

## 1 Introduction

The analysis of judicial behavior is thriving. Once the sole province of US scholars – and mostly political scientists at that – researchers throughout the world are illuminating how and why judges make the choices they do and what effect those choices have on society.<sup>1</sup>

Guiding work on judicial behavior is a range of theories, reflecting different disciplinary traditions, as Table 1 shows. But common features of these accounts are not hard to spot. First, all ascribe a key role to the judges' preferences. This is obvious for the attitudinal model under which judges vote in accord with their ideological commitments. Preferences also figure into the labor market model, which draws attention to personal motivations for judicial choices; and for legalism, which holds that adhering to the law is an end in and of itself. Identity accounts and thinking-fast judging are less focused on any one set of goals but they help explain why judges hold particular preferences (identity approaches) and why, no matter how hard they try, judges may be unable to maximize them (thinking-fast judging).<sup>2</sup>

A second common feature of the approaches is that they highlight the importance of institutions – or rules that shape judicial choices. For the legal model, formal constitutional provisions, laws, precedent, and the like serve as guideposts for judges desiring to follow the law (Eskridge, 1991a; Knight, 1992; Knight and Epstein, 1996a). Identity approaches show how particular rules allow personal characteristics to seep into the judges' choices, such as those making transparent the litigants' religion, race, and ethnicity (Shayo and Zussman, 2011). Even the attitudinal model, although often caricatured as “judges vote on the basis of their ideology,” appreciates the importance of institutions. Judges only enjoy “enormous latitude to reach decisions based on their policy preferences” when they can serve for life on a court of last resort and when that court has substantial control over the cases it will hear and decide (Segal and Spaeth, 2002).<sup>3</sup> For judges operating under these rules, the labor market approach concurs on the importance of ideology (Epstein, Landes, and Posner, 2013; Alarie and Green, 2017).

As Table 1 makes plain, preferences and institutions are also central to strategic accounts of judicial behavior – the subject of this Element. But strategic analysis adds a third ingredient: interdependency. In strategic accounts, judges do not make decisions in a vacuum, but, rather, attend to

<sup>1</sup> Worth noting, however, is that some of the pioneers of US judicial behavior conducted the first systematic comparative studies (e.g., Schubert and Danelski, 1969; Becker, 1970; Tate, 1971). See Dyevre (2010).

<sup>2</sup> We return to thinking-fast judging in Section 6.

<sup>3</sup> These are just some of the factors that can lead to (more or less) ideological voting. For others, see Section 2.1.1.

**Table 1** Six approaches to the study of judicial behavior

<b>Approach (disciplinary origin(s))</b>	<b>Description</b>
Attitudinal model (political science, psychology)	Judges' votes reflect their ideological attitudes toward case facts <sup>4</sup>
Legalism (strong version) (law)	Judges "find" the meaning of legal rules through politically neutral methods <sup>5</sup>
Thinking-fast judging (psychology, behavioral economics)	Judges rely on heuristics, intuitions and the like to make fast decisions without much effort <sup>6</sup>
Identity accounts (psychology, sociology)	Judges' biographies, personal characteristics, and identities affect their choices <sup>7</sup>
Labor market model (economics)	Judges are motivated and constrained by (mostly) nonpecuniary costs (e.g., effort, criticism) and benefits (e.g., esteem, influence, self-expression) <sup>8</sup>
Strategic accounts (economics, political science)	Judges are strategic actors who realize that their ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they interact <sup>9</sup>

the preferences and likely actions of other key players, including their colleagues, judicial superiors, politicians, and the public.

<sup>4</sup> Segal and Spaeth, 2002.

<sup>5</sup> Under a weaker version of legalism, "law" (broadly defined) constrains judges from acting on their personal preferences, intuitions, biases, and emotions. Because this version – "law-as-an-institution" – figures prominently in strategic accounts, we consider it in Section 2.3.

<sup>6</sup> See, generally, Kahneman, 2011; Thaler, 2015. Numerous experiments on judges show that non-rational factors complicate their ability to make (strategically) rational decisions (Rachlinski et al., 2009; Rachlinski, Guthrie, and Wistrich, 2011; Sonnemans and van Dijk, 2012; Wistrich, Rachlinski, and Guthrie, 2015). Observational studies include Shayo and Zussman, 2011; Epstein, Parker, and Segal, 2018; Eren and Mocan, 2018; Segal, Sood, and Woodson, 2018.

<sup>7</sup> Examples include national identity (Posner and de Figueiredo, 2005; Voeten, 2008), race (Cox and Miles, 2008; Kastellec, 2013; Sen 2015), gender (Boyd, Epstein, and Martin, 2010; Haire and Moyer, 2015), and religion (Sisk, Heise, and Morriss, 2004; Shayo and Zussman, 2011).

<sup>8</sup> See, e.g., Posner, 1993, 2008; Alarie and Green, 2017.

<sup>9</sup> From Epstein and Knight, 1998a.

Strategic accounts of judging, in short, contain three essential components: (1) judges' actions are directed toward the attainment of goals; (2) judges are strategic or interdependent decision makers, meaning they realize that to achieve their goals, they must consider the preferences and likely actions of other relevant actors; and (3) institutions structure the judges' interactions with these other actors.

In what follows, we explore the literature on the forms of strategic behavior in courts around the world and the ways in which preference-maximizing judges interact with important players in their society. Section 2 provides a foreword to strategic analysis, fleshing out its three components: judicial preferences (including policy, personal, and institutional goals), the institutional context, and the interdependencies between judges and other relevant actors. In Section 3, we survey the major methodological approaches for conducting strategic analysis; and Sections 4 and 5 consider how scholars have used those methodologies to provide insight into the effect of internal and external actors on the judges' choices. The conclusion flags opportunities for future research.

## 2 Building Strategic Accounts

Strategic accounts consist of three components: preferences, interdependency, and institutions. Because the three are foundational in any strategic analysis, each merits attention.<sup>10</sup>

### 2.1 Preferences

Strategic accounts assume that people make decisions consistent with their goals and interests. We say that judges (or anyone else for that matter) make rational decisions when they choose a course of action that they believe satisfies their desires most efficiently. To give meaning to this assumption – essentially, that judges maximize their preferences – we researchers must identify the judges' goals. If we do not, our explanations become tautological because we can always claim that a judge's goal is to do exactly what we observe her doing (Ordeshook, 1992).

On several accounts of judicial behavior, the judges' motivations are fixed; for example, the attitudinal model holds that judges pursue policy goals and only policy goals (Segal and Spaeth, 2002); so too strong versions of legalism suggest that judges' sole goal is to follow “the law.” Strategic accounts, in contrast, enable researchers to advance any motivations they believe judges hold. And scholars have taken advantage of this flexibility, positing three classes of motivations – policy, personal, and institutional

<sup>10</sup> We do not recount the history of the strategic analysis of judicial behavior because other reviews exist (Cameron, 1993; Epstein and Knight, 2000; Epstein and Jacobi, 2010).

motivations – although, as we hasten to note, analyses can consider all three simultaneously by, say, weighting motivations in the judges’ utility function (Knight and Epstein, 1996b; Epstein, Landes, and Posner, 2013), among other approaches (see, generally, Helmke and Sanders, 2006).

### 2.1.1 Policy

Many early strategic studies characterized judges as “single-minded seekers of policy” (George and Epstein, 1992, 325), a phrase encapsulating the idea that judges work to bring the law in line with their preferred policy position (Murphy, 1964; Pritchett, 1961; Rohde, 1972; Eskridge, 1991a, b; Spiller and Gely, 1992; Cross and Tiller, 1998; Epstein and Knight, 1998a). By policy position, scholars usually mean the judges’ ideological preferences (although to assess these preferences, scholars use both partisan and ideological measures. More on this point soon.)

The emphasis on ideology continues today in large part because scholars have offered plausible (although somewhat distinct) reasons and mounds of data for thinking that ideology affects the choices judges make. That certainly holds for US justices (Segal and Spaeth, 2002; Epstein, Landes, and Posner, 2013; Baum, 2017) but they are hardly unique: In virtually all studies that measure it, the judges’ partisanship or ideology has a role to play. Work on the Norwegian Supreme Court by Grendstad et al. (2015), for example, establishes that justices appointed by social democratic governments are significantly more likely than nonsocialist appointees to find for the litigant pursuing a “public economic interest.” Ideology (as measured by the appointing regime) plays a bigger role in these decisions than most any other factor that Grendstad et al. considered. Hönnige (2009) shows that ideology helps predict the votes of judges serving on the French and German constitutional courts (see also Hanretty, 2012); and Carroll and Tiede (2012) identify dissent patterns on the Constitutional Court of Chile “consistent with a general separation between the judges with center-left and right backgrounds.” In their study of Spanish Constitutional Court judges, Garoupa, Gomez-Pomar, and Grembi (2013, 516) report that under certain conditions, “[t]he personal ideology of the judges does matter,” leading the authors to “reject the formalist approach taken by traditional constitutional law scholars in Spain.” Likewise, Corrado, Garoupa, and Magalhães (2017) persuasively demonstrate that the Portuguese Constitutional Court’s decisions on austerity policies are less a function of business cycles than of policy preferences.

We could go on; many other studies of courts around the globe reach similar conclusions (Weiden, 2011; Weinshall-Margel, 2011; Dalla, Escresa, and Garoupa,

2014; Kantorowicz and Garoupa, 2016). At the same time, however, these studies demonstrate that ideological (or partisan) motivations pose their share of difficulties.

One follows from the ways that scholars assess empirically the judges' policy positions. Sometimes they use partisan measures (e.g., the appointing regime's party, the judges' partisan identity, or even their campaign contributions); and sometimes they deploy ideological measures (e.g., those derived from voting patterns or from text analysis of opinions or pre-appointment newspaper editorials).<sup>11</sup> For this reason, research on judicial behavior tends to treat political goals, policy goals, ideological goals, and partisan goals as interchangeable. Setting aside theoretical qualms about conflating these terms,<sup>12</sup> empirically all the various measures of policy preferences operate under assumptions that are worrying, unacknowledged, or both. Assessing judges' ideology on the basis of their votes, for example, assumes that votes are mainly ideologically driven. Likewise, partisan measures assume that policy preferences motivate voting aligned with party identity, when, in fact, those patterns may be a manifestation of strategically motivated behavior, especially on courts in which judges are attentive to the implications of their decisions for their future career prospects.

A second difficulty, a limit really, of ideological (or partisan) motivations is that no matter the study, their explanatory power may be constrained by high levels of consensus on courts worldwide. True, socialist appointees on the Norwegian Court, relative to nonsocialists, are more inclined to support public economic interests. But with a unanimity rate of about 80 percent, the opposing Norwegian partisans are mostly allied (Bentsen, 2019). More generally, for many apex courts, the effect of ideology is less pronounced than it is in the US Supreme Court<sup>13</sup> (Weinshall, Sommer, and Ritov, 2018); and even in the US, moving down the judicial hierarchy from apex to trial courts, ideology and partisanship carry even less weight (Hettinger, Lindquist, and Martinek, 2006; Zorn and Bowie, 2010; Boyd and Sievert, 2013; Epstein, Landes, and Posner, 2013).

<sup>11</sup> For a review of these measures, see Epstein et al., 2012; Weinshall, Sommer, and Ritov, 2018 and Bonica and Sen, 2021.

<sup>12</sup> The literature on political behavior shows that, however closely connected ideology and partisanship, they are distinct concepts, resulting in distinct behavior. In other words, a meaningful difference exists between "partisan loyalists" and "policy loyalists" (for a review, see Barber and Pope, 2019).

<sup>13</sup> Then again, even the US Supreme Court – a highly "political court" (Alarie and Green, 2017) – issues unanimous decisions in 40 percent of its cases, meaning that the most extreme liberals/Democrats and conservatives/Republicans often find common ground.

Why? The list of explanations for the varying strength of ideology is long and now includes the process of judicial appointments (e.g., the more political actors involved or the more contentious the process, the more political the court) (Wetstein et al., 2009; Robinson, 2013), as well as agenda-setting mechanisms (Eisenberg et al., 2012; Alarie and Green, 2017), the size of the court's docket (Narayan and Smyth, 2007), and the size of judicial panels (Weinshall et al. 2018) – such that courts with a mandatory docket, high caseload, and fluid or small panels tend to be more legalistic. The multidimensional nature of legal issues and the limitations of ideological proxies may also contribute to weaker (observed) connections between policy preferences and voting.

Regardless of the precise reasons for the differential effect of “political preferences,” the upshot is this: However useful partisanship and ideology are for understanding judicial behavior, they are not the only motivations at work (and they may not even be especially important for many judges). Fortunately, strategic accounts allow scholars to posit others.

### 2.1.2 Personal Preferences

As the pool of scholars studying judicial behavior has grown to include economists, psychologists, and legal academics, and the targets of inquiry have expanded to include judges throughout the world – many of whom are more career-minded than politically oriented – increasing attention has been paid to personal motivations for judicial choice (Helmke and Sanders, 2006; Garoupa and Ginsburg, 2015; Melcarne, 2017). The idea is that, given time constraints, judges seek to maximize their preferences over a set of personal factors (some of which also have implications for political and institutional goals) (see, generally, Helmke and Sanders, 2006; Epstein and Knight, 2013). Examples include: job satisfaction (Shapiro and Levy, 1995; Drahozal, 1998; Baum, 2006; Engel and Zhurakhovska, 2017);<sup>14</sup> promotion to a “higher” or more prestigious job or office (Salzberger and Fenn, 1999; Ramseyer and Rasmussen, 2001; Melcarne, 2017); leisure (Klein and Hume, 2003; Clark, Engst, and Staton, 2018);<sup>15</sup> salary

<sup>14</sup> Job satisfaction is usually conceived in positive terms: as the judges' internal satisfaction of feeling that they are doing a good job, as well as the more social dimensions of judicial work, such as relations with other judges, clerks, and staff. de Figueiredo, Lahav, and Siegelman (2019), however, reveal the negative side of job satisfaction. The authors demonstrate how fear of public shaming causes US district court judges to swiftly resolve “old” cases and motions to avoid publication in the Six-Month List (a twice-yearly public list detailing the judges' backlogs). The swift resolution comes at the price of delays in cases for which the deadline is less pressing.

<sup>15</sup> Such that, at some point, “the opportunity cost of foregone leisure exceeds the benefits to the judge of additional time spent making decisions” (Drahozal, 1998, 476).

and income (Cooter, 1983; Toma, 1991; Melcarne, 2017);<sup>16</sup> and external satisfactions that come from being a judge, including reputation, prestige, power, influence, and celebrity (Miceli and Cosgel, 1994; Baum, 1997, 2006; Schauer, 2000; Dothan, 2015; Garoupa and Ginsburg, 2015).

This class of personal preferences has two especially nice properties. First, because all the elements are rather universal motivations, they lend themselves to comparative analysis. Second, even though personal preferences derive from parametric (nonstrategic) rational choice models of judicial behavior,<sup>17</sup> they are useful for strategic analysis. That is because maximizing personal preferences almost always requires judges to account for the preferences and likely actions of others, whether colleagues or external actors.

The desire for promotion illustrates both properties. Enhancing future job prospects could seem to be an important factor influencing the personal utility that judges gain from their work: It tends to increase job satisfaction, prestige, reputation, and salary.<sup>18</sup> For this reason, it is no surprise that many studies provide evidence of a connection between the judges' choices and career-advancement goals. In the USA, for example, federal judges with some realistic possibility of promotion impose harsher sentences on criminal defendants to avoid being tagged as soft on crime by appointing authorities (and the public) (Epstein, Landes, and Posner, 2013). Likewise, these "auditioners" are more likely to vote in line with the preferences of the president who could promote them (Black and Owens, 2016). The same holds in Japan where judges tend to defer to the national government because deference improves their chances of "doing better in their careers" (Ramseyer and Rasmussen, 2001). Along somewhat different lines, Italian Constitutional Court judges (who serve for a nine-year nonrenewable term) make judicial choices designed to enhance their post-court professional opportunities (Melcarne, 2017); and UK judges work to avoid reversal because a lower reversal rate increases their prestige, in addition to the likelihood of promotion (Salzberger and Fenn, 1999).

### 2.1.3 Institutional Preferences

In general, institutional preferences implicate the interest of government actors in their relative power and authority (Knight and Epstein, 1996b). When it

<sup>16</sup> That is, all else equal, judges, like most of us, prefer more salary, income, and personal comfort to less.

<sup>17</sup> Specifically, personal motivations grow out of the labor market approach introduced by Posner (1993, 2008) and interrogated empirically in Epstein, Landes, and Posner (2013) and Alarie and Green (2017).

<sup>18</sup> Promotion also could be coincident with policy preferences: The higher judges sit in the hierarchy, the more important the cases they hear and the greater the opportunity to influence the law.



comes to courts, usually lacking “influence over either the sword or the purse” (Hamilton, 1788), institutionalist judges care about issuing decisions that the public and the ruling regime will respect and implement (Epstein, Knight, and Shvetsova, 2002), while avoiding institutional sanctions that would undermine their court’s legitimacy (Helmke and Sanders, 2006; Clark, 2011). Possible sanctions that could be imposed against judges and their courts are many in number and severity, ranging from impeachment, removal, and court-packing to criminal indictment, physical violence, and even death (Rosenberg, 1992; Helmke, 2005).

Hints within the literature suggest that institutional preferences are strongest when a court is seeking to establish itself as a player within a regime and/or for the court’s leader (e.g., chief justice or president) (Katz, 2006; Fettig and Benesh, 2016; Li, 2020). Maybe so. But the literature provides plenty of examples of judges on well-established courts giving less weight to personal and political preferences in an effort to maintain and even deepen their court’s legitimacy (Dothan, 2015). Krehbiel (2016), for example, demonstrates how the German Constitutional Court (a highly respected court) strategically uses hearings to generate public support for its decisions and, ultimately, to increase the odds of government compliance. Another example is the tendency of Israeli justices to intervene latently in security policy by promoting court settlements in the days following deadly terror attacks, compared with openly accepting petitions against the security forces in times of peace (Hofnung and Weinshall-Margel, 2010).

These are but a few of the strategies institutionalist-oriented judges deploy to accomplish the twin goals of issuing efficacious decisions and avoiding sanctions. We consider others in Section 5, which explores interactions between courts and external actors – many of which are driven by the judges’ institutional preferences.

## 2.2 Interdependent (Strategic) Decision Making

The second part of the strategic account is tied to the first: For judges to maximize their preferences, whatever they may be, they must act strategically. By “strategic,” we mean that judicial behavior is interdependent: Judges’ actions are, in part, a function of their expectations about the actions of others. To say that a judge acts strategically is to say that she realizes that her success depends on the preferences of other relevant actors and the actions she expects them to take, not just on her own preferences and actions. On strategic accounts of judicial behavior, “other relevant actors” include the judges’ colleagues (if they work on a collegial court) of course, but also their judicial superiors (if they serve on



a non-apex court), elected officials, and the public – in other words, anyone in a position to help judges achieve their goals or stand in their way.

This component of the strategic account is in direct juxtaposition to most other approaches to judicial behavior. The attitudinal model and extreme legalism, for example, hold that judges always make choices that reflect their sincere preferences – whether to align decisions with their ideological commitments or to follow the law. Under the strategic account, whether judges behave sincerely or in a sophisticated fashion (that is, in a way that is not compatible with their most preferred position) depends on the preferences of the other relevant actors and the actions they are likely to take.

### 2.3 Institutions

Strategic accounts assume that judging takes place within a complex institutional framework. By institutions, we mean rules that structure the judges' interactions among themselves or with other relevant actors, and, ultimately, that may constrain them from acting on their sincere preferences. Institutions can be informal, such as norms and conventions. They can also be formal, such as “law” (broadly construed to include constitutional provisions, statutes, past judicial decisions, and the like) (Knight, 1992). So outlined, this approach to institutions highlights a key difference between legalism and strategic analysis. Extreme legalists argue that adherence to the law is a positive, not just normative, goal (i.e., judges derive pleasure from following previously decided cases) (Friedman, 2001), whereas strategic accounts tend to treat law as a formal institution that structures judicial decisions or that serves as a means to institutional or even personal ends. Examples include Knight and Epstein's (1996a) assertion that *stare decisis* (“to stand by things decided”) helps judges to issue efficacious decisions; and Posner's (1993) claim that adhering to precedent increases opportunities for leisure by saving time, relative to deciding each case from first principles. Running along similar lines, Guerriero (2016) and Anderlini, Felli, and Riboni (2020) endogenize the extent of discretion that appellate judges can exploit under different legal traditions and show that a larger degree of judicial autonomy helps limit both the volatility of precedents and the inconsistency of rulings (see also Hanssen, 2004).

Whether formal or informal, institutions can be internal to the court – for example, the Supreme Court of Canada's institution that allows the chief justice to set the size and composition of panels (Alarie and Green, 2017) or the US Supreme Court's norm governing opinion assignment, which holds that the chief justice assigns the opinion of the court if he is in the majority (Lax and Rader, 2015). Institutions can also be external, governing relations between

higher (or international) and lower (or domestic) courts (Cross and Tiller, 1998; Sweet and Brunell, 1998; Blanes i Vidal and Leaver, 2013, 2016; Dyevre, 2013; Masood and Lineberger, 2020), between courts and other governmental actors (Gely and Spiller, 1990; Eskridge, 1991a; Carrubba, Gabel, and Hankla, 2008; Larsson and Naurin, 2016; Arguelhes and Hartmann, 2017) and with the public (Knight and Epstein, 1996a; Friedman, 2009; Krehbiel, 2016). (All topics covered in Sections 4 and 5.)

Of course, the internal and external often work in concert, as made plain in research on rules governing the retention of judges. We already mentioned a study demonstrating that relatively short nonrenewable terms can cause judges to make strategic decisions designed to enhance their career prospects (Melcarne, 2017); the same holds for formal constitutional provisions forcing judges to face the electorate to retain their job (Huber and Gordon, 2004; Berdejó and Yuchtman, 2013; Canes-Wrone, Clark, and Kelly, 2014). Norms can play a similar role. Helmke (2002), for example, establishes that the Argentine constitution's assurance that judges "hold their office during good behavior" (the same as the US constitution) is little more than a parchment guarantee: "good behavior" does not mean life tenure as it is understood in the United States; it is instead a norm that has come to mean tenure for the life of the appointing regime. As Helmke writes: "[I]ncoming governments in Argentina routinely get rid of their predecessors' judges despite constitutional guarantees" (p. 292). Out of fear for their jobs or even their lives, Helmke theorized and empirically demonstrated that Argentine judges rationally anticipate the threat and begin "strategically defecting" by voting against the existing regime once it begins to lose power.

### 3 Conducting Strategic Analysis

With the basics of strategic analysis now fleshed out, we turn to the question of how scholars conduct the analysis. To be sure, debates ensue over the "best" approach but to us they are about as fruitful as debates over the "best" kinds of method and data – that is, not very (see Epstein, Šadl, and Weinshall, 2021). The fact of it is, at least four ways exist to "do" strategic analysis, none of which is superior to the others.

The first and perhaps most obvious is formal equilibrium analysis.<sup>19</sup> Although strategic analysis is not synonymous with formalization – indeed, various forms of strategic behavior can be fruitfully analyzed without formal work (Schelling, 1960; North, 1990) – that does not diminish the importance of formal analysis for many issues related to judicial behavior. If scholars hope to explain a particular line of decisions or a substantive body of law as the

<sup>19</sup> We adapt some of this discussion from Epstein and Knight (2000).