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Judicial Decision Making

For decades now, scholars of law and courts have debated the factors that influence judicial decisions. Some analysts assert that *legal* factors control judges' rulings, while others believe that *extra-legal* factors motivate those decisions. In what follows, we clarify and contrast these two sets of factors, beginning with the legal approach and then moving to three extra-legal accounts: attitudinal, strategic, and historical institutionalism.

THE LEGAL APPROACH

The legal approach holds that judges decide cases based on “the law” without regard to their personal policy preferences. By applying legal principles to the facts of cases, according to this account, judges arrive at sound decisions without injecting their personal beliefs into them. While scholars have identified a number of these legal principles, three appear frequently: *stare decisis*, intent, and textualism.

Pursuant to the legal principle of *stare decisis*—or, translated from Latin, “let the decision stand”—judges apply “precedent” to disputes. Applying precedent means that judges look for factual similarities between previously decided cases and the case before them and, once found, apply the law declared in the previous case—the precedent—to the extant dispute. Since it depends on past decisions, *stare decisis* aims at predictability and stability.

When applying the principle of *intent*, judges determine what the law's or constitution's creators intended at the time of drafting. In a constitutional dispute, for example, a judge may refer to the records of the constitutional convention, state ratification debates, and the Federalist Papers. These historical documents are important because, when read together they may reveal the specific goals for which the framers strived when creating the constitution.

The principle of *textualism*, on the other hand, considers the *words* of a law or constitution and gives them the meaning the law's drafters gave them. According to this principle, to apply the modern definitions of words whose meanings have evolved over time is to amend the statute or constitution without following proper procedure. By referring to contemporaneous dictionaries or other lexiconic-type materials, textualists say they can determine the proper meaning of disputed statutory or constitutional words and phrases and, in so doing, avoid the pitfalls that judges encounter when researching historical documents for expressed *or unexpressed* "intent."

These and other "principled" legal approaches to decision making dominated social-scientific scholarship on law and courts until 1940s, when scholars began to collect data on judicial decisions. From these data, they observed that judges often voted on the basis of their own policy (ideological) preferences, and not on legal principles. These empirical observations gave birth to new social scientific theories, which argued that ideological or institutional factors, rather than legal factors, influenced judges' decisions. Three extra-legal approaches—the attitudinal, strategic, and historical institutional approaches—dominate the field of judicial politics today. While each differs from the

other in important ways, they all claim that any approach to judicial decision making that relies exclusively on legal principles is incomplete.

THE ATTITUDINAL APPROACH

The attitudinal approach emphasizes the importance of the *justices'* political ideologies. Typically, scholars examining the ideologies of the *justices* characterize the degree to which a *justice* is liberal or conservative—as in "Justice X holds conservative views on issues of criminal law" or "Justice Y holds liberal issues on free speech." This approach maintains that when a case comes before the *Supreme Court* each *justice* evaluates the facts of the dispute and arrives at a decision consistent with his or her personal ideologies.

Our emphasis on "justices" and the "Supreme Court" is no mistake, for the attitudinal approach is geared to explaining U.S. Supreme Court decisions. That is because the approach works only under three conditions. First, the judge must lack political or electoral accountability. Second, the judge must have no ambition for higher office. Third, the judge must serve on a court of last resort that controls its own agenda. The only court that fulfills these conditions in the United States is the U.S. Supreme Court.

While the attitudinal approach is relatively successful at explaining Supreme Court justices' behavior, scholars have pointed out that it ignores important factors. That is where strategic approaches come into play. According to their proponents, strategic approaches fill many of the voids left by the attitudinal approach's limitations.

STRATEGIC APPROACHES

Most strategic approaches argue that judges wish to decide cases to advance their personal policy preferences (like the attitudinal approach), *but* (unlike the attitudinal approach) they can only maximize those preferences if they are attentive to the preferences and likely actions of other relevant actors (such as their colleagues, elected officials, and the public) and the institutional context in which they make their decisions.

As even this brief description suggests, strategic accounts rest on three major premises. First, they assume that judges make decisions consistent with their *goals* and *interests*. Judges can rank the alternative courses of action available to them in terms of their preferences and the outcomes they expect their actions to produce. Once they have established the relationship between actions and outcomes, they can compare the relative benefits of alternative actions and choose the one that produces the highest ranked outcome. Second, strategic accounts hold that for justices to maximize their preferences they must act *strategically* when making their choices. Strategic action is required because judicial decision making is interdependent: An individual judge's action is, in part, a function of her expectations about the actions of others. Because judges know that other government actors can undo their decisions (e.g., Congress can pass legislation that overrides a court decision), they must contemplate those other actors if they hope to maximize their policy preferences. Finally, strategic accounts assume that *institutions* structure the choices judges make. On the Supreme Court, for example, the norm that a majority of the justices must sign an opinion for it to become the law of the land may affect how justices write their opinions. They know they must attract the votes of at least four of their colleagues if they are to write a precedent-setting opinion.

HISTORICAL INSTITUTIONAL APPROACHES

Historical institutionalism too argues that institutions structure and constrain actors' powers to advance their own preferences, but it also maintains that institutions *themselves* create goals and preferences. Institutions gain their own perspectives and goals through a process called path dependence.

As an institution develops over time, it acquires certain goals to which its members adhere, a kind of institutional outlook. Thus, unlike the attitudinal approach, judges are not necessarily motivated solely by *their* individual policy preferences, but rather, may be motivated by a desire to further the interests of *the court*. For example, judges, as members of the "judicial institution," believe that they must follow judicial obligations, such as adhering to precedent, in order to maintain judicial legitimacy. Institutions, then, not only constrain preferences, they also create them.

Institutions develop perspectives through a process called path dependence. Path dependence reflects the idea, broken down into three parts, that actions have long-term consequences. First, after a political actor or institution chooses a "path" down which to "travel," it becomes very difficult to undo that decision and move to another path. *Sequence* and *inertia* are crucial. Second, *early events* in the sequence are more important than later events because they decide the foundational paths down which actors move. These early decisions are the large branches off which smaller ones grow. It is difficult to deviate from the decisions made in these early events because the cost of undoing them is high. Third, even "minor" events can have important consequences, depending on their *timing*.

Applying these three features of path dependence, then, the historical approach holds that judicial development frequently turns on "critical moments"—times when

actors and events define and limit the judiciary and its future actors. Thus, the historical approach views judicial decision making from a broad perspective to explain how current judicial behavior is constrained and defined by past actions.

CONCLUSION

We have described the most common legal and extra-legal approaches scholars invoke to explain judicial decision making. Legal approaches argue that the law, via legal principles, determines judicial outcomes. Extra-legal approaches, on the other hand, claim that something other than “the law” motivates those decisions. Attitudinalists believe ideology controls outcomes; strategic advocates hold that ideology and political pressures combine to create judicial decisions; and, finally, historical institutionalists argue that judges are swept up in larger historical movements that structure and define their goals.

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Further reading:

Epstein, Lee and Jack Knight. (1998). *The Choices Justices Make*. Washington, D.C.: CQ Press.

Clayton, Cornell W. and Howard Gillman, eds. (1998). *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: The University of Chicago Press.

Pierson, Paul. (2000). "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review* 94: 251-267.

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