



The Behavior of **FEDERAL JUDGES**

A Theoretical & Empirical Study
of Rational Choice

Lee Epstein

William M. Landes

Richard A. Posner

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Harvard University Press
Cambridge, Massachusetts • London, England

2013

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Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Epstein, Lee, 1958–

The behavior of federal judges : a theoretical and empirical study of
rational choice / Lee Epstein, William M. Landes, and Richard A. Posner.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-674-04989-5 (alk. paper)

1. Judicial process—United States. I. Landes, William M.

II. Posner, Richard A. III. Title.

KF5130.E46 2013

347.73'14—dc23

2012008907

The Behavior of Federal Judges

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I often say that when you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind: it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the state of *science*, whatever the matter may be.

—Baron William Thomson Kelvin, “Electrical Units of Measurement” (May 3, 1883), in Kelvin, *Constitution of Matter* (vol. 1 of his *Popular Lectures and Addresses*), 73–74 (1889) (emphasis in original)

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

—O. W. Holmes, “The Path of the Law,” 10 *Harvard Law Review* 457, 469 (1897)

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General Introduction

In the continuing drama of American law the judge still holds the center of the stage, down in front of the footlights. . . . Much of our finest intelligence is engaged in studying what judges do and say and in guessing at their inmost sensations.

—John P. Dawson¹

JUDGES INDEED PLAY a central role in the American legal system—more so than in most others. But the behavior of American judges, and in particular the determinants of their decisions, are not well understood, including by lawyers, law professors, and even many judges (we'll explain that paradox in due course). In part this is because judges in our system are permitted to be, and most are, quite secretive.² Indirect methods must be employed to understand their behavior. Beginning more than half a century ago but accelerating in recent decades, social scientists—political scientists in particular, but also economists and psychologists, and, increasingly, academic lawyers knowledgeable about social science—have used ever more sophisticated theoretical concepts and quantitative tools to penetrate self-serving judicial rhetoric, go beyond judges' limited self-understanding, and place the study of judicial behavior on a scientific ba-

1. *The Oracles of the Law* xi (1968). Still true, almost half a century later.

2. With exceptions, of course. See, for example, William Domnarski, *Federal Judges Revealed* (2009), a study based on oral histories of a number of federal district and circuit judges. See also books based on the private papers of Supreme Court Justices, such as Lee Epstein and Jack Knight, *The Choices Justices Make* (1998); Forrest Malzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court* (2000); and Walter F. Murphy, *Elements of Judicial Strategy* (1964).