



How well do measures of judicial ability predict judicial performance?: A case study using securities class actions

Stephen J. Choi^{a,*}, Mitu Gulati^b, Eric A. Posner^c

^a NYU Law School, 40 Washington Sq South, New York, NY 10012, United States

^b Duke Law School, United States

^c University of Chicago Law School, United States

ARTICLE INFO

Article history:

Received 4 April 2012

Received in revised form

16 September 2012

Accepted 20 September 2012

Keywords:

Securities class actions

Judicial ability

Litigation

Judges

JEL classification:

K22

K41

ABSTRACT

Diverse measures are used as proxies for judicial ability, ranging from the college and law school a judge attended to the rate at which her decisions are cited by other judges. Yet there has been little examination of which of these ability measures is better or worse at predicting the quality of judicial performance – including the management and disposition of cases. In this article, we attempt to evaluate these measures of ability by examining a rich group of performance indicators. Our innovation is to derive performance measures from judicial decisions other than case outcomes (which are inherently difficult to evaluate): the decisions to preside over a securities class action, to reject a motion for lead plaintiff, to dismiss the complaint with prejudice, and to reject a request for fees. In each case, an affirmative decision requires more work from the judge, and thus may be an indicator that the judge works hard and, all else equal, performs well. Using a database of securities class action cases, we find that judges who publish frequently and are highly cited are more likely to dismiss with prejudice but no more likely to make the hard choice in the other cases. Other proxies for judicial ability (attended top law school, judicial experience, earlier position as judge, prior private practice, heavy business caseload, and senior status) are more mixed in terms of their predictive power.

© 2012 Elsevier Inc. All rights reserved.

1. Introduction

A large literature has established that judges are sometimes influenced by their ideological preferences, but leaves unanswered many questions about judicial decisionmaking. One unanswered question concerns the relationship between the ability of judges and their output. Everyone would agree that judges with greater ability should produce better output—more decisions, higher-quality decisions, better opinions that describe their reasoning. But what are the best indicators of judicial ability? This question has received little attention. Yet it is important. When district judges are nominated to the appellate bench, for example, their performance as trial judges provides a basis for evaluating them. Nevertheless, there is rarely inquiry into what objectively measurable aspects of the relative performances of the lower court judges or their prior backgrounds should be considered in determining the best candidates for promotion.

By contrast, the primary ratings of nominees that are employed in the context of the judicial appointments, the subjective ratings produced by the American Bar Association, have been found

to have but a limited relationship to future judicial performance, measured in terms of reversals and citations (Barondes, 2009; Landes, Lessig, & Solimine, 1998, at 325). These ratings have also been criticized by conservatives who believe that they are politically biased (Vining, Steigerwalt, & Smelcher, 2009, discuss the debate and the empirical evidence). Similarly, take some of the most familiar indicators of quality that the press discusses any time there is a judicial candidate who has been nominated for a higher office; law school attended, prior judicial experience, prior practice experience. It is plausible that each of these may be an indicator of future judicial performance, but there is also reason to be skeptical of the degree to which these measures will translate into future judicial performance. Law school, for example, for most judicial candidates (who are usually in their late 40s or early 50s) reflects experiences from at least two decades in their past.

Broadly speaking, our hypothesis is that more able judges produce superior judicial output. This hypothesis might seem too obvious to be worth proving, but in fact raises important and interesting issues. The first is the methodological challenge of finding measures for judicial ability—which judges are “better” than other judges? We catalog three categories of judicial ability: past judicial performance; native or experiential ability; and depreciating ability.

* Corresponding author.

E-mail address: stephen.choi@nyu.edu (S.J. Choi).

1.1. Past performance

Recent academic work on judicial behavior, including ours, has extensively used measures of past performance of judges as a measure of judicial ability (e.g., Choi & Gulati, 2004; Cross & Lindquist, 2009). The most commonly used measures of past judicial performance are positive citations to a judge's opinions (which purports to measure opinion quality), the judge's rate of affirmances by a higher court (which might measure either quality or an ability to anticipate the preferences of the higher court), and productivity or propensity to exert effort (as measured by the number of published opinions per district court filing).

1.2. Native talent and experience

A casual examination of press accounts of the qualifications of lower court judges seeking elevation reveals that other measures – ones that might be characterized as indicators of native talent and experience – are discussed far more often. These are measures such as general judicial experience (number of years on the job as a federal district judge and whether the district judge served as a judge in another court prior to elevation to the federal bench) and specialized judicial experience (whether one has worked on business matters in private practice prior to becoming a judge and prior judicial experience in the business law area, for example). Similarly, those who attended the best law schools are generally assumed to have the most native talent.

1.3. Depreciating ability

Judicial ability may increase with age (because of experience) or decline with age (because of cognitive impairment). Given that judges will vary widely in terms of the impact of age on them, as a function of their individual characteristics, one way to study the impact of aging is to examine the performance of judges who choose to take senior status. The choice to take senior status, we assume, is also an indication that the judge herself has determined that she is no longer able to take on a full load of work.

Our three categories of judicial ability give us a total of nine measures of judicial ability—past performance (citations, affirmances, and publications), prior experience (prior experience as a judge before joining the federal bench, experience as a federal district judge, prior private practice experience, the business caseload of the judge), native talent (whether the judge attended a top law school), and depreciating ability (senior status). In discussions of judges and their qualifications, these various measures are often discussed. But no one knows whether these measures predict judicial performance. In this article, we attempt to get some traction on that question.

Our basic hypothesis that high-ability judges produce superior judicial output is central to the design of the judicial system. In theory, only the law and the facts of a specific case should determine judicial outcomes. If judicial characteristics matter, one can ask how the judicial system should be structured to minimize the negative impact of such characteristics. Our findings provide insight into the relative value of having generalist judges deciding complex, subject-matter specific legal issues, particularly relating to securities class actions. If, for example, judges with specific business-law related ability produce better judicial output, then our findings support the argument that the federal judiciary may benefit from having more specialist judges.

Our dataset consists of decisions of trial judges on motions in securities class actions for cases initially filed between 2003 to mid-2007. The dataset of cases includes not just case outcomes, the typical measure used to evaluate judicial performance, but also

judges' decisions on various motions, including motions to dismiss, to approve settlements, and to approve attorneys' fees.

We focus on securities class actions for a number of reasons. They are typically characterized by two-sided agency problems (Choi, 2003). That is, the real parties whose interests are at stake, the shareholders, frequently have little control over the litigation. Instead, the agents on one side, the corporate executives whose actions are being challenged, have an incentive to bury any problems and settle using the company's funds. The agents on the other side, the plaintiffs' lawyers, have an incentive to focus on obtaining the highest fees with as little effort as possible. The end result is that many of these cases result in high payouts for the plaintiff's lawyers, low penalties for the misbehaving executives, and high costs to the shareholders (Bai, Cox, & Thomas, 2010; Choi, 2003; Romano, 1991, surveys the literature).

For our purposes, what is important here is that there is a central role for the judge in protecting the interests of the class of investors (Miller, 2003). The judge, who has to approve of any settlement that the executives and the plaintiffs' lawyers make, has the power to reject the settlement and demand that greater attention be paid to the interests of investors. However, the incentives of the judge are not necessarily to act in such a fashion. Demanding that the parties redo the settlement will require effort from the judge, since she will have to give reasons and later assess the revised settlements. There is also the theoretical risk of a time-consuming trial (although the risk is small, the costs of a trial in terms of a busy judge's time and effort would be high). Given that typically both plaintiffs and defendants will support the settlement, the judge who wishes to minimize work has an incentive to approve quickly whatever settlement is suggested (as well as any attorney fees for the plaintiffs' attorneys). This setting is useful for our inquiry because it allows us to look at the behavior of judges in approving these settlements as well as other pre-trial motions and draw conclusions as to whether they exerted effort to protect the interests of the absent parties or deferred to the interests of the lawyers controlling the litigation.

We also examine securities class actions because the law on such actions, largely a function of the 1995 Private Securities Litigation Reform Act ("PSLRA") was still relatively new and evolving during the period that we examine (cases decided from 2003 to mid-2007). Bernardo, Talley, and Welch (2000: 31 n. 49) find that the rate of class action filings against publicly traded companies returned to its pre-PLRSA level by 1998. In our dataset, the average resolution time for a settled class action is 1046 days, or a little under three years. Assuming a similar resolution time for those actions filed in 1998, significant numbers of settled actions therefore likely did not start appearing until the early 2000s (and appellate review of settlement decisions until somewhat later). That means that lawyers would not have been able to collect a substantial body of information about how individual judges would behave so as to be able to fully adjust their litigation strategies to the likely behavior of the judges in these cases during the time period of our study. Even for judges who did see a number of securities class actions, the uncertain nature of how the PSLRA ultimately would be interpreted added to the difficulty in predicting judge behavior.¹ To the extent litigants did adjust their litigation strategies to particular judges during our study period, this will bias against finding that the characteristics of individual

¹ The Supreme Court, for example, has issued a number of opinions interpreting important aspects of the PSRLA over the 2000s, including *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); and *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005). These cases range in issues from what standard to apply to assessing whether plaintiffs adequately meet the pleading with particularity requirement for scienter at the dismissal stage to what is necessary to meet the loss causation-pleading requirement at the dismissal stage. While the PSLRA was enacted in 1995, the ultimate legal resolution of these issues relating to the PSLRA did not occur until a decade or more later.

Download English Version:

<https://daneshyari.com/en/article/5085619>

Download Persian Version:

<https://daneshyari.com/article/5085619>

[Daneshyari.com](https://daneshyari.com)