

THE OXFORD HANDBOOK OF

U.S. JUDICIAL
BEHAVIOR

Edited by

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and

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PREFACE

SOME THOUGHTS ON THE FUTURE OF THE STUDY OF JUDICIAL BEHAVIOR

WITH its origins in the works of C. Herman Pritchett in the 1940s and Walter F. Murphy, Glendon Schubert, Harold J. Spaeth, and S. Sidney Ulmer (among others) in the 1950s and 1960s, the study of judicial behavior is now an established field in political science and, increasingly in law, history, sociology, psychology, and economics. Written by leading scholars, the chapters in this volume show off the interdisciplinary nature of the factors and institutional dynamic(s) that shape the choices judges make. We hope they offer useful roadmaps to those who are new to the field, and that they provide veteran scholars with ideas for fruitful directions for future research. So too, although the chapters focus exclusively on state and federal American courts, they illuminate theories and perspectives on judicial behavior and provide insights that might assist or inspire comparative research outside the United States. In short, we hope that these chapters push along study in this area by illustrating where we have been and where our scholarly travels might take us.

We have divided the Handbook into five parts. Part 1 focuses on the critical issue of staffing the courts. In her chapter on federal judicial appointments in the lower federal courts, Nancy Scherer explores the changing dynamics and forces that have affected the nomination and confirmation process over time. Chapter 2 shifts to the U.S. Supreme Court. Christine Nemacheck explains the strategies that presidents have used to secure their preferred appointments—including how they anticipate and manage the preferences of senators who must confirm the presidents' choices. James Gibson and Michael Nelson move us from the federal bench to state judges, many of whom must be elected and re-elected to retain their jobs. Gibson and Nelson describe and explain how institutional, electoral, and behavioral factors in the context of judicial elections affect the nature of decisions those state court judges make.

Once appointed or elected, judges must make decisions about when to step down (unless, of course, they are forced to do so because of an electoral defeat, impeachment, illness, or death). In his comprehensive chapter on the factors that affect federal judges' decisions to depart or retire from the bench, Albert Yoon reviews the literature

and presents data demonstrating the effect of personal and institutional factors on federal judges' decisions to leave active status. Judges are not the only court personnel who influence legal outcomes; judges' law clerks also have the potential to shape judicial decisions through the process of advising their judges. Artemus Ward's essay reviews the key decision-making stages in which clerks participate, concluding ultimately that while clerks exercise some influence, it is more modest than we might think.

Part 2 includes four chapters that address the process of appellate review, with emphasis on access to courts and oral argument. Christina Boyd's chapter on access to trial courts highlights the complex dynamics associated with case filings, settlements, and plea bargains—and the influence of parties and lawyers on these key stages in the litigation process. Losers in the trial courts may appeal to an appellate court, though such an appeal does not guarantee that the higher court will grant full review of the lower court judgment. Donald Songer and Susan Haire's chapter on access to intermediate appellate courts explores the calculations made by litigants in deciding whether to appeal, as well as the influence of jurisdictional constraints and other factors on the likelihood and scope of appellate review. Next, Ryan Owens and Joe Sieja take up the process of case selection in the U.S. Supreme Court, focusing on four possible explanations of why the justices grant or deny review. Timothy Johnson explores procedures that govern the litigation process, from trial to appellate review, with a particular focus on variations in procedures across appellate courts. He also explores how oral arguments have the potential to affect case outcomes in the U.S. Supreme Court. Finally, Pam Corley's chapter on opinion writing in the U.S. Supreme Court highlights how bargaining between the justices over opinion content—in combination with the options available to the justices in concurring, dissenting, or joining the majority—ultimately affects the nature of legal rules and holdings.

Chapters in Part 3 take up the core question: How do judges make decisions and what influences their votes? The first two chapters focus on the influence of law and precedent on the outcome of cases. For the sake of efficiency and predictability lower courts are expected to follow the legal principles and interpretations articulated by courts higher in the appellate hierarchy. Thomas Hansford's chapter explores the influence of top-down *stare decisis*, as well as the potential for bottom-up influences on judicial policy-making. David Klein also stresses the influence of law and legal doctrine on court decision-making—an area that has been particularly challenging for social scientists who seek to distinguish between the effects of legalistic versus more political factors. Professor Klein suggests a new strategy for meeting that challenge. Judges may also be strategic as they shape judicial policy in anticipation of reactions from political actors who have the potential to constrain the courts through budgetary and other oversight processes. Chad Westerland's chapter reviews the literature on the U.S. system of separated powers, with emphasis on how it may create an institutional context that causes judges to act strategically under particular circumstances. Tom Clark's chapter is related. He explores both normative and empirical theories of judicial review in U.S. courts, noting the implications for non-U.S. courts as judicial review has become prevalent in many other countries.

Part 3 also includes chapters that consider how judges' personal and policy preferences, along with their background experiences and characteristics, influence the way they resolve the cases brought before them. As Tracey George and Taylor Weaver explain, judges bring their own personal and background attributes to the bench; in fact, they are often selected on the basis of those background characteristics. George and Weaver assess theories that seek to explain judicial decisions on the basis of judges' attributes and experiences. Judges' ideological attitudes are among those key characteristics. In their chapter on partisanship and decision-making, Jeffrey Segal and Justine D'Elia-Kueper explain how partisanship—either as a proxy for ideology or as a group affiliation—influences judicial decision-making, and whether the Supreme Court's decisions reflect party polarization. Lee Epstein and Jack Knight conclude this section with a chapter exploring the economic analysis of judicial behavior that posits judges as rational actors motivated by preferences for multiple goods, including leisure time and policy outcomes. Epstein and Knight apply this approach to help explain judicial behavior in a number of different contexts.

Part 4 shifts our attention to external forces and parties that operate to shape the context in which judges reach their decisions, as well as the effect of their decisions. Although we often think about judges' decisions as having an impact on the public by shaping the rule of law, Lawrence Baum points out that judges are influenced by their audiences, including the elites with whom Supreme Court justices, in particular, interact in Washington D.C. Interest groups, so influential in legislative and executive decision-making, also play a vital role in the litigation process, as Jared Perkins and Paul Collins' chapter reminds us. They explain how interest groups, as parties or *amicus curiae*, can influence case outcomes. Thomas Keck's chapter explores how the courts interact with another key institutional partner: the legislature. Professor Keck demonstrates that although several theories provide leverage on understanding the relationship between U.S. courts and legislatures, an "interbranch" perspective may be the most promising for future scholarship. Similarly, the executive branch has a significant stake in judges' decisions, with its own administrative agencies and lawyers frequent participants in litigation. Jeffrey Yates and Scott Bodderly explain how court decisions have shaped the power of the president; and how the president, in turn, has altered court outcomes through appointments and legal arguments made by the Solicitor General. The general public also constitutes a key constituency. Americans' reactions to court decisions can determine the likelihood of compliance and, ultimately, the strength of the rule of law. Rorie Solberg's chapter explains, first, how the media presents court decisions to the public and second, how media coverage may affect the courts' institutional legitimacy. As for public opinion more generally, Joseph Ura and Alison Higgins explore the reciprocal relationship between court decisions and public opinion, with each influencing the other in the formation of public policy.

Part 4 concludes with Matthew Hall's discussion of judicial impact. As institutions that lack the power of the purse (appropriation) or the sword (enforcement authority), U.S. courts are formally weak institutions relative to the legislature and executive. Hall addresses the conceptual ambiguity associated with the term "impact," and

identifies conditions under which the relevant actors will follow and enforce judicial policies.

This book concludes with three chapters in Part 5 that address methodological issues and approaches in the study of judicial behavior in U.S. courts. Eileen Braman does double duty, exploring both various theoretical approaches from social psychology and behavioral economics and experiments that scholars have used to assess them. Daniel Ho and Michael Morse revisit how we calculate the justices' ideal points. They argue for the inclusion of more nuanced jurisprudential data that recent advancements in the automation of data collection will allow us to collect. Finally, Sarah Benesh reflects upon the influence and impact of Harold J. Spaeth et al.'s widely used U.S. Supreme Court Database; she also offers insights on how scholars can most effectively deploy it to study the justices' decisions.

As you can probably tell by now, all our authors offer exciting opportunities for research in their particular bailiwick. Again, whether you are new to the field or a veteran court scholar, we urge you to consider their ideas; pursuing any one of them could lead to important breakthroughs.

Here we want to conclude by emphasizing a few broader avenues for future research—some on theory and others on design, data, and methods. Beginning with theory, we have two suggestions. The first centers on the way that scholars have long framed their studies of judicial behavior: as a veritable competition between “law versus politics” or among the “attitudinal model” versus the “legal model” versus “strategic accounts.”

Although we too have run these races in our work (e.g., George and Epstein 1992; Hettinger, Lindquist, and Martinek 2004), we now think they are unproductive (live and learn!) and should be abandoned. We suggest supplanting the competing model/division approach with a more encompassing and realistic judicial utility function. Baum (1997, 2006), Epstein and Knight (2013), and Epstein, Landes, and Posner (2013) all gesture in this direction. In different ways, they contend that we should take seriously not only the the political scientists' emphasis on ideology and the law community's interest in legalism but also the importance of personal motivations for judicial choice—including job satisfaction, external satisfactions, leisure, income, and promotion, among others.

Actually, we're now to the point where we no longer “should” but must attend to personal motivations. That's because a growing body of empirical evidence demonstrates their importance. Take external satisfactions. Scholars have long posited that judges, no less than academics, care about maximizing their “reputation, prestige, power, influence, and celebrity” (e.g., Drahozal 1998; Miceli and Cosgel 1994; Shapiro and Levy 1994). This desire could be related to policy goals. But the pursuit of external satisfactions also takes more direct forms such as when judges (and indeed most humans) engage in “reputation-seeking behavior” (Levy 2005). Garoupa and Ginsburg (2015), for example, find that the increasingly global implications of many court cases have paved the way for a competition of sorts among judges and their “teams” for worldwide influence on law. Advancing in this game seems to require competitor-judges to hone their reputations by hobnobbing at conferences, teaching abroad, and considering developments

elsewhere (see also Breyer 2015). Likewise, in explaining Benjamin Cardozo’s fame, Posner (1990: 132) shows that the judge/justice “cultivated the good opinion of academics” by regularly citing to their work in his opinions. Cardozo was also far more likely than his colleagues to cite to the opinions of other judges thus fostering their good will as well. Finally, Baum (2006) and Davis (2011) offer some evidence of Supreme Court justices adjusting their behavior to conform to the preferences of “reputation creators” and “esteem grantors” (Schauer 2000: 629).

Collapsing the various distinctions we have long made (e.g., law versus politics) and simultaneously expanding the set of relevant preferences will help us account for these and the many judicial choices that we simply ignore because they are neither about law nor politics—whether the tendency of busy trial court judges to apply access doctrines more strictly than judges with lower workloads; or the inclination of judges with some potential for promotion (the “auditioners”) to impose harsher sentences on criminal defendants, all else equal. Proceeding in this way will also allow us to adapt (or weight) preferences depending on the institutional context in which the judge works. Epstein, Landes, and Posner (2013: 103), for example, offer a simpler utility function for Supreme Court justices than for all other federal judges because the justices can’t be promoted to a higher court and have such a large staff (relative to their workload) that “leisure activities and nonjudicial work activities are not significantly constrained by [their] judicial duties.”

Note that our suggestion of reconceptualizing judicial preferences does not require a change in a key assumption in many studies: that judges are rational actors (meaning they make decisions consistent with their goals and interests). We believe this is a reasonable assumption, and one that gets us pretty far in developing explanations of judicial behavior. But it’s hardly infallible, as Epstein and Knight note in their chapter. The problem is that scores of studies tell us that that in many situations, people—judges not excepted—have difficulty suppressing or converting their intuitions, prejudices, sympathies, and the like into rational decisions (see generally Thaler 2015; Kahneman 2011; on judges, see, e.g., Guthrie et al. 2007; Wistrich et al. 2015).

Which brings us to a second suggestion: We need to take seriously these studies and assess the extent to which non-rational factors alter what we would expect to see if we assume that judges act rationally. Again, Epstein and Knight say as much in their chapter; and we take note of some limited moves in this direction (see, e.g., Owens 2010)—but not nearly enough. We strongly advocate more studies along these lines, whether observational or experimental.

These are some theoretical suggestions. On the design and empirical ends, we think it obvious that we should continue to expand the targets of inquiry. Even today U.S. Supreme Court justices and federal appellate court judges receive the lions’ share of attention. We should set our sights on trial court judges (state and federal) and also, despite the Handbook’s focus on the United States, on judges abroad for many reasons, including the illumination of the behavior of U.S. judges.

Following from our theoretical suggestion about rethinking judicial preferences, we also want to encourage readers to expand the set of judicial choices. Back in the 1960s

when the systematic study of judicial behavior exploded (see e.g., Schubert 1965; Spaeth 1963; Ulmer 1962), scholars focused on the judges' votes or the dispositions of cases. That emphasis continues today, and with good reason: dispositions and votes matter a lot. But because other aspects of judicial behavior matter too our focus should be far broader. To provide just one example: What with many courts/governments (here and abroad) making judicial decisions available online (coupled with advances in the systematic analysis of text), opportunities now abound for the rigorous study of judicial opinions. Work has already begun (e.g., Black et al. 2016; Corley and Wedeking 2014); and more sophisticated efforts will soon follow as scholars move away from canned one-size-fits-all software and libraries to tools more tailored to our needs.

As we develop new research questions and construct new sources of data to answer them, we must be mindful of the way we design our work and conduct our analysis. Many studies of judicial behavior seek to establish causal relationships, for example, war triggers justices to favor the government in cases of rights and liberties, fear of losing a judicial election causes judges to impose harsher sentences on criminal defendants, concerns about enforcement lead judges to write vague opinions, and on and on. Attention to how to make and test causal claims have become obsessions among political scientists and economists but not so much among scholars of judicial behavior. For example, we can identify only a few studies (e.g., Epstein et al. 2005; Boyd et al. 2010; Black and Owens 2012) that make explicit use of the potential outcomes framework (which emphasizes the counterfactual nature of casual inference; see, e.g., Rubin 1974; Ho and Rubin 2011)—despite its domination in “statistical thinking about causality” over the last two decades or so (Keele 2015: 314).

We could point to other related gaps (e.g., inattentiveness to identification strategies). But rather than belabor the point (or sound like the causal inference cops now terrorizing political science), we'll conclude with the good news: We should embrace, not evade, the challenge of designing studies for credible causal inference; and we should take up, not dismiss, the equally demanding challenges our authors present. As their chapters reveal, meeting them in the past has led to enormous progress; no doubt we'll say the same about the current crop in the next edition of the Handbook.

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