

**Pre-Copy-Edited Version**  
**Strategic Accounts of Judging\***  
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Nearly two decades ago, in *The Choices Justices Make*, we proposed a strategic account of judicial behavior (Epstein and Knight 1998). On this account, judges are strategic actors who realize that their ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they act.

In what directly follows, we flesh out what we said in *Choices* (Section 1) and what others have said since (Section 2). In Section 3, we offer to two thoughts we didn't express (or didn't express clearly enough) in *Choices* but wish we had: (1) on the preferences of judges and (2) and on the limits of strategic rationality. Both provide avenues for future research.

### 1. What We Said in *Choices*

Strategic accounts of judging contain three essential components: (1) judges' actions are directed toward the attainment of goals; (2) judges are strategic or interdependent decision makers, meaning they realize that to achieve their goals, they must consider the preferences and likely actions of other relevant actors; and (3) institutions structure the judges' interactions with these other actors. Each deserves a bit of explanation.

Starting with (1), strategic accounts assume that actors make decisions consistent with their goals and interests. We say that judges or any other actors make rational decisions when they chose a course of action that they believe satisfies their desires most efficiently. To give meaning to this assumption—essentially, that judges maximize their preferences—we must identify the judges' goals. If we do not, our explanations become a tautology because we can always claim that a judge's goal is to do exactly what we observe her doing (Ordeshook 1992).

Unlike the attitudinal model, which holds that judges (really just justices) pursue policy goals and only policy goals (Segal and Spaeth 2002), strategic accounts enable the researchers to posit any motivations they believe judges hold. This much we noted in *Choices*, but we then went on to adopt the conventional (political science) party line and argue that maximizing policy is of paramount, even exclusive, concern.<sup>1</sup>

We were wrong—or at least partially so. Although it may be true that Supreme Court justices are "likely to derive personal satisfaction, as well as reap prestige, exert power and influence, and achieve celebrity, from attempting to align the law with his ideological commitments" (Epstein, Landes, and Posner 2013, 103) the policy goal is hardly the only one; it may not even be dominant for many judges. We explain

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<sup>1</sup> The idea here is that judges want the law to reflect their preferred policy positions. To assess empirically the judges' policy positions, political scientists use partisan measures (e.g., the party affiliation of the judge or the appointing president) and ideological measures (e.g., the Segal-Cover [1989] or Martin-Quinn [2002] scores). For a review, see Epstein et al. (2012). This is why the political science literature tends to treat political goals, policy goals, ideological goals, and partisan goals as interchangeable terms.

why we've had this change of heart and, more importantly, how scholars can—and must—begin incorporating other motivations into their work, in Section 3 below.

The second part of the strategic account is tied to the first: for judges to maximize their preferences, they must act strategically. By "strategic," we mean that judicial behavior is interdependent: Judges' actions are, in part, a function of their expectations about the actions of others. To say that a judge acts strategically is to say that she realizes that her success depends on the preferences of other relevant actors and the actions she expects them to take, not just on her own preferences and actions. On strategic accounts of judicial behavior, "other relevant actors" include the judges' colleagues (if she sits on a collegial court) of course, but also her judicial superiors (if she serves on a non-apex court), elected officials, and even the public—in other words, anyone in a position to help her achieve or thwart her goals.

This component of the strategic account too is in direct juxtaposition to the attitudinal model, which holds that justices always behave in accord with their sincere preferences. Under the strategic account, whether judges behave sincerely or in a sophisticated fashion (that is, in a way that is not compatible with their most preferred position) depends on the preferences of the other relevant actors and the actions they are likely to take.

Finally, strategic accounts assume that judging takes place within a complex institutional framework. By institutions we mean sets of rules that structure the judges' interactions among themselves or with other relevant actors and, in so doing might ultimately constrain them from acting on their sincere policy preferences. As we noted in *Choices*, institutions can be formal, such as constitutional provisions or informal, such as norms and conventions (Knight 1992). Either way, institutions can be internal to the court—for example, the Supreme Court's Rule of 4, which establishes that four justices must agree to hear a case or the norm governing opinion assignment, which holds that the Chief Justice assigns the opinion of the Court if he is in the majority. Institutions can also be external, governing the relations between higher and lower courts (the hierarchy of justice), between courts and other governmental actors (the separation-of-powers system), and with the American people (norms of legitimacy).

Strategic analysis' emphasis on the role of internal and external institutions in structuring interactions and constraining judges is another feature that differentiates strategic accounts from the attitudinal model. Under the attitudinal model, institutions are relevant only to the extent that they (can) enable judges (justices) to vote their sincere policy preferences (*e.g.*, because federal judges have life tenure, they need not take into account the views of the public when they make their decisions). Strategic accounts argue that judges must attend to the rules if they wish to issue efficacious decisions.

## 2. What Others Have Said Since *Choices*

Taken as a whole, we hoped the strategic account would provide a unifying framework—a set of tools—for the analysis of the range of judicial behavior. We tried to demonstrate as much by looking at the many choices that Supreme Court justices make, from deciding to decide to assigning opinions to manipulating the agenda to joining and writing opinions, among others.

Even so, we knew when we wrote *Choices* that we had hardly scratched the surface. We trusted that follow-up work would take up the many topics we didn't touch, whether for high court justices in the United States or abroad or for judges serving on courts with judicial superiors. We also imagined scholars would proceed in multiple ways, whether by incorporating the logic of strategic action into interpretive-historical research, invoking the strategic account to construct conceptions of judicial decision making, using micro-economic theories to reason by analogy and, undertaking formal equilibrium analysis. And we had hoped that subsequent work would use a variety of methods from historical case studies to large-*n* quantitative research, whether for particular courts or cross nationally (see Epstein and Knight 2000).

We were not disappointed. To the contrary: Even a cursory review of all the many excellent studies invoking strategic accounts would fill up this entire volume.

And we won't even try.<sup>2</sup> What we can say is that there are now very well-developed literatures on both the (1) internal (relations among colleagues) and (2) external (relations with other actors) dimensions of judging.

## 2.1 Internal Accounts

It may not have been our exclusive (empirical) focus in *Choices* but we did devote substantial space to internal accounts of judging, with our opening discussion of *Craig v. Boren* (1976) setting the tone. Subsequent studies have advanced the project in countless ways, some by finding evidence of strategic behavior in areas that weren't on our radar screen—for example, during oral argument. From the many studies on this topic (*e.g.*, Epstein, Landes, and Posner 2013, Johnson 2004; Ringsmuth and Johnson 2013, Black, Sorenson, and Johnson 2013), we've learned that orals involve important interactions between the justices and the lawyers as well as interactions among the justices themselves; and that information communicated during these interactions can strategically influence the justices' decisions.

Other studies have analyzed behavior we took up in *Choices* including bargaining (*e.g.*, Lax and Cameron 2007, Lax and Rader 2015, Spriggs et al. 1999), forward thinking (*e.g.*, Black and Owens 2009, Benesh, Brenner, and Spaeth 2002; Caldeira, Wright, and Zorn 1999), agenda manipulation (*e.g.*, Black, Schutte, and Johnson 2013, Epstein and Shvetsova 2002, Goelzhauser 2011, Staudt 2004, Johnson, Spriggs, and Wahlbeck 2005), opinion assignment (Farhang, Kastellec and Wawro 2015, Lazarus 2015, Maltzman, Spriggs, and Wahlbeck 2000, Wahlbeck 2006, Maltzman and Wahlbeck 1996), and opinion writing (Owens, Wedeking and Wohlfarth 2013, Maltzman, Spriggs, and Wahlbeck 2000), among others.

But even this follow-up<sup>3</sup> research pushed the boundaries well beyond *Choices*. Take opinion writing. We focused on the extent to which opinion writers would put aside their most preferred positions to generate a definitive ruling of the Court—and one that represented the best they felt they could achieve under the circumstances. In other words, in *Choices* strategic opinion writing relates to the internal context of judging. In very important (likely classic) paper, Staton and Vanberg (2008) also analyze opinions, but they are less concerned with opinion writers grappling with colleagues than with the external context of judging. They want to know why judges sometimes write vague opinions when the judges could be more decisive. The result they derive is interesting: Assuming the costs to political actors (or other implementers) of deviating from a clear court decision are higher than the costs of deviating from a vague decision (because noncompliance is easier to detect), then 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 are determined to defy even a crystal clear decision, they would highlight the relative lack of judicial power. To soften anticipated resistance, courts may be purposefully vague.

Staton and Vanberg provide several examples of their theory in action (*e.g.*, *Brown v. Board of Education (Brown II)* (1955)), but more systematic follow-ups now exist. Black et al. (2016) show that justices strategically craft language in their opinions, adjusting the level of clarity to correspond to their assessment of the likelihood of noncompliance by external actors, including federal agencies and the states. Corley and Wedeking (2014) find that lower courts are more likely to follow Supreme Court decisions that

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<sup>2</sup> For recent, though short, reviews, see Epstein 2013, 2016.

<sup>3</sup> And, in fact, because we were not the first to write in some of these areas, *Choices* could be considered a follow-up study. *E.g.*, on forward thinking, see Boucher and Segal (1995), Perry 1994. On agenda manipulation, see Rathjen, and Spaeth, (1979, 1983). More generally, see Murphy (1964).

are written at higher degrees of certainty. And there is also work on how lower court judges write opinions to insulate themselves from reversal (Boyd 2015, Hinkle 2016, Hinkle, et al. 2012, Smith and Tiller 2002).<sup>4</sup> In addition to serving as an antidote to the long suffering study of judicial implementation and compliance, this new line of work on opinion writing provides a link between the internal and external contexts of judging.

We could say the same of research focusing on the hierarchy of justice. A growing literature shows that trial court judges alter their behavior to avoid reversal by intermediate appellate courts (*e.g.*, Boyd 2015a, Randazzo 2008, Epstein, Landes, and Posner 2013). And there are even more studies of the U.S. Court of Appeals. These tend to focus on so-called "panel," "collegial," or "peer" effects, asking whether the case's outcome (or a judge's vote) would have been different had a single judge, and not a panel, decided the case (Kastellec 2007) —and, if so, why? This first question motivates much of *Choices*; it's the second question, the why, that takes a different form in this literature because circuit judges must attend not only to the preferences of their fellow panel members but also to the preferences and likely actions of their hierarchical superiors (the circuit *en banc* or the Supreme Court). At least that's Cross and Tiller's (1998) argument in their path-marking paper, "Judicial Partisanship and Obedience to Legal Doctrine." They contend that the presence of a "whistleblower"—a judge on a circuit panel "whose policy preferences differ from the majority's and who will expose the majority's manipulation or disregard of the applicable legal doctrine" to a higher court—can constrain her colleagues from behaving in accord with their sincere preferences.

Some studies find evidence of this phenomenon while bringing more nuance to it (*e.g.*, Kastellec 2007, 2011; Beim et al. 2014); others offer different explanations for moderation among judges serving on an ideologically mixed panel. Epstein, Landes, and Posner (2013), for example, argue that moderation (in the form of dissent aversion) on circuit courts reflects the substantial collegiality costs that dissents impose on the other judges on the panel (*e.g.*, more work), while the benefits of dissenting (*e.g.*, future citations) are few—though more recent studies (Beim et al. 2015, Lindquist et al. 2007 and Black and Owens 2012) suggest that the benefits may be more substantial than Epstein, Landes, and Posner posited.

A related literature, and again one that we did not touch in *Choices*, focuses on how a hierarchically superior court can extract conformity from a subordinate court with different preferences. To the extent that higher courts (or at least the U.S. Supreme Court) cannot hire, fire, promote, demote, financially reward or penalize members of trial or intermediate courts, work has proposed various mechanisms for keeping lower courts honest including strategic auditing (*e.g.*, Spitzer and Talley 2000, Cameron, Segal, and Cover 2000), implicit tournaments among lower courts (*e.g.*, McNollgast 1995), *en banc* review (Clark 2009a, Giles, et al., 2006, 2007) and of course whistleblowers in the form of dissenters (Lindquist, Haire, and Songer 2007, Black and Owens 2012).

This recent spate of research on the judicial hierarchy goes to show that scholars of judicial behavior are no longer giving pride of place to the U.S. Supreme Court; the array of courts that has gained attention from the research community has expanded exponentially. This is all to the good because in the lower courts strategic decision making and institutional rules come into stark interaction: as the judges face more intricate institutional constraints, their choices grow in complexity. We have much to learn from the study of this interaction

## 2.2 External Accounts

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<sup>4</sup> Although we endorse this general line of work, we withhold judgment about Linguistic Inquiry and Word (LIWC), the software that some of the authors use to assess clarity. Because it was developed for ordinary speech and texts, we wonder whether it has been sufficiently validated for legal materials.

Research exploring relations between courts and actors external to courts—government officials and the public—has also exploded in ways we could never have imagined. Beginning with the government, *Choices* drew on the then-emerging separation-of-powers literature, which contended that judges must attend to the preferences and likely actions of the government if they are to achieve their policy goals (*e.g.*, Eskridge 1991, Ferejohn and Weingast 1992; Gely and Spiller 1990). If they do not, they run the risk of retaliation from elected actors, thereby making it difficult for them to establish enduring policy. Most of the empirical work back then assessed this claim in statutory interpretation cases on the theory that when federal judges interpret statutes, Congress can (easily) override their interpretations by enacting new laws. The empirical results were mixed and debates (apparently) continue (*e.g.*, compare Bergara, Richman, and Spiller 2003, Spiller and Gely 1992, Eskridge 1991 and Sala and Spriggs 2004, Segal 1997).

In *Choices* and elsewhere (Epstein, Knight & Martin 2001) we extended the argument to cases involving constitutional interpretation. Our contention was (and still is) that although Congress cannot pass legislation to overturn decisions grounded in the Constitution,<sup>5</sup> it can take aim at courts in other ways: withdrawing their jurisdiction, eradicating judicial review, approving constitutional amendments to overturn decisions, slashing the court's budget, and impeaching judges (Rosenberg 1992). As a result, we speculated (but only partially tested the idea) that the Court must be equally if not more vigilant in attending to the preferences of elected actors in constitutional cases.

Subsequent work has shown this to be a promising hypothesis. From Clark's (2009) important study, we know that congressional threats are not merely theoretical: Members of Congress introduced more than 900 court-curbing proposals between 1877 and 2008. More to the point, Clark's work, along with an equally important article by Segal et al. (2011), demonstrates that when Congress threatens the Supreme Court's authority, the Court cowers, either exercising greater judicial self-restraint or reaching decisions closer to congressional preferences. Related research also suggests that under certain circumstances, the Court will duck constitutional cases (Goelzhauser 2011).

These studies focus on the United States. We hope this work continues but even more exciting to us, frankly, is the comparative turn in the analysis of Court-government relations. In *Choices*, we did not say much (read: nothing) about apex courts in other societies, though we quickly remedied this with a study of the Russian Constitutional Court (Epstein, Knight and Shetsova 2002). Far more famous—and largely responsible for the cascade of rigorous comparative studies of court-government relations—is Helmke's (2002, 2005) work on Argentina. Helmke drew attention to the fact that in many parts of the developing world, governments have taken even more radical steps to tame their courts, with sanctions ranging from impeachment, removal, and court-packing to criminal indictment, physical violence, and even death.<sup>6</sup> Her study and many others running along similar lines show that judges respond to these potential threats by defecting against the old regime (Helmke 2002, 2005), avoiding cases that may contribute to further escalation (Epstein, Knight and Shvetsova 2002), going public (Gauri et al. 2015, Staton 2010) and passing up posts on apex courts altogether (Basabe-Serrano 2012), among other strategies.

This line of literature on the external context of judging highlights the importance of separation-of-powers systems. In *Choices* we extended the discussion to consider the relationship between courts and the

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<sup>5</sup> At least not in theory. In practice, the U.S. Congress has enacted over forty statutes designed to reverse Supreme Court decisions that invalidated federal or state laws (Meernik and Ignagni 1997).

<sup>6</sup> There are also of course many excellent studies of courts in developed democracies, notably Vanberg's (2005) work on the German Constitutional Court, perhaps the most influential national court in Europe. Vanberg takes on questions that now dominate commentary and scholarship not only about courts in Europe but throughout the world, including whether "the potential for evasion" of court decisions by the elected branches and the public "shape[s] judicial deliberations and perhaps even decisions" and "[u]nder what circumstances [courts can] successfully constrain legislative majorities, and when will they not do so." and we hope the work continues.

American people, which we said were governed by legitimacy norms, notably *stare decisis* (the norm favoring respect for precedent) (see also Knight and Epstein 1996). Since *Choices* the strategic analysis of precedent has moved in interesting directions that we did not anticipate, including the ways lawyers use it in their briefs (Corley 2008) and the conditions under which the Court may depart from it (Hansford and Spriggs 2008, Epstein, Landes, and Liptak 2015).

The same holds for research on the extent to which the public constrains judicial decisions. Using qualitative data and historical methods, Friedman (2009) provides an unequivocal answer to the question of whether "we the people" influence the Supreme Court: we do. Many large-*n* studies agree (e.g., Giles et al. 2008, McGuire and Stimson 2004, Mishler and Sheehan 1996). At the risk of generalizing, they tend to find that when the "mood of the public" is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions.

But *why* is the real question. Friedman offers a response straight out of the strategic literature: The Justices bend to the will of the people because the Court requires public support to remain an efficacious branch of government. We agree with his response; and the existing quantitative studies could be read to lend support to this view. But even we must admit that the findings are consistent with another mechanism: that "the people" include the Justices. On this account, the justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinion of other members of the public.<sup>7</sup> To quote Cardozo (1921, 168), "[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."<sup>8</sup> The evidence up to this point lends support to both of these explanations.

### 3. What We Didn't Say in *Choices* but Wish We Had: Avenues for Future Research

It should go without saying but we'll say it anyway: We're thrilled by the now-vast literature that attends to the strategic dimensions of judging. And we know that many more great studies are to come. Some will continue to use strategic accounts to analyze the internal and external contexts of judging in courts in the United States and abroad. Others, we hope, will take up some of the lapses in *Choices*, with two especially noticeable: one on the preferences of judges and the other, on the limits of strategic rationality. Both have the potential to open important new lines of inquiry, though we hope the latter doesn't have the effect of raining too much on the strategic parade.

#### 3.1 *Reconsidering Judicial Preferences*

What do judges want? Beginning with C. Herman Pritchett (1941, 1948), political scientists have emphasized the policy goal, or the idea that judges want to bring the law in line with their own policy or ideological values (see note 1). And we, in *Choices*, followed the party line, as we noted at the outset.

Because *Choices* analyzed the behavior of Supreme Court justices, we don't think we were terribly wrong to focus on this one objective. From Pritchett (1941) to Segal and Spaeth (2001) to Epstein, Landes, Posner (2013), scholars have offered plausible (although somewhat distinct) reasons and mounds of data for thinking that ideology plays a very substantial role in the choices justices make.

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7. That's why Epstein and Martin (2010) titled their paper (written for a symposium on Friedman's book), "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)." For a possible answer (supportive of Friedman's argument), see Casillas et al. (2011).

<sup>8</sup> By the way, the same problem of behavioral equivalence arises in work on macroevents, e.g., war: do judges strategically retreat from war-related cases (or otherwise rubber stamp the government) or are they too swept in rally-round-flag effects?

It's also worth pointing out that justices of the Supreme Court are not unique. Studies of the high courts of other countries lend support to this focus. Grendstad et al.'s (2015) wonderful book on the Norwegian Supreme Court demonstrates that justices appointed by social democratic governments are significantly more likely to find for the litigant pursuing a "public economic interest" than are their nonsocialist counterparts. Ideology (as measured by the appointing regime) plays a bigger role in these decisions than most any other factor that Grendstad et al. considered. Hönnige (2009) found that ideology helps predict the votes of judges serving on the French and German Supreme Courts (see also Hanretty 2012). And, in their study of Spanish Constitutional Court Judges, Garoupa et al. (2013, 516) 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." Iaryczower and Katz (2015) found that ideology plays a role on the British Appellate Committee, though their account is more nuanced.<sup>9</sup>

At the same time, though, these studies demonstrate that ideological (or partisan) motivations have their limits—and not only for judges outside the United States. As so much research as shown, there is hardly a perfect correlation between ideology and voting: Far short of zero percent of the votes cast by liberal justices (however measured) are conservative; and far short of one hundred percent of the conservatives' votes are conservative (see even Segal and Spaeth 2002). Moreover, once we move down the judicial hierarchy to the U.S. courts of appeals and district courts, ideology carries even less weight (see, *e.g.*, Epstein, Landes and Posner 2013).

The upshot is this: However useful ideology is for understanding judicial behavior, it cannot be the only motivation (it may not even be especially weighty for many judges) or explanation of judicial behavior.<sup>10</sup> For this reason, contemporary studies have offered (or found evidence consistent with) some twenty-odd goals, motives, and preferences, ranging from "reasoning utility" (Drahozal 1998, Shapiro and Levy 1995) to discretion (Cohen 1991, Higgins and Rubin 1980, Macey 1994) to income (Anderson 1980), in addition to legal and ideological considerations (see generally Baum 1997, 2006; for a sampling of other goals, see Klein 2002, Bainbridge and Gulati 2002, Cooter 1983, Gulati and McCauliff 1998, Klein and Hume 2003, Miceli and Cosgel 1994, Posner 1993, 2008, 2013, Salzberger & Fenn 1999, Schauer 2000, Shepherd 2011, Whitman 2000).

Attending to all these goals would undermine the project of developing generalizable explanations of judicial behavior. More to the point, it is possible to construct a realistic conception of the judicial motivation that could be incorporated into strategic accounts of judging without devolving into the "what-the-judge-ate-for-breakfast" morass.<sup>11</sup>

Epstein, Landes, and Posner (ELP) (2013) make such an effort by introducing the importance of personal motivations for judicial choice, while also paying heed to the political scientists' emphasis on ideology and the law community's interest in legal motivations (though political scientists seem more interested in "legal motivations" than lawyers!). ELP argue 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 ideological and legal goals):

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<sup>9</sup> Ideology, they show, establishes "an informational hurdle for judges to rule in a certain direction." A judge leaning liberal (or conservative) will vote against his bias if the information based on the facts and on how the law applies to the case under consideration surpasses the threshold imposed by his preferences."

<sup>10</sup> We adopt some of this discussion from Epstein & Knight (2013) and Epstein (2016).

<sup>11</sup> Then again, see Danziger et al. (2011), showing that judges are more lenient at the beginning of the work day and after a food break, though Weinshall-Margel & Shapard (2011) cast doubt on their findings.

1. job satisfaction, which we take to mean 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 staff (see Baum 2006, Caldeira 1977, Drahozal 1998, Gulati & McCauliff 1998, Shapiro & Levy 1995).
2. external satisfactions that come from being a judge, including reputation, prestige, power, influence, and celebrity (see Drahozal 1998, Miceli & Cosgel 1994, Schauer 2000, Shapiro & Levy 1995, Whitman 2000).
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" Drahozal (1998, 476; see also Klein and Hume 2003).
4. salary/income, in that all else equal, judges like most of us, prefer more salary, income, and personal comfort to less (see, *e.g.*, Baum 2006).<sup>12</sup>
5. promotion

We flesh out these possibilities in Epstein and Knight (2013). But let us provide a flavor of the analysis by focusing on the last motivation: promotion. This would seem to be an important factor influencing the personal utility that judges gain from their work. 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.

To explore the possible effects of this motivation, Epstein, Landes, and Posner (2013) compared federal judges with some realistic possibility of promotion to those without much hope of promotion to determine whether the former "audition" for their next job. They hypothesized that these auditioners would impose harsher sentences on criminal defendants to avoid being tagged as soft on crime. The data supported their hypothesis.

These results, along with other studies of promotion effects (*e.g.*, Cohen 1991, Sisk et al. 1998, Taha 2004, Gaille 1997, Ramseyer and Rasmussen 2001, Salzberger and Fenn 1999, Black and Owens 2016), we think do more than flesh out a particular element in the judge's personal utility function. They pose a serious challenge to the standard political science line that judges are driven largely, if not exclusively, by ideology—and unless we incorporate them into strategic accounts of judging, we run the risk of perpetuating (un)realist(ic) conceptions of judicial behavior.

In Epstein and Knight (2013) we offer a conceptual and methodological framework for incorporating these additional motivations into a strategic account. This more realistic conception introduces a set of research questions about the relative effects of different types of motivations as well as about the conditions under which judges strike a balance among the different, and sometimes competing, motivations. For example, what are the types of cases in which judges are motivated by ideological values? And what are the conditions under which judges are most affected by the personal factors we detailed above—the factors that motivate most of us in our daily lives? Of equal importance, what are the types of cases in which judges are most likely to follow existing legal sources such as precedent? Future research on

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<sup>12</sup> The empirical literature provides some evidence that they attempt to maximize pecuniary goals by acting in ways consistent with the preferences of their "bosses"—of which the legislature is certainly one. Because elected representatives control raises, court budgets (and thus, for example, can augment or reduce the number of staff), and pension plans, it is not surprising to find some deference to their preferences (*e.g.*, Bergara et al. 2003, Harvey & Friedman 2006, Segal et al. 2011). But, again, the mechanism is not always clear. It could be that deference is primarily a function of the legislature's power to hold salaries constant or impose other pecuniary sanctions (or rewards), or it could be that the judges are responding to a multitude of other weapons, which we noted earlier, at the legislature's disposal.

these questions could lead to more direct explanations of the effects of these different motivations on judicial decisions in particular kinds of cases.

### **3.2 Rethinking Strategic Rationality**

As we noted earlier, strategic accounts assume that the judge “is a rational maximizer of his ends in life, his satisfactions... his ‘self-interest’” (Posner 2011, p. 3). Our own view is that this is a reasonable assumption, or at least it gets us pretty far in understanding judicial behavior. But it will not get us all the way. It is just too late in the day to question the decades' worth of studies showing that in many situations, people rely heavily on their intuitions to make fast decisions without much effort. Social psychologists tell us that these responses are not always wrong or even unhelpful (Wistrich, et al. 2015). But we also know that unchecked by deliberative assessments, they can lead to mistakes and biased decisions (Thaler 2015; Kahneman 2011).

Although judges may think they can “suppress or convert” their intuitions, prejudices, sympathies, and the like into rational decisions (Wistrich et al., 2015, 862), this is not so. Experiments conducted on thousands of judges by Rachlinski et al. demonstrate that judges respond more favorably to litigants they like or with whom they sympathize (*e.g.*, Wistrich, et al. 2015), are affected by anchors in making numeric estimates (*e.g.*, Rachlinski et al. 2015), and fall prey to hindsight bias when assessing probable cause (*e.g.*, Rachlinski et al. 2015). In short, it turns out that judges are human too (see also Rachlinski et al. 2009, Rachlinski et al. 2011, Guthrie, et al. 2001, Guthrie, et al. 2007, along with work by Braman 2009, Landsman and Rakos 1994, Simon and Scurich, 2013).

To the extent that judges are influenced by their emotions, intuitions and prejudices, it will complicate their ability to make strategically rational decisions. And thus it complicates our efforts to explain their behavior. There is no getting around the fact that these very human features can distort purely strategic decision-making. The interesting research questions relate to how much they alter what we would expect to see if we assume that judges are acting rationally. Possible avenues for relevant research would compare the predictions of strategic analysis with the data on actual judicial decisions. This would give us a better sense of the extent to which these non-rational factors influence the judges' choices.

As we hope even this brief discussion makes clear, we take the experimental evidence quite seriously. But some members of the legal community (especially judges) do not; they complain that the experiments are artificial and do not really capture the real courtroom environment. This counsels for observational studies—that is, studies making use of data that the world, not the researchers, have created. These are not easy to do, but neither are they impossible, as Shayo and Zussman’s (2011) study of Israeli small claims courts demonstrates. More to the point, we think they are crucial: should the experimental and the observational converge, we can be far more confident in our conclusions.

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