

The Economics of Judicial Behaviour

VOLUME I

Edited by Lee Epstein

The Economics of Judicial Behaviour

Volume I

Edited by

Lee Epstein

*Provost Professor of Law and Political Science,
and Rader Family Trustee Chair in Law
University of Southern California, USA*



ECONOMIC APPROACHES TO LAW

An Elgar Research Collection
Cheltenham, UK • Northampton, MA, USA

© Lee Epstein 2013. For copyright of individual articles, please refer to the Acknowledgements.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2013932958



ISBN 978 1 78100 721 1 (2 volume set)

Printed by MPG PRINTGROUP, UK

Acknowledgements

The editor and publishers wish to thank the authors and the following publishers who have kindly given permission for the use of copyright material.

Blackwell Publishing Ltd for articles: Jeffrey A. Segal and Harold J. Spaeth (1996), 'The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices', *American Journal of Political Science*, **40** (4), November, 971–1003; Jack Knight and Lee Epstein (1996), 'The Norm of *Stare Decisis*', *American Journal of Political Science*, **40** (4), November, 1018–35; Virginia A. Hettinger, Stefanie A. Lindquist and Wendy L. Martinek (2004), 'Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals', *American Journal of Political Science*, **48** (1), January, 123–37; Gregory A. Huber and Sanford C. Gordon (2004), 'Accountability and Coercion: Is Justice Blind when It Runs for Office?', *American Journal of Political Science*, **48** (2), April, 247–63; Jeffrey K. Staton and Georg Vanberg (2008), 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions', *American Journal of Political Science*, **52** (3), July, 504–19.

Cambridge University Press for articles: Melinda Gann Hall (1992), 'Electoral Politics and Strategic Voting in State Supreme Courts', *Journal of Politics*, **54** (2), May, 427–46; J. Mark Ramseyer and Eric B. Rasmusen (2001), 'Why Are Japanese Judges So Conservative in Politically Charged Cases?', *American Political Science Review*, **95** (2), June, 331–44; Ethan Bueno de Mesquita and Matthew Stephenson (2002), 'Informative Precedent and Intrajudicial Communication', *American Political Science Review*, **96** (4), December, 755–66.

Elsevier for articles: Lewis A. Kornhauser (1992), 'Modeling Collegial Courts I: Path-Dependence', *International Review of Law and Economics*, **12** (1), March, 169–85; Thomas J. Miceli and Metin M. Coşgel (1994), 'Reputation and Judicial Decision-Making', *Journal of Economic Behavior and Organization*, **23** (1), January, 31–51; Vincy Fon and Francesco Parisi (2006), 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis', *International Review of Law and Economics*, **26** (4), December, 519–35; Nicola Gennaioli and Andrei Shleifer (2007), 'Overruling and the Instability of Law', *Journal of Comparative Economics*, **35** (2), June, 309–28.

Florida State University Law Review for article: Hon. Richard A. Posner (2005), 'Judicial Behavior and Performance: An Economic Approach', *Florida State University Law Review*, **32**, 1259–79.

Oxford University Press for articles: Mark A. Cohen (1991), 'Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?', *Journal of Law, Economics, and Organization*, **7** (1), Spring, 183–99; Eric Rasmusen (1994), 'Judicial Legitimacy as a

Repeated Game', *Journal of Law, Economics, and Organization*, **10** (1), April, 63–83; Daniel M. Klerman and Paul G. Mahoney (2005), 'The Value of Judicial Independence: Evidence from Eighteenth Century England', *American Law and Economics Review*, **7** (1), Spring, 1–27; Stephen J. Choi, G. Mitu Gulati and Eric A. Posner (2009), 'Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate', *Journal of Legal Analysis*, **1** (1), Winter, 47–117; Lee Epstein, William M. Landes and Richard A. Posner (2011), 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis', *Journal of Legal Analysis*, **3** (1), Spring, 101–37.

RAND Journal of Economics for article: Gilat Levy (2005), 'Careerist Judges and the Appeals Process', *RAND Journal of Economics*, **36** (2), Summer, 275–97.

SAGE Publications, Inc. via the Copyright Clearance Center's Rightslink Service for article: James F. Spriggs, II and Paul J. Wahlbeck (1995), 'Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991', *Political Research Quarterly*, **48** (3), September, 573–97.

SMU Law Review for article: Christopher R. Drahozal (1998), 'Judicial Incentives and the Appeals Process', *SMU Law Review*, **51**, 469–503.

Southern California Law Review for articles: Lewis A. Kornhauser (1995), 'Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System', *Southern California Law Review*, **68** (4), May, 1605–29; McNollgast (1995), 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', *Southern California Law Review*, **68** (5), July, 1631–83; John Ferejohn (1999), 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', *Southern California Law Review*, **72**, 353–84; Daniel Klerman (1999), 'Nonpromotion and Judicial Independence', *Southern California Law Review*, **72**, 455–63.

University of Chicago Press for articles: William M. Landes and Richard A. Posner (1975), 'The Independent Judiciary in an Interest-Group Perspective', *Journal of Law and Economics*, **XVIII** (1), April, 875–901; William M. Landes and Richard A. Posner (1976), 'Legal Precedent: A Theoretical and Empirical Analysis', *Journal of Law and Economics*, **XIX** (1), April, 249–307; William M. Landes and Richard A. Posner (1980), 'Legal Change, Judicial Behavior, and the Diversity Jurisdiction', *Journal of Legal Studies*, **9** (2), March, 367–86; Richard A. Posner (1993), 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', *Supreme Court Economic Review*, **3**, 1–41; William M. Landes, Lawrence Lessig and Michael E. Solimine (1998), 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges', *Journal of Legal Studies*, **XXVII** (1), January, 271–332; Alexander Tabarrok and Eric Helland (1999), 'Court Politics: The Political Economy of Tort Awards', *Journal of Law and Economics*, **XLII** (1), April, 157–88; Rafael La Porta, Florencio López-de-Silanes, Cristian Pop-Eleches and Andrei Shleifer (2004), 'Judicial Checks and Balances', *Journal of Political Economy*, **112** (2), 445–70; Michael Abramowicz and Emerson H. Tiller (2009), 'Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making', *Journal of Legal Studies*, **38** (2), June, 419–43.

Every effort has been made to trace all the copyright holders but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

In addition the publishers wish to thank the Library at Warwick University, UK and the Library of Indiana University at Bloomington, USA for their assistance in obtaining these articles.

Introduction

Lee Epstein*

In the study of judicial behaviour, 'economics' has multiple meanings. Many scholars view it through a theoretical lens, arguing that economic studies operate under the assumption that the judge is a 'rational maximizer of his ends in life, his satisfactions—or ... his "self-interest"'.¹ Others focus on whether the research employs the tools of econometrics. A third group might claim that work exploring economics as a substantive matter—say, a paper on the effect of the economy on judicial decisions—qualifies as an economic study of judging.

I limit articles in these two volumes to those falling into the first group—to studies proceeding from the assumption of rationality, regardless of their methodological approach. This was not a decision meant to deprecate the other two types but rather one of necessity. Because most landmark studies of judicial behaviour fit into at least one of the three categories, including the range of 'economic' work would have required many more than two volumes.²

Still, mine is not an especially limiting decision. In the first place, rational choice studies of judicial behaviour vary in approach. Some are purely theoretical (whether focused on the choices of individuals in isolation or on their behaviour in social groups); others are mostly empirical; and yet a third set makes use of descriptive or historical data. Exemplars of all types appear in these volumes; I did not limit my selections to articles undertaking formal equilibrium analysis.³ Second, the targets of inquiry are multiple. Though many of the early studies focus on U.S. federal judges (especially the Supreme Court), scholars are paying greater attention to judiciaries in the U.S. states and abroad—and *The Economics of Judicial Behaviour* reflects the growing interest in comparative analysis. Third, because rational choice accounts of the judiciary are hardly the sole province of economists, the scholars themselves vary. Murphy's pioneering work in political science, *Elements of Judicial Strategy*,⁴ portrayed U.S. Supreme Court justices as strategic actors who seek to maximise their policy preferences. Likewise in the 1990s, Eskridge, a law professor, developed an account of statutory interpretation in which judges are more concerned with the preferences and likely actions of contemporaneous elected actors than with the legislature that enacted the law.⁵ The articles in these volumes show off this disciplinary diversity. Fifteen of the contributors are J.D.s; the other 71 hold a Ph.D. in Business, Economics, History or Political Science.⁶ (As an aside, bringing together these literatures is, I hope, an important contribution in and of itself. Because of the number of disciplines engaged in the study of judicial behaviour, the right hand does not always know what the left hand is doing, even when they are writing on the same topics.)

Finally, the range of topics is impressive. All in all, these volumes cover six areas of scholarship: (1) The Judge: Motivations, Careers and Performance; (2) Judicial Independence and Dependence; (3) Opinions and Precedent; (4) Collegial Courts; (5) The Hierarchy of Justice; and (6) Executives and Legislatures. Let me say a word or two about each.

As its name suggests, articles in the first area, which can be found in Volume I, Part I, explore features of individual judges—especially their motivations. Political scientists, the first to

systematically study judicial behaviour (though, in the beginning, not usually from an economic perspective⁷), almost always assume that judges seek to etch their ideological values into law.⁸ The studies here—written by law professors, economists, and even a judge—challenge this assumption. They suggest that however useful ideology is for understanding judicial behaviour, it is not the only motivation (it may not even be especially weighty for many judges). More realistic conceptions contend that judges also seek to maximise their preferences over a set of personal factors, such as job satisfaction, external satisfactions, leisure, salary/income, and promotion.⁹ The articles in this part do more than flesh out each of these elements in the judge's personal utility function. They also provide such compelling evidence for their importance that they pose a serious challenge to the extremely (un)realist(ic) conception of judicial behaviour that generations of political scientists have assumed in their study of law and legal institutions.

Articles in Volume I, Part II, on Judicial Independence and Dependence, vary in their concerns—and in their coverage. La Porta et al. is a cross-national study of 71 countries;¹⁰ Klerman and Mahoney analyse time-series data drawn from eighteenth century England.¹¹ But their conclusions do not differ much. La Porta et al. find that courts with substantial independence (measured in part by the length of tenure) and constitutional review power are more likely to exhibit higher levels of economic freedom (as assessed by the security of property rights, the number of legal procedures to start a business, the level of worker protection and government ownership of banks). Klerman and Mahoney show that eighteenth century laws in England providing greater job security to judges increased the value of financial assets.

Both studies thus unearth evidence of a strong link between judicial independence and economic freedom or growth. Their results would seem to have implications for the U.S. states, most of which attempt to foster some kind of judicial dependence by forcing their judges to face the electorate to retain their jobs. The three studies focusing on the states do not directly address this issue but they all show that elections affect judicial behaviour.¹² Elected state judges tend to rule in ways designed to please their constituents, for example by favouring in-state plaintiffs over out-of-state corporations¹³ and the government over criminal defendants.¹⁴

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. The articles in Volume I, Part III (Opinions and Precedent) address these and other choices. My study with Landes and Posner takes up the puzzle of why judges sometimes do not dissent when they disagree with the majority.¹⁵ The basic argument is that dissents impose substantial collegiality costs on the other judges on the panel by making them work harder (e.g., increasing the length of majority opinions), while the benefits of dissenting (e.g., future citations) are few. Although 'dissent aversion' is stronger in the U.S. circuits than in the Supreme Court, there is some evidence that it exists there too, especially in cases in which the ideological stakes are low, for even in the high court dissents can be the source of workplace irritation. Hettinger, Lindquist and Martinek¹⁶ consider dissents from a different angle, asking whether attitudinal (purely ideological) or strategic accounts best explain the judge's decision to join the majority or not. (Their answer? Attitudinal approaches.)

Many of the other articles in this part focus not on dissents but on opinions of the court, and consider how they make use of precedent and other traditional legal materials. In the formal economics literature, there is a debate of long standing over the extent to which reputation- or power-seeking judges ought to be followers (apply existing doctrine) or more avant-garde. Levy contends that judges motivated by esteem should be less willing to follow precedent to

show that they are more capable than their predecessors.¹⁷ Creating new precedents can also generate citations and other accolades. Landes and Posner, on the other hand, note that if judges do not sometimes follow existing doctrine, the 'precedential value of [their] own decisions would be reduced'.¹⁸ Of course, this could lead to rogue judges—those who feel free to disregard all precedents in their quest for power (or policy). But on Landes and Posner's account appellate review keeps the system in check. Judges who are too innovative run the risk of seeing their decisions overturned, which can harm their reputation.

Staton and Vanberg also analyse majority opinions but they are less concerned with adherence to precedent than with exploring the question of why judges sometimes write vague opinions when they could be more decisive.¹⁹ The answer 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 non-compliance is easier to detect), then a court facing 'friendly' implementers will write clear opinions. Clarity increases pressure for—and so the likelihood of—compliance. But when the probability of opposition from implementers is high, clarity could be costly to the judges; if policymakers are determined to defy even a crystal clear decision, they highlight the relative lack of judicial power. To soften anticipated resistance, courts may be purposefully vague. Staton and Vanberg provide several examples, including the U.S. Supreme Court's decision in the school desegregation case known as *Brown II*²⁰ and the German Constitutional Court's rulings in two important taxation cases.²¹ 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.

Volume II, Part I covers the literature on Collegial Courts, that is, the relations among judges who serve on the same court. Several of the papers 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 case²²—and, if so, why? The foundational work is Cross and Tiller's 'Judicial Partisanship and Obedience to Legal Doctrine',²³ which argues that the presence of a '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'²⁴ to a higher court—can constrain his or her colleagues from behaving in accord with their own preferences. Some studies find evidence of this phenomenon,²⁵ while others offer different explanations for moderation among judges serving on an ideologically mixed panel.²⁶ 'Dissent aversion', as the Epstein, Landes and Posner article in Volume I, Part III explains, is an example of the latter.

Cross and Tiller's study, and work following from it, focus on the U.S. courts of appeals, where judges decide cases in panels of three (except in those cases heard en banc). Collegial effects, though, are not limited to courts that sit in panels, as other articles in this part demonstrate. Take Caldeira, Wright and Zorn's justifiably famous analysis of case selection in the Supreme Court.²⁷ The authors show that justices are less likely to vote to grant certiorari (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'). 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. Other studies in this part demonstrate that justices try to influence one another through memoranda;²⁸ and that group effects also play a role in the Chief Justice's assignment of the majority opinion.²⁹ Lax and Cameron's model, for example, yields a

prediction that the Chief Justice will favour justices 'who are more extreme ideologically' than himself in part because 'more extreme writers must invest more heavily in judicial craftsmanship, in order to hold the majority'.³⁰

In short, the Lax and Cameron study and the others in this part show that group or collegial effects are hardly limited to panels on circuit courts. Whether voting on certiorari or the merits of cases, bargaining or assigning opinions, the articles demonstrate that a justice's choices might have been different if the outcome depended only his vote and not of the votes of his eight other colleagues.

The articles in Volume II, Part II, *The Hierarchy of Justice*, explore interactions between higher and lower courts and so are related to those in Volume II, Part I. The efficacy of whistleblowing, for example, hinges on the ability of a higher court to reverse the decision of a lower court.

Many of the articles in Volume II, Part II make use of principal-agent theory, which assumes heterogeneous preferences among participants and focuses on methods of control or evasion.³¹ In studies of judging, the main emphasis has been on how a hierarchically superior court can extract conformity from a hierarchically subordinate contemporaneous court with different preferences. More concretely, the typical starting point in these studies is that lower court judges no less than higher court judges are interested in etching their values into law. But lower court judges face a substantial constraint in their quest to do so—the possibility of sanctioning from a higher court. To the extent that higher courts (or at least the U.S. Supreme Court) cannot hire, fire, promote, demote, financially reward or penalise members of trial or intermediate courts, the articles propose various mechanisms for keeping the lower courts honest, including strategic auditing,³² implicit tournaments among lower courts,³³ en banc review³⁴ and, of course, whistleblowing.³⁵

Murphy's paper, which ends this part, reverses the usual approach to lower-higher court relations. While he recognises that the hierarchical structure imposes limits on lower courts from tribunals above them, he suggests that the same structure can work the other way: lower-court judges are fully capable of limiting the commands of higher courts by avoiding, or even defying them—as many did with the U.S. Supreme Court's desegregation decisions.³⁶ Seen in this way, 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.³⁷

Scholars have said the same of the relationship between courts and executives/legislatures. According to the separation-of-power studies (amply represented in Volume II, Part III), judges must attend to the preferences and likely actions of the government if they are to achieve their goals.³⁸ If they do not, they run the risk of retaliation from elected actors, thereby making it difficult for judges to achieve policy goals, not to mention to develop or maintain some level of institutional legitimacy.

Certainly this is true when the U.S. federal courts interpret statutes: Congress can override their interpretations by enacting new law.³⁹ But what of constitutional review? Although Congress cannot pass legislation to overturn decisions reached by courts on constitutional grounds,⁴⁰ it can take aim in other ways: withdrawing the court's jurisdiction, eradicating judicial review, approving constitutional amendments to overturn decisions, slashing the court's budget, and impeaching judges.⁴¹ These threats, I hasten to note, are not merely theoretical. Clark's study identifies nearly 900 court-curbing proposals in the U.S. Congress between 1877

and 2008.⁴² More to the point, his work, along with an article by Segal and his colleagues (also in Volume II),⁴³ demonstrates that when Congress threatens, the Supreme Court cowers, exercising greater judicial self-restraint or reaching decisions closer to congressional preferences.

These studies focus on the United States. Elsewhere, governments have taken even more radical steps to tame their courts, as Helmke's article on the Argentine judiciary points out:

In many parts of the developing world, judges face threats far greater than simply having their decisions overturned. In such contexts, sanctions range from impeachment, removal, and court-packing to criminal indictment, physical violence, and even death. Compared to American justices, who serve an average of 16.3 years on the bench, in Argentina in the post-Perón period, the average length of tenure has been a mere 5.6 years. Although judges stepped down for a variety of reasons throughout each of the three governments, multiple resignations clustered at the end of both the military and the first democratic government of Alfonsín suggest that incoming governments in Argentina routinely get rid of their predecessors' judges despite constitutional guarantees.⁴⁴

Helmke demonstrates that Argentine judges respond to these potential threats by 'strategically defecting', that is, by ruling *against* the existing regime once it begins to lose power.

While I have organised these volumes around the six topics, they are hardly mutually exclusive as you can probably tell from even these brief descriptions. Consider the Cross and Tiller study.⁴⁵ As I just noted, it started a burgeoning literature on panel effects, and so appears in Volume II, Part I, on Collegial Courts. On the other hand, because the mechanism triggering the effect is the lower court judges' fear of reversal by a higher court, the paper implicates the hierarchy of justice (Volume II, Part II). Then there is Ramseyer and Rasmussen's study on Japanese judges,⁴⁶ which suggests that the judges' careers hinge on deference to the government. This study would fit in Volume II, Part III, on the separation of powers, but I put it in Volume I, Part I because it speaks to the judges' interest in promotion and other careerist motivations. McNollgast's work provides an even more extreme example.⁴⁷ I could have located it with work on legislatures and executives (Volume II, Part III) or even with studies on the judicial hierarchy (Volume II, Part II), but it appears in Volume I, Part III because McNollgast's ultimate concern, it seems to me, is with doctrine: to understand how a high court can establish new precedent or defend existing doctrine in the face of lower courts or elected branches that do not share its preferences.

Cross and Tiller, Ramseyer and Rasmussen, and McNollgast are seminal studies—those that have become part of the foundational literature on judicial behaviour. The same holds for many of the other articles in these volumes. But I have also included a sprinkling of more recent work that I think could one day achieve landmark status. In making these choices, I scoured the existing literature, checked syllabi for Ph.D. and law courses, and consulted with many experts in the field. I am especially grateful to Charles M. Cameron, Tom S. Clark, William M. Landes, Jeffrey R. Lax, Andrew D. Martin, Richard A. Posner, Kevin Quinn, Jeffrey A. Segal and Jeffrey K. Staton. Of course, I recognise that no two scholars are likely to agree on a list of the leading articles in their field. This fact alone absolves my experts, though not me, from any sins of commission and omission.

One final note. Per the guidelines for this series, I was limited to article-length papers. This is a reasonable restriction, but it is also unfortunate because more than a handful of books have made important contributions to the economic analysis of judicial behaviour. Indeed, many

scholars (especially political scientists) working in the field would identify the *locus classicus* as Murphy's *Elements of Judicial Strategy*,⁴⁸ which I mentioned above. Given the opportunity, I also probably would have excerpted chapters from Epstein and Knight's *The Choices Justices Make*,⁴⁹ Helmke's *Courts Under Constraints*,⁵⁰ Ginsburg's *Judicial Review in New Democracies*,⁵¹ Hettinger, Lindquist and Martinek's *Judging on a Collegial Court*,⁵² Maltzman, Spriggs and Wahlbeck's *Crafting the Law on the Supreme Court*,⁵³ Perry's *Deciding to Decide*,⁵⁴ Posner's *How Judges Think*,⁵⁵ and Vanberg's *The Politics of Constitutional Review in Germany*.⁵⁶ In some instances, I was able to include an article derived from a book (or vice versa, a book following from an article)—as with the Helmke study⁵⁷—but not always. And for this I am sorry.

Notes

* Lee Epstein (<http://epstein.usc.edu>) is the Provost Professor of Law and Political Science and the Rader Family Trustee Chair in Law at the University of Southern California. She is grateful to the National Science Foundation for supporting her research on judicial behaviour.

1. Richard A. Posner, *Economic Analysis of Law*, 8th ed. (2010), at 3.
2. For the same reason, I exclude articles that are related to but do not focus squarely on the behaviour of judges. (I make some exceptions here and there for especially important studies that have an obvious, though not necessarily direct, connection to judging, e.g., Rafael La Porta et al., 'Judicial Checks and Balances', 112 *Journal of Political Economy* 445 (2004) in Volume I (Chapter 12), which assesses whether judicial independence affects economic and political freedom.)

Excluded subjects include (1) studies of litigants and lawyers, including the selection of cases for litigation, e.g., George Priest and Benjamin Klein, 'The Selection of Disputes for Litigation', 14 *Journal of Legal Studies* 1 (1984) and (2) the large literature on judicial appointments, e.g., Jeffrey A. Segal, Charles M. Cameron and Albert D. Cover, 'A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations', 36 *American Journal of Political Science* 96 (1992); Bryon J. Moraski and Charles R. Shipan, 'The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices', 43 *American Journal of Political Science* 1069 (1999).

3. Following from Epstein and Knight, there are many ways to undertake rational choice work on judicial behaviour. These include incorporating assumptions of rationality (and strategic action) into interpretive-historical work. Lee Epstein and Jack Knight, 'Toward a Strategic Revolution in Judicial Politics', 53 *Political Research Quarterly* 625 (2000).
4. Walter F. Murphy, *Elements of Judicial Strategy* (1964).
5. Included in Volume II is William N. Eskridge, Jr., 'Overriding Supreme Court Statutory Interpretation Decisions', 101 *Yale Law Journal* 331 (1991) (see Chapter 23, Volume II).
6. Some of the Ph.D.s also have J.D.s. I included all authors but did not double count.
7. Exceptions include Glendon Schubert, 'The Study of Judicial Decision-Making as an Aspect of Political Behavior', 52 *American Political Science Review* 1007 (1958); Walter F. Murphy, *Congress and the Supreme Court* (1962) and Murphy, note 4 above. Other early studies mostly took their cues from political or psychological theories. See, e.g., C. Herman Pritchett, 'Divisions of Opinion among Justices of the U.S. Supreme Court', 35 *American Political Science Review* 890 (1941) and his *The Roosevelt Court* (1948); Glendon Schubert, 'The 1960 Term of the Supreme Court: A Psychological Analysis', 56 *American Political Science Review* 90 (1962) and his *The Judicial Mind* (1965); Harold J. Spaeth, *An Introduction to Supreme Court Decision Making* (1972).
8. For more on this point, see Lee Epstein and Jack Knight, 'Reconsidering Judicial Preferences', *Annual Review of Political Science* (2013, forthcoming).
9. See generally Richard A. Posner, *How Judges Think* (2008); Lee Epstein, William M. Landes and Richard Posner, *The Behavior of Federal Judges* (2012).

10. La Porta et al., note 2 above.
11. See Chapter 13, Volume I: Daniel M. Klorman and Paul G. Mahoney, 'The Value of Judicial Independence: Evidence from Eighteenth Century England', 7 *American Law and Economics Review* 1 (2005).
12. See Chapters 16, 17 and 18, Volume I: Melinda Gann Hall, 'Electoral Politics and Strategic Voting in State Supreme Courts', 54 *Journal of Politics* 427 (1992); Alexander Tabarrok and Eric Helland, 'Court Politics: The Political Economy of Tort Awards', 42 *Journal of Law & Economics* 157 (1999); Gregory A. Huber and Sanford C. Gordon, 'Accountability and Coercion: Is Justice Blind When It Runs for Office?', 48 *American Journal of Political Science* 247 (2004).
13. Tabarrok and Helland, note 12 above.
14. Hall, note 12 above; Huber and Gordon, note 12 above.
15. See Chapter 22, Volume I: Lee Epstein, William M. Landes and Richard A. Posner, 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis', 3 *Journal of Legal Analysis* 101 (2011).
16. See Chapter 23, Volume I: Virginia A. Hettinger, Stefanie A. Lindquist and Wendy L. Martinek, 'Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals', 48 *American Journal of Political Science* 123 (2004).
17. See Chapter 10, Volume I: Gilat Levy, 'Careerist Judges and the Appeals Process', 36 *RAND Journal of Economics* 275 (2005).
18. See Chapter 25, Volume I: William M. Landes and Richard A. Posner, 'Legal Precedent: A Theoretical and Empirical Analysis', 19 *Journal of Law & Economics* 249 (1976), at 273.
19. See Chapter 19, Volume I: Jeffrey K. Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions', 52 *American Journal of Political Science* 504 (2008).
20. *Brown v. Board of Education* (II), 349 U.S. 294 (1955).
21. BVerfGE 54, 34 in 1980 and BVerfGE 86, 369 in 1992.
22. Definition adopted from Jonathan Kstellec, 'Panel Composition and Judicial Compliance on the US Courts of Appeals', 23 *Journal of Law, Economics, & Organization* 421 (2007) (see Chapter 12, Volume II).
23. See Chapter 10, Volume II: Frank B. Cross and Emerson H. Tiller, 'Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals', 107 *Yale Law Journal* 2155 (1998).
24. *Ibid.*, at 2156.
25. Kstellec, note 22 above.
26. See Epstein, Landes and Posner, note 15 above.
27. See Chapter 1, Volume II: Gregory A. Caldeira, John R. Wright and Christopher J.W. Zorn, 'Sophisticated Voting and Gate-Keeping in the Supreme Court', 15 *Journal of Law, Economics, & Organization* 549 (1999).
28. See Chapter 4, Volume II: Paul J. Wahlbeck, James F. Spriggs and Forrest Maltzman, 'Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court', 42 *American Journal of Political Science* 294 (1998).
29. See Chapter 3, Volume II: Jeffrey R. Lax and Charles M. Cameron, 'Bargaining and Opinion Assignment on the US Supreme Court', 23 *Journal of Law, Economics, & Organization* 276 (2007).
30. *Ibid.*, at 293.
31. I adopt this discussion from Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron and Scott Comarato, 'Strategic Defiance and Compliance in the U.S. Courts of Appeals', 54 *American Journal of Political Science* 891 (2010) (see Chapter 20, Volume II).
32. Matt Spitzer and Eric Talley, 'Judicial Auditing', 29 *Journal of Legal Studies* 649 (2000) (Chapter 18, Volume II); Charles M. Cameron, Jeffrey A. Segal and Donald Songer, 'Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions', 94 *American Political Science Review* 101 (2000) (Chapter 14, Volume II).
33. See Chapter 32, Volume I: McNollgast, 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', 68 *Southern California Law Review* 1631 (1995).
34. See Chapter 16, Volume II: Tom S. Clark, 'A Principal-Agent Theory of En Banc Review', 25 *Journal of Law, Economics, & Organization* 55 (2009).

35. Cross and Tiller (1998), note 23 above; Kesteléc, note 22 above.
36. See Chapter 21, Volume II: Walter F. Murphy, 'Lower Court Checks on Supreme Court Power', 53 *American Political Science Review* 1017 (1959).
37. Ibid., at 1031. See also Westerland et al., note 31 above.
38. For example, Rafael Gely and Pablo T. Spiller, 'A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases', 6 *Journal of Law, Economics, & Organization* 263 (1990) (Chapter 22, Volume II); John A. Ferejohn and Barry R. Weingast 'A Positive Theory of Statutory Interpretation', 12 *International Review of Law and Economics* 263 (1992) (Chapter 24, Volume II).
39. See Eskridge, note 5 above.
40. At least not in theory. In practice, the U.S. Congress has enacted over 40 statutes designed to reverse Supreme Court decisions that invalidated federal or state laws. See James Meernik and Joseph Ignagni, 'Judicial Review and Coordinate Construction of the Constitution,' 41 *American Journal of Political Science* 447 (1997).
41. See Gerald N. Rosenberg, 'Judicial Independence and the Reality of Political Power', 54 *Review of Politics* 369 (1992).
42. See Chapter 26, Volume II: Tom S. Clark, 'The Separation of Powers, Court Curbing and Judicial Legitimacy', 53 *American Journal of Political Science* 971 (2009).
43. See Chapter 25, Volume II: Jeffrey A. Segal, Chad Westerland and Stefanie A. Lindquist, 'Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model', 89 *American Journal of Political Science* 55 (2011).
44. See Chapter 27, Volume II: Gretchen Helmke, 'The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy', 96 *American Political Science Review* 291 (2002), at 292.
45. Cross and Tiller, note 23 above.
46. See Chapter 3, Volume I: J. Mark Ramseyer and Eric B. Rasmusen, 'Why Are Japanese Judges So Conservative in Politically Charged Cases', 95 *American Political Science Review* 331 (2001).
47. McNollgast, note 33 above.
48. See note 4 above.
49. Lee Epstein and Jack Knight, *The Choices Justices Make* (1998).
50. Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina* (2005).
51. Tom Ginsburg, *Judicial Review in New Democracies* (2003).
52. Virginia A. Hettinger, Stefanie A. Lindquist and Wendy L. Martinek, *Judging on a Collegial Court: Influences on Appellate Decision Making* (2006).
53. Forrest Maltzman, James F. Spriggs, II and Paul J. Wahlbeck. *Crafting Law on the Supreme Court* (2000).
54. H.W. Perry, Jr., *Deciding to Decide* (1991).
55. See note 9 above.
56. Georg Vanberg, *The Politics of Constitutional Review in Germany* (2005).
57. See note 44 above.

Contents

<i>Acknowledgements</i>	ix
<i>Introduction</i> Lee Epstein	xiii

PART I THE JUDGE: MOTIVATIONS, CAREERS AND PERFORMANCE

1. Richard A. Posner (1993), 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', <i>Supreme Court Economic Review</i> , 3 , 1–41	3
2. Christopher R. Drahozal (1998), 'Judicial Incentives and the Appeals Process', <i>SMU Law Review</i> , 51 , 469–503	44
3. J. Mark Ramseyer and Eric B. Rasmusen (2001), 'Why Are Japanese Judges So Conservative in Politically Charged Cases?', <i>American Political Science Review</i> , 95 (2), June, 331–44	79
4. Mark A. Cohen (1991), 'Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?', <i>Journal of Law, Economics, and Organization</i> , 7 (1), Spring, 183–99	93
5. Daniel Klerman (1999), 'Nonpromotion and Judicial Independence', <i>Southern California Law Review</i> , 72 , 455–63	110
6. Stephen J. Choi, G. Mitu Gulati and Eric A. Posner (2009), 'Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate', <i>Journal of Legal Analysis</i> , 1 (1), Winter, 47–117	119
7. Thomas J. Miceli and Metin M. Coşgel (1994), 'Reputation and Judicial Decision-Making', <i>Journal of Economic Behavior and Organization</i> , 23 (1), January, 31–51	190
8. Hon. Richard A. Posner (2005), 'Judicial Behavior and Performance: An Economic Approach', <i>Florida State University Law Review</i> , 32 , 1259–79	211
9. William M. Landes, Lawrence Lessig and Michael E. Solimine (1998), 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges', <i>Journal of Legal Studies</i> , XXVII (1), January, 271–332	232
10. Gilat Levy (2005), 'Careerist Judges and the Appeals Process', <i>RAND Journal of Economics</i> , 36 (2), Summer, 275–97	294
11. James F. Spriggs, II and Paul J. Wahlbeck (1995), 'Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991', <i>Political Research Quarterly</i> , 48 (3), September, 573–97	317

PART II JUDICIAL INDEPENDENCE AND DEPENDENCE

12. Rafael La Porta, Florencio López-de-Silanes, Cristian Pop-Eleches and Andrei Shleifer (2004), 'Judicial Checks and Balances', *Journal of Political Economy*, **112** (2), 445–70 345
13. Daniel M. Klorman and Paul G. Mahoney (2005), 'The Value of Judicial Independence: Evidence from Eighteenth Century England', *American Law and Economics Review*, **7** (1), Spring, 1–27 371
14. William M. Landes and Richard A. Posner (1975), 'The Independent Judiciary in an Interest-Group Perspective', *Journal of Law and Economics*, **XVIII** (1), April, 875–901 398
15. John Ferejohn (1999), 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', *Southern California Law Review*, **72**, 353–84 425
16. Melinda Gann Hall (1992), 'Electoral Politics and Strategic Voting in State Supreme Courts', *Journal of Politics*, **54** (2), May, 427–46 457
17. Alexander Tabarrok and Eric Helland (1999), 'Court Politics: The Political Economy of Tort Awards', *Journal of Law and Economics*, **XLII** (1), April, 157–88 477
18. Gregory A. Huber and Sanford C. Gordon (2004), 'Accountability and Coercion: Is Justice Blind when It Runs for Office?', *American Journal of Political Science*, **48** (2), April, 247–63 509

PART III OPINIONS AND PRECEDENT

19. Jeffrey K. Staton and Georg Vanberg (2008), 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions', *American Journal of Political Science*, **52** (3), July, 504–19 529
20. Michael Abramowicz and Emerson H. Tiller (2009), 'Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making', *Journal of Legal Studies*, **38** (2), June, 419–43 545
21. William M. Landes and Richard A. Posner (1980), 'Legal Change, Judicial Behavior, and the Diversity Jurisdiction', *Journal of Legal Studies*, **9** (2), March, 367–86 570
22. Lee Epstein, William M. Landes and Richard A. Posner (2011), 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis', *Journal of Legal Analysis*, **3** (1), Spring, 101–37 590
23. Virginia A. Hettinger, Stefanie A. Lindquist and Wendy L. Martinek (2004), 'Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals', *American Journal of Political Science*, **48** (1), January, 123–37 627
24. Eric Rasmusen (1994), 'Judicial Legitimacy as a Repeated Game', *Journal of Law, Economics, and Organization*, **10** (1), April, 63–83 642

25. William M. Landes and Richard A. Posner (1976), 'Legal Precedent: A Theoretical and Empirical Analysis', *Journal of Law and Economics*, **XIX** (1), April, 249–307 663
26. Lewis A. Kornhauser (1992), 'Modeling Collegial Courts I: Path-Dependence', *International Review of Law and Economics*, **12** (1), March, 169–85 722
27. Jeffrey A. Segal and Harold J. Spaeth (1996), 'The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices', *American Journal of Political Science*, **40** (4), November, 971–1003 739
28. Jack Knight and Lee Epstein (1996), 'The Norm of *Stare Decisis*', *American Journal of Political Science*, **40** (4), November, 1018–35 772
29. Lewis A. Kornhauser (1995), 'Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System', *Southern California Law Review*, **68** (4), May, 1605–29 790
30. Ethan Bueno de Mesquita and Matthew Stephenson (2002), 'Informative Precedent and Intrajudicial Communication', *American Political Science Review*, **96** (4), December, 755–66 815
31. Vincy Fon and Francesco Parisi (2006), 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis', *International Review of Law and Economics*, **26** (4), December, 519–35 827
32. McNollgast (1995), 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', *Southern California Law Review*, **68** (5), July, 1631–83 844
33. Nicola Gennaioli and Andrei Shleifer (2007), 'Overruling and the Instability of Law', *Journal of Comparative Economics*, **35** (2), June, 309–28 897