

Lee Epstein & Jack Knight, *The Choices Justices Make*

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1 Citation

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2 Abstract

Epstein and Knight's *The Choices Justices make* builds upon and empirically assesses Walter F. Murphy's argument in *Elements of Judicial Strategy* (1964) that Supreme Court justices act strategically. "On our account," Epstein and Knight write, "which we call a strategic account, justices may be primarily seekers of legal policy, but they are not unsophisticated characters who make choices based merely on their own political preferences. Instead, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act" (Epstein and Knight 1998: xiii). Specifically, a Supreme Court justice must make *interdependent choices* that take account of the preferences of (1) his/her fellow justices, (2) the executive branch or the legislature, (3) the public. The law, by this account, constitutes the slow accretion of myriad bouts of "short-term strategic decision-making" (ibid). As such, Epstein and Knight seek to incorporate the insights of rational choice institutionalism within the study of judicial behavior, and to oppose the attitudinal model that "for nearly thirty years" has misleadingly characterized "justices as unconstrained decision makers who are free to behave in accord with their own ideological attitudes" (ibid: xii).

3 Details

3.1 Data Sources and Main Claims

The vast majority of Epstein and Knight's hypotheses are empirically assessed leveraging two data sources: (1) All 1983 term cases that were orally argued and listed in Justice Brennan's register (157 cases in total); and (2) Landmark cases decided during the Burger Court years (1969-1985, or a total of 125 cases) (ibid: xv). The logic behind the selection of these data sources is to assess whether strategic behavior is a quotidian element in Supreme Court decisionmaking or whether it only emerges, if at all, during politically salient cases. To obtain more fine-grained data about the bargaining process behind Supreme Court decisionmaking, Epstein and Knight make use of (1) the case files of Justices Marshall and Brennan, who served during the entire Burger Court years, (2) Justice Powell's case files, docket books, and conference notes, from 1972 onwards, and (3) Justice Brennan's conference notes and docket books (ibid: xv).

Epstein and Knight make an assumption about Supreme Court Justices' preferences that underlies all of the observable implications of the strategic account: "a major goal of all justices is to see the law reflect their preferred policy positions" (ibid: 11). Recognizing that their ability to do so requires that they make interdependent choices in relation to their colleagues, to other branches of government, and to the broader public, we should expect justices to act strategically and to not always "choose" sincerely.

3.2 Strategic Action Amongst Justices

Epstein and Knight begin by assessing the degree to which Supreme Court Justices act strategically amongst themselves. They argue that the strategic account generates four observable implications that the attitudinal

model could not explain: (1) *bargaining*, (2) *forward thinking*, (3) *manipulating the agenda*, and (4) *engaging in sophisticated opinion writing*. Let us consider the evidence in favor of each in turn.

3.2.1 Bargaining

The presence of bargaining amongst the Supreme Court Justices is probably the most extensively documented portion of Epstein and Knight's book. Justices bargain over whether or not to grant *certiorari*: Given the Rule of Four, which allows four justices to grant *certiorari*, justices face an interdependent choice (ibid: 58). Epstein and Knight find evidence that justices strategically leverage the threat of dissenting from a denial of cert to bargain with their colleagues - they leverage this threat infrequently enough such that it remains credible, but frequently enough to make a difference (the threat of a dissenting opinion altered the Court's decision in about 23 percent of cases in which it was leveraged) (ibid: 64-65). Justices bargain on the merits of the case, usually "after the opinion writer sends a first draft of an opinion to the full Court" (ibid: 67). Specifically, they issue "bargaining statements," which seek to negotiate differences amongst themselves and to communicate their preferred positions, and "circulate separate writings" with the hopes of altering the majority opinion or forging a new majority (ibid: 70). Bargaining statements were issued 70 percent of the time in landmark cases, and 47 percent of the time over the course of the 1983 term (ibid: 74). Separate writings, which include (1) concurrences in judgment, (2) regular concurrences, (3) concurrences in part and dissents in part, (4) dissents, or (5) memoranda opinions, are also used as bargaining tools (ibid: 76-77). Justices seek to have their preferences codified into precedent, and that requires a five-justice majority opinion - another interdependent choice. Overall, separate writings were produced and then retracted or altered in nearly 20 percent of cases - a phenomena that cannot be explained by the attitudinal model (ibid: 79).

3.2.2 Forward Thinking

Justices also engage in strategic forward thinking, anticipating the decisions of their colleagues and preemptively adjusting their own choices. At the *certiorari* stage, Epstein and Knight document how justices often use "defensive denials:" as one of Thurgood Marshall's clerks advised his boss in *Wiegman v. United States*, "there is an incipient split [among] the Circuits here on an important question. Nonetheless I would not vote to grant on this issue, because I think that this Court will not find any First Amendment problem with such a warrant. Seems to me that a defensive denial is in order" (ibid: 81). As another Justice put it, "I might think that the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become precedent" (ibid: 80).

3.2.3 Manipulating the Agenda

Epstein and Knight also note that the Supreme Court norm that the Chief Justice speaks first during conference deliberations following oral arguments provides him with the opportunity to manipulate the agenda. If the Chief Justice believes that he will be outnumbered, he may seek to refocus debate on a different dimension of the case where a more favorable outcome is possible (ibid: 88-89). Epstein and Knight's qualitative coding of the Powell, Marshall, and Brennan papers finds that agenda manipulation attempts are made in approximately 17 percent of cases (ibid: 91).

3.2.4 Strategic Opinion Writing

Finally, Epstein and Knight argue that justices frequently engage in strategic opinion writing: "Given the requirement of a majority for the establishment of precedent and the fact that it would be difficult to imagine any case in which the opinion writer fully agreed with the majority on every point, all opinions of the Court are, to greater and lesser degrees, the product of strategic calculations" (ibid: 96). Epstein and Knight compared the policy and rationale articulated by the opinion writer in the first circulation with that contained in the published opinion, and found that Justices substantially altered their opinion in 45 percent of 1983 term cases and 65 percent of landmark cases (ibid: 98-99). They posit that the norm of unanimity in important cases limits the range of choices available to justices and explicates why strategic opinion writing would be most prominent in landmark cases (ibid: 107).

3.3 Strategic Action With External Actors

Justices do not just bargain strategically amongst themselves, for “the institutional context is more complex than that . . . First, because they serve in one of three branches of government, their decisions are subject to the checks and balances inherent in the separation of powers system . . . Second, because the justices operate within the greater social and political context of the society as a whole, they need to be attentive to the informal norms that reflect dominant societal beliefs about the rule of law in general and the role of the Supreme Court in particular” (ibid: 138). Let us consider the evidence that Epstein and Knight offer to bolster these claims.

3.3.1 Responsiveness to the Preferences of Governmental Actors

First, Justices engage in the same kind of forward-thinking exhibited in their private bargaining dynamics with external actors, and they should be particularly sensitive to Congressional/Executive opinion when deciding a statutory case, since the threat of override is greater (ibid: 140). For example, in the 1978 term when the Republican Court was more conservative than the Democratic Congress and President, the court rejected 90 percent of *certiorari* petitions related to employment discrimination. Epstein and Knight argue that although the Court believed “it could prevail on the merits, [it also] thought that the Democratic president and Congress would override the Court’s decision. Rather than see its holdings reversed, it avoided the dispute” (ibid: 84). Indeed, in the early 1980s when Ronald Regan ascended to the Presidency and the Senate flipped in favor of the Republicans, the Court “agreed to hear 28 percent of the employment cases” - four times its average acceptance rate for that term (ibid). Yet Epstein and Knight argue that justices remain somewhat constrained even in constitutional cases. First, the executive and legislature could always alter constitutional policy established by the Court by amending the Constitution; Second, Congress can always “hold judicial salaries constant, impeach justices, and pass legislation to remove the Court’s ability to hear certain kinds of cases;” Third, government actors can refuse to implement particular court decisions, “thereby decreasing the Court’s ability to create efficacious policy” (ibid: 142-143).

Epstein and Knight further show that Justices pay attention to, and strategically respond to, the likely actions of other governmental actors because they (1) obtain information about other actors’ positions; (2) are attentive to those positions; and (3) their beliefs about the positions of external government actors affect the choices they make. On the first point, justices are likely audiences of national media sources like everyone else, and *amicus curiae* briefs delineate the preferences of other government actors 78 percent of the time (ibid: 145-147). On the second point, evidence from Powell and Brennan’s papers suggests that justices discuss the preferences of other government actors in some 46 percent of constitutional cases and 70 percent of nonconstitutional cases (ibid: 149). Finally, evidence from such cases as *Marbury v. Madison* underscore the fact that the “external constraint of the separation of powers system is in fact operative in some constitutional cases” (ibid: 157).

3.3.2 Responsiveness to Broader Social Values

Finally, the Supreme Court is attentive to the preferences of the American people, for social norms regarding the proper role of the judiciary “[affects] the ability of justices to influence the substantive content of the law” (ibid: 157). Consider, for example, the joint opinion issued in *Planned Parenthood v. Casey* authored by Justices O’Connor, Kennedy, and Souter: “A decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy and to the Nation’s commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*’s original decision, and we do so today” (ibid: 159).

Epstein and Knight also argue that adherence to precedent, or *stare decisis*, is a tool strategically leveraged by justices to nurture the social perception that they are bound by preexisting law: “Why would justices feel compelled to invoke precedent . . . especially when many other justifications exist? The answer is clear. The justices’ behavior is consistent with a belief that a norm favoring precedent is a fundamental part of the general conception of the function of the Supreme Court in society at large” (ibid: 172). The attitudinal model, on the other hand, cannot explain why justices invoke precedent with such frequency, particular if, as Segal and Spaeth (2002) argue, there is almost always precedential evidence on either side of a given

controversy. Importantly, justices' attention to social norms and public perceptions of the rule of law may well serve to uphold "the legitimacy of the system . . . even if judges act in political ways" (ibid: 184).

3.4 Concluding Remarks

Epstein and Knight close their study with some suggestions for future research. First, "we encourage researchers to pick up where we have left off and invoke the strategic account to understand the choices justices make" (ibid: 185). Second, beyond explaining the strategic logic underlying Supreme Court decisionmaking, Epstein and Knight "hope that future scholarship does not lose sight of the ultimate goal: to understand how these choices come together to explain the substantive content of law" (ibid). Finally, Epstein and Knight conclude that "strategic analysis is not synonymous with formalization; various forms of strategic behavior can be fruitfully analyzed without a formal model. . . we cannot emphasize enough the basic idea that strategic behavior is a broader and more extensive phenomenon than what can be captured by formal equilibrium analysis" (ibid: 186). One presumes that this final note seeks to broaden the appeal of the strategic account of judicial decisionmaking.