

# Some Thoughts on the Study of Judicial Behavior

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## SOME THOUGHTS ON THE STUDY OF JUDICIAL BEHAVIOR<sup>†</sup>

LEE EPSTEIN<sup>\*</sup>

### ABSTRACT

*Back in the 1940s the political scientist C. Herman Pritchett began tallying the votes and opinions of Supreme Court Justices. His goal was to use data to test the hypothesis that the Justices were not only following the “law,” but were also motivated by their own ideological preferences.*

*With the hindsight of nearly eighty years, we know that Pritchett’s seemingly small project helped to create a big field: Judicial Behavior, which I take to be the theoretical and empirical study of the choices judges make. Political scientists continue to play a central role, but they are now joined by economists, psychologists, historians, and legal academics. I briefly explore their contributions. I also consider other developments since Pritchett’s time, including the analysis of judicial behavior abroad, the massive improvements in our data, and the increasing number of topics under study. I conclude with some directions the field might take in the next few years. All in all, I am quite optimistic that the study of judicial behavior will continue to hold an important place in the social sciences, history, and, increasingly, I hope, law.*

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<sup>†</sup> A revised version of the 2015 George Wythe Lecture.

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## INTRODUCTION

The name C. Herman Pritchett is probably unfamiliar to many in the law community, but he was a very famous political scientist; a prolific scholar;<sup>1</sup> a great citizen of the University of Chicago, where he spent much of his career;<sup>2</sup> and a leader in the profession, serving as the president of the American Political Science Association.<sup>3</sup>

But back in the fall of 1940, when Pritchett was just starting his career, he had his “own version of Newton’s apple.”<sup>4</sup> As he tells it:

I was reading the current issue of the *Supreme Court Reporter* in my office at the University of Chicago, one floor above and some thirty feet west of the inscription on the Social Science Research Building which quotes Lord Kelvin’s statement that “When you cannot measure, your knowledge is meager and unsatisfactory,” when I was struck by what seemed a peculiar combination of [J]ustices who had joined in a dissent to one of the Supreme Court’s opinions. I began to wonder what it was in that case and in the autobiographies of those [J]ustices that led them to disagree with the majority of the Court on the issue there raised.<sup>5</sup>

With this revelation, Pritchett set out to collect data on Supreme Court Justices: the number of dissenting votes, the fraction of agree-

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1. For a survey of his work, see Lawrence Baum, *C. Herman Pritchett: Innovator with an Ambiguous Legacy*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 57, 57-59 (Nancy Maveety ed., 2003).

2. Walter F. Murphy, *In Memoriam: Charles Herman Pritchett*, 28 *POL. SCI. & POL.* 748, 749 (1995); see also *Obituary: C. Herman Pritchett, Political Science*, *U. CHI. CHRON.* (May 11, 1995), <http://chronicle.uchicago.edu/950511/pritchett.shtml> [<https://perma.cc/2ZBG-JCDU>].

3. *APSA Presidents: 1903 to Present*, *AM. POL. SCI. ASS’N*, <http://www.apsanet.org/ABOUT/Leadership-Governance/APSA-Presidents-1903-to-Present> [<https://perma.cc/CW3G-VLHW>] (last visited Apr. 15, 2016).

4. *Charles Herman Pritchett, Political Science: Santa Barbara*, *CAL. DIGITAL LIBR.*, <http://texts.cdlib.org/view?docId=hb0z09n6nn;NAAN=13030&doc.view=frames&chunk.id=div00051&toc.depth=1&toc.id=&brand=calisph%20ere> [<https://perma.cc/57JK-Z6LQ>] (last visited Apr. 15, 2016).

5. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at xi (1948).

ments with other Justices, their support for the federal government in tax cases, and on and on.<sup>6</sup>

By today's standards, Pritchett's counting project seems small, even quaint.<sup>7</sup> But back in the 1940s, it was unique enough to generate some public interest. Arthur Krock of the *New York Times* wrote of a young political scientist who was keeping "box scores" of the votes and opinions of Supreme Court Justices.<sup>8</sup> The *Washington Post* was downright hostile to his methods. After Harvard Law Professor Mark De Wolfe Howe "doubted 'whether the statistical analysis of Supreme Court opinions can, under any circumstances, be fruitful[,].... [t]he *Washington Post* editorialized: 'We hope that Mr. Howe's expose of this shallow thinking about the judicial process will hasten the relegation of box scores to the sports pages—where they belong.'"<sup>9</sup> Pritchett took note of this criticism,<sup>10</sup> but, "[a]s an old White Sox fan, he was not offended."<sup>11</sup>

Pritchett also knew he was not tallying votes just to tally votes. His ideas were much deeper: he wanted to use *data* to test the hypothesis that the Justices were not only following the "law"—text, precedents, and the like—but were also motivated by their own ideological preferences. To that end, he created matrices showing the number of nonunanimous decisions in which pairs of Justices voted together, as well as left-right continua.<sup>12</sup> Operating under the assumption that such comparisons revealed the Justices' "liberalism" and "conservatism" as those terms are understood by the man

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6. Much of this is on display in PRITCHETT, *supra* note 5, at xii-xiii, and C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890, 892-94 (1941).

7. I draw some of the material in the next few paragraphs from LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 66, 69 (2013).

8. The original article was Arthur Krock, *In the Nation: Alignments and Disputes in the Supreme Court*, N.Y. TIMES, Jan. 14, 1944, at C18. The term "box score" appeared in a follow-up piece: Arthur Krock, *In the Nation: The Supreme Court's Dissent Record Grows*, N.Y. TIMES, Feb. 22, 1946, at L24.

9. This story is recounted in C. HERMAN PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* 189 (1954).

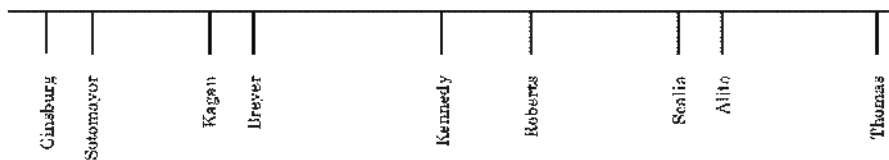
10. *See id.*

11. Murphy, *supra* note 2, at 749. Pritchett had the last laugh: the *Harvard Law Review* now publishes "box scores" of their own in their annual report on the Supreme Court's Term. *Id.* Its statistics bear more than a familiar resemblance to the data Pritchett began compiling in the 1940s. *See id.*

12. *See* Pritchett, *supra* note 6, at 893.

in the street,”<sup>13</sup> Pritchett concluded that ideology influenced the Justices’ decisions.<sup>14</sup> (Figure 1 provides an example of what Pritchett was up to, only I use today’s Justices and not the McReynolds, Blacks, and Frankfurters who populated Pritchett’s Court.)

Figure 1. Left-Right Alignment of Current U.S. Supreme Court Justices, 2015<sup>15</sup>



I emphasize the “data” part of Pritchett’s project because it is the crucial part. Without data, Pritchett would have been just another legal realist: a writer making claims, however insightful, with only examples and anecdotes to back them up.<sup>16</sup> Having data to demonstrate that the realists were right is, in part, what made Pritchett’s ideas so powerful.<sup>17</sup>

And powerful they were. With the hindsight of nearly eighty years, we know that Pritchett’s seemingly small project helped to

13. *Id.* at 895.

14. There is some debate over whether Pritchett thought ideology was the primary or even exclusive driver of the Justices’ votes. I tend to side with Baum, who writes, “Pritchett was a moderate realist,” meaning that he “saw judges as following their preferences within the framework and constraints of legal reasoning.” Baum, *supra* note 1, at 60.

15. The Justices are organized from more liberal to more conservative based on their Martin-Quinn scores for the 2014 Term. *Measures*, MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu/measures.php> [<https://perma.cc/A74C-GXFS>] (last visited Apr. 15, 2016).

16. For more on this point, see EPSTEIN ET AL., *supra* note 7, at 66-67.

17. Though, truth be told, Pritchett was not the first to use data to study judicial behavior. *See id.* at 66 n.3 (“Charles Grove Haines ... had examined the outcomes in New York City’s courts of 17,000 prosecutions for public intoxication. Forty-one magistrates heard these cases, and the results varied dramatically among them. One dismissed the charges against only one of the 566 defendants he tried; another dismissed 54 percent. Only a few social scientists tried to carry on Haines’s work until Pritchett picked up the banner after the Supreme Court’s challenge to the New Deal.”).

create a big field<sup>18</sup>: Judicial Behavior, which I take to be the theoretical and empirical study<sup>19</sup> of the choices judges make.<sup>20</sup>

Political scientists continue to play a central role, but they are now joined by economists, psychologists, historians, and legal academics. In Part I, I briefly explore their important contributions. I also consider other developments since Pritchett's time, including the study of judicial behavior abroad and the massive improvements in data. These are not the only indicators of the field's evolution. Another is the number of substantive topics that have come under analysis. Pritchett focused on the individual judge, and that remains at the field's core. But many other topics have come under study, ten of which I consider quite briefly in Part II.

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18. Even though Pritchett's work attracted substantial attention, it took another decade after publication of *The Roosevelt Court*, *supra* note 5, before others began to "construct[] on the foundations that [Pritchett] built." WALTER F. MURPHY & JOSEPH TANENHAUS, *THE STUDY OF PUBLIC LAW* 19-20 (1972). By the early 1960s, Pritchett's contribution was so apparent that Glendon Schubert, another early pioneer of judicial behavior, dedicated a collection he edited to C. Herman Pritchett, "who blazed a trail." *JUDICIAL DECISION-MAKING* (Glendon Schubert ed., 1963). By 1995, Murphy declared, "no serious scholar would examine the work of the Supreme Court—or any other multi-judge tribunal—without following Herman's analytical approach. Perhaps the ultimate compliment is that ... Herman's contribution ... has become so accepted as to appear common sensical." Murphy, *supra* note 2, at 749.

Still, I want to emphasize that Pritchett *helped* create the field; there were other very influential scholars, many of whom also emphasized the role of ideology on the Supreme Court's decision making. A short list includes: Walter F. Murphy (e.g., *ELEMENTS OF JUDICIAL STRATEGY* 2-3 (1964); *Lower Court Checks on Supreme Court Power*, 53 *AM. POL. SCI. REV.* 1017, 1019-20 (1959)); Glendon Schubert (e.g., *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963*, at 5-6 (1965); *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 *AM. POL. SCI. REV.* 1007, 1022-25 (1958)); Harold J. Spaeth (e.g., *AN INTRODUCTION TO SUPREME COURT DECISION MAKING* 61-69 (rev. ed. 1972); *An Analysis of Judicial Attitudes in the Labor Relations Decisions of the Warren Court*, 25 *J. POL.* 290, 310-11 (1963)); and S. Sidney Ulmer (e.g., *The Political Party Variable in the Michigan Supreme Court*, 11 *J. PUB. L.* 352, 360-61 (1962)). For a complete list, see *THE PIONEERS OF JUDICIAL BEHAVIOR*, *supra* note 1.

19. That the study of judicial behavior is theoretical, empirical, or both distinguishes it from "empirical legal studies," a seemingly catch-all phrase for all work on law and legal institutions that draws on facts about the world—that is, data (and usually quantified data). There are many important studies of judicial behavior that have empirical implications though are themselves purely theoretical (or nearly so). Recent examples include: Adam B. Badawi & Scott Baker, *Appellate Lawmaking in a Judicial Hierarchy*, 58 *J.L. & ECON.* 139, 141-42 (2015); Anthony Niblett, *Case-by-Case Adjudication and the Path of the Law*, 42 *J. LEGAL STUD.* 303, 322-24 (2013); Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 *AM. J. POL. SCI.* 504, 516 (2008).

20. Others offer slightly different definitions. *See, e.g.*, Jeffrey A. Segal, *Judicial Behavior*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 19, 19 (Keith E. Whittington et al. eds., 2008) (defining judicial behavior as "[w]hat do judges do and why do they do it").

I conclude with some directions the field might take in the next few years.<sup>21</sup> All in all, I am quite sanguine that the study of judicial behavior will continue to hold an important place in the social sciences, history, and, increasingly, I hope, law.

#### I. NOTES ON THE EVOLUTION OF THE STUDY OF JUDICIAL BEHAVIOR

It would be impossible in this short Article to describe the full evolution of the study of judicial behavior from Pritchett through today.<sup>22</sup> In what follows, I focus on a few key developments: (1) the influx of scholars from other disciplines; (2) the worldwide interest in judging; and (3) improvements in data. I reserve discussion of what may be the biggest change of all—the increase in the number of substantive topics under analysis—for Part II.

##### A. *Disciplines*

Although I have not conducted a systematic study of the matter, it is probably fair to say that interest in judicial behavior remains highest among political scientists. But that is changing. Political scientists are now joined by other social scientists, especially economists and psychologists, many of whom also have J.D.'s. Legal historians and law professors are important players in the field too. Needless to say, the influx of ideas from these disciplines has improved the field in ways big and small.

Let me start with economists. Their theoretical and methodological contributions to the study of judicial behavior are many—too many to recount here. If forced to name just one, I would say they have redirected attention from the political scientists' emphasis on ideology as the primary driver of judicial decisions to the many

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21. In my lecture, I considered some criticisms of the study of judicial behavior. Because Landes, Posner, and I have already addressed some of the more prominent critiques, see EPSTEIN ET AL., *supra* note 7, at 50-63, I will not repeat them here.

22. Besides, others have already done it. See, e.g., *id.*; JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH (Glendon Schubert ed., 1964); MURPHY & TANENHAUS, *supra* note 18; Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 1, at 1; C. Herman Pritchett, *Public Law and Judicial Behavior*, 30 J. POL. 480, 496-509 (1968).



other goals that judges pursue, whether legal, personal, or professional.<sup>23</sup>

I discuss some of these motivations in Part II, so it will suffice here to provide a flavor of their work by focusing on one goal economists (and others) have highlighted: the judges' desire to retain their jobs. This goal was not on Pritchett's radar screen because he studied life-tenured federal judges.<sup>24</sup> But once scholars turned to state judges, most of whom must stand for reelection or retention to stay in office, electoral motivations and their effect on judicial behavior moved to the fore.

There are many wonderful studies that make this connection, but I especially admire a classic article by two economists, Alexander Tabarrok and Eric Helland.<sup>25</sup> Focusing on U.S. states that elect their judges, the authors studied whether tort awards were higher in cases brought by an in-state plaintiff against an out-of-state defendant.<sup>26</sup> They predicted that elected judges would be more likely than appointed judges to rule in favor of plaintiffs because "redistribut[ing] wealth from out-of-state businesses to in-state plaintiffs" would help them win reelection.<sup>27</sup> Using a variety of statistical methods,<sup>28</sup> Tabarrok and Helland reported that their hypothesis held: "[T]he expected total award in ... elected states with out-of-state defendants is approximately \$240,000 higher than in other states."<sup>29</sup>

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23. Jack Knight and I reviewed this large literature in Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 18-19 (2013). As we noted, political scientists and legal academics also played a role in forcing us to reconsider the preferences of judges. *See id.* at 15-16.

24. Still, federal judges on the United States courts of appeals and district courts have related motivations: the desire for promotion. *See infra* Part II.A.

25. Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186-87 (1999) ("Elected judges know they rule at the discretion of the voters, and, like other politicians, they rule accordingly.").

26. *See id.* at 161-62.

27. *Id.* at 157. The story is a little more complicated than this because Tabarrok and Helland compared awards in partisan-elected states (where judges identify their partisan affiliation), nonpartisan states (where judges run for reelection but not on a partisan ballot), and nonelected states.

28. Andrew Martin and I discussed the logic behind their study in some detail in LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 144-48 (2014).

29. Tabarrok & Helland, *supra* note 25, at 186.

More recent and equally strong work has come from the team of Joanna Shepherd, an economist by training,<sup>30</sup> and Michael Kang, a J.D./Ph.D. in government.<sup>31</sup> In one article, they demonstrate that the desire to be reelected—and the need for campaign contributions—is such a driving force for state supreme court justices who run on a partisan ballot that “every dollar of contributions from business groups” raises the probability that the justice will rule in favor of business.<sup>32</sup> In another study, Shepherd and Kang show that “the more [television] ads aired during ... judicial elections..., the less likely justices are to vote in favor of criminal defendants.”<sup>33</sup> The results of the Shepherd-Kang studies have been so relevant to debates over judicial selection here and abroad that not only have scholars cited them in law reviews and social science journals,<sup>34</sup> but judges<sup>35</sup> and media outlets<sup>36</sup> have referenced the findings as well.<sup>37</sup>

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30. See *Experts: Joanna Shepherd*, GLOBAL ECON. GROUP, <http://www.globaleconomicsgroup.com/experts/joanna-shepherd-bailey/#> [<https://perma.cc/T4C8-XM62>] (last visited Apr. 15, 2016).

31. See *Faculty Profiles: Michael S. Kang*, EMORY U. SCH. L., <http://law.emory.edu/faculty-and-scholarship/faculty-profiles/kang-profile.html> [<https://perma.cc/EQ93-LM5Y>] (last visited Apr. 15, 2016).

32. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011).

33. Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases*, SKEWED JUST., <http://skewedjustice.org> [<https://perma.cc/84HJ-ZNTJ>] (last visited Apr. 15, 2016).

34. See, e.g., Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1236 n.82, 1262 n.183 (2012); Yasmin Dawood, *Campaign Finance and American Democracy*, 18 ANN. REV. POL. SCI. 329, 341 (2015); Timothy Werner & John J. Coleman, *Citizens United, Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes*, 31 J.L. ECON. & ORG. 127, 134 (2015).

35. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1675 (2015) (Ginsburg, J., concurring); *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 750 (9th Cir. 2012) (Schroeder, J., dissenting).

36. See, e.g., Niraj Chokshi, *How Judicial Campaign Ads May Be Affecting Legal Decisions*, WASH. POST (Oct. 22, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/22/how-judicial-campaign-ads-may-be-affecting-legal-decisions/> [<https://perma.cc/QW9B-AZQJ>]; Joe Pinsker, *It's Cheaper to Buy a Judge than a State Senator*, ATLANTIC (Nov. 2, 2014), <http://www.theatlantic.com/business/archive/2014/11/its-cheaper-to-buy-a-judge-than-a-state-senator/382198> [<https://perma.cc/B69H-KKJN>]; Derek Willis, *'Soft on Crime' TV Ads Affect Judges' Decisions, Not Just Elections*, N.Y. TIMES (Oct. 21, 2014), <http://nyti.ms/1pwD1qW#> [<https://perma.cc/R6MM-VPDE>].

37. Both teams (Kang/Shepherd and Tabarrok/Helland) focused (mostly) on civil litigation. See generally Kang & Shepherd, *supra* note 32; Tabarrok & Helland, *supra* note 25. A substantial amount of work has analyzed criminal cases, and though the studies vary in their

Though they may be outnumbered by political scientists and economists working in the field, psychologists too have made substantial contributions to our understanding of judicial behavior<sup>38</sup>—but none more so than Jeffrey J. Rachlinski, a law professor at Cornell with a Ph.D. in psychology; Chris Guthrie, a J.D. with advanced training in psychology; and Andrew J. Wistrich, a magistrate judge. In an impressive series of papers,<sup>39</sup> they report the results of experiments they performed on judges to see if the judges can convert their intuitive “emotional reactions into orderly, rational responses.”<sup>40</sup> Not surprisingly, they can’t. Because I think the Rachlinski et al. findings are so important and will be even more so going forward, I return to them in the Conclusion.

I am equally impressed with the work of legal historians. A study by Daniel Klerman, a J.D./Ph.D. in history (with an economic bent), and Paul Mahoney, the dean of the University of Virginia School of Law, well illustrates the importance of historical work on judging.

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details, their findings are uniform: judges who face the electorate to retain their jobs are especially tough on criminal defendants, in part because the public does not like judges who appear soft on crime. *Cf.* Kang & Shepherd, *supra* note 32, at 128-29 (making the similar finding that judges who face the electorate are more likely to favor contributors’ interests). For example, in their examination of more than 22,000 criminal sentences imposed by Pennsylvania trial court judges, Sanford Gordon and Gregory Huber found that judges are significantly harsher on defendants as the judges’ retention election grows closer. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004). Overall, the researchers “attribute at least 1,818 to 2,705 years of additional prison time to this electoral dynamic.” *Id.*; *see also* Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 741-42 (2013); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 111 (2007); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120-21 (1987). For even more state court studies, see the bibliography in EPSTEIN ET AL., *supra* note 7, at 97-98.

38. This team has made great contributions, but there are others who have produced equally interesting and important work along similar lines. *See, e.g.*, EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING (2009); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994); Dan Simon & Nicholas Scurich, *Judicial Overstating*, 88 CHI.-KENT L. REV. 411 (2013).

39. *E.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

40. Wistrich et al., *supra* note 39, at 863.

In *The Value of Judicial Independence*, the two join an important conversation about the relationship between judicial independence and economic prosperity.<sup>41</sup> The hypothesis, in a nutshell, is that when courts are independent from the government, they are more willing to enforce contract and property rights,<sup>42</sup> which, in turn, encourages economic investment and growth. But instead of testing it against contemporary data, as social scientists usually do,<sup>43</sup> Klerman and Mahoney had the clever idea of looking back—to England in the 1700s.<sup>44</sup> They show that eighteenth-century laws providing greater job security to the judges increased the value of financial assets.<sup>45</sup>

Many of the scholars I have referenced have a Ph.D., but a Ph.D. is hardly necessary to analyze the choices judges make. To the contrary, J.D.s have become active and insightful contributors to the field. There are so many interesting and well-executed studies by law professors that it would take several articles to explore them in the detail they deserve. So I will mention just a few. In an influential study, my colleague at the Washington University School of Law Pauline Kim mounted a compelling challenge to the standard social science account of the relationship between higher and lower courts<sup>46</sup> (a subject to which I return in Part II). Throughout his career, the late Ted Eisenberg wrote on judicial behavior<sup>47</sup>—including a series of studies on the decisions of the Israeli Supreme Court,

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41. See Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1, 6-7, 23-25 (2005) (finding that judicial independence yielded positive economic effects not only by increasing the reliability of government debt, but also by better securing property and contract rights and enabling increased predictability for the liabilities attendant to agency relationships).

42. See, e.g., Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 819 (1989).

43. E.g., Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497, 498 (2003); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 468 (2004).

44. See Klerman & Mahoney, *supra* note 41, at 1.

45. See *id.* at 10-12.

46. Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 538 (2011).

47. See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325 (2011).

which he co-authored with Israeli scholars.<sup>48</sup> Eric Posner, Mitu Gulati, and Stephen Choi<sup>49</sup> have written on many features of judging, including judicial performance. In their much-debated article *Are Judges Overpaid?*, they focus on the chronic complaint (at least among judges) that judges are so inadequately paid that the courts eventually will be filled with “less capable judges,” leading to “inferior adjudication.”<sup>50</sup> Choi et al. put this claim to the test, analyzing whether higher judicial salaries lead to better judicial performance.<sup>51</sup> The results show that the correlation between salary and quality is not as strong as the pay-raise proponents maintain.<sup>52</sup> And then there is Barry Friedman’s book on the effect of public opinion on the Supreme Court.<sup>53</sup> Not only has it been wildly influential in its own right, it has also become a must-cite in the more quantified social science literature on the topic.<sup>54</sup> (I return to Friedman in Part II.)

Judges have gotten into the act too. Richard A. Posner’s books and articles on “how judges think” are rightfully famous.<sup>55</sup> And at an

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48. See, e.g., Theodore Eisenberg et al., *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246 (2012); Theodore Eisenberg et al., *Israel’s Supreme Court Appellate Jurisdiction: An Empirical Study*, 96 CORNELL L. REV. 693 (2011); Theodore Eisenberg et al., *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452 (2013).

49. Okay, Choi has a Ph.D. in economics. See *Stephen Choi and David Yermack Are Appointed Directors of the Pollack Center for Law & Business*, N.Y.U. L. (Nov. 8, 2013), <http://www.law.nyu.edu/news/stephen-choi-and-david-yermack-directors-of-pollack-center-for-law-and-business> [https://perma.cc/L52C-K6YA].

50. Stephen J. Choi et al., *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 48 (2009) (quoting Justice Alito).

51. See *id.* at 47, 50.

52. See *id.* at 50, 102; see also James M. Anderson & Eric Helland, *How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench*, 64 STAN. L. REV. 1277, 1277 (2012) (finding that “judicial salaries have a small but significant effect on the likelihood of exit and ... on the background of judges that join the appellate bench”).

53. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

54. See, e.g., Matthew E.K. Hall et al., *Holding Steady on Shifting Sands: Counter-majoritarian Decision Making in the US Courts of Appeals*, 79 PUB. OPINION Q. 504, 506 (2015); Stefanie A. Lindquist & Pamela C. Corley, *National Policy Preferences and Judicial Review of State Statutes at the United States Supreme Court*, 43 PUBLIUS 151, 152 (2013); Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 111-12, 124 (2014).

55. E.g., RICHARD A. POSNER, *HOW JUDGES THINK* (2008); RICHARD A. POSNER,

advanced degree program at Duke University Law School where judges study judicial behavior (among other topics),<sup>56</sup> the “students” have gone on to publish interesting studies on the topic.<sup>57</sup>

### B. Worldwide Interest

As even this brief review shows, there is still a good deal of emphasis on United States courts, and many of the key studies are conducted by American scholars. But this too is changing,<sup>58</sup> as the Eisenberg team’s research on the Israeli Supreme Court makes clear.<sup>59</sup> More to the point—and despite the continued dominance of U.S. authors and courts—there is almost no corner of the world whose judges are not under analysis by some scholar somewhere. Through these analyses, we have learned a great deal about the choices of judges in other societies of course, but also about our own judges. For example, to understand the effect of life tenure on judging, we need points of comparison. Kang and Shepherd’s research on

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REFLECTIONS ON JUDGING (2013); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

56. See *Master of Judicial Studies*, DUKE L., [https://law.duke.edu/judicialstudies/degree/#\[https://perma.cc/BEZ2-V8S3\]](https://law.duke.edu/judicialstudies/degree/#[https://perma.cc/BEZ2-V8S3]) (last visited Apr. 15, 2016) (a master’s program “open to state, federal, and international judges who sit on courts of general jurisdiction”).

57. See, e.g., Kem Thompson Frost, *Predictability in the Law, Prized yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48 (2015) (analyzing judicial priorities); George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 FED. CTS. L. REV. 35, 37 (2015) (arguing that “district courts are using magistrate judges ... as the primary resource for assistance in managing multi-district litigation”).

58. And it should change, for the reasons I discuss in the Conclusion.

59. See *supra* note 48 and accompanying text. This is not to stay that the comparative analysis of courts is entirely new. In the 1960s and 1970s, some of the “pioneers” of judicial behavior began to study—or at least think about—courts elsewhere. Also in the 1960s, David J. Danelski wrote a series of papers and book chapters on the Japanese Supreme Court. See Thomas G. Walker, *David J. Danelski: Social Psychology and Group Choice*, in THE PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 1, at 248, 266 (listing Danelski’s works). And there were some important books in the 1990s, especially by Alec Stone and Charles R. Epp. See CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992) (analyzing European constitutional courts). But it took another decade before the study really took off. See the data I report in Lee Epstein, *The Comparative Advantage*, 9 LAW & CTS. 1, 1 (1999), <http://epstein.wustl.edu/research/compadv.pdf> [<https://perma.cc/9DRJ-XJDU>] (showing that even as recently as fifteen years ago, the number of rigorous analyses of courts abroad was quite limited).



the state courts provides some,<sup>60</sup> but moving to a comparative context provides even more. The worldwide variation of judicial selection-retention mechanisms is so high that it is hard to imagine one that does not exist.<sup>61</sup>

To get a feel for the importance of moving beyond U.S. courts, let me start with research on judges in Latin America. For many reasons, courts there have long been of interest to political scientists, though in my opinion (others may differ) it was Gretchen Helmke's work in the early 2000s that started the cascade of rigorous research we see today.<sup>62</sup> Helmke focused on Argentina, a country whose constitution reads quite similar to ours regarding tenure for judges.<sup>63</sup> There, as here, the constitution guarantees that judges "shall hold their offices during good behavior."<sup>64</sup> Helmke shows, however, that in Argentina, this is a parchment guarantee: "good behavior" does not mean tenure for life; it means tenure for the life of the appointing regime.<sup>65</sup> As Helmke writes, "incoming governments in Argentina routinely get rid of their predecessors' judges despite constitutional guarantees."<sup>66</sup> Out of fear for their jobs and/or even their lives, Helmke theorized that the judges would rationally anticipate the threat and begin "strategic[ally] defecting," that is, ruling *against* the existing regime once it began to lose power.<sup>67</sup> The data confirmed her hypothesis.<sup>68</sup>

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60. See Kang & Shepherd, *supra* note 32, at 69.

61. For those in Europe alone, see Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 10-11 (2001).

62. For an overview of the "unprecedented boom in the study of courts as political actors in Latin America," see Diana Kapiszewski & Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, 6 PERSP. ON POL. 741, 741 (2008).

63. See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 291-92 (2002); see also GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA 14, 15 (2005).

64. U.S. CONST. art. III, § 1 (providing that, inter alia, "[t]he Judges ... shall hold their Offices during good Behaviour"). In the Argentine Republic, the official English translation of the Constitución Nacional similarly provides that "[t]he Justices of the Supreme Court and the judges of the lower courts ... shall hold their offices during good behavior." Art. 110, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

65. See Helmke, *supra* note 63, at 292.

66. *Id.*

67. *Id.* at 291.

68. See *id.* at 296-97, 300-01.

Many more studies of Latin American judges have followed. Some are explicitly cross-national; others focus on a particular country.<sup>69</sup> Either way, like Helmke's studies, they carry important implications well beyond the confines of the region, whether for the analysis of judicial selection and retention, relations between courts and the elected branches, or judicial independence, among others. Equally compelling work is on its way as scholars within the countries are conducting systematic investigations of their own. Julio Ríos-Figueroa's new book is an example,<sup>70</sup> as is research by Brazilian scholars, led by law professor Ivar Hartmann, who are collaborating with their high court to create a database of all the Court's decisions.<sup>71</sup>

Studies on European judges are also numerous—especially those on judges serving on so-called peak or apex courts.<sup>72</sup> A few countries in Europe have legal systems that resemble ours: three levels, with judges on all three levels able to examine laws for their compatibility with the constitution and invalidate laws that are incompatible. In these countries, as in the United States, the apex court is usually called the “supreme court.” The Norwegian Supreme Court is an

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69. See, e.g., Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT'L L.J. 595 (2005); David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT'L L. REV. 687 (2005).

70. JULIO RÍOS-FIGUEROA, *CONSTITUTIONAL COURTS AS MEDIATORS: ARMED CONFLICT, CIVIL-MILITARY RELATIONS, AND THE RULE OF LAW IN LATIN AMERICA* (2016).

71. Most of their papers are in Portuguese. For one in English, see Diego Werneck Arguelles & Ivar A. Hartmann, *Timing Control Without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda* (May 28, 2014) (unpublished paper presented at the Conference on Empirical Studies on Constitutional Courts, FGV Direito Rio, Rio de Janeiro, Brazil) (on file with author).

72. I do not mean to imply that work is limited to peak courts; there are plenty of studies on the “ordinary” courts in Europe. See, e.g., Taavi Annus & Margit Tavits, *Judicial Behavior After a Change of Regime: The Effects of Judge and Defendant Characteristics*, 38 LAW & SOC'Y REV. 711, 711 (2004) (examining the decisions of trial courts in Estonia); Nuno Garoupa et al., *Political Influence and Career Judges: An Empirical Analysis of Administrative Review by the Spanish Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 795, 797-98 (2012); Alessandro Melcarne & Giovanni B. Ramello, *Judicial Independence, Judges' Incentives and Efficiency*, 11 REV. L. & ECON. 149, 150 (2015) (examining judicial performance based on data supplied by the Council of Europe); Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831, 831 (1999) (evaluating the debate on judicial independence using evidence from the English Court of Appeal from 1951-1986).



example and has been the subject of a terrific new book devoted to exploring its behavior.<sup>73</sup>

But most European countries do not allow their “ordinary” courts, not even their supreme court, to exercise constitutional review. They reserve this function for constitutional courts to which, depending on the country, the ordinary courts can refer constitutional matters, or in which individuals or members of the government can bring constitutional questions in the first instance and in the abstract (that is, absent a real case or controversy).<sup>74</sup> The idea of empowering one court with constitutional review power is not new,<sup>75</sup> but its systematic study is at a relatively early stage.

Even so, we have already learned a lot. Among the many excellent papers and books, I think of Georg Vanberg’s work on the German Constitutional Court,<sup>76</sup> perhaps the most influential national court in Europe. Vanberg takes on questions that dominate discussions not only about courts in Europe but throughout the world, including whether “the potential for evasion” of court decisions by the elected branches and the public “shape[s] judicial deliberations and perhaps even decisions” and “[u]nder what circumstances [courts can] successfully constrain legislative majorities, and when will they not do so.”<sup>77</sup> Alec Stone’s study of the French Constitutional Council has also been quite influential—first, for bringing attention to the very fact that constitutional courts in Europe exercise abstract review,<sup>78</sup> and second, for suggesting that their exercise of this power opens the door for “constitutional courts [to] behave as third legislative chambers.”<sup>79</sup>

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73. See GUNNAR GRENDSTAD ET AL., *POLICY MAKING IN AN INDEPENDENT JUDICIARY* (2015).

74. See, e.g., Bojan Bugarić, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT’L L.J. 247, 250-61 (2001).

75. See Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 589-90 (2014).

76. See GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

77. *Id.* at 8.

78. See STONE, *supra* note 59, at 225. For another interesting study on the French Constitutional Council, see Raphaël Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959-2006*, 25 J.L. ECON. & ORG. 262 (2009).

79. STONE, *supra* note 59, at 225. I should also note that judicial behavior in postcommunist constitutional courts has not escaped attention either, with many papers focused on judicial independence. E.g., Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC’Y REV. 117 (2001); Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judi-*

As the study of national courts in Europe has gained steam, so too has the analysis of relations between the domestic institutions and the European courts. Clifford Carrubba and his colleagues, for example, show that the European Court of Justice (ECJ) is quite attentive to the preferences and likely actions of EU member states when it reaches its decisions.<sup>80</sup> Assuming the ECJ cares about influencing public policy, rational anticipation of the reaction of governments in a position to thwart its decisions makes good sense.<sup>81</sup> Based on discussions at a recent conference of European judges and scholars,<sup>82</sup> I predict even more research along these lines, as well as the analysis of communication among domestic European courts.<sup>83</sup> Some refer to this as a dialogue, but it may also be viewed as a competition among judges for influence in developing European law.

The study of judicial behavior in Asia is also thriving. Perhaps because of “its central role in Indian political life and [its] massive docket,”<sup>84</sup> not to mention the sheer number of judges and courtrooms, the Supreme Court of India has long been the subject of rigorous analysis, and the work continues.<sup>85</sup> Nick Robinson’s interesting

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*cial Review in Post-Communist Courts*, 65 J. POL. 422 (2003); Shannon Ishiyama Smithey & John Ishiyama, *Judicial Activism in Post-Communist Politics*, 36 LAW & SOC’Y REV. 719 (2002).

80. See Clifford J. Carrubba et al., *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435, 449 (2008).

81. *But see* Alec Stone Sweet & Thomas Brunnell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106 AM. POL. SCI. REV. 204 (2012) (taking issue with the findings of the Carrubba et al. study). Carrubba and his colleagues responded in Clifford J. Carrubba et al., *Understanding the Role of the European Court of Justice in European Integration*, 106 AM. POL. SCI. REV. 214 (2012).

82. Program for the International Conference on Supreme Courts in Context (Univ. in Bergen, Sept. 21-22, 2015), <http://www.stj.pt/ficheiros/Noticias/ActividadeInstitucional/programfortheinternationalconferenceonsupremecourtsincontext2015.pdf> [<https://perma.cc/3ASH-EW77>].

83. And more research on the European (and international) courts themselves. Examples include: Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413 (2012); Michael Malecki, *Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers*, 19 J. EUR. PUB. POL’Y 59 (2011); Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).

84. Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court’s Workload*, 10 J. EMPIRICAL LEGAL STUD. 570, 571 (2013).

85. *E.g.*, RAJEEV DHAVAN, *LITIGATION EXPLOSION IN INDIA* (1986); *see also* George H. Gadbois, Jr., *Indian Judicial Behaviour*, 5 ECON. & POL. WKLY. 149 (1970); George H. Gadbois, Jr., *Indian Supreme Court Judges: A Portrait*, 3 LAW & SOC’Y REV. 317 (1968); Robert Moog,

article, for example, shows that the court disproportionately draws its cases from states close to Delhi and the wealthy.<sup>86</sup>

Likewise, J. Mark Ramseyer and Eric Rasmusen's work has taught us much about the Japanese Supreme Court,<sup>87</sup> but its lessons transcend judges sitting on that court. To see this, consider the long-standing debate in the formal economics literature over the extent to which reputation- or power-seeking judges ought to be followers (applying existing doctrine) or more *avant garde*. Some contend that judges motivated by esteem should be less willing to follow precedent to show that they are more capable than their predecessors.<sup>88</sup> William Landes and Richard Posner, though, suggest that appellate review keeps rogue judges—those who feel free to disregard precedents in their quest for power or policy—in check.<sup>89</sup> Perhaps judges who are too innovative run the risk of seeing their decisions overturned, which can harm their reputation. Because Ramseyer and Rasmusen show that Japanese judges who are reversed receive less prestigious responsibilities,<sup>90</sup> their analysis, I think, lends some support to Landes and Posner's account.<sup>91</sup>

As for the Mideast, I have already mentioned work on the Israeli Supreme Court.<sup>92</sup> And there are many other studies. Among the most striking is Moses Shayo and Asaf Zussman's analysis of the decisions of Israeli small claims courts, which shows that Jewish

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*Indian Litigiousness and the Litigation Explosion: Challenging the Legend*, 33 *ASIAN SURV.* 1136 (1993) (looking at litigation in India's district courts); *see also, e.g.*, SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA'S SUPREME COURT, SOCIAL RIGHTS, AND CIVIL LIBERTIES* (2009); Abhinav Chandrachud, *An Empirical Study of the Supreme Court's Composition*, 46 *ECON. & POL. WKLY.* 71 (2011); Robinson, *supra* note 84.

86. *See* Robinson, *supra* note 84, at 570.

87. *See, e.g.*, J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993*, 154 *U. PA. L. REV.* 1879 (2006); J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 *AM. POL. SCI. REV.* 331 (2001) [hereinafter Ramseyer & Rasmusen, *Japanese Judges*]; J. Mark Ramseyer & Eric B. Rasmusen, *Why the Japanese Taxpayer Always Loses*, 72 *S. CAL. L. REV.* 571 (1999) [hereinafter Ramseyer & Rasmusen, *Taxpayer*].

88. *See, e.g.*, Gilat Levy, *Careerist Judges and the Appeals Process*, 36 *RAND J. ECON.* 275, 277 (2005).

89. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J.L. & ECON.* 249, 273 (1976).

90. *See* Ramseyer & Rasmusen, *Taxpayer*, *supra* note 87, at 573-74, 590, 594.

91. *Cf.* Salzberger & Fenn, *supra* note 72, at 846 (showing that the lower the reversal rate, the higher the judge's prestige and thus, the higher the likelihood of promotion from the Court of Appeal to the House of Lords in England).

92. *See supra* note 48.

judges favor Jewish litigants, and Arab judges favor Arab litigants.<sup>93</sup> Then there is Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso's study of the effect of food breaks on the decisions of judges serving on Israeli parole boards.<sup>94</sup> Their finding that judges are more lenient at the beginning of the work day and after a food break<sup>95</sup> received worldwide attention (though subsequently came under some criticism<sup>96</sup>). And anyone interested in the role of courts in promoting economic development and political reform in authoritarian regimes should read Tamir Moustafa's book on the Egyptian high court.<sup>97</sup>

### C. Data

I could go on; there are many other interesting studies to reference.<sup>98</sup> But let me turn to another important development in the study of judicial behavior: the marked improvement of our data. Just think about the way that Pritchett and the other pioneers of

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93. See Moses Shayo & Asaf Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q.J. ECON. 1447, 1499 (2011) (“[T]he data seem to indicate that terrorism affects judges of both ethnicities, leading Arab judges to favor Arab plaintiffs and Jewish judges to favor Jewish plaintiffs.”). For equally good studies of ethnic in-group bias in the criminal context, see Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIRICAL LEGAL STUD. 403 (2010), and Guy Grossman et al., *Descriptive Representation and Judicial Outcomes in Multiethnic Societies*, 60 AM. J. POL. SCI. 44 (2016).

94. See Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889 (2011).

95. *Id.* at 6890.

96. See Keren Weinshall-Margel & John Shapard, *Overlooked Factors in the Analysis of Parole Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. E833 (2011).

97. TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007). See also his insightful review of the literature on the role of courts in authoritarian regimes, Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281 (2014).

98. For example, there are many excellent systematic studies of the Canadian Supreme Court. See, e.g., ROY B. FLEMMING, *TOURNAMENT OF APPEALS: GRANTING JUDICIAL REVIEW IN CANADA* (2004); C.L. OSTBERG & MATTHEW E. WETSTEIN, *ATTITUDINAL DECISION MAKING IN THE SUPREME COURT OF CANADA* (2007); DONALD R. SONGER ET AL., *LAW, IDEOLOGY, AND COLLEGIALLY: JUDICIAL BEHAVIOUR IN THE SUPREME COURT OF CANADA* (2012). There are fewer studies of courts in Africa. Exceptions include: THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005* (2013); JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* (2001); Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps'*, 4 CONST. CT. REV. 1 (2011).

judicial behavior likely collected their data<sup>99</sup>: Either they or their research assistants made their way into a law library where they pulled off the shelves (hard!) copies of the *U.S. Reports* and went through the cases one by one, noting the issues involved and marking down (maybe even with a pencil!), say, the number of Justices in the majority, the number of dissenting opinions, and the ideological outcome of the case.

Some of the authors I have referenced may have also proceeded in this way when they created their datasets (though I doubt they used hard copies of cases, what with electronic versions all over the Internet). But many more likely relied on public or multiuser databases—databases that are not tailored to a particular study but are so rich in content that many scholars, even those with distinct projects, can draw on them.<sup>100</sup>

The United States Supreme Court Database,<sup>101</sup> the brainchild of Harold J. Spaeth, was among the first of these efforts, and it continues to serve as a foundation for virtually all empirical analyses of the Court.<sup>102</sup> That database is now joined by many others, including Donald R. Songer's U.S. Appeals Courts Database, housing information on cases decided in the courts of appeals between 1925 and 2002,<sup>103</sup> and the National High Courts Judicial Database,<sup>104</sup> providing data on the decisions of apex courts in eleven countries.<sup>105</sup>

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99. I do not know for sure, but I have heard countless stories from my mentors.

100. In addition to opening access to many researchers, large multiuser databases have what is known as a combinatoric advantage. For more details, see EPSTEIN & MARTIN, *supra* note 28, at 16-18.

101. SUP. CT. DATABASE, <http://supremecourtdatabase.org> [<https://perma.cc/7VNV-AEKX>] (last visited Apr. 15, 2016).

102. See, e.g., Adam Liptak, *Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES (Sept. 28, 2015), [http://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-roberts-amasses-conservative-record-and-the-rights-ire.html?\\_r=0](http://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-roberts-amasses-conservative-record-and-the-rights-ire.html?_r=0) [<https://perma.cc/Z55R-SKCQ>]; Adam Liptak, *Right Divided, a Disciplined Left Steered the Supreme Court*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/us/supreme-court-tacks-left-with-push-from-disciplined-liberals.html> [<https://perma.cc/D2QG-M6PV>].

103. *U.S. Appeals Courts Database*, JUD. RES. INITIATIVE U.S.C., <http://artsandsciences.sc.edu/poli/juri/appct.htm> [<https://perma.cc/EKN7-T6CF>] (last visited Apr. 15, 2016).

104. *National High Courts Database*, JUD. RES. INITIATIVE U.S.C., <http://artsandsciences.sc.edu/poli/juri/highcts.htm> [<https://perma.cc/2FZ6-BB6Z>] (last visited Apr. 15, 2016).

105. *Id.* The courts (and years) covered are: High Court of Australia (1969-2003); Supreme Court of Canada (1969-2003); Supreme Court of India (1970-2000); Supreme Court of Namibia (1990-1998); Supreme Court of the Philippines (1970-2003); South Africa Supreme Court of Appeal (1970-2000) and Constitutional Court (1995-2000); Tanzania Court of Appeal (1983-1998); Judicial Committee of the House of Lords (Law Lords) of the United Kingdom (1970-

Many similar data-collection efforts are underway all over the world.

To be sure, multiuser databases are not panaceas; they cannot directly answer every question scholars may have about the behavior of judges. But researchers can adapt them—and even more tailored databases<sup>106</sup>—to suit their needs.<sup>107</sup> Consider the National High Courts Judicial Database, which contains a good deal of information on the Indian Supreme Court's decisions between 1970 and 2000.<sup>108</sup> Following the Database's protocols, users can update or even back-date the dataset. They can also create new variables. For example, although the Database provides information on how the judges voted and whether they wrote an opinion, it does not include data on the judges' background characteristics (for example, age, gender, and previous positions). Because this information is available on the Indian Supreme Court's website<sup>109</sup> (and perhaps from other sources), analysts could add it to the dataset.

That scholars are now doing so seems evident. More to the point, I have no doubt that the existence of these multiuser databases has contributed quite productively to the study of judicial behavior. To see this, we need consider only that just a few short decades ago, prior to the appearance of Songer's United States Appeals Courts Database,<sup>110</sup> the circuit courts received only limited systematic attention<sup>111</sup>; the great bulk of research focused on the United States Supreme Court. No longer. Today, there is an explosion of work on

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2002); Supreme Court of the United States (1953-2005); Supreme Court of Zambia (1973-1997); Supreme Court of Zimbabwe (1989-2000). *Id.*

106. An example is Sunstein et al.'s data on the United States courts of appeals. See CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006). Although Sunstein et al. developed the dataset for a particular research project, other scholars have adapted it to their own needs. We did so in our article on gender and judging by adding, among other variables, the gender of the judge. See Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 408 (2010).

107. See EPSTEIN & MARTIN, *supra* note 28, at 68.

108. See *National High Courts Database*, *supra* note 104.

109. See *Hon'ble The Chief Justice of India & Hon'ble Judges*, SUP. CT. INDIA, <http://supremecourtsofindia.nic.in/judges/judges.htm> [<https://perma.cc/37D8-SBPC>] (last visited Apr. 15, 2016).

110. See *U.S. Appeals Courts Database*, *supra* note 103.

111. See *id.* (noting the paucity of studies in this area prior to the creation of the source).



the courts of appeals, much of which makes use of the Songer database.<sup>112</sup>

While we are on the topic of data, I should also note that advances in strategies and tools for analyzing data also have added power to research on judging. Improvements have come about, in part, because specialists in methodology with an interest in law realized that the unique sorts of data that scholars have amassed on courts and judges can be useful for the development, adaptation, and assessment of innovative analytic strategies. Examples in the past few decades include, but are certainly not limited to, matching methods,<sup>113</sup> network analysis,<sup>114</sup> and measurement<sup>115</sup> and event count models.<sup>116</sup>

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112. See, e.g., Deborah Beim et al., *Signaling and Counter-Signaling in the Judicial Hierarchy: An Empirical Analysis of En Banc Review*, 60 AM. J. POL. SCI. 490, 491, 508 (2016); Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 LAW & SOC'Y REV. 171 (2011); Robert K. Christensen & John Szmer, *Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions*, 32 INT'L REV. L. & ECON. 30, 30 (2012).

113. See, e.g., RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* (2012). For a review, see Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17 (2011); Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. LEGAL STUD. S187 (2015).

114. See, e.g., Janet M. Box-Steffensmeier et al., *Quality over Quantity: Amici Influence and Judicial Decision Making*, 107 AM. POL. SCI. REV. 446 (2013); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008); James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324 (2007); Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413 (2012).

115. See, e.g., Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010) [hereinafter Ho & Quinn, *A Switch in Time*]; Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002). See generally Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813 (2010) [hereinafter Ho & Quinn, *How Not to Lie*].

116. See, e.g., Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009); James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573 (1995); see also THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006).

*D. Why All the Attention?*

In addition to improvements in data, the number of substantive topics under investigation has exploded, so much so that I devote Part II to this development. But let me pause for a moment and ask, why all the attention to judicial behavior? Landes, Posner, and I suggest one answer: the growing realization that law students, lawyers, law professors, and even judges would better advance their own career objectives by understanding the behavior of judges.<sup>117</sup>

I am sure there are other reasons, too—from the revolution in microcomputing to the decades-old push for interprofessionality and interdisciplinarity in many academic organizations. But at a meta-level, I cannot help thinking that the study of judicial behavior is a manifestation of the importance—perhaps growing importance—of judges worldwide. Some of this stems from the fact that more courts than ever have the power to invalidate government acts<sup>118</sup> and, occasionally, are not timid about using it to do very big things. The Constitutional Court of South Africa held the death penalty unconstitutional,<sup>119</sup> and the German Constitutional Court held that refusing to appoint Muslim female school teachers who wear head scarves infringes on teachers' rights to equal access to public office.<sup>120</sup> Along somewhat different lines, Laurence Helfer and Erik Voeten show how the European Court of Human Rights convinced national governments (and courts) to become more progressive in their treatment of LGBT rights issues, even though their decisions are formally binding on only the parties to the dispute.<sup>121</sup>

But we do not have to travel to Johannesburg, Karlsruhe, or Strasbourg for examples. Before the U.S. Supreme Court took up the subject of same-sex marriage in 2015, thirty-seven states already had banned it.<sup>122</sup> But in only eleven states did the people or

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117. EPSTEIN ET AL., *supra* note 7, at 5-6; *see also* RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016).

118. *See* Ginsburg & Versteeg, *supra* note 75, at 589-90.

119. *See State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

120. *See* BVerfG, 2 BvR 1436/02, Sept. 24, 2003, [http://www.bverfg.de/e/rs20030924\\_2bvr143602en.html](http://www.bverfg.de/e/rs20030924_2bvr143602en.html) [<https://perma.cc/U5RP-45TH>] (English translation).

121. *See* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 89-90 (2014).

122. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2615 (2015) (Roberts, C.J., dissenting).



their representatives vote for same-sex marriage.<sup>123</sup> In the rest, judges voted for it.<sup>124</sup> And, of course, the Supreme Court dealt the final blow when it held that the remaining bans violated guarantees of due process and equal protection.<sup>125</sup>

It is not only in sociocultural matters where courts are important players. Klerman and Mahoney were right when they linked judicial independence and economic prosperity.<sup>126</sup> Or at least the IMF and World Bank seem to think Klerman and Mahoney got it right.<sup>127</sup> These organizations have invested millions, perhaps billions, in legal systems throughout the world, with an emphasis on improving efficiency, access, independence, public trust, and implementation of judicial decisions<sup>128</sup>—all in an effort to encourage economic growth and investment.

## II. SUBSTANTIVE AREAS OF INTEREST

I have identified a number of important ways in which the field has changed since Pritchett's day. One that I have not discussed but have telegraphed throughout is the increase in the number of substantive topics now under study. In addition to the judge, which was Pritchett's interest, I count at least ten; and I doubt my list is inclusive.<sup>129</sup> I describe these topics briefly in Part II.B.

In what directly follows, I focus on a subject that is not new: the individual judge. I do so because it remains a primitive in the study of judicial behavior and because even this "old" topic has advanced in exciting and new ways, moving well beyond Pritchett's emphasis on the role of ideology in the decisions of the U.S. Supreme Court.

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123. *Id.*

124. *Id.*

125. *Id.* at 2604-05.

126. See Klerman & Mahoney, *supra* note 41, at 25.

127. See, e.g., *Justice Sector Institutional Strengthening Project*, WORLD BANK, <http://www.worldbank.org/projects/P143274/justice-sector-institutional-strengthening-project?lang=en> [<https://perma.cc/4TV2-CFDV>] (last visited Apr. 15, 2016). As do many economists. See, e.g., La Porta et al., *supra* note 43, at 468-69. As a political scientist, I am not yet convinced. Helmke's study, *supra* note 63, along with many others, tells us that there are limits to what courts can accomplish when they are out of line with political elites, even when they seem to have some degree of independence. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008).

128. See, e.g., *Justice Sector Institutional Strengthening Project*, *supra* note 127.

129. See *infra* Part II.B.

*A. The Judge: Motivations, Careers, and Performance*

Pritchett analyzed “The Judge”—or, in his case, “The Justice”—and this remains a focus of study. In fact, I think of my book with Posner and Landes as very much a story about the individual judge.<sup>130</sup> In it we present and test a realist model of judging that views the judge as a participant in a labor market—the judicial labor market.<sup>131</sup> A judge so viewed, we argue, is motivated and constrained as other workers are: by personal and institutional concerns, by costs and benefits, by expectations, and by the tools and methods of the job.<sup>132</sup>

We lay out a judicial utility function that reflects these ideas, but to me it boils down to this: we think about judges as judges who are bound by certain rules and norms,<sup>133</sup> but also as people with professional and personal goals that they seek to maximize.

What are judges’ goals? Pritchett emphasized the policy goal, or the idea that judges want to bring the law in line with their own policy or ideological values.<sup>134</sup> And Landes, Posner, and I find a good deal of evidence to support Pritchett’s ideas among contemporary judges and justices.<sup>135</sup> No matter how we measure it, ideology plays a role in judicial decisions.

Figure 2 provides a very simple example for the U.S. Supreme Court. It shows voting in favor of business, in favor of the government (in criminal cases), and in opposition to the civil rights claimant—in other words, it depicts the percentage of conservative decisions. The dark gray bars are Roberts Court Justices appointed by Democratic Presidents (Clinton and Obama), and the lighter bars

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130. See EPSTEIN ET AL., *supra* note 7.

131. See *id.* at ch. 1.

132. See *id.*

133. I do not dwell in this Article on legal factors, motivations, or considerations. Instead I will simply reiterate what Knight and I have said elsewhere: rather than perpetuate the counterproductive, and unrealistic, legalism-versus-realism distinction by treating law as a constraint or as a choice grounded in personal motivation, we should think about the desire to “follow the law” as a factor motivating judges. Epstein & Knight, *supra* note 23, at 25.

134. See *supra* notes 12-14 and accompanying text; see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

135. See EPSTEIN ET AL., *supra* note 7, at 66. The political science literature tends to treat political goals, policy goals, ideological goals, and partisan goals as interchangeable. That is in part because political scientists use partisan measures and ideological measures. See *infra* notes 146-48 and accompanying text.

are Roberts Court Justices appointed by Republican Presidents (Ford, Reagan, Bush I, and Bush II). In each of the three areas, the Republican appointees were significantly more conservative than the Democratic appointees. These same basic patterns, it is worth adding, hold for every issue area going back to 1937, the last Term in our dataset.<sup>136</sup>

What is more, the Justices of our Supreme Court are not unique. From Gunnar Grendstad et al.'s study, we learn that Norwegian Supreme Court justices appointed by social democratic governments are significantly more likely to find for the litigant pursuing a "public economic interest" than are their nonsocialist counterparts.<sup>137</sup> Ideology (as measured by the appointing regime) plays a bigger role in these decisions than most any other factor that Grendstad et al. considered. Christoph Hönnige found that ideology helps predict the votes of judges serving on the French and German Supreme Courts.<sup>138</sup> And, in their study of Spanish Constitutional Court judges, Nuno Garoupa et al. discovered that under certain conditions, "[t]he personal ideology of the judges does matter," which led them to "reject the formalist approach taken by traditional constitutional law scholars in Spain."<sup>139</sup> Matias Iaryczower and Gabriel Katz found that ideology plays a role on the British Appellate Committee, though their account is more nuanced.<sup>140</sup> Ideology, they show, establishes "an informational hurdle for judges to rule in a certain direction."<sup>141</sup> A judge leaning liberal (or conservative) "will vote against his bias if the information based on the facts and on how the law applies to the case under consideration surpasses the threshold imposed by his preferences."<sup>142</sup>

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136. See EPSTEIN ET AL., *supra* note 7, at 112.

137. GRENDSAD ET AL., *supra* note 73.

138. Christoph Hönnige, *The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts*, 32 W. EUR. POL. 963, 979-80 (2009); see also Chris Hanretty, *Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals*, 51 EUR. J. POL. RES. 671 (2012) (studying constitutional judges in Spain and Portugal).

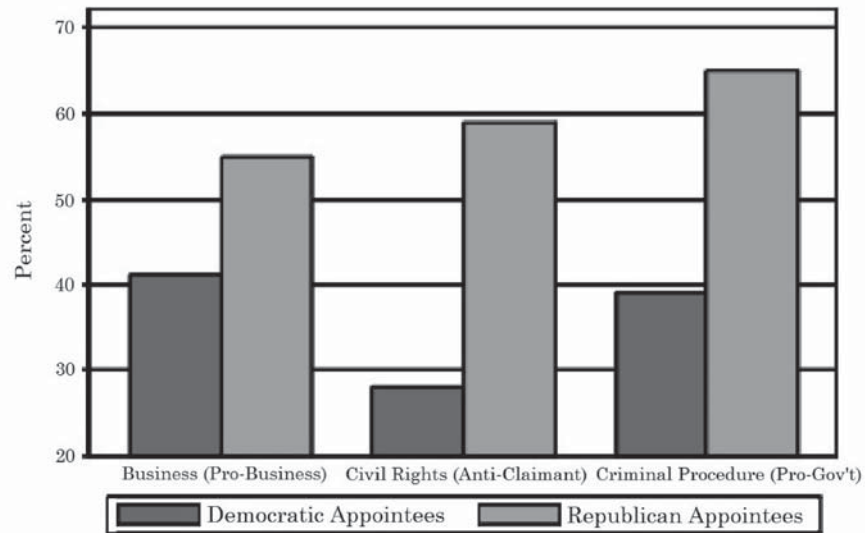
139. Nuno Garoupa et al., *Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*, 29 J.L. ECON. & ORG. 513, 516 (2013).

140. See generally Matias Iaryczower & Gabriel Katz, *More than Politics: Ability and Ideology in the British Appellate Committee*, 32 J.L. ECON. & ORG. 61 (2016).

141. *Id.* at 3.

142. *Id.*

Figure 2. Votes by Justices During the Roberts Court Years,  
Broken Down by the Party of the Appointing President



*Notes:*

- (1) Includes twelve Justices serving during the Roberts Court.
- (2) All differences between Republican and Democratic appointees are statistically significant at  $p < 0.01$ .
- (3) Business: Percent support for business. Data are from Epstein, Landes, and Posner for the 2005-2011 Terms (1173 total votes).<sup>143</sup>
- (4) Civil Rights: Percent opposing civil rights claimants (except in affirmative action cases). Calculated from the Supreme Court Database, using all orally argued cases for the 2005-2014 terms (1713 total votes).<sup>144</sup>
- (5) Criminal Procedure: Percent support for the government. Calculated from the Supreme Court Database, using all orally argued cases for the 2005-2014 Terms (1009 total votes).<sup>145</sup>

Because “ideology does not appear to be [a] uniquely American phenomenon,”<sup>146</sup> there is a virtual cottage industry devoted to measuring the underlying ideological preferences of judges.<sup>147</sup> Some

143. Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1434-37 (2013).

144. See SUP. CT. DATABASE, *supra* note 101.

145. *Id.*

146. GRENSTAD ET AL., *supra* note 73, at 146.

147. On measures of judicial ideology in general, see Lee Epstein et al., *Ideology and the*

measures are exogenous, meaning that they are based on information that is causally prior to any vote cast by the judge. Especially prevalent is the judges' or the appointing authority's party affiliation, as you can tell from some of the studies I just discussed.<sup>148</sup> There are also endogenous measures, which rely on revealed behavior (usually votes or voting patterns) to measure ideology.<sup>149</sup> Both have their uses depending on the project.

At the same time, the studies, especially Iaryczower and Katz's,<sup>150</sup> demonstrate that ideological (or partisan) motivations have their limits—and not only for judges outside the United States. As Figure 2 shows, there is hardly a perfect correlation between ideology and voting: Far short of 0 percent of the votes cast by Democratic appointees were against business; and far short of 100 percent of the Republican votes were in support of business. Moreover, once we move down the judicial hierarchy to the U.S. courts of appeals and district courts, ideology carries even less weight.<sup>151</sup>

To me, the upshot is this: however useful ideology is for understanding judicial behavior, it cannot be the only motivation or explanation of judicial behavior (it may not even be especially

*Study of Judicial Behavior*, in IDEOLOGY, PSYCHOLOGY, AND LAW 705 (Jon Hanson ed., 2012); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133 (2009); Ho & Quinn, *How Not to Lie*, *supra* note 115.

148. Other examples are the Segal-Cover scores, which are based on an analysis of editorials published before the Justice is confirmed. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989). For scores based on the ideology of the home-state senator or appointing president, see Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001), and Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

149. The most prominent of these are the Martin-Quinn scores. See Martin & Quinn, *supra* note 115; see also Jason H. Windett et al., *Estimating Dynamic Ideal Points for State Supreme Courts*, 23 POL. ANALYSIS 461 (2015).

150. See Iaryczower & Katz, *supra* note 140.

151. See EPSTEIN ET AL., *supra* note 7, at ch. 5. There are exceptions. See, e.g., Mark Jonathan McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799, 808-09 (2012) (showing that, in redistricting cases, when precedent is ambiguous, "partisan favoritism ... operates as a significant and strong influence that could overshadow ideological impulses" among federal judges); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1205 (2012) (arguing that no variable other than ideology "proved consistently salient in predicting the outcome" of religious establishment cases in the federal district courts and courts of appeals); see also SUNSTEIN ET AL., *supra* note 106 (noting exceptions in certain areas of the law).

weighty for many judges).<sup>152</sup> For this reason, contemporary studies have offered (or found evidence consistent with) some twenty-odd goals, motives, and preferences, ranging from “reasoning utility”<sup>153</sup> to discretion<sup>154</sup> to income,<sup>155</sup> in addition to legal and ideological considerations.

Attending to all these goals would undermine the project of developing a more realistic conception of judicial behavior; it would devolve into a “what-the-judge-ate-for-breakfast” account.<sup>156</sup> More to the point, 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.

As I mentioned earlier, Landes, Posner, and I make such an effort by introducing the importance of personal motivations for judicial choice, without downgrading the political scientists’ emphasis on

152. I adopt some of this discussion from Epstein & Knight, *supra* note 23, at 25.

153. See Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 474 (1998); see also Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053-54 (1995).

154. See, e.g., Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 186-87 (1991); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994).

155. See, e.g., Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215 (1989). See generally LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997) [hereinafter BAUM, PUZZLE].

For other goals, see LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* (2002); Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everyone Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107 (1983); Mitu Gulati & C.M.A McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157 (1998); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC’Y REV. 579 (2003); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994); Posner, *supra* note 55; Salzberger & Fenn, *supra* note 72; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753; Douglas Glen Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753 (2000).

156. *But see* Danziger et al., *supra* note 94.



ideology or the law community's interest in legal motivations.<sup>157</sup> We argue that given time constraints, judges seek to maximize their preferences over a set of roughly five personal factors (most of which also have implications for ideological and legal goals<sup>158</sup>): job satisfaction,<sup>159</sup> external satisfactions,<sup>160</sup> leisure,<sup>161</sup> salary/income,<sup>162</sup> and promotion.<sup>163</sup>

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157. See generally EPSTEIN ET AL., *supra* note 7.

158. Knight and I explored these in some detail in Epstein & Knight, *supra* note 23, at 19-24.

159. I take job satisfaction to mean “the internal satisfaction of feeling that one is doing a good job,” as well as the more social dimensions of judicial work, such as relations with other judges, clerks, and staff. EPSTEIN ET AL., *supra* note 7, at 48; see also BAUM, PUZZLE, *supra* note 155, at 42-47; Greg A. Caldeira, *The Incentives of Trial Judges and the Administration of Justice*, 3 JUST. SYS. J. 163, 163-64 (1977); Drahozal, *supra* note 153, at 476; Gulati & McCauliff, *supra* note 155, at 165; Shapiro & Levy, *supra* note 153, at 1055-56.

160. Many studies emphasize the “external satisfactions [that come] from being a judge, including reputation, prestige, power, influence, and celebrity.” EPSTEIN ET AL., *supra* note 7, at 48; see, e.g., Drahozal, *supra* note 153, at 475; Miceli & Cosgel, *supra* note 155, at 31-33; Schauer, *supra* note 155, at 7; Shapiro & Levy, *supra* note 153, at 1055-56; Whitman, *supra* note 155, at 753.

161. A preference for leisure plays almost no role in the political science literature, *but see* Klein & Hume, *supra* note 155, at 602, but it comes to the fore in many economic analyses of judging. See, e.g., Bainbridge & Gulati, *supra* note 155, at 105-06; Drahozal, *supra* note 153, at 475-76; Posner, *supra* note 55, at 1-2. The basic idea is that, again like all of us, judges value leisure and, “[a]t some point, the opportunity cost of foregone leisure exceeds the benefits to the judge of additional time spent making decisions.” Drahozal, *supra* note 153, at 476. If so, we would expect judges to engage in behaviors designed to increase or at least protect their leisure time. *Id.*

162. Holding all else equal, judges prefer more salary, income, and personal comfort to less—as do most of us. See BAUM, PUZZLE, *supra* note 155, at 44. The empirical literature provides some evidence that they attempt to maximize these goals by acting in ways consistent with the preferences of their “bosses”—of which the legislature is certainly one. *Id.* at 42-44. Because elected representatives control raises, court budgets (and thus, for example, can augment or reduce the number of staff), and pension plans, it is not surprising to find some deference to their preferences. See, e.g., Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 247-48 (2003); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987-2000*, 31 LEGIS. STUD. Q. 533, 535-36 (2006); Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 91-93 (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 Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376-77 (1992).

163. See EPSTEIN ET AL., *supra* note 7, at 48.

To give you a flavor of the analysis, let me focus on the last motivation: promotion. This would seem to be an important factor influencing the personal utility that judges gain from their work.<sup>164</sup> 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.<sup>165</sup>

To explore the possible effects of this motivation, Landes, Posner, and I compare federal judges with some realistic possibility of promotion with those without much hope of promotion to determine whether the former “audition” for their next job.<sup>166</sup> We hypothesized that these auditioners would impose harsher sentences on criminal defendants to avoid being tagged as soft on crime.<sup>167</sup> The data supported this hypothesis.<sup>168</sup>

But our results, I think, do more than flesh out a particular element in the judge’s personal utility function. They, along with the many other studies I cite in the notes, pose a serious challenge to the standard political science line that judges are driven largely, if not exclusively, by ideology—or what Jack Knight and I have called an “(un)realist(ic) conception of judicial behavior.”<sup>169</sup>

Posing a challenge of a different sort are the many studies assessing the extent to which the judges’ attributes and backgrounds

164. *See id.*

165. *Id.* at 35-36.

166. *Id.* at 341. We were hardly the first to explore promotion effects. *See, e.g.*, Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT’L REV. L. & ECON. 13, 27 (1992) (finding that judges with promotion potential give higher antitrust fines); S. Scott Gaille, *Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings*, 26 J. LEGAL STUD. 371, 372-75 (1997) (finding 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); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487-93 (1998) (showing that district court judges with a higher chance of promotion are more likely to uphold the politically popular federal sentencing guidelines); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 21-23 (2004) (same). On promotion effects in courts abroad, see Ramseyer & Rasmusen, *Japanese Judges*, *supra* note 87 (discussing promotion of judges in Japanese courts); Salzberger & Fenn, *supra* note 72 (studying promotion of judges in the English Court of Appeals).

167. EPSTEIN ET AL., *supra* note 7, at 359.

168. *Id.* at 376-79.

169. Epstein & Knight, *supra* note 23, at 13.



affect their choices.<sup>170</sup> Some focus on the judges' career experiences—for example, do judges who come to the bench from another judicial post make different choices than those who come from the private sector or another public-sector job?<sup>171</sup> Are former prosecutors tougher on defendants?<sup>172</sup> There is also a growing-by-the-day literature on the effect of race and ethnicity on judging—whether on the litigants, the judges, or both.<sup>173</sup>

I am especially interested in the effect of gender, perhaps because of the extraordinary growth in the fraction of female judges over the course of my career—from well under 10 percent of federal judges to a third by 2015.<sup>174</sup>

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170. The study of judges' backgrounds has a long pedigree in the literature on judicial behavior tracing back to at least Sheldon Goldman's seminal study, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966). See also Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 929 (1975) (finding that whether a judge went to school in the South or not helps explain the policy choices made by southern federal judges in race relations cases).

171. See, e.g., James J. Brudeny et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1682 (1999); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 349 (2001).

172. See, e.g., Stuart S. Nagel, *Judicial Background and Criminal Cases*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 333 (1962). We review much of this literature in Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 961-65 (2003). For examples of studies published subsequent to ours, see Luciano Da Ros, *Judges in the Formation of the Nation-State: Professional Experiences, Academic Background and Geographic Circulation of Members of the Supreme Courts of Brazil and the United States*, 4 BRAZILIAN POL. SCI. REV. 102 (2010), [http://socialsciences.scielo.org/pdf/s\\_bpsr/v5nse/scs\\_a04.pdf](http://socialsciences.scielo.org/pdf/s_bpsr/v5nse/scs_a04.pdf) [<https://perma.cc/69GW-EJY3>]; Tracey E. George & Margaret S. Williams, *Venue Shopping: The Judges of the U.S. Judicial Panel on Multidistrict Litigation*, 97 JUDICATURE 196, 196-97 (2014); Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?*, 25 VA. TAX REV. 201 (2005).

173. Some relatively recent examples include David Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167 (2013); Jason L. Morin, *The Voting Behavior of Minority Judges in the U.S. Courts of Appeals: Does the Race of the Claimant Matter?*, 42 AM. POL. RES. 34 (2014); Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75 (2013).

174. According to the Biographical Directory of Federal Judges, of the 791 active judges sitting on the U.S. Supreme Court, the courts of appeals, and the district courts in November 2015, 266 are female. See *Biographical Directory of Federal Judges*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> [<https://perma.cc/5QVW-3BRA>] (last visited

Naturally enough, this development has led many scholars to ask: Do female judges decide cases differently than male judges?<sup>175</sup> Christina Boyd, Andrew Martin, and I took our own stab at answering this question by using a matching method to compare the votes of male and female judges in thirteen areas of the law.<sup>176</sup> We found no difference in twelve of the areas; the exception was gender-based employment discrimination.<sup>177</sup> In these cases, the female judges were 12 percentage points more likely than males to favor the party bringing suit—a significant and substantial difference.<sup>178</sup>

So, almost needless to write, work on the individual judge goes on, but it has taken some interesting turns since Pritchett. I have emphasized explanations for the judicial vote other than partisanship and ideology. But there are at least two other developments that deserve mention. First, studies are now moving beyond the vote with the goal of analyzing the many other choices judges make—for example, whether to recuse,<sup>179</sup> whether to encourage settlement,<sup>180</sup> how to approach oral argument,<sup>181</sup> how to write (efficacious) opinions,<sup>182</sup> to whom to assign the opinion of the court and the impor-

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Apr. 15, 2016).

175. See Boyd, Epstein & Martin, *supra* note 106, at 390-92 (reviewing existing literature on this issue).

176. *Id.* at 389.

177. *Id.* at 406.

178. *Id.* Why the difference? We think it likely has to do with priors. Having likely experienced employment discrimination themselves, the females start with higher priors about the plaintiff's believability. We are exploring this and other possible explanations in a follow-up study.

179. See, e.g., Robert J. Hume, *Deciding Not to Decide: The Politics of Recusals on the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 621 (2014).

180. See, e.g., Christina L. Boyd, *She'll Settle It?*, 1 J.L. & CTS. 193 (2013).

181. See, e.g., RYAN C. BLACK ET AL., ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (2012); LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT (2008); Lee Epstein et al., *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433 (2010); Timothy R. Johnson et al., *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 MARQ. L. REV. 21 (2014).

182. See, e.g., Susan B. Haire et al., *Diversity, Deliberation, and Judicial Opinion Writing*, 1 J.L. & CTS. 303 (2013); Rachael K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. LEGAL ANALYSIS 407 (2012); Ryan J. Owens et al., *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & CTS. 35 (2013); Staton & Vanberg, *supra* note 19.

tance of that choice,<sup>183</sup> and what precedents (and other authority) to cite.<sup>184</sup> (I have more to say about some of these in the next Section.)

Second and relatedly, there is a developing literature on judicial service. Some studies assess judicial performance,<sup>185</sup> and others focus on judges' end-of-career decisions.<sup>186</sup> Both topics are sufficiently important to merit more sustained attention.

### *B. Other Topics and Research Questions*

Work on the individual judge will continue; it is that essential to the judicial behavior project. At the same time, there has been an explosion of research on other topics. Below I very briefly reference ten: (1) judicial independence and dependence, (2) judicial selection and retention, (3) access to court, (4) opinions and precedent, (5) collegial courts, (6) the hierarchy of justice, (7) executives and legislatures, (8) litigants, attorneys, and interest groups, (9) public opinion and macroevents, and (10) implementation and efficacy of judicial decisions.<sup>187</sup>

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183. See, e.g., Jeffrey R. Lax & Kelly Rader, *Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching*, 77 J. POL. 648 (2015).

184. See, e.g., Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325 (2013); Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 J. LEGAL STUD. 151 (2013); Stephen A. Simon, *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study*, 1 J.L. & CTS. 279, 279-81 (2013).

185. See, e.g., Choi et al., *supra* note 50, at 47-51; Elliot Ash & W. Bentley MacLeod, *The Performance of Elected Officials: Evidence from State Supreme Courts 1-4* (Sept. 11, 2015) (unpublished paper), [http://www.law.nyu.edu/sites/default/files/MacLeod\\_and\\_Ash\\_The\\_Performance\\_of\\_Elected\\_Officials.pdf](http://www.law.nyu.edu/sites/default/files/MacLeod_and_Ash_The_Performance_of_Elected_Officials.pdf) [<https://perma.cc/USQ2-3KAA>]; Tom S. Clark et al., *Estimating the Effect of Leisure on Judicial Performance 1-2* (Aug. 6, 2015) (unpublished paper), <http://www.tomclarkphd.com/workingpapers/LeisureAndEffort.pdf> [<https://perma.cc/PKH6-P7U2>].

186. See, e.g., Stephen J. Choi et al., *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. LEGAL STUD. 111 (2013); Tajuana Massie et al., *The Politics of Judicial Retirement in Canada and the United Kingdom*, 2 J.L. & CTS. 273 (2014); Spriggs & Wahlbeck, *supra* note 116, at 573-74.

187. I adapt some of the material to follow from my introductions to *THE ECONOMICS OF JUDICIAL BEHAVIOUR* (L. Epstein ed., 2013) and *COURTS AND JUDGES* (L. Epstein ed., 2005). In the former, I do not discuss all these topics; in the latter, I organize the discussion in a different way, focusing on the selection and retention of judges, judicial decision making, limitations on judicial power, and the role of courts in democracies.

Before turning to these topics, three notes are in order. First, I cannot do justice to any one of them.<sup>188</sup> My goal is rather to supply a bit of information on each if only to induce you to read more deeply. The footnotes provide some pointers (though if I tried to cite all the relevant studies, I would need an entire volume, maybe two, of the *William & Mary Law Review*).

Second, it is highly unlikely that my list of ten is inclusive. In fact, I know I exclude some topics on the ground that they do not fit squarely in the area of judicial behavior. One example is the analysis of clerks and other judicial staff. Although some of the studies attempt to draw a connection between the actors and the choices judges make,<sup>189</sup> many of them are devoted to studying the actors themselves.<sup>190</sup>

Finally, although I take each topic in turn, the ten (eleven if we count “The Judge”) are far from mutually exclusive. This is entirely evident from the material that follows, so let me provide just one example—from Ramseyer and Rasmusen’s study on Japanese judges.<sup>191</sup> Because the authors demonstrate that the judges’ careers hinge on deference to the government,<sup>192</sup> this work makes a contribution to the literature on courts and elected officials. But it just as easily fits into the literature on “The Judge” as it speaks to the judges’ interest in promotion and other careerist motivations.<sup>193</sup>

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188. See EPSTEIN ET AL., *supra* note 7, at 89-99 (providing a reasonably comprehensive bibliography of studies falling under some of the topics I discuss below). I therefore (mostly) emphasize more recent ones in the footnotes to follow.

189. See, e.g., Ryan C. Black et al., *Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process*, 98 MARQ. L. REV. 75, 76-79 (2014); Johnson et al., *supra* note 181, at 22-25; Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1308-13 (2011).

190. Another example is the role of courts in their societies. Although related to several of the topics above (especially (1), (7), (9), and (10)), much of this literature focuses on the circumstances under which judges will invalidate government action on the ground that it violates the Constitution and, so, relates directly to the study of judicial behavior. This literature, both in the United States and abroad, is so substantial and already the subject of good reviews that I (mostly) set it aside in the material to follow.

191. Ramseyer & Rasmusen, *Japanese Judges*, *supra* note 87, at 331-32.

192. *Id.* at 334.

193. See *id.*

### 1. *Judicial Independence and Dependence*

Studies focusing on judicial independence vary in their concerns. Some attempt to define the term “judicial independence,” though there now seems to be convergence on conceptualizing it as the ability of judges to behave sincerely, whatever their sincere preferences may be and regardless of the preferences of other relevant actors, without fear of reprisal and with some confidence that political actors will enforce their decisions.<sup>194</sup> Other work has attempted to develop and analyze measures of de jure (for example, a constitutional guarantee of life tenure) or de facto (expert assessments, for instance) judicial independence<sup>195</sup> to understand why societies are more or less prone to adopt institutions associated with judicial independence<sup>196</sup> and to connect judicial independence to economic prosperity and human rights.<sup>197</sup>

More relevant to the analysis of judicial behavior is research testing the assumption that de jure guarantees of judicial independence, in fact, lead to a more “independent” judiciary. Much of this work explores the relationship (or lack thereof) between measures of de jure and de facto independence<sup>198</sup>—for example, is there a connection between giving judges life tenure and experts rating the judiciary as “independent”? Fewer studies consider the relationship between de jure measures and actual judicial behavior (though the literature I referenced earlier on judicial elections in the states is an exception; more on this momentarily)—for example, is it the case, as the economic literature assumes, that courts with de jure

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194. See, e.g., Julio Ríos-Figueroa & Jeffrey K. Staton, *An Evaluation of Cross-National Measures of Judicial Independence*, 30 J.L. ECON. & ORG. 104, 104-06 (2014).

195. See *id.* at 106-08. For a cross-national measure of de facto independence, see Drew A. Linzer & Jeffrey K. Staton, *A Global Measure of Judicial Independence, 1948-2012*, 3 J.L. & CTS. 223, 223-25 (2015).

196. See, e.g., TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 1-20 (2003); Bernd Hayo & Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence—A Global Survey*, 11 J. EMPIRICAL LEGAL STUD. 159, 159-61 (2014).

197. See, e.g., Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195, 195-96 (2002); Klerman & Mahoney, *supra* note 41, at 2-5; La Porta et al., *supra* note 43, at 446-49.

198. See, e.g., James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J.L. & CTS. 187, 187-90 (2014); Ríos-Figueroa & Staton, *supra* note 194, at 106-08.

independence are more likely to protect rights against government interference in actual judicial decisions? Both lines of research are equally interesting, but at this stage in the field's development, I would welcome more on the latter.

## 2. *The Selection and Retention of Judges*

Societies have composed an impressive array of institutions to govern the selection and retention of judges—from life tenure, to a single nonrenewable term, to periodic election and reelection by the electorate.<sup>199</sup> And a substantial body of work considers the decisions of the actors who select (or retain) the judges—the President and Senate for federal judges, and governors, legislatures, commissions, and voters for state judges.<sup>200</sup>

The literature on judicial behavior is more concerned with whether and how these various institutions affect the choices judges make<sup>201</sup>—and so is related to the work on judicial independence. If we define judicial independence as I have above, then we might expect that forcing judges to face the electorate or the legislature for renewal—relative to providing them with life tenure—leads to a more dependent judiciary because there are higher opportunity costs for voting on the basis of their sincere preferences. On this

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199. For a list of selection and retention systems in the United States, see *Retention Evaluation Programs*, NAT'L CTR. FOR ST. CTS., [http://judicialselection.us/judicial\\_selection/methods/judicial\\_performance\\_evaluations.cfm?state=](http://judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state=) [https://perma.cc/HR6Q-N69Q] (last visited Apr. 15, 2016), and *Selection of Judges*, NAT'L CTR. FOR ST. CTS., [http://judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) [https://perma.cc/RTZ8-4V4F] (last visited Apr. 15, 2016). For systems used in Europe, see Lee Epstein & Jack Knight, *Courts and Judges*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 170, 178 (Austin Sarat ed., 2004), and Epstein et al., *supra* note 61, at 11-15.

200. *E.g.*, JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012); Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 *AM. POL. SCI. REV.* 525, 525-27 (1990); Chris Hanretty, *The Appointment of Judges by Ministers: Political Preferment in England, 1880-2005*, 3 *J.L. & CTS.* 305, 305-07 (2015).

201. There is a related body of literature that looks at whether the rules governing the appointment and retention of judges affect the types of people who are selected to serve as judges. *See, e.g.*, Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 *ST. POL. & POL'Y Q.* 329, 329-31 (2003); Margaret Williams, *Women's Representation on State Trial and Appellate Courts*, 88 *SOC. SCI. Q.* 1192, 1192-95 (2007).



theory, a life-tenured system should lead to a more independent judiciary, with judges freer to vote as they desire.

There seems to be some truth to this. Recall Tabarrok and Helland's study (among many others), demonstrating that when judges in the United States know that they must face the electorate to keep their jobs, the judges engage in sophisticated behavior, such as ruling for in-state plaintiffs and against criminal defendants.<sup>202</sup>

These results are not surprising: when societies subject their judges to reelection, they are presumably trying to induce accountability. But what of life-tenured judges? Oddly, research has shown that U.S. Supreme Court Justices tend to vote as their appointing President would—almost as if the President appointed himself to the Court.<sup>203</sup> Perhaps this recurring pattern reflects loyalty on the part of life-tenured Justices,<sup>204</sup> or perhaps life-tenured Justices feel free to vote sincerely (without fear of reprisal) because they share the preferences of the regime that appointed them.

And therein lies the rub for life-tenured schemes. Although they are designed to induce judicial independence, once the appointing regime changes, they can produce the opposite effect, or at least cause institutional problems for the judges. There is some limited evidence (not to mention famous anecdotes<sup>205</sup>) that as a life-tenured Court ages, attacks from the elected branches follow, with the judges ultimately caving to the pressure.<sup>206</sup> Seen in this way, nonrenewable terms, which are used in many European countries for their constitutional court judges, may be a better mechanism than life

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202. See Tabarrok & Helland, *supra* note 25, at 186-87.

203. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 135-41 (2005); Jeffrey A. Segal et al., *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 *POL. RES. Q.* 557, 557-70 (2000).

204. Because Presidents cannot really retaliate against a particular Justice once the Justice is on the bench, I was surprised when Eric Posner and I found some evidence of a loyalty effect. See Lee Epstein & Eric Posner, *Supreme Court Justices' Loyalty to the President* (Dec. 10, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2702144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702144) [<https://perma.cc/JM8N-P5YV>].

205. The battle between FDR and the Supreme Court is the most obvious example. For a great empirical account, see Ho & Quinn, *A Switch in Time*, *supra* note 115.

206. See, e.g., Epstein et al., *supra* note 61, at 34-36.

tenure for inducing judicial independence.<sup>207</sup> But we need far more work—necessarily comparative work—to get a better handle on this.

### 3. Access to Judicial Power

Accessing courts is another substantial area of study in the judicial behavior literature, and it covers a lot of terrain. In past decades, the emphasis was on agenda setting in apex courts—mostly on the Supreme Court's decision to grant or deny certiorari. I think here of Gregory Caldeira, John Wright, and Christopher Zorn's justifiably famous analysis of case selection in the Supreme Court.<sup>208</sup> They show that Justices are less likely to vote to grant certiorari (that is, to agree to hear a case) when they think they will be on the losing side of the case if certiorari is granted, even if they would like to reverse the decision below (sometimes called a "defensive denial").<sup>209</sup> Caldeira et al. also supply evidence of "aggressive grants": voting to hear a case when the Justice agrees with the lower court's decision because he believes that the majority of the other Justices do too.<sup>210</sup> This sort of strategic behavior may be contributing to the noticeable decline in the Supreme Court's plenary docket.<sup>211</sup>

Work on certiorari is ongoing,<sup>212</sup> but scholars also have turned their attention to how courts interpret various threshold requirements.<sup>213</sup> In one of the first systematic studies,<sup>214</sup> C. K. Rowland and

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207. *See id.* at 33-34. Had some version of nonrenewable terms been in effect—say one creating a tenure of nine years—only three of the Justices serving on the 1935-1937 Court would have been on the bench: Hughes (appointed Chief Justice in 1930); Owen J. Roberts (1930); and Benjamin Cardozo (1932). *See id.* at 34.

208. Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999).

209. *See id.* at 556-58.

210. *See id.*

211. *See id.* at 570.

212. *See, e.g.*, FLEMMING, *supra* note 98, at 1-3; Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062 (2009).

213. *See, e.g.*, Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591 (2010); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004).

214. Other early work includes Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979), and Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An*



Bridget Todd found that Reagan appointees to the U.S. district courts were more likely to grant standing to “upperdog” litigants, relative to Nixon, Ford, and Carter appointees.<sup>215</sup> Also, following from the late, great William H. Riker’s work on the “art of manipulation,”<sup>216</sup> studies have explored whether and to what extent judges raise questions about standing, mootness, and the like to turn around a seemingly foregone loss.<sup>217</sup>

Finally, I would include in this category research on how judges use various procedures to kick or keep cases on the docket. The Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*<sup>218</sup> and *Ashcroft v. Iqbal*<sup>219</sup> (“*Twiqbal*”), which made it easier for district courts to dismiss cases before any pretrial discovery, have led to a virtual cottage industry of studies assessing the impact of these decisions on lawyers and lower courts.<sup>220</sup> Depending on the case, the design, the data, and so on, studies have reached different conclusions. In a particularly smart article, William Hubbard finds that “*Twombly* precipitated no significant change in dismissal rates, even after accounting for selection effects.”<sup>221</sup> Our analysis concluded much the same about *Twombly*, but not so of *Iqbal*. In the post-*Iqbal* period (June 2009 to June 2010), the predicted probabil-

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*Analysis of the Voting Behavior of the Burger Court Justices, 1969-1976*, 36 W. POL. Q. 71 (1983).

215. See C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175, 180-82 (1991). More recent studies include FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS 1-2*, 178-79 (2007), and Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 LAW & SOC’Y REV. 129 (2010).

216. E.g., WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION*, at ix-xi (1986); William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AM. POL. SCI. REV. 1, 14-15 (1984).

217. See, e.g., Ryan C. Black et al., *Trying to Get What You Want: Heresthetical Maneuvering and U.S. Supreme Court Decision Making*, 66 POL. RES. Q. 819, 819 (2013); Lee Epstein & Olga Shvetsova, *Heresthetical Maneuvering on the US Supreme Court*, 14 J. THEORETICAL POL. 93, 95-97 (2002); Greg Goelzhauser, *Avoiding Constitutional Cases*, 39 AM. POL. RES. 483, 483 (2011).

218. 550 U.S. 544 (2007).

219. 556 U.S. 662 (2009).

220. For a review of the “[s]ome twenty published and unpublished studies [offering] systematic empirical analysis of *Twiqbal*’s impact,” see David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 n.7 (2013).

221. William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 35 (2013).

ity of dismissal increased by somewhere between 35 and 49 percent relative to their pre-*Iqbal* levels.<sup>222</sup>

#### 4. *Opinions and Precedent*

In the course of deciding cases, judges face countless choices, including, in many societies, whether to join the majority or write separately, and then how to craft their opinions. A substantial literature addresses these choices. For example, Landes, Posner, and I take up the puzzle of why judges sometimes do not dissent when they disagree with the majority.<sup>223</sup> Our basic argument is that dissents impose substantial collegiality costs on the other judges on the panel by making them work harder (for example, increasing the length of majority opinions), while the benefits of dissenting (such as future citations) are few.<sup>224</sup> Although “dissent aversion” is stronger in the U.S. circuit courts (and in many courts abroad) than in the U.S. Supreme Court, some evidence suggests that it exists there too, especially in cases in which the ideological stakes are low, for even in the Court, dissents can be the source of workplace irritation.<sup>225</sup> Virginia Hettinger, Stefanie Lindquist, and Wendy Martinek consider dissent from a different angle, asking whether purely ideological or strategic accounts best explain a judge’s decision to join the majority.<sup>226</sup> Their answer? Ideological accounts.<sup>227</sup>

Other studies are trained on majority opinions and consider how they make use of precedent and other materials (legal or otherwise). I have already mentioned work addressing whether and why lower court judges follow precedent established by higher courts.<sup>228</sup> A

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222. See Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011).

223. See *id.* at 101.

224. See *id.* at 102-03. *But see* Deborah Beim & Jonathan P. Kastellec, *The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Cases*, 76 J. POL. 1074, 1074 (2014) (arguing that dissenting has more benefits, and explaining that “this rarity of dissent means they are informative: when judges do dissent, they influence *en banc* review in a manner consistent with the preferences of full circuits”).

225. See Epstein et al., *supra* note 222, at 118-20.

226. Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 123-24 (2004).

227. See *id.* at 123.

228. See *supra* notes 88-91 and accompanying text.

fascinating literature also details how judges develop their arguments and choose which materials to cite (or “borrow”), including internal precedent,<sup>229</sup> lower court opinions,<sup>230</sup> foreign law,<sup>231</sup> legal and nonlegal information from briefs,<sup>232</sup> and “originalist” sources.<sup>233</sup> Work using plagiarism software to compare the parties’ briefs and the Justices’ opinions too has been quite eye-opening.<sup>234</sup>

Jeffrey Staton and Georg Vanberg also analyze opinions, but they are less concerned with the sources the judges use than with the way the judges write them.<sup>235</sup> They want to know why judges sometimes write vague opinions when the judges could be more decisive.<sup>236</sup> The result they derive is interesting: assuming the costs to implementers of deviating from a clear court decision are higher than the costs of deviating from a vague decision (because noncompliance is easier to detect), then a court facing “friendly” implementers will write clear opinions.<sup>237</sup> Clarity increases pressure for—and

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229. See, e.g., Black & Spriggs, *supra* note 184, at 327-28 (2013); Lupu & Fowler, *supra* note 184, at 152-53.

230. See, e.g., Pamela C. Corley et al., *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31 (2011).

231. See, e.g., Stephen A. Simon, *The Supreme Court’s Use of Foreign Law in Constitutional Rights Cases: An Empirical Study*, 1 J.L. & CTS. 279, 280-81 (2013).

232. See, e.g., Paul M. Collins, Jr. et al., *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC’Y REV. 917, 917 (2015); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties’ Briefs*, 61 POL. RES. Q. 468, 477 (2008).

233. See, e.g., Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 329-30 (2005); Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 247 (2005); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC’Y REV. 113, 113 (2002).

234. E.g., Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946-2013*, MISS. L.J. (forthcoming), <http://papers.ssrn.com/sol3/papers.cfm?abstract=2574451> [<https://perma.cc/WG66-9HER>]. This paper received write-ups in the *New York Times* and the *ABA Journal*, among other outlets. See Adam Liptak, *Clarence Thomas, a Supreme Court Justice of Few Words, Some Not His Own*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/us/justice-clarence-thomas-rulings-studies.html> [<https://perma.cc/3PT4-S8L6>]; Debra Cassens Weiss, *Which SCOTUS Justices Crib the Most from Briefs?*, A.B.A. J. (Aug. 28, 2015, 9:36 AM), [http://www.abajournal.com/news/article/which\\_scotus\\_justices\\_crib\\_the\\_most\\_from\\_briefs](http://www.abajournal.com/news/article/which_scotus_justices_crib_the_most_from_briefs) [<https://perma.cc/ZM8F-F4NU>].

235. See Staton & Vanberg, *supra* note 19, at 504.

236. *Id.*

237. See *id.* at 507.

thus the likelihood of—compliance.<sup>238</sup> But when the probability of opposition from implementers is high, clarity could be costly to the judges; if policymakers are determined to defy even a crystal clear decision, they would highlight the relative lack of judicial power.<sup>239</sup> To soften anticipated resistance, courts may be purposefully vague.<sup>240</sup>

Staton and Vanberg provide several examples of their theory in action,<sup>241</sup> but more systematic follow-ups now exist. Ryan C. Black et al., for example, use software called Linguistic Inquiry and Word Count (LIWC) to show that Justices strategically craft language in their opinions, adjusting the level of clarity to correspond to their assessment of the likelihood of noncompliance by external actors, including federal agencies and the states.<sup>242</sup> Pamela Corley and Justin Wedeking find that lower courts are more likely to follow Supreme Court decisions that are written at higher degrees of certainty, with certainty also assessed using LIWC.<sup>243</sup>

### 5. Collegial Courts

A cottage industry of studies exists on the relations among judges who serve on the same court. Many studies focus on so-called “panel,” “collegial,” or “peer” effects, asking whether the case’s outcome (or a judge’s vote) would have been different had a single judge, and not a panel, decided the case<sup>244</sup>—and, if so, why? The foundational work is Frank Cross and Emerson Tiller’s *Judicial Partisanship and Obedience to Legal Doctrine*, which argues that the presence of a

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238. *Id.*

239. *Id.*

240. *Id.*

241. Staton and Vanberg point to the United States Supreme Court’s decision in the school desegregation case *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955), and the German Constitutional Court’s rulings in two important taxation cases. See Staton & Vanberg, *supra* note 19, at 504. In both, the Justices’ concerns about compliance and, ultimately, legitimacy, led the courts to be ambiguous about the precise actions that would be consistent with their decision. *Id.*

242. RYAN C. BLACK ET AL., U.S. SUPREME COURT OPINIONS AND THEIR AUDIENCES 56-57 (2016).

243. See Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 LAW & SOC’Y REV. 35, 36-37 (2014).

244. Definition adopted from Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeals*, 23 J.L. ECON. & ORG. 421, 422 (2007).

“whistleblower” on the panel—“a judge whose policy preferences differ from the majority’s and who will expose the majority’s manipulation or disregard of the applicable legal doctrine” to a higher court—can constrain his or her colleagues from behaving in accord with their own preferences.<sup>245</sup> Some studies find evidence of this phenomenon,<sup>246</sup> while others offer other explanations for moderation among judges serving on an ideologically mixed panel. “Dissent aversion,” which I just mentioned, is an example of the latter.<sup>247</sup>

Cross and Tiller’s study, and work following from it, focuses on the U.S. courts of appeals, in which judges decide cases in panels of three (except in those cases heard en banc). Collegial effects, though, are not limited to courts sitting in panels. The Caldeira et al. study of certiorari is an example of collegial effects on a court that sits en banc.<sup>248</sup> And other studies demonstrate that Justices try to influence one another through memoranda<sup>249</sup> and that group effects also play a role in the Chief Justice’s assignment of the majority opinion. A formal model developed by Jeffrey Lax and Charles Cameron, for example, yields a prediction that the Chief Justice will favor Justices more (ideologically) extreme than himself in part because “more extreme writers must invest more heavily in judicial craftsmanship, in order to hold the majority.”<sup>250</sup> All in all, these studies demonstrate that a Justice’s choices might have been different if the outcome depended on only his behavior and not on the behavior of his eight other colleagues.

Cross and Tiller’s line of work mostly draws attention (yet again) to ideological motivations.<sup>251</sup> But some research also considers panel effects relating to gender and race.<sup>252</sup> The question in these studies

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245. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156, 2174 (1998).

246. *E.g.*, Kastellec, *supra* note 244, at 423.

247. *See supra* notes 223-27 and accompanying text.

248. *See* Caldeira, Wright & Zorn, *supra* note 208, at 550.

249. *See, e.g.*, Paul J. Wahlbeck et al., *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294, 295-96 (1998).

250. Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276, 293 (2007).

251. *See* Cross & Tiller, *supra* note 245, at 2155-56.

252. *E.g.*, Cox & Miles, *supra* note 173, at 4; Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 299-300 (2004); Jonathan R. Kastellec, *Racial Diversity*

is whether traditional judges (usually defined as white, male, or both) vote differently when they are on a panel with, say, a female or a black judge. The answer is that they do, though the effect might be limited to a particular set of cases.<sup>253</sup> In our analysis of gender and judging, for example, we find gender effects only in gender-based employment suits.<sup>254</sup> A male judge tends to be more plaintiff-friendly when sitting with a female than when he sits with two other males.<sup>255</sup>

### 6. *The Hierarchy of Justice*

Studies of the hierarchy of justice explore interactions between higher and lower courts and so are related to literature on the collegial court. The efficacy of whistleblowing, for example, hinges on the ability of a higher court to reverse the decision of a lower court.<sup>256</sup>

Many of the studies make use of principal-agent theory, which, in this literature, assumes heterogeneous ideological preferences between upper and lower court judges and emphasizes how a higher court can extract conformity from a lower court with different preferences.<sup>257</sup> More concretely, the typical starting point in these papers is that lower court judges no less than higher court judges are interested in etching their political values into law.<sup>258</sup> But lower court judges face a substantial constraint in their quest to do so: the

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*and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 168 (2013).

253. See, e.g., Cox & Miles, *supra* note 173, at 4 (“When a white judge sits on a panel with at least one African-American judge, she becomes roughly 20 percentage points more likely to find a section 2 violation.”); Farhang & Wawro, *supra* note 252, at 324 (“[M]ale judges vote more liberally when one woman serves on a panel with them as compared to all-male panels.”); Kastlelec, *supra* note 252, at 167 (“Randomly assigning a black counterjudge—a black judge sitting with two nonblack judges—to a three-judge panel of the Courts of Appeals nearly ensures that the panel will vote in favor of an affirmative action program.”).

254. Boyd, Epstein & Martin, *supra* note 106, at 406.

255. Literature also looks at collegial effects on other choices judges make, including their behavior during oral arguments, which can be conceptualized as part of the deliberative process. See, e.g., BLACK ET AL., *supra* note 181, at 3-5; WRIGHTSMAN, *supra* note 181, at ix-xi; Epstein et al., *supra* note 181, at 433.

256. See, e.g., Cross & Tiller, *supra* note 245, at 2174.

257. I adopt this discussion from Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 891-92 (2010).

258. See *id.*



possibility of sanctioning from a higher court. To the extent that higher courts cannot hire, fire, promote, demote, financially reward, or penalize members of trial or intermediate courts, the studies propose various mechanisms for keeping the lower courts honest, including strategic auditing,<sup>259</sup> implicit tournaments among lower courts,<sup>260</sup> en banc review,<sup>261</sup> articulating rules rather than standards,<sup>262</sup> and, of course, whistleblowing.<sup>263</sup>

Other work, though rarer, reverses the usual approach to lower-higher court relations and attends to the fact that lower court judges are fully capable of limiting the commands of higher courts by avoiding, limiting, or even defying them—as many did with the U.S. Supreme Court’s desegregation decisions.<sup>264</sup> In these studies, the limitation imposed by the hierarchy of justice “comes full circle”: higher courts “must take into account the reaction of inferior judges, and lower courts must attempt to divine the counter-reaction” of superior courts.<sup>265</sup>

However important and interesting this avenue of research—whether taking a bottom-up or top-down approach—it is not without its share of detractors.<sup>266</sup> In a study I mentioned earlier, Pauline Kim questions models that rest on the assumption of ideological value conflicts between lower and higher courts on the ground that

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259. *E.g.*, Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 101 (2000); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 650-51 (2000).

260. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1634-35 (1995).

261. See Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 56 (2009).

262. See Joseph L. Smith & James A. Todd, *Rules, Standards, and Lower Court Decisions*, 3 J.L. & CTS. 257, 258 (2015).

263. See, *e.g.*, Cross & Tiller, *supra* note 245, at 2156; Kastellec, *supra* note 244, at 421. Beim, Hirsch, and Kastellec connect whistleblowing to en banc review. See Beim et al., *supra* note 112.

264. The classic study here is Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1018-20. See also Westerland et al., *supra* note 257, at 891.

265. Murphy, *supra* note 264, at 1031.

266. See Kim, *supra* note 46, at 536-37; see also Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 332-33 (2013). Both argue that “the principal-agent model does not map so neatly onto the structure of the [federal] judicial hierarchy.” Kim, *supra* note 46, at 537; see Nash & Pardo, *supra*, at 337 (quoting Kim, *supra* note 46, at 537).

they “distort the role that law plays in judicial decisionmaking.”<sup>267</sup> Rather than assuming that “judges are primarily motivated by their policy preferences,” she suggests that:

[We] might view judges as engaged in an interaction that involves both elements of cooperation and conflict in a type of mixed-motive coordination game. From this perspective, judges share a common goal—the production of a (relatively) coherent body of rules that can govern primary behavior in the real world and is viewed as authoritative.<sup>268</sup>

Kim’s account does not deny that judges are “*making* law”; it simply suggests that they are doing it in a cooperative way so as to enhance their decisions and institutional legitimacy.<sup>269</sup> Her insights strike me as so sensible (and realistic) that future work should pay heed.

Finally, I should note that Kim is not the only one who has sought to move the focus from ideology to other factors that may affect relations between lower and upper courts. In a provocative article, Maya Sen demonstrates that U.S. courts of appeals panels are more likely to overturn the decisions of black district court judges than those of similar white judges.<sup>270</sup> Equally interesting are the results of Jordi Blanes Vidal and Clare Leaver’s study of English courts, showing favoritism in the review process.<sup>271</sup> Their results are reminiscent of an earlier article demonstrating that U.S. Supreme Court Justices tend to affirm cases coming from the courts of appeals where they served.<sup>272</sup>

### 7. Executives and Legislatures

Much of the work on the relationship between courts and elected actors bears a family resemblance to the hierarchy of justice studies

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267. Kim, *supra* note 46, at 538.

268. *Id.* at 572 (footnote omitted).

269. *Id.* at 575.

270. Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. LEGAL STUD. S187, S220-21 (2015).

271. Jordi Blanes i Vidal & Clare Leaver, *Bias in Open Peer-Review: Evidence from the English Superior Courts*, 31 J.L. ECON. & ORG. 431, 435-36 (2015).

272. Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833, 873-77 (2009).

in that it too uses a strategic framework to explore their interactions. In this literature, the judges must attend to the preferences and likely actions of the government if the judges are to achieve their goals, which are usually framed in ideological or institutional terms.<sup>273</sup> If they do not, they run the risk of retaliation from elected actors, thereby making it difficult for judges to establish enduring policy, or maintain legitimacy.<sup>274</sup>

A fair amount of empirical research validates this claim in the statutory context.<sup>275</sup> This makes sense: when the U.S. federal courts interpret statutes, Congress can override their interpretations by enacting new law. But what of constitutional review? Although Congress cannot pass legislation to overturn decisions reached by courts on constitutional grounds,<sup>276</sup> it can take aim at courts in other ways: withdrawing their jurisdiction, eradicating judicial review, approving constitutional amendments to overturn decisions, slashing the court's budget, and impeaching judges.<sup>277</sup> These threats, I hasten to note, are not merely theoretical. Tom Clark's study identifies nearly nine hundred court-curbing proposals in the U.S. Congress between 1877 and 2008.<sup>278</sup> More to the point, his work, along with an article by Jeffrey Segal and his colleagues,<sup>279</sup> demonstrates that when Congress threatens the Supreme Court's authority, the Court cowers,

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273. *E.g.*, John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 263-64 (1992); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263, 295-96 (1990).

274. *See* Gely & Spiller, *supra* note 273, at 265.

275. *See, e.g.*, Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 248 (2003); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 403 (1999); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463, 465 (1992). *But see* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42-43 (1997).

276. At least not in theory. In practice, the United States Congress has enacted over forty statutes designed to reverse Supreme Court decisions that invalidated federal or state laws. *See* James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447, 458-59 (1997).

277. *See* Rosenberg, *supra* note 162, at 376-77.

278. Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 979 (2009).

279. Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011).

exercising greater judicial self-restraint or reaching decisions closer to congressional preferences.<sup>280</sup>

These studies focus on the United States. In parts of the developing world, governments have taken even more radical steps to tame their courts, with sanctions ranging from impeachment, removal, and court packing, to criminal indictment, physical violence, and even death. Helmke's study and other work running along similar lines show that judges respond to these potential threats by defecting against the old regime,<sup>281</sup> avoiding cases that may contribute to further escalation,<sup>282</sup> going public,<sup>283</sup> and passing up posts on apex courts altogether,<sup>284</sup> among other strategies.

### 8. *Litigants, Attorneys, and Interest Groups*

Under this category fall many different kinds of studies. One set addresses questions such as whether, where, and how to litigate.<sup>285</sup> Much of this work tends to focus on the choices made by external actors rather than on the judges' behavior—although, of course, the choices courts and judges have made (or are likely to make) figure into the actors' calculations.<sup>286</sup>

Two other strands make a tighter connection between litigants/lawyers and judging. One focuses on the parties, asking whether certain types are more likely than others to win in court. Many of these studies follow from Marc Galanter's classic article *Why the "Haves" Come Out Ahead*<sup>287</sup>—and there are piles of them, whether

280. See Clark, *supra* note 278, at 981; Segal et al., *supra* note 279, at 99-100.

281. See Helmke, *supra* note 63, at 296-98.

282. See Epstein et al., *supra* note 79, at 131.

283. See Varun Gauri et al., *The Costa Rican Supreme Court's Compliance Monitoring System*, 77 J. POL. 774, 775-76 (2015).

284. See Santiago Basabe-Serrano, *Judges Without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999-2007*, 44 J. LATIN AM. STUD. 127, 156-58 (2012).

285. *E.g.*, William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151 (2013); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

286. However, Daniel Klerman's work on forum selling demonstrates that judges consciously encourage litigants to file in their districts. *E.g.*, Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

287. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal*

on courts in the United States<sup>288</sup> or abroad.<sup>289</sup> As far as I can tell, most tend to confirm Galanter's hypothesis that the courts favor "repeat players" over "one-shotters."<sup>290</sup>

Another related strand focuses on whether lawyering has an effect on judicial decisions. In one clever study, the authors used a Justice's notes from oral arguments, which graded the attorneys, to find out whether their arguments make any difference.<sup>291</sup> They do. For years, social scientists have been studying whether amicus curiae briefs filed by interest groups influence the Supreme Court. Although some judges say no,<sup>292</sup> recent research points in a different direction. Janet Box-Steffensmeier et al., for example, show that the ability of groups to influence the Court depends on the group.<sup>293</sup> "Groups who are more connected with other interest groups and collaborate with other well-connected groups ... have a greater effect on the probability that a [J]ustice votes in their favor, compared to ...

*Change*, 9 LAW & SOC'Y REV. 95 (1974).

288. See, e.g., Ryan C. Black & Christina L. Boyd, *US Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J.L. ECON. & ORG. 286 (2012); Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464 (1992); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992).

289. See, e.g., Kong-Pin Chen et al., *Party Capability Versus Court Preference: Why Do the "Haves" Come Out Ahead?—An Empirical Lesson from the Taiwan Supreme Court*, 31 J.L. ECON. & ORG. 93 (2015); Stacia L. Haynie, *Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court*, 56 J. POL. 752 (1994); Xin He & Yang Su, *Do the "Haves" Come Out Ahead in Shanghai Courts?*, 10 J. EMPIRICAL LEGAL STUD. 120 (2013).

290. See Galanter, *supra* note 287, at 97-104. But see Yoav Dotan, *Do the "Haves" Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice*, 33 LAW & SOC'Y REV. 1059, 1059-61 (1999).

291. Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006).

292. Judge Posner once wrote:

After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

293. See Box-Steffensmeier et al., *supra* note 114.

groups who participate on their own” or collaborate with less well-connected groups.<sup>294</sup>

And now there has been a spate of research suggesting that a small group of elite private-sector lawyers not only have been “dominating advocacy” before the Supreme Court,<sup>295</sup> but have been enormously successful in gaining access and in winning their cases on the merits.<sup>296</sup> Much of this research is descriptive, meaning that it does not attend to other factors that could explain the lawyers’ success. So we will have to wait to see if the findings hold up under more systematic analysis, though I suspect they will. These lawyers are, after all, quintessential “repeat players.”

### 9. Public Opinion and Macroevents

There are at least two ways to think about the relationship between the public and the court: First, how do court decisions affect the public;<sup>297</sup> and second, how does the public affect courts.<sup>298</sup> Though the first results from judicial behavior, the second relates more directly to the choices judges make.

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294. *Id.* at 458. Other studies also found some influence of amici. *See, e.g.*, PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2008); Paul M. Collins, Jr. & Wendy L. Martinek, *Judges and Friends: The Influence of Amici Curiae on U.S. Court of Appeals Judges*, 43 AM. POL. RES. 255 (2015).

295. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1487 (2008).

296. *See, e.g., id.*; *see also* Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/J3BU-C5WF>].

297. The classic work is Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989) (finding that the Court’s decisions have an impact on the public but that the impact manifests itself as both increased support and increased opposition for the position taken by the Court’s majority). For more recent work reaching much the same conclusion as Franklin and Kosaki, *see* Aziz Z. Huq & Avital Mentovich, *The Polarizing Court* (2015) (unpublished paper), <http://law.huji.ac.il/upload/ThePolarizingCourtAvitalMentovich.pdf> [<https://perma.cc/XH4F-56F9>].

298. There are others. James L. Gibson has generated a large body of work on the legitimacy of courts. *See, e.g.*, James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195 (2011); James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court’s Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162 (2015); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998); James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003).



Barry Friedman's book,<sup>299</sup> mentioned previously, provides a reasonable point of departure in this line of research.<sup>300</sup> Using qualitative data and historical methods, Friedman provides an unequivocal answer to the question of whether "we the people" influence the decisions of the U.S. Supreme Court: we do. Large-*n* studies do not disagree. At the risk of generalizing, they tend to find that when the "mood of the public" is liberal (or conservative), the Court is significantly more likely to issue liberal (or conservative) decisions.<sup>301</sup> But *why* is the real question. Friedman posits that the Justices bend to the will of the people because the Court requires public support to remain an efficacious branch of government.<sup>302</sup> The existing quantitative studies could be read to support this view, but they are equally consistent with another mechanism: that "the people" includes the Justices. On this account, the Justices do not respond to public opinion directly but rather respond to the same events or forces that affect the opinion of other members of the public.<sup>303</sup>

The "macroevent" studies raise a similar question.<sup>304</sup> Several systematic analyses, for example, find that Justices are more deferential to the government (or the President) in times of war.<sup>305</sup> But

299. FRIEDMAN, *supra* note 53.

300. It is not, however, the first to tackle the question of whether the public influences the Court. *See, e.g.*, Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293 (2008); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996).

301. *E.g.*, Giles et al., *supra* note 300, at 303-04; McGuire & Stimson, *supra* note 300, at 1033; Mishler & Sheehan, *supra* note 300, at 196-98.

302. *See* FRIEDMAN, *supra* note 53, at 383.

303. That is why we titled our paper (written for a symposium on Professor Friedman's book), *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010). For a possible answer (supportive of Friedman's argument), see Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011).

304. I focus here on war, but there is also a nascent body of literature that looks at the effect of the economy on judicial decisions. *See, e.g.*, Thomas Brennan et al., *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191 (2009); Douglas Rice, *On Courts and Pocketbooks: Macroeconomic Judicial Behavior Across Methods of Judicial Selection*, 2 J.L. & CTS. 327 (2014); Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J.L. & SOC. POL'Y 87 (2010).

305. *See, e.g.*, NANCY STAUDT, *THE JUDICIAL POWER OF THE PURSE: HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS* (2011); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 109-10 (2005); William G.

again the mechanism is not clear. Do the Justices believe that they should take a back seat to the elected branches during wartime, or, again, are they swept up in “[t]he great tides and currents which engulf the rest of men,” as Cardozo put it?<sup>306</sup> No doubt future studies will attempt to solve what amounts to a tricky problem of behavioral equivalence.

### *10. Implementation and Efficacy of Judicial Decisions*

I see three interrelated research topics in this category. One focuses on systematically assessing the effect of particular judicial decisions.<sup>307</sup> I have already mentioned the *Twombly/Iqbal* studies,<sup>308</sup> and there may be just as many on the impact of *Citizens United*.<sup>309</sup> A second set focuses on the actors who must implement, or comply with, court decisions.<sup>310</sup> Sometimes these are lower court judges; think *Twiqbal*, or more famously, *Brown v. Board of Education*.<sup>311</sup> But many times the implementors are federal agencies, state actors, and, of course, the public.<sup>312</sup>

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Howell & Faisal Z. Ahmed, *Voting for the President: The Supreme Court During War*, 30 J.L. ECON. & ORG. 39, 68 (2014).

306. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

307. Of course, no review on the effect of judicial decisions would be complete without mentioning GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 1991), which at its core asks whether courts are effective policymakers, and whether courts can yield social change. His answer is generally no: courts cannot generate large-scale social change unless the ruling regime supports them. *The Hollow Hope* spawned an enormous literature, much of which is qualitative or descriptive.

308. See *supra* notes 219-22 and accompanying text.

309. E.g., Wendy L. Hansen et al., *The Effects of Citizens United on Corporate Spending in the 2012 Presidential Election*, 77 J. POL. 535 (2015); Raymond J. La Raja & Brian F. Schaffner, *The Effects of Campaign Finance Spending Bans on Electoral Outcomes: Evidence from the States about the Potential Impact of Citizens United v. FEC*, 33 ELECTORAL STUD. 102 (2014); Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315 (2014); Timothy Werner, *The Sound, the Fury, and the Nonevent: Business Power and Market Reactions to the Citizens United Decision*, 39 AM. POL. RES. 118 (2011).

310. See generally BRADLEY C. CANNON & CHARLES A. JOHNSON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (2d ed. 1999).

311. See, e.g., Giles & Walker, *supra* note 170.

312. See, e.g., Susan B. Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates Since Roe v. Wade*, 42 J. POL. 371, 379 (1980); Rachael K. Hinkle, *Into the Words: Using Statutory Text to Explore the Impact of Federal Courts on State Policy Diffusion*, 59 AM. J. POL. SCI. 1002 (2015); James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567 (1997).

The third set of studies provides the strongest link to judicial behavior. This work focuses on how judges attempt to ensure that their decisions are efficacious. Staton and Vanberg focused on this idea in their article on vague versus clear opinion writing that I mentioned earlier.<sup>313</sup> And Staton has continued this line of work in a collaborative project with the Constitutional Chamber of the Costa Rican Supreme Court, which began a program of monitoring compliance with some of its decisions.<sup>314</sup> In reviewing data generated from the monitoring, Staton and his colleagues found “that vague orders, and orders issued without definite time frames for compliance, were associated with delayed implementation.”<sup>315</sup> Along somewhat different lines, Matthew Hall finds that even the U.S. Supreme Court, a court with very high legitimacy, worries about compliance with its decisions because the Court depends on nonjudicial actors for implementation.<sup>316</sup>

#### CONCLUSION: THE FUTURE

My goal was to provide a taste of the literature available, but I am not sure I have even accomplished that. There is so much more to say. But rather than go on and on about the past and current state of thinking on judicial behavior, let me end with some thoughts on the future. Certainly, I see challenges moving forward. However exciting the entry of many disciplines into the field, it inevitably raises right hand-left hand problems. Keeping up with a literature developing so fast across so many disciplines is hard work. And even if the various communities can locate each other's studies, there is no guarantee that they will understand them, what with all the jargon (most especially, and unfortunately, in my own discipline of political science). Likewise, the worldwide attention, although wonderful in so many ways, has its share of difficulties, notably language and data barriers, that make the sharing and development of knowledge more difficult.

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313. Staton & Vanberg, *supra* note 19, at 505.

314. See Gauri et al., *supra* note 283.

315. *Id.* at 774.

316. Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 364 (2014).

But I do not want to dwell on the challenges, which we will inevitably find ways to meet. I want to focus on possible directions—one on theory, the other on data.

Starting with theory, as you can probably tell from the work I reviewed in Part II, many studies operate under the assumption that the judge “is a rational maximizer of his ends in life, his satisfactions—... his ‘self-interest.’”<sup>317</sup> My own view is that this is a reasonable assumption or at least gets us pretty far in understanding judicial behavior. But it will not get us all the way. It is just too late in the day to question the decades’ worth of studies showing that in many situations, people rely heavily on their intuitions to make fast decisions without much effort. Social psychologists tell us that these responses are not always wrong or even unhelpful.<sup>318</sup> But we also know that unchecked by deliberative assessments, they can lead to mistakes and biased decisions.

Although judges may think they can “suppress or convert” their intuitions, prejudices, sympathies, and the like into rational decisions,<sup>319</sup> the experiments I mentioned earlier by the Rachlinski team suggest that this is not the case. Their studies have documented that judges respond more favorably to litigants they like or with whom they sympathize,<sup>320</sup> are affected by “anchors” in making numeric estimates,<sup>321</sup> and fall prey to hindsight bias when assessing probable cause.<sup>322</sup> In short, it turns out that judges are human too.

I take the experimental evidence quite seriously, but some members of the legal community (especially judges) do not; they complain that the experiments are artificial and do not capture the real courtroom environment. This counsels for observational studies—that is, studies making use of data that the world, not the researchers, have generated. These are not easy to do, but neither are they impossible, as Shayo and Zussman’s study of Israeli small claims courts demonstrates.<sup>323</sup> More to the point, I think they are

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317. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (8th ed. 2011).

318. See Wistrich et al., *supra* note 39, at 865-66, 865 n.69, 866 n.70.

319. *Id.* at 862.

320. *Id.* at 898-99.

321. See Jeffrey J. Rachlinski et al., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 *IND. L.J.* 695, 696, 736 (2015).

322. See Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight*, 8 *J. EMPIRICAL LEGAL STUD.* 72, 75-76 (2011).

323. See Shayo & Zussman, *supra* note 93.

crucial: should the experimental and the observational converge, we can be far more confident in our conclusions.

Turning to data, in Part I.C I pointed out that our datasets have improved dramatically. We now have fabulous public, multiuser databases—including, of course, the U.S. Supreme Court Database.

I have no doubt that we will continue to rely on these databases to gain great insight into judicial behavior. At the same time, we have long ignored the most obvious feature of what we study: the actual texts that judges produce.<sup>324</sup> Happily, this is changing. Although the automated analysis of learning about judicial behavior got off to (what I see as) an unfortunate start,<sup>325</sup> we are back on track with some very innovative work. I have already pointed to studies analyzing the clarity of judicial opinions; there are others too. Hinkle et al. examined the word choices of district court judges to see if they were more likely to use “hedging” language when they were out of ideological alignment with their circuit in an effort to avoid reversal.<sup>326</sup> Susan Haire et al. found that court of appeals panels “composed of a majority of women or minorities produced opinions with significantly more points of law” than panels with three white males.<sup>327</sup>

These examples focus on the text of judicial opinions, but we certainly do not need to limit ourselves to judicial texts. Imagine analyzing oral argument transcripts to learn about emotions;<sup>328</sup> briefs to analyze truthfulness; and Twitter feeds to assess public sentiment.<sup>329</sup>

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324. Creating databases and automating text analysis are not mutually exclusive. In fact, scholars are now systematically scraping information from court decisions to produce databases. See, e.g., Matthew E.K. Hall & Jason Harold Windett, *New Data on State Supreme Court Cases*, 13 ST. POL. & POL'Y Q. (2013).

325. I think here of the application of Wordscores—a program developed to analyze party manifestos in Europe—to judicial decisions. Among other problems, judicial decisions do not analogize well to party manifestos. LIWC, which I mentioned earlier, seems more promising, but it too is not perfect, in part because its dictionaries were not designed for legal texts.

326. Hinkle et al., *supra* note 182, at 407. They are.

327. Haire et al., *supra* note 182, at 303.

328. Work is already underway. See Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572 (2011).

329. This project is also in progress. See Tom S. Clark et al., *Revealed Public Opinion on Twitter: The Supreme Court of the United States Same-Sex Marriage Decisions* (Mar. 31, 2014) (unpublished paper), <http://polisci.emory.edu/faculty/jkstatato/resources/WorkingPapers/changeintwitteropinion.pdf> [<https://perma.cc/KCK9-F367>].

The possibilities seem limitless. Though I doubt C. Herman Pritchett would have been surprised, I like to think he would have been pleased.