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Abstract and Keywords

The title of the chapter, "Politics and the Legal System," might conjure up images of judges logrolling, credit claiming, vote buying, and redirecting blame—in other words, judges acting as politicians. But the literature on judicial behavior almost never characterizes judges as "politicians in robes." Rather, it treats "politics," or more precisely "policy preferences," as an important motivating force, such that a major goal of all judges is to see the law reflect their preferred policy positions. The authors follow suit, describing the role of policy preferences in studies of judging, as well as the approaches scholars have proposed to measure them. The chapter ends with a discussion of whether policy preferences should remain a focal point of research on judging. Believing that the answer is (an equivocal) no, the authors propose new avenues for research.

Keywords: judicial behavior, policy preferences, policy maximizer, policy goal, median justice, ideology

THE title of this chapter, "Politics and the Legal System," might conjure up images of judges logrolling, credit claiming, vote buying, and redirecting blame—in other words, deploying strategies we typically associate with elected politicians.[*] But the literature on judicial behavior almost never characterizes judges as "politicians in robes." Rather, it treats "politics," or more precisely "policy preferences," as an important motivating force, such that a major goal of all judges is to see the law reflect their preferred policy positions. (Scholars mostly frame "policy positions" in ideological terms. But because they use partisan and ideological measures to assess empirically the judges' policy positions, they often use the terms "political goals," "policy goals," "ideological goals," and "partisan goals" interchangeably.)

In this chapter, we follow suit, focusing not on judges as politicians but as policy maximizers. We begin in section 7.1 with a brief description of the role that policy preferences have played in studies of judging. Next, we turn to the ways that scholars have measured the judges' policy preferences and how they have used those measures to explore judicial behavior (section 7.2). We end with a discussion of whether policy

preferences should remain a focal point of research on judging. Believing that the answer is (an equivocal) no, we propose new avenues for research in this field.

Just one quick caveat before we begin: Legal systems are vast organizations, housing many more actors than judges and covering many more actions than the judges' choices. To mention just a few possibilities, we could have focused on the extent to which the public views judges as partisan or ideological actors (e.g., Gibson and Caldeira 2011); on how constitutional framers design various legal institutions (including selection systems for judges, court competencies, and judicial review; e.g., Ginsburg 2003); or on the political and economic consequences of legal origins (e.g., La Porta et al. 2008).

(p. 115) All are worthwhile topics, and all relate to politics in the legal system. We chose to focus on the role of policy preferences in judicial behavior because it is an important enough subject to merit full-chapter treatment and yet manageable enough to cover in the space we have been allocated; and because, frankly, it is of great and ongoing interest to us.

7.1 Judges as Policy Maximizers

The role of policy preferences in the form of ideology has a long and distinguished history in the study of mass political behavior. Whether writing in the 1940s, the 2000s, or in eras in between, social scientists have explored the assumption that peoples' ideological commitments help explain the political choices they make—from their willingness to support particular public policies to the votes they cast.[1] As James L. Stimson, the eminent student of public opinion, writes "Ideology won't go away. It is too important."[2]

Stimson was referring (primarily) to the mass public. Does the same hold for judges? Are they similarly motivated to make choices on the basis of their own political (partisan or ideological) commitments? To the extent that most social scientists and, increasingly, legal academics would reject any explanation of judicial behavior that failed to incorporate the judges' policy preferences, the answer is yes. Even more to the point, in virtually all rigorous accounts of judicial decisions, policy preferences play an important, if not central, role. As in the study of mass behavior, the focus on ideology began in the 1940s with C. Herman Pritchett's path-marking studies (1941, 1948). And it continues today (e.g., Segal and Spaeth 2002; Epstein et al. 2013).

These and many more studies than we can possibly cite make use of policy preferences in two related ways: to understand the behavior of individual judges and to characterize courts. Let's *very* briefly consider each.

7.1.1 Understanding the Individual Judge

At the risk of grossly generalizing, two accounts tend to dominate (social science) thinking about judicial behavior—and both emphasize policy goals. According to the first, known as the "attitudinal model," judges vote on the basis of their sincerely held

ideological attitudes vis-à-vis the facts of cases, and little more (Segal and Spaeth 2002). To put it more concretely, U.S. Supreme Court Justice Antonin Scalia "voted the way he did because he was extremely was conservative; Justice Thurgood Marshall voted the way he did because he was extremely liberal."[3] On the second account, judges seek to achieve their policy goals by acting *strategically*—that is, by attending to the preferences and likely actions of actors who are in position to thwart the achievement of their political objectives, including Congress, the president, and their own colleagues (Epstein and Knight 1998).

(p. 116) These accounts differ in important ways,[4] but in practice they both emphasize politics as opposed to "law." Neither posits judges as neutral, principled decision-makers; rather, both subscribe to Stimson's general view that ideology is a driving force in politics, including on the bench (but see note 4). Viewed in this way, both attitudinal and strategic approaches offer a fundamentally different take on judging than the traditional legalistic accounts that remain popular in some law circles. Not only does legalism reject any room for policy considerations in judging; it also tends to treat (even venerate) judges as apolitical, apartisan, value-free umpires who resolve disputes with reference to the law alone, or the law plus a particular methodology for interpreting it (e.g., textualism, active liberty, originalism). Policy-maximizing accounts do not necessarily reject a role for law in judicial decisions; they instead tend to view it as a constraint on the ability of judges to write their ideology into decisions.

7.1.2 Characterizing Courts

In addition to supplying a primitive in explanations of judicial behavior, policy preferences help scholars characterize collegial courts. That's because social scientists tend to depict an entire court on the basis of its *ideological* median: the judge in the middle of an ideological distribution of judges, such that half the judges are to the right of (more "conservative" than) the median and half are to the left (more "liberal" than) the median (see, e.g., Epstein and Jacobi 2008; Martin et al. 2005; Enns and Wohlfarth 2013).

Why the idea of a "median" judge dominates this literature is a hardly a mystery. Since publication of Duncan Black's seminal work (1948, 1958) we know that, under certain conditions and voting procedures, the outcome of a majority vote will pull toward the position favored by the median because the median is necessary to secure a majority.[5] In the context of judicial behavior, this means that the legal policy desired by the median judge will (again, under certain conditions) be the choice of the court's majority. As such, and assuming that judges are policy maximizers, the median's preferences can serve as an appropriate way to characterize the preferences of "the court" and help explain the decisions it reaches.

7.2 Measuring Policy Preferences and Putting the Measures to Use

If we believe that policy preferences are crucial to understanding and characterizing judicial behavior—as many social scientists do—then we must measure those preferences. For most research, this challenge boils down to determining whether judges are liberal, conservative, or something in between.

(p. 117) In what follows we consider three approaches: (1) measures that rely on the party affiliation of the judge or the judge's appointer, (2) more sophisticated exogenous measures (that is, measures other than partisanship that are not based on the judge's votes or other choices he or she makes), and (3) endogenous measures (that is, measures derived in part from the judge's votes). We also provide examples of how scholars have deployed the various measures in studies of judicial behavior.

As we hope the discussion makes clear, each measurement strategy has its advantages and disadvantages—with the ultimate choice largely dependent on the goals of the research. To preview: When the goal is to explain the effect of ideology on judges' votes, scholars typically prefer exogenous measures because explaining votes with measures derived (even in part) from those very same votes involves a degree of circularity. In other words, if we classify a judge as conservative because she casts conservative votes, all we can say is that the judge's votes predict her votes. But in studies that take the effect of ideology as a given and wish to describe how it works (e.g., whether ideology changes over time), endogenous approaches may be preferable because they are more precise.

7.2.1 Partisan-Based Measures

Most early research on the effect of policy preferences on judicial behavior measured preferences as the judge's political party affiliation or, more typically, the party of the appointing authority or government (for a review, see Pinello 1999). In the United States, for example, judges appointed by Republican presidents, or who are Republicans themselves, are thought to be more conservative than Democratic appointees. In Norway, researchers hypothesize that judges appointed by social-democratic governments are economically more liberal than nonsocialist appointees (e.g., Grendstad et al. 2015). In England, judges are presumed conservative if they affiliate with the Conservative Party and progressive if they are from the Labour (or Liberal) Party (see, e.g., Hanretty 2013). And on and on.

This approach to measuring the judges' preferences continues today (see, e.g., Grendstad et al. 2015; Sunstein et al. 2006; Epstein et al. 2013) because it has several nice properties. First, it produces very high inter-coder agreement: if data coders have a list of the party affiliation of, say, every U.S. president (or every judge), and they know which president appointed a particular judge, no judgment calls are required. Second, the party approach is mostly (though not always) transportable across societies with more than one political party. Scholars have used it to study judicial behavior across the globe, but

especially in the Americas, including Canada (e.g., Tate and Sittwong 1989) and Argentina (e.g., Iaryczower et al. 2002); and in Europe (Grendstad et al. 2015; Garoupa, et al. 2013; Kantorowicz and Garoupa 2016; Hönnige 2009).

Last but not least, party affiliation has some explanatory power. In each of the 11 subject-matter categories they examined, Epstein et al. (2013) found that the fraction of conservative votes cast by the entire set of Supreme Court justices appointed by Republican presidents (since 1937) is significantly greater than that cast by the entire set (p. 118) appointed by Democratic presidents. For some areas, the disparity was quite substantial: in union, civil rights, and due process cases, the average difference in conservative voting between Republican and Democratic appointees was 20 percentage points. (For other areas—judicial power, federal, privacy, and taxation—the differences, though significant, were far smaller, in the 7–10% range). Likewise, Grendstadt et al. (2015, 114) report that Norwegian Supreme Court justices appointed by socialist governments were about 36% more likely to rule for the public-interest litigant in economic cases than were nonsocialist appointees. As for lower courts, a landmark study conducted by Goldman in 1966 demonstrated that U.S. circuit court judges affiliated with the Democratic Party were, relative to Republican judges, far more likely to vote for unions in labor–management disputes and against corporations charged with antitrust violations. More recently, Sunstein et al. (2006) provided evidence of partisan voting in more than a dozen areas of the law. In affirmative-action suits, for example, judges appointed by Republican presidents voted to uphold the plan at issue in less than 50% of the disputes. By contrast, Democratic appointees supported the plan in three out of every four cases.

Reliability, universality, and explanatory power are important benefits of the use of partisanship as a surrogate for ideology, but the approach also has its costs—mostly in the form of assumptions that may be questionable (see generally Epstein et al. 2013).[6] Four come quickly to mind, with the first rather obvious: the measure assumes ideological homogeneity across co-partisans—for example, that all Republican U.S. presidents (or judges) are conservative and all Democratic presidents (or judges) are liberal. But data suggest otherwise. According to one measure of economic liberalism, President Jimmy Carter, a Democrat, was ideologically closer to Richard Nixon, a Republican, than to Lyndon Johnson, a fellow Democrat.[7] As Giles et al. (2001) note, U.S. "presidents of the same political party vary in their ideological preferences. . . . [T]he empirical record demonstrates that the voting propensities of the appointees of some Democratic and Republican presidents do not differ significantly" (see also Haire et al. 2001). True enough. Although, as we just noted, Goldman (1966) reported substantial differences in how Democrats and Republicans vote in union cases, he found no significant gaps in the judges' voting in the areas of criminal law and civil liberties, nor in challenges to government regulations brought by businesses. Judges appointed by the Democrat Lyndon Johnson were no more likely to rule in favor of criminal defendants than were judges appointed by the Republican Dwight Eisenhower, to provide one example. Sunstein et al. (2006) confirm Goldman's (1996) (mixed) findings for more contemporary

judges. In 5 of the 24 areas of the law they analyzed, the party of the appointing judge was not an especially good predictor of the judge's vote.

These mixed results could reflect various constraints on the ability of lower court judges to vote on the basis of their sincere political preferences—they may fear reversal of their decisions by a higher court (e.g., Cross and Tiller 1998) or perhaps they don't want to create more work for their (overworked) colleagues by dissenting (e.g., Epstein et al. 2011). But the uneven findings could also reflect a flaw in the assumption of homogeneity among co-partisans. Even for the U.S. Supreme Court, Epstein et al. (2013) (p. 119) found small differences between Democratic and Republican appointees in some areas of the law. If this problem exists in the United States, it seems fair to conclude that it affects courts in other countries as well.

A second concern with partisan-based approaches follows from their assumption that all appointers are motivated to seat judges who reflect their own policy values. This is highly doubtful. To provide a few examples (again from the country we know best, the United States), President Ronald Reagan's appointment of Sandra Day O'Connor as the first female Supreme Court justice was less about advancing ideological goals than about appealing to female voters.[8] And Eisenhower's appointment of Earl Warren was not about promoting an ideology but, rather, about repaying a campaign debt. A prediction of Warren's votes that was based on Eisenhower's ideology would be that half his votes should have been liberal—in fact three-fourths were.

A third crucial assumption underlying partisan approaches is that a judge's ideology is stable over time; if not, the static measure of the judge's or a president's party affiliation would fail to capture any movement to the right or the left. But this assumption, too, does not necessarily hold. Alarie and Green (2007, 197) report that a Canadian Supreme Court justice, Frank Iacobucci, voted in a liberal direction almost twice as frequently at the end of his career as when he joined the court. And in the United States, research shows that virtually all U.S. Supreme Court justices serving since 1937 grew more liberal or more conservative during their tenure on the court (e.g., Epstein, Martin, Quinn et al. 2007; Epstein et al. 2013).

Figure 7.1 illustrates one of the more extreme examples: the Republican Harry Blackmun's near-complete reversal. Mirroring Iacobucci's drift, Blackmun moved from one of the court's most conservative justices to among its most consistent liberals. Obviously the ideological label of "Republican" in 1970 (when Nixon appointed Blackmun to the court) would not be especially useful in predicting Blackmun's votes two decades later, in 1990.

Finally, party-based approaches assume that the researcher can identify the appointing authority's (or the judge's) partisan affiliation when, in fact, this can be challenging. Sometimes many actors play a role in the appointment process, making it difficult to measure or even identify their ideological leanings; and sometimes norms are quite important, but without substantial country knowledge, they can go undetected. The United States provides an example of both. Studies assuming federal appellate and trial

court judges reflect the ideology of their appointing president neglect an important norm —called "senatorial courtesy"—which may constrain the president from nominating a candidate to the lower federal courts who mirrors his ideology (see Giles et al. 2001). Under courtesy norms, when a senator is of the same party as the president and the vacancy is from the senator's state, the senator can exert considerable influence on the selection of judges, and so the senator's ideology or partisanship should also be considered.[9] From studies of Latin America and Europe, we know that the U.S. appointment process is hardly the only one in which multiple actors and well-entrenched norms play important roles (see, e.g., Iaryczower et al. 2002; Garoupa et al. 2013). (p. 120)
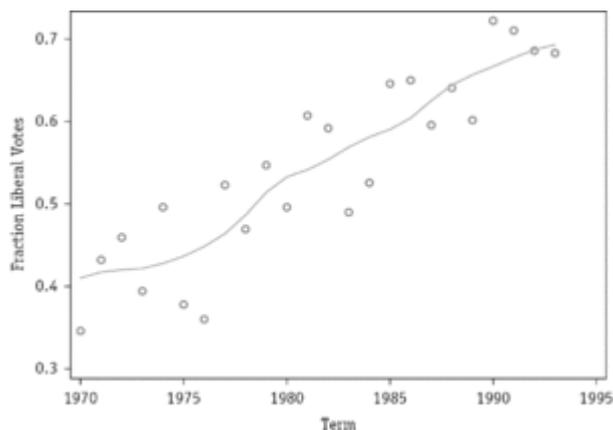

Figure 7.1 Fraction of Liberal Votes Cast by Justice Harry Blackmun over the Course of his Career on the U.S. Supreme Court

Note: Liberal votes include votes supporting defendants in criminal cases, women and minorities in civil rights cases, the government in tax cases, and individuals against the government in First Amendment, privacy, and due process cases. For a full definition, see the documentation to the U.S. Supreme Court Database (http:// supremecourtdatabase.org/data.php). We include only orally argued cases resulting in a signed majority opinion or judgment of the Court. The superimposed line is a first-degree loess smooth with span = 0.45. Fraction liberal calculated from the Supreme Court Database (http:// supremecourtdatabase.org), using decisionType = 1 or 7.

7.2.2 Other Exogenous Measures

In light of these (nontrivial) concerns about partisan-based strategies, social scientists have devised many alternative measures of judicial policy preferences. Some are also exogenous, meaning (like partisanship) they are causally prior to (not based on) the votes judges cast or other choices they make. Others measures are endogenous, meaning they are derived, at least in part, from those votes. Exogenous measures are useful for causal accounts; endogenous measures have the benefit of greater precision.

Let's begin with exogenous measures, and merely note that scholars have devised perhaps a dozen or more. Danelski (1966), for example, examined pre-nomination speeches delivered by two U.S. Supreme Court justices to extract their policy values in much the same way scholars now content-analyze elite-produced documents (such as political party manifestos) to locate actors' preferences (see, e.g., the Manifesto Project, at https://manifestoproject.wzb.eu). This approach has its advantages (Epstein and Mershon 1996), but it also has substantial downsides—chiefly, it may be impossible to locate a similar set of documents (analogous to party manifestos) on which to compare even contemporary judges, much less those serving in earlier eras. Along somewhat different lines, Bonica and Woodruff (2016) estimated the ideology of U.S. state supreme court justices by using records of the justices' campaign contributions. This is reasonable **(p. 121)** enough for U.S. judges, but for obvious reasons, the Bonica-Woodruff approach is unlikely to transport to apex judges throughout the world.

We could rehearse other exogenous approaches, but in our opinion, the most promising of all is some variant of the "Segal-Cover scores." Developed in 1989 by two political scientists, Segal and Cover, and updated with each new appointment to the U.S. Supreme Court, the scores are based on the editorials published in five newspapers (three conservative and two liberal) about a Supreme Court nominee, from the time of nomination through the Senate's vote to confirm. To derive the scores, Segal and Cover code each paragraph in each editorial as liberal, moderate, conservative, or not applicable. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and free-speech cases. Conservative statements are those in an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values. The researchers measure judicial ideology by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal, and then dividing by the total number of paragraphs coded liberal, conservative, and moderate. The resulting scale of policy preferences ranges from 0 (unanimously conservative) to 0.5 (moderate) to 1 (unanimously liberal).

This approach is not perfect, of course (no measure is!). Just as some analysts critique partisan measures for being static, the same could be said of the Segal-Cover scores: once computed, they do not vary over the course of a judge's career. Still, the Segal-Cover scores have substantial (and offsetting) benefits. First, with only a few exceptions, the overall results comport with scholarly impressions of the justices (see the horizontal axis in figure 7.2). William Brennan, Thurgood Marshall, and Abe Fortas, generally regarded as liberals, receive scores of 1.00; Antonin Scalia and William Rehnquist, generally regarded as conservatives, receive scores of 0.00 and 0.045, respectively.

Second, the Segal-Cover scores do not appear to systematically over- or underestimate liberal votes, as figure 7.2 also shows. For most justices, the statistical fit between their scores and their votes is quite good. Note, too, the strong overall relationship between the scores and the voting. The correlation of 0.76 reflected in figure 7.2 is not at all

atypical, and represents yet another advantage of the Segal-Cover scores: they are reasonably good predictors of aggregated votes. (Also notice that many of the justices in grey—Republican appointees—cluster toward the left side of the figure; and the justices in black—Democratic appointees—toward the right. Convergence between partisan approaches and the Segal-Cover scores, along with their predictive power, suggests some facial validity to both as measures policy preferences.)

It is no wonder scholars often turn to the Segal-Cover scores to measure policy preferences in research that either focuses on or must control for judicial ideology. A very small sample of recent studies using the scores includes Pacelle et al.'s (2017) analysis of the effect of the U.S. government as an *amicus curiae* in the Supreme Court; Yates et al.'s (2013) study of the influence of the justices' personal-social contexts on their (p. 122) voting; and Scherer's (2014) research predicting outcomes in the same-sex marriage decisions.
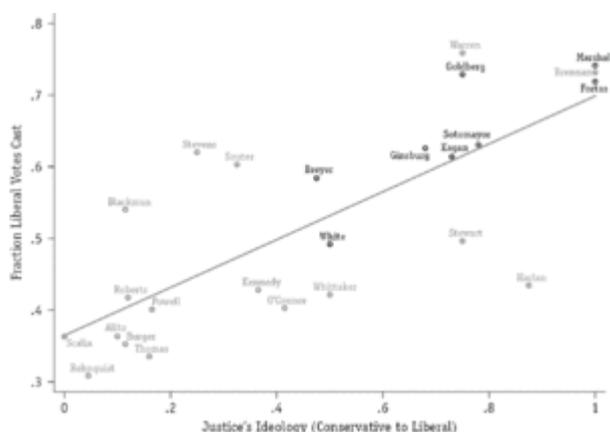

Figure 7.2 Relationship Between Newspaper Editors' Characterizations of U.S. Supreme Court Justices' Ideology Prior to their Appointment and the Justices' Votes, 1953–2015 Terms

Note: Includes only justices appointed after the 1952 term; and only orally argued cases resulting in a signed majority opinion or judgment of the Court. Democratic presidents appointed the justices in black; Republicans, the justices in grey. The superimposed line represents a regression-based prediction of the justices' votes based on their ideology, as measured by the Segal-Cover scores. The closer a justice is to the line, the stronger the association between the justice's ideology and the justice's votes. The justices above the line voted more liberally than we would predict based on their ideology; the justices below it, more conservatively. For justices on the line, their ideology perfectly (or nearly so) predicts their votes. The correlation between the justices' ideology and their votes is 0.76. Fraction liberal calculated from the Supreme Court Database (http://supremecourtdatabase.org), using decisionType = 1 or 7.

Yet a third advantage of the Segal-Cover scores is that scholars could (and should!) modernize and transport their underlying approach to assessing ideology. In their present state, the Segal-Cover scores rely solely on newspaper editorials. That made sense in 1989, when the researchers developed the scores—newspapers were the only game in town. But today there is something distinctly quaint about thinking that only newspaper editorials can provide reliable information about a judge's pre-appointment ideology. What with blogs, tweets, and new media, scholars could exponentially expand the set of reference texts. Doing so would make it feasible to bring the Segal-

Cover approach to lower court candidates (mostly ignored by the major newspapers).

Moving beyond newspapers would also increase the odds of the development of Segal-Cover–type scores for judicial candidates outside the United States. To our knowledge, scholars have calculated them from newspapers for only one other country (Canada; Ostberg and Wetstein 2007). That may reflect the lack of coverage of judicial (p. 123) nominees in papers abroad. But if scholars no longer feel wedded to the print media (and they shouldn't!), perhaps we will see the wider development of exogeneous ideology measures, which would be a very welcome development indeed.

7.2.3 Endogenous Measures

Exogenous measures are useful in studies attempting to develop *causal* claims about the relationship between ideology and the choices judges make because they do not rely on the judges' behavior. As we suggested earlier, to measure the political preferences of judges by their votes in year 1 and, then to use those very votes to explain their behavior in year 1 is to argue that judges vote the way they do because they vote the way they do. Exogenous measures avoid this problem, but in so doing, they can generate imprecise measures of ideology. We saw this with partisan-based approaches, and it is also true of the Segal-Cover scores. Although the overall fit between the scores and voting is quite good, outliers exist—Justices Stevens and Souter, for example (see figure 7.2).

To generate more precise estimates of ideology, social scientists have proposed several endogenous measures—that is, measures that depend on revealed behavior to assess ideology (Epstein & Mershon 1996). Virtually all modern-day approaches, though, rely on a strategy developed by Andrew D. Martin and Kevin Quinn (2002). Theirs amounts to a "company you keep" measure: it begins with voting data for each judge (e.g., whether the judge voted with the majority) in each term and uses voting alignments between judges to get a more precise fix on the judge's ideology (for details notes, see Martin and Quinn 2002; for a less technical explanation, see Martin et al. 2005).

Martin and Quinn developed their strategy for U.S. Supreme Court justices,[10] and now work using their scores to study the court is omnipresent (recent examples include Whalen 2015; Niblett and Yoon 2015; Lax and Rader 2015; Benjamin and Vanberg 2016). But Martin and Quinn's strategy need not be cabined to the United States—and, happily, no longer is. Over the past few year, scholars have developed "Martin-Quinn scores" for judges all over the world, including Argentina (Bertomeu et al. 2016), Britain (Hanretty 2013), Canada (Alarie and Green 2007), the Philippines (Pellegrina et al. 2014), Portugal (Hanretty 2012), and Spain (Hanretty 2012).

Global adaptation reflects several strong properties of the Martin-Quinn strategy. First, because the approach estimates policy preferences from voting patterns each year, it allows for the possibility that judges' preferences can change over time. The scores, in other words, are dynamic, which is a huge advantage over measures fixed at one point in time. Unlike, say, partisan approaches or Segal-Cover's strategy, the Martin-Quinn scores

allow for reliable and valid measurements of the judges' ideology even if their ideology drifts with time, as did Justice Blackmun's (see, e.g., figure 7.1).

The Martin-Quinn scores can also more accurately characterize entire court eras or individual years. Figure 7.3 makes this clear by comparing the left–right ordering of U.S. Supreme Court justices produced by the Segal-Cover and Martin-Quinn scores for the 2007 term. Note that despite some differences in their precise placement, both (p. 124) measures converge on the identity of the four most conservative justices (Roberts, Alito, Scalia, and Thomas); both also agree that Ginsburg, Breyer, and Souter are liberals. The major—and indeed, crucial—difference between the two approaches comes in their identification of the median justice. The Segal-Cover scores incorrectly pick Stevens, who, in terms of his voting, was the most liberal member of the court; the Martin-Quinn scores correctly identify Kennedy, who by all accounts was the pivotal justice. Put more bluntly, relying on the Segal-Cover scores to characterize the 2007 term would lead scholars astray, while the Martin-Quinn scores seem to produce the right answer.
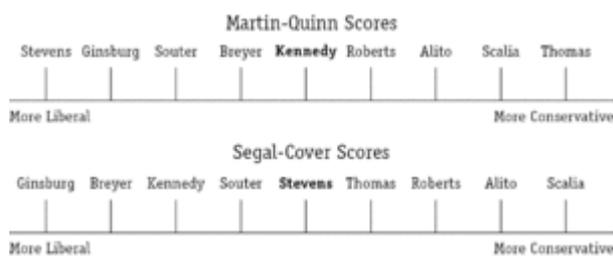

Figure 7.3 A Comparison of the Left-Right Ideological Ordering of U.S. Supreme Court Justices in the 2007 Term: The Martin-Quinn versus Segal-Cover Scores

There is yet one more advantage to the Martin-Quinn scores: U.S. scholars have developed (scaling) strategies to place judges (based on their Martin-Quinn scores) and elected actors (based, too, on their voting patterns as reflected in Poole's NOMINATE Common Space scores[11]) in the same policy space (Epstein, Martin, Segal, et al. 2007)—known as the Judicial Common Space (JCS). The JCS, in turn, allows scholars to assess, among many other applications, various empirical implications following from attitudinal and strategic accounts of interactions between courts and elected actors (see, generally, Eskridge 1991; Spiller and Gely 1992; Segal 1997; for an application using the JCS, see Segal et al. 2011).[12]

Figure 7.4 provides a simple (hypothetical) demonstration. The horizontal lines represent a policy space—for example, over civil rights policy—ordered from left (most "liberal") to right (most "conservative"). The vertical lines show the policy preferences the relevant actors based (again hypothetically) on their JCS scores: the president and the median member of the court, of Congress, and of the committees in Congress charged with proposing bills. Note that we also identify the committees' indifference point (denoted with an asterisk)—that is, the point "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber" (Eskridge 1991, 378).

Because the JCS allows us to compare the actors in the same policy space, we can make predictions about how the court would decide a civil-rights case—say, one in which a black woman claims that her employer refused to promote her because of her race and sex. Under the attitudinal model, the court would vote exactly the position (p. 125) shown on the line—its sincere policy preferences. Under strategic accounts, the court would understand that the threat of congressional reaction looms large were it to vote its sincere preferences.[13] In this instance, then, the rational course of action—the best choice for justices interested in policy—is to place policy near the committees' indifference point: because the committees are indifferent between that point and the most preferred position of the median member of Congress, they have no incentive to introduce legislation to overturn the court's decision. The court would end up with a policy close to, but not exactly on, its ideal point without risking congressional reaction.
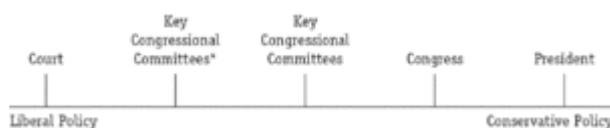
Figure 7.4 Hypothetical Distribution of Policy Preferences

Note: The vertical lines represent the (most preferred) policy positions of the key actors. In denoting them we assume that the actors prefer an outcome that is nearer to that point than one that is further away. We also assume that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policy making enfolds as follows: the court interprets a law, the relevant congressional committees propose (or do not propose) legislation to override the court's interpretation, Congress (if the committees propose legislation) enacts (or does not enact) an override bill, the president (if Congress acts) signs (or does not sign) the override bill, and Congress (if the president vetoes) overrides (or does not override) the veto. See, e.g., Eskridge 1991.

[*] The Committees' indifference point (between their most preferred position and Congress's).

Even with these benefits, we must note that the Martin-Quinn scores suffer from the same problem as do all endogenous measures: because researchers derive the estimates from votes, deploying them to study the effect of ideology presents the problem, yet again, of using votes to predict votes. One response is that researchers should use them only for certain kinds of studies—typically, studies that already assume ideology has an effect on voting. Examples include research on ideological drift (see, e.g., figure 7.1), the median judge (see, e.g., figure 7.3), and interactions among the branches of government (see, e.g., figure 7.4). For research in this vein, scholars should prefer the Martin-Quinn scores to exogenous measures because they are descriptively more accurate—that is, on a term-by-term basis, the Martin-Quinn scores provide a more revealing picture of the judges' policy preferences than either the Segal-Cover scores or party-based measures.

Another response to the problem of endogeneity is to remove the cases of interest from the data and then estimate the Martin-Quinn scores. Suppose we wanted to study the effect of ideology on votes in cases implicating free speech. By purging the speech cases

and recalculating the scores, we would avoid the trap of using votes to predict votes. Martin and Quinn (2005, 3) go even further:

> [A]s a practical matter using the full data Martin-Quinn scores when modeling votes in a single issue is perfectly appropriate. While circularity is a technical concern, the resultant measures from purging issues will change very little, and so it is not worth the effort to do so. When modeling votes in a single issue area, circularity is not a practical concern (3).

(p. 126) But we must admit that their response (or even purging) does not resolve the related problem of what causes the justices' votes in the first place. Again, let's say we are interested in the role of ideology in explaining the judges' decisions in free-speech cases. If we exclude free-speech votes when calculating the Martin-Quinn–type scores, we have eliminated the circularity problem. But we evade the question of what caused the non-free-speech votes in the first place. We can claim that it is ideology, but all we really know is that the same factors that influence the judges' non-free-speech votes influence their free-speech votes.

None of this is to suggest that researchers should avoid the Martin-Quinn scores or any other endogenous measures; it is meant only as a reminder that scholars should understand the strengths and weaknesses of any measure before using it.

7.3 Revisiting the Primacy of Policy Preferences

What do judges want? We have emphasized the policy goal, or the idea that judges desire to bring the law in line with their own policy or ideological values. That emphasis seems right, perhaps even beyond question, when we study judges serving on apex courts. From Pritchett (1941), to Segal and Spaeth (2002), to Epstein et al. (2013), scholars have offered plausible (although somewhat distinct) reasons and mounds of data for thinking that ideology plays a very substantial role in the choices U.S. Supreme Court justices make. And it is worth reiterating that studies of the high courts of other countries lend support to a focus on policy preferences. We've already noted Grendstad et al.'s (2015) work on the Norwegian Supreme Court, demonstrating that ideology (measured by the appointing regime) plays a larger role in explaining the court's economic decisions than almost any other factor the researchers considered. There is also Hönnige's (2009) study, which showed that that ideology helps predict the votes of judges serving on the French and German Supreme Courts. And, in their analysis of Spanish Constitutional Court judges, Garoupa et al. (2013, 516) discovered that under certain conditions, "[t]he personal ideology of the judges does matter," which led them to "reject the formalist approach taken by traditional constitutional law scholars in Spain." Iaryczower and Katz (2016) found that ideology plays a role on the British Appellate Committee, though their account is more nuanced.

At the same time, though, these studies demonstrate that policy motivations have their limits—and not only for judges outside the United States. As figure 7.2 shows, there is hardly a perfect correlation between ideology and voting even for U.S. Supreme Court justices: far short of zero votes cast by liberal justices (however measured) are conservative; and far short of 100% of the conservatives' votes are conservative (see even Segal and Spaeth 2002). Moreover, once we move down the judicial hierarchy, ideology carries even less weight (see, e.g., Epstein et al. 2013).

The upshot is this: however useful ideology is for understanding judicial behavior, it cannot be the only motivation (it may not even be especially weighty for many judges) (p. 127) or explanation of judicial behavior. For this reason, studies have offered (or found evidence consistent with) some 20-odd goals, motives, and preferences, ranging from "reasoning utility" (Drahozal 1998; Shapiro and Levy 1995) to discretion (Cohen 1991; Higgins and Rubin 1980; Macey 1994) to income (Anderson et al 1989), in addition to legal and ideological considerations (see generally Baum 1997, 2006; for a sampling of other goals, see Klein 2002; Bainbridge and Gulati 2002; Gulati and McCauliff 1998; Klein and Hume 2003; Miceli and Cosgel 1994; Posner 1993, 2008, 2013; Salzberger and Fenn 1999; Whitman 2000).

Attending to all these goals would undermine the project of developing generalizable explanations of judicial behavior. More to the point, it is possible to construct a realistic conception of the judicial motivation that could be incorporated into strategic accounts of judging without devolving into the "what-the-judge-ate-for-breakfast" morass.

Epstein et al. (2013) make such an effort by introducing the importance of personal motivations for judicial choice, while also paying heed to the social scientists' emphasis on ideology and the law community's interest in legal motivations (though sometimes we think social scientists are more interested in "legal motivations" than lawyers!). Given time constraints, Epstein et al. (2013) contend that judges seek to maximize their preferences over a set of roughly five personal factors (most of which also have implications for ideological and legal goals): job satisfaction; external satisfactions that come from being a judge, including reputation, prestige, power, influence, and celebrity; leisure; salary/income; and promotion. All these motivations find some support in the literature (for a review, see Epstein and Knight 2013), as do legal considerations (e.g., Bartels and O'Geen 2015; Bartels 2009; Luce et al. 2009).

So, ironically enough for a chapter on the role of politics in judging, we end with a call to reconsider the primacy of politics—at least for certain kinds of judges (see also Epstein and Knight 2013). This does not mean dispensing with ideology altogether; rather, it suggests the value of considering how other motivations enter the picture. We might explore, for example, the kinds of cases in which judges are more or less motivated by ideological values, and the conditions under which judges are most affected by the personal factors we have detailed here—the factors that motivate most of us in our daily lives. Of equal importance, in what types of cases are judges most likely to follow existing legal sources such as precedent? We have little doubt that answering these questions

and, more generally, finding ways to incorporate personal and legal goals in addition to policy motivations will lead to more realistic conceptions of judicial behavior.

References

Alarie, Benjamin R. D., and Andrew Green. 2007. "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada." *University of Toronto Law Journal* 57: 195–226.

Anderson, Gary M., William F. Shughart II, and Robert D. Tollison. 1989. "On the Incentives of Judges to Enforce Legislative Wealth Transfers." *Journal of Law and Economics* 32: 215–228.

Bainbridge, Stephen M., and G. Mitu Gulati. 2002 "How Do Judges Maximize? (The Same Way Everyone Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions." *Emory Law Journal* 51: 83–151.

Bartels, Brandon L. 2009. "The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court." *American Political Science Review* 103: 474–495.

Bartels, Brandon L., and Andrew J. O'Geen. 2015. "The Nature of Legal Change on the U.S. Supreme Court: Jurisprudential Regimes Theory and Its Alternatives." *American Journal of Political Science* 59: 880–895.

Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.

Baum, Lawrence. 2006. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton, NJ: Princeton University Press.

Bawn, Kathleen. 1999. "Constructing 'Us': Ideology, Coalition Politics, and False Consciousness." *American Journal of Political Science* 43: 303–334.

Benjamin, Stuart Minor, and Georg Vanberg. 2016. "Judicial Retirements and the Staying Power of U.S. Supreme Court Decisions." *Journal of Empirical Legal Studies* 13: 5–26.

Bertomeu, Juan González, Lucia Dalla Pellegrina, and Nuno Garoupa. 2016. "Estimating Judicial Ideal Points in Latin America: The Case of Argentina." *Review of Law and Economics* 13: 1–35.

(p. 130) Black, Duncan. 1948. "On the Rationale of Group Decision Making." *Journal of Political Economy* 56: 23–34.

Black, Duncan. 1958. *The Theory of Committees and Elections*. Cambridge: Cambridge University Press.

Bonica, Adam, and Michael Woodruff. 2015. "A Common-Space Measure of State Supreme Court Ideology." *Journal of Law, Economics, & Organization* 31: 472–498.

Clark, Tom S. 2009. "A Principal-Agent Theory of En Banc Review." *Journal of Law, Economics, & Organization* 25: 55–79.

Cohen, Mark A. 1991. "Explaining Judicial Behavior or What's 'Unconstitutional' About the Sentencing Commission?" *Journal of Law, Economics, & Organization* 7: 183–200.

Converse, Philip. 1964. "The Nature of Belief Systems in Mass Publics." In *Ideology and Discontent*, edited by David Apter, 206–261. New York: Free Press.

Corley, Pamela C. 2009. "Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions." *American Politics Research* 37: 30–49.

Cross, Frank B., and Emerson H. Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals." *Yale Law Journal* 107: 2155–2176.

Danelski, David. 1966. "Values as Variables in Judicial Decision Making: Notes Toward a Theory. *Vanderbilt Law Review* 19: 721–740.

Drahozal, Christopher R. 1998. "Judicial Incentives and the Appeals Process." *SMU Law Review* 51: 469–503.

Enns, Peter K., and Patrick C. Wohlfarth. 2013. "The Swing Justice." *Journal of Politics* 75: 1089–1107.

Epstein, Lee, and Tonja Jacobi. 2008. "Super Medians." *Stanford Law Review* 61: 37–100.

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make.* Washington, DC: CQ Press.

Epstein, Lee, and Jack Knight. 2013. "Reconsidering Judicial Preferences." *Annual Review of Political Science* 16: 11–31.

Epstein, Lee, William M. Landes, and Richard A. Posner. 2011. "Why (and When) Judges Dissent." *Journal of Legal Analysis* 3: 101–137.

Epstein, Lee, William M. Landes, and Richard A. Posner. 2013. *The Behavior of Federal Judges.* Cambridge, MA: Harvard University Press.

Epstein, Lee, and Andrew D. Martin. 2014. *An Introduction to Empirical Legal Research.* Oxford, UK: Oxford University Press.

Epstein, Lee, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal. 2007. "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review* 101: 1483–1542.

Epstein, Lee, Andrew D. Martin, Kevin Quinn, and Jeffrey A. Segal. 2012. "Ideology and the Study of Judicial Behavior." In *Ideology, Psychology, and Law*, edited by Jon Hanson, 705–728. New York: Oxford University Press.

Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23: 303–325.

Epstein, Lee, and Carol Mershon. 1996. "Measuring Political Preferences." *American Journal of Political Science* 40: 261–294.

Eskridge, William N. Jr. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101: 331–455.

Garoupa, Nuno, Fernando Gomez-Pomar, and Veronica Grembi. 2013. "Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court." *Journal of Law, Economics, & Organization* 29: 513–534.

(p. 131) Gerring, John. 1997. "Ideology: A Definitional Analysis." *Political Research Quarterly* 50: 957–994.

Gibson, James L., and Gregory A. Caldeira. 2011. "Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?" *Law & Society Review* 45: 195–219.

Giles, Micheal W., Virginia Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54: 623–641.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies*. Cambridge, UK: Cambridge University Press.

Goldman, Sheldon. 1966. "Voting Behavior on the United States Courts of Appeals, 1961–1964." *American Political Science Review* 60: 374–383.

Goldman, Sheldon. 1997. *Picking Federal Judges.* New Haven, CT: Yale University Press.

Grendstad, Gunnar, William R. Shaffer, and Eric N Waltenburg. 2015. *Policy Making in an Independent Judiciary.* Colchester, UK: ECPR Press.

Grofman, Bernard, and Timothy Brazill. 2002. "Identifying the Median Justice on the Supreme Court through Multidimensional Scaling: Analysis of 'Natural Courts' 1953–1991." *Public Choice* 112: 55–79.

Gulati, Mitu, and C. M. A McCauliff. 1998. "On Not Making Law." *Law & Contemporary Problems* 61: 157–228.

Haire, Susan B., Martha Anne Humphries, and Donald R. Songer. 2001. "The Voting Behavior of Clinton's Courts of Appeals Appointees." *Judicature* 84: 274–281.

Hanretty, Chris. 2012. "Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals." *European Journal of Political Research* 51: 671–692.

Hanretty, Chris. 2013. "The Decisions and Ideal Points of British Law Lords." *British Journal of Political Science* 43: 703–716.

Higgins, Richard S., and Paul H. Rubin. 1980. "Judicial Discretion." *Journal of Legal Studies* 9: 129–138.

Hönnige, Christoph. 2009. "The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts." *West European Politics* 32: 963–984.

Iaryczower, Matias, and Gabriel Katz. 2016. "More than Politics: Ability and Ideology in the British Appellate Committee." *Journal of Law, Economics, & Organization* 32: 61–93.

Iaryczower, Matías, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1953–1998." *American Journal of Political Science* 46: 699–716.

Kantorowicz, Jarosław, and Nuno Garoupa. 2016. "An Empirical Analysis of Constitutional Review Voting in the Polish Constitutional Tribunal," 2003–2014 *Constitutional Political Economy* 27: 66-92.

Klein, David E. 2002. *Making Law in the United States Courts of Appeals.* New York: Cambridge University Press.

Klein, David E., and Robert J. Hume. 2003. "Fear of Reversal as an Explanation of Lower Court Compliance." *Law & Society Review* 37: 579–606.

La Porta, Rafael, Florencio Lopez-de-Silanes, and Andrei Shleifer. 2008. "The Economic Consequences of Legal Origins," *Journal of Economic Literature* 46: 285–332.

Lax, Jeffrey R. and Kelly Rader. 2015. "Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching." *Journal of Politics* 77: 648–663.

Luce, Jennifer, Geoffrey McGovern, Wendy L. Martinek, and Sara C. Benesh. 2009. "'Such Inferior Courts': Compliance by Circuits with Jurisprudential Regimes." *American Politics Research* 37: 75–106.

(p. 132) Macey, Jonathan R. 1994. "Judicial Preferences, Public Choice, and the Rules of Procedure." *Journal of Legal Studies* 23: 627–646.

Martin, Andrew D., and Kevin M. Quinn. 2002. Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis*. 10: 134–153.

Martin, Andrew D., and Kevin M. Quinn. 2005. "Can Ideal Point Estimates be Used as Explanatory Variables?" Working Paper, **http://mqscores.lsa.umich.edu/media/resnote.pdf**

Martin, Andrew D., Kevin Quinn, and Lee Epstein. 2005. "The Median Justice on the U.S. Supreme Court." *North Carolina Law Review* 83: 1275–1322.

Miceli, Thomas J., and Metin M. Cosgel. 1994. "Reputation and Judicial Decision-Making." *Journal of Economic Behavior & Organization* 23: 31–51.

Niblett, Anthony, and Albert H. Yoon. 2015. "Judicial Harmony: A Study of Dissent." *International Review of Law and Economics* 42: 60–71.

Ostberg, C. L., and Matthew E. Wetstein. 007. *Attitudinal Decision Making in the Supreme Court of Canada.* Vancouver: UBC Press.

Pacelle, Richard L. Jr., John M. Scheb II, Hemant K. Sharma, and David H. Scott. 2017. "The Influence of the Solicitor General as Amicus Curiae on the Roberts Court, 2005–2014: A Research Note." *Justice System Journal* 38: 202–208.

Pellegrina, Lucia Dalla, Nuno Garoupa, and Shirley Lin. 2014. "Measuring Judicial Ideal Points in New Democracies: The Case of the Philippines." *Asian Journal of Law and Society* 1: 125–164.

Pinello, Daniel R. 1999. "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." *Justice System Journal* 20: 219–254.

Poole, Keith T. 1998. "Estimating a Basic Space from a Set of Issue Scales." *American Journal of Political Science* 42: 954–993.

Posner, Richard A. 1993. "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)." *Supreme Court Economic Review* 3: 1–41.

Posner, Richard A. 2008. *How Judges Think*. Cambridge, MA: Harvard University Press.

Posner, Richard A. 2013. *Reflections on Judging*. Cambridge, MA: Harvard University Press.

Pritchett, C. Herman. 1941. "Divisions of Opinion among Justices of the U.S. Supreme Court, 1939–1941." *American Political Science Review* 35: 890–898.

Pritchett, C. Herman. 1948. *The Roosevelt Court.* New York: Macmillan.

Salzberger, Eli, and Paul Fenn. 1999. "Judicial Independence: Some Evidence from the English Court of Appeal." *Journal of Law and Economics* 42: 831–847.

Scherer, Nancy. 2014. "Viewing the Supreme Court's Marriage Cases through the Lens of Political Science." *Case Western Law Review* 64: 1131–1160.

Segal, Jeffrey A. 1997. "Separation of Power Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91: 28–44.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of Supreme Court Justices." *American Political Science Review* 83: 557–565.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited.* Cambridge: Cambridge University Press.

Segal, Jeffrey A., Richard J. Timpone, and Robert M. Howard. 2000. "Buyer Beware?: Presidential Success through Supreme Court Appointments." *Political Research Quarterly* 53: 557–595.

(p. 133) Segal, Jeffrey A., Chad Westerland, and Stefanie A. Lindquist. 2011. "Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model." *American Journal of Political Science* 55: 89–104.

Shapiro, Sidney A., and Richard E. Levy. 1995. "Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions." *Duke Law Journal* 44: 1051–1080.

Shepherd, Joanna. 2009. "The Influence of Retention Politics on Judges' Voting." *Journal of Legal Studies* 38: 169–206.

Spiller, Pablo T., and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988." *RAND Journal of Economics* 23: 463–492.

Stimson, James A. 1991. *Public Opinion in America.* Boulder, CO: Westview.

Sunstein, Cass, David Schkade, Lisa M. Ellman, and Andres Sawicki. 2006. *Are Judges Political?* Washington, DC: Brookings Institution Press.

Tate, C. Neal, and Panu Sittiwong. 1989. "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations." *Journal of Politics* 51: 900–916.

Westerland, Chad, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Scott Comparato. 2010. "Strategic Defiance and Compliance in the U.S. Courts of Appeals." *American Journal of Political Science* 54: 891–905.

Whalen, Ryan. 2015. "Judicial Gobbledygook: The Readability of Supreme Court Writing." Supreme Court Writing." *Yale Law Journal Forum*, November 19, 200–211.

Whitman, Douglas Glen. 2000. "Evolution of the Common Law and the Emergence of Compromise." *Journal of Legal Studies* 29: 753–781.

Yates, Jeff, Justin Moeller, and Brian Levey. 2013. "'For the Times they are A-Changin': Explaining Voting Patterns of U.S. Supreme Court Justices through Identification of Micro-Publics." *BYU Journal of Public Law* 28: 117–144.

Notes:

(*) This chapter adapts and updates some of our earlier work on judicial behavior, including Martin et al. (2005) and Epstein et al. (2012). We thank the National Science Foundation for supporting our research on law, legal institutions, and judicial behavior. Epstein also thanks the John Simon Guggenheim Foundation and Washington University in St. Louis.

(1.) Social scientists do, however, disagree over the definition of ideology. For a range of possibilities, see Gerring (1997), though we think Bawn's (1999) approach captures contemporary thinking: "Ideology is enduring system of beliefs, prescribing what action to take in a variety of political circumstances. For example, if an abortion clinic opens in my neighborhood, my ideology tells me whether I should (a) picket the entrance (b) write a check to support the clinic, or (c) do nothing" (305).

(2.) Stimson (1991, 61). But see Converse (1964), who argues that American voters typically lack the attitudinal constraint necessary for ideological behavior.

(3.) Paraphrased from Segal and Spaeth (2002, 86).

(4.) For present purposes, a crucial distinction is that under the attitudinal model, judges pursue one and only one goal: policy. On strategic accounts, it is up to the researcher to specify a priori the actors' goals. The researcher may select any motivation(s) she believes that the actors hold. Still, almost all strategic accounts of judicial decisions posit that judges pursue policy—that is, their goal is to see public policy, the ultimate state of the law, reflect their preferences.

(5.) Specifically Black's median voter theorem shows if voters (1) have single-peaked preferences (2) in a single-dimensional issue space, then the position of the median will prevail under majority rule and various voting procedures. Nearly all statistical work on the U.S. Supreme Court suggests that the issue space is single-dimensional. See, e.g., Grofman and Brazill (2002).

(6.) For systematic approaches to evaluating measures, see Epstein and Martin (2014).

(7.) Carter's score is 60.3, Nixon's is 47.7, and Johnson's is 78.2. See Segal et al. (2000).

(8.) More generally, Goldman (1997) points out that U.S. presidents seek to advance one or some combination of three agendas—personal, partisan, or policy—when they make judicial nominations. Personal agenda refers to using the nominating power to please a friend or associate; partisan agenda means using nominations as vehicles for shoring up electoral support for their party or for themselves within their party; and policy agenda is about using nominations to enhance the substantive policy objectives of an administration.

(9.) And, in fact, the state-of-the-art measure for the ideological preferences of U.S. court of appeals judges (and, for that matter, U.S. district court judges), developed by Giles and

his colleagues (2001), exploits the norm of senatorial courtesy. If a judge is appointed from a state where the president and at least one home-state senator are of the same party, the nominee is assigned the ideology of the home-state senator. If both senators are from the president's party, the nominee is assigned the average ideology of the home state. If neither home-state senator is of the president's party, the nominee receives the ideological score of the appointing president. (To measure senators' and president's ideology, Giles et al. use Poole's Nominate Common Scores; see note 11.)

In short, when courtesy is in effect, the federal judge receives the ideology of the "nominating" senator; when courtesy is not in effect, the judge receives the score of the nominating president. Seen in this way, the Giles et al. approach is far more efficient than party-based approaches because it incorporates important information about how federal judges are appointed—information that party-based approaches disregard. And yet it suffers from a problem that plagues many exogenous measures: it is static and so cannot account for ideological drift. It also assigns all judicial nominees from the same state and year the same ideology.

(10.) Martin and Quinn update their scores each year and make them available at http://mqscores.lsa.umich.edu

(11.) These scores are the result of a scaling algorithm that takes a set of issue scales (in this case, a set of measures for U.S. representatives, senators, and presidents) fit term by term. Using legislators who have served in both chambers, presidents who have served in the legislature, and stated presidential vote intentions, the algorithm provides an ideal point for all representatives, senators, and presidents in a two-dimensional Downsian issue space, though most applications use only the predominant first dimension. For more details on the NOMINATE scores, see Poole 1998. The NOMINATE scores are available at: http://voteview.com/dwnomin_joint_house_and_senate.html. The (updated) Judicial Common Space Scores are at: http://epstein.wustl.edu/research/JCS.html.

(12.) The JCS also provides a reliable and valid measurement strategy for comparing judges of lower courts (using the measure described in note 9) and justices of higher courts (using the transformed Martin-Quinn scores) in the same policy space. For examples, see Clark (2009); Westerland et al. (2010); Corley (2009).

(13.) That is because the policy articulated by the attitudinally driven court would be to the left of the indifference point of the relevant committees, giving them every incentive to introduce legislation lying at their preferred point. Congress would support such legislation because it would prefer the committees' preferred policy to the court's. Further, the president would sign the bill, as he also prefers the position of the committee over that of the court.

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