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THE

Behavior

OF

Federal Judges

A THEORETICAL AND EMPIRICAL STUDY
OF RATIONAL CHOICE

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A Realistic Theory of Judicial Behavior

Judicial responsibility . . . connotes the recurring choice of one policy over another.

—Roger J. Traynor

The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative.

—Henry J. Friendly

In a recent book one of us listed and summarized nine theories of judicial behavior, but then proceeded to integrate them into a single theory, that of the judge as a participant in a labor market—that is, as a worker. That is the approach we take in this book to creating a model of judicial behavior that generates hypotheses testable with data.

What kind of worker is a judge? Well, he is not a freelance writer, a proprietor, a composer or other independent artist, or an entrepreneur; he is a government employee. In economic terms he is an agent; the government is the principal. To understand an agent’s behavior requires understanding his incentives and constraints, some personal and others imposed by the principal.

4. Id., ch. 2.
Empirical research cannot be conducted in a vacuum. The researcher has to have an idea of what facts about a matter are interesting, and theory may help him to identify those facts. We think the most fruitful theory to guide empirical study of judicial behavior is one of self-interested behavior, broadly understood, in a labor-market setting. Our premise is that judges, at least in case law systems, which are characteristic of nations that derive their legal systems from England, are not calculating machines. Judges in a system that allows them a good deal of discretion, by granting them (in the case of federal judges) secure tenure but not providing rules of decision that make judging the mechanical application of rules to facts in all cases, are best understood as imperfect agents of a diffuse principal.

Three Concepts of Legal Realism

It has long been understood that American judges exercise, at least occasionally (and at the Supreme Court level much more than occasionally), a legislative or policymaking role, as acknowledged by Henry Friendly and Roger Traynor, the authors of the epigraphs that open this chapter. They were two of the most distinguished American judges of the modern era, and the passages we quoted state a position that was orthodox when they wrote them. Similar passages could be quoted from distinguished predecessors of Friendly and Traynor, such as Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, Learned Hand, and Robert Jackson, from leading academics and practitioners, and from presidents such as Franklin Roosevelt and philosophers such as John Dewey. The antecedents go as far back as Plato’s dialogues, before there was a legal profession. In the Apology Socrates notes that each judge (really juror—there were no professional judges) “has sworn that he will judge according to the laws and not according to his own good pleasure”—but in Gorgias Socrates predicted that his trial would be the equivalent of the trial of a doctor prosecuted by a cook before a jury of children, and in the Republic Thrasymuchus powerfully argues that justice is simply the will of the stronger. That is a common view of the legislative process (and therefore a view likely to be descriptive of judges when they exercise legislative powers), memorably articulated and embraced by Holmes when he said, “All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of
the *de facto* supreme power in the community. . . . The more powerful interests must be more or less reflected in legislation, which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.”

The first full articulation of the realist conception of judging can be found in Jeremy Bentham’s *Introduction to the Principles of Morals and Legislation* (1780). A century later Holmes gave it a slogan on the first page of his book *The Common Law* (1881): “The life of the law has not been logic; it has been experience.” The same conception was articulated by Cardozo and Roscoe Pound, and by the self-described legal realists of the 1920s and 1930s, such as Jerome Frank and Karl Llewellyn, and it has been refined by political scientists, economists, psychologists, and sociologists, and also by lawyers—increasingly, law professors who have degrees in other fields as well as in law—who adopt a social-scientific approach to law.

Every competent observer knows that American judges at the appellate level create rules of law, both explicitly in common law fields and implicitly by interpretation of constitutional and statutory provisions, and that this is inevitable, given the nature of American government. Not only constitutional law—obviously—but also antitrust law, labor law, securities law, pension law, and so on are largely the result of discretionary judgments made by judges. That is why confirmation hearings for federal judges are often so contentious, why judicial elections (common at the state level) attract large campaign contributions, and why proposals to make state judges appointed rather than elected are strongly opposed. Judges like to refer to Congress and the Presidency as the “political branches” of government, implying self-servingly that the judiciary is apolitical. That is almost true if “politics” is equated with partisan politics, but it should not be. Decisions influenced by a political ideology are political, and many judicial decisions are so influenced.

The term “legal realism” is sometimes used to denote a jurisprudential approach rather than judicial behavior as such—a jurisprudential approach that has regard only for the consequences of a decision for the parties to the case before the court, and thus that ignores systemic conse-

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quences, such as the effect on the efficacy of law if precedent, clear statutory text, or other conventional sources of legal meaning are disregarded. Legal realism so regarded is a brand of shortsighted pragmatism that inflects the consequences for the parties with the judge’s political preferences or personal sentiments. Legal realism in this sense has strongly influenced the approach of political scientists to judicial behavior—naturally; political scientists are students of politics and study government agencies and officials as political organs and actors, and judges are government officials.

The defensible realisms—realism about the judge as a human being exercising discretionary authority, and realism as a jurisprudential theory that emphasizes the judge’s legislative or policymaking role (the indefensible concept of judicial realism is the assumption that judicial behavior in the American system is guided entirely by political, religious, sentimental, or other personal, subjective factors)—are linked. If the judge has to exercise discretion, implying that he cannot in all cases just mechanically apply rules to facts to yield a decision (even assuming unrealistically that fact-finding, at least, is mechanical and unproblematic), then to decide a case he is bound sometimes to have to fall back on intuitions of policy; and often they will be intuitions generated by ideology. He cannot just throw up his hands and refuse to decide a case on the ground that the “law” in some narrow sense yields no clue to how to decide.

But it would be more precise to describe judicial decision-making in areas in which mechanical application of rules that have been given to rather than made up by judges is infeasible as subjective rather than as ideological, because nonlegalistic factors other than ideology influence decisions, such as the judge’s mood, his energy, his idiosyncratic reaction to the parties or their lawyers, or his lack of interest in the case. Ideology (or, more broadly, “values”) may be the subjective influence on judges that is most significant for the society, but other subjective influences should not be ignored and we do not ignore them, but have called in economics to help us understand them.

6. A study of parole decisions by Israeli judges found that the judges were more favorable to parole applicants early in the day and after their food breaks. Apparently the judges tire as the day wears on, as do most workers. Shai Danziger, Jonathan Levav, and Liora Avnaim, “Extraneous Factors in Judicial Decisions,” 108 Proceedings of the National Academy of Sciences 6889 (2011).
Economics has already contributed to the development of a realistic theory of judicial behavior by emphasizing the judge as a rational actor—a maker of rational choices—in the standard economic sense. In this theory the ideological and the legalist approaches to deciding cases are not posited, but instead are derived from a judicial utility function—a model of rational response to preferences and aversions not limited to legalism and ideology. This book refines and extends that approach.

Other social-scientific research on judicial behavior has tended to be empirical to the virtual exclusion of theory—in other words, it has tended to lack “microfoundations.” It has tended to posit, rather than to derive from a utility function, such propositions as that the goal of Supreme Court Justices is to produce outcomes that coincide with the Justices’ ideological preferences, which the Justices can do because they control their docket, have life tenure, are not subject to reversal by a higher court, and are not ambitious for higher office, and so, being minimally constrained, can pursue that goal by voting in cases in accordance with their ideological preferences. That is too simple an account of the Justices’ behavior, because it neglects factors that deflect Justices from the whole-hearted pursuit of their goals.

An empirical literature adds complexity by emphasizing the strategic


8. These are the basic premises of the “attitudinal” model of judicial behavior, as influentially articulated in Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 92–94 (2002). We discuss that model in the next chapter.
interactions of judges (including Supreme Court Justices) who are connected either collegially (as members of the same appellate court or panel) or hierarchically (as lower court and higher court judges). We examine those issues in this book but set others aside, such as “strategic retirement”—the idea that Justices accelerate or delay their retirement in order to maximize the probability that their successors will be ideologically akin to them. We also set aside strategic interaction between the courts (especially the U.S. Supreme Court) and other branches of government. The Constitution creates a system of checks and balances among the branches, and the courts both engage in and are subject to checking and balancing. To keep this book within reasonable bounds we do not discuss that form of judicial strategizing, though in the next chapter we cite some of the pertinent literature.

Political scientists were the first social scientists to study judicial behavior; economists, and academic lawyers influenced by economics, are Johnny-come-latelies. Although some of the political science literature now borrows from economics, we’ll see that economics can further enrich political science by relating political behavior by judges to incentives and constraints, in the spirit of economic analysis of rational behavior, and by doing so can enable, among other things, a more precise understanding of the role and character of ideology in the behavior of American judges.

The Labor-Market Theory of Judicial Behavior

Consider the benefits and costs of work as they appear to a worker. Rarely are they only pecuniary. A worker will care about what he is paid, of course, but a paycheck is not the full measure of a worker’s “income” in a real as distinct from a solely pecuniary sense of that word. Nor are readily

monetizable fringe benefits such as health insurance and a pension the only components of real income besides wages. Some benefits of work are difficult to monetize, such as tenure or other forms of job security. Others have no monetary dimension at all, unlike job tenure, which affects expected earnings. Nonmonetizable benefits, which are important in jobs such as a judgeship that attract persons who could generally earn more money in a different branch of the legal profession, include the intrinsic interest of the work and the power or prestige and pride or self-esteem (for example, the sense of satisfaction at being employed in a socially useful job) that the job confers on him. The social dimension of work—interactions with colleagues, staff (for example, law clerks), and customers (lawyers and litigants are rough analogs, in judicial work, of customers—though not of customers who can invoke the slogan “The customer is always right”)—can also be a source of pleasure, though also of pain. Promotion prospects may be important too; the value of a job to a worker includes the prospect of higher pay or more satisfying work as he climbs the promotion ladder. And for judges, as for some other classes of public employee, there is the “revolving door” option to consider.

And the costs of work? One cost—the risk of losing one’s job (and perhaps having great difficulty finding another, comparable one) or of suffering a pay cut—is just the obverse of the benefit of job security, which eliminates or reduces such risks. Other costs of work include the forgone value of leisure, the expenditure of energy in working, and adverse working conditions, such as long commutes or heavy travel (except for court of appeals judges in some of the circuits that embrace a large geographical region), boring or physically strenuous or even dangerous work, and criticism by superiors or members of the public. Leisure preference can make work costly in nonpecuniary terms by increasing the opportunity costs of work (the benefits of leisure that are forgone when one is working). So can effort aversion (the desire for a “quiet life”), which is a broader concept. Effort aversion is affected not only by hours worked but also by the intensity of the work—the effort invested in it—plus anything else that makes it harder or less agreeable, such as physical or emotional strain. Like the nonpecuniary satisfactions of work, effort aversion can be expected to play a particularly large role in the utility function of a securely tenured worker—such as a federal judge—who can slack off without paying a heavy penalty.
The obverse of fruitful relations with colleagues are tense, competitive, even antagonistic ones. These are not uncommon in appellate courts (the relations of the members of which have been analogized to arranged marriage with no divorce option), but they are minimized in the federal courts of appeals by clever rules governing the power structure within the court. One is the role assigned to seniority in the allocation of power. The court’s chief judge is neither elected nor appointed; he is simply whichever judge in active service (that is, not yet a senior-status judge) has served longest on the court but is not yet 65. (He can refuse the appointment, and if so the next most senior active-service judge is offered it.) Therefore judges do not scheme or campaign to become chief judge, which would cause bruised feelings. In addition, the judge who presides at oral argument and therefore assigns the majority opinion (and thus occupies a position of modest power vis-à-vis the other judges on the panel) is, again, simply the active judge who has served the longest of any of the judges on the panel (unless the chief judge is on the panel, in which event he presides).

Determining who is chief judge strictly on the basis of seniority means that he or she often will not be the best person for the job. The response to this problem has been to limit chief judges to a nonrenewable seven-year term (which probably should be shorter, however). The system thus trades off competence against the danger of infighting, which is acute in a system in which the members of a group, who must work together, are chosen by different appointing authorities (different Presidents, often of different parties and different ideologies) on the basis of differing criteria, serve long terms, and are subject to very little in the way of discipline. Holmes likened the Supreme Court Justices to nine scorpions in a bottle.

The rational worker will want to have as great a surplus of benefits

10. Federal judges, upon reaching the age of 65 with 15 years of service or 70 with 10, have the option of taking “senior status,” which allows them to work part-time at full pay, in lieu of retirement (also at full pay).

11. The method of appointing chief district judges is the same. In contrast, the Chief Justice of the United States (who is of course the chief judge of the Supreme Court, though he also has administrative responsibilities with respect to the entire federal judiciary) is appointed by the President when the position becomes vacant, rather than being selected automatically on the basis of seniority.
from work over costs as he can obtain. This may require him to make difficult tradeoffs—for example, between on the one hand money and satisfactions generated by a job that requires long hours of work and high risks of failure and on the other hand leisure and avoidance of stress; or between a job that promises riches but obscurity and a job that pays much less but confers power and the possibility of a measure of fame. The employer has a different objective—to maximize the worker’s net contribution to the value of the employer’s output. Insofar as that contribution is positively related to the costliness of working to the worker (for example, to how hard he works) and negatively related to the worker’s expense to the employer, there is a conflict of interest. The employer will want to adopt rules and practices intended to align the worker’s incentives with the employer’s. The worker will resist—sometimes successfully, as when the workplace is unionized, or when management and ownership are divided, as in large publicly traded corporations, whose top executives frequently are overcompensated in the sense that their services could be bought more cheaply if only the shareholders controlled hiring and compensation.

These principal-agent tensions are present in all jobs, including that of a judge. They may seem, and indeed may be, particularly acute in the federal judiciary, because many of the traditional ways in which principals seek to align their agents’ incentives with their own have been taken off the table in the interest of assuring the judges’ independence not only from the other branches of government but also from the other judges. Federal judges cannot be fired, or even forced to retire, except for egregious misconduct or complete inability to perform. They cannot be demoted, either, and their pay cannot be docked. Nor do they receive bonuses for superior performance; the only raises permitted are uniform raises for all the judges of the same rank.  

12. We limit our attention to Article III judges—that is, judges who are confirmed by the Senate for life—and thus exclude other federal judicial officers: bankruptcy judges, magistrate judges, administrative law judges (including immigration judges), and members of administrative boards that review the decisions of administrative law judges.

13. There are only four ranks in the case of Article III judges: district judge, circuit judge (that is, court of appeals judge), Associate Justice of the Supreme Court, and Chief Justice of the United States. Chief judges of courts of appeals and district courts are not a separate grade.
A higher court can reverse decisions by a lower court but has no control over that court’s personnel, budget, or other management functions. The judges of the district courts and courts of appeals thus don’t “work for” the Supreme Court, though they are subordinate to it. It’s as if in a private company the only authority of one’s boss were to correct one’s work. And as we’ve said, authority within the federal courts is determined by seniority rather than by decisions made by superiors.

It may seem from this description that the “agents” in the federal judiciary (that is, the judges) are completely autonomous and so might as well be considered the real principals. Not so. Some behavioral constraints are imposed on judges by their principal—a collective principal consisting of the appointing authorities, the judges’ judicial superiors, and, to a degree, their colleagues; members of the legislative and executive branches of government; and even the public—the ultimate principal in democratic government. (Franklin Roosevelt’s unsuccessful Court-packing plan is the locus classicus of a power struggle involving the Supreme Court, Congress, the President, and the general public.14) There are also constraints that would operate on judges even if they were principals (realistically, they are semiprincipals) rather than agents. We have mentioned professional criticism, which includes criticism by other judges, who may or may not be the judicial superiors of the judge they are criticizing, and criticism by lawyers, law professors, and journalists. The possibility of such criticism, along with the other constraints that we have discussed, affects a judge’s labor-leisure tradeoff. A judge can work at a leisurely pace or intensely. If the leisurely pace, by reducing the quality or quantity of a judge’s work, generates criticism, the judge may decide to shift his effort-leisure boundary closer to the effort end of the spectrum.

Organization theorists discuss the creation of a “high commitment” culture as a method of motivating agents when the usual incentives and constraints are inoperative—a way of getting the agents to identify with

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the mission.\textsuperscript{15} The professional military is a high-commitment culture. The judiciary has long aspired to be (or, cynics would say, pretended to be) one. Borrowing from the myth that ermines would rather die than get their lovely white fur dirty, English judges trimmed their robes with ermine to signify purity.

Consistent with endeavoring to create a high-commitment culture in the federal judiciary, the White House generally attempts (though within limits defined by politics) to recruit persons who will be highly committed to their judicial job. Candidates for a federal judgeship undergo an elaborate screening process, in conformity with the economic principle that where it is difficult to evaluate the quality of a producer’s output, the buyer will perforce scrutinize the quality of the producer’s inputs. That is the basis on which a person might choose a surgeon or a lawyer and it is one reason why federal judging is a lateral-entry career. As we’ll see in chapter 8, a federal judge is rarely appointed before the age of 40, and often he is in his fifties and occasionally even in his early sixties. He will have had a substantial career in another branch of the legal profession and thus have acquired habits of work and demonstrated traits of character that provide some evidence that he will perform the duties of his judicial office competently.

The threat of reversal by a higher court, and in extreme cases of discipline (usually in the form of a reprimand, but in cases of criminal conduct or abandonment of office, removal by impeachment by the House of Representatives and conviction by the Senate or, in the case of incapacity, removal by a circuit’s judicial council), is a constraint. As are professional criticism and even public opinion; for as tenured academics know, when the heavier constraints of termination or demotion are inoperative with respect to an employee, the lighter constraint of criticism can weigh heavily.

There is also the carrot of promotion—promotion of district judges to the court of appeals and of court of appeals judges to the Supreme Court. About 11 percent of district judges are promoted to the courts of appeals, a percentage high enough to influence a district judge’s behavior if he as-

pires to be a court of appeals judge. Not all district judges do, though the pay is slightly higher, the staff slightly larger, the prestige slightly greater (because there are many fewer court of appeals judges than there are district judges), threats by angry litigants fewer, and the work somewhat less demanding.

Although the probability that a court of appeals judge will be promoted to the Supreme Court may seem minuscule, this is misleading. Most court of appeals judges, whether because of advanced age or other disqualifying characteristics, have no chance of being promoted. A small number are realistically eligible; each of them has a probability of promotion that, while still low, is not minuscule, at least in recent decades, when most Supreme Court Justices have been former federal court of appeals judges. The 11 percent figure for promotion from the district court to the court of appeals similarly underestimates the promotion prospects of the subset of district judges who are plausible candidates for promotion. We test the effect of promotion prospects on the behavior of federal judges in chapter 8. We study whether they wait for lightning to strike or audition for a star role.

We expect leisure preference to play a greater role in judicial than in most other employments because of life tenure and the invariability of the judicial salary to performance. One should not be surprised that the rate at which federal courts of appeals reversed district courts’ judgments in civil cases fell in the Second and Ninth Circuits, relative to the other circuits, when those circuits (but not the others) were inundated by immigration cases in the early 2000s as a result of efforts by the Justice Department to clear the backlog of immigration cases at the administrative level.¹⁶ Less time and effort are involved in affirming than reversing a decision, whether by a district court or by an administrative agency such as the Board of Immigration Appeals. Especially as judges age, and either their energy wanes or boredom sets in, or they realize that further effort will do little to alter their career achievements or reputation, we can ex-

pect them to delegate more of their work to law clerks and other staff, and perhaps to dissent less (see the last section of chapter 6), because a dissent is always added work—a judge does not get credit against his opinion-writing assignments by writing dissents.

A possible example of leisure preference is the increasing public extra-judicial activity of Supreme Court Justices. Courts throughout the world publicize their decisions, issue press releases, and maintain websites describing their procedures and publishing their opinions and brief biographies of their members.\textsuperscript{17} What is new for the Court are the book tours, mock trials of fictional and historical figures, ethnic pride activities, autobiographies and memoirs, authorized biographies, talks to high school students, debates with each other on television, speechifying all over the world, and even the making of rather unguarded public statements on controversial legal and political issues.\textsuperscript{18} “There are no more wallflowers on the Supreme Court.”\textsuperscript{19} Even as dignified and reserved a Justice as Ruth Bader Ginsburg consented to preside, wearing a Civil War uniform, at a mock public court-martial of General Custer for losing the Battle of the Little Big Horn.\textsuperscript{20} In the past, Justices engaged with the media primarily when the Court was embattled, which it is not at present and hasn’t been since the Reagan years (and then only mildly).\textsuperscript{21} No more. “It seems that

21. Some might point to the 2000 decision in \textit{Bush v. Gore}, but the public’s confidence in the Court did not drop as a result of the much-criticized decision in favor of Bush. See James S. L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, “The Supreme Court and the
everywhere you look, you see [a Justice] popping up: giving speeches, signing books, leading workshops, posing for pictures at charity functions. This is what law professors call ‘extrajudicial activity,’ and we have seen a spate of it lately, not only during the court’s summer recesses, when justices fly the marble coop, but throughout the term that began last October and ended this week.” 22 In an article about Justice Sotomayor we read that “the substance of what she says and stands for might be familiar, but her style in communicating that substance seem to be making it newly appealing. This bodes well for the liberal wing of the Court, which has been waiting years for an effective voice to promote its views to the general public. Here’s hoping it has finally found a voice with staying power.” 23

The increase in the Justices’ extrajudicial activities has coincided with a decline in their workload as a result of a reduction in the number of cases in which plenary review is granted and of the growth in the size and quality of the Justices’ staffs. Both developments have given Justices more time for extrajudicial activity—stated differently, have reduced the opportunity costs of such activity.

Tables 1.1 through 1.3, which are based on the Justices’ publicly available financial disclosure forms, give a partial glimpse of the amount of their current public extrajudicial activity.

Leisure preference may figure in judges’ creation and embrace of doctrines that limit judicial workloads—doctrines such as harmless error, waiver and forfeiture, political questions, the plain-meaning rule of statute.

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A Realistic Theory of Judicial Behavior

Table 1.1  Average Annual Number of Public Nonjudicial Events, by Justice, 2002–2009

<table>
<thead>
<tr>
<th>Justice (Years on Court between 2002 and 2009)</th>
<th>Average Number of Events per Year</th>
<th>Total Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scalia (8)</td>
<td>23.13</td>
<td>185</td>
</tr>
<tr>
<td>Breyer (8)</td>
<td>16.50</td>
<td>132</td>
</tr>
<tr>
<td>O’Connor (4)</td>
<td>15.75</td>
<td>63</td>
</tr>
<tr>
<td>Kennedy (8)</td>
<td>15.00</td>
<td>120</td>
</tr>
<tr>
<td>Ginsburg (8)</td>
<td>12.25</td>
<td>98</td>
</tr>
<tr>
<td>Thomas (8)</td>
<td>8.38</td>
<td>67</td>
</tr>
<tr>
<td>Roberts (4)</td>
<td>8.00</td>
<td>32</td>
</tr>
<tr>
<td>Alito (4)</td>
<td>7.25</td>
<td>29</td>
</tr>
<tr>
<td>Rehnquist (3)</td>
<td>2.50</td>
<td>5</td>
</tr>
<tr>
<td>Stevens (8)</td>
<td>2.25</td>
<td>18</td>
</tr>
<tr>
<td>Souter (8)</td>
<td>0.38</td>
<td>3</td>
</tr>
</tbody>
</table>

Note: We exclude Sotomayor, who was not confirmed until August of 2009.

tory interpretation, the adoption of rules in lieu of standards, deferential standards of appellate review, plea bargaining, and, above all, the requirements of standing (federal courts may not adjudicate cases that are moot, may not issue advisory opinions, and so forth) and the principle of adhering to precedent (stare decisis), along with the correlative practice of distinguishing precedents (rather than either following them blindly or overruling and replacing them) in order to make the law a more precise and therefore more reliable guide.24 These practices are big time-savers! For example, it’s a lot easier to decide a case because it is materially identical to one previously decided (which might be a case that had distinguished an earlier precedent in an effort to fine-tune the law) than to analyze every new case afresh. Notice too that if appellate judges don’t respect precedent, the law is less certain and this results in more appeals—so the appellate judges have more work to do. In chapter 5 we test the hypothesis that district judges with heavier workloads are more likely to accept the Supreme Court’s recent invitations (in the Twombly and Iqbal decisions, discussed in that chapter) to require a plaintiff to conduct a more thorough precomplaint investigation in order defeat a motion to dismiss the complaint. We call these “invitations” rather than “directives” because

rarely can the defendant appeal the ruling if a judge decides not to dismiss a case, so the case continues on to settlement or final judgment.

The doctrines that we have listed are more than just time-savers. That is why they can’t be classified as products just of leisure preference or effort aversion. They are essential to the manageability of the federal judicial system. Because of the pyramidal structure of a judicial system, adding judges would not be an apt response to increased workload. As the bottom of the pyramid expanded, the judges at the top (the Supreme Court Justices), however hardworking, would be overwhelmed unless their number was increased—which would make it more difficult to keep

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**Table 1.2**  Justices’ Total Public Events by Category, 2002–2009

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Events</th>
<th>Percent of Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Law School Event</td>
<td>311</td>
<td>41.4</td>
</tr>
<tr>
<td>U.S. Public Event</td>
<td>38</td>
<td>5.1</td>
</tr>
<tr>
<td>U.S. Private Event</td>
<td>270</td>
<td>35.9</td>
</tr>
<tr>
<td>International Event</td>
<td>133</td>
<td>17.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>752</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

*Note:* “U.S. Law School Event” denotes events sponsored by law schools in the United States, including moot court competitions, lectures, and classes. “U.S. Public Event” denotes government-sponsored events, mostly speeches to other members of the federal judiciary. “U.S. Private Event” denotes events sponsored by private U.S. organizations, such as bar associations and interest groups. “International Event” denotes events sponsored by foreign governments, universities, or other organizations.

**Table 1.3**  Justices’ Total Public Events by Year, 2002–2009

<table>
<thead>
<tr>
<th>Justice</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehnquist</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Stevens</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>O’Connor</td>
<td>16</td>
<td>19</td>
<td>28</td>
<td>0</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Scalia</td>
<td>15</td>
<td>21</td>
<td>15</td>
<td>24</td>
<td>25</td>
<td>33</td>
<td>30</td>
<td>22</td>
</tr>
<tr>
<td>Kennedy</td>
<td>15</td>
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the law coherent—or unless they dealt summarily with their cases, thereby reducing the quality of their output, or unless their jurisdiction was curtailed.

The workload-saving doctrines we’ve listed are sometimes defended as reducing the role of ideology in the judicial process by reducing the scope of judicial discretion. But the effects of such doctrines are not substantively neutral. Reducing access to federal courts weighs most heavily on persons seeking to expand legal rights, and such expansions generally advance the liberal political agenda; examples are antidiscrimination, prisoner rights, immigrant rights, consumer protection, and environmental litigation.

Moreover, procedural doctrines that reduce judicial workload have only a short-run effect in curbing ideological judging. When the Supreme Court decides a novel case, the lower courts fall into line and dissenting and successor Justices may do so as well; but that does not detract from the novelty of the decision—which is to say that it was not itself based on a mechanical application of existing rules but created a new rule and thus was legislative in character. One has only to compare the existing body of constitutional doctrine with the slim text of the Constitution to see the point. The Supreme Court has created constitutional law, despite its embrace of doctrines designed to curtail its discretion as well as limit its workload and that of the lower courts.

A related point is that procedural doctrines (not limited to those designed to reduce judges’ workloads or curtail judicial discretion) are not always applied neutrally. Conservative Justices tend to vote to deny plaintiffs seeking a liberal decision standing to sue, and liberal Justices to vote to grant standing to such plaintiffs. Court of appeals judges in ideolog-


cally heterogeneous circuits are more likely to invoke procedural limitations to avoid having to rule on the merits of disputes.\textsuperscript{27} In chapter 5 we'll see that even after one controls for the influence of Supreme Court precedent, the district court's workload, and the ideological predisposition of the appellate judges in the district court's circuit, a district judge's ideological leanings are likely to influence his decision on whether to grant or deny a motion to dismiss—and such motions usually are filed by defendants aligned with conservative interests.

In private employment the volume of work that an employee is required to do is determined by the employer; in the judiciary it is determined jointly by the "employer"—the elected branches of government, which determine the number of judges—and by the employees (the judges), who create rules, both procedural and substantive, for regulating the volume and complexity of cases and therefore the amount of work per judge. All the doctrines that we've listed that limit judicial workloads were created by judges.

An example of an effort-versus-leisure choice that appellate judges make is whether to write a dissenting opinion. A judge is committed to writing the majority opinions that are assigned to him (and if he is the assigning judge, the norms of equal assignment require him to assign the same number of opinions to himself as to the other judges). But the decision to write a dissenting opinion is discretionary, and since it requires effort, we predict that the number of dissenting opinions that a judge writes will be negatively influenced by effort costs (see chapter 6).

An important form of judicial effort aversion is avoiding the ill will of one's judicial colleagues—wrangles with colleagues make for a harder job, thus requiring more effort, than if collegiality reigns. The relation of ill will to the decision to dissent comes from the fact that a dissent imposes effort costs on the writer of the majority opinion, who, to hold on to a majority, may have to revise his opinion to meet the points made by the

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dissent. It is also a criticism of the judges in the majority for adopting a position that the dissent contends is wrong. Neither judges in the majority in a case nor putative dissenters much like dissents, and we infer from this that the number of dissenting opinions will overstate the actual unanimity of judicial opinion concerning the correct outcome of cases.

The desire for a good reputation, like the desire to avoid criticism (which for most judges is really just the obverse of the desire for a good reputation), affects a judge’s effort-leisure tradeoff. But it affects another tradeoff as well: the creativity-continuity tradeoff. Judges are expected to maintain a reasonable degree of stability of law by meeting such role expectations as giving substantial weight in their decisions to legislative texts and prior judicial decisions. But they can obtain an enhanced reputation by seasoning their respect for continuity with a dash of creativity. As one moves up the judicial hierarchy, the weight of creativity in judicial reputation increases. Not only do the higher judges have greater power to change the law, but the percentage of novel cases rises as one moves up the ladder, and the uncreative judge, virtually by definition, cannot do justice to novel cases. So the higher judges are evaluated by their creativity and not just by their ability to apply clearly applicable statutory text and judicial precedent to new cases that do not differ materially from previous ones or to exploit gaps or ambiguities in the applicable statutory text. Traynor and Friendly, with whom we began, are notable examples of judges who achieved renown by being creative. But creativity comes at a cost in leisure forgone by a judge who strives to speak in a distinctive voice rather than edit law clerks’ opinion drafts.

Related to creativity is power. When text and precedent do not dictate a decision, the judge has an opportunity to implement his view of desirable public policy, as if he were a legislator; and decisions affect behavior in the world outside the courthouse—precedents operate much as statutes do, constraining behavior. Judges trade off power against leisure and against other influences on reputation. A judge may feel very strongly about a policy issue; yet a fear of being criticized for “judicial activism,” or fear of reversal by a higher court, by legislation, or in an extreme case by a constitutional amendment, may convince him that he cannot achieve his policy objective in the case at hand.

The power and creativity satisfactions of a judgeship bear on the pro-
pensity to dissent. A dissent unlikely to lead to an eventual change in law confers little benefit on the dissenter. And the busier a court is, the less likely it is to reexamine its precedents, because decision according to precedent is a big time-saver, and so the less likely a dissent is to herald future changes in law. Also the more cut-and-dried the courts’ cases are, the less room there is for disagreement about proper outcomes and so the fewer will be the occasions for dissent. On both workload and novelty grounds we can expect dissents to be more frequent in the Supreme Court than in the courts of appeals. Workload pressures too, as we noted earlier, make the rate of dissenting understated the actual disagreement among judges, and those pressures diminish as one moves up the judicial ladder.

We must not limit our consideration of factors influencing judicial behavior to those that are external to the judge, such as the possibility of reversal or the reactions of colleagues. Other important influences are internal. One example is how the mind processes information; another is personality. We’ll call these influences “psychological.” They are both cognitive and emotional.

Judicial decisions in cases involving either factual or legal uncertainty (or both) can be expected to be heavily influenced by the preconceptions that a judge brings to a case. Those preconceptions are likely to be influenced in turn by a host of background factors, including personal-identity characteristics such as race and sex, previous professional and life experiences, education, parental influence, personality or temperament, and (often as a function of such characteristics) moral or religious principles and political ideology. Judges are supposed to lay their preconceptions to one side when deciding a case, and usually they try to do so because it is one of the expectations of the role and a trait for which aspirants for a judgeship are self-selected or which is selected for by the appointing authorities. But when one must make a decision under uncertainty, it is impossible to banish preconceptions unless one decides to flip a coin or can

28. Judges are reluctant to acknowledge that preconceptions influence their decisions. For a notable exception, see Henry J. Friendly, “Reactions of a Lawyer-Newly-Become-Judge,” in Friendly, Benchmarks 1, 14–21 (1967).
A Realistic Theory of Judicial Behavior

delay decision until the uncertainty is dispelled; neither is a permissible option for a judge.

When a case is novel in the sense that it can’t be resolved by reference to the orthodox legal materials of authoritative legislative text and precedent, then beliefs and intuitions shaped by the judge’s personal history, identity, and psychology may be decisive. Bayesian decision theory teaches that a good reasoner begins an inquiry with prior beliefs about its likely outcome but updates them as evidence accumulates. The priors of a judge facing a novel case are likely to have a strong ideological component because ideology is a worldview that gives one an initial take on a new problem. (If the case is not novel, the judge’s priors are likely to be legalistic rather than ideological.) So liberals are suspicious of the police, and before the terrorist attacks on the United States of September 11, 2001, opposed most wiretapping. They updated their view on the basis of the attacks, and so while remaining more suspicious of the police than conservatives became less suspicious than they had been.

Even if a case isn’t particularly novel, judges sometimes (maybe often) engage in “motivated reasoning”—picking out unconsciously those facts, precedents or other authoritative texts, or secondary materials, that support a preexisting view (wherever it might come from) and discounting the materials that don’t support that preconceived view. Another name for this tendency is “confirmation bias”—the common tendency, when one has a preconception (and that is almost always), to look for evidence to confirm, not refute, it. Scientists are trained to look for evidence that refutes their hypotheses; lawyers and judges are not. “An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.”

Think of two extreme models of judicial decision-making. In one, the judge, giving up on reason, decides the outcome of a case by flipping a

coin (Justice Bridlegoose in Rabelais’s *Gargantua and Pantagruel*). In the other, the judge uses tools of logic and science to decide the outcome. Judges don’t decide cases by coin flipping or some other aleatory method, and often they are both able and motivated to decide a case by something approaching a scientific or logical methodology. But sometimes they perforce just muddle through, using a “method,” if one can call it that, that has been described in another context as “a tension between ‘ingenious’ and ‘apodeictic’ modes of cognition. The former is characterized by the contingency and instability of the self’s cognitive encounter with the world, and by the self’s readiness to ‘invent’ meaning through language, to adjust style and turn substance into metaphor; the latter by the attaching of the self to the illusory certainties and conclusions produced by such encounters.\(^{32}\)

In light of this discussion it is easy to see how a judge can be ideological without having an ideology that conforms to standard notions of “liberal” and “conservative.” In fact it’s unclear what a “standard” liberal or, especially, conservative ideology is.\(^{33}\) Most liberals place personal liberty far above economic liberty, but libertarians, though generally thought of as conservative, value both forms of liberty and so may combine laissez-faire economic views with support of gay marriage, legalized prostitution, and repeal of the drug laws. But they tend, in contrast to liberals, to be unsympathetic to the poor, to criminals (except for some white-collar criminals), and to members of minority groups—libertarians are individualists, often Social Darwinists, believing in sink or swim (another name for survival of the fittest). Most conservatives, however, are not libertarians; they tend to exalt executive power, especially in matters of national security, to be social conservatives, and to be religious, which liberals nowadays tend not to be.

Neglect of the variousness of ideology, and of factors influencing judicial decision-making that aren’t limited to ideology but include personal-
ity, animosities, resentments, and ambition, leads to the underestimation of the influence on judicial decisions of subjective factors—factors that are extralegal, at least in a narrow, legalistic sense of “legal.” Such neglect suggests that classifying judges as liberal or conservative simply on the basis of whether a liberal or a conservative President appointed them is simplistic; yet we shall see throughout the book that it is a serviceable proxy, although we use other proxies as well. There are many conservatisms—on the present Supreme Court, Roberts, Scalia, Kennedy, Thomas, and Alito are differently conservative from each other—but there is enough overlap for these Justices to constitute a conservative bloc, though less cohesive than the liberal bloc.34

Moreover, while a judicial vote that would be coded conservative by all observers—for example, a vote to affirm a death sentence—might be cast by a conservative judge motivated by his conservative ideology, it might also be cast by a liberal judge pragmatically trading off the systemic bad consequences of a liberal ruling against the attraction of doing justice in the individual case, by a strategic liberal who doesn’t want to anger colleagues by dissenting (or who is auditioning for appointment to a higher court), or by a lazy liberal. Only if the first cause were the operative one would the vote be a product of ideology. Ideology, legalism, pragmatism, strategy, and effort aversion all enter as preferences in the judge’s utility function, with different weights depending on the judge (his personality, temperament, life and career experiences, and so forth) and the particulars of the case. It is out of such elements rather than out of logic and data that some judges (and more law professors) have built elaborate theories—law as the quest for original meanings, law as active liberty, law as libertarianism, law as integrity, and so forth—theories the realist regards as rationalizations of dispositions rather than as theories that actually guide decisions.

34. Of the Court’s 14 5–4 decisions during the 2010 term, the four liberals were on one side and the four conservatives (the ninth Justice, Kennedy, is also conservative, but not as conservative as the other four—he is the swing Justice) on the other in all but two. The odds of this occurring by chance are minuscule. See Adam Liptak, “A Significant Term, with Bigger Cases Ahead,” New York Times, June 28, 2011, p. A12.
The Judicial Utility Function

Drawing together the principal strands of the preceding discussion, and simplifying, we can formalize the judicial utility function \((U)\) as follows:

\[ U = U(S(t_j), EXT(t_{nj}, t_l), W, Y(t_{nj}), Z). \]

That is, the judge seeks to maximize his utility subject to a time constraint \((T = t_j + t_{nj} + t_l)\) where \(T\) is his total available hours (24 hours per day), \(t_j\) is the number of hours he devotes to judicial activities, \(t_{nj}\) is the number of hours he devotes to nonjudicial work such as writing and lecturing, and \(t_l\) is the number of his leisure hours.

\(S\) denotes the satisfactions of the job and is expected to be a positive function of the hours the judge devotes to his judicial work. \(S\) includes the internal satisfaction of feeling that one is doing a good job, the prospect of being promoted within the judiciary, and the social dimensions of a judgeship, which can either add to or subtract from utility—productive working relations with judicial colleagues, law clerks, other staff, and lawyers add to utility, while animosities, usually from or toward judicial colleagues and usually resulting from disagreement, subtract from it.

\(EXT\) are external satisfactions from being a judge, including reputation, prestige, power, influence, and celebrity, which are positively related to the time devoted to both judicial and nonjudicial activities. \(L\) is leisure, and is a function of hours of leisure activities (so \(t_l = T - t_j - t_{nj}\)). \(W\) is the judicial salary, while \(Y(t_{nj})\) is other earned income and is related to hours spent in nonjudicial work. \(Z\) is the combined effect of all other variables, including the cost of increasing the probability of promotion to a higher level of the judiciary (what we call auditioning).

Throughout the book we’ll be examining factors that influence various arguments in the judicial utility function and as a result alter judicial behavior. The judicial workload is an obvious example; it is likely to have a negative effect on \(S, L,\) and \(Y(t_{nj})\). Another is the cost, in time (for example, in forgone leisure hours and nonjudicial work hours) and in collegiality, of dissenting, a cost that also is likely to have a negative effect on \(S, L,\) and \(Y(t_{nj})\).

A factor that might or might not affect judicial behavior is reversals. At the judicial level, reversal may have a negative effect on the judge's satisfaction (\(S\)) and leisure (\(L\)).
the district court level reversals result in more work for judges because often the reversal is accompanied by a remand of the case to the district judge for further proceedings, which can increase $t_j$ and also decrease the time available for desired nonjudicial activities, including both leisure and nonjudicial work. These reversals reduce both $EXT$ and $L$ and by doing so can be expected to generate reversal aversion. By this we mean efforts by district judges to avoid being reversed and thus avoid the increase in $t_j$ devoted to rehearing a case or rebutting criticism that accompany a reversal.

We expect less or perhaps zero reversal aversion at the court of appeals level, because the Supreme Court reviews, and hence reverses, such a minute fraction of court of appeals decisions. At the Supreme Court level there is zero reversal aversion. Supreme Court decisions cannot be reversed, although in statutory as distinct from constitutional cases Congress can abrogate for the future the rule or principle declared by the Court. And while abrogating a rule of constitutional law adopted by the Court formally requires a constitutional amendment, which has become almost impossibly difficult, Congress has and sometimes deploys weapons that can prod the Court into reversing a constitutional decision—weapons such as jurisdiction stripping, impeachment threats, and threats to cut the Court’s budget.35

It might seem that reversal aversion would be motivated at both the court of appeals and district court levels by their possible effect on $S$ and $EXT$, including any negative effects on promotion. But, perhaps oddly, little attention is paid to reversal rates, even with respect to promotion. For example, Robert Bork had a perfect record—zero reversals as a court of appeals judge—yet was denied confirmation, whereas Alito and Sotomayor had been reversed frequently yet were confirmed easily. In some instances there may even be a Babe Ruth effect. Ruth during his career hit more home runs than any other baseball player, but he also struck out more and had a lower batting average than some players, such as Ty Cobb, who probably were less able than he. Ruth could have increased

his batting average and reduced his strikeouts by swinging less often for
the fence, but his reputation would have suffered. (Think how much
more famous he is than Cobb.) Similarly, the bolder judges may be court-
ing reversal because the cost to their reputation and influence of being
reversed is less than the benefit to their reputation and influence from
their bold decisions that are not reversed.

The Legalist Countertheory of Judicial Behavior

The theory that we have sketched thus far of judicial behavior that is ra-
tional in the economic sense is opposed to the conventional theory of ju-
dicial behavior, in which judges decide cases strictly in accordance with
orthodox norms of judicial decision-making. That theory allows no room
for leisure preference, angling for promotion, worrying about engender-
ing the ill will of colleagues by taking forthright positions, allowing policy
preferences to influence decisions, or allowing ideological or other sub-
jective preconceptions to contaminate the impartial application of legal
rules and principles given to rather than invented by the current judges.
On this account legal reasoning is impersonal, even algorithmic; judges
are human computers. In an older metaphor, they are oracles, applying
to the facts of new cases law found in orthodox legal sources, such as
statutory or constitutional text, or judicial decisions having the status of
precedents, and doctrines built from those decisions. Like the oracle at
Delphi the judges are the passive transmitter of Apollo’s prophecies. The
analogy of judge to oracle was Blackstone’s, who went so far as to argue
that even common law judges were oracles, engaged in pressing imme-
memorial custom into service as legal doctrines, rather than in creating doc-

No one today thinks the judicial process \textit{wholly} oracular. But lawyers
and judges—particularly judges and law professors—cling to the idea
(though how far they actually believe it may be questioned) that judicial
decision-making is, at least primarily, an “objective” activity, producing
decisions by analysis rather than by ideology or emotion. The idea of the
judge as an analyst shares with the idea of judge as an oracle the assump-

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tion that legal questions always have right answers, answers transmitted from an authoritative source, though in the modern view the transmission is not direct but is mediated by analysis. The judge remains an oracle in the sense that his personality does not count. The personality of the oracle at Delphi was no more important to her prophecies than the personality of a coaxial cable.

The legalist theory received its canonical modern expression by John Roberts at his Senate confirmation hearing for Chief Justice, when he said that the role of a Supreme Court Justice, which he promised to faithfully inhabit, was comparable to that of a baseball umpire. The umpire calls balls and strikes but does not pitch or bat or field—or make or alter the rules of baseball. Roberts was echoed four years later by Sonia Sotomayor at her confirmation hearing. Yet no competent observer of the judicial process actually believes that all judges, or even most judges, in our system are always legalists, or for that matter always realists. More cases fit the legalistic theory than the realistic one (notably appellate cases decided without a published opinion—which is now the majority of cases decided in the federal courts of appeals), but a greater number of important cases, the cases that shape the law, fit the realistic theory than the legalistic one.

Roberts can’t have meant what he said. This is not to accuse him of hypocrisy. Judicial confirmation hearings are a farce in which a display of candor would be suicide (as Elena Kagan acknowledged at her confirmation hearing, having earlier urged greater candor in these hearings). It


38. “The task of a judge is not to make law—it is to apply the law.” Confirmation Hearing on the Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 111th Cong., S. Hearing 503, p. 1344 (2009).


would be what philosophers call a “category mistake,” as if a Shakespear-
ean actor were to interrupt his recital of Hamlet’s “To be, or not to be”
soliloquy by saying that he didn’t actually think that death was “a con-
summation devoutly to be wished”; he was just saying it because it was in
the script he’d been given. Judicial confirmation hearings are theater.

And must be. Imagine if a nominee acknowledged that a high propor-
tion of cases that reach the Supreme Court are indeterminate to legalistic
analysis, so that in those cases the Justices perforce rely on intuition, often
flavored by political ideology. The nominee would then have to answer
questions about his ideology (of which he might be unaware, resulting in
future embarrassment when he wrote an opinion that invited interpreta-
tion in ideological terms), and his willingness to do so would make agree-
ment with that ideology the natural and legitimate touchstone for a Sena-
tor’s vote for or against confirmation because the nominee would be
acknowledging publicly that ideology is law at the Supreme Court level.
By confining himself to purely technical issues the nominee enacts his
belief that technical competence is the only consideration pertinent to
confirmation.

Most proponents of one or another legalist theory of judging would if
pressed acknowledge that it is less a rival to realism than a normative the-
ory expressing the aspirations of an influential segment of the legal and
political communities and one that resonates with the naïve conception of
the judicial process held by much of the general public. There is a well-
deﬁned “ofﬁcial” judicial role, and many judges would experience cogni-
tive dissonance if they acknowledged to themselves that really they were
playing a different role in many cases, and those usually the most impor-
tant. Many don’t realize it or suppress the realization.

Beginning with chapter 3, we present our statistical evidence testing
the realist versus legalist approaches. Not that statistical evidence is the
only worthwhile evidence of judicial behavior. There is much to be
learned from studies that compare a judicial opinion with the briefs and
trial transcripts and other materials on which the judge based—or pur-
ported or was expected to base—his opinion.41 And if impatient with aca-

41. See Gerald Caplan, “Legal Autopsies: Assessing the Performance of Judges and Law-
Academic studies, one has only to read the transcripts of Senate hearings on judicial nominees both to the Supreme Court and to the courts of appeals to realize the importance of ideology in the judicial process. The Senators pay less attention to legal skills or other technical qualifications to be a judge than they do to the nominee’s ideology. Are the Senators deceived in thinking that ideology influences judges? Was then-Senator Obama mistaken when he voted against the confirmation of John Roberts to be Chief Justice, believing that Roberts would decide cases in accordance with his conservative ideology?42 Were President Reagan and his advisers deceived when they tried to alter the ideological complexion of the federal courts of appeals by challenging “senatorial courtesy” and appointing conservative law professors?43

The decisions that invalidated the early New Deal statutes, the decisions that overruled those decisions, the decisions of the Warren Court, the decisions overruling or narrowing those decisions, the conservative activism of the Rehnquist and, even more, the Roberts Courts—how can such a cacophony of conflicting judicial voices be thought the result of judges’ reasoning with the same tools learned in law school and honed in practice from the same constitutional language and the same precedents?44

**Antirealism Personified: Judge Harry Edwards**

Defenses of legalism tend to ignore the empirical literature, but an important exception is a long article by Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit.45 Judge Edwards is the most pertinacious current critic of legal realism as a positive theory of judi-

45. Harry T. Edwards and Michael A. Livermore, “Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking,” 58 *Duke Law Journal* 1895 (2009). The article was coauthored with Michael Livermore, executive director of the Institute for Policy Integrity at New York University School of Law, but key portions are by
judicial behavior, and his article with Livermore is the fullest account of his position. It may help in clarifying our approach to indicate the respects in which we disagree with Edwards’s critique of realism—though with the qualification that if his critique is representative, we are all realists now, even Judge Edwards, though some of us don’t know it.

Legalistically Indeterminate Cases Shape the Law. Edwards contends that realists exaggerate the degree to which judges are unable to achieve agreement through deliberation that, overriding ideological and other differences, generates an objectively correct decision. His main evidence is that even in the Supreme Court about a third of the decisions are unanimous even though the Justices are ideologically diverse. And the percentage of unanimous decisions is much higher in the courts of appeals.

That is no evidence. Realists do not deny that most judicial decisions are legalistic, though not in the Supreme Court. Legalism is a category of realistic judicial decision-making, as our labor-market model of judicial behavior, which emphasizes work pressures, can help us see. Doctrines such as plain meaning (a rebuttable presumption that statutes and constitutional provisions mean what they say) and stare decisis (deciding cases in accordance with precedent) enable judges not only to economize on their time and effort but also to minimize controversy with other branches of government by appearing to play a modest “professional” role (in the sense in which members of professions seek deference from the laity on the basis of their real or pretended specialized knowledge), and to provide a product—reasonably predictable law—that is socially valued and therefore justifies the judges’ independence and other privileges.

The prevalence of unanimous decisions in the courts of appeals—almost 98 percent of their decisions are unanimous, as we’ll see in chapter

Judge Edwards alone and to simplify exposition we’ll treat him as the sole author, though without meaning to depreciate Livermore’s contribution.


47. See also Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (2010).
6, in contrast to the Supreme Court—is a common riposte to arguments for the realistic conception of judging, just as the existence of dissent is one of the most common ripostes to arguments for the legalistic conception. But the divergence is less than it appears. Unanimity exaggerates consensus, and dissent underestimates disagreement.

And cases that arouse no disagreement among the judges tend not to be the cases that shape the law. Of the 7183 cases decided by the Supreme Court in the 1946 through 2009 terms, 38 percent were unanimous but only 9 percent were reported on the front page of the New York Times the day after the Court issued it; the corresponding percentage of the 4488 non-unanimous cases was double that. Today’s law is the product of decisions that were stabs in the dark when made rather than applications of settled law. Only a few of those cases were unanimous, such as Brown v. Board of Education, and that decision was not arrived at by legalistic analysis and could not have been. It was the product of ideological consensus among the Justices, reflecting elite opinion—a growing repugnance of enlightened Americans to racial segregation, viewed as antithetical to evolving American values.

This point undermines Judge Edwards’s complaint that the principal court of appeals databases (including two we use, the Songer and Sunstein databases; see chapters 3 and 4) are limited to published court of appeals decisions, and the majority of court of appeals decisions nowadays are unpublished; if they are included in the denominator, the dissent rate is minuscule. The vast majority of unpublished decisions are affirmances, and as we show in chapter 5 this is a reflection of the signal lack of merit of most cases filed in the federal district courts. It doesn’t cost much to file a case; the filing fee is low and the plaintiff is not required to be represented by a lawyer. There are also many incompetent lawyers, many potential plaintiffs who have very low opportunity costs of suing (prison inmates, for example), and many emotional plaintiffs with a deep sense of having been wronged who will sue even if there is no substantial legal ground for suing. These cases are losers and the unpublished decisions affirming their dismissal have little impact on the law, especially since most such decisions cannot be cited as precedents.

When he was a young poet T. S. Eliot had a day job as a banker, at which he probably spent more time than he did writing poetry at night and on weekends. And actors spend more of their working time reading
scripts, auditioning, negotiating contracts, and simply waiting for another acting engagement than they spend acting. Should we say therefore that T. S. Eliot and Lawrence Olivier weren’t primarily creative artists but rather were primarily drudges? To answer yes would be no sillier than to say that the dominant activity of court of appeals judges is applying settled law to uncontested facts. That may be what they spend a majority of their time on in some of the busier circuits, but it is not their principal work.

Judge Edwards estimates that 5 to 15 percent of cases decided by his court are indeterminate from a legalist standpoint.\(^48\) And his is an intermediate, not a final, appellate court. If one cumulates those figures over many years and many courts, it is apparent that an immense number of decisions are legally indeterminate; and among them are the decisions that have made the law what it is today.

Granted, Judge Edwards’s court, the U.S. Court of Appeals for the District of Columbia Circuit, has few criminal or civil rights cases; appeals in such cases bulk large in the other federal courts of appeals, and very few have merit. So in those courts the percentage of indeterminate cases is lower than in Edwards’s court, yet it is high enough to change the law profoundly over a period of years, and this apart from the seismic changes brought about by Supreme Court decisions.

Edward Rubin, noting in the spirit of Edwards’s 5 to 15 percent estimate of indeterminate cases that judges “generally say . . . that they perceive about 90 percent of the cases presented to them as controlled by [existing] law,”\(^49\) remarks that this “sounds a bit like an urban legend.” The judges “are almost certainly correct in their assessment that 90% of their cases do not elicit controversy” among them, but “this may only mean that virtually all federal judges share an ideology that determines 90% of the cases. . . . Moreover, . . . [the 10 percent] probably represent the growing edge of the law, the issues that determine its future contours. If two countries are fighting each other along a shared frontier, we would not say they are 90% at peace; rather, we would say that they are fully at

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war, but fighting in only 10% of each country’s area.”50 And there is the Supreme Court to consider. It “takes the cases most likely to change [the law],” and “once the court has changed the law, lower federal courts will be heavily influenced by its decision. Thus, the Justices can answer as Aesop’s lioness did when the rabbit asked her how many children she had: ‘Only one, but that one is a lion.’”51

Proxy Problems. Judge Edwards points out that the standard realist variable in empirical studies of judicial behavior—the party of the President who appointed the judge who cast the vote in question—explains only a fraction of judges’ votes. And that is true. One reason it’s true is that the party of the appointing President is, as we’ve said, a crude proxy for ideological leanings.

Yet despite its crudeness, it has been found in numerous studies (see next chapter)—including many of the studies that we have conducted and report on in this book—to have significant explanatory value even after correction for other variables that might influence a judge’s votes. The crudeness of the variable actually enhances the significance of its correlation with judicial votes classified by ideology; for there could be, and indeed doubtless are, many judges whose votes are motivated by ideology but just not the ideology of the party to which the President who appointed them belonged. And there are less crude proxies for a judge’s ideology, which we and other students of judicial behavior employ—and find to have the predicted effect.

Judicial Self-Reporting. Judge Edwards gives great weight to what judges report about how they decide to vote as they do—in fact, to what Judge Edwards reports.52 The premise is that judicial introspection is a valid source of knowledge. The premise is sound only if judges are introspective, only if introspection enables a judge to dredge up from the depths of his unconscious the full array of influences on his exercise of discretion, and only if judges are candid in their self-reporting. None of these as-

50. Id. at 873–874.
51. Id. at 875.
sumptions is plausible. One expects judges in their public statements to down-pedal the creative or legislative element in judging, if only to avoid seeming to compete with the other branches of government in making policy. And of many a judge it can be said, as Goneril said of King Lear, “He hath ever but slenderly known himself.”

Edwards argues from the secrecy of judicial deliberations that there is no alternative to taking the judges’ self-reported motives at face value: “The deliberative process pursuant to which case inputs are transformed into a judicial decision cannot be observed by outsiders.” But secrecy is characteristic of political and business deliberation as well as judicial, yet Edwards doubtless believes, and rightly so, that he understands a good deal about political and commercial decision-making.

Is Judicial Rhetoric Evidence for How Judges Decide Cases? Most judicial opinions are legalistic in style. They cite prior decisions as if those decisions really were binding, parade reasoning by analogy, appear to give great weight to statutory and constitutional language, delve into history for clues to original meaning, and so forth. But that is what one expects if most judges think of themselves as legalists, or wish to conceal the creative (often the ideological) element in judging; or if most judicial opinions are largely written by law clerks (they are), who are inveterate legalists because they lack the experience or confidence or “voice” to write a legislative opinion of the kind that judges like John Marshall, Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, Robert Jackson, Learned Hand, Roger Traynor, and Henry Friendly wrote.

The motive of concealment deserves particular emphasis. Judges have political reasons to represent creativity as continuity and innovation as constraint; and as there is no recognized duty of candor in judicial opinion writing, they cannot be accused of hypocrisy in writing (or having their law clerks write) that way even if they’re aware that it doesn’t always track their actual decisional process.

Law Suffused with Politics. The rhetorically strongest move by legalists is to label the legalist approach “law” and the realist approach “politics.”

53. Id. at 1903.
It is effective rhetoric because it makes a realist judge seem like someone who flouts his judicial oath—which requires a judge to uphold the law—and thus a usurper. Edwards states that “the hypothesis that law substantially influences outcomes in most cases certainly has not been disproved by the analyses offered in [the social-scientific literature].” No one ever said it has been. But what is interesting is his suggestion that “law substantially influences outcomes in most cases.” In other words, in some cases the law doesn’t influence the outcome of the case at all and in the other cases it merely influences—it does not determine—the outcome. This statement, which if read literally would be an endorsement of legal realism in its most extreme form, is best understood as reflecting an impoverished conception of law. For what does Judge Edwards think the judge is doing in those cases in which “law” doesn’t even influence the outcome? And in the rest of the cases, where it does influence the outcome, what else is going on?

A more coherent understanding of the word is that as long as the judge is acting within his jurisdiction he is doing “law.” The judge’s duty is to decide cases. If the orthodox materials that guide decision do not point one way or the other in a particular case, is the judge to throw up his hands and say, “No law to apply, so I’m going home early today”? Edwards quotes approvingly a statement by Brian Tamanaha that “judges have acknowledged the openness of law and their frailty as humans, but steadfastly maintain that this reality does not prevent them from carrying out their charge to make decisions in accordance with the law to the best of their ability.” What does “law” mean when its “openness” is conceded? If law is open to the influence of ideology, and properly so as the quotation implies, then what is legalism in contrast to realism? Tamanaha goes on to state, in another passage quoted approvingly by Judge Edwards, that judges say “they follow the law in the substantial proportion

54. Id. at 1942.
of the cases where the legal result is clear.”

Again, what are they doing in the other cases?

Justice Scalia was not stepping out of his proper role as a judge when he said in an opinion that “the rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”

This is just as proper a judicial statement as the legalist assertions for which Justice Scalia (he of such pronouncements as the “rule of law” is the “law of rules”) is more famous.

Judge Edwards does not make the mistake of thinking that ideology is external to law. He does state incorrectly that “empirical studies... assume... that ideology is invariably extrinsic to law;” but what is significant about the statement is the implication that ideology is intrinsic to law—which is true, and is what realists think. Continuing in this vein, he acknowledges (albeit in tension with his “substantially influences” statement in the same article, and with his approval of the Tamanaha passage that we quoted) that “some play for inherently contestable political judgments is simply built into law and strikes us as a normal constituent of good judging” and that the American conception of law “encompasses, at least in some circumstances, forms of moral or political reasoning.”

The first acknowledgment gives the game away. The second assumes that judicial resort to moral and political considerations is a form of “reasoning;” but such beliefs are less often the product of a reasoning process than of temperament, upbringing, religious affiliation, personal and professional experiences, and characteristics of personal identity such as race and sex.

Edwards makes other concessions to realism. He says that law includes

57. Id. at 89, quoted in Edwards and Livermore, note 45 above, at 1943.
60. Id. at 1946.
61. Id. at 1900. See also id. at 1898–1901.
what is “ideological in a law-like way,” and that there are “situations in which ideological or political questions are intrinsic to law.” He doesn’t indicate how common those situations are, however, and his article offers no example of a case in which ideology or politics influenced the outcome. One way to interpret his article is as claiming that all judicial decisions are proper, because ideology and politics are proper influences on law in difficult cases, at least in the American legal system, but that empirical students of judicial behavior deny this, define law as legalism, and so regard all traces of ideological or political influence in judicial decisions as showing that much of the time judges aren’t doing “law”; they’re politicians in robes. That is one possible reading of some of the early empirical studies of judicial behavior but is an inaccurate description of more recent studies.

The Significance of Deliberation. Recognizing that there is a considerable area of indeterminacy in law viewed from a legalistic perspective, Edwards falls back on the idea of deliberation as a way of overcoming indeterminacy. We’ll see in chapter 8 that this idea exaggerates the significance of judicial deliberation. Here we note merely that English judges until quite recently did not engage in deliberation at all—they were forbidden to do so by the rule of “orality”: everything a judge did was to be done in public so that the public could monitor judicial behavior. Yet the product of these nondeliberating judges was highly regarded; nor are we aware that the decline of orality in the English legal system—a product of increased workload—has improved the system. In fairness, however, we note that the leisurely pace of English appellate proceedings may have provided a substitute for deliberation; each judge on the appellate panel had much longer than his American counterpart to think about the case he was hearing.

Judicial deliberation in the American context is handicapped by the heterogeneity of American judges. Judges do not select their colleagues

64. Id. at 1943.
65. Id. at 1949.
or successors; nor are all the judges on a court selected for the same reasons or on the basis of the same criteria. Even when all were appointed by the same President (which is uncommon), the appointments will have been influenced by considerations unrelated to the likelihood that the appointees will form a coherent deliberating entity—considerations such as the recommendations of a Senator, the quest for racial, ethnic, gender, and other forms of diversity, and political services.

Consider too the curiously stilted character of judicial deliberation, generally confined to the discussion of and voting on cases after oral argument (if the case is argued rather than submitted on the briefs). At the post-argument conference the judges speak their piece, usually culminating in a statement of the vote they are casting, either in order of seniority or in reverse order of seniority, depending on the court, and it is a serious breach of etiquette to interrupt a judge when he has the floor. This corseted structure of discussion reflects the potential awkwardness of a freewheeling discussion among persons who are not entirely comfortable arguing with each other because they were not picked to form an effective committee, and who as an aspect of the diversity that results from the considerations that shape judicial appointments may have sensitivities that inhibit discussion of issues involving race, sex, religion, criminal rights, immigrants’ rights, and other areas of law that arouse strong emotions. Judicial deliberation can be productive when the issues discussed are technical in character, in the sense of ideologically and emotionally indifferent, in contrast to issues that carry a moral or ideological charge; frank discussion of such issues is productive of animosity. But cases that raise issues that all the judges agree are merely technical tend not to be the cases that shape the law in momentous ways.

Should Judges Be Expected to Be Legalists? Anyone who has studied professional behavior, including that of academics, knows that self-interest, along with personality and, yes, in many fields (including law!), politics, play a role in their behavior. Why would we not expect that to be true with respect to judges? Are they saints by birth or continuous prayer? Are they made saints by being appointed to the bench? Does a politicized selection process select for saints? Legalist theorists have not explained how it is that federal judges are made over into baseball umpires. Granted, 

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there are expectations concerning the judicial role; there is a degree of self-selection into the career of a judge and anyway persons uncomfortable in the role are unlikely to seek a judgeship or remain a judge; and an appreciation for legal values is inculcated by legal training and reinforced by experience as a lawyer. So judges are not *just* like other people, or, in their “legislative” role, just like members of Congress. But remember that Judge Edwards has conceded that a nontrivial fraction even of intermediate appellate cases cannot be decided by legalist methods but require what he calls moral and political reasoning. In the cases that count, judges cannot be legalists even if they want to be or think they are. Presidents know this; the Senate knows this; much of the public knows this; and legalists, Judge Edwards not excepted, know it too but are reluctant, in part perhaps out of concern for the public image of the judiciary, to confront its full implications for the understanding of judicial behavior.