Introduction to the Study of Comparative Judicial Behaviour

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* Introduction to the forthcoming Oxford Handbook of Comparative Judicial Behaviour *

Contents

1. Introduction

These are momentous times for the comparative analysis of judicial behaviour. Once the sole province of U.S. political scientists, the field has transformed into a global research enterprise with scholars drawing on history, economics, and psychology to illuminate *how and why judges make the choices they do and the consequences of their choices for society.*

Virtually no judicial system has escaped systematic and rigorous attention, from Argentina (Muro et al. 2018) and Brazil (Arguelhes and Hartmann 2017) up to Mexico (Staton 2010) and

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Canada (Alarie and Green 2014); and from China (Liu and Li 2019) and Taiwan (Chen et al. 2015) across the globe to India (Green and Yoon 2017), Israel (Weinshall-Margel 2016) and most of Europe (e.g. Hanretty 2020 (UK); Grendstad et al. 2020 (Norway); Krehbiel 2016 (Germany); Melcarne 2017 (Italy)), down to South Africa (Sill and Haynie 2010) and Australia (Nielsen and Smyth 2019). Analysis extends from long-standing to developing democracies and authoritarian regimes (Moustafa 2014). Likewise, judges serving on international and transnational courts, long of interest to scholars, are now more than ever the targets of sophisticated theoretical and empirical work (e.g., Gabel et al. 2012; Lupu and Voeten 2012; Cichowski 2016; Frankenreiter 2017; and Voeten 2020).

Despite their common interest in explaining the causes and effects of judicial choices, scholars ask substantively different questions, subscribe to manifold theories, apply multiple methodologies, and pursue varied targets of inquiry. Some draw comparisons over time (e.g., Gabel et al. 2012; Lupu and Voeten 2012; Frankenreiter 2017; Bentsen 2018); others engage in cross-national studies of multiple courts operating during similar eras (e.g., Garoupa and Ginsburg 2015; Voigt et al. 2015; Brouard and Honnige 2017; Alarie and Green 2017; Basabe-Serrano 2019; Voeten 2020). The researchers' motivations are equally diverse, from describing features of judging to offering measures of crucial concepts (e.g., judicial independence) to making causal inferences to developing implications for law and public policy.

Perhaps tracing to these differences and the wide array of publication outlets in multiple languages in multiple disciplines researchers sometimes lose track of new developments.[2] They may be entirely unaware of studies directly bearing on their research conducted in other corners of the world and in other disciplinary pockets.

The *Oxford Handbook of Comparative Judicial Behaviour* (the Handbook) unites scholars from many corners of the world and disciplinary pockets to offer up-to date expert roadmaps of the topics falling under the field's domain, from approaches to judging to staffing the courts to relations among courts and society. Each chapter critically assesses the major contributions to the literature, describes how the literature has developed, and provides promising directions for future research. All in all, the *Handbook* aims to provide an indispensable tool for veterans and newcomers alike.

The *Handbook*'s table of contents reflects these objectives. Rather than zooming in on countries, legal cultures or regions, the organization is topical, following the research process of scholars and students. With 42 chapters divided into ten sections, we hope to introduce comparative analysis of judicial behaviour and encourage contributions to this growing and exciting field.

[2] The list includes some university presses (especially in Asia and Latin America) and various journals in law and political science (both in and out of Europe) that don't always or even usually publish in English (for examples relating to judicial behaviour include Weinshall-Margel, 2016; Rodrigues et al., 2017; Hartmann et al., 2018; Grendstad et al., 2012).

We begin, in Section 2, with a discussion of "comparative judicial behaviour," emphasising our inclusive approach to the field. Section 3 surveys the major approaches (theories) which remain guideposts for scholars seeking to develop and answer a range of research questions. Section 4 provides a comprehensive outline of the structure of the *Handbook* and individual chapters. Throughout this introduction, we flag contributions to the field detailed in the *Handbook's* chapters. as well as identify opportunities for advancement.

2. Comparative Judicial Behaviour: State of the Art

Comparative judicial behaviour seeks to illuminate the choices judges make and the consequences of their choices for society. Understanding key terms in this definition—choices, consequences, illuminate, and comparative—opens a window into the field's goals and domains.

2.1 Choices

The modern-day study of judicial behaviour owes its origins to U.S. political scientists working in the mid-20th century (Dyevre 2010). At that time, the discipline was in the early stages of the behavioural revolution grounded in studies of citizens' voting behaviour (notably Campbell et al., 1960). When political scientists turned to the judiciary, they naturally equated the "choices judges make" with the "votes judges cast" and, ultimately, the outcomes: to affirm or reverse the lower court's decision, for or against the government, in the "liberal" or "conservative" direction, and so on (Pritchett, 1948; Schubert, 1965; Spaeth 1963).

Contemporary scholars of judicial behaviour have broadened their definition of "choices" without however turning away from judicial votes and case outcomes. Explaining these choices remains a mainstay of the field because the judges' votes and the cases' outcomes, like citizens' voting choices, matter to countless stakeholders.

Helmke's (2002, 2005) path-marking research on the Argentine Supreme Court illustrates the value of "vote" and "outcome" studies. She shows that although both the Argentine and the U.S. Constitutions allow judges to "hold their office during good behaviour", that rule is a parchment guarantee in Argentina: "good behaviour" does not mean life tenure as understood and practiced in the U.S. but tenure for the life of the appointing regime. As Helmke (2002, 292) writes, "incoming governments in Argentina routinely get rid of their predecessors' judges despite constitutional guarantees". Helmke (2002, 291) theorized and empirically demonstrated that Argentine judges, fearing for their jobs or even their lives, rationally anticipate the threat and "strategically defect", that is, vote against the existing regime once it begins losing power.

The government's preferences might figure into outcomes even when the threats are milder. Carrubba and his co-authors show that the European Court of Justice relies on "observations" (briefs filed by European Union's institutions and member state governments in judicial proceedings) to assess the "balance of member state preferences regarding the legal issue" (Carrubba, et al., 2008, 440). The political majority thus has higher chances of winning a legal argument, which seems intuitively sound. If most member states disfavour the Court's ruling,

they can potentially form a coalition to override the decision by contrary legislation, thereby rendering the ruling ineffective (see also Martinsen, 2015).

On the flipside, when the political branches lack the wherewithal to overturn their high court's decisions or otherwise retaliate against the court and its members—perhaps because of gridlock or disagreement over the "right" course of action—judges ignore the government and the public. Such is how studies have characterized the U.S. Supreme Court in the 2020s. That Court, the research suggests, has exhibited historic levels of partisan bias, not to mention a strong penchant for judicial supremacy rather than deference (Brown and Epstein 2023; Lemley 2022).

While the above studies focus on the effect of external forces on votes and outcomes, other work is more internal looking. Sen (2015), for example, finds that Black U.S. trial court judges face reversal on appeal more often than their white colleagues, attributing the finding to implicit bias. Blanes i Vidal and Leaver's (2015) study of English courts shows that the judges' "collegial culture" artificially lowers the reversal rate. Judges "actively avoid public contradiction of their peers." These results are akin to findings in the US indicating that justices tend to affirm cases coming from the appellate court on which they served (Epstein, et al., 2009).

The chapters in the *Handbook* highlight other examples of vote-outcome studies; they remain central to the study of judicial behaviour. Worth reiterating, though, is that the term "choices" now encompasses more than just votes and outcomes. Examples include:

- whether and how to encourage settlement (Sela and Gabay-Egozi, 2017; Boyd, 2013)
- which cases to select for "full-dress treatment" (Arguelhes and Hartmann, 2017; Eisenberg et al., 2012; Urribarri et al., 2011) and which to avoid (e.g., Epstein et al., 2002; Goelzhauser, 2011)
- to whom to assign the opinion of the court (e.g., Alarie and Green, 2017)
- how to approach opinion writing, including what sources to cite (e.g., Frankenreiter (2017); Lupu and Voeten, 2012; Green and Yoon, 2017), whether to dissent (e.g., Bentsen, 2018; Tiede, 2016), and how to frame opinions for different audiences (e.g., Staton and Vanberg, 2008)
- strategies to enhance future job prospects (including promotion and retention) (Melcarne, 2017; Ramseyer and Rasmusen, 2001; Stiansen 2022) and the judges' reputation and legacy (Garoupa & Ginsburg, 2015; Posner 1990)
- ways to keep lower (or national) courts in line (e.g., Dyevre, 2013; Sweet and Brunell, 1998) and ways to evade backlash from governments (Carrubba et al., 2008; Helmke, 2002, 2005)
- approaches to cement the court's legitimacy and encourage compliance with its decisions (e.g., Vanberg, 2005; Krehbiel, 2016)
- when to leave the bench (e.g., Pérez-Liñán and Araya, 2017; Massie et al., 2014) and even when to avoid judicial posts altogether (Basabe-Serrano, 2012).

As the choice set expanded so too did the number of topics falling under the rubric of comparative judicial behaviour. To note a few examples: Helmke's (2002, 2005) and Carrubba et al.'s (2008) studies, recall, embed the judges' choices in their regimes; and now an entire

branch of judicial behaviour centres on the courts' relations with elected political actors (e.g., Engst, 2021; Brouard and Hönnige, 2017; Epstein et al., 2002). Along somewhat different lines, work by Sen (2015) and Blanes i Vidal and Leaver (2015) illustrates the value of embedding courts within their legal system. A large area of inquiry that goes under the name "The Hierarchy of Justice," explores the interactions between judges on higher (or transnational) and lower (or domestic) courts. Extensive scholarship draws attention to connections between courts and citizens. Some studies explore how judges develop popular rights or incorporate public opinion into their decisions or procedures (see generally Epstein and Knight, 2018) perhaps pursuing legitimacy goals; other research focuses on public relations campaigns mounted by courts to generate conditions favourable to the exercise of their power (Staton 2010).

As a final example of subjects under study is a vast literature linking institutions (formal and informal rules) governing judicial selection and retention to judicial decisions. That literature tends to confirm what many constitutional framers seem to understand: If law in books and law in action coincide, institutional arrangements for judicial appointment and tenure can affect the people selected to serve and, ultimately, the choices they, as judges, make (e.g., Driscoll and Nelson, 2015; Weinshall and Epstein, 2020; Spirig, 2023; Varol et al., 2017; Stiansen, 2022). Work on economic prosperity provides a classic example. The hypothesis, in a nutshell, is that judges with life tenure will more likely enforce contract and property rights, thereby indirectly ensuring economic investment and growth (North and Weingast, 1989). Scholars have validated this expectation against contemporaneous cross-national (most famously, La Porta et al., 2004) and even historical data. Looking back to England in the 1700s, Klerman and Mahoney (2005), for example, found that laws providing greater job security to judges increased the value of financial assets.

2.2 Consequences

Klerman and Mahoney's study of 18th century England draws attention to the relationship between institutions (tenure arrangements) and judicial choices, and to the consequence of those choices: economic prosperity. Clever research by Mehmood (2022) runs along similar lines. It shows that a change in Pakistan's method of appointing judges (from presidential selection to appointment by merit commissions) resulted in judges less inclined toward government expropriation, resulting in greater investment in the construction industry.

These examples focus on how institutions governing judicial appointments prompted judicial decisions affecting economic trends. But the formal and informal rules shaping judicial choices are hardly limited to selection mechanisms, and the consequences, not cabined to economics. On almost all comparative analyses, constitutional provisions, statutes, treaties, case law, and the like serve to structure the judges' choices, thereby affecting their decisions and the decisions' impact. Consider studies exploring the relations between judges and external actors. Because constitutional arrangements usually provide a mechanism(s) for the people or their representatives to undo judicial decisions, studies demonstrate that judges can't afford to ignore the possible consequences of rulings against the regime's or the public's preferences

(unless the public and its representatives are so divided that they can't retaliate). Carruba et al.'s (2008) analysis of the European Court of Justice (ECJ) it is hardly alone in this category.

Other work on judicial behaviour considers the consequences of internal institutional arrangements like rules that allow the chief justice to set the size and composition of panels (*e.g.,* Indian and Canadian Supreme Courts), norms that permit, if not encourage, dissent (*e.g.,* U.S. and Australian Supreme Courts) (Alarie and Green, 2014) or how docket control shapes judicial behaviour (Skiple et al. 2021). Once again, the idea is to explore how institutions drive judicial choices and, ultimately, the effect of those choices for society or even for the Court.

An example is a court's approach to dissenting opinions. Some courts (*e.g.,* the German Constitutional Court and especially the European Court of Justice) and judges (U.S. Chief Justice Roberts) disfavour dissents. More preferable, they argue, is a norm of consensus because it produces positive consequences: consensus "contributes to stability in law," reflects a more "cautious" approach, encourages deliberation, and promotes the court's legitimacy. Studies on international human rights judiciaries tend to support the dissent naysayers: in those courts, separate opinions lower compliance rates (Naurin and Stiansen 2020). Experimental research on domestic courts, however, shows that dissents can boost support for courts because they amount to consolation prizes for people who disagreed with the decision: even losers get representation (Salamone, 2018; Bentsen, 2019).

Whatever the studies' particulars, a focus on the relationship among institutions, judicial choices, and consequences highlights the importance of comparative analysis. It is one thing to claim that job security frees judges to act on own their own preferences (rather than the government's) or that dissent produces good (or bad) consequences, but quite another to test those assertions. Only by comparing judges in societies with different jurisdictions and audiences and where particular institutions, such as life tenure, exist or not (or where institutional change occurred) is it possible to even begin to determine whether and which rules matter for judicial choice and eventually for society.

2.3 Illumination of Choices and Consequences

The term "illuminate" refers to the aim of comparative judicial behaviour to make the judges' choices and the consequences of their choices for society intelligible. This term is purposefully broad to convey the different motivations and methods scholars bring to the comparative analysis of judicial behaviour. The goals vary widely, including rich description of features of judging (such as norms governing dissent or the institutions structuring judicial selection and retention), measures of crucial concepts (such as judicial ideology or judicial independence), to causal claims with legal and public policy implications (such as the effect of tenure arrangements on economic prosperity).

These varying motivations lead scholars to different types of data (facts about the world) and methods. Some favour quantitative (numerical) data and the process of data collection, which allows for statistical inference. Others prefer qualitative (non-numerical) data that they can interpret, categorise, and use to identify patterns or understand particular legal phenomena; and still others produce narratives about specific features of the judges' choices. The data can

be historical or contemporary, based on legislation, treaties, case law, interviews, secondary archival research, or primary data collection.

The choice of data and methods should be guided by the research questions, theory, and hypotheses—not by a belief that some are per se superior or preferable. None is. In fact, all have led to valuable insights, answered pertinent research questions, and helped solve persistent societal puzzles, as the chapters in this *Handbook* so ably demonstrate.

2.4 Comparative Judicial Behaviour

For the purposes of the *Handbook*, the term 'comparative' is equally wide and inclusive: It ranges from intuitive attempts to make sense of judicial behaviour through contrasts and similarities between courts, legal systems, or institutional characteristics, to sophisticated research agendas falling squarely within a particular comparative school and following a prescribed comparative design. Such an expansive (and for some, unorthodox) definition best reflects the reality of the emerging field united around a common commitment to illuminate judicial choices and their implications for society, while drawing on a range of disciplines, a wealth of motivations, and the gamut of research strategies, data sources, and methods.

This definition of, or approaches to, comparative has at least four advantages. First, it potentially avoids internecine strife inherent in a priori or top-down conceptualizations. Attempts to define the formal features of a comparative study (i.e., what counts as comparative) have long plagued the comparative legal scholarship, leading to idiosyncratic and at times unproductive debates (Siems 2002, Legrand and Munday 2003). There is little need to reproduce them but a pressing need to learn from them.

Second, our definition of comparative is pragmatic, enabling scholars to enrich the debate by capitalizing on their own skill set, know-how, and experience acquired in various disciplines, legal traditions, and approaches. In this sense, the definition encourages interdisciplinary research. Put another way, the contributors to the *Handbook* could independently decide which meaning of the term was the most meaningful to their topics and research questions.

Third, the definition best furthers the double aim of the *Handbook*: to map and review the existing scholarship on the topics of judicial behaviour (such as the relations within, between, and among courts), and to develop new and exciting research agendas for the comparative study of judicial behaviour where currently none exist (examples include Niblett's chapter on AI and judging; Pavone's outline of a comparative agenda to understand the influence of government lawyers on judicial behaviour).

Finally, the definition strives for a geographical rebalancing, indirectly responding to the historical dominance of U.S. based scholarship—both subject—and methodology-wise. The need for such rebalancing follows Macridis's (1955) early criticism of traditional comparative politics as "essentially noncomparative" (Sartori, 1991, 243), which got second wind in Sartori's (1991, 243) critique of American comparativists' nonsensical focus on (typically one) 'other country.' In Sartori's words, "a scholar who studies only American presidents is an Americanist, whereas a scholar who studies only the French presidents is a comparativist."

While the readers will be the final arbiters of the usefulness of the distinction, Sartori's critique has been instructive to the *Handbook* in two respects. On the one hand, it contextualized the tendency to unreflectively transplant ideas developed in the United States to non-American legal and political systems, originating in the tendency to speak of "comparative courts" when actually speaking of non-American courts and political systems. Because interest in judicial behaviour originated in the United States and developed much earlier there than elsewhere— a fact to which the *Oxford Handbook of U.S. Judicial Behavior* clearly speaks (Epstein and Lindquist 2017)—this tendency is unsurprising. But it has had obvious and even troubling implications: European, Asian, and other scholars adopted influential theories (like the attitudinal or ideological model); and comparative studies adopted crude or misleading (Lasser 2009) assumptions about courts and judicial decision making, as they relied on early comparative law treaties by American scholars (notably Dawson, see Garoupa in Chapter 2).

On the other hand, Sartori's critique highlights the methodological consequences of testing the theories developed in the U.S. context elsewhere: chiefly, the U.S. system became the default benchmark. To be sure, this benchmark occasionally results in implicit comparisons and illuminating studies (see, e.g., Hanretty's (2020) analysis of judicial behaviour on the UK Supreme Court). More often, though, studies do not feel the urge to adopt or explicitly follow a clearly defined comparative or cross-national design (Driscoll, 2021), with the comparative judicial behaviour literature showing bias towards country-level or court-level research strategy (Garoupa et al., 2021).

To conclude, the *Handbook* is neither oblivious nor dismissive of weighty scholarly debates about the acceptable aims, methods, and research strategies of comparative analysis of judicial behaviour. Then again, to chart the state of the art as comprehensively as possible and to avoid self-sabotaging quarrels and paralyzing navel-gazing, it casts a wide net. Hopefully, the strategy will increase scholarly interest in the exciting field of comparative judicial behaviour.

3. Approaches to Analyse Judicial Behaviour

The study of comparative judicial behaviour is rich, diverse, and stable at its core. In their quest to explain judicial choices, scholars continue to labour within the five key approaches outlined in Table 1. The sections to follow flesh them out in greater detail.

Table 1. Approaches to analyse judicial behaviour

Approach (disciplinary origin(s))	**Description**
Legalism (traditional version: law; institutional version: law, political science)	Traditional version: Judges "find" the meaning of legal rules through (politically) neutral methods. Law-as-an-Institution: "Law" (broadly defined) constrains judges from acting on their personal preferences, intuitions, biases, and emotions.

Attitudinal Model (political science, psychology)	Judges' votes reflect their policy preferences toward case facts.
Rational Choice Accounts (economics, political science)	Labour Market Model: Judges are motivated and constrained by (mostly) non-pecuniary costs (e.g., effort, criticism) and benefits (e.g., esteem, influence, self-expression). Strategic Analysis: Judges are strategic actors who realize that their ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they interact.
Identity Accounts (psychology, sociology)	Judges' biographies, professional backgrounds, personal characteristics, and identities affect their choices.
"Thinking Fast" Judging (psychology, behavioural economics)	Judges rely on heuristics, intuitions, and the like (e.g., "hunches") to make fast and effortless decisions.

Sources: Adapted from Epstein and Weinshall (2021, 2) and Epstein, Šadl, and Weinshall (2023).

3.1 Legalism

On trial for his life, Socrates refused to appeal to the "emotions" of judges, believing that the judge "has sworn that he will judge according to the laws and not according to his own good pleasure" (Jowett 2020).[3] This outlook is often labelled "legalism". In its simplest form, legalism holds that law exists independently from judges, free of morals and politics; legal rules are determinate; the legal system is "complete" (Maitland's [1898] seamless web).

A traditional version of the legalist outlook requires judges to "find" or discover the meaning of legal rules through politically neutral methods—regardless of careerism, ideology, and emotions, just as Socrates proclaimed. And it engages the scholars (especially of the continental or civil law tradition) in the construction of a rationalized ideal: a systematization of legal sources, including judicial decisions, into a coherent whole.

Legalism continues to permeate theories of judicial behaviour but usually in its weaker or more modern form. The dominant approaches today tend to reject extreme legalistic assertions that law's rationality, neutrality, and objectivity guide the judges' choices. Rather, contemporary accounts—which we label "law-as-an-institution" approaches—suggest that law "matters", though with a twist. The idea is that law (broadly defined to include a variety of legal

[3] Then again, *Socrates* predicted that his trial would be the equivalent of the trial of a doctor prosecuted by a cook before a jury of children (Cope, 1864).

sources, like constitutional provisions, statutes, and past judicial decisions) is one of many institutions that structure judicial behaviour, either by constraining their choices or by shaping shared judicial preferences.

Seen in this way, legal rules cannot fully explain why judges make the choices they do; rather, law is a normative constraint on judges from acting on their personal preferences, intuitions, biases, and emotions. Put another way, judges might have a preferred rule that they would like to establish in a case or a preferred reading of a statute, but they adapt their position to the constraints imposed by law.

To see why, consider the norm of *stare decisis* ("to stand by things decided"). Confronted with a precedent they disfavour judges may nonetheless apply it because *stare decisis* signals respect for the established expectations of a community. To the extent that people act on the belief that others in their community will follow existing laws, courts have an interest in minimizing the disruptive effects of overturning entrenched rules of behaviour. Radical changes of the established rules may prove too disruptive for the members of the community, resulting in inefficacious decisions.

Studies of judicial behaviour have provided evidence of this constraint in action. For example, analyses of U.S. and Canadian Supreme Court decisions demonstrate that various "jurisprudential regimes" structure how the justices evaluate cases (respectively Richards and Kritzer, 2002 and Muttart, 2007).

But more work awaits. New studies should inquire how, why, and under what circumstances law shapes judicial decisions in national legal systems and international regimes. Future research could contribute to the on-going debate over how to measure the "law" and the weight of precedent (thus the actual force of *stare decisis* on judicial choices). Under the institutional understanding, law is not a static formalistic concept but a complex and dynamic institution structuring and constraining judges' thinking. This makes empirically defining law a challenging task, though no doubt one that more cross-country comparisons would aid.

3.2 The Attitudinal Model

Of all the approaches listed in Table 1, the attitudinal model likely dominates the field. Developed by U.S. political scientists in the mid-20th century (e.g., Schubert, 1965), this model holds that judges' votes reflect their political preferences toward the facts raised in disputes – with political preferences usually defined by the judges' ideology or partisan identity (Segal and Spaeth, 2002).

The sustained sway of the attitudinal model is a testament to its explanatory power. Political preferences, no matter how measured, drive judicial decisions everywhere — not just in the U.S. Supreme Court. Virtually all studies that measure it, find that partisanship or ideology affect judging. Grendstad et al.'s (2015) book on the Norwegian Supreme Court demonstrates that justices appointed by social democratic governments are significantly more likely than non-socialist appointees to find for the litigant pursuing a "public economic interest". Ideology (as measured by the appointing regime) plays a bigger role in these decisions than almost any other factor considered by Grendstad et al. (2015). Hönnige (2009) found that ideology helps predict

the votes of judges serving on the French and German Constitutional Courts; and Carroll and Tiede (2012, 85) identify dissent patterns on the Constitutional Court of Chile "consistent with a general separation between the judges with centre-left and right backgrounds".

At the same time, though, these and other studies demonstrate the limits of ideological (or partisan) motivations: in none is there even close to a perfect correlation between political preferences and voting. Moreover, moving down the judicial hierarchy, from apex to trial courts, ideology and partisanship carry even less weight (Epstein et al., 2013).

That political preferences do not seem to fully explain the judges' choices—they may not even be especially weighty for many judges—has influenced the study of judicial behaviour in two ways. First, it has prompted scholars to try to isolate the factors that lead to "attitudinal" voting. The list is now long and includes the process of judicial appointments (e.g., the more political actors involved, the more political the court), agenda-setting mechanisms (e.g., the degree of discretion the court has to decide which cases to hear), the size of the court's docket, and the size of judicial panels (courts with a mandatory docket, high caseload, and small panels tend to be more legalistic) (see Eisenberg, et al., 2012; Narayan and Smyth, 2007; Robinson, 2013; Skiple et al., 2021; Weinshall, et al., 2018).

A second result of the realization that political preferences have limited explanatory power has been even more consequential: a quest for other motivations and explanations. That quest, in turn, spurred a new generation of approaches to judicial behaviour, the labour market model and strategic accounts, both of which accommodate preferences beyond the political.

3.3 Rational Choice Accounts

The labour market model and strategic accounts are distinct approaches to judging with a common grounding in rational choice theory. On this theory, judges (or any other actors) make rational decisions when they choose a course of action that they believe satisfies their desires most efficiently. Or as Posner (2011, 3) famously put it, the judge is "a rational maximizer of his ends in life, his satisfactions (...) his 'self-interest'".

The difference between the labour market model and strategic accounts is the flavour of rational choice theory that grounds them (Epstein and Knight, 2017). The labour market model considers how individuals act to maximize their preferences, "given the constraints they happen to face" (Lovett, 2006). According to this model judges, just as other workers, are motivated and constrained by costs and benefits both pecuniary and non-pecuniary (Epstein et al., 2013). A judge wanting to earn more might write a novel assuming she has carefully weighed her own costs (e.g., time away from her job) and benefits. In other words, she is the variable and all others, the constants (Elster, 1983).

Strategic accounts, in contrast, assume that goal-directed judges (regardless of their goal) operate in interdependent decision-making context; that is, when the judges make decisions, they attend to the preferences and likely actions of other relevant actors (Epstein and Knight, 1998). For example, judges who care about the implementation of their decisions will consider the implementers' possible responses in their opinions (Staton and Vanberg, 2008).

Although both the labour market model and strategic accounts have shed much light on judicial behaviour, their chief contributions are complementary. The labour market model has expanded the set of relevant motivations; and strategic accounts have introduced the importance of actors beyond the individual judge.

3.3.1 The Labour Market and Personal Motivations

The judges' preferences matter in almost all studies of judicial behaviour. Political scientists tend to emphasize ideology and partisanship, whereas strong forms of legalism focus on legal motivations. Without denigrating either, the labour market model draws attention to personal motivations for judicial choice. The idea is that given time constraints, judges seek to maximize their preferences over a set of roughly five personal factors (most of which also have implications for political and legal goals): (1) job satisfaction, or the internal satisfaction of feeling of doing a good job, as well as the more social dimensions of judicial work, such as relations with other judges, clerks, and staff; (2) external satisfactions that come from being a judge, including reputation, prestige, power, influence, and celebrity; (3) leisure; (4) salary and income; (5) promotion to a higher or more prestigious office.

Chapter 10 fully fleshes out these specific personal factors, so suffice it here to make two more general points here. First, the factors—really elements in the judge's personal utility function—are not mutually exclusive but rather overlap substantially. Promotion provides an example. This would seem to be an important factor in its own right, influencing the personal utility that judges (and, in fact, many of us) gain from their work (Bell, 2006). But promotion also tends to increase job satisfaction, external satisfactions (such as prestige and reputation) and, of course, salary.

Second, because the five personal motivations are rather universal, they lend themselves nicely to comparative analysis. Again, consider promotion. This as an important factor in its own right influencing the personal utility that judges gain from their work. But promotion could could also coincide with policy preferences: the higher judges sit in the hierarchy, the more important the cases they hear and the greater the opportunity to shape the law. Promotion also tends to increase job satisfaction, prestige, and reputation, and, of course, income. For these reasons, it is no surprise that many studies demonstrate a connection between the judges' choices and promotion goals. Ramseyer and Rasmusen (2001), for example, find that Japanese lower court judges tend to defer to the national government because deference improves their chances of "doing better in their careers". And Salzberger and Fenn (1999) show that UK judges work to avoid reversal because a lower reversal rate increases the judge's prestige and the likelihood of promotion.

Despite the generalizability of promotion and other personal motivations, most studies focus on U.S. judges. This gap, in turn, suggests numerous opportunities for new research. Comparative work could unpack the mechanisms driving these seemingly universal motivations and their effect on judges in national or international settings. To provide some examples: research comparing the effect of time constraints in courts characterized by *certiorari* (the power to select the cases to decide on the merits) versus the prohibition of *non liquet* (the duty to decide a case on the merits) might reveal that a preference for leisure, say, does not have

a linear effect on decisions (e.g., a decision to push litigants to compromise, or formalism); a study of promotion rules may aid in designing a system with tamer effects of career prospects on case outcomes (if that's desirable).

3.3.2 Strategic Accounts and Interdependent Decision Making

If the labour market model goes some distance toward layering the one-dimensional portrait of judges as policy maximisers or mechanical legalists, strategic accounts highlight the importance of interdependent decision making. The idea is that judges must attend to the preferences and likely actions of *other relevant actors* when making decisions if they are to achieve their goals. Those other "relevant actors" run the gamut, from the judges' colleagues to the ruling regime and the public.

Interesting strands of literature cover these actors; and this work, especially on court-government relations, is likely to mushroom if only because of global conditions. The rise of populism presents opportunities to explore backlash against international and domestic courts in the form of impeachment, jurisdiction-stripping, court-packing, non-compliance, or even criminal indictment and physical violence—and how backlash might affect the judges' choices (see Voeten, 2020). Other research programs might consider threats to courts from politicians who have taken to social media to express their displeasure with decisions or even threaten judges by name (Krewson et al., 2018).

New projects, though, need not write on a blank slate. Strategic accounts of court-government relations hypothesize that rational judges will respond to threats with various strategies to preserve their legitimacy, such as avoiding cases that may contribute to further escalation (Epstein and Knight, 2018), vague opinions (Staton and Vanberg, 2008), and soliciting public support (Staton, 2010). A next step for scholars would be to specify the circumstances under which certain strategies might be more effective (Dothan, 2015). So doing would likely help us understand how political threats reduce the ability of courts to develop doctrines, ensure individual protection, reduce arbitrariness, or engage in international cooperation. Comparative analyses of the efficacy of strategies used elsewhere to calm rough political waters would also benefit judges, helping to inform their choices of what cases to hear and decide and how to justify their decisions.

3.4 Identity Approaches

Studies exploring the relationship between the choices judges make and their biographies is old and new. Early research tended to focus on career experience, asking, for example, whether former prosecutors-turned-judges are tougher on criminal defendants (Goldman, 1975) or whether judges who were corporate lawyers favoured wealthy and powerful interests (Tate and Sittiwong, 1989).

But these days, as the composition of judiciaries throughout the world has become (somewhat) more diverse, the characteristics under analysis have expanded to include the judges' (and, sometimes, the litigants') social categories**,** and personal attributes—especially gender (Boyd et al., 2010; Voeten, 2021), religion (Koev, 2019), race (Sen, 2015), ethnicity

(Schwartz and Murchison, 2016), and nationality (Posner and de Figueiredo, 2005; Voeten, 2008).

Reading across the growing number of articles and books on social identity and social diversity in courts, it seems that their findings have converged—though in distinct ways (see Epstein and Knight, 2022). On the one hand, research that characterizes individual judges based on their social identity (e.g., gender, race, nationality) tends to generate results in line with in-group bias: the inclination of individuals to disfavour outsiders. Examples include the tendency of international court judges to favour the appointing government (Posner and de Figueiredo, 2005), of Jewish judges to rule for Jewish litigants, and Arab judges, for Arab litigants (Shayo and Zussman, 2011).

On the other hand, research on the social diversity of collegiate courts (those on which judges sit in panels or en banc) suggests that greater heterogeneity leads to better reasoned (more persuasively argued) decisions. For example, studies find that gender- and racially-diverse panels more frequently consider alternative views on the questions presented in cases (Haire, et al., 2013).

These are the differences between studies on social identity and on social diversity. Their commonality may be even more important: Both can potentially increase our understanding of judicial behaviour. But "potential" is the operative word. Much more work is needed for the field to reach its full potential in terms of academic consequence and, we might add, policy impact.

One example of a gap squarely implicates "identity" or more accurately "identities". Virtually all existing data studies of judging "separate out the effects of individual identity attributes" (Page, 2017, 142; see also Bonthuys, 2015). A Jewish female judge is decomposed into a Jewish effect and a female effect; a Black male British judge into a Black, a male, and a British effect, and on and on. Many scholars working in the diversity space, however, reject this approach arguing instead that "the inseparability of attributes … should give us pause when interpreting data sorted by a single attribute" (Page, 2017, 142). Recognizing that individual judges are, like all of us, bundles of identities—identities that intersect and overlap (Crenshaw, 1989)—is crucial to advance work in the field.

But the studies need not move in lockstep. One approach is to consider more carefully when one identity over others is likely to be activated because it may be particularly salient to the dispute at hand (Shayo, 2009). Comparative research could serve as a method to identify or unpack the most relevant overlap of interaction of personal attributes that affect judicial choices. Likewise, it might be desirable to explicitly account for the intersectionality of identities (Kang et al., 2020). One of the rare examples is a study of U.S. appellate judges modelling the joint effects of gender and race (Collins and Moyer, 2008).

3.5 Thinking-Fast Judging

Some findings of the identity studies, like the effect of national identity in judging on international courts, resonate with rational-choice accounts. Posner and de Figueiredo (2005, 608) explain that International Court of Justice judges tend to vote for the appointing state:

> Economically, judges may be motivated by material incentives. Judges who defy the wills of their government by holding against it may be penalized. The government may refuse to support them for reappointment and also refuse to give them any other desirable government position after the expiration of their term.

A decades' worth of studies in social psychology (and behavioural economics) offers a competing explanation: people generally rely on mental shortcuts derived from intuition and emotion for effortless fast decisions (Kahneman, 2011; Thaler, 2015). On this account, judges may not rationally but intuitively side with their own country. Posner and de Figueiredo (2005, 608) concur, offering an alternative explanation:

> Psychologically, if judges identify with their countries, they may find it difficult to maintain impartiality. International Court of Justice judges are … nationals who would normally have strong emotional ties with their country… Even with the best intentions, they may have trouble seeing the dispute from the perspective of any country but that of their native land.

The basic point is that regardless of the judges' goals, irrational factors can complicate their ability to make strategically rational decisions. These human features can distort rational decision-making and find their way into legal interpretation and the legal outcomes that ultimately become the law.

Even so, many judges think they can "suppress or convert" their intuitions, prejudices, sympathies, and the like into rational decisions. But experiments conducted on thousands of judges suggest that they are just as human on the bench as the rest of us (e.g., Spamann and Klöhn, 2016; Wistrich et al., 2015). Judges respond more favourably to litigants they like or with whom they sympathize (Wistrich et al., 2015), harbour implicit bias against Black defendants (Rachlinski et al., 2009), and use anchoring and other simplifying heuristics in making numerical estimates (Sonnemans and van Dijk, 2012).

This line of research is extremely important. It has real implications for lawyering; and, more relevant here, it presents real opportunities for scholars of comparative judicial behaviour. To the extent that cognitive biases are features of human decision making, research findings should transport to judges working across the globe, regardless of the appointment and tenure arrangements, the type of court, or the legal origin. Experiments on non-U.S. judges and observational data suggest as much (Sonnemans and van Dijk, 2012). But far more work is needed, not only to identify the effects of various biases but also to devise legal solutions to promote debiasing.

4. Overview of the Handbook

The ten sections of the *Handbook* reflect our understanding of the field of comparative judicial behaviour. The first three offer a forward to the field's premises, approaches, and methods. The subsequent seven sections explore significant inquiries within the field on how and why judges make the choices they do (sections 4-8) and how those choices affect society (section 9). The *Handbook* concludes with a section devoted to the frontiers of comparative judicial behaviour.

To be more specific: The chapters in Section 1 ("Fundamentals") provide overviews designed to identify common trends in courts worldwide. In his chapter on legal traditions and their relation to judicial behaviour, Nuno Garoupa lays out an analytical division between courts in which the emphasis is on single judges—individual recognition judiciaries—and collective judiciaries, which emphasize the institution. The classification relates to the traditional common law-civil law divide but contributes more significant insights in the context of judging. Tom Ginsburg and Mila Versteeg, in Chapter 3, offer a new and fresh take on another classic topic in the analysis of comparative judicial behaviour—the three "canonical models" of judicial review (associated with the United States, Germany and, France). Briefly, they suggest an alternative classification along three dimensions (access, finality, and concentration), which cut across the canonical models.

In Chapter 4 Ran Hirschl identifies a global movement towards the expansion of judicial power. Hirschl's comparative analysis allows him to categorize the causes for this worldwide phenomenon, among them the proliferation of international tribunals. Chapter 5, by Daniel Naurin and Erik Voeten, investigates the extent to which studies on domestic and international courts are converging into "one coherent literature." The answer is that, overall, the division remains but it's mostly driven by U.S. studies of judicial behaviour. Putting those studies aside and solely focusing on comparative and international courts, convergence is indeed occurring.

Section 2 turns to the different "Approaches to Judging". Alexander Morell expands on both the traditional and institutional versions of legalism in Chapter 6. He traces the origins of traditional legalism back to legal positivism, which has evolved distinctively within common law and continental civil law judiciaries. Through a comparative analysis of these divergent trajectories, Morell illuminates fresh insights into the notion of law as a constraining professional norm. Chapter 7 focuses on the attitudinal model. Rorie Spill Solberg and Eric N. Waltenburg conduct a meta-analysis of global attitudinal studies to evaluate the extent of attitudinal voting within various judiciaries and explore institutional and contextual variables that impact attitudinal behaviour. In Chapter 8, Santiago Basabe-Serrano and colleagues bring a comparative perspective to bear on the relationship between the judges' decisions and their personal characteristics—especially their social identities.

A strategic analysis approach is introduced in chapter 9 by Shai Dothan, who differentiates between the strategies employed by judges and courts and between short-term strategies, which encompass a single judgment and its immediate consequences, and long-term strategies. In Chapter 10, the focus shifts to the labour market model, with Lee Epstein and Jack Knight delving into the significance of five crucial personal motivations shaping judicial choices (job satisfaction, external satisfactions, leisure, salary, and promotion). Finally, in Chapter 11, Eileen Braman introduces the comparative research on "Thinking Fast" judging, showcasing how cognitive shortcomings implicate the ability of judges to make fair and accurate decisions around the world.

Section 3 includes five chapters that address the various "Data, Methods, and Technologies" employed in the comparative analysis of judicial behaviour. In chapter 12, Benjamin G. Engst and Thomas Gschwend proceed from the premise that if the study of judicial behaviour is to be truly comparative, scholars need comparable data. One obstacle is that national data sets often

are developed for single case studies. They then proceed to detail the procedures and coding of national databases so that observational data can be more easily connected with databases in other countries. In chapter 13 on experimental research, Christoph Engel discusses the difficult trade-off where internal validity eliminates alternative explanations while external validity makes the research question relevant. Experimental research on judges must account for judicial decision making that takes places in a heavily institutionalized context by a rich set of procedural rules.

Wolgang Alschner, in chapter 14, shows how network analysis reduces the complex interactions of legal actors, legal sources and decisions, displaying the complexities in more intuitive spiderwebs of ties and nodes. A crucial challenge to network analysis is missing data which is not randomly distributed and can lead to major gaps. In chapter 15, Bao Kham Chau and Michael A. Livermore discuss how digitization permits researchers to move from "small data" doctrinal analysis to computational text analysis techniques of large corpora of legal documents. They survey different tools for analyzing legal documents which today are "born digital". In the last chapter in this section, Lee Epstein, Andrew D. Martin, and Kevin Quinn appraise strategies for measuring and estimating judges' political preferences. They consider exogeneous measures of partisanship, which can be easily identified but also risk tenuously linking the judge to the label, and endogenous measures of ideology, which are more precise but risk explaining votes by votes.

Sections 4-8 investigate the internal and external forces shaping judges' decision-making (although the distinction may sometime blur). Section 4 focuses on the critical issue of "Staffing the Courts", a major external factor affecting judges' choices. In chapter 17, Lydia Brashear Tiede maps the comparative variation in judicial selections across 220 courts in 180 countries. She discusses how these selections can have significant implications for judicial behaviour and highlights how different methods of appointing judges have the potential to allow for political manipulation of decisions. In the next chapter, Michal Burnham and Michael J. Nelson examine judicial elections, an atypical and empirically rare procedure of selecting judges. They suggest that judicial elections present researchers with theoretically rich opportunities: if researchers are willing to abandon their "institutional silos", they can test general theories of elections on elite behaviour, electoral representation, and judicial decision making.

In chapter 19, Anibal Pérez-Liñán and Andrea Castagnola tackle the trade-offs between tenure protection on the one side and judicial performance and accountability on the other side. Next, they offer and discuss four types of judicial exit: natural exit, strategic retirement, induced departure, and formal removal. Finally, in chapter 20, Anne Sanders addresses law clerks, the often-forgotten court staff with legal education who support judges in the adjudicative process. Drawing on a unique survey by the Council of Europe, Sanders discusses the wide variation in recruitment, organization, and duties of law clerks.

Section 5 on "Advocacy, Litigation, and Appellate Review" offers more on the mechanisms that enable and affect external influences on judging. Ching-fang Hsu and Yun-chien Chang survey the literature on lawyering in the private sector, arguing for the use of comparative research designs with cross-country data. Those could bring scholars closer to the gold standard

of causal inference. Tommaso Pavone's chapter tackles the impact of government lawyers on judges' choices. The chapter, by developing a typology of government lawyers and formalizing their influence, offers an excellent springboard for a new comparative research agenda. Diego Werneck Arguelhes and Ivar A. Hartmann propose a matrix that ranks courts' agenda-setting powers using two dimensions: the court's power to control its docket and to time its decisions. Courts with high agenda settings power can better respond to external influences. Finally, Jay N. Krehbiel's insightful chapter shows how the design of oral hearings relates to the court's need for public legitimacy, awareness, and support.

Section 6 on "Opinions" underscores the significant strides that law and political science are making to expand their conception of choices with the aim of understanding judicial language and arguments. Katalin Kelemen offers a classical comparative analysis of judicial dissent, outlining the existing literature, and highlighting the areas and questions for further research. Jens Frankenreiter's in-depth exploration of micro and macro-level studies presents a compelling argument for methodological advancement that can increase our understanding of the behaviour behind judges' citation practices across jurisdictions. Elliot Ash grapples with an elusive subject: the judicial choice of words, asking how judges decide what to write in their opinions. After a formal presentation of a model explaining judges' language choices and a comprehensive discussion of various measurement methods, Ash sheds light on the factors influencing these choices and their potential ramifications.

Section 7 on "Relations Within, Between, and Among Courts" shifts towards internal influences on judges' choices. Henrik Litleré Bentsen and Jon Kåre Skiple examine the effects of leadership in courts. Their review suggests that court leaders in most courts prioritize stability, consensus-building, and the preservation of institutional legitimacy over favourable policy outcomes, strategically encouraging decisions that promote these values. Cynthia L. Ostberg and Matthew E. Wetstein's chapter focuses on panel effects in apex courts, specifically comparing courts where chief justices assign panels versus those that operate with rotating panels. As scholars persist in studying panel effects in global courts, Ostberg and Wetstein advocate for greater methodological pluralism and the advancement of new theoretical paradigms tailored to civil law jurisdictions.

Benjamin Bricker, Clifford J. Carrubba, and Matthew J. Gabel conduct a comprehensive review of the scholarship on judicial referrals in the Court of Justice of the European Union, other major international courts, and national courts. They aim to understand the motivations behind judges, national courts, and private litigants soliciting referrals. Björn Dressel focuses on the effects of judge networks, which he broadly interprets as encompassing the interlocking, relatively stable relationships that a judge maintains with peers and other political and social actors on and off the bench. Dressel also discusses the potential and the limitations of a judge-centred relational perspective on the study of judicial decision-making in the Global South and beyond. In the last chapter of this section, Ori Aronson offers a critical comparative assessment of the hierarchy of justice, with a central focus on the institution of appeal. Aronson further highlights the presence of hierarchical inversions and the various contexts in which lower courts and judges can exercise agency, generating information that may not be accessible to higher judicial levels.

Section 8 delves into a central topic that may significantly influences judicial choices and affects the courts' impact on society: judicial independence. Alex Schwartz discuss the many ways in which governments or legislatures may attempt to curb the power or independence of the judiciary. His chapter considers both theory and evidence concerning the factors that might encourage or discourage court curbing. The next two chapters examine judicial independence from different perspectives. Brad Epperly, in Chapter 34, takes a conceptual approach to the topic, arguing that research on judicial independence does not devote sufficient attention "to the related matter of judicial review," while Frans van Dijk, in Chapter 35, focuses cross-national measures of judicial independence.

Section 9 of the *Handbook* concentrates on the second half of the judicial-behaviour puzzle: How do judges' choices impact society? In chapter 36, Russel Smyth starts with the fundamental assumption that judicial legitimacy is crucial for ensuring the public's acceptance of court decisions. Recognizing the tug-of-war between the positivity bias and subjective ideological disagreement theorists in the United States over the nature and causality of diffuse and specific support, Smyth encourages comparativists to replicate studies of legitimacy, and study how courts curate their images and how attacks from politicians affect the legitimacy of courts. Elin Skaar unpacks the role of courts in transitional justice, a field where the behaviour of judges has remained almost entirely unexplored despite consensus that criminal trials are vital to reestablishing the rule of law, and hence contribute to transitions to peace and democracy after violent conflict.

In chapter 38, Courtney Hillebrecht discusses how compliance with judicial decisions is an elusive process that is best understood both as a process and an outcome and where three factors are crucial: the degree of "wiggle room" in the decisions that judges leave for the stakeholders; the institutional capacity; and the commitment from key actors of stakeholders to overcome collective action challenges. Finally, Gerald N. Rosenberg investigates courts as agents of change, identifying the characteristics of judges and legal systems that influence judges' ability to act 'progressively.' The chapter suggests that judicial decision-making designed to produce progressive social change is highly contextual, varying from country to country, underlining the importance of initial in-depth, country focused studies as indispensable for comparative research in courts as agents of social change.

The final Section 10 is dedicated to the "Frontiers of Comparative Judicial Behaviour." While all the chapters in the book explore avenues for advancement, this section specifically focuses on pushing the boundaries and exploring new frontiers in the field. In chapter 40, Kevin L. Cope develops a broad functional definition of judicial ideology and a typology of judges' positions along the two distinct dimensions of pragmatism versus idealism and legalism versus activism. He argues that third-party expert assessment is a more promising method of measuring judges' ideology than vote-counting and proxy models. Jeffrey K. Staton makes a compelling case for collective investment of comparative law and politics in data infrastructure in Chapter 41. Pointing at the prohibitive costs associated with data production for single researchers and small research groups the chapter sketches the terms for a meaningful and mutually rewarding collaboration on vital infrastructure. Anthony Niblett's chapter delves in the brave new literature of artificial intelligence (AI) and judging, from "robot judges" to the great promise of AI to improve judicial process and outcomes. While the chapter embraces the new

developments, it does not shy away from the grimmer prospects and risks associated with the increasing use of AI by judges.

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The comparative analysis of judicial behaviour is thriving. Once a small cottage industry dominated by U.S. political scientists, it has grown into a world-wide enterprise.

Still, because many gaps in our knowledge remain, prospects for new projects abound. Each chapter in this *Handbook* flags specific opportunities. But a few of the suggestions are universal, appearing in chapter after chapter. One is the need for more data in service of better description. Good description often starts with case studies that come in many different forms. Description involves conceptualization and measurement, providing the basis for associational arguments because "descriptive arguments are nested within causal arguments" (Gerring 2012, 723). Another relates to theoretical and empirical gaps in our knowledge of judging on civil-law courts, in non-Western countries, and in societies under non-democratic regimes. Third, many authors are keen on the development of new infrastructure to analyse courts and judging (see generally Weinshall and Epstein 2020). We agree. Not only will high-quality common resources advance knowledge and drive discovery, but they also have the potential to bring together diverse scholars interested in comparative law, legal institutions, and judicial behaviour.

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