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Judicial Decision Making

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For decades, scholars of law and courts have debated the factors that influence judicial decisions. Some analysts assert that *legal* factors control judges' rulings, while others believe that extralegal factors motivate them. This entry clarifies and contrasts the legal and extralegal factors, presenting first the legal approach and then three categories of extralegal approaches: attitudinal, strategic, and historical-institutional.

[p. 847 ↓]

Legal Approach

Proponents of the legal approach hold that judges decide cases based on “the law” without regard to personal policy preferences. By applying legal principles to the facts of cases, judges arrive at sound decisions without interjecting their personal beliefs into them. Although scholars have identified several such legal principles, three appear frequently in social science accounts of judging: *stare decisis*, intent, and textualism.

The legal principle of *stare decisis*, “let the decision stand,” requires judges relying on this principle to apply precedent to disputes. In applying precedent, judges look for factual similarities between previously decided cases and the case before them. Once they find similarities, they apply the rule declared in the previous case, the precedent, to the pending dispute. Reliance on *stare decisis* aims toward predictability and stability.

When judges apply the principle of *intent*, they determine what the creators of the regulation, statute, or constitution intended at the time of its drafting. In a U.S. federal constitutional dispute, for example, a judge may refer to the records of the Constitutional Convention, the state ratification debates, and the *Federalist Papers*. These historical documents are important because when one reads them together, they may reveal the specific goals the framers strove for when they created the legal rule.

Proponents of *textualism*, on the other hand, consider the words of a legal rule and give them the same meaning that the drafters of the regulation, statute, or constitution gave them. Proponents believe that if one uses modern definitions of words whose meanings have evolved over time, then one is amending the rule without following

proper procedure. Textualists refer to contemporaneous dictionaries or other lexical materials to determine the proper meaning of disputed statutory or constitutional words and phrases. In so doing, they hope to avoid the pitfalls that judges encounter when they study historical documents to find expressed or unexpressed “intent.”

These and other “principled” legal approaches to decision making were fixtures in social-scientific scholarship on law and courts until the 1940s, when scholars began to collect data on judicial decisions. From these data, they observed that judges often voted according to their own policy (ideological) preferences and not according to legal principles. These empirical observations gave birth to new social scientific theories. Scholars argued that ideological or institutional factors, rather than legal factors, influenced judges' decisions. Three extralegal approaches—the attitudinal, strategic, and historical-institutional—dominate the field of judicial politics today. Although each approach differs from the others in important ways, they all embody the idea that any approach to judicial decision making that relies exclusively on legal principles is incomplete.

Attitudinal Approach

Supporters of the attitudinal approach emphasize the importance of *judges'* political ideologies. Typically, scholars examining ideologies characterize the degree to which a judge is liberal or conservative. For example, one might say, “Judge X holds conservative views on issues of criminal law” or “Judge Y holds liberal views on free speech.” This approach maintains, for instance, that when a case comes before the U.S. Supreme Court, each justice evaluates the facts of the dispute and arrives at a decision consistent with his or her personal ideology.

Much research using the attitudinal approach endeavors to explain decisions of the U.S. Supreme Court. The reason is that the attitudinal approach works only under three conditions. First, the judge must lack political or electoral accountability. Second, the judge must have no ambitions for higher office. Third, the judge must serve on a court of last resort that controls its own agenda. The only federal court that fulfills these conditions in the United States is the Supreme Court.

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

[p. 848 ↓]

Strategic Approach

Most proponents of the strategic approach argue that judges decide cases to advance their personal policy preferences, as do those using the attitudinal approach. However, proponents continue that judges can maximize their preferences only if they are attentive to the preferences and likely actions of other relevant actors (such as their judicial colleagues, elected officials, and the public) and the institutional context in which they make their decisions.

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

Historical-Institutional Approach

Supporters of historical institutionalism argue that institutions structure and constrain actors' powers to advance their own preferences, but also maintain that members of institutions themselves create goals and constraints. The perspectives and goals of institutions emerge through a process called *path dependence*.

As an institution develops over time, its members focus on certain goals and create an institutional "outlook." Unlike the attitudinal approach, therefore, historical-institutionalists believe that judges are not motivated solely by individual policy preferences. Rather, they may be motivated by a desire to further the interests of the court. For example, judges, as members of the "judicial institution," believe that they must follow judicial obligations, such as adhering to precedent, in order to maintain judicial legitimacy. Institutions, then, not only constrain preferences but also create them.

An institutional perspective develops through path dependence. Path dependence reflects the idea that actions have long-term consequences. There are three components to path dependence. First, after a political actor or members of an institution choose a path down which to travel, they find it difficult to undo that decision and move down a different path. Sequence and inertia are crucial. Second, early events in the sequence are more important than later events because the former determine the foundational path down which actors will move. Early decisions are the large branches from which later decisions (smaller branches) grow. It is difficult to revise previously made decisions because the cost of undoing their results is high. Third, even minor events can have important consequences, depending on their timing.

Applying these features of path dependence, the historical-institutional approach holds that judicial development frequently turns on critical moments, or times when actors and events define and limit the judiciary and its future actors. Therefore, it views judicial decision making from a broad perspective in explaining how current judicial behavior is constrained and defined by past actions.

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See also

- [American Political Science Association Law and Courts Section](#)
- [Courts, Lawmaking by](#)
- [Game Theory](#)
- [Interpretation and Reasoning, Legal](#)
- [Judges](#)
- [Judicial Activism](#)
- [Judicial Independence](#)
- [Judicial Politicization](#)
- [Judicial Selection](#)
- [Social Choice and Judicial Decision Making](#)

Further Readings

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