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THE EMPIRICAL STUDY OF LAW AND COURTS

Artemus Ward *

LEE EPSTEIN, WILLIAM LANDES & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2012). Pp. 422. Hardcover \$49.95.

NEW DIRECTIONS IN JUDICIAL POLITICS (Kevin T. McGuire ed., 2012). Pp. 338. Hardcover \$47.95.

On August 23, 2013, Justice Ruth Bader Ginsburg gave an interview to the *New York Times* in which she described the current Supreme Court as “one of the most activist courts in history.”¹ She said the Court’s decision in *Shelby County v. Holder* striking down Section 4 of the Voting Rights Act of 1965, which set the requirements for states and localities to gain preclearance from the Department of Justice in order to make changes in their voting laws, was “stunning in terms of activism.”² She characterized the Court’s role as part of an ongoing dialogue with outside actors: “In so many instances, the Court and Congress have been having conversations with each other, particularly in the civil rights area. So it isn’t good when you have a Congress that can’t react.”³ She noted the jurisprudential division among her colleagues and highlighted her position as the leader of the Court’s liberal wing: “I am now the most senior justice when we divide 5-4 with the usual suspects.”⁴ She explained that she had no plans to retire during President Barack Obama’s second term: “There will be a president after this one, and I’m hopeful that that president will be a fine president.”⁵ And she predicted the eventual fate of her opinions: “I don’t see that my majority opinions are going to be undone. I do hope that some of my dissents will one day be the law.”

Ginsburg’s comments give rise to a number of important questions about the behavior of judges and the operation of courts. Are some judges and courts more activist than others, and if so, why? Do judges behave strategically by taking into account the behavior of outside actors? Why do judges disagree, and do their roles on

* Associate Professor of Political Science at Northern Illinois University.

1. Adam Liptak, *Court is “One of Most Activist,” Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html?_r=0.

2. *Id.*; *Shelby County v. Holder*, 570 U.S. ___ (2013).

3. Liptak, *supra* note 1.

4. *Id.*

5. *Id.*

collegial courts alter their behavior? Do judges attempt to time their departures to influence the choice of their successors? How important is the judicial selection process for the future direction of judicial decisions? The last decade or so has seen a considerable amount of empirical analyses brought to bear on these and other questions of interest to legal scholars.⁶ In short, this research shows that some courts and judges are more activist than others.⁷ Larger contexts matter and courts do operate in and are both constrained and enabled by outside actors.⁸ The decisions judges make are based on a number of factors, including their attitudes or ideology.⁹ Judges on collegial courts negotiate, bargain, and accommodate one another.¹⁰ Judges attempt to time their departures both to minimize politicizing the judiciary and to influence the choice of their successors.¹¹ The judicial selection process is crucial for determining the future direction of law.¹² In sum, the literature suggests that judges are neither simply legal nor political actors, but a unique

6. The “empirical” study of law and courts involves systematic, replicable analysis and can employ both quantitative and qualitative methodological approaches.

7. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

8. See MATTHEW E. K. HALL, *THE NATURE OF SUPREME COURT POWER* (2013); JULIE NOVKOV, *THE SUPREME COURT AND THE PRESIDENCY: STRUGGLES FOR SUPREMACY* (2013); RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT* (2012); JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012); TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2010); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2009); VANESSA A. BAIRD, *ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA* (2008); PAUL M. COLLINS JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008); *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., 2006); KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* (2004); J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* (2003); *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999); *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (Howard Gillman & Cornell Clayton eds., 1999); CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997).

9. See PAMELA C. CORLEY, *AMY STEIGERWALT & ARTEMUS WARD, THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* (2013); MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

10. See PAMELA C. CORLEY, *CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT* (2011); VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (2007); FORREST MALTZMAN, JAMES F. SPRIGGS II, & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

11. See Richard L. Vining Jr., *Politics, Pragmatism, and Departures from the U.S. Courts of Appeals, 1954-2004*, 90 Soc. Sci. Q. 834 (2009); ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* (2003).

12. See JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012); AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS* (2010); SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* (2009); CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009); CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH* (2008); LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2007); *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* (Matthew J. Streb ed., 2007); NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005); LAUREN COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* (2002); DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (2001); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1999).

combination of both.

What is surprising, however, is that this body of empirical research is largely unknown to the legal community. For example, have you ever seen any of the books cited in this essay in the U.S. Supreme Court gift shop? Instead, judges and law professors have long propagated so-called objective or neutral modes of decision making such as the mechanical application of law and rules to facts or a particular intellectual methodology such as “textualism,” “originalism,” or “the living Constitution” to describe what judges do or ought to do. A small group of legal academics—particularly those aligned with the Critical Legal Studies movement—and some social scientists and journalists have fostered the opposite conception: that judges are simply political actors, not unlike legislators, who base their decisions on personal policy preferences. Yet the research continues to demonstrate that the reality lies somewhere in between.

NEW RESEARCH

Adding to the growing list of top-notch empirical research, two new books highlight the best of what this literature has to offer: Lee Epstein, William M. Landes, and Richard A. Posner’s, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*¹³ and Kevin T. McGuire’s edited volume, *New Directions in Judicial Politics*.¹⁴ Both offer thorough discussion of existing research and provide rigorous analyses of the most important questions that law and courts scholars are concerned about: the behavior of judges, judicial selection, how courts operate within the larger political environment, and the impact of judicial decisions, including how courts can be used to effect social change. Perhaps most importantly, they cover not only the U.S. Supreme Court, but also the lower federal and state courts.

In *The Behavior of Federal Judges*, the authors offer a unified theory of judicial decision-making for all federal judges: district courts, circuit courts, and the Supreme Court. Their hypotheses are derived from a labor-market model—namely that judges are like any other economic actor: self-interested and motivated by both the pecuniary and non-pecuniary parts of their work.¹⁵ The authors contend that this model does a better job in explaining judicial behavior than the traditional legal or attitudinal models.¹⁶ Interestingly, they find that attitudes or ideology, while present at all levels of the judiciary, are most pronounced at the Supreme Court, less so at the courts of appeals, and even less at the district courts.¹⁷ They conclude that judges are neither simple automatons who apply the law in machine-like fashion, nor are they mere politicians in robes.¹⁸

The scholarly community will be familiar with much of what *The Behavior of Federal Judges* has to offer as a good deal of the book is derived from the authors’

13. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013) [hereinafter EPSTEIN ET AL.].

14. *NEW DIRECTIONS IN JUDICIAL POLITICS* (Kevin T. McGuire ed., 2012) [hereinafter NEW DIRECTIONS].

15. See EPSTEIN ET AL., *supra* note 13, at 30-47.

16. *Id.*

17. See *id.* at chs. 3-5.

18. See *id.* at 30-47.

previously published articles on the subject. Yet they have extensively revised their previous works to fit in the context of this book and the results provide for a fluid and illuminating read. The authors note at the outset that the determinants of judicial decision-making are not well understood by lawyers, law professors, and even many judges themselves. Indeed, the authors make plain that their intended audience is lawyers and judges because the better that judges are understood, the more effective lawyers will be in litigating cases, judges will be in the performance of their work, and legal education will be for both continuing judicial education and for judicial reform.¹⁹

One hopes that the first-rate research contained in both *The Behavior of Federal Judges* and *New Directions in Judicial Politics*, as well as the work of other empirical scholars, will reach legal professionals soon as the empirical evidence continues to mount. What has kept them away? It may be that many are simply unfamiliar with the statistical techniques that many empirical legal scholars employ. If so, Epstein, Landes, and Posner provide a very brief technical primer at the start of their book that simply and elegantly introduces readers to hypothesis testing, linear and logistic regression, and other matters common to statistical work.²⁰ Similarly, in Chapter Two they provide an excellent review of the existing empirical literature on judges with a focus on the methodological problems of determining judicial ideology, which has been at the heart of the judicial behavior literature.²¹ These two aspects of the book alone provide a welcome service for those in the legal profession and others who wish to get up to speed on the current state of the empirical study of judicial behavior. With this background, readers will not only be able to interpret the data analysis in this book, but will also be able to easily understand the chapters in McGuire's volume and the other works they both cite and discuss.

The substantive chapters of *The Behavior of Federal Judges* begin with Chapter One, where the authors introduce their model—what they call a realistic theory of judicial behavior.²² By “realistic” the authors mean a self-interested economic model of behavior. Specifically, they contend that judges are motivated by such factors as effort, esteem, influence, self-expression, celebrity, and career advancement (promotion to a higher court), but also constrained by professional and institutional rules and expectations, and by the tools and methods used by judges in doing their work.²³ The authors do not deny that other factors are at work, such as personal characteristics like race, sex, and educational background or ideology, but their focus is on presenting the simplest model possible to explain why judges decide cases the way they do.²⁴ Chapters Three through Eight constitute the empirical tests of the authors' hypotheses. They measure traditional influences on judicial behavior including ideology and law, but go further in fascinating ways. For example, “effort aversion” measures the extent to which judges want to live a “quiet life” of leisure

19. *Id.* at 6.

20. *See id.* at 17-24.

21. *See id.* at 65-100.

22. *See id.* at 25-64.

23. *Id.* at 48.

24. *Id.* at 44.

as defined by a reluctance to work “too” hard and avoid conflict with colleagues.²⁵

U.S. SUPREME COURT

In Chapter Three, Epstein, Landes, and Posner examine the ideology of Supreme Court Justices—by far the most studied question in the literature—and confirm what the literature suggests, namely that Justices appointed by Democratic presidents generally vote in a liberal direction, while those appointed by Republican presidents generally vote in a conservative direction.²⁶ This is most pronounced in cases involving civil rights and less pronounced in the areas of federalism, privacy, and judicial power and reinforces the notion that the Supreme Court largely deals with politically charged issues where the law is indeterminate. The authors further show that Justices do not always share the ideology of their appointing presidents and that a Justice’s ideology may change or drift over time.²⁷ The authors also find that while the Court reaches unanimity in roughly one-third of the cases it decides, there are still ideological influences at work.²⁸ Finally, there is no evidence of group effects—the notion that there will be pressure to join a coalition as it grows—and the authors attribute this to life tenure and the lack of ambition from promotion to higher office that is unique to the Supreme Court.²⁹

Chapter Seven also focuses on the Supreme Court, but examines the increasingly studied question of the goals Justices have during oral argument.³⁰ The authors suggest that oral argument is much more than a forum for establishing facts and truth in an attempt to figure out the law. Instead, it is a strategic process where the Justices’ personalities and leisure preferences drive their questioning.³¹ Specifically, Justices who are extroverts and like to participate in many public events are also generally active questioners at oral argument, but not in every case, as with Justices Clarence Thomas and David Souter.

New Directions in Judicial Politics also offers a number of chapters on the Supreme Court. Ryan Black and Ryan Owens focus on agenda setting.³² They look at the private papers of Justice Harry Blackmun for the individual *certiorari* votes of the Justices and other information such as the issues contained in the pool memos. They find that three broad considerations influence the Justices: 1) Justices vote to grant review when they expect policy gains from hearing the case, 2) Justices vote to grant review when legal factors suggest they should, and 3) policy and legal considerations interact with each other and jointly explain agenda setting.³³ In their

25. *Id.* at 7.

26. *See id.* at 101-52.

27. *See id.* at 116-23.

28. *See id.* at 124-37.

29. *See id.* at 144-49.

30. *See* RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT (2012); Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Argumentation Before the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006); TIMOTHY R. JOHNSON, ORAL ARGUMENT AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004).

31. *See* EPSTEIN ET AL., *supra* note 13, at 305-11.

32. *See* Ryan C. Black & Ryan J. Owens, *Supreme Court Agenda Setting: Policy Uncertainty and Legal Considerations*, in *NEW DIRECTIONS*, *supra* note 14, at 144-66.

33. *See id.* at 149-55.

chapter, Timothy Johnson, James Spriggs, and Paul Wahlbeck explore the origin and development of *stare decisis* at the Supreme Court.³⁴ They analyze the citations in Supreme Court opinions to show how the Court moved from common law to rely on its own precedent by the 1810s—partly because the Justices saw law as important to judicial decision making and partly because they saw *stare decisis* as a vehicle to enhance the Court’s legitimacy.³⁵ They further show how the Court’s expanding reliance on its own precedent over time served to insulate it from attacks by other institutions.³⁶ Tom Clark’s chapter on bargaining and opinion writing on the Court provides an excellent overview of the large literature on the subject with particular attention to the strengths and weaknesses of the empirical approaches that have been employed for testing the various theories about the process. Clark suggests that no existing model accurately captures the process and that future empirical research should focus on measuring the doctrinal content of opinions and the non-ideological features of judicial decision-making.³⁷

COURTS OF APPEALS

Chapter Four in *The Behavior of Federal Judges* focuses on the courts of appeals and shows that their judges exhibit less ideological behavior and greater group effects than are present at the Supreme Court. This is largely due to the mandatory jurisdiction of the courts of appeals—which provides for a heavier workload and for less ideologically charged cases—and the resultant effort aversion that its judges exhibit. Interestingly, the authors employ two measures of ideology for courts of appeals judges. First, based on their own online research, they determine a judges’ ideology before they began their appointment.³⁸ The authors find that their classifications—strongly conservative, moderately conservative, moderately liberal, and strongly liberal—have a strong correlation to the party of the appointing president.³⁹ Thus, the appointing president’s party is a valid proxy for the ideological predispositions of courts of appeals judges. At the Supreme Court level, they find that their classifications are more valid (have fewer anomalies) than the often-used Segal-Cover scores.⁴⁰ Second, they compare their “*ex ante*” measure of ideology to “*ex post* ideology” based on judicial votes.⁴¹ Surprisingly, they find that courts of appeals judges behave in a more moderate fashion than their *ex ante* ideology would predict.⁴² The authors attribute this not to ideological drift or panel composition, but instead to the constraining effect of precedent (law), which is more pro-

34. See Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, in *NEW DIRECTIONS*, *supra* note 14, at 167-85.

35. See *id.* at 169-72.

36. See *id.* at 175-81.

37. See Tom S. Clark, *Bargaining and Opinion Writing on the U.S. Supreme Court*, in *NEW DIRECTIONS*, *supra* note 14, at 186-204.

38. See EPSTEIN ET AL., *supra* note 13, at 154-58.

39. See *id.* at 177-81.

40. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); See also Jeffrey A. Segal et al., *Ideological Values and the Votes of the U.S. Supreme Court Justices Revisited*, 57 J. OF POL. 812 (1995).

41. See EPSTEIN ET AL., *supra* note 13, at 177-83.

42. See *id.* at 178-79.

nounced at the courts of appeals than it is at the Supreme Court.⁴³

In Chapter Six, Epstein, Landes, and Posner discuss dissent aversion: the reluctance by some judges to dissent publicly even when they disagree with their colleagues. This is largely attributed to effort aversion rather than to factors that the traditional ideological or legal models would suggest.⁴⁴ Courts of appeals judges are far more prone to dissent aversion than are Supreme Court justices because of the smaller number of judges participating in cases—usually three at the courts of appeals—and the greater workload that those judges are faced with.⁴⁵

New Directions in Judicial Politics continues the discussion of appellate courts with a chapter by Virginia Hettinger and Stefanie Lindquist on why and how the courts of appeals reverse lower court decisions. Examining data from the 1980s to the present, they show how even though reversal rates are relatively low (less than 15 percent per year) there is considerable variation over time and across circuits.⁴⁶ The authors also examine the factors that might influence individual circuit judges to reverse (or affirm) the lower court. Their model includes a number of variables thought to influence judicial behavior. They find that ideological disagreement, prior experience as a district court judge, whether the U.S. government is the losing litigant making the appeal, the presence of amicus briefs, and the legal and procedural posture of the case increase the chances that a circuit judge will vote to reverse the lower court.⁴⁷ Conversely, they find no effect for workload or circuit court norms.⁴⁸

TRIAL COURTS

Both books offer research on trial courts—an area that has been far less studied than appellate courts. Chapter Five in *The Behavior of Federal Judges* covers federal district courts, with the authors finding that ideology is less operative than legal considerations such as standing, ripeness, mootness, and other doctrines that allow for early dismissal of cases.⁴⁹ Given the district courts' lack of control over the cases that come to them, the authors conclude that their findings are not surprising.⁵⁰

In *New Directions in Judicial Politics*, Isaac Unah examines the relationship between race and death sentencing by looking at homicide cases over a five-year period during the 1990s in North Carolina. He finds that the aggravated murder of a white individual is 3.4 times more likely to result in a death sentence compared to the murder of a nonwhite individual, and that nonwhite killers of whites are overwhelmingly more likely to receive the death penalty than any other racial configura-

43. *Id.* at 180.

44. *See id.* at 261-62.

45. *See id.* at 262-64.

46. Virginia A. Hettinger & Stefanie A. Lindquist, *Decision Making in the U.S. Courts of Appeals: The Determinants of Reversal on Appeal*, in *NEW DIRECTIONS*, *supra* note 14, at 126, 129.

47. *See id.* at 132-41.

48. *See id.*

49. *See id.* at 10, 225-31.

50. *See id.*

ration.⁵¹ William Haltom and Michael McCann explain how activist plaintiffs may advance their causes even as they lose their cases. Specifically, they review news coverage of litigation over tobacco, firearms, silicon breast implants, and food and find that the plaintiff suits on these matters generate media coverage that advantages them and their causes and denigrates producers and vendors for practices that are deemed irresponsible or even criminal.⁵² Indeed, litigation generates more favorable coverage for activists than stories about issues or policy alone.

JUDICIAL SELECTION

Judicial selection has long been an important topic for discussion among academics and both books address the topic from an empirical perspective. In Chapter Eight of *The Behavior of Federal Judges*, the authors explore the behavior of judges who have a realistic chance at promotion. Do judges “audition” for promotion to higher courts? The authors’ use past scholarly and popular literature to identify past auditioners, and then derive the common factors that these judges exhibit, including age, year confirmed, party of appointing president, law school, sex, and race.⁵³ They find that potential auditioners do generally tend to alter their voting behavior to improve their prospects for promotion, with courts of appeals auditioners more likely to do so than district court auditioners.⁵⁴ This chapter provides a nice lead-in to Part I of McGuire’s book, which covers the topic of judicial selection from three different angles.

Building on her book on the topic, Christine Nemacheck’s chapter looks at strategy and uncertainty in choosing Supreme Court nominees from 1930 to 2005 (39 nominations and 240 candidates). Using archival documents, she develops presidential shortlists and empirically analyzes the factors that affected a president’s decision to select a nominee.⁵⁵ She finds support for presidents’ use of both informational—lessening uncertainty about a candidate’s future behavior—and political—improving a candidate’s chances for confirmation—strategies.⁵⁶ Jonathan Kstellec, Jeffrey Lax, and Justin Phillips examine the role of public opinion in Supreme Court confirmations. They empirically test the relationship between confirmation votes and constituent opinion, a senator’s partisanship, and the ideological distance between a senator and a nominee, and find that constituent opinion—measured at the state level—is a strong predictor of a senator’s roll call vote even when controlling for other factors.⁵⁷

The final chapter in this section is by Damon Cann, Chris Bonneau, and Brent Boyea, and deals with campaign contributions and judicial decisions in partisan and

51. Issac Unah, *Race and Death Sentencing*, in *NEW DIRECTIONS*, *supra* note 14, at 55.

52. See William Haltom & Michael McCann, *Under-Estimating and Over-Estimating Litigation: How Activist Plaintiffs may Advance Their Causes Even as they Lose Their Cases*, in *NEW DIRECTIONS*, *supra* note 14, at 80, 88-103.

53. EPSTEIN ET AL., *supra* note 13, at 365.

54. See *id.* at 369-79.

55. Christine L. Nemacheck, *Selecting Justice: Strategy and Uncertainty in Choosing Supreme Court Nominees*, in *NEW DIRECTIONS*, *supra* note 14, at 14.

56. See *id.* at 15-18.

57. See Jonathan P. Kstellec, Jeffrey R. Lax & Justin Phillips, *The Role of Public Opinion in Supreme Court Confirmations*, in *NEW DIRECTIONS*, *supra* note 14, at 20-37.

nonpartisan elections. The topic of judicial elections has garnered considerable attention from the scholarly community in recent years with much empirical work devoted to the topic. In this chapter, the authors gathered data on the decisions during the 2005 term of three state supreme courts whose judges are selected through competitive elections: Nevada, Texas, and Michigan.⁵⁸ They use data on contributions from attorneys and law firms in the most recent election campaign to test whether there is a relationship between dollars and decisions. Consistent with prior studies, they find mixed results with evidence of correlation and suggestions of causality in Michigan (which has partisan elections) but no evidence of even a correlational relationship in Nevada (which does not have partisan elections) and Texas (which does have them).⁵⁹

COURTS IN CONTEXT

New Directions in Judicial Politics offers a number of chapters on how courts operate in the larger political environment, including the implementation of judicial decisions. Two chapters focus on the U.S. Supreme Court. Michael Bailey and Forrest Maltzman explore the relationship between the Supreme Court, the president, and Congress.⁶⁰ They identify four areas where elected branches can and do influence the Court: the appointment process, deference by judges to political actors, overrides of judicial decisions by Congress and the president (particularly in statutory cases), and through the expertise of actors outside the Court such as legislative committees and the solicitor general.⁶¹ The authors conclude that each constraint allows the national will to affect what the Court does.⁶² Paul Collins explains the influence of interest groups on judicial policy. He details how interest group participation through *amicus curiae* briefs has steadily grown over time with increasing diversity in terms of issue areas and participating actors.⁶³ Collins reviews the empirical literature on the impact of *amici curiae* in terms of both methodology and findings. In short, these studies have demonstrated that *amicus* briefs play a crucial role for both clerks and justices in the decision-making process at the Supreme Court.⁶⁴

Do lower courts follow the decisions of the U.S. Supreme Court? Three chapters tackle this topic. Sara Benesh and Wendy Martinek delve into the question of lower-court compliance with precedent through a review of the empirical literature. The research shows that the lower courts—and the federal courts in particular—generally comply with Supreme Court precedents.⁶⁵ The authors suggest that

58. See Damon M. Cann, Chris W. Bonneau & Brent D. Boyea, *Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections*, in *NEW DIRECTIONS*, *supra* note 14, at 41-43.

59. See *id.* at 43-51.

60. See Michael A. Bailey & Forrest Maltzman, *Goldilocks and the Supreme Court: Understanding the Relationship between the Supreme Court, the President, and the Congress*, in *NEW DIRECTIONS*, *supra* note 14, at 207-20.

61. See *id.*

62. *Id.* at 220.

63. See Paul M. Collins Jr., *Interest Groups and Their Influence on Judicial Policy*, in *NEW DIRECTIONS*, *supra* note 14, at 221-36.

64. See *id.* at 232-34.

65. See Sara C. Benesh & Wendy L. Martinek, *Lower Court Compliance with Precedent*, in *NEW*

this is due to the Court's legitimacy and that as long as the Court is seen as a legitimate institution, its dictates will be followed.⁶⁶ Scott Comparato, Scott McClurg, and Shane Gleason look at whether state supreme courts follow U.S. Supreme Court precedent. They compare state supreme court judges across three different institutional contexts: judges who are selected by elites, judges who gain their seats through competitive elections, and those who are selected through a merit retention election.⁶⁷ Overall, they find that U.S. Supreme Court precedent is not uniformly applied across states. State supreme court judges use Supreme Court precedent to further their policy goals or to bolster their chances for electoral success, depending on case salience and the extent of past conflict between the state supreme court and U.S. Supreme Court.⁶⁸

Similarly, Kevin McGuire examines how state supreme court judges interpret the First Amendment's Establishment Clause and the precedents of the U.S. Supreme Court. His empirical analysis is based on all Establishment Clause cases decided by state supreme courts from 1960-2010 (335 cases).⁶⁹ He operationalizes local political pressure in various ways, including whether judges are elected, whether the court is located in the South, and the percentage of Evangelical Christians in each state, while controlling for other potential influences.⁷⁰ McGuire finds that state supreme court judges are influenced by a variety of factors, including local political preferences and the traditional values of the Christian Right in the South. Furthermore, he finds that elected judges are particularly prone to deviating from federal precedent because following it may harm their chances for reelection.⁷¹

Richard Sander moves beyond courts complying with courts to the implementation of court decisions. He offers a case study of the on-the-ground effects of judicial pronouncements.⁷² Specifically, he examines the effect of the U.S. Supreme Court's affirmative action decisions on university admissions policies. He marshals admissions data by race for the University of Michigan (both undergraduate and the law school) in particular and for a wider sample of public law schools in general.⁷³ He finds that rather than minimizing the influence of race in admissions decisions, the Court's rulings had the opposite effect: racial preferences became larger, particular racial classifications became more determinative, and the entire admissions process became more mechanical than ever.⁷⁴

DIRECTIONS, *supra* note 14, at 260-74.

66. *See id.* at 272-74.

67. *See* Scott A. Comparato, Scott D. McClurg & Shane A. Gleason, *Patterns of Policy Making across State Supreme Courts*, in NEW DIRECTIONS, *supra* note 14, at 119-22.

68. *See id.*

69. Kevin T. McGuire, *Public Opinion, Religion, and Constraints on Judicial Behavior*, in NEW DIRECTIONS, *supra* note 14, at 246.

70. *Id.* at 249.

71. *See id.* at 248-52.

72. *See* Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in NEW DIRECTIONS, *supra* note 14, at 277-98.

73. *See id.* at 291-96.

74. *See id.* at 296-98.

CONCLUSION

As Justice Ginsburg's interview demonstrates, there are many questions raised by legal actors that can be studied empirically. Both *The Behavior of Federal Judges* and *New Directions in Judicial Politics* not only demonstrate through their impressive review of existing literature that scholars of law and courts have developed a considerable body of research on these important questions, but that this inquiry is ongoing and continues to bear fruit. Taken together, both books offer new insight across different legal settings (e.g., appellate and trial courts; federal and state courts). They make plain that a growing number of legal scholars are using the tools of social science to explain how courts function and judges operate. The scholarly community will no doubt seek out both books, but it is the practitioners themselves—lawyers, judges, and the larger polity—who can most benefit from understanding not only how we study law and courts but, more importantly, what we find. A careful read of these new books will aid lawyers in becoming better litigators and counselors, judges in becoming more conscious of the various determinants and implications of their own work, and the larger political community in thinking about how law and courts should be constituted in the United States. If change is necessary, it will be most evident through the empirical study of law and courts.