The Strategic Analysis of Judicial Decisions

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Abstract

Since the 1990s, there has been an explosion of empirical and theoretical work dedicated to advancing strategic accounts of law and legal institutions. Reviewing this extensive literature could be accomplished in multiple ways. We chose an approach that underscores a major contribution of strategic accounts: that they have forced scholars to think about the interdependent—i.e., strategic—nature of judicial decisions. On strategic accounts, in other words, judges do not make decisions in a vacuum, but rather take into account the preferences and likely actions of other relevant actors, including their colleagues, their judicial superiors, and members of the other branches of government. After defining strategic analysis and how it differs from other approaches to judicial decisions, we examine the literature on the forms of strategic behavior in which (preference-maximizing) judges engage when interacting with these three sets of actors.

INTRODUCTION

The strategic analysis of judicial decisions is older and newer than other topics in this volume. Its origins trace back to work in the 1950s by an important political scientist, Glendon Schubert. Schubert gained fame among political scientists for applying social-psychological theories to judicial decisions (see, e.g., Schubert 1965), but he was also one of the first to apply rational choice theory to political problems. In a 1958 review of the public law field, he included a section called "game analysis" in which he asserted that "[t]he judicial process is tailor-made for investigation by the theory of games" (Schubert 1958, p. 1022). Schubert went on to invoke game theory to study the decisions of two Supreme Court justices—Hughes and Roberts—during a crucial historical period, the New Deal (the "Hughberts" game). In so doing, he showed that the justices were strategic decision makers: Only by recognizing their interdependency could they maximize their preferences.

Nonetheless, Schubert's work had only a limited impact on the study of judicial opinions. Even as it encouraged others to think about the interdependent nature of judicial decision making—with Pritchett (1961) and Murphy (1962, 1964) the most important examples—most scholars of the 1960s through the 1980s remained committed to theories drawn from social psychology rather than from economics (see Epstein & Knight 2000).

Due in no small part to the emergence, in the 1990s, of an influential group of law and business school professors that advocated the use of strategic analysis to study a wide range of legal phenomena (e.g., Cohen & Spitzer 1994; Cross & Tiller 1998; Eskridge 1991a,b; Kornhauser 1992a,b; Rodriguez 1994; Stearns 1997), along with systematic evidence of strategic judicial decision making (e.g., Boucher & Segal 1995, Epstein & Knight 1998, Spiller & Gely 1992), the tide began to turn. Now, in the 2000s, no one could miss the virtual tsunami of empirical and theoretical studies dedicated to advancing strategic accounts of law and legal institutions (e.g., Lax & Cameron 2007, Maltzman et al. 2000, Staton & Vanberg 2008). It is the rare journal article or book on judicial decisions in economics and political science, in particular, that does not at least attend to strategic accounts, and it would be equally unusual for syllabi in the field to exclude this line of research altogether. Moreover, following from Schubert's (and Murphy's) seminal work, many studies continue to focus on the decisions of the U.S. Supreme Court, but there is also increasing emphasis on strategic behavior in the lower U.S. federal courts, state high courts, and tribunals abroad.

Rather than explaining why four decades elapsed before Schubert's insights gained traction (see Epstein & Knight 2000), our focus here is on providing a critical survey of the literature and on offering directions for future research. This task could be effectively accomplished in multiple ways. We have chosen an approach that underscores a major contribution of strategic accounts of law and legal institutions: that they have forced scholars (not to mention lawyers and judges) to think about the interdependent—i.e., strategic—nature of judicial decisions. On strategic accounts, in other words, judges do not make decisions in a vacuum, but rather take into account the preferences and likely actions of other relevant actors, including (*a*) their colleagues, (*b*) their judicial superiors, and (*c*) members of the other branches of government.

In what follows, we examine the literature on the various forms of strategic behavior in which (preference-maximizing) judges engage when interacting with these actors. We begin, though, with a brief discussion of what scholars mean when they use the term strategic analysis and how it differs from other approaches to judicial decisions.

A BRIEF PRIMER ON STRATEGIC ANALYSIS: WHAT IT IS, HOW IT DIFFERS FROM OTHER APPROACHES, AND WHY CONTROVERSIES REMAIN

Scholars typically divide the study of judicial decisions into two large categories: legalism

and realism. Briefly, legal accounts suggest that judges create and apply legal rules through methods that are objective, impersonal, and politically neutral.[1] Realism, in contrast, contends that judges' utility functions resemble those of nonjudges in similar professions and so they value leisure, prestige, self-expression, power and influence, and so on (see Epstein et al. 2010). [As an aside, we are sympathetic to Judge Richard A. Posner's (2010) assertion that legalism and realism are not mutually exclusive. Rather, to the extent that behaving legalistically in many, probably most, cases would be utility maximizing, legalism is a subset of realism. Decisions in accord with the text of statutes and with precedent, for example, both economize on judicial time and create the politically valuable impression that judges simply follow the law and do not just make it up as they go along to promote their political preferences.]

This approach to realism employs the language of economics (and we return to it momentarily). Other variants are decidedly more psychological or sociological in orientation and, in fact, tended to dominate the early studies of judicial decisions. Prominent examples include the literature on life experiences (see, e.g., Schmidhauser 1962, Tate 1981, Tate & Handberg 1991, Ulmer 1973); roles (e.g., Becker 1966, Gibson 1978, Glick & Vines 1969, Howard 1977, James 1968); and, of course, ideological attitudes and values (i.e., the attitudinal model) (see, e.g., Goldman 1966, Pritchett 1948, Rohde & Spaeth 1976, Schubert 1965, Segal & Spaeth 2002).

These variants differ from one another at the margins, but because (at least initially) they drew from the same paradigm, they are complementary in their core beliefs about the way people make decisions. As Grossman & Tanenhaus (1969, pp. 10–11) put it, "these hypothesized determinants can be traced back to the simple-action stimulus-response model. . . . This S-R model, of which there are now several variants, conceptualized the [judicial decisions] as responses to stimuli provided by cases presented to them for decision" (see also Gibson 1978, p. 917).

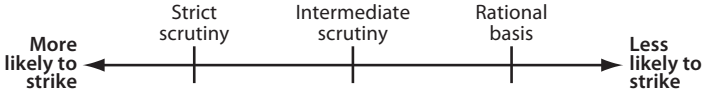

Figure 1

Choosing a legal standard in cases alleging discrimination based on sexual orientation. Opposing ends of the continuum indicate whether the court is more or less likely to strike down the law or other government action.

Strategic accounts, in contrast, belong to a class of nonparametric rational choice models, as they assume that goal-directed actors—including judges—operate in a strategic or interdependent decision-making context. In this account (*a*) social actors make choices in order to achieve certain goals, (*b*) social actors behave strategically in the sense that their choices depend on their expectations about the choices of other actors, and (*c*) these choices are structured by the institutional setting in which they are made (see, generally, Elster 1986, Epstein & Knight 1998).

To be sure, S-R models and (most) strategic accounts of judicial decisions are realist in orientation; both also (typically) acknowledge the importance of the judges' goals and the institutions that structure their behavior.[2] But the fact that many social-psychological approaches do not acknowledge a strategic (interdependent) component to decision making is a point of distinction between the two that can lead to very different predictions about judicial decisions.

To see the point, consider **Figure 1**, in which we depict three choices confronting a

[1] We do not have a count of the number of law scholars, lawyers, and judges who believe that judges do decide cases in a politically neutral way (as opposed to those who think judges should decide cases in this way). Some have suggested that the number is small and continues to dwindle, but surely it is not zero (see, e.g., Edwards & Livermore 2009; Spaeth & Segal 1999, p. 11). They analyze law review articles that attempt to explain judicial decisions; precedent was the leading explanation.

[2] This is obvious for role accounts, which stress the various institutions (such as stare decisis) that may constrain judges from acting on their preferences. But it is also true for contemporary attitudinalists, who argue that life tenure (among other institutions) frees Supreme Court justices to vote in accord with their sincere preferences (see Segal & Spaeth 2002; Segal 1997).

judge over which standard to apply in a case alleging discrimination based on sexual orientation. Suppose the judge was to select among the three possible alternatives; further suppose that she sincerely prefers, in this order, strict scrutiny to intermediate scrutiny to rational basis. Theoretically speaking, if the judge is motivated in the way assumed by, say, those personal attribute models that suggest a direct connection between background factors and judicial decisions, the prediction is simple enough: She would always choose strict scrutiny, regardless of the positions of her colleagues. That is because she makes decisions that are in accord with her background characteristics—characteristics that do not change after she has ascended to the bench. The strategic account, on the other hand, supposes that the judge might choose intermediate scrutiny if, depending on the preferences of the other players (e.g., her colleagues), that would allow her to avoid rational basis, her least preferred outcome.

This example focuses attention on the distinction between strategic and other realist accounts of judicial decisions. Though not as extreme, differences also exist among the various strategic accounts of judging, which continue to propel debates among scholars. Three are worthy of mention. [A fourth focuses on the very notion of strategic behavior. Obviously, adherents of attitudinal accounts reject it, but so do some well-known students of (law and) economics—the very discipline on which strategic accounts draw. Posner (2007), for example, has argued that judges are utility maximizers, but he has expressed skepticism toward strategic accounts of their decisions. We bypass this critique because virtually all rational choice models that scholars have invoked to study judicial decisions assume that goal-directed judges operate in a strategic decision-making context. For more on this point, see Epstein & Knight (2004).]

The first debate regarding strategic accounts of judging centers on the goals of judges, and particularly on the question of what they seek to maximize. Most rational choice scholarship has posited that judges are "single-minded seekers of policy," meaning they want the ultimate state of the law to reflect their ideological values. But this need not be the case. When a researcher invokes a strategic account (or any rational choice account, for that matter), it is up to the researcher to specify the content of actors' goals so as to give meaning to the assumption that people are utility maximizers. This permits the possibility that judges are motivated to further certain interpretive principles (the dominant assumption of some flavors of legalism), but it adds to it the proposition that justices may pursue those principles in a strategic way (see Ferejohn & Weingast 1992, Sisk et al. 1988). It also allows for even more mundane goals to come into play. In line with our broad definition of realism, Posner (1993) has argued that judges are not judicial titans, always seeking to promote their power and policy goals; rather, they are ordinary people who rationally attempt to minimize their own work. This, Posner argues, explains numerous decisional practices: dicta, for example, are explicable in terms of leisure promotion because, given that they are not binding, a judge can join an opinion in which she disagrees with much of the content without "mortgaging . . . future votes." In a similar vein, Baum (1997) shows that judges seek to promote prestige and audience respect, as well as the reduction of future workload. Maintaining good relations with colleagues is another possible source of judicial happiness and may help explain the low dissent rates on some courts (Epstein et al. 2010). Finally, empirical studies have demonstrated that occasionally judges make decisions with a view to their personal chances of promotion (Kaheny et al. 2008, Sisk et al. 1988).

Because all these goals could influence judicial decisions, traces of them appear in the articles we examine momentarily. Nonetheless, it bears repeating that the desire to issue efficacious decisions—those that reflect the judge's political values and that other actors will respect and with which they will comply—remains the primary motivation in most strategic analyses. And this too is evident in the studies we consider throughout.

A second point of debate within strategic circles is over institutions. Most scholars agree that institutions are important, but they question why as well as what role institutions should play in analyses. For example, adherence to precedent is on some accounts a goal in and of itself and as a result should be factored into the judge's utility function (e.g., judges derive pleasure from following previously decided cases). More dominant, though, are accounts that view precedent as structuring judicial decisions or as a means to another end—whether policy (e.g., Knight & Epstein 1996a argue that attending to precedent can help the judge in her quest to render decisions that other actors are more likely to follow) or leisure (e.g., Posner 1993) suggests that adherence to precedent saves time, in contrast to deciding every case from first principles. Either way, these accounts have led to many interesting studies that explore why and how utility-maximizing judges establish and maintain particular institutions. In terms of precedent, some theorists argue that it is a logical consequence of efforts by the judicial team—judges who share the same utility function—to organize itself effectively (e.g., Caminker 1994a; Kornhauser 1989, 1995). Another institutional example, and one we consider in more detail in the section on Judicial Colleagues, is the instantiation of the rule of four, which provides that the Supreme Court will hear and decide a case if four or more of the nine justices vote to grant certiorari (cert for short). Lax (2003) argues that although this is a countermajoritarian rule, it nonetheless advantages justices in the majority because it increases the odds that lower courts will comply with their rulings, thereby giving the majority greater influence.

A final debate centers on the question of how scholars should conduct strategic analyses. On the one side are analysts who translate strategic intuition into variables that they include in their statistical models of judicial decisions (e.g., Maltzman et al. 2000). On the other side are (mostly) formal theorists who take the position, in its strongest form, that rational choice work must embody formal equilibrium analysis; rational choice work, in other words, is not rational choice work unless the analyst has written down and solved a formal model (Schwartz 1997).

To us, there are several ways to do strategic analysis, and the studies we consider below prove the point. A first set of studies deploys statistical models; a second is mostly theoretical exercises (e.g., Landa & Lax 2009, Lax & Cameron 2007, Jacobi 2009); a third incorporates the logic of strategic action into interpretive-historical research (e.g., Knight & Epstein 1996b); and a fourth uses microeconomic theories to reason by analogy (e.g., Songer et al. 1994). Yet another set of studies—perhaps the largest these days—combines one or more of these approaches (e.g., Helmke 2005, Hettinger et al. 2004, Vanberg 2005). Regardless of the tack they take, all have added substantially to our understanding of judicial decisions, as is discussed below.

One final note before turning to strategic behavior on the part of judges. We have outlined some of the debates, controversies, and critiques most relevant to the strategic analysis of judging. Other debates also ensue. One to which we already alluded is between scholars proceeding from psychological versus economic theories, particularly over whether it is safe to assume rationality. Another squares off those who accept the role of ideology, life experiences, cognitive biases, etc., in judging (realists) and those who do not (legalists of one form or another). These debates and their variants are important but too broad in scope to cover here. We direct the interested reader to Baum (1997), Cross (1998), Edwards & Livermore (2009), and Posner (2008).

JUDICIAL COLLEAGUES

In this section, we examine the various actors to whom judges must attend if they hope to maximize their preferences—primarily to issue efficacious decisions that reflect their ideological preferences—and the strategies they have developed for so doing. We begin with horizontal colleagues (those serving on the same

level of court as the judge), even though most U.S. judges do not work in panels or sit en banc. For these judges, trial court judges, the preferences and likely actions of colleagues serving on the same tier probably are not much of a factor in their decisions (although the preferences and likely actions of their superiors may well be).

For all other judges, attention to their colleagues is crucial if they hope to realize their goals. Of course, in some cases attending to colleagues will have little effect on the judges' decisions. On an appellate court panel in which all three judges believe that strict scrutiny should be applied to all classifications based on sexual orientation, there may be no reason to engage in various forms of strategic behavior, such as bargaining with and accommodating the views of the other panelists. But when value conflicts exist, judges may act in a sophisticated fashion to ensure that the panel's decision maximizes their preferences, whatever they may be.

This more or less holds for the judges' interactions with all the other actors we examine in this review; it is the particular forms of strategic behavior that can vary. With regard to their horizontal colleagues, the literature has pointed to several forms of strategic behavior, depending on whether the judges are deciding to decide (i.e., selecting cases for review) or rendering decisions on their merits.

Deciding (Not) to Decide

A starting point for many strategic analyses of case selection is Perry's (1991) classic book *Deciding to Decide.* Drawing on interviews he conducted with justices of the U.S. Supreme Court and their clerks, Perry showed that the justices work in one of two modes when deciding whether to grant cert. Jurisprudential mode involves asking several formal questions: is there a conflict in the circuits, is there sufficient percolation, is it an important issue, and so on. When the justices care strongly about the outcome of a case on the merits, however, they enter into outcome or forward-thinking mode. In general, forward thinking suggests behavior that is strategically shaped by anticipating and adapting to the likely reactions of the relevant actors. In the certiorari context, forward thinking occurs when the justices calculate whether the side they favor is likely to win on the merits. If so, they might cast an aggressive grant—a vote to hear a case even if they agree with the lower court's decision, in order to give the ruling the weight of a Supreme Court affirmance. If not, they might cast a defensive denial—a vote to deny cert even though they would like to reverse the decision below.

According to the justices and clerks Perry interviewed, forward thinking is the exception; jurisprudential mode tends to be the rule. But even by the justices' own admission, the question is not whether defensive denials and aggressive grants occur, but how often.

Subsequent scholarship has provided an answer, and it is often indeed. Some studies coming in the wake of Perry's book found more evidence of aggressive grants than defensive denials (e.g., Boucher & Segal 1995, Palmer 1982). But in their analysis of the justices' private papers, Epstein & Knight (1998) uncovered substantial evidence of both forms of policy maximization, as did the most sophisticated studies to date, Caldeira et al. (1999) and Black & Owens (2009). Even after controlling for the many factors that Perry identified as affecting the justices' votes on cert—such as conflict in the lower courts—both demonstrate that the justices are quite strategic in their thinking. As Black & Owens (2009) explain, "Justices grant review when they believe that the policy outcome of the merits decision will be better ideologically for them than is the status quo. Conversely, they deny review when they prefer the status quo policy."

Scholars also have suggested that this level of judicial sophistication extends to agenda-setting behavior beyond decisions on cert; recent work on judicial signaling has added yet another layer to our understanding of judicial strategizing (though not necessarily with regard to the justices' colleagues). The judicial signaling literature suggests that the justices control their agendas not simply by exercising their discretion over which cases to hear, but by

signaling the sort of cases they want to hear. Early evidence showed that the justices go public, publishing dissents from denials of certiorari "in an effort to communicate their dissatisfaction so that in the future similar case may garner more support from justices who are not yet sufficiently dissatisfied to want to give the matter plenary review" (Linzer 1979, p. 1304). More recent work has formalized this process. Jacobi (2008) modeled when the justices will send signals encouraging cases in a given area of law and when those signals will be reliable indicators of the likely outcome of the case—sometimes justices may wish to hear a case even when they expect that the side they support will not succeed, so as to catalyze change in the law. Ironically, the more a justice cares about a particular area of the law, the less reliable the signals she sends will be; this is because strong signals indicate that the justice wants to hear the case at all costs in order to bring about that change. Baird (2004, 2007) found broad-ranging evidence of such judicial signaling by Supreme Court majorities across 13 issue areas, and Baird & Jacobi (2009) found similar strategic signals by dissenting justices.

We now know a good deal about how and why Supreme Court justices reach decisions at the case-selection stage. What we do not know is whether members of other collegial courts are also strategic when they are deciding to decide. There have been only a few studies of agenda setting on high courts in the U.S. states or abroad (Flemming's 2004 study on Canada is a notable exception), even though many exercise substantial discretion over their docket. Moreover, even courts that lack discretion have the authority to give minimal treatment to a case or decline to review it altogether. Judges on the U.S. Courts of Appeals, for example, can affirm (or reverse) decisions of trial courts dismissing suits on various grounds; they can choose to hear oral arguments (or not); and they can issue unpublished decisions. Based on the literature on the Supreme Court, we naturally believe that the judges on these courts are equally strategic, though their goals may be different. Supreme Court justices seem primarily motivated to ensure that their views are reflected in the Court's decision: they do not want to vote to hear a case only to issue a dissent later (but see Black & Owens 2009 for an interesting analysis of Perry's jurisprudential mode). Busy lower court judges may be more interested in unburdening themselves and their colleagues from yet more cases to decide than in advancing their own policy preferences. Either way, only with more research on this unexplored aspect of lower court decision making can we begin to develop answers.

Decisions on the Merits of Disputes

The case-selection literature on the Supreme Court tells us that the justices occasionally engage in strategic behavior with regard to their colleagues in an effort to advance their policy goals. Such behavior also—if not more so—occurs when it comes to reaching decisions on the merits of disputes.

Much of the research on the Supreme Court examines the lengths to which the justices will go to establish precedent that maximizes their policy preferences. Some analyses focus on the conference that follows oral arguments in cases, during which the justices vote in order of seniority. (A justice can pass and vote later, whether during the conference or even after the opinions have circulated.) The vote is not binding—justices can and do change their minds (Howard 1968, Maltzman & Wahlbeck 1996)—but a conference vote is important because it determines who assigns the majority opinion. If the chief justice is in the majority, he assigns the opinion to another member of the majority or to himself; if he is not in the majority, the assignment power belongs to the most senior member of the majority.

Given these voting and assignment norms, there is plenty of room for strategic maneuvering on the part of policy-oriented justices, and the literature has documented numerous such maneuvers. Epstein & Knight (1998) and Johnson et al. (2005) supply evidence of chief

justices using internal rules to their strategic advantage—for example, deliberately passing at conference when they are uncertain about whether they will be in the majority, so that they can control the assignment of the majority opinion. There is also little doubt that strategic calculations figure into the chief justice's decision over whom to assign the majority opinion. As Maltzman & Wahlbeck (2004) explain, "If a justice is [ideologically] close to a chief, as Brennan was to Warren in criminal procedure cases, the probability of being assigned the opinion-writing task is 19.8% greater than the odds that an ideologically-distant justice will receive the assignment." (On the other hand, equity norms—assigning roughly the same number of majority opinions to each justice—seem to figure even more prominently in the chief's decision. For a theoretically developed explanation, see Anderson & Tahk 2007; see also Hammond et al. 2005)

Once the writer circulates a draft opinion, the other justices may attempt to bargain and negotiate with her. Strategic analyses have sought to delineate the circumstances under which the justice will accept the opinion as is or write a concurring or dissenting opinion. Likewise, scholars have examined the extent to which writers engage in sophisticated opinion writing, compromising their own vision of the law to win over ambivalent colleagues or, at the least, snatch (some) victory from the jaws of defeat. Epstein & Knight (1998) provide many examples of famous opinions that were the product of strategic calculations, including *Craig v. Boren* (1976) (in which Justice Brennan adopted an intermediate test for claims of sex discrimination even though he preferred strict scrutiny); Maltzman et al. (2000), estimating multivariate models, reach much the same conclusion.

But when do majority opinion writers stop negotiating? Conventional wisdom tends to echo Justice Brennan's view that five is the most important number on the Court. The idea is that once a majority (five of the nine justices) has signed on, the opinion has the force of precedent and so the majority opinion writer need not negotiate further. More recently, though, scholars have argued that the justices not only care about establishing precedent, but also care about the size of the coalition (Edwards 1998, Kornhauser & Sager 1993). Jacobi (2009) has modeled the effect of justices caring about case outcomes and coalition size when these two factors are at odds. If justices care only about the outcome, then the Court median should dominate the determination of the ideological position of case outcomes. But if justices also care about the size of the coalition, the less moderate justices gain power, as they can leverage their willingness to sign on to a majority for accommodations in the majority opinion.

That justices may get some utility from larger coalitions could reflect collegial concerns (e.g., Coffin 1994) or more consequentialist motivations. For example, they may believe that broad majorities strengthen the willingness of elected actors and the public to accept an opinion; or that consensual opinions promote the legitimacy of the Court. Chief Justice Roberts has said that "[u]nanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court; by contrast, closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics" (Rosen 2007; see also Fischman 2007). Epstein et al. (2002b) show that homogeneity on the Court, which translates into unity, provides an adequate basis for justices to make statutory rulings when they would otherwise make constitutional rulings to minimize the odds of a congressional override. The mechanism here is unclear, but it is possible that without a dissent, interest groups lack the ammunition—the alternative viewpoint—they may need to lobby effectively in Congress.

Do collegial considerations play a role on other courts? Until recently, this question received short shrift from strategic analysts, but there is now something of a cottage industry devoted to exploring panel effects on the U.S. Court of Appeals. Much of this work follows

from the low dissent rates among circuit judges: Although the justices of the Supreme Court file dissenting opinions in four out of every ten cases, in fewer than 10% of the cases do circuit judges dissent. Hence, even when judges of very different political persuasions—say, two conservatives and one liberal—sit together, they tend to reach consensual decisions. The question is why: Why would a majority ever yield to the wishes of the minority, or why would the judge in the minority suppress a dissent when she disagrees with the majority?

Cross & Tiller (1998) argue that the answer lies in strategic behavior on the part of the judges on the panel, in relation to one another and to their judicial superiors, the Supreme Court justices. When the appellate panel is ideologically homogeneous and the odds of a dissenting opinion are low, the judges tend to reach more extreme decisions; in other words, homogeneity amplifies the effect of ideology (see also Sunstein et al. 2006). The panel can get away with this extreme behavior because, Cross & Tiller explain, it lacks a whistleblower—a judge whose preferences differ from the majority's and who will expose the majority's extremeness relative to the rest of the circuit or to Supreme Court. Mixed panels, in contrast, will reach more moderate decisions because, by definition, a potential whistleblower is always present. Either way, a dissenting opinion is less likely.

Epstein et al. (2010) also examine what they call "dissent aversion" on the circuit courts but contend that self-interested behavior on the part of the individual judges, and not the ideological mix of the panel, best explains it. Their data support the hypothesis that dissents impose costs on nondissenting judges (and therefore impose collegiality costs on the dissenter), while yielding minimal benefits (as proxied by number of citations) to a dissenter in prestige or recognition.

JUDICIAL SUPERIORS

Much of the literature we have discussed so far focuses on the judge in her milieu. Yet another influence, as Cross & Tiller's study suggests, comes from within the judiciary but beyond the judge's courtroom: the hierarchical structures in which federal and state judges operate.[3] A serious limit on trial judges is the right of a losing litigant to appeal a decision. Although appellate judges may give a certain presumption to the judgment of a colleague who presided over the trial, reversals of lower courts' rulings do occur. By the same token, appellate court panels face their own share of superiors. They may have their decision reviewed and reversed by the entire circuit court (en banc review). Courts of last resort may also have the opportunity to review decisions made by intermediate appellate courts; and the evidence suggests that they have not been hesitant about reversing decisions of courts below. When the U.S. Supreme Court agrees to hear a case, the likelihood that it will reverse the lower court is about 0.66. This is not terribly surprising. To the extent that supreme courts cannot hire, fire, promote, demote, financially reward, or penalize members of trial or intermediate courts, sanctions can take only one form: reversal.

Obviously, none of this would matter too much if judges had no value conflicts, that is, if they all shared the same utility function. Although some in the legal academy may subscribe to this view, most social scientists argue that value conflicts are as pervasive in the judiciary as they are in any other organization. Accordingly, they have drawn analogies between principal-agent theory and the judicial hierarchy based on various empirical correspondences. Providing an example is a seminal study by Songer et al. (1994), in which the authors draw an analogy between the economic marketplace and the judicial system. The principal is the Supreme Court, and the agent is the courts of appeals; both try to maximize their (policy) preferences strategically. Using this analogy, Songer and colleagues developed

[3] We focus here on the constraining effect of judicial superiors, but the ideological makeup of law courts can also restrict the options of higher courts. See Cohen & Spitzer (1994); Jacobi & Tiller (2007).

several interesting propositions. To wit: Because principal-agent theory suggests that monitoring by the principal should influence the behavior of the agent, we might infer that monitoring by the Supreme Court enhances the responsiveness of the courts of appeals.

But to what extent does monitoring or, more pointedly, (the threat of) sanctioning constrain judges from acting on their own preferences, ideological or otherwise? Assuming that judges do not like to be reversed—whether because it is embarrassing, because their view of the law will not carry the day, or for any other reason—some scholars have posited that judicial inferiors must take into account the preferences and likely actions of their superiors when making decisions. Other scholars have countered that judges are not likely to attend to the judicial hierarchy because the odds of reversal are so slim. Almost uniformly, the strategic literature comes down on the side of the first view and so has set out to explore the decisions that result when value conflicts exist between higher and lower courts.

Starting with the relationship between intermediate appellate and trial courts, there is little doubt that the threat of reversal is quite effective in dampening the role of partisanship or ideology. A recent study shows that in many areas of the law, district court judges strategically anticipate the likely reactions of the appellate court that could review their decisions: liberal judges will reach more conservative decisions than they otherwise would as the probability of reversal by the appellate court increases, and likewise for conservative judges (Randazzo 2008). Studies of sentencing in criminal cases reach much the same conclusion: Trial court judges who are politically aligned with the supervising circuit court are more likely to depart from sentencing guidelines than are judges not so aligned (Schanzenbach & Tiller 2007). To provide but one example, a Democratic judge–Democratic circuit alignment results in a sentence reduction of 9.5 months, compared with a 5.5 reduction for a Democratic judge–Republican circuit.

If the superiors are the judges' own colleagues, as is the case in en banc proceedings, the possibility of reversal also seems to influence behavior. An analysis of all en bancs between 1942 and 1999 finds that the incidence of reversal decreases as the average length of service in the circuit increases. The authors take this as evidence of strategic behavior: As the judges in the circuit's ideological minority learn about the preferences of their colleagues, they modify their decisions to avoid en banc review (Giles et al. 2007).

Where the studies are slightly more mixed is over the extent to which the possibility of Supreme Court review exerts an influence on appellate court judges. A recent analysis of Establishment Clause litigation in the U.S. Court of Appeals reports that the judges tend to follow the Supreme Court's lead in this area, faithfully implementing its doctrinal commands (though conservative panels tend to be more accommodating toward religion and liberal panels tend to be more separationist in orientation) (Luse et al. 2009). But the authors show that a threat of reversal does not explain adherence to precedents established by the Court. If the judges were reversal-averse, we might expect them to ignore liberal precedent when the Court is conservative and conservative precedent when the Court is liberal. But, in fact, regardless of the justices' ideology, the appellate judges follow precedent.

The balance of work in this area, however, suggests quite the opposite. Capturing the flavor of this research is a study that examined over 10,000 appellate court citations to 500 randomly selected Supreme Court decisions (Westerland et al. 2011). The authors report that when the enacting court (i.e., the Supreme Court that established the precedent) and the contemporaneous court (i.e., the sitting Supreme Court) are ideologically quite close, the circuits are extremely unwilling to act in defiance of the Court: All else being equal, the likelihood of a positive treatment of Supreme Court precedent—compliance—is 0.54; the likelihood of a negative

treatment—defiance—is 0.25.[4] But when the enacting and contemporary Supreme Courts are ideologically quite different (e.g., the Warren versus the Rehnquist Court), the odds of defiance increase to about 0.37, and compliance falls to about 40%. Broadly speaking, these results indicate that the circuits are quite sensitive to the shifting preferences of the High Court—so much so that earlier treatments of precedent by the justices do not seem to matter much after controlling for the political preferences of the sitting Court. These results suggest that fear of reversal is more powerful than the urge to follow precedent.

Other studies have reached much the same conclusion. Brent (1999) found that the lower courts, regardless of their ideological propensities, grew increasingly reluctant to rule in favor of free exercise claimants after the Supreme Court's rulings in *Employment Division v. Smith* (1990) and *City of Boerne v. Flores* (1997). Likewise Caminker (1994b) demonstrated that federal courts have adopted a predictive approach when discerning state law pursuant to the Erie doctrine. Finally, Songer et al. (1994) hypothesized that the circuits would become more willing to uphold searches as the Supreme Court became increasingly law-and-order oriented after Warren Burger replaced Earl Warren in 1969. The data bear this out: The odds of a circuit upholding a given search grew from 50% in 1968 to 73% in 1990.

OTHER BRANCHES

If the hierarchy of justice affects the decisions judges reach, as many social scientists maintain, so too might the separation-of-powers system. The basic idea is that for judges to render efficacious decisions—those that other actors will respect and with which they will comply—the judge must attend to the preferences and likely actions of members of the elected branches who could override or otherwise thwart their decisions.

Some analysts might consider this level of strategizing as unnecessary because, as Dahl (1957) famously put it, "the policy views dominant on the Court are never for long out of line with the policy views dominant among lawmaking majorities." In other words, the odds of issuing inefficacious decisions are quite small, as political actors and judges share the same political preferences. But why does this coincidence of preferences occur? In Dahl's account, the mechanism is periodic turnover. Every few years, the ruling regime will have an opportunity to appoint new judges, and those new judges will make decisions in accord with their sincere political preferences, which happen to coincide with the views of those who appointed them.

A problem with this account is that systematic assessments of its empirical implications have repeatedly failed to validate it. The theory, in other words, does not seem to generate the data we observe. If it did, only rarely would we notice courts overturning laws passed by the contemporaneous regime, judges worrying about the efficacy of their decisions, or elected actors punishing their judiciary.[5] But overrides do occur in the real world, as do other events unanticipated by Dahl's account. In a comprehensive study of the U.S. Supreme Court, Whittington & Clark (2006) found that the justices are indeed ideologically sensitive when reviewing federal legislation, but they are not particularly deferential to their own ideological (partisan) allies, as Dahl's thesis would suggest. Epstein et al. (2002a) show that the Russian Constitutional Court was so worried about its continued viability that it avoided

[4]The authors used Shepard's categories (e.g., "followed," "criticized") to categorize positive and negative treatments of Supreme Court cases.

[5]This last point raises another obvious objection to strategic accounts of the effect of the separation-of-powers system on judicial decisions: If courts follow various strategies to stay out of trouble with the elected branches, they should never find themselves in such trouble in the first place. For responses, see Ferejohn et al. (2007), Spiller & Tiller (1996).

certain kinds of disputes. As for courts clashing with ruling regimes, Helmke & Staton's (2009) new research on interbranch disputes shows that this is hardly a rare occurrence.

We could point to many other systematic, empirical studies, but the more important question is why the ruling regime account is so hard to validate. The primary and perhaps all too obvious answer is that its assumptions are not often met. Consider Dahl's emphasis on periodic turnover, such that the ruling regime has an opportunity to appoint new justices who will hold sway on their Court.[6] It turns out that "moving the median" on courts with life-tenured judges is very hard (Krehbiel 2007; see also Epstein & Jacobi 2008). And at least in the United States it may be getting even harder. Calabresi & Lindgren (2007) report that between 1789 and 1970, the mean tenure for a Supreme Court justice was 14.9 years; since 1970, it has jumped to 26.1. The average length of time between vacancies has increased to 3.1 years, from the 22-month figure on which Dahl relied.

The upshot is that unless the regime can completely replace the Court or, for whatever reason, a coincidence of preferences emerges, there will be occasions when the preferences of the judges and the ruling regime will fail to align; there will be value conflicts.

How might courts respond? The literature identifies several approaches ensuring efficacious decisions, but perhaps the most prominent is rational anticipation followed by, if necessary, sophisticated behavior (see, e.g., Bergara et al. 2003; Epstein et al. 2001; Eskridge 1991a,b; Vanberg 2005). The basic idea here is that courts can work to ensure the integrity of their rulings by taking into account the preferences and likely reactions of external actors in a position to respect or thwart them, and act accordingly. How might courts undertake this task via their decisions? Scholars have offered a range of approaches but, given space limits, we focus on two: engaging in dynamic interpretation and writing vague opinions.[7]

Dynamic Interpretation

Whether in the constitutional or statutory context, judges invoke various methods for interpreting text. The idea behind dynamic interpretation is that if the judges' goal is to generate enduring policy, they should (and do) read an act of government or constitutional provision in line with the preferences and likely actions of the contemporaneous body (or other relevant actors), rather than the desires, intent, or understanding of the enacting body. This approach supposes that if judges truly care about the ultimate state of the law, then they must "keep [their] watch in the halls of Congress" and, occasionally, in the oval office of the White House (Fairman 1987).

Eskridge (1991a,b) was among the first to raise and explore these ideas in a systematic way (see also Eskridge & Ferejohn 1992, Gely & Spiller 1990, Marks 1988). In considering the course of civil rights policy in the United States, he identified many Supreme Court decisions that would be difficult to explain if the justices voted solely on the basis of their own policy preferences (e.g., instances of the relatively conservative Burger Court reaching liberal results). Hence, the question emerged: If not straight preferences, then what? Eskridge's intuition was that the separation-of-powers system induces strategic decision making on the part of Supreme Court justices. In other words, if the goal of justices is to establish policy for the nation that is as close as possible to their ideal points, they must engage in dynamic interpretation, taking into account the preferences of other relevant actors (here, Congress and the

[6] We focus here on the lack of periodic turnover. See Ferejohn et al. (2007) for a discussion of political fragmentation, which also presents a problem for Dahl's account.

[7] Other include cultivating public opinion to increase the costs of noncompliance by elected officials and promote the courts' legitimacy (see, e.g., Epstein et al. 2002a, Staton 2010); and two to which we already have alluded: presenting a unified front by reaching unanimous decisions (for an example, see Brams 1990), and developing avoidance procedures and limiting doctrines (see, e.g., Harvey & Friedman 2009, Koopmans 2003; but see Owens 2010).

president) and the actions these other actors are likely to take. Justices who do not make such calculations risk congressional overrides and, thus, of seeing their least preferred policy become law.

Eskridge formalized this intuition in his Court/Congress/President game (also known as the separation-of-powers game) that unfolds on a one-dimensional policy space over which the relevant actors have single-peaked utility functions. All the actors, Eskridge assumes, have perfect and complete information about the preferences of the other actors and about the sequence of play. The Court begins the game by interpreting federal laws. In the second stage, legislative gatekeepers (congressional committees/leaders) can introduce legislation to override the Court's decision; if they do, Congress must act by adopting the committee's recommendation, enacting a different version of it, or rejecting it. If Congress takes action, then the president has the option of vetoing the law. In this depiction, the last move rests again with Congress, which must decide whether to override the president's veto.

By invoking simple spatial models, Eskridge noted the existence of two different regimes with regard to the Court (illustrated in **Figure 2**): one in which political actors constrain the Court and one in which they do not. Based on the ideal points depicted in **Figure 2*a***, the equilibrium result is $x \cong J$. In other words, the Court is free to read its sincere preferences into law because its preferences are aligned with those of the relevant political actors.[8] [Along similar lines, although we do not show it here, certain forms of political fragmentation may give judges more room to maneuver. Iaryczower et al. (2006), for example, find that the Argentine Supreme Court tends to rule in favor of the government when the regime is unified, but is often defiant when the regime is divided.]

Figure 2*b* yields a very different expectation. Because the Court's preferences are now to the left of $C(M)$ (the point that lies to the committee's left that is equidistant to the median of Congress on its right), it would vote in a sophisticated fashion to avoid a congressional override; the equilibrium result is $x \cong C(M)$.

These regimes, at least according to Eskridge, not only provide us with insight into some important and seemingly anomalous Burger Court decisions in the area of civil rights, but they also hold important lessons about the Court's decision-making process. For example, in interpreting legislation, we learn that the intent of the enacting Congress is far less important to preference-maximizing justices than are the preferences and likely actions of the current one.

Do these results hold over larger samples of cases? In the first rigorous empirical article on the subject, Segal (1997; see also Segal & Spaeth 2002) was blunt: "the Court's reaction to the . . . revelation of congressional preferences is a collective yawn." Armed with equally impressive evidence, Bergara et al. (2003) refuted Segal's conclusion, claiming instead that when the Court interprets statutes, it in fact "adjusts its decisions to Presidential and congressional

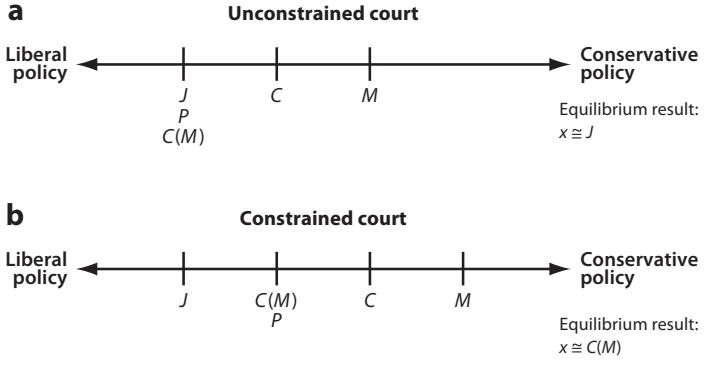

Figure 2

Hypothetical distributions of preferences. J is the justices' preferred position based on the attitudes of the median member of the Court; M and P denote, respectively, the most preferred positions of the median member of Congress and the president; C is the preferred position of the key committees in Congress that make the decision whether or not to propose legislation to their respective houses; and $C(M)$ represents the committees' indifference point (between their preferred position and that desired by M). Adapted from Eskridge 1991a.

[8] Of course, variants of social-psychological theory (especially the attitudinal model) would make the same prediction. The difference between the two approaches is seen in **Figure 2*b***, where the attitudinal model would still predict $x \cong J$.

preferences" (see also Epstein et al. 2001, Harvey & Friedman 2006). And now even Segal has (partially) conceded the point. In a new study that considers the Supreme Court's exercise of judicial review, he and his coauthors find that the Court is significantly less likely to strike down a federal law when the justices and legislators have opposing ideologies (Segal et al. 2007; see also Cooter & Ginsburg 1996).

Writing Vague Opinions

Dynamic interpretation may receive the lion's share of attention, but it is not the only method available to judges facing potential opposition to their rulings. Another, suggested by Staton & Vanberg (2008), is the production of vague opinions. The researchers assume, reasonably so, that the costs to political actors of deviating from a clear court decision are higher than the costs of deviating from a vague decision because noncompliance is easier to detect. So if a court faces friendly implementers, it may be better off writing clear opinions; clarity will increase pressure for—and thus the likelihood of—compliance.

When there is a high probability of opposition from implementers, however, clarity could be costly to the judges. The idea is that if policy makers are determined to defy even a crystal-clear decision, they highlight the relative lack of judicial power. To prevent such an erosion of authority, courts may be purposefully vague to soften the appearance of anticipated resistance.

Staton & Vanberg provide a range of interesting examples to illustrate the strategic use of vagueness, from the Warren Court's decision in *Brown v. Board of Education II* (1954) to the German Constitutional Court's ruling in an important taxation case. In both, as the authors write, the justices had the same reason for leaving ambiguous "the precise actions that would be consistent with the decision": concerns about compliance and, ultimately, legitimacy. Using similar logic, Jacobi & Tiller (2007) model how high courts use choice over doctrinal determinacy—crafting rules versus standards—to control lower court compliance. The level of policy alignment between higher and lower court judges will shape the likelihood that lower courts will use any doctrinal discretion they are given to promote or defy higher court judicial preferences, and thus whether such discretion is likely to be given.

Knowing when to write clear decisions and knowing when to write vague ones—not to mention implementing dynamic interpretation—require that judges learn about the preferences and likely actions of those in a position to thwart their objectives. To that end, we should, and do, see courts develop information-acquiring rules and procedures (see, e.g., Johnson 2004, Brodie 2002). Exemplary in the United States are rules governing the participation of the federal government as amicus curiae. Perhaps believing that the government's briefs can advance its project of learning about the likely response of a key implementer, the Court maintains a rather lax rule.

Because the Court's approach to amici implicates rule making, rather than opinion writing, this is yet another topic we must leave for another day. Suffice it to note here that using rules to learn about preferences for the purpose of writing vague or concrete opinions has benefits beyond the strategic context of decision making—for example, encouraging a diversity of inputs, which can lead to better opinions (see generally Posner 1990). On the other hand, one might ask whether judges who write vague opinions or engage in dynamic interpretation help or hinder their courts in the long run. These may be rational courses of action for preference-maximizing judges, but do they contribute to the establishment and maintenance of their court's legitimacy over time? Or do the courts that deploy them run the risk of becoming an entrenched part of the ruling regime, and (owing to their timidity) not a particularly relevant part? Although we cannot now answer these questions with any degree of certainty, we have little doubt that the next generation of strategic studies will supply interesting insights.

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