law, which explicitly entails using illustrations from other legal systems to compare rules, norms, application, and legal culture.⁷⁶ Likewise, because

⁷⁴ Daniel Naurin & Øyvind Stiansen, *The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary*, 53 COMPAR. POL. STUD. 959 (2020).

⁷⁵ MICHAEL F. SALAMONE, PERCEPTIONS OF A POLARIZED COURT: HOW DIVISION AMONG JUSTICES SHAPES THE SUPREME COURT'S PUBLIC IMAGE (2018); Henrik Litleré Bentsen, *Dissent, Legitimacy, and Public Support for Court Decisions: Evidence from a Survey-Based Experiment*, 53 LAW & SOC'Y REV. 588 (2019).

⁷⁶ See, e.g., UWE KISCHEL & ANDREW HAMMEL, COMPARATIVE LAW (2019).

U.S. scholars, focusing on U.S. courts, dominated the study of judicial behavior for so long, there's a tendency in the field to equate the term "comparative" with studies of non-U.S. judges and courts.

These definitions are understandable, but they are not our understanding. To us, analyses could focus on a single country (court) drawing comparisons over time; that's Helmke's study of Argentina⁷⁷ and Klerman and Mahoney's analysis of England.⁷⁸ Equally comparative are studies on a single country (court) at a single point in time that likens features of judging there to elsewhere.⁷⁹ Then, of course there are cross-national studies of many courts operating during similar eras.⁸⁰ Alarie and Green's analysis of variation in modern-day dissent rates on peak courts in Canada, India, the UK, and the US falls into this category,⁸¹ as does La Porta et al.'s study of the effect of judicial tenure on economic prosperity. Again, none is superior to or more "comparative" than the others; all contribute to the enterprise of illuminating the choices judges make.

III. Approaches to Judging

When Socrates was on trial for his life, he refused to appeal to the "emotions" of judges out of a belief that the judge "has sworn that he will judge according to the laws and not according to his own good pleasure."⁸² This outlook is often labelled "legalism." In its simplest form, legalism holds that law is "out there," distinct from morals and politics; legal rules are determinate; the legal system is "complete" (Maitland's seamless web).

A legalistic outlook toward judging calls for judges to "find" the meaning of legal rules through politically neutral methods (careerism, ideology, and emotions, just as Socrates proclaimed, are immaterial). And it engages the legal scholar (especially of the continental or civil law tradition) in the construction of a rationalized ideal: a systematization of legal sources, including judicial decisions, into a coherent whole.

Various versions of legalism continue to permeate important theories of judging, legal curricula throughout the world, and traditional comparative law analyses. There is also a legalistic component to the study of judicial behavior (see Part III.E). The dominant theories, however, trace more directly to so-called realist ideas, which also infuse a growing number of comparative law studies of courts⁸³ and their jurisprudence.⁸⁴

⁷⁷ Helmke, *supra* note 36.

⁷⁸ Klerman & Mahoney, *supra* note 65; *see also* Frankenreiter, *supra* note 26; Lupu & Voeten, *supra* note 26; Bentsen, *supra* note 48.

⁷⁹ *E.g.*, Epstein et al., *supra* note 45 (analysis of the run-in between the Russian Constitutional Court and the government in the 1990s as an example of courts as constrained actors).

⁸⁰ *E.g.*, GAROUPA & GINSBURG, *supra* note 13; Brouard & Hönnige, *supra* note 13.

⁸¹ Alarie & Green *supra* note 13.

⁸² Then again, in E.M. Cope, PLATO'S: GORGIAS (1864) Socrates predicted that his trial would be the equivalent of the trial of a doctor prosecuted by a cook before a jury of children.

⁸³ Duncan Kennedy, *Political Ideology and Comparative Law*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW (Mauro Bussani & Ugo Mattei eds., 2012). Exposing the ideological context is likely to make the difference between countries a good deal more intelligible than it would if we had nothing but a "merely legal" explanation of what happened. *Id.* at 46.

⁸⁴ *E.g.*, John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMPAR. L. 617, 629 (1998) ("In some systems, like that of the United States with its common law heritage and explicitly political ways of selecting judges, lawyers tend to include a consideration of broader questions of policy in their formal legal reasoning and may also take into consideration the political dimensions of a legal problem in analyzing how a court will likely decide a given issue.

The sections to come outline the five approaches that comprise the core of the field of judicial behavior: the attitudinal model (Part III.A), the labor market model (Part III.B.1), strategic accounts (Part III.B.2), identity approaches (Part III.C), and the “thinking-fast” judging (Part III.D). A sixth (Part III.E) returns us to legalism, and the importance of “law,” broadly defined, in judging.

These theories, we hasten to note, are decidedly not internal to law but rather reflect different disciplinary traditions. The attitudinal model comes from political science; strategic accounts and the labor market model draw on economics; identity and “thinking fast,” on sociology, social psychology, and behavior economics; and the legal on a combination of law and organizational sociology. For this reason, the theories differ in details (and terminology). But they are also complimentary or, at the least, not mutually exclusive. Most importantly, together they supply a reasonably comprehensive and realistic conception of judging.

A. The Attitudinal Model

Beginning in the 1880s and picking up steam in the 1920s and '30s, some law professors and judges expressed skepticism of legalism, claiming “mechanical judging” to be mere rhetoric designed to conceal the political character of the judges’ rulings. These “realists” sought to supplant legalistic accounts of judging with conceptions they believed were more accurate, chiefly by offering conjectures about the influence of the judges’ political preferences (their ideology or partisanship) and even their social class on their decisions.⁸⁵

Among political scientists trained to view the world through a political lens, the idea that judges attempt to align the law with their political preferences was naturally appealing (and fit comfortably with the voting studies of the day, which emphasized partisanship as a determinant of electoral choices). By the turn of the 20th century, political scientists studying courts ultimately packaged the realists’ conjectures as the “attitudinal model,” which holds that judges’ votes reflect their political preferences toward the facts raised in cases—with political preferences usually defined by the judges’ ideology or partisan identity.⁸⁶ Unlike the realists, political scientists offered empirical evidence to prove the realists’ intuition right: the justices of the US Supreme Court voted according to their ideology or partisanship.⁸⁷

The attitudinal model continues to hold sway because political preferences, no matter how measured, remain drivers of judicial decisions—and not just in the U.S. Supreme Court. In virtually all studies that measure it, partisanship or ideology affects judging. Grendstad and co-author’s book on the Norwegian Supreme Court demonstrates that justices appointed by social democratic governments are significantly more likely than non-socialist appointees to find for the litigant pursuing a “public economic interest.”⁸⁸ Ideology (as measured by the appointing regime) plays a bigger role in these decisions than almost any other factor that Grendstad et al. considered. Hönnige found that ideology helps predict the votes of judges serving on the French and German

These kinds of policy considerations and political calculations should also be included as part of the mental world of the well-trained lawyer in such a system.”)

⁸⁵ *E.g.*, JEROME FRANK, *LAW AND THE MODERN MIND* (1930); KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930).

⁸⁶ Best articulated in JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002), especially Chapters 3 and 8.

⁸⁷ See work listed in *supra* note 33.

⁸⁸ Grendstad et al., *supra* note 22.

Constitutional Courts;⁸⁹ and Carroll and Tiede identify dissent patterns on the Constitutional Court of Chile “consistent with a general separation between the judges with center-left and right backgrounds.”⁹⁰ In their study of Spanish Constitutional Court judges, Garoupa et al. discovered that under certain conditions, “[t]he personal ideology of the judges does matter,” which led them to “reject the formalist approach taken by traditional constitutional law scholars in Spain.”⁹¹

At the same time, though, these studies demonstrate that ideological (or partisan) motivations have their limits: in none is there a perfect correlation between political preferences and voting. (e.g., far more than 0% of the votes cast by non-socialist appointees on the Norwegian Court are in favor of public economic interests; and far short of 100% of the socialist-appointees’ votes are in their favor). Moreover, moving down the judicial hierarchy, from apex to trial courts, ideology and partisanship carry even less weight.⁹²

That political preferences don’t seem to provide a complete explanation of the judges’ choices—they may not even be especially weighty for many judges—has affected the study of judicial behavior in two ways. First, it has prompted scholars to try to isolate the factors that lead to “attitudinal” voting. The list is now long and includes the process of judicial appointments (e.g., the more political actors involved or the more contentious the process, the more political the court⁹³), agenda-setting mechanisms, the size of the court's docket, and the size of judicial panels (courts with a mandatory docket,⁹⁴ high caseload,⁹⁵ and small-inconsistent panels tend to be more legalistic).⁹⁶

A second result of the realization that political preferences have limited explanatory power has been even more consequential: a quest for other motivations and explanations. That quest, in turn, gave rise to the next set of approaches to judicial behavior, the labor market model and strategic accounts, both of which accommodate preferences beyond the political.

B. Rational Choice Accounts

The labor market model and strategic accounts are different approaches to judging but they share a common grounding in rational choice theory. On this theory, judges or any other actors make rational decisions when they choose a course of action that they believe satisfies their desires most efficiently. Or as Judge Posner famously put it, the judge is “a rational maximizer of his ends in life, his satisfactions. . . his ‘self-interest’.”⁹⁷

⁸⁹ Christoph Hönnige, *The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts*, 32 W. EUR. POL. 963 (2009); see also Chris Hanretty, *Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals*, 51 EUR. J. POL. RSCH. 671 (2012).

⁹⁰ Royce Carroll & Lydia Tiede, *Ideological Voting on Chile’s Constitutional Tribunal: Dissent Coalitions in the Adjudication of Rights*, 11 J. HUM. RTS. 85, 86 (2012).

⁹¹ Nuno Garoupa et al., *Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*, 29 J.L., ECON., & ORG. 513, 516 (2013).

⁹² On federal courts in the United States, see Epstein et al., *supra* note 27.

⁹³ See, e.g., Matthew E. Wetstein et al., *Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. and Canadian Supreme Courts*, 42 COMPAR.POL. STUD. 763 (2009); Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMPAR. L. 173 (2013)

⁹⁴ Eisenberg et al., *supra* note 44.

⁹⁵ Paresh Kumar Narayan & Russell Smyth, *What Explains Dissent on the High Court of Australia? An Empirical Assessment Using a Cointegration and Error Correction Approach*, 4 J. EMPIRICAL LEGAL STUD. 401 (2007).

⁹⁶ Keren Weinsall et al., *Ideological Influences on Governance and Regulation: The Comparative Case of Supreme Courts*, 12 REGUL. & GOVERNANCE 334 (2018).

⁹⁷ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (2011).

The difference between the labor market model and strategic accounts is the flavor of rational choice theory that grounds them.⁹⁸ The labor market model considers how individuals act to maximize their preferences, “given the constraints they happen to face.”⁹⁹ According to this model judges, just as other workers, are motivated and constrained by costs and benefits both pecuniary and non-pecuniary.¹⁰⁰ If a judge wants to earn more money, she might write a novel assuming she has carefully weighed her own costs, like time away from her job, and benefits. In other words, she is the variable and all others, the constants.¹⁰¹ Strategic accounts, in contrast, assume that goal-directed judges (regardless of their goal) operate in interdependent decision-making context; that is, when the judges make decisions, they attend to the preferences and likely actions of other relevant actors.¹⁰² For example, if judges care about the implementation of their decisions, their opinions will take into account the implementers’ possible responses.¹⁰³

Although both the labor market model and strategic accounts have shed much light on judicial behavior, their chief contributions are distinct. The labor market model has expanded the set of relevant motivations; and strategic accounts have introduced the importance of actors beyond the individual judge.

1. The Labor Market and Personal Motivations

Preferences play a role in almost all studies of judicial behavior. Political scientists, as we have seen, tend to emphasize ideology and partisanship, whereas the law community seems more interested in legal motivations. Without denigrating the importance of either, the labor market model draws attention to personal motivations for judicial choice. The idea is that given time constraints, judges seek to maximize their preferences over a set of roughly five personal factors (most of which also have implications for political and legal goals):¹⁰⁴

- 1) Job satisfaction, or the internal satisfaction of feeling that one is doing a good job, as well as the more social dimensions of judicial work, such as relations with other judges, clerks, and staff¹⁰⁵
- 2) External satisfactions that come from being a judge, including reputation, prestige, power,

⁹⁸ Lee Epstein & Jack Knight, *The Economic Analysis of Judicial Behavior*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR (Lee Epstein & Stefanie A. Lindquist eds., 2017).

⁹⁹ Frank Lovett, *Rational Choice Theory and Explanation*, 18 RATIONALITY & SOC’Y 237, 238 (2006).

¹⁰⁰ Epstein et al., *supra* note 27; Alarie & Green *supra* note 13.

¹⁰¹ JON ELSTER, EXPLAINING TECHNICAL CHANGE (1983).

¹⁰² LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997).

¹⁰³ *E.g.*, Staton & Vanberg, *supra* note 49. Assuming that the costs to implementers of deviating from a clear court decision are higher than the costs of deviating from a vague decision (because non-compliance is easier to detect), a court facing “friendly” implementers will write clear opinions. Clarity increases pressure for—and thus the likelihood of—compliance. But when the probability of opposition from implementers is high, clarity could be costly to the judges; if policymakers were determined to defy even a crystal-clear decision, they would highlight the relative lack of judicial power. To soften the anticipated resistance, courts may be purposefully vague.

¹⁰⁴ For more details, see Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 AN. REV. POL. SCI. 11 (2013).

¹⁰⁵ *E.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMUL. REV. 469 (1998); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

influence, and celebrity¹⁰⁶

- 3) Leisure, such that at some point “the opportunity cost of foregone leisure exceeds the benefits to the judge of additional time spent making decisions”¹⁰⁷
- 4) Salary/income, in that all else being equal, judges, like most of us, prefer more salary, income, and personal comfort to less¹⁰⁸
- 5) Promotion, to a “higher” or more prestigious job or office¹⁰⁹

Because these are rather universal motivations, they lend themselves nicely to comparative analysis, such as getting a promotion. This would seem to be an important factor influencing the personal utility that judges gain from their work.¹¹⁰ It could be coincident with policy preferences: the higher judges sit in the hierarchy, the more important the cases they hear and the greater the opportunity to influence the law. Promotion also tends to increase job satisfaction, prestige and reputation, and, of course, salary. For these reasons, it is no surprise that many studies provide evidence of a connection between the judges’ choices and promotion goals. Epstein, Landes, and Posner, for example, compared U.S. federal judges with some realistic possibility of promotion to those without much hope to determine whether the former “audition” for their next job.¹¹¹ The data support their hypothesis that the auditioners would impose harsher sentences on criminal defendants to avoid being tagged as soft on crime.¹¹² Along similar lines Ramseyer and Rasmusen famously demonstrate that Japanese lower court judges tend to defer to the national government because deference improves their chances of “doing better in their careers.”¹¹³ Salzberger and Fenn show that UK judges work to avoid reversal because a lower reversal rate increases the judge’s prestige and the likelihood of promotion.¹¹⁴

Then again, despite the generalizability of promotion and other personal motivations, most studies focus on U.S. judges. This gap, in turn, suggests numerous opportunities for contributions by comparatists with deep knowledge of law and legal institutions across or within particular legal systems/countries. Comparative research could uncover the mechanisms, degree, and ways in

¹⁰⁶ GAROUPA & GINSBURG, *supra* note 13; Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994).

¹⁰⁷ Drahozal, *supra* note 105, at 476; *see also* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC’Y REV. 579 (2003); Tom S. Clark et al., *Estimating the Effect of Leisure on Judicial Performance*, 47 J. LEGAL STUD. 349 (2018).

¹⁰⁸ Alessandro Melcarne & Giovanni B. Ramello, *Judicial Independence, Judges’ Incentives and Efficiency*, 11 REV. L. & ECON. 149 (2015); Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131 (1991); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107 (1983).

¹⁰⁹ Ramseyer & Rasmusen, *supra* note 50; Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831(1999).

¹¹⁰ John Bell, *supra* note 28.

¹¹¹ Epstein et al., *supra* note 278.

¹¹² For other U.S. studies, *see* Ryan C. Black & Ryan J. Owens, *Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court*, 60 AM. J. POL. SCI. 30 (2016); Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L., ECON. & ORG. 183 (1991); S. Scott Gaille, *Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings*, 26 J. LEGAL STUD. 371 (1997).

¹¹³ Ramseyer & Rasmusen, *supra* note 50.

¹¹⁴ Salzberger & Fenn, *supra* note 109.

which these universal motivations affect judges. For example, comparing the effect of time constraints in systems with different caseloads might reveal that a preference for leisure does not have a linear effect on decisions (*e.g.*, a decision to push litigants to compromise); and studying different procedures for judicial promotion may aid in designing a system where its effects on outcomes are tamer (if that's desirable).

These examples relate to contributions that comparative lawyers can make to the analysis of judicial behavior. There are also many ways that scholars in both fields can combine their skills to their mutual benefit. To return to the subject of promotion: Comparative lawyers understand that individual incentives can differ across countries depending on who gets promoted when. In some systems promotion (or appointment) is a matter of prestige (not money) coming at the end of a distinguished career; in others, promotions can come far earlier and translate into higher salaries. How to assess the effect of these different incentives—not anecdotally, but systematically—falls squarely in the wheelhouse of judicial behavior scholars.¹¹⁵

2. *Strategic Accounts and Interdependent Decision Making*

If the labor market model goes some distance toward layering the one-dimensional portrait of judges as policy maximizers or mechanical legalists, strategic accounts highlight the importance of interdependent decision making. The idea is that judges must attend to the preferences and likely actions of *other relevant actors* when they make their decisions if they are to achieve their goals. Those other “relevant actors” run the gamut, from the judges’ colleagues to the ruling regime and the public.

Interesting bodies of literature now cover each of these actors; and this work, especially on court-government relations, is likely to mushroom if only because of current global conditions. New research programs might consider threats to courts from politicians who have taken to social media to express their displeasure with particular decisions or even threaten judges by name.¹¹⁶ The rise of populism presents opportunities to explore backlash against international and domestic courts¹¹⁷ in the form of impeachment, jurisdiction-stripping, court-packing, non-compliance, or even criminal indictment and physical violence—and how backlash might affect the judges’ choices.

New projects, though, need not write on a blank slate. Strategic accounts of court-government relations hypothesize that rational judges will respond to threats with various strategies to maintain their legitimacy,¹¹⁸ such as avoiding cases that may contribute to further escalation,¹¹⁹ writing

¹¹⁵ Another example comes from Christoph Engel & Lilia Zhurakhovska’s study, *You Are In Charge: Experimentally Testing the Motivating Power of Holding a Judicial Office*, 46 J. LEGAL STUD. 1 (2017). The authors find that when judges are given an opportunity to announce an explicit policy, they become less sensitive to the objective degree of offenses or to their desire to fulfill the expectations of their judicial duty, and more sensitive to their personal social value orientation. Comparative lawyers could study the implications of these findings for judging in systems with binding legal precedent (announcing explicit policies) and those with unreasoned judgments.

¹¹⁶ Chris Krewson et al., *Twitter and the Supreme Court: An Examination of Congressional Tweets about the Supreme Court*, 39 JUST. SYS. J. 322 (2018).

¹¹⁷ Voeten, *supra* note 26.

¹¹⁸ For a review of these and other strategies for efficacious judging, see Epstein & Knight, *supra* note 60.

¹¹⁹ Epstein et al., *supra* note 45.

vague opinions,¹²⁰ and going public.¹²¹ A next step for scholars would be to specify formally, or otherwise, the circumstances under which one strategy might be more effective than others.¹²² Doing so would likely help comparative lawyers understand the ways in which political threats might reduce the ability of courts to develop particular doctrines or engage in international cooperation. Comparative analyses of the efficacy of strategies used elsewhere to calm rough political waters would also benefit judges, helping to inform their choices of what cases to hear and decide and how to justify their decisions.

C. Identity Approaches

Exploring the relationship between the choices judges make, and their biographies has a long pedigree, tracing to the 1960s. Early studies focused on career experience,¹²³ asking, for example, whether former prosecutors are tougher on criminal defendants,¹²⁴ whether judges who came from other judicial posts are more likely to adhere to precedent,¹²⁵ or whether private-practice lawyers turned judges are unusually favorable to wealthy and powerful interests.¹²⁶

There was also interest in the features of the judges' identities, especially their partisanship and nationality. Partisanship figured prominently in the behavioral revolution in political science in the 1960s, and that work continues globally, as already mentioned. National and regional identities also played a role in foundational research—for example, a study of the Canadian Supreme Court found that Quebec/non-Quebec justices voted differently.¹²⁷ That work is ongoing, but mostly in relation to international courts. Exemplary examples are Posner and de Figueiredo's study showing that judges on the International Court of Justice (ICJ) tend to favor the states that appoint them,¹²⁸ and Voeten's analysis of the European Court of Human Rights, also unearthing evidence that “judges [are] more likely [to] favor their national government when it is a party to a dispute.”¹²⁹

As judiciaries everywhere have grown (somewhat) more diverse in composition,¹³⁰ identity

¹²⁰ Staton & Vanberg, *supra* note 49.

¹²¹ Varun Gauri et al., *The Costa Rican Supreme Court's Compliance Monitoring System*, 77 J. POL. 774 (2015); STATON, *supra* note 16.

¹²² See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. COMPAR. L. 241 (2008); SHAI DOTHAN, *REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS* (2014).

¹²³ For a list of these studies and their results, see Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 961–965 (2003).

¹²⁴ Sheldon Goldman, *Voting Behavior on the United States Courts of Appeal Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333 (1962).

¹²⁵ John R. Schmidhauser, *Stare Decisis, Dissent, and the Backgrounds of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L. REV. 194 (1962).

¹²⁶ C. Neal Tate & Panu Sittiwong, *Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations*, 51 J. POL. 900 (1989).

¹²⁷ *Id.*

¹²⁸ Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).

¹²⁹ Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

¹³⁰ Margaret S. Williams & Frank C. Thames, *Women's Representation on High Courts in Advanced Industrialized Countries*, 4 POL. & GENDER 451 (2008); Santiago Basabe-Serrano, *The Representation of Women in the Judicial Branch: Eighteen Latin American High Courts in Comparative Perspective*, 185 REVISTA DE ESTUDIOS POLICOS 259 (2019).

has expanded to race,¹³¹ gender¹³² and ethnicity/religion,¹³³ with work drawing on a range of theories in the social sciences and law to produce interesting conclusions. Recall Sen's finding that Black trial court judges are reversed on appeal more often than their white counterparts.¹³⁴ Equally striking is Shayo and Zussman's study of small claims courts in Israel, showing clear evidence of in-group bias. Jewish judges systematically favor Jewish litigants, and Arab judges favor Arab litigants.¹³⁵

D. Thinking-Fast Judging

Some findings in the identity studies could be seen as consistent with rational-choice accounts. Take the effect of national identity in judging on international courts. Posner and de Figueiredo offer one explanation for why ICJ judges tend to vote in favor of their home country:

Economically, judges may be motivated by material incentives. Judges who defy the wills of their government by holding against it may be penalized. The government may refuse to support them for reappointment and also refuse to give them any other desirable government position after the expiration of their term.¹³⁶

But there's another explanation for the findings in the identity studies, one that comes not from economics but from decades' worth of studies in social psychology (and behavioral economics) In many situations, people rely on mental short cuts derived from intuition and emotion to make fast decisions without much effort.¹³⁷ On this account, judges may side with their own country not because they are rationally advancing an economic or any other interest but because of an emotional response. Posner and de Figueiredo recognize as much when they offer this alternative explanation for their finding:

Psychologically, if judges identify with their countries, they may find it difficult to maintain impartiality. International Court of Justice judges are not only nationals who would normally have strong emotional ties with their country; they also have spent their careers in national service as diplomats, legal advisors, administrators, and politicians. Even with the best intentions, they may have trouble seeing the dispute from the

¹³¹ Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167 (2013).

¹³² Laura P. Moyer, *Gender on the International Bench*, in HANDBOOK ON RESEARCH ON LAW AND COURTS (Susan M. Sterett & Lee Demetrius Walker eds., 2019); Christina L. Boyd et al., *Untangling the Causal Effect of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Erik Voeten, *Gender and Judging: Evidence from the European Court of Human Rights*, J. OF EUR. PUB. POL'Y 1 (2020).

¹³³ Moses Shayo & Asaf Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q.J. ECON. 1447 (2011); Guy Grossman et al., *Descriptive Representation and Judicial Outcomes in Multiethnic Societies*, 60 AM. J. POL. SCI. 44 (2016); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decision*, 65 OHIO ST. L.J. 491 (2004).

¹³⁴ Sen, *supra* note 40.

¹³⁵ Shayo & Zussman, *supra* note 133; For similar results, see Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIRICAL LEGAL STUD. 403 (2010); and criminal appeal rulings, Grossman et al., *supra* note 133.

¹³⁶ Posner & de Figueiredo, *supra* note 128, at 608.

¹³⁷ DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (2015). These responses are not always wrong or even unhelpful, but left unchecked by deliberative assessments, they can lead to mistakes and biased decisions. See Wistrich et al., *supra* note 27.

perspective of any country but that of their native land.¹³⁸

The basic point is that regardless of the judges' goals—adhering to the text of statutes, aligning the law with their ideological commitments, attaining promotion, etc.—non-rational factors will complicate their ability to make strategically, rational decisions. There is no getting around the fact that these very human features distort purely rational decision-making and find their way into legal interpretation and the legal outcomes that ultimately become the law.

Even so, many judges think they can “suppress or convert” their intuitions, prejudices, sympathies, and the like into rational decisions.¹³⁹ As the U.S. Justice Antonin Scalia once wrote, “Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”¹⁴⁰ But it turns out that another U.S. justice, Robert H. Jackson, had the better case when he compared “dispassionate judges” to “Santa Claus” and “Easter bunnies”¹⁴¹—or at least experiments conducted on thousands of judges suggest that they are just as human on the bench as the rest of us.¹⁴² The experiments show that judges respond more favorably to litigants they like or with whom they sympathize,¹⁴³ harbor implicit bias against Black defendants,¹⁴⁴ fall prey to hindsight bias when assessing probable cause,¹⁴⁵ and use anchoring and other simplifying heuristics in making numerical estimates.¹⁴⁶

If the experiments were the only evidence of non-rational behavior, it would be easy enough for judges and scholars alike to dismiss them as artificial, incapable of capturing the real courtroom environment. But that complaint, which implicates external validity, fizzles in light of the increasing number of studies using real courtroom data and finding similar biases. Shayo and Zussman's demonstration of in-group bias among Arab and Israeli judges is one example.¹⁴⁷ Another is a study of free-expression cases that also finds evidence of “us-against-them” judging: U.S. justices are more likely to find in favor of litigants alleging a speech infringement when the justices agree with the litigants' message.¹⁴⁸ And yet a third study finds that as the severity of a crime increases, U.S. appellate judges are significantly less likely to exclude evidence challenged as illegally gathered even though “crime severity” is a legally irrelevant consideration.¹⁴⁹

This line of research is extremely important. It has real implications for lawyering;¹⁵⁰ and, more relevant here, it presents real opportunities for scholars of comparative law and behavior. To

¹³⁸ Posner & de Figueiredo, *supra* note 128, at 608.

¹³⁹ Wistrich et al., *supra* note 27.

¹⁴⁰ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 32 (2008).

¹⁴¹ *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

¹⁴² See, e.g., Wistrich et al., *supra* note 27; Holger Spamann & Lars Klöhn, *Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255 (2016).

¹⁴³ Wistrich et al., *supra* note 27.

¹⁴⁴ Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

¹⁴⁵ Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight*, 8 J. EMPIRICAL LEGAL STUD. 72 (2011).

¹⁴⁶ Joep Sonnemans & Frans van Dijk, *Errors in Judicial Decisions: Experimental Results*, 28 J.L., ECON., & ORG. 687 (2012).

¹⁴⁷ Shayo & Zussman, *supra* note 133.

¹⁴⁸ Lee Epstein et al., *Do Justices Defend the Speech They Hate?: An Analysis of In-Group Bias on the US Supreme Court*, 6 J.L. & CTS. 237, 251 (2018).

¹⁴⁹ Jeffrey A. Segal et al., *The “Murder-Scene Exception” —Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases*, 105 Va. L. REV. 543 (2019).

¹⁵⁰ See generally Wistrich et al., *supra* note 27. As a litigator, Ruth Bader Ginsburg not only understood the idea of in-group bias; she built it into her litigation strategy. When she challenged sex-based classification in laws, she represented male plaintiffs to appeal to the predominately all-male judiciary of the day.

the extent that cognitive biases are features of human decision making, the findings from experiments and observational studies should transport to judges working across the globe, regardless of the appointment and tenure arrangements, the type of court, or the legal origin. Experiments on non-U.S. judges¹⁵¹ and observational data suggest as much. But far more work is needed, not only to identify the effects of various biases but also to devise legal solutions to promote debiasing. Along these lines a recent Swedish study recommends, on the basis of experimental evidence, assigning different judges to decide on detention and guilt as an effective way to mitigate confirmation bias in criminal cases.¹⁵²

E. Back to the Law (As an Institution)

The foregoing approaches reject extreme legalistic assertions that law's rationality, neutrality, and objectivity guide the judges' choices. The law-as-an-institution approach suggest that the law does "matter," though with a twist. The idea is that law (broadly defined to include constitutional provisions, statutes, past judicial decisions, and the like) is one of many institutions that structure (mostly by constraining) judicial behavior.

Seen in this way, law is not, as legalists might argue, the exclusive reason why judges make the decisions they do;¹⁵³ it rather serves as a normative constraint on judges from acting on their personal preferences, intuitions, biases, and emotions. On this account, judges might have a preferred rule that they would like to establish in a case or a preferred reading of statute, but they modify their position to take account of the constraint imposed by law.

To see why, consider the norm of *stare decisis*. Confronted with a precedent they disfavor; judges may nonetheless apply it for two reasons.¹⁵⁴ The first is prudential. *Stare decisis* is one way that courts respect the established expectations of a community. To the extent that people base their future expectations on the belief that others in their community will follow existing laws, courts have an interest in minimizing the disruptive effects of overturning entrenched rules of behavior. If courts seek to radically change the rules, then the changes may prove too much for the members of the community, resulting in an inefficacious decision. The second reason is more normative. If people believe that the legitimate judicial function involves following precedent, they'll reject as normatively illegitimate decisions that regularly and systematically violate precedent. To the extent that judges are concerned with establishing rules that engender compliance, they will take account of the fact that they must establish rules that are legitimate in the eyes of that community.

Although studies of judicial behavior haven't (thus far) distinguished empirically between these explanations, they have provided evidence of a role for legal doctrine. For example, analyzing US Supreme Court decisions, Kritzer and Richards demonstrate that various

¹⁵¹ Sonnemans & van Dijk *supra* note 146.

¹⁵² Moa Lidén et al., 'Guilty, No Doubt': *Detention Provoking Confirmation Bias in Judges' Guilt Assessments and Debiasing Techniques*, 25 PSYCH., CRIME & L. 219 (2019).

¹⁵³ Though some scholars of judicial behavior argue as much. See, e.g., Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261 (2006).

¹⁵⁴ We adapt some of this discussion from Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996).

“jurisprudential regimes” structure how the justices evaluate cases.¹⁵⁵ This is seen in quantitative research analyzing published decisions of the Canadian Supreme Court. Muttart shows that legal considerations play a crucial role in the justices’ choices.¹⁵⁶ Songer’s research, which combined quantitative evidence and in-depth interviews with Canadian justices, supports Muttart’s conclusions.¹⁵⁷

Nonetheless, comparative work must further inquire into how, why, and under what circumstances law shapes judicial decisions. Future studies could also contribute to the on-going debate over how to measure the “law.” Under the institutional understanding of law not as a static formalistic concept, but as a complex and dynamic institution that structures and constrains judges’ thinking, empirically defining law is quite challenging.¹⁵⁸ No doubt, comparisons would help.

IV. Design, Data, and Methods

Most approaches to judging, even extreme legalism, can generate testable hypotheses. A legalistic outlook, for example, might suggest that judges are little more than umpires, whereas the attitudinal model implies that “it’s all politics.” Following from both rational choice approaches are implications about how judges attempt to achieve their goals, though thinking-fast expects cognitive biases to stand in the way of preference-maximization.

Generating implications is one thing, while assessing them is another. Scholars of comparative judicial behavior do not follow one single, uniform path. Targets of inquiry vary from one court in one country to hundreds of courts in multiple countries across time. Measures of similar concepts, such as “judicial independence” or “ideology,” abound. Data can be developed in the lab from experiments on judges; or produced from court decisions, lawyers’ briefs, surveys, and interviews. Recall, that data, a fancy term for facts about the world, can be numerical or not.

On the one hand, this big-tent approach to the study of comparative judicial behavior seems appealing; it amounts to an invitation to all comers: legal academics, social scientists, historians, lawyers, and even the judges themselves. On the other hand, variations in methods, measures, and data have been the cause of much handwringing in the comparative community. Contested claims about the value (or lack thereof) of case studies and cross-national research are legion; and in some quarters even suggesting a large-*N* quantitative study amounts to *casus belli*. These battles are

¹⁵⁵ See, e.g., Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273 (2010) (questioning Richards and Kritzer’s results). But a more recent paper reinforces the existence of jurisprudential regimes in some U.S. legal spheres. Xun Pang et al., *Endogenous Jurisprudential Regimes*, 20 POL. ANALYSIS 417 (2012).

¹⁵⁶ DAVED MUTTART, *THE EMPIRICAL GAP IN JURISPRUDENCE: A COMPREHENSIVE STUDY OF THE SUPREME COURT OF CANADA* (2007).

¹⁵⁷ DONALD R. SONGER, *THE TRANSFORMATION OF THE SUPREME COURT OF CANADA: AN EMPIRICAL EXAMINATION* (2008). See also research on the law’s impact in Israel, including David Gliksberg, *Does the Law Matter? Win Rates and Law Reforms*, 11 J. EMPIRICAL LEGAL STUD. 378 (2014); Leon Yehuda Anidjar et al., *Enforced Performance in Common-Law Versus Civil-Law Systems: An Empirical Study of a Legal Transformation*, 68 AM. J. COMPAR. L. 1 (2020).

¹⁵⁸ Howard Gillman, *What’s Law Got to Do with It? Judicial Behaviorists Test the “Legal Model” of Judicial Decision-Making*, 26 LAW & SOC. INQUIRY 465 (2001); Brian Z. Tamanaha, *The Distorting Slant of Quantitative Studies of Judging*, 50 B.C.L. REV. 685 (2009).

ultimately of little scientific consequence. Data are data, methods are methods.¹⁵⁹ Which types get selected (should) depend on the researchers' questions and goals.

Where far more agreement exists is over the need to build common resources. To see why, suppose you wanted to conduct a comparative study of the doctrine, holdings, and votes in constitutional gay rights cases resolved in apex courts. Further suppose that you were interested in whether those outcomes varied by features of the judges (say, their age, gender, and religion) and various constitutional arrangements and rules (say, appointment, tenure, equality guarantees). One approach would be to go it alone: locating all the necessary texts and characteristics, categorizing each (whether numerically or not) by hand, and then somehow putting it a form that you could inspect (e.g., in an Excel file). No doubt this "one-off" approach has its benefits; chiefly, the resulting data are precisely tailored to your research question. But it also has substantial costs. Because collecting information on courts and judges can be expensive, many tailored data files consist of a small number of observations, which can be a problem for performing even simple analyses. For the same reason, the data files are rarely updated, limiting their value for answering contemporary questions. Finally, even when scholars include the same cases and "variables" (columns of data) in their studies conflicting results can, and do, emerge because of different procedures and practices for collecting the data of interest.

Now imagine a better research world—one in which there were common resources on which you could draw to conduct your study. A data file of all the attributes of all justices serving on apex courts; another with basic information on all their decisions (including links to the cases); and still another with all constitutional provisions. Assuming these resources were of "high quality,"¹⁶⁰ fully reliable, and freely available, not only would they eliminate the problems of the one-off approach; they would provide the tools—the infrastructure—necessary to advance knowledge and drive discovery and innovation in the study of judging worldwide.

Although this alternative universe does not yet exist, we're moving ever closer. Elkins, Ginsburg, and Melton's *Comparative Constitutions Project* (CCP)¹⁶¹ provides a common resource on constitutions that could be used to learn about formal arrangements relevant to our imagined research on gay rights.¹⁶¹ For example, from the CCP's website, it's a snap to identify the constitutional provisions relating to selection procedures and term length for apex court judges.

Likewise, teams of scholars all over the world are working to develop equally high-quality infrastructure on judges and courts, with some projects very far along. Consider the Israeli Supreme Court Database, which encodes information on the formal decisions of all 16,109 panel cases opened by the Supreme Court of Israel between 2010 and 2018 (with annual updates), as well as attributes of the justices.¹⁶² To be sure, scholars can analyze these data using fancy

¹⁵⁹ John Patty, *Responding to a Petition to Nobody (or Everybody)*, MATH OF POLITICS (Nov. 6, 2015), <http://www.mathofpolitics.com/2015/11/06/responding-to-a-petition-to-nobody-or-everybody/>.

¹⁶⁰ By high quality, we mean data infrastructure that capable of addressing real-world problems, accessible, reproducible and reliable, sustainable and updatable, and can serve as a foundation for present and future research needs. See Weinschall & Epstein, *supra* note 62.

¹⁶¹ Zachary Elkins et al., COMPARATIVE CONSTITUTIONS PROJECT, <https://comparativeconstitutionsproject.org>. Several scholars of comparative and international law have made great use of the CCP, notably Mila Versteeg, Tom Ginsburg and various colleagues. See, e.g., Tom Ginsburg & Mila Versteeg, *From Catalonia to California: Secession in Constitutional Law*, 70 ALA. L. REV. 923 (2019); Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1291 (2017); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587 (2014).

¹⁶² ISRAEL SUPREME COURT DATABASE, <https://iscd.huji.ac.il/home>.

statistical tools but rich description too is possible without even downloading the data. Figure 1 provides a simple example: the percentage of votes cast by the justices' gender and religiosity.¹⁶³ Note that over time the percentage by female justices shows a small decline, while the percentage by religious-Jewish justices has increased significantly. Whether this is less-than-welcome news for gay rights advocates¹⁶⁴ is a hypothesis that awaits testing.

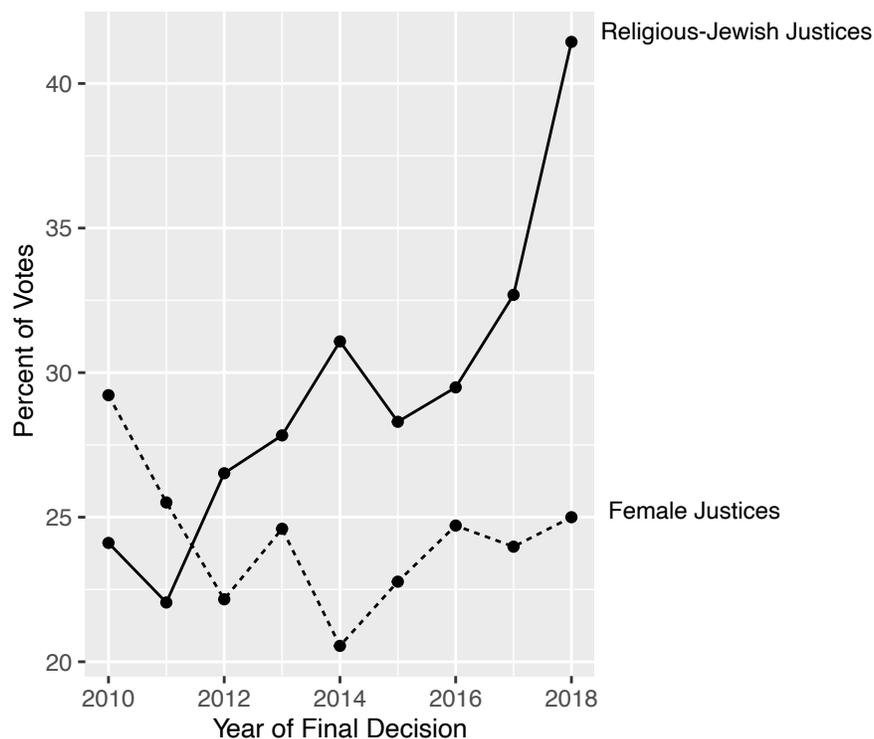


Figure 1. Two examples of biographical variables in the Israeli Supreme Court Database: Percentage votes cast by female justices and religious (Jewish) justices, 2010-2018. The Database labels justices as Jewish-religious, Jewish-secular, and non-Jewish. Because one justice's religiosity is unknown, his votes are omitted from calculation of the percentage.¹⁶⁵

Of course, the Israeli Database covers just one court in one country. That's typical of existing and emerging infrastructure for the study of judicial behavior.¹⁶⁶ The hope, though, is that in the

¹⁶³ This example appears in Weinshall & Epstein, *supra* note 62.

¹⁶⁴ E.g., surveys in the United States show that men and more religious people are more likely to allow business to "refuse products or service to gay or lesbian people if providing them would violate their religious beliefs." PRRI Staff, *Broad Support for LGBT Rights Across all 50 States: Findings from the 2019 American Values Atlas*, PUB. RELIGION RSCH. INST. (Apr. 14, 2020), <https://www.prrri.org/research/broad-support-for-lgbt-rights/>.

¹⁶⁵ ISRAEL SUPREME COURT DATABASE, <https://iscd.huji.ac.il/home>.

¹⁶⁶ Existing data infrastructure relevant to the study of comparative judicial behavior include the *Biographical Directory of U.S. Federal Judges, 1789-present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges>; Elkins et al., *supra* note 161; the German Federal Courts Dataset (see Hanjo Hamann, *The German Federal Courts Dataset 1950–2019: From Paper Archives to Linked Open Data*, 16 J. EMPIRICAL LEGAL STUD. 671 (2019)); the Norwegian Supreme Court Database (see Grendstad et al., *supra* note 22.); *U.S. Supreme Court Database*, WASHINGTON UNIVERSITY LAW, <http://scdb.wustl.edu>; *The Supreme Court Justices Database*, WASHINGTON UNIVERSITY IN ST. LOUIS, <http://epstein.wustl.edu/research/justicesdata.html>; and VARIETIES OF DEMOCRACY, <https://www.v->

not-so-distant future, scholars of comparative judicial behavior will form even larger teams—R & D units—that would produce high-quality infrastructure covering all apex courts across all decisions and judges. Such would amount to a common resource updated annually that all comparativists would use and ultimately adapt for their own purposes.¹⁶⁷

This is no impossible dream. A related project, conceptualizing and measuring democracy in 202 countries, is now complete;¹⁶⁸ and the timing couldn't be better to launch one on courts and judges considering the breakthroughs in data production. These include automating input (*e.g.*, through data scraping); developing algorithms to help organize the texts—court decisions, briefs, laws, constitutions, and so on—into categories of interest (*i.e.*, classification);¹⁶⁹ and outsourcing coding to non-experts.¹⁷⁰

Undoubtedly challenges remain obtaining the relevant texts, harnessing a common set of variables based on the existing literature, and not least, resisting irrational data exuberance. There might be additional legal concerns to address, such as preserving the privacy of litigants and judges.¹⁷¹ But is the impossible dream possible? Yes, and we should band together to pursue it. Not only will high-quality common resources advance knowledge and drive discovery, they have the potential to bring together diverse scholars interested in comparative law, legal institutions, and judicial behavior. One reason is obvious: working from and building on common resources is efficient, time- and resource-wise. Another less so. Because building infrastructure requires technical skills *and* specialized knowledge of local conditions (*i.e.*, insight into the legal system and its operation), it opens the door to collaborations among data and social scientists, lawyers, and legal academics.

Of great value to the development of common resources, for example, would be a list of factors that lend themselves to comparison (and to what kind of comparison), with each factor categorized

dem.net/en/. THE EUROPEAN COURT OF HUMAN RIGHTS DATABASE, <https://depts.washington.edu/echrdb/> and *The National High Courts Database*, UNIVERSITY OF SOUTH CAROLINA, <http://artsandsciences.sc.edu/poli/juri/highcts.htm> are also public multi-user databases that could be used for various purposes, though neither had been recently updated. For more detail on these and other datasets, see Lee Epstein et al., *Using Databases to Study Constitutional Law*, in *HANDBOOK OF RESEARCH METHODS IN CONSTITUTIONAL LAW*, (Malcolm Langford & David Law eds.) (forthcoming).

Many others are in the works. For example, at a 2019 conference at the European University Institute on multi-user databases for the study of judicial behavior (October 11–12), developers presented plans for building datasets on the Inter-American Court of Human Rights, the Court of Justice of the European Union, the Costa Rican Supreme Court, the German Federal Constitutional Court, and the Swedish Supreme Court.

¹⁶⁷ See Jeffrey K. Staton, *Building Research Communities via Collective Investment in Data Infrastructure*, in *CONCEPTS, DATA, AND METHODS IN COMPARATIVE LAW AND POLITICS* (Diana Kapiszewski & Matthew C. Ingram eds.) (forthcoming).

¹⁶⁸ VARIETIES OF DEMOCRACY, <https://www.v-dem.net/en/>. This is a massive project, involving over 50 social scientists and 3,000 country experts on six continents. Some of the data it contains would be of interest to comparative law scholars, including expert assessments of judicial accountability, independence, and corruption.

¹⁶⁹ For a nontechnical introduction, see Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 *POL. ANALYSIS* 267 (2013).

¹⁷⁰ See Kenneth Benoit et al., *Crowd-sourced Text Analysis: Reproducible and Agile Production of Political Data*, 110 *AM. POL. SCI. REV.* 278 (2016); David Carlson & Jacob M. Montgomery, *A Pairwise Comparison Framework for Fast, Flexible, and Reliable Human Coding of Political Texts*, 111 *AM. POL. SCI. REV.* 835 (2017).

¹⁷¹ An extreme, and in our eyes, unjust, legal hindered to freedom of information and to the transparency of the judiciary was imposed in France in 2019. The new French legislation banned the publication, evaluation, analysis, comparison or predictions of the behavior of individual judges (Article 33 of the Justice Reform Act). Were researchers to release datasets revealing the judges' names, they could face a maximum sentence of five years in prison.

from most to least comparable in the light of the research aim and questions. Take characteristics related to the position of a court in the judicial hierarchy: what, for example, do lawyers in Germany mean by high or federal courts or courts with general jurisdiction and what are high courts in the legal system of the UK? In what respects are the French Council of State and the Federal German Constitutional Court comparable (or not)? When would it make sense to compare them (to answer what kind of research questions)? By addressing these and related questions, comparative lawyers can ensure that resources for the study of judicial behavior are comparing apples with apples.

Relatedly, comparativists can help hone and improve measures of concepts that often appear in data infrastructure. These include (but are certainly not limited to) case salience, judicial activism, and the informal rules underlying formal institutional procedures for judicial appointment. Developing measures and categories of these and many other concepts is crucial for the study of judicial behavior and often requires a strong working knowledge of substantive and procedural law within particular societies; in other words, knowledge that only legal experts possess.

V. Jump In!

Collaborating on infrastructure is just one example of the many great opportunities for comparative law scholars to jump into the world of judicial behavior, as we have tried to highlight throughout. How can you get started?

First, you can delve into one or more of the topics listed in the On-Line Appendix. Around each, literatures have developed, some small, some large, all with room for more. Second, consider attending conferences where work on comparative judicial behavior is regularly aired. These include the Conference on Empirical Legal Studies and the annual meetings of the Midwest Political Science Association (always in Chicago) and the Society for Institutional and Organizational Economics. Finally, search around your university for partners—scholars already working on topics, countries, or courts of interests. Collaboration is the norm in the study of comparative judicial behavior (as the footnotes attest). We cannot imagine a faculty colleague or an advanced graduate student who would turn down the opportunity to work with someone with rich substantive knowledge of law and legal institutions.