

Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory and Judicial Behavior

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Abstract:

In this brief Article, the author explore the growing empirical evidence in support of the public choice model of judicial decision making. Although legal scholars have traditionally been reluctant to engage in a critical inquiry into the role of judicial self-interest on judicial behavior, recent empirical studies confirm many of the predictions of the model. As a result, the public choice model has gained broad acceptance across a range of disciplines, courts, and even the U.S. public.

Rezumat:

În acest scurt articol, autoarea explorează motivele empirice crescânde de la baza modelului de abordare publică a procesului de luare a hotărârilor judecătorești. Deși oamenii de știință au fost în mod tradițional reticenți să se angajeze într-o anchetă critică asupra rolului interesului individual în comportamentul judiciar, studii empirice recente confirmă multe dintre predicțiile modelului. Ca rezultat, abordarea publică a câștigat o acceptare largă într-un mare număr de discipline, instanțe și chiar în rândurile publicului din Statele Unite.

Keywords: judicial decision-making, models of judicial decision making, behavioralism, attitudinalism, models of judicial behavior, the legal model, the public choice model,

I. Introduction

One area of legal scholarship that has particularly benefitted from empirical research is the judicial decision-making literature. Several scholars have identified empirical advances in this field. For example, writing for a symposium on empirical and experimental methods in legal scholarship hosted by the University

of Illinois College of Law in 2001, my current copanelist, Michael Heise, extensively documented empirical support for the two domi-



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In sum, although the empirical evidence is somewhat mixed, the majority of recent studies find that self-interest concerns such as promotion desires and reversal aversion influence the decision making of judges with permanent tenure

nant models of judicial decision making: behavioralism and attitudinalism.¹⁰⁵ He also identified the three most prominent emerging models of judicial behavior at the time: the legal model,¹⁰⁶ the public choice model, and the institutional model.¹⁰⁷

In this short Article, I will focus on recent advances in the public choice model of judicial decision making. I contend that the public choice theory of judicial behavior has gone from an “emerging” model to a model with broad acceptance across a range of disciplines. Although the model was originally advanced by only law and economics and public choice scholars, it has since gained widespread acceptance by political scientists, legal scholars, many courts, and even the U.S. public. This is largely due to the impressive body of empirical

legal scholarship that confirms many of the predictions and assumptions about the public choice model.¹⁰⁸

II. The public choice model of judicial decision making

The basic assumption of public choice theory is that “self interest rules behavior in public as well as private transactions.¹⁰⁹ Thus, the public choice model of judicial decision making takes a “[c]andid [l]ook at [j]udicial [m]otivation”¹¹⁰ and assumes that judges may be influenced by the “day-to-day pressures and temptations”¹¹¹ of their positions.

Legal scholars have traditionally been reluctant to engage in a critical inquiry into the role of judicial self-interest on judicial behavior.¹¹² The judiciary is more insulated from the political process than any other branch of government and, as a result, judges seem less likely than legislators, executives, and bureaucrats to insert their own self-interest into the decision-making process.

As Richard Epstein argues: The structure of the “independent” judiciary is designed to remove judges from the day-to-day pressures and temptations of ordinary political office, and with some qualifications it achieves that end. It is a strategy that recognizes the forces of self-interest, regards them as potentially

¹⁰⁵ See Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 833–39.

¹⁰⁶ See *id.* at 839–40. For an excellent review of empirical analyses of the legal model, see FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 39–68 (2007).

¹⁰⁷ See Heise, *supra* note 1, at 841–43.

¹⁰⁸ In this brief review, I discuss “the subset of empirical legal scholarship that uses statistical techniques and analyses,” that is, “studies that employ data (including systematically coded judicial opinions) that facilitate descriptions of or inferences to a larger sample or population as well as replication by other scholars.” Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810 (1999). For other views on what constitutes “empirical” scholarship, see Lee Epstein & Gary

King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2–3 (2002).

¹⁰⁹ Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827.

¹¹⁰ Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 625 (2000).

¹¹¹ Epstein, *supra* note 5, at 832.

¹¹² See, e.g., Andrew P. Morriss et al., *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 64 (2005) (“That judges’ self-interest might influence judicial opinions often has been neglected in the research literature.”); Schauer, *supra* note 6, at 615 (“Unexpectedly, the reluctance to engage in critical inquiry into judicial motivation exists even outside of the precincts in which sympathy with the judiciary is the normal order of things.”)

destructive, and then takes *successful* institutional steps to counteract certain known and obvious risks.¹¹³

As a result of this perceived protection from the influences of judicial self-interest, both legal scholars and public choice scholars have traditionally had a strong preference for more active judicial involvement in law making. Despite the general preference for litigation over legislation, judicial self-interest has been shown to be an important determinant of judicial behavior. Moreover, like legislatures, executives, and bureaucrats, the judiciary is also susceptible to inappropriate rent seeking. The courts simply represent another opportunity for interest groups to shape the law.

Explanations for the absence of attention to judicial self-interest include legal scholars' myopic focus on the reluctance of judges in federal courts, especially the U.S. Supreme Court, to talk about career ambitions and the idealized notion of judges among legal scholars.¹¹⁴ I briefly discuss each of these explanations below.

First, the overwhelming majority of both legal scholarship and teaching in law schools examines the federal court system. For instance, one state court judge recently noted sarcastically that, as a student, "[he] did not know that state courts existed."¹¹⁵ The reason for this

myopic focus is itself an interesting question, but it is certainly fair to say that most law professors perceive a "yawning chasm of fabulousness [that] separates state court judges and federal judicial celebrities."¹¹⁶ Whatever the explanation, this fascination with federal courts is surprising given that "state courts process over ninety-nine percent of the nation's litigation (or about 100 million cases per year)."¹¹⁷ In contrast to most state judges, federal judges serve with life tenure. Thus, the traditional self-interested motivations that public choice scholars commonly attribute to legislators and bureaucrats -the desire for reelection and the need to raise campaign funds -do not apply to federal judges. As a result, many legal scholars never consider the possibility that other forms of judicial self-interest might determine the behavior of federal judges.¹¹⁸ Even more myopic than the scholarly focus on federal courts is the focus on the U.S. Supreme Court.¹¹⁹ Inferences about the behavior of Justices on the Supreme Court certainly do not generalize to most other judges in both the federal and state court systems. In contrast to all other courts, the majority of the Supreme Court's docket involves cases with politically salient issues. As a result, the policy preferences of the Justices are likely to be the biggest influence on their decision making.¹²⁰

¹¹³ Epstein, *supra* note 5, at 831–32.

¹¹⁴ For a more thorough discussion of these explanations, see Schauer, *supra* note 6, at 622–24.

¹¹⁵ Rick Haselton, *A Look at a State Appellate Court*, 26 JUST. SYS. J. 98, 98 (2005).

¹¹⁶ As stated by David Lat, founder and managing editor of the blog *Above the Law*, under the pseudonym Article III Groupie on the judicial gossip blog *Underneath Their Robes*. Article III Groupie, *State Court Judges Are Icky*, UNDERNEATH THEIR ROBES (July 28, 2004, 1:32 AM), http://underneaththeirrobes.blogs.com/main/2004/07/state_.html.

¹¹⁷ Paul Brace et al., *Placing State Supreme Courts in State Politics*, 1 ST. POL. & POL'Y Q. 81, 85 (2001).

¹¹⁸ "Justices may have goals other than policy, but no serious scholar of the Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things over which most social scientists agree." Lee Epstein & Jack Knight, *The New Institutionalism, Part II*, L. & Cts. (Am. Political Sci. Ass'n, Wash. D.C.), Spring 1997, at 4, 5.

¹¹⁹ Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 680–81 (1999).

¹²⁰ See generally Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 231–34 (1993) (concluding that the evidence suggests a strong relationship between policy preferences and judicial behavior).

Moreover, as there is no higher court to which Supreme Court Justices can hope to be promoted, promotion desires likely have little influence on their behavior.

Another explanation for the lack of inquiry into self-interested judicial motivation is that judges rarely discuss their own career ambitions: “Most judges would sooner admit to grand larceny than confess a political interest or motivation.”¹²¹ In contrast to legislators and executives that speak publicly about their ambitions to be reelected or to attain a higher office,¹²² judges are generally silent on these same ambitions. Consequently, judicial self-interest is certainly a less apparent motivation for judicial behavior than the self-interest of most politicians.

Finally, legal scholars may have traditionally been reticent to examine judicial self-interest because those same scholars have an idealized notion of the judge. Judges are typically revered as noble protectors of our fundamental rights, not ordinary people trying to advance their careers or establish their legacy. This romantic ideal of judges among both legal scholars and the public may account for the dearth of cynical explanations for judicial behavior.¹²³

III. Empirical studies of judicial self-interest

In his provocative 1993 article, Judge Posner attempted to challenge this romantic ideal of judges by asking (and answering), *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*.¹²⁴ Judge Posner

argues that “[j]udges are rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do.”¹²⁵ Although Judge Posner was not the first legal scholar to apply public choice theory to the judiciary,¹²⁶ his provocative article incited a new empirical interest into both the components of judicial self-interest and the effects of this self-interest on case outcomes. Numerous empirical studies have identified a relationship between judicial self-interest and judicial decision making. The specific institutional structure of the judiciary dictates the types of self-interest concerns that might influence judges. For example, while retention concerns might be a significant influence on judges without permanent tenure, judges with permanent tenure might consider factors such as promotion potential, reputation, and leisure. Section A discusses the empirical evidence supporting the possible self-interest influences on judicial decision making among judges that serve with and without permanent tenure.

A. Judges with Permanent Tenure

Many judges serve with permanent tenure. For example, although U.S. federal judges are appointed through a process that is oftentimes political, they enjoy life tenure. Similarly, state supreme court judges in Rhode Island are granted life tenure, [to author: consider adding citation to table or “infra” to later footnote] and in both Massachusetts and New Hampshire, judges serve until age seventy.

¹²¹ Donald Dale Jackson, *Judges* 18 (1974).

¹²² See David R. Mayhew, *Congress: The Electoral Connection* 73 (1974).

¹²³ Schauer, *supra* note 6, at 624.

¹²⁴ Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

¹²⁵ *Id.* at 39.

¹²⁶ See, e.g., Walter F. Murphy, *Elements of Judicial Strategy* (1964); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

Although judges with permanent tenure need not fear losing their jobs, other self-interest concerns may influence their judicial decisions. For example, Judge Posner speculates that judges' utility functions might include variables such as the utility derived from the acts of judging, leisure, reputation, and avoiding reversal.¹²⁷ Numerous empirical studies have found results consistent with Judge Posner's conjecture. For example, several scholars have explored the relationship between judges' promotion desires and their decision making. In one of the earliest empirical studies on the influence of promotion desires, Cohen explores voting on the constitutionality of the U.S. Sentencing Commission in 1988 and finds that judges who have higher probabilities of being promoted to an appeals court position are more likely to rule that the Commission was constitutional.¹²⁸ He interprets the results as suggesting that judges are more likely to follow the governing administration's wishes when facing the prospect of a promotion to an appellate court position.¹²⁹ In another study of all federal antitrust sentences from 1955 to 1981, Cohen finds that promotion potential exerts a significant influence on corporate criminal antitrust penalties.¹³⁰ Similarly, in two separate studies, Morriss, Heise, and Sisk also explore the relationship between promotion potential and judicial decision making in challenges to the

constitutionality of the U.S. Sentencing Guidelines. The authors find that the district court judges with the greatest potential for promotion are most likely to approve the constitutionality of the guidelines.¹³¹ They also find that the judges with the greatest potential for promotion to the circuit court of appeals are more likely to communicate their rulings through written opinions, which signal their qualifications for promotion as well as their political views.¹³² Using the Morriss, Heise, and Sisk dataset, Taha finds that the potential for promotion is an important influence on district judges' decisions to publish an opinion.¹³³ In another recent study, BarNiv and Lachman find that judges allocate more time to writing opinions when they believe that lengthy opinions contribute to their personal reputation and promotion potential.¹³⁴

Other scholars have explored whether judges' aversion to having their rulings reversed affects judicial decision making. These studies indirectly test the influence of promotion potential on judicial rulings because lower reversal rates may increase the chances for promotion. For example, Smith explores civil rights cases in the District of Columbia Circuit and finds that reversal aversion influences the rulings of trial court judges; upon reversal by the appellate court, the trial court judges adjust their rulings to be more in line with the preferences of the appellate

¹²⁷ See MURPHY, *supra* note 22, at 31–34.

¹²⁸ Mark A. Cohen, Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?, 7 J.L. ECON. & ORG. 183, 188–90 (1991).

¹²⁹ *Id.* at 193.

¹³⁰ Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 14 (1992).

¹³¹ See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487–93

(1998).

¹³² See Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 64–65 (2005).

¹³³ See Ahmed E. Taha, *Publish or Perish? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 21–23 (2004).

¹³⁴ See Moshe BarNiv (Burnovski) & Ran Lachman, *Self-interest in Judges' Time Allocation to Writing Judgments* 14–17 (July 16, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1641376>.

court to avoid future reversals.¹³⁵ Similarly, Randazzo examines a sample of district court cases decided between 1925 and 1996 and finds that, in many cases, if the federal trial judges anticipate a negative response on appeal, they curtail their ideological influences and adjust their rulings to reduce the chances of reversal.¹³⁶ In another recent study, Choi, Gulati, and Posner find that fear of reversal influences federal district judges' opinion writing practices.¹³⁷ District judges are more likely to publish opinions in politically uniform circuits where they can predict which opinions will get reversed; in contrast, in politically diverse circuits where reversal is less predictable, the district judges publish fewer but higher quality opinions in order to reduce their chances of reversal.¹³⁸

In contrast, [to author: last sentence began with "in contrast", consider rephrasing] other studies find no evidence that reversal aversion influences judicial decision making. Higgins and Rubin hypothesize that if reversals matter to judges, they should matter less as judges grow older and gain seniority.¹³⁹ As a result, reversal rates should increase with age and seniority.¹⁴⁰ Their empirical analysis of U.S. district court judges in the Eighth Circuit, however, finds no

relationship between reversal rates, age, and seniority.¹⁴¹ Klein and Hume analyze search and seizure cases decided in the U.S. courts of appeals between 1961 and 1990 and find no evidence that fear of reversal influences circuit judges to align their preferences with the Supreme Court in cases that are more likely to be reviewed by the Court.¹⁴² Boyd and Spriggs predict that trial judges, because of their aversion to reversal, will adjust their citation patterns to cite Supreme Court cases based on the ideological preferences of the intermediate appellate courts¹⁴³. Their analysis, however, finds no evidence that trial judges' reversal aversion influences citation patterns.¹⁴⁴

In sum, although the empirical evidence is somewhat mixed, the majority of recent studies find that self-interest concerns such as promotion desires and reversal aversion influence the decision making of judges with permanent tenure. Similar studies of judges in other countries also suggest that self-interest concerns influence judicial decision making.¹⁴⁵

B. Judges Without Permanent Tenure

In contrast to federal judges, the majority of state court judges serve without permanent tenure. In order for

¹³⁵ See Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J., 28, 41 (2006).

¹³⁶ See Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669, 686 (2008).

¹³⁷ See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* 24 (Univ. of Chi. John M. Olin Law & Econ., Working Paper Series, Paper No. 508; N.Y. Univ. Law & Econ. Research Paper Series, Paper No. 10-06, 2010), available at <http://ssrn.com/abstract=1536723>.

¹³⁸ See *id.* at 25.

¹³⁹ See Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130

(1980).

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 133–35.

¹⁴² See David E. Klein & Robert J. Hume, *Fear of Reversal As an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 585, 597 (2003).

¹⁴³ See Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL'Y 37, 50 (2009).

¹⁴⁴ *Id.*

¹⁴⁵ For a discussion, see Nuno Garoupa, *Empirical Legal Studies and Constitutional Courts* 29 (Ill. Law & Econ. Research Paper Series, Research Paper No. LE10-015, 2010), available at <http://ssrn.com/abstract=1635963>.

these judges to retain their office, they must either face voters in partisan, nonpartisan, or unopposed retention elections or be reappointed by either the governor or legislature. Table 1 details each state's current method of selection and retention. [to author: would you like Table 1 inserted here, or at the end of the document]

Judges without permanent tenure have the incentive to vote strategically if they believe it will help them get reappointed, reelected, or otherwise retained.¹⁴⁶ As a result, the judges may decide cases in ways that benefit specific litigants or establish precedents that are favored by the people responsible for retaining judges. This is true whether it is a politician who decides whether to reappoint the judge or the voters in a retention election.

For example, it may be in the best interest of judges seeking reappointment by the governor or legislature to vote in a way that favors the executive or legislative branches. The power over judicial retention held by the governor or legislature offers the political branches of government direct opportunities to sanction judges for unpopular rulings. Judges who consistently vote against the interests of the other branches of government may hurt their chances for reappointment. As a result, in the

types of cases in which state governments have a stake, the decision making of judges seeking reappointment

may be influenced by retention concerns.

Empirical studies have found results consistent with this hypothesis. Brace, Hall, and Langer find that judges seeking gubernatorial or legislative reappointment are less likely to hear abortion cases.¹⁴⁷ The authors conclude that the judges resist voting against the interests of the other government branches.¹⁴⁸ Similarly, Shepherd finds that judges facing gubernatorial or legislative reappointment are more likely to vote for litigants from the other government branches.¹⁴⁹

Similarly, judges seeking reelection have the incentive to issue judicial decisions that will help them to attract both votes and campaign contributions. The increasing competitiveness of elections has likely heightened the pressure on judges to decide cases strategically and help them win support among voters.

Numerous empirical studies have found a relationship between elections and judicial decision making. For example, some of the initial studies in this area by Hall find that judges deviate from expected voting patterns when their terms are nearing an end and electoral pressures intensify.¹⁵⁰ Hanssen finds that litigation rates are lower in states where judges are elected and argues that elected judges' strategic voting reduces uncertainty about court decisions so that more cases settle.¹⁵¹ Besley and Payne find that states that elect judges have more anti-discrimination claims filed than

¹⁴⁶ See PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980); Lawrence Baum, *State Supreme Courts: Activism and Accountability*, in THE STATE OF THE STATES 103, 126 (Carl E. Van Horn ed., 1989).

¹⁴⁷ Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALA. L. REV. 1265, 1291 (1999) ("Judges subject to retention by state political elites are dramatically less likely to hear abortion cases.").

¹⁴⁸ See *id.*

¹⁴⁹ See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1607–08 (2009).

¹⁵⁰ See Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1123 (1987); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 443 (1992).

¹⁵¹ See F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 232 (1999).

states that appoint judges; they argue that elected judges have stronger pro-employee preferences, inducing more employees to file claims.¹⁵² Huber and Gordon find that elected judges impose longer sentences as their reelection approaches, arguing that voters care more about underpunishment than overpunishment of criminals.¹⁵³ Not all studies find such results; a recent study by Choi, Gulati, and Posner finds almost no evidence of elected judges responding to political pressure.¹⁵⁴

Other recent studies have explored the role of self-interest on judicial decision making when judges face different types of elections. Many studies have found instances of strategic voting among judges facing partisan elections. They find that, in their attempt to appeal to constituents and campaign donors, judges facing partisan elections are less likely to dissent on politically controversial issues,¹⁵⁵ less likely to rule for challengers to a regulatory status quo,¹⁵⁶ and more likely to redistribute wealth in torts cases from out-of-state businesses to in-state plaintiffs.¹⁵⁷ Similarly, Shepherd finds evidence suggesting that the decision making of judges facing partisan

reelections is aligned with the political preferences of the majority of voters.¹⁵⁸

Other studies have explored the role of self-interest on judicial decision making among judges that face nonpartisan or retention elections. For example, Canes-Wrone and Clark find that public opinion about abortion policy has a stronger effect on judicial decisions in nonpartisan systems than in partisan systems.¹⁵⁹ The authors argue that, in contrast to partisan judges that have a party label to inform voters about their policy preferences, nonpartisan judges communicate their policy positions through their decisions on the bench.¹⁶⁰ They conclude that, because nonpartisan judicial candidates will be particularly sensitive to making decisions that run against public opinion, nonpartisan elections could give rise to greater political pressure on judges than partisan elections.¹⁶¹ In a similar study, these authors find that retention elections also create pressure for judges to cater to public opinion on the abortion issue.¹⁶²

Recent empirical studies have also examined the relationship between campaign contributions and judicial decision making. With the costs of winning judicial

¹⁵² See Timothy Besley & A. Abigail Payne, *Implementation of Anti-Discrimination Policy: Does Judicial Discretion Matter?* 20 (London Sch. Econ. & Political Sci., STICERD Research Paper No. PEPP04, 2005), available at http://ssrn.com/sol3/papers.cfm?abstract_id=1158326##.

¹⁵³ See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 262 (2004).

¹⁵⁴ See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, J.L. ECON. & ORG. 290, 328 (2008).

¹⁵⁵ See, e.g., Melinda Gann Hall & Paul Brace, *Justices' Responses to Case Facts: An Interactive Model*, 24 AM. POL. Q. 237, 255 (1996).

¹⁵⁶ See, e.g., F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical*

Analysis of the States, 16 J.L. ECON. & ORG. 534, 542 (2000).

¹⁵⁷ See, e.g., Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. ECON. REV. 341, 368 (2002); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 180 (1999).

¹⁵⁸ See Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009).

¹⁵⁹ See Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 52, 63.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 63.

¹⁶² See Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J.L. ECON. & ORG. 18–20 (forthcoming 2012).

elections increasing dramatically, it is in judges' self-interest to rule in ways that help them obtain campaign funds. Shepherd finds that contributions from various interest groups are associated with increases in the probability that judges will vote for the litigants whom those interest groups favor.¹⁶³ Similarly, Kang and Shepherd find that judges facing partisan reelections are more likely to decide in favor of business interests as the amount of campaign contributions that they receive from those interests increases.¹⁶⁴ Other recent studies have examined the relationship between contributions from individual law firms and case outcomes when those law firms appear in court.¹⁶⁵ Scholars have found a correlation between the sources of a judge's funding and the judge's rulings in arbitration decisions from the Alabama Supreme Court;¹⁶⁶ in tort cases before state supreme courts in Alabama, Kentucky, and Ohio;¹⁶⁷ in cases between two businesses in the Texas Supreme Court;¹⁶⁸ and in cases during the Georgia Supreme Court's 2003 term.¹⁶⁹

In addition to empiricists studying the public choice model of judicial behavior, the public has also come to believe that

judicial self-interest influences judicial decision making. One national survey finds that three out of four voters believe that campaign contributions influence judges' decisions, while only five percent of those surveyed believe that campaign contributions have no influence on judges' decisions.¹⁷⁰ Similarly, fifty-five percent of voters believe that judges are "[b]eholden to campaign donors," and fifty-two percent of voters believe that judges are "[c]ontrolled by special interests."¹⁷¹ The public concern is not surprising given that incumbent state supreme court justices in judicial elections are more likely to be defeated than incumbents in both the U.S. House of Representatives, U.S. Senate, and state legislatures.¹⁷² Thus, the political pressure on judges to appeal to constituents, campaign donors, and special interest groups may be even stronger than the pressure that legislators confront.

Justices of the U.S. Supreme Court have also recently indicated their concern that judicial self-interest plays a role in the decision making of judges facing election. In 2008, Justice Kennedy expressed concern in *New York State Board of Elections v. Lopez Torres* about

¹⁶³ See Shepherd, *supra* note 54, at 629–30.

¹⁶⁴ See Michael S. Kang & Joanna Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 28 (Emory Univ. Sch. of Law, Pub. Law Research Paper Series, Research Paper No. 10-115; Law & Econ. Research Paper Series, Research Paper No. 10-74, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649402.

¹⁶⁵ [note to author: need cite]

¹⁶⁶ See Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999).

¹⁶⁷ See Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241, 242 (2000).

¹⁶⁸ See Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 POL. & POL'Y 314, 314–

315 (2003).

¹⁶⁹ See Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 ST. POL. & POL'Y Q. 281, 283 (2007).

¹⁷⁰ See GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE: FREQUENCY QUESTIONNAIRE 4 (2001), http://www.greenbergresearch.com/articles/1617/1412_JAS_ntlsurvey.pdf.

¹⁷¹ *Id.* at 5.

¹⁷² See Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001). From 1990 through 2000, reelection rates were approximately 94.1% in the U.S. House of Representatives, 89.3% in the U.S. Senate, 85.1% in state houses, and 84.1% in state supreme courts. Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20, 21 (2006).

whether “elections [that] require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties... is consistent with the perception and the reality of judicial independence and judicial excellence.”¹⁷³ Likewise, Justices Stevens and Souter agreed with “the broader proposition that the very practice of electing judges is unwise.”¹⁷⁴

Similarly, in a 2009 decision, *Caperton v. A.T. Massey Coal Co.*, the U.S. Supreme Court recognized for the first time the possibility of a due process violation caused by judicial bias involving a major campaign contributor.¹⁷⁵ This case involved Don Blankenship, the CEO of Massey Coal Company, who contributed three million dollars in 2004 to help elect Brent Benjamin to the West Virginia Supreme Court.¹⁷⁶ Benjamin won the election, and when Massey appealed a fifty million dollar verdict to the West Virginia Supreme Court, Justice Benjamin denied motions to recuse himself and voted to reverse the verdict against Massey.¹⁷⁷ The U.S. Supreme Court reversed the decision of the West Virginia Supreme Court and ruled that the due process clause requires judges to recuse themselves when there is a serious and objective risk of actual bias in cases like *Caperton*.¹⁷⁸ Justice Kennedy, writing for the majority, concluded that “there is a serious risk of actual bias -based on objective and reasonable perceptions -when a person with a personal stake in a particular case had a significant and

disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign ...”¹⁷⁹

IV. Conclusion

Empirical scholars have made great progress in the study of judicial self-interest and judicial behavior. Political scientists, economists, and empirically trained legal scholars have made important contributions to the growing body of empirical work which establishes that many of the predictions of the public choice model of judicial behavior are true.

To be sure, any existing model of judicial decision making, including both the public choice model and the well-established attitudinal and behavioral models, has only limited applicability to the study of judicial behavior. The importance of the law cannot be dismissed from theories of judicial behavior. Presumably, all judges are imbued to some extent with “rule of law” values, and, as a result, the law is the dominant factor in many decisions that they make. As Judge Posner himself has explained, many judges enjoy the practice of judging and would no more consider maximizing policy or personal preferences than a chess player would consider his own background or self-interest when moving his pieces.¹⁸⁰ Even in instances when judges’ personal preferences might take precedence over their pleasure in judging, much of our judicial system has been created to minimize the opportunity for judges to act out of self-interest.¹⁸¹

¹⁷³ 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

¹⁷⁴ *Id.* at 209 (Stevens, J., concurring).

¹⁷⁵ See 129 S.Ct. 2252, 2265 (2009).

¹⁷⁶ *Id.* at 2254.

¹⁷⁷ *Id.* at 2257–58.

¹⁷⁸ *Id.* at 2265–67.

¹⁷⁹ *Id.* at 2263–64.

¹⁸⁰ The point belongs to Posner, the examples belong to Schauer. See Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 634 (2000).

¹⁸¹ See Epstein, *supra* note 5, at 831–32.

As a result, empirical studies have yet to demonstrate that any one extralegal factor, including ideology, self-interest, background, or institutions, has a significant influence on a large number of cases.¹⁸² Thus, although empirical studies of judicial behavior are a “sobering splash in the face with cold reality”¹⁸³ for scholars that believe in principled judging, the influence of extralegal factors cannot be overstated.

Moreover, even the particular influences on judicial behavior will vary greatly among judges. It would be naïve to assert that influences “should be the same with respect to every judge in a particular judicial system, or indeed that it is or it should be the same even for judges on the same court in every type of case.”¹⁸⁴ Hence we should talk about “judicial behaviors” rather than just “judicial

behavior.” Thus, adherents of the public choice model, or any other model of judicial decision making, must avoid wielding their hammers at everything that could be a nail.

Nevertheless, empirical legal studies into the role of judicial selfinterest have made important strides in explaining some judicial behaviors. Hopefully, in contrast to certain other disciplines in legal academia that tend to “confuse the question of what judges *can do* with the question of what they *ought to do* and who, in any event, *d[o]* not systematically explore what judges *in fact do*,”¹⁸⁵ these empiricists have brought to light important examples of judicial self-interest affecting case outcomes. As a result, the findings of these empiricists and the implications for fair and impartial justice cannot be ignored.

TABLE 1:
METHODS OF SELECTION AND RETENTION FOR THE HIGHEST COURT BY STATE¹⁸⁶

State	Selection Method for Full Term	Method of Retention	State	Selection Method for Full Term	Method of Retention
Alabama	P	P	Montana	N	N
Alaska	M	R	Nebraska	M	R
Arizona	M	R	Nevada	N	N
Arkansas	P	P	New Hampshire ¹⁸⁷	G	-
California	G	R	New Jersey ¹⁸⁸	G	G

¹⁸² See CROSS, *supra* note 2, at 229.

¹⁸³ Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 211 (2000).

¹⁸⁴ Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility* 13 (Univ. Pa. Law Sch., Pub. Law and Legal Theory Research Paper Series, Research Paper No. 09-11) (2009) (emphasis omitted), available at <http://ssrn.com/abstract=1393362>.

¹⁸⁵ *Id.* at 7 (discussing the contribution of critical legal studies).

¹⁸⁶ DAVID B. ROTTMAN ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS: STATE COURT ORGANIZATION: 1998, at 21–25 tbl.4 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco98.pdf>; *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicial-selection.us/judicial_selection/methods/selection_of_judges.cfm?state=; (last visited June 15, 2011). G=gubernatorial appointment or reappointment, P=partisan election or reelection, N=nonpartisan election or reelection, LA=legislative appointment or reappointment, LE=legislative election or reelection, M=merit plan, R=retention election, and J=reappointment by a judicial nominating commission.

¹⁸⁷ In New Hampshire, judges serve until age seventy. ROTTMAN ET AL., *supra* note 82, at 28.

¹⁸⁸ In New Jersey, after an initial gubernatorial reappointment, judges serve until age seventy. N.J. CONST. art. VI, § 6, 3.

Continue –Table 1

Colorado	M	R	New Mexico	P	R
Connecticut ¹⁸⁹	LA	LA	New York	M	G
Delaware	M	G	North Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio ¹⁹⁰	N	N
Hawaii	M	J	Oklahoma	M	R
Idaho	N	N	Oregon	N	N
Illinois	P	R	Pennsylvania	P	R
Indiana	M	R	Rhode Island ¹⁹¹	M	-
Iowa South	M	R	Carolina	LE	LE
Kansas	M	R	South Dakota	M	R
Kentucky	N	N	Tennessee	M	N
Louisiana	P	P	Texas	P	P
Maine	G	G	Utah	M	R
Maryland	M	R	Vermont	M	LE
Massachusetts ¹⁹²	M	-	Virginia	LE	LE
Michigan ¹⁹³	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P
Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

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¹⁸⁹ In Connecticut, the governor nominates and the legislature appoints. ROTTMAN ET AL., *supra* note 82, at 21 tbl.4, 25 n.2.

¹⁹⁰ In Ohio, political parties nominate candidates to run in nonpartisan elections. AM. JUDICATURE SOC'Y, *supra* note 82.

¹⁹¹ In Rhode Island, judges have life tenure.

ROTTMAN ET AL., *supra* note 82, at 28 tbl.5.

¹⁹² In Massachusetts, judges serve until age seventy. *Id.* at 27 tbl.5.

¹⁹³ In Michigan, political parties nominate candidates to run in nonpartisan elections. AM. JUDICATURE SOC'Y, *supra* note 82.