

Lee Epstein, William M. Landes and Richard A. Posner: The behavior of federal judges: a theoretical and empirical study of rational choice

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“The Behavior of Federal Judges: a Theoretical and Empirical Study of Rational Choice” by Epstein, Landes and Posner (hereafter, ELP) probably represents the most complete empirical investigation of US federal judges’ behavior to date. Undoubtedly, it meets the expectations that any reader might have when three top scholars respectively in the fields of Political Science, Economics and Law join their knowledge in discussing this topic. The behavior of federal judges is thus investigated under different facets, although often the political analysis of ideology becomes prevalent. Despite the title, the book is mainly empirical, with non-formalized economic models limited only to Chapters 1 and 6. However, this is not necessarily a bad thing, since one of the main criticisms towards legal realism’s claims was their lack of “hard-evidence”, something now abundantly supplied.

Following these premises, ELP focus on several factors that might impact on judicial behavior. Chapters 3, 4 and 5 focus on the role of ideology, which is shown to be a significant determinant of judicial behavior in all three tiers of the American Federal Judiciary. This effect is milder in lower jurisdictions, where cases are (on average) characterized by less novelty of the issues proposed and often lack merit. However, for as important as it may be, ELP stress that ideology cannot explain every decision. Otherwise it could not be possible to observe such a big share of unanimous decisions. Apart from ideological/political issues, also other more canonical economic factors arise and this is where the theoretical model of judges as participants to a labor market, deployed in Chapter 1, becomes more meaningful. Following a long lasting literature that sees judges as economic actors, ELP supply evidence of justices’ leisure preferences. Aversion towards dissenting, in particular,

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emerges whenever this option does not yield sufficient benefits so as to overcome the greater effort necessary to write a distinct and dissenting opinion.

More generally, with this book ELP try to reconcile opposite factions in the never-ending debate between realists and formalists (here in the book called legalists) about judicial behavior. If the latter, still preponderant in legal scholarship, depicts judges as mechanical executors of the law, realism (the school of thought embraced by ELP) in its various declinations (the attitudinal, strategic or public choice models) allows various factors to influence judicial conduct. One of the many added values of this book, might be found in the fact that ELP, although not adhering to the legalist tradition, acknowledge the boundaries within which this theory is valid. Being supporters of legal realism, does not prevent them from ascribing to a rather legalistic way of deciding cases, the roughly 30 % of decisions disposed unanimously by the Supreme Court. Decisions that otherwise would hardly be explained by realists, given the high level of ideological partisanship in the Court. If accordingly to the realist theory, judges are not robots trained to automatically apply the law in a rather mechanical way, this does not mean that they always behave according to egoistic goals: the truth is somewhere in the middle. In fact, the realist model applies to a portion of judicial decisions, just as the legalist one does to a complementary share of cases. The latter being composed by those cases that do not have particular important issues at stakes. Their humble claim about the non-all-inclusiveness of their theory (corroborated by empirical results, that do not always supply significant backing to their theoretical hypothesis) is indeed a valuable one.

The use of economic theory (mostly not formalized) is aimed at supplying an economic justification to the attitudinal model: judges prefer to vote accordingly to their ideology, but they do not do this uncritically. On the contrary, they behave in this way because doing so maximizes their utility. In this sense, the attitudinal, strategic and economic models of judicial behavior are elegantly harmonized: judges wish to maximize their utility and voting accordingly to their ideology usually meets this objective. However, sometimes the costs related to remaining loyal to one's own ideology might become too high with respect to the attached benefits. This would happen when voting in such way creates within-court tension, undermines judges' career potential or implies too much effort in writing dissenting opinions. In this event, judges might prefer to strategically vote against their own beliefs in order to aim at something bigger, which is ultimately what maximizes their utility.

Indeed, one of the most interesting parts of the book, at least for the reader interested in Law and Economics, is the one devoted to judges' careerism (Chapter 8). In fact, apart from judiciary-scholars, this book could probably find a further (unintended) audience in federal judges. This is because Chapter 8 could be considered as a sort of "handbook" for ambitious judges willing to get promoted. Various characteristics that judges should exhibit in order to better qualify for a promotion to higher tiers of the federal judiciary are taken into consideration and empirical evidence of their significance is supplied. Accordingly, from ELP's empirical investigation emerges that younger judges with an Ivy League education are more likely to be promoted. The same is true for women and justices belonging to a non-white minority.

Careerism is a very controversial topic, especially among lawyers (formalists above all) who often idealize the role of judges. The book thus contributes to a very long debate. With respect to some legalist criticisms towards careerism, ELP offer a less idealized, but at the same time equally credible view. Critics usually point out that only a small (to their view insignificant) share of federal judges is promoted to upper tiers of this jurisdiction. Accordingly, building theories around this topic is downgraded to a rather useless academic exercise. Such evidence is indeed undeniable and ELP also supply interesting figures regarding this topic. In particular, they show that since the 1930s roughly 10 % of district judges were promoted to a Court of Appeal judgeship, while 3 % of circuit judges reached the Supreme Court. If these percentages might appear, at a first glance, not very meaningful for legitimizing a theory of judicial careerism, ELP have the merit of viewing this phenomenon from the opposite perspective. When focusing on promotions to the Supreme Court, they emphasize how all but one (Justice Kagan) of the current members were previously serving as circuit judges. The conclusion is straightforward: although only a small fraction Court of Appeal judges make it to the Supreme Court, this does not prevent them to aspire to that position. This is sufficient to hypothesize the existence of careerism and its potential influence on judicial decision-making. ELP formalize this idea by referring to judges as “auditioners” (that is, potential nominees). In order to test empirically the idea that careerist judges adjust their behavior so as to maximize their chances of future promotions, the authors investigate whether auditioners are “tougher” (less lenient) in criminal cases; something believed to gain favor with political audiences. Estimates allow claiming that this phenomenon exists among circuit judges aspiring to reach the Supreme Court, while the same cannot be asserted with respect to district judges.

Despite some limits, “The Behavior of Federal Judges” represents a useful tool for any social science scholar willing to approach the topic of judicial behavior. In a reasonable-sized book the reader might find condensed a complete literature review and all the information, theories and empirical analyses one could possibly desire.