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Judicial disharmony: A study of dissent

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ABSTRACT

While it is well documented that judges at times disagree on case outcomes, less understood is the process by which they justify their divergence. In this article, we empirically examine how judges differ in their view of the relevant law to a case. We create a unique dataset looking at the universe of published opinions in federal appellate court cases from the United States between 2001 and 2005 that include a dissenting opinion. We find that judges who disagree on the outcome of a case disagree as to which binding precedents apply. Authoring judges gravitate toward precedents that are ideologically similar to their own preferences. Precedents cited only by the majority are strongly ideologically correlated with the majority author's preferences; precedents cited only by the dissenting judge are ideologically similar to her preferences. Precedents cited by both the majority and dissent (i.e., precedent that both judges agree are relevant to the case before them) are not ideologically correlated with either judge. Our findings provide strong evidence that judicial differences over case outcomes do not reflect judges' divergent interpretations of the same precedent, but gravitation towards largely different precedent.

1. Introduction

What do appellate judges disagree about when an opinion generates a dissent? Do they disagree about the applicable law? Do they disagree about the facts of the case? Or, do they disagree about the application of law to those facts? In this paper, we compare the precedents that majority and dissenting judges cite in their published opinions. We find that the majority and the dissenting judges, when disagreeing over outcome, cite largely different sets of cases. The result is notable because one might think that both the majority and dissent would accept the same body of law as relevant authority.

Consider Belmontes v Brown, 414 F.3d 1094 (9th Cir. 2005), where the majority vacated a death sentence on the grounds that the judge failed to instruct the jury to consider mitigating evidence of the petitioner's capacity for rehabilitation in prison. Judge Reinhardt, writing for the majority, found constitutional error. In reaching this result, he cited two main precedents on constitutional error, then cited several Supreme Court and federal appellate decisions to support the majority's finding. Judge O'Scannlain, dissenting, concluded no constitutional error. In so doing, he omitted most of the majority's precedents, finding that the "majority strains mightily—and unpersuasively—to perceive constitutional error" (p. 1140).

The example illustrates shows how judges, faced with the same set of facts, can disagree over outcome. More specifically, they demonstrate how judges, in disagreeing over questions of law, do so not by interpreting the same precedent differently, but interpreting different precedent altogether.

But what can explain the disagreement? An obvious starting point is judicial ideology. We look to whether the judges' views on the relevant law are intrinsically colored by their political preferences. One may think of judges gravitating toward precedent with which they are politically aligned, in much the same way that a guest at a party will be drawn toward her friends when entering a room full of people.[1] That is, we test whether judges gravitate toward friendly precedent.

The dispute, of course, is more nuanced and continues to generate a fundamental tension among legal scholars across multiple disciplines. Political scientists contend that studying judicial decision-making is similar to studying legislatures. Judges, like legislatures, have preferences, and cast their votes accordingly (Miles and Sunstein, 2008; Smith and Tiller, 2002; Revesz, 1997).

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[1] Abramowicz and Tiller (2009) find similar results looking at citation of legislative history in judicial opinions.

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At the same time, countless judges, legal scholars, lawyers, and law school students painstakingly read judicial opinions, focusing less on the outcome and more on the legal reasoning contained therein. This jurisprudence not merely serves to support the outcome a judge reaches, but also provides guidance on how subsequent judges may decide cases and litigants should behave in this shadow of the law (Mnookin and Kornhauser, 1979).

This paper accepts the premise that judges differ in judicial ideology, and that these preferences can help explain differences in how judges decide cases. At the same time, we are cognizant that political scientists and legal scholars at times have behaved like two ships passing in the night. The former argues that judicial ideology matters (e.g., Epstein and Segal, 2005; Segal and Spaeth, 2002); the latter argues that legal doctrine matters (e.g., Baum, 1997; Kahn, 1999). What they have largely ignored is the possibility that both claims may be correct.[2] Just as important, they have ignored exactly the process by which judges interpret the law to achieve outcomes consistent with their judicial ideology. This is the gap our paper seeks to fill.

Returning to our example above, in Belmontes v Brown, Judge Reinhardt – a Democrat appointee – writing for the majority, heavily cited precedents from both the Supreme Court and the Court of Appeals that, on average, were decided by more liberal judges. In his dissent, Judge O'Scannlain – a Republican appointee – elected to cite other precedents decided by more conservative panels. He cited four precedents that were not cited in the majority opinion. Two of these precedents were from the Court of Appeals with panels with Republican-appointed majorities; two were Supreme Court precedents where the Supreme Court split 5–4 with majorities viewed as conservative. The example merely offers anecdotal evidence that judges may differ in their views of what the relevant law is in a particularly case.

This paper seeks to examine judges' use of precedent in a rigorous manner. Building a unique dataset, we examine all published opinions from the U.S. Courts of Appeal for the period 2001–2005 in which one judge from the three-judge panel dissented. Appellate courts, with rare exceptions, accept the findings of fact from the lower court. Accordingly, any disagreement that arises stems from questions of law: namely judges' disagreement over applicable precedent. We apply an empirical strategy in which we examine precedent that the majority and dissent both cite, and compare that with the precedent that the majority and dissent alone cite.

We ask two questions from our data. First, when judges disagree on the outcome of the case, to what extent do the majority and the dissent mutually agree on the relevance of particular precedents? We find that even when disagreeing over outcome, judges manage to agree on a small set of precedent. This set, however, is very small relative to the precedent that the majority and dissent alone believe is germane to the case.

Second, given that judges disagree as to which precedents are relevant to the case at hand, can the differences in citation behavior be explained by political preferences? The answer is yes. Precedents that are cited only by the majority are strongly correlated with the ideology of the majority judge; precedents that are cited only by the dissent are strongly correlated with the ideology of the dissenting judge. We find similar results whether looking at citations to Supreme Court precedent or just Courts of Appeal precedent.

The paper proceeds as follows. Section 2 provides a brief literature review of the role of precedent in judicial decision-making. Section 3 describes our data and provides our empirical framework. We present our results in Section 4. We present robustness tests in Section 5. Section 6 concludes.

[2] More recently, some legal scholars have recognized that "both ideology and preexisting legal sources influence outcomes." Samaha (2010) p. 1710.

2. Literature review

This paper speaks to two well-established literatures. The first asks how and why judges dissent. Given their considerable docket, judges must weigh the costs and benefits of writing a dissent. Writing a dissent reveals disagreement among judges, which Learned Hand warned "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends" (Hand, 1958). Dissents also impose additional writing upon judges.

At the same time, dissents may serve as oversight for majority opinions that – at least from the perspective of the dissenting judge – erroneously applies legal doctrine (Wood, 2012; Cross and Tiller, 1998). Dissent, accordingly, can positively influence the content of the majority opinion (Berzon, 2012), and hence the development of precedent (Epstein et al., 2011).

Given the norms of collegiality on the bench, judges have an incentive not to write a dissent every time they disagree with their colleagues (Posner, 1993). Judicial ideology, unsurprisingly, affects the likelihood of dissent: the greater the difference in ideology among judges on a given panel, the more likely one of them will dissent (Wahlbeck et al., 1999; Hettinger et al., 2004). Whether a decision produces a dissent is endogenous not only to the judge contemplating dissenting, but the judge drafting the majority: the majority, facing a credible threat of dissent, may construct their opinion accordingly (Fischman, 2008). Other factors, such as seniority of the judge, also influence whether a judge dissents (Hettinger et al., 2003).

The Supreme Court in recent years has drawn considerable attention for its dissents, but has achieved greater consensus more recently: nearly 60% of opinions from the 2013–2014 term have been unanimous (Liptak, 2013). Given their more voluminous docket, U.S. Courts of Appeal judges are less likely to dissent than their counterparts on the Supreme Court (Landes and Posner, 2009; Gerber and Park, 1997).

The existing scholarship on judicial use of precedent, however, remains under-explored relative to the judicial outcomes. Judicial behavior scholars implicitly recognize precedent as the means by which judges justify case outcomes, but have largely ignored the interplay between the two. The paper closest to ours in its examination of citations is Choi and Gulati (2008). In that paper, the authors show that federal court judges cite politically aligned precedents from other circuits. Choi and Gulati, however, focus exclusively on these discretionary citations. In our paper, we go one step further. We show that judges gravitate toward politically aligned precedent even within the universe of binding precedent, i.e., Supreme Court precedent or within-circuit precedent.

The second literature explores how judges view precedent. Formally, judges are bound by precedent, and must follow it to preserve the integrity of the judicial process (Landes and Posner, 1976). That said, how judges choose precedent "may operate at different times under different circumstances" (Cross and Tiller, 1998). A school of legal formalists argued that law is a self-contained system where judges decide cases deductively (Hayman et al., 2002; Grey, 1996; Langdell, 1871), while legal realists argue that the meaning of precedent is largely what judges attach to it (Oliphant, 1928). For example, Llewellyn argued, "in most doubtful cases the precedents must speak ambiguously until the court has made up its mind whether each one of them is welcome or unwelcome" (Llewellyn, 2008). If Llewellyn's claim holds, we should observe judges who disagree on outcomes resorting to different precedent to justify their results.

Both literatures, drawn from different disciplines within law, enhance our understanding of judicial process. The first emphasizes that a judge's ideology influences the outcome that she will reach. The second recognizes that judges wield considerable discretion in how they select precedent, subject only to judicial review. Judicial