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judging, judicial behavior, motives, leisure, ideology, reputation

Abstract
Among political scientists, not only is it uncontroversial to say that judges seek to etch their political values into law; it would be near heresy to suggest otherwise. And yet this article does just that because research conducted by scholars (mostly outside of political science) has demonstrated that the policy goal is not the only motivation; it may not even be dominant for many judges. The evidence is now so strong that it poses a serious challenge to the extremely (un)realist(ic) conception of judicial behavior that has dominated the study of law and legal institutions for generations. In addition to reviewing this evidence, we offer a more realistic conception of judicial motivations and suggest how different approaches to the study of courts can contribute to this new avenue of research.
The Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological values of the justices.

Segal & Spaeth (2002, p. 86)

Most justices, in most cases, pursue policy; that is, they want to move the substantive content of the law as close as possible to their preferred position.

Epstein & Knight (1998, p. 23)

Some of us [historical-interpretivists] are even willing to agree that justices sometimes do whatever they want without apparent regard for legal norms or institutional constraints.

Gillman (2001, p. 18)

INTRODUCTION

Fifteen years ago, we offered a strategic account of judicial behavior (Epstein & 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.

Three features distinguish strategic accounts from the ideological, partisan, or policy-based approaches (especially the attitudinal model) that then dominated disciplinary conceptions of judging (see, e.g., Epstein et al. 2003, pp. 798–802).1

1. Under strategic accounts, it is up to the researcher to specify a priori the actors’ goals. The researcher may select any motivation(s) she believes that the actors hold. Under the attitudinal model, judges pursue one and only one goal: policy.

2. Strategic accounts assume that when goal-oriented justices make their decisions, they take into account the preferences and likely actions of other relevant actors, including their colleagues, elected officials, and the public; the attitudinal model assumes no such thing. Under the attitudinal model, justices always behave in accord with their sincere preferences; under the strategic account, whether they behave sincerely or in a sophisticated fashion (that is, in a way that is not compatible with their most preferred position) will depend on the preferences of the other relevant actors and the actions they are likely to take.

3. Strategic accounts assume that judging takes place within a complex institutional framework—that sets of rules structure the judges’ interactions among themselves or with other relevant actors. Under the attitudinal model, institutions are relevant only to the extent that they (can) enable judges to vote their sincere policy preferences.

In our work (and indeed in most strategic accounts), features 2 and 3 remain distinctive, but not necessarily feature 1. Theoretically, yes, strategic and, more generally, rational choice accounts of judicial behavior can accommodate different or even multiple motivations (see, e.g., Ferejohn & Weingast 1992, Knight & Epstein 1996a). But in practice we adopted the conventional (political science) party line and argued that maximizing policy is of paramount, even exclusive, concern.2

We were wrong. Data and research developed by scholars (mostly from other disciplines) have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges. The evidence is now so strong

1A fourth might be that strategic accounts are more ambitious than the attitudinal model as they can be used to explain behavior other than votes.

2The 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 or Martin-Quinn scores). For a review, see Epstein et al. (2012). That is why the political science literature tends to treat political goals, policy goals, ideological goals, and partisan goals as interchangeable terms.
that it poses a serious challenge to the extremely (un)realist(ic) conception of judicial behavior that has dominated the study of law and legal institutions for generations. For political scientists to continue to distract from this fact would not only amount to disciplinary ignorance. It may also lead to disciplinary marginalization, as economists (Abrams et al. 2013, Shayo & Zussman 2011, Shepherd 2009), legal academics (Schrag et al. 2009, Sunstein et al. 2006, Yung 2010), and psychologists (e.g., Guthrie et al. 2007, Rachlinski et al. 2009, Simon 2010) are now laying claim to the very line of inquiry we political scientists opened—the scientific study of judicial behavior. Only by updating our theories and empirics to develop a more complete vision of judging will we continue to remain players in a field that is now more vibrant than ever (due in almost no part to our contributions).

We realize that we are calling for nothing short of a restructuring of the very foundation of the (political science) study of judging. But this should be a cause for celebration, not dismay. In reimagining our corner of political science, there will be plenty of challenges, yes, but plenty of opportunities for new theoretical, empirical, and substantive breakthroughs.

So let’s get started. Our first section below considers the received wisdom on judges’ preferences. We keep it short because this “wisdom” is so entrenched in the political science literature that it requires little elaboration. We devote a bit more space to explaining why political scientists have focused on policy goals because those reasons have bearing on why we should reconsider our emphasis. A third section examines the data and now-robust literature that provide evidence of numerous judicial motivations. We end with a proposal for a more realistic conception of judicial motivations as well as suggestions for how different approaches to the study of courts can contribute to this new avenue of research.

THE (POLITICAL SCIENCE) PARTY LINE ON JUDICIAL PREFERENCES

It goes without saying that scholars of judicial behavior realize that explanations—and not merely predictions—of the choices judges make require researchers to posit a priori the goals judges are trying to attain. To do otherwise is to offer a tautology: we can always claim that judges’ preferences over the various choices they confront are the choices we observe them making.

For decades, political scientists treated (read: venerated) judges as apolitical, apartisan, value-free umpires who resolved disputes with reference to the law alone, sometimes supplemented with a normative theory of the judges’ role in society (e.g., legal positivism, natural law) (see e.g., Cushman 1938, Mendelson 1964). This assumption persisted even as serious challenges to “mechanical,” neutral views of judging emerged in the nation’s law schools. Picking up where Holmes’s (1881, p. 1) famous quip (“The life of the law has not been logic; it has been experience.”) left off, Frank (1930), Llewellyn (1930), and other law professors sought to supplant legalistic accounts of judging with conceptions they believed were more realistic—for example, accounts that emphasized the influence of the judges’ values on their decisions.

Only in the 1940s and 1950s did political scientists begin to question the umpire view of judging. But they—led by C. Herman Pritchett (1941, 1948)—took a decidedly different tack than the legal academics. Whereas the law professors made use of exemplary decisions, Pritchett and others relied on data drawn from those decisions to show that judges were “motivated by their own preferences” (Pritchett 1948, p. xiii). In fact, it was less the realists’ writings than an empirical observation that led Pritchett to consider the importance of ideology in the first place. Prior to the 1930s, dissenting opinions were rare, filed in less than one out of ten cases (Figure 1). But after 1941, cases without dissent were the exception. Such disagreement, Pritchett reasoned, did not fit as comfortably with legalistic theories of judging.
Pritchett's counting project caught on (see, e.g., Ulmer 1960, Goldman 1966, Schubert 1965, Spaeth 1972), as did his emphasis on policy preferences. The epigraphs that introduce this review, from scholars hewing to different accounts of judging, are just a small sample of political science thinking. The conception of judges as “single minded seekers of legal policy” (George & Epstein 1992, p. 325) is—and has been for generations—so firmly ingrained in the literature that almost all serious theoretical and empirical work proceeds from it.

EXPLANATIONS FOR THE (NEARLY) EXCLUSIVE FOCUS ON POLICY PREFERENCES

Among political scientists, not only is it uncontroversial to say that judges seek to etch their political values into law—it would be near heresy to suggest otherwise. Why have we been so quick to embrace the policy goal to the exclusion of other possibilities? The easy answer is some form of historical hangover. Once Pritchett identified the policy motivation, following his lead became the path of least resistance.

This answer may have some purchase in explaining work directly following from Pritchett in the 1950s and even 1960s. But it does not tell us why the policy motivation has been so sticky in political science. For this we turn to the confluence of three other explanations—the professional, theoretical, and empirical.

From a practical professional standpoint, the idea that judges use the law to achieve their ideological or partisan ends has a natural appeal for scholars trained in viewing the world through a political lens. Likewise, conceptualizing judges as “politicians in robes” placed the study of courts on the same footing as the analysis of legislatures and executives. It’s all politics, stupid—or so became our mantra.

Thinking theoretically about judges, especially life-tenured judges, as self-interested actors only reinforces the practicality of the policy-seeking motivation. Indeed, coming up with a list
of alternatives seems difficult because, although judges may be employees, “the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives—to take away the carrots and sticks, the different benefits and costs associated with different behaviors, that determine human action” (Posner 1993, p. 2; see also Gulati & McCauliff 1998). Without the usual “carrots and sticks,” the assumption that judges derive satisfaction from seeing their policy preferences reflected in the law seems the only plausible option (see, e.g., Landes & Posner 1976).

Last but certainly not least, beginning with Pritchett and continuing through today, political scientists have amassed seemingly endless amounts of evidence consistent with the existence of a policy goal. To provide the simplest example, scholars have shown the correlation between ex ante measures of ideology and the votes of Supreme Court justices to be on the order of 0.78 (see, e.g., Segal 2008).

As for other US courts, Pinello’s (1999) meta-analysis reveals that the effect of ideology on judicial votes is half as strong in the courts of appeals as in the Supreme Court and still weaker in the federal district courts and state courts. Under dominant disciplinary thinking, though, this is not taken as evidence of the presence of other goals. It is rather suggestive of constraints that operate on lower court judges. Were they all free agents, we would observe larger differences between the Democratic/liberal judges and Republican/conservative judges in Pinello’s study. But because they worry about reversal by a higher court (in which case their least preferred policy could become the law), they modulate. Elected state judges have the same goal and the same constraint—the judicial hierarchy—along with the constraint imposed by the public; if they are not reelected they cannot impose their ideological preferences on the community.

THE REASONS WE MUST UPDATE

In light of these seemingly strong reasons for the nearly exclusive focus on policy preferences, why question it now? As a preliminary matter, it is important to note that we are not the first to do so. Four decades ago, in *Economic Analysis of Law* (1972, p. 415), Posner raised the possibility that “judges, like other people, seek to maximize a utility function that includes monetary and nonmonetary elements (the latter including leisure, prestige, and power).” Later, to the question “What Do Judges Maximize?,” Posner (1993) had a simple response: “The Same Thing Everybody Else Does”—their own self-interest, which may include imposing their policy preferences on the law but so much more.

This should have been a wake-up call to political scientists. Here was a federal judge challenging (although it’s not clear that he knew he was) or, at the least, attempting to supplement our orthodoxy. Then again, perhaps Posner’s occupation was the problem: we tend to ignore what judges say, chalking it up as self-serving. (Does anyone, even John Roberts himself, believe that US Supreme Court justices are “umpires?”)

Still, Posner was not alone. In the wake of his work came a series of papers, written largely by economists and the occasional law professor, subjecting Posner’s ideas to more rigorous formal and informal (though not usually empirical) interrogation (e.g., Drahozal 1998, Miceli & Cosgel 1994, Macey 1994). A few years later, one of our own, Lawrence Baum (1997), sought to shift attention to goals that seem to have little to do with ideology, including lighter workloads and personal esteem.

Then Schauer’s (2000) article directly challenged the reluctance of even usually “hard-headed political scientists” to “engage in critical inquiry into judicial motivation” (see also Shepherd 2011). After all, Schauer wrote, “legislators, executives, and bureaucrats are widely understood...to be motivated by various forms of self-interest, including...the desire for promotion to higher office,
the desire to expand their base of power, the desire to maximize future even if not current income” (p. 616). And yet, political scientists don’t even bother to “pause to examine the possibility that judicial self-interest, rather than the non-self-interested policy preferences, determines judicial behavior or determines the policy preferences of judges in the first place” (p. 617).

Schauer bemoaned the fact that Posner’s work has “largely been ignored” (p. 615). Unfortunately, the same could be said of Schauer’s article, despite the numerous hypotheses and examples he offered of justices and judges pursuing goals other than ideology.

But therein may lie the reasons for the neglect. First, the previous literature identifies so many possible motivations that the entire enterprise begins to border on the idiosyncratic. If judges have “widely varying preferences” (Macey 1994, p. 620), with each judge “motivated by a different combination of factors” (Gulati & McCauliff 1998, p. 172), there doesn’t seem to be much room for social science. Fortunately, as we explain in the following sections, this is not the obstacle it may seem. [See also Macey (1994, p. 620), who notes “that like Congress the judiciary is a bureaucracy with its own set of institutional preferences,” thus minimizing the importance of individual differences.]

A second problem is that like the early legal realists, Posner, Baum, Schauer, and the others provided little systematic support for their contentions.3 They told interesting stories; they pointed to some extant literature; and some even formalized accounts that relied on motivations other than or in addition to policy (see, e.g., Brams & Muzzio 1977, Knight & Epstein 1996a). But we find little of the sort of evidence Pritchett brought to bear on the realists’ claims. The lack of a smoking gun, in turn, enabled policy-goal centrists to explain away the examples as just that—anomalies or exceptions carefully selected to make a point rather than clear evidence of the existence of other or multiple motivations.

That has changed. There are now too many well-observed but often ignored patterns in raw data (i.e., facts) at odds with an exclusive focus on policy motivations to continue to deem them idiopathic, exceptions, or anomalies. Even more convincing are a spate of empirical studies also suggesting that the so-called exceptions to the policy motivation are becoming—rather than proving—the rule.

The Data

Starting with the facts, there are several that strike us (and others) as difficult to explain with reference only to policy motivations. The first takes us back to Pritchett. Recall that the increase in dissent in the 1930s–1940s prompted Pritchett to examine ideological patterns in the justices’ voting. Without doubt, Pritchett was onto something: dissent had jumped from a mean of 9% in the 1920s to 50% in the 1940s (see Figure 1). And yet since 1946 the Court has decided 38% of the 7,259 orally argued cases by a unanimous vote (Figure 2a). That is not only a reasonably high fraction; it’s one that has not varied much (the standard deviation is 7%) over the 60+ terms. (If anything, there has been a slight uptick.)

Because unanimous decisions seem inconsistent with their model (or any extreme version of realism), attitudinalists tend to ignore them (Edelman et al. 2012). They could argue that these cases are so extreme (easy) that the justices are all to the right or left of the case’s cut point. 4 But this seems a little hard to swallow. In the first place, the degree of homogeneity in judicial preferences has varied markedly over the past seven decades (see, e.g., Staadt et al. 2008). Second,

3Little isn’t none. We discuss some of the early studies in the next section.
4Another attitudinalist response, from Rohde & Spaeth (1976, pp. 195–203), is that unanimous decisions emerge from “threat” situations. But “threat” is not an explanation available to the attitudinalists. Threats are strategic choices.
a cut-point analysis begs the question of why the Court would fill nearly 40% of its plenary docket with “easy” cases if policy were the only motivation. Something other than or perhaps in addition to ideological goals must be driving this behavioral regularity. (We also observe very low dissent rates on the US courts of appeals, even on ideologically diverse panels.)

Likewise, how should we think about the success of the US government, which is usually represented by the Solicitor General in the Supreme Court? Figure 2b shows, and study after study has documented, the Solicitor General’s extraordinary success (see, e.g., Black & Owens 2012). By their own admission, attitudinalists cannot explain these data—and for good reason. As Black & Owens (2012) demonstrate, the Solicitor General’s influence stems not from ideological congruence but from the office’s professionalism and objectivity—explanations that are hard to square with the image of justices as politicians in robes.
High unanimity rates and support for the Solicitor General have been nearly constant over the past seven decades. A third fact seemingly incompatible with policy-centric preferences is the decline in the Court’s plenary docket. As we show in Figure 2, the number of petitions granted has fallen from 255 in 1970 to 76 in 2009; the fraction too has taken a nosedive, from 0.06 in 1970 to 0.008 in 2009. Wouldn’t policy-oriented justices want to hear more rather than fewer cases so that they could leave their mark on wider swaths of the law?

It is possible that the justices take on a lighter caseload to secure more time to write opinions that are of higher quality and so less susceptible to future challenge (though related studies don’t provide much support; see, e.g., Cross & Spriggs 2011). More plausible, we think, is that hearing fewer cases frees up time for leisure or nonjudicial work (such as lecturing, writing, and attending conferences), which the justices have undertaken in increasing numbers in recent years (see, e.g., Baum 2006, Epstein et al. 2013). When justices make the judicial work/nonjudicial work trade-off in favor of the latter, it strikes many observers as easier to justify on motives such as prestige and reputation than on policy grounds.

The Studies

We return to this last point momentarily. For now, note that it was not a state court, a constitutional court abroad, or a lower federal court that generated the data displayed in Figure 2; it was the US Supreme Court. This is worth highlighting because scholars hold out the Supreme Court justices as the quintessential single-minded seekers of policy. And yet policy-centric accounts cannot explain important aspects of even their behavior.

So what does? By our count scholars have offered (or found evidence consistent with) some 20-odd goals, motives, and preferences, ranging from “reasoning utility” (Drahozal 1998; see also Shapiro & Levy 1994) to discretion (e.g., Cohen 1991, Higgins & Rubin 1980, Macey 1994) to income (e.g., Baum 1997, Anderson et al. 1989). (For others, see, e.g., Bainbridge & Gulati 2002; Baum 2006; Cass 1995; Cohen 1991, 1992; Cooter 1983; Georgakopoulos 2000; Gulati & McCauliff 1998; Klein 2002; Klein & Hume 2003; Klein & Morrisroe 1999; Miceli & Cosgel 1994; Posner 1993; Salzberger & Fenn 1999; Schauer 2000; Shepherd 2011; Whitman 2000.)

For the reasons we noted above, to consider all these goals would be to continue to undermine the project of developing a more realistic conception of judicial behavior. The enterprise would devolve into “what-the-judge-ate-for-breakfast” accounts, with the goals “so numerous and relating to outcomes in so complex a manner as to obscure the actual basis for decision” (Cass 1995, p. 944), not to mention limit generalizability.

Moreover, considering every goal is unnecessary. We believe it is possible to construct a more realistic conception of judicial motivation that expands the set of relevant motivations while continuing to facilitate the pursuit of general explanations of judicial decision making. An advance toward a more realistic conception of judicial motivations is offered by Posner (2008) and developed more fully by Epstein et al. (2013). This research introduces the importance of personal motivations for judicial choice (without downgrading the political scientists’ emphasis on ideology or the law community’s interest in legal motivations). The basic argument is as follows. Because

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5Actually, existing research suggests motives other than the creation of enduring policy lead judges to write high-quality opinions. For example, Bar Niv & Lachman (2010) find that Israeli judges allocate more time to writing opinions to advance their reputations or chances for promotion; Choi et al. (2011) show that federal district court judges in politically diverse circuits write higher-quality opinions to avoid reversal (also in an effort to maximize their reputations and odds of elevation).

6But see Danziger et al.’s (2011) study of parole decisions by Israeli judges, which finds that the judges were more favorable to parole applicants early in the day and after their food breaks. Apparently judges tire as the day wears on, as do many of us.
there are only 24 hours in a day, judges must decide how to allocate their time among the activities we note above: judicial activities (e.g., hearing and deciding cases, working with colleagues and staff), nonjudicial work (e.g., writing books, participating in conferences, teaching), and leisure. Given these time constraints, judges seek to maximize their preferences over a set of personal factors (most of which also have implications for ideological and legal goals):

1. Job satisfaction
2. External satisfactions
3. Leisure
4. Salary/income
5. Promotion

As we have mentioned, there is now a large and growing body of empirical literature providing evidence for (or at least consistent with) each of these elements in the judge’s personal utility function. Some studies provide direct tests; others (though perhaps unwittingly) examine factors that influence these preferences and, ultimately, affect the choices judges make. Regardless, just as the data we presented in the previous section are difficult to explain without reference to goals other than policy, so too are the findings of these studies. We now consider each of the five personal factors in turn.

Job satisfaction. By job satisfaction we 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 (Epstein et al. 2013; see also, e.g., Baum 1997, Caldeira 1977, Drahozal 1998, Gulati & McCauliff 1998, Klein 2002, Shapiro & Levy 1994).

Surely maximizing policy preferences is part and parcel of a judge’s internal satisfaction with the job (Drahozal 1994, Gulati & McCauliff 1998, Landes & Posner 1976). But it is not the only influence. Another is the discretion a judge enjoys. As Macey (1994) notes, because judges have broad jurisdiction, are assigned cases randomly, and must justify their decisions, they desire control over their agendas. He provides qualitative evidence that judges design rules to advance this desire. And Cohen (1991, p. 186), also arguing that “judicial discretion clearly affects job satisfaction,” reports that a majority of district judges struck down the Sentencing Reform Act of 1984 even though the Supreme Court upheld it in a lopsided 8–1 vote. The reason? The judges thought the law would impinge on their discretion to impose sentence.

As for the social dimensions, judges frequently refer to the importance of collegiality (e.g., Edwards 2003, Wald 1987), and just as frequently, scholars reject it. We should not. As most of us know all too well, maintaining good collegial relations is not some abstract, squishy concept; it has a direct effect on job satisfaction. In the case of judges, good relations with colleagues, law clerks, other staff, and lawyers add to their personal utility, “while animosities, usually from or toward judicial colleagues and usually resulting from disagreement, subtract from it” (Epstein et al. 2013, p. 48).

Collegiality also affects external satisfactions and leisure goals (Cohen 2002), as recent empirical work on dissent demonstrates (Epstein et al. 2011). The basic finding is that circuit court judges sometimes do not dissent when they disagree with the majority opinion, in part because dissents impose collegiality costs on the other judges on the panel by making them work harder (e.g., increasing the length of majority opinions). Although “dissent aversion” is not as strong in the Supreme Court, there is some evidence that it exists in cases in which the ideological stakes are low, for even in the Supreme Court dissents can be the source of workplace irritation. This motivation, in turn, may help explain the relatively high and consistent fraction of unanimous decisions (see Figure 2a).
External satisfactions. Many studies emphasize the external satisfactions that come from being a judge, including “reputation, prestige, power, influence, and celebrity” (e.g., Drahozal 1998, Georgakopoulos 2000, Miceli & Cosgel 1994, Schauer 2000, Shapiro & Levy 1994, Whitman 2000). Some of these are likely related to the policy goal. As Schauer (2000, p. 633) notes, “for some judges, judicial reputation might be an instrumental goal” designed to increase power. When judges brand themselves by certain “substantive or methodological trademarks,” they may be attempting not only to develop a reputation but also to exert greater influence on their court and the law. On this account, Scalia’s originalism may be the ultimate have-cake-and-eat-it-too approach.

But the quest for external satisfaction can take more direct forms. Levy (2005, p. 25) argues that reputation seeking behavior is a “human concern” that academics certainly pursue and judges do too. One approach is to develop a reputation as an able judge, that is, as a judge oriented toward “craft”—or the “well-reasoned application of doctrine to the circumstances of a particular case” (Shapiro & Levy 1994, p. 1053).

In the formal economics literature, there is a debate of long standing over the extent to which reputation- or power-seeking judges ought to be followers (apply existing doctrine) or more avant garde. Levy (2005) contends that judges motivated by esteem should be less willing to follow precedent to show that they are more capable than their predecessors. Creating new precedents too can generate citations and other accolades. Landes & Posner (1976, p. 273), on the other hand, note that if judges do not sometimes follow existing doctrine, the “precedential value of [their] own decisions would be reduced.” Of course, this could lead to rogue judges—those who feel free to disregard all precedents in their quest for power (or policy).

But, on Landes & Posner’s account, appellate review keeps the system in check. Judges who are too innovative run the risk of seeing their decisions overturned, which can harm their reputation. Miceli & Cosgel (1994) explore this trade-off, concluding that judges might deviate from established precedent if they thought other judges would go along (thus enhancing the judges’ reputation) but would follow precedent (even if they disagreed with it) if they worried about reversal (see also Foxall 2004, Posner 1995). Similarly, Salzberger & Fenn (1999) provide evidence showing that the lower the reversal rate, the higher the judge’s prestige and thus the higher the likelihood of promotion from a court of appeals to the House of Lords in England.7

Much of this literature reinforces the idea that there is a more important connection between law and the decisions judges make than an exclusive focus on ideology allows. There is other evidence of the connection. In the previous section, we highlighted data on unanimous decisions and on the success rate of the Solicitor General, which suggest that judicial decisions will occasionally, if not often, track the existing law rather than ideological preferences. Moreover, long ago, Segal (1984) demonstrated that even Supreme Court justices follow legal principles in search and seizure cases; and subsequent work has only underscored the importance of the “law” in even this, the most political of courts (e.g., Bailey & Maltzman 2008, George & Epstein 1992). Studies of the circumstances under which lower courts respect extant precedent (they usually do) are even more numerous (see, e.g., Klein & Hume 2003, Westerland et al. 2010).

The importance of law for judicial decision making supports two dimensions on which a more realistic conception of judicial motivation might progress. The first is related to the traditional notion that judges are motivated to “follow the law.” We address this possibility in the next section. The second is related to the importance we place on the personal motivations that influence judicial decisions. The value of working within the existing body of law can be an important feature of

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7 Ramseyer & Rasmusen (2001) show that Japanese judges who are reversed receive less prestigious responsibilities; Klein & Hume (2003) demonstrate that US appellate court judges do not comply with precedent out of fear of reversal.
a craft orientation to judging, an orientation with significant implications for a judge's personal satisfaction with her job.

What's more, following the law is not the only indication of a craft orientation designed to advance reputational goals. Corley et al. (2011) find that the ideology of the judge is not a significant predictor of Supreme Court “borrowing” from lower court opinions but the judge’s prestige is (see also Lindquist & Klein 2006). [By analogy, these results could explain Black & Owens’ (2012) finding that the Solicitor General’s influence stems less from ideology than from professionalism.] The empirical studies we mention in footnote 5, also focusing on craft, too are consistent with a desire to maximize reputation, as is Gulati & McCauliff’s (1998) analysis of publication practices on the Third Circuit. The researchers come to the seemingly counterintuitive conclusion that judges worry so much about their reputation that they are more—not less—likely to make use of summary opinions in the hardest cases. As they explain it (Gulati & McCauliff 1998, pp. 176–77),

Published opinions in the most difficult and important cases draw attention from lawyers, academics, and other courts. Badly reasoned opinions carry with them the risk of negative attention (in addition to a risk of reversal and disagreement from other circuits). Judges, therefore, have a reputation-driven incentive to tackle difficult issues only when they have the time, resources, and expertise to write a well-reasoned opinion that will withstand external scrutiny and enhance the author’s reputation.

(Both the Corley et al. and Gulati & McCauliff studies are also consistent with a preference for leisure, as we discuss below.)

Of course, a craft orientation is not the only way judges build their reputations. In explaining Benjamin Cardozo’s fame, Posner (1990, p. 132) provides evidence that Cardozo “cultivated the good opinion of academics” by regularly citing their work in his opinions. Cardozo was also far more likely than his colleagues to cite the opinions of other judges, thereby fostering their good will as well. Baum (2006) and Davis (2011) also offer some evidence of Supreme Court justices adjusting their behavior to conform to the preferences of “reputation creators” and “esteem grantors” (Schauer 2000, p. 629). At the very least, it is clear that their nonjudicial activities are on the upswing, as we have already mentioned (see, e.g., Baum 2006, Davis 2011, Epstein et al. 2013).

Finally, a large body of empirical literature falling under the categories of institutional maintenance, legitimacy, and public support is consistent with the external satisfaction argument (see, generally, Baum 2006). For self-interested judges, it would be difficult to develop influence, esteem, and prestige if their court or legal system did not enjoy a certain degree of respect. Cultivating and following public opinion are behaviors consistent with this end, and the most recent empirical and historical literature suggests that justices do just that (Clark 2009, Epstein & Martin 2011, Friedman 2009, Giles et al. 2008, McGuire & Stimson 2004).

Leisure. A preference for leisure plays almost no role in the political science literature (though see Klein & Hume 2003), but it comes to the fore in many economic analyses of judging (e.g., Bainbridge & Gulati 2002, Macey 1994, Posner 1993). The basic idea is that, again like all of us, judges value leisure and, at some point, the “opportunity cost of foregone leisure exceeds the benefits to the judge of additional time spent making decisions” (Drahozal 1998, p. 475). If so, we would expect judges to engage in behaviors designed to increase or at least protect their leisure time. The decline in the Supreme Court’s plenary docket (see Figure 2e) may be an example. Not only does it free up time for nonjudicial work but also for leisure, which may have implications for departures from the bench. In a moment of candor prior to his retirement, Justice Stevens said, “The fact that the [caseload] has gone down and the work has relaxed a little bit has made it easy for me to hang around…” (quoted in Stephan 2009).
In general, though, leisure will be of greater concern for judges with heavier workloads and less staff than the Supreme Court. In addition to decreasing leisure time, backlogs can decrease respect and thus external satisfaction, not to mention job satisfaction (Cohen 1992, Drahozal 1998). So it is perhaps not surprising that Cohen (1991) reports that district court judges with heavier dockets were more likely to strike the sentencing guidelines on the theory that the guidelines would discourage plea bargaining and thus increase trials. In another study, Cohen (1992) hypothesized that judges, especially in busy districts, would penalize defendants who opt for a trial over a guilty plea because trials take more time (see also Landes 1971). The data support the hypothesis. Likewise Taha (2004) demonstrates that the heavier the workload, the less likely judges were to publish their opinions in the sentencing cases. Finally, Epstein et al. (2013) show that busier judges took greater advantage of the Supreme Court’s decision in *Ashcroft v. Iqbal* (2009), which made it easier for judges to dismiss civil suits. Because this study (like many of the others) controls for the judges’ ideology, the findings are difficult to explain without reference to a preference for leisure.

Analyses of leisure also focus on the content of opinions. For example, Judges Posner (1995) and Easterbrook (1990) have characterized *stare decisis* as consistent with leisure seeking. Generalist judges “do not have the time to start anew on each case” (Easterbrook 1990, p. 782), and so adhering to precedent becomes a time-saving device. Klein & Hume (2003) do not explicitly test this hypothesis, but their results are consistent with it. After discovering that circuit judges do not comply with precedent out of fear of reversal, the researchers speculated that compliance might instead reflect a desire to simplify work:

> Instead of investing the time needed to weigh every detail of each case before them and consider the legal merits of every issue anew, judges might limit their attention to key facts or patterns and simply ask themselves, based on what they have observed in the past, how the case would normally be decided in the federal courts. In fact, it would be very surprising if judges did not do this often. (Klein & Hume 2003, p. 602)

Related too is Bainbridge & Gulati’s (2002, p. 84) research, which provides evidence that in securities litigation, judges engage not in “complex modes of legal reasoning” but instead “decisionmaking heuristics.” Given the judges’ high workloads and low expertise in this complex area of law, the use of simplifying strategies makes sense. It reflects a desire to shift the cases from their dockets as quickly as possible. We already described Gulati & McCauliff’s (1998) study on the use of short-form dispositions, as well as Corley et al.’s (2011) article showing that Supreme Court justices tend to crib from influential appellate judges. These findings could well reflect leisure-seeking behavior, as might Klein & Morrisroe’s (1999) article demonstrating that judges are more likely to adopt rules when the rule’s author is a prestigious judge.

**Salary/income.** All else equal, judges, like most of us, prefer more salary, income, and personal comfort to less. The empirical literature provides some evidence that they attempt to maximize these goals by acting in ways consistent with the preferences of their “bosses” (Baum 1997)—of which the legislature is certainly one. Because elected representatives control raises, court budgets (and so, 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 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 at the legislature’s disposal (for a list, see Rosenberg 1992).
Several empirical studies by economists attempt to sort this out. Toma (1991) shows that Congress uses the budget to signal its preferences to the Supreme Court; a later paper (Toma 1996) provides empirical support for the argument that Congress and the Court “enter into a contract of budgetary favors in exchange for politically influenced output,” with the Chief Justice assuming the role of contract enforcer. Anderson et al.’s (1989) study is equally consistent with a salary motivation. Picking up where Landes & Posner (1976) left off, they ask: What motivates judges to act independently—in this context, to ensure the durability of legislative bargains by interpreting laws in line with the intent of the enacting legislature? The answer they offer, using data from the states, is that legislatures reward judges with higher salaries when they act “independently.”

Also consistent with financial ends is the literature on retirement and retention. Political scientists have long suggested that federal judges and justices strategically time their retirements to coincide with presidents who share their party affiliation or ideology. Some empirical studies provide support for this suggestion (e.g., Spriggs & Wahlbeck 1995), but they also demonstrate the importance of pension eligibility. Even for Supreme Court justices, eligibility “raises the annual odds of retirement by an order of magnitude—a huge effect by social science and employment research standards,” all else being equal (Stolzenberg & Lindgren 2010, p. 291; see also Yoon 2006). Pensions may also play a role in explaining why state judges are motivated to seek reelection. Consider how Hall (1987, p. 1120), in her path-breaking study of state supreme court justices, described one of her interviews: “[The justice] expressed a great deal of anxiety over potentially losing his position, for which he would be running again in the upcoming few years. This justice, who seemed particularly satisfied with his office, apparently did not have the necessary years of service to draw a pension if defeated.”

**Promotion.** Promotion 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.

And yet, scholars tend to dismiss it as a driver for life-tenured judges. They say promotion is such a “random” (Cooter 1983, p. 129) or low-probability event that it could not possibly influence judicial behavior.

We agree that promotion is not a relevant motivation for most US Supreme Court justices (Schauer 2000, Segal & Spaeth 2002). Arthur Goldberg, in 1965, was the last to leave for “higher” office—and his departure wasn’t voluntary. Of course, some associates might hope to become Chief Justice (Frank 1970), but that is truly a rare event.

What of lower court judges? Federal district judges are occasionally promoted to the court of appeals, and court of appeals judges are sometimes promoted to the Supreme Court. But “occasionally” and “sometimes” are the operative words; only 11% of all district court and 4% of all appellate judges have been elevated. If a desire for promotion led these judges to alter their behavior, it would seem they had fallen prey to optimism bias, right?

Wrong. The problem is that these percentages are deceiving. The odds of promotion for some judges are substantially higher—for example, perhaps 1 in 5 (or even higher) for court of appeals judges desiring appointment to the Supreme Court. That’s because these judges possess certain markers (e.g., their age, pedigree, and even circuit) that place them in a genuine promotion pool—and they know it (see Epstein et al. 2013).

Perhaps this explains the growing number of empirical studies showing that these judges, the “auditioners,” seem motivated by the possibility of promotion to higher-status (and higher-paying) jobs and will make choices based on this motivation. Cohen (1991) demonstrates, and Sisk et al.
(1998) confirm, that district court judges with a higher chance of promotion are more likely to uphold the politically popular federal sentencing guidelines (see also Taha 2004). In a separate study, Cohen (1992) also finds that judges with promotion potential give higher antitrust fines. Along similar lines, Epstein et al. (2013) show that auditors, not wanting to appear soft on crime, impose harsher sentences on criminal defendants. Finally, Gaille (1997) finds that the number of articles published by court of appeals judges standing some chance of elevation to the Supreme Court dropped “precipitously” after the Bork hearings. He concludes (p. 376): “Rather than the selection process constituting a one-sided choice by the president and Congress, it appears that prospective nominees themselves make important behind-the-scenes decisions that may influence the president’s choice and, ultimately, determine the composition of the Court.”

These are studies of the US federal courts. Promotion (and retention) has also figured into work on courts abroad. We have mentioned Salzberger & Fenn’s (1999) work on English judges. Ramseyer & Rasmusen (1997, 2001) too have written a series of papers on the relationship between judicial careers and judicial decisions. Their research focused on Japan, but there are many lessons for the United States as well.

MOVING FORWARD: HOW WE CAN UPDATE

Based on the data and these quantitative studies, not to mention more qualitative and historical evidence, it is impossible to deny that political scientists have offered an extremely unrealistic conception of judicial behavior for far too many years. It’s time to move toward a more realistic understanding. How?

For starters, political scientists should dismiss the attitudinal model qua model. Because it focuses exclusively on ideological (or, in some applications, partisan or political) motives, it cannot form the basis for a realistic conception of judicial behavior. This is not to say that the attitudinal model has not produced important insights into judicial decision making. The evidence of ideological voting is too extensive to ignore as we move forward. But ideological motivations are just one of several kinds of motivations that should be incorporated into a realistic and comprehensive conception of judicial decision making.

Next, we must begin to flesh out the details of a motivational model of judges that would form the basis of a more realistic conception. If the process of judicial decision making is best characterized as a complicated mix of motivations, then the motivational framework should allow us to accommodate this complexity and, perhaps, to distinguish the conditions under which different types of motivations apply. In what follows, we briefly develop some general themes that would characterize such a model, as well as a few methodological implications.

A More Realistic Conception of Judicial Motivation

As we said at the outset, we remain committed to the strategic model as the basic assumption about how judges reason about their cases. But this is merely to say that judges act in such a way as to best achieve their goals, whatever their goals might be in a particular case. Judges want to be efficacious; they want to accomplish their goals in the most efficient way possible. Strategic reasoning accommodates a wide array of possible motivations.

Posner offers valuable insight into the complexity of such reasoning. He argues that circumstances beyond the control of any particular judge (the inevitable uncertainty and ambiguity in the existing law and the necessity, in most cases, of having to render a decision) forces judges to balance a variety of factors in the course of their reasoning:
Their response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors. A judge does not reach a point in a difficult case at which he says, "the law has run out and now I must do some legislating." He knows that he has to decide and that whatever he does decide will (within the broadest of limits) be law; for the judge as occasional legislator is still a judge (Posner 2008, pp. 84–85).

In so writing, Posner highlights an important set of questions that should enter into political science studies of courts: the ways in which judges balance their various motivations and, if possible, the conditions under which one set of motivations or another might dominate.

We envision three primary types of motivations that should be incorporated in a more realistic framework of judicial decision making. The first would be ideological motivations (following from the attitudinal model), and the second would be the personal (self-interested) motivations that political scientists have long neglected but that we have identified here. The third type would be the legal motivations to which Posner refers and that we have touched on throughout. Although we need not say any more about the ideological and personal motivations, we should offer some additional justification for the legal motivations, if only because many political science studies over the past 60 years have sought to refute them.

In The Choices Justices Make, we argued that empirical studies of judicial decision making had focused too narrowly on judicial votes (Epstein & Knight 1998). We recommended that attention be turned to a more general analysis of the ways in which justices and judges affect the development of the law: “We would be disappointed if all our work generated [were] studies designed to explain the decision to accommodate or bargain or to persuade or to vote in a particular way and so on. We hope that future scholarship does not lose sight of the ultimate goal: to understand how these choices come together to explain the substantive content of law” (Epstein & Knight 1998, p. 185).

We believe that this expanded focus will enable a better understanding of the role that law might play as an underlying motivation of judicial decision making. But here it is important to distinguish how law as a motivation might be different from the two other ways in which law has recently entered into social scientific studies in an effort to eradicate the (counterproductive and unrealistic) legalism/realism distinction. One approach is to characterize law as a constraint on ideological choice (Bailey & Maltzman 2008, Knight & Epstein 1996b). The other, which we discussed in the previous section, is to treat following precedent, in particular, as a choice grounded in personal motivations (e.g., enhancing personal satisfaction and/or increasing leisure).

These approaches remain plausible hypotheses about how law can affect judicial decisions, and there has been important empirical evidence that supports them. But the data, as we have also suggested, show that the choices of judges map to the dictates of precedent in a large number of cases. These findings lend support to another plausible hypothesis: one of the factors motivating judges is a simple desire to “follow the law.” Our recommendation that political scientists expand their focus to the important dimension of written opinions and the substantive content of the law should, we believe, provide new avenues to investigate this additional claim.

This approach also highlights a distinctive contribution political scientists can make to the study of how law affects judicial decisions. The primary task of incorporating law into strategic analysis is to develop plausible indicators of the various ways in which law can affect decisions. Drawing on just a sample of the available theories of judicial interpretation, we can come up with a long list of possibilities. They may include, but are not limited to, precedents, constitutional provisions, statutes, administrative regulations, legislative history, generally accepted social practices (e.g., in the commercial law area), social norms, and basic values on which there is a social consensus in the community.
To translate these into a workable social scientific analysis, we need to convert the wide variety of sources into data that might lead to the identification of causal mechanisms. A promising tactic would be to identify a set of categories of different types of legal sources and then establish generalizable claims about the conditions under which judges are more or less likely to invoke a particular category. The focus would not be on the particular details of a specific argument but rather on how the argument fits into a general framework of legal categories. The primary interest of the political scientist would be in how different categories of factors affect the evolution of the substantive content of the law.

For example, in the field of constitutional law, there have been long and complex normative debates over the proper approach to questions of constitutional interpretation. But there has been little effort to document and systematically explain the actual use by judges of the various interpretive alternatives. By constructing a study of how judges employ the competing alternatives (e.g., originalism, precedent, history and tradition, contemporary meaning, and consequentialism) across a large set of cases (selected in order to highlight variation over time or subject matter), political scientists could significantly enhance our understanding of how and when the sources of constitutional law affect the substantive evolution of the law over time.

A focus on categories and conditions highlights the comparative advantage of empirical political scientists. For explanations of the substantive content of law, political scientists are better equipped than legal scholars to establish and document the general causal framework in which judges change the law. This—and not the detailed analysis of the substantive path of the law in particular areas—is our strength. We can make an important contribution to explanations of how legal motivations may or may not affect the strategic choices of judges.

This more realistic conception of judicial motivation posits a clear set of 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. What are the types of cases in which judges are most likely to follow existing legal sources, such as precedent? 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 the rest of us in our daily lives? The answers should lead to more direct explanations of the effects of these different motivations on the decisions in particular sets of cases.

Methodological Implications

This realistic conception suggests how the different approaches and methods employed by political scientists in the study of law and legal institutions can be interrelated in new and interesting ways. Here we have in mind qualitative/historical analysis, experiments, and formal theory as vehicles for informing large-N quantitative studies. Of course, we could focus the discussion on the implications of any of the other approaches, but we think a focus on large-N studies is especially illuminating.

Historical approaches have focused primarily on the effects of social and political factors on the jurisprudential evolution of the courts and, thus, on the substantive evolution of the law (e.g., Graber 2006, Whittington 2007). Central to these studies are historical claims about the influence of particular social and political circumstances on the reasoning of judges over time. From the perspective of large-N quantitative studies, these claims can be interpreted as plausible hypotheses about the effects of legal factors on the motivations of judges. Similarly, other historical accounts present hypotheses about the ways in which institutions and other contextual factors affect the strategic decisions of judges.

Turning to experimental research, studies on the psychology of judging have introduced an array of individual and collective mechanisms that influence the decisions judges make (Braman
Building on prior work about the heuristics that decision makers employ and the biases that often follow from such use, this research explains how judicial decisions often deviate from their desired result because of such heuristics. From the perspective of large-N studies, the experimental findings introduce a new set of hypotheses about how social norms and other institutional factors (e.g., the rules governing collegial courts) influence judicial decision making.

In formal theory, early accounts imported the spatial model from legislative studies to the US Supreme Court and analyzed the dynamic of decision making in terms of minimizing the policy differences between case outcomes and the ideal points of the justices. In these early studies, judicial choices were operationalized not as dispositional votes but rather as measures of the substantive policy consequences of the decisions.

More recently, theorists have refined the framework to better characterize what they take to be the distinctive nature of judicial decision making (e.g., Kastellec 2007; see Lax 2011 for a review of the studies). The authors of these studies employ what they call a “case space” approach to judicial decision making. Lax & Cameron (2007, p. 280) describe how this approach captures the distinctive task faced by judges:

Judges resolve legal disputes; that is, they decide cases, which present themselves as bundles of facts (fact patterns). Depending on the facts presented in the case, the judge determines the case’s disposition (typically a dichotomous judgment) according to a rule. When appellate courts address judicial policy, they typically do so in opinions that modify existing legal rules or create new ones, perhaps to accommodate new factual situations. Thus, judge-created rules embody the content of judicial policy, and bargaining over judicial policy on collegial courts typically involves bargaining over the content of legal rules.

With this analytical framework, they seek to explain a judicial decision as a function primarily of the effect that it will have on the content of the rule that will be established. In so doing, the formal theoretic scholars conceptualize the judicial choice as a decision about the substantive content of the opinion that accompanies, and justifies, the disposition of the case.

Formal theoretic analyses offer several important insights that can be incorporated into large-N studies. With a broader focus on the substantive content of the law, they provide a helpful basis for generating well-reasoned hypotheses about the effects of ideological and legal motivations on the evolution of the law. More generally, formal theoretic models can serve as a strategic framework for conceptualizing the relative effects of all three different types of motivations on decision making—the ideological, the personal, and the legal. They also provide a rigorous basis for assessing the implications of a balancing approach to judicial motivations, as well as a way of investigating the aggregate effects on judicial choice.

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