International Review of Law and Economics 34 (2013) 9–20

Contents lists available at SciVerse ScienceDirect

International Review of Law and Economics

Tracking inconsistent judicial behavior

Anthony Niblett

Univ. of Toronto, Faculty of Law, 84 Queens Park Cres. W., Toronto, ON, Canada M5S 2C5

ARTICLE INFO

Article history:
Received 10 September 2012
Accepted 11 October 2012

Keywords:
Judicial behavior
Inconsistency
Courts
Contracts
Arbitration provisions

ABSTRACT

This paper explores the phenomenon of inconsistent judicial decisions. We analyze inconsistency in 174 legal decisions from the California Court of Appeal that determine whether or not an arbitration provision in a contract is enforceable as written. We map the facts of cases and introduce a new methodology for measuring inconsistency, directly comparing each case with every precedent. Our results indicate that cases are inconsistent with about one-quarter of relevant precedents. Inconsistency is highly correlated with conflicting political ideology of the judges on the benches that hear the two cases. Inconsistency also correlates with the publication of cases and the non-publication of precedents.

1. Introduction

Judges are afforded a great deal of discretion when resolving disputes. This discretion can manifest itself in delivering decisions that are inconsistent with earlier decisions. The personality of the judge that hears a case can, in some circumstances, have greater bearing on the outcome than precedents. This paper analyzes the phenomenon of inconsistent judicial decisions. Specifically, we empirically track the inconsistent enforcement of contracts. We plot the facts and dispositions of contracts decisions in case space, commonly used in the judicial politics literature (see *e.g.*, Kastellac & Lax, 2008; Kornhauser, 1992; Lax, 2011). We use this mapping of the facts of cases to argue that pairs of cases are inconsistently decided. We look at 174 Californian appeal decisions that resolve a relatively discrete issue: Is an arbitration clause in a standard-form contract unconscionable?

We say that a pair of cases, *A* and *B*, are inconsistently decided if a liable defendant in case *A* has behaved equally or less egregiously than a not liable defendant in case *B*. We compare each case in our sample to every precedent and ask whether the two decisions are inconsistent. Cases and precedents are inconsistent in about 23% of case-precedent pairs where direct comparisons can be made. Our findings provide some empirical support for the hypothesis of Kornhauser (1989) and Posner (2008) that neither extreme legalism nor extreme skepticism adequately describes judicial behavior. We find that conflicting political ideology of the benches that hear the two cases is highly correlated with inconsistency. That is, when we can directly compare pairs of cases, conservative judges are more likely to enforce a contract as written and decide inconsistently with precedents delivered by liberal judges; liberal judges are more likely to hold an arbitration provision unconscionable and decide inconsistently with precedents delivered by conservative judges. The publication status of cases and precedents is also correlated with inconsistency between cases.

Inconsistency between judicial decisions is an important phenomenon for economists to study. Inconsistent enforcement of laws generates unpredictability, which may impose significant costs on economic agents when planning economic activities. These costs are especially salient in commercial fields of law, such as the field we study here, contract law, where state court judges are significant economic policymakers (Stephenson, 2009, p. 191). To minimize these costs, the common law seeks to adhere to the doctrine of precedent: Like cases should be decided the same way. Consistency in adjudication has other, non-economic normative goals. There is a rich literature in legal theory discussing the "fairness" of treating like cases alike (see *e.g.*, Dworkin, 1977; Fuller, 1978). A decision that is inconsistent with an earlier case may cause injustice to those who have ordered their affairs in reliance on it. Further, inconsistency in dispute resolution can undermine the credibility of the legal system.

The extent to which precedent actually constrains judges has long been a source of debate among legal scholars.[1] Economists,

[1] Legal realists and critical legal scholars contend that the law is characterized by indeterminacy that emanates from conflicting sources of law. Judges have leeway to legitimately decide either way in a dispute and decisions reflect the different policy values of judges (see *e.g.*, Frank, 1930; Holmes, 1897; Hutcheson, 1929; Llewellyn, 1930). Jerome Frank suggested that a judicial decision makes law applicable only to the case at hand and does not legislate future conduct. He contended there is "no possibility of delimiting the uncertainty of future decisions and of saying that in

E-mail address: anthony.niblett@utoronto.ca

0144-8188/$ – see front matter © 2012 Elsevier Inc. All rights reserved.
http://dx.doi.org/10.1016/j.irle.2012.10.003

in comparison, have had relatively little to say about inconsistency of judicial decisions. There are some recent exceptions. Baker and Mezzetti (2012) suggest inconsistency between cases can arise from rational decision-making. Judges may erroneously apply precedents, only to be overruled when judges in subsequent cases learn the correct boundaries of the law; inconsistency, in this model, is not generated by different policy preferences. Our empirical findings, however, suggest policy preferences do play a role in generating inconsistency. Gennaioli and Shleifer (2007a, 2007b) show that when judges with different policy values decide cases, the practice of overruling cases – *i.e.*, explicitly deciding inconsistently with precedent – is less likely to generate efficient legal rules than the practice of distinguishing cases from precedents.

Empirically, Niblett, Posner, and Shleifer (2010) analyze the evolution of a common law rule over a period of 35 years and show that different jurisdictions inconsistently employ exceptions to the rule. They find that in about 12% of cases, state appellate courts employ exceptions that the vast majority of other states reject.[2] Fischman (2012) argues that the precise level of inconsistency cannot be isolated, but it can be estimated within some range of feasible values. Crucially, Fischman's notion of inconsistency differs somewhat from the definition we use in this paper, noted above. Fischman formally defines inconsistency as the probability that two judges would differ in their disposition of a randomly selected case.

There are three main aspects to our paper that distinguish it from other empirical papers that study judicial politics:

(1) Our study focuses on the resolution of a commercial law question by a state court in the United States. Much of the prior literature examining the influence of judicial politics primarily focuses on social issues, such as privacy, abortion, discrimination, death penalty (see *e.g.*, Segal & Spaeth, 2002; Sunstein, Schkade, Ellman, & Sawicki, 2006, among many others). In the United States, Federal appellate courts decide these social issues; very few studies in judicial politics examine the behavior of state courts. State courts, however, are perhaps more important for economists to study. State courts hear cases in the traditional areas of common law, such as contracts, torts, and property. These areas are key to the operation of markets, and therefore, important to economists. We seek to fill this gap in the literature by examining inconsistency in a doctrine that affects the enforcement of contracts in a state court.
(2) We introduce a methodology for measuring the facts of cases, described in detail in Section 3. We use text-parsing software to track the facts that the authoring judge found important in determining the egregiousness of the defendant. Using the words contained in the written opinion cannot perfectly measure the facts of a case; it is analogous to trying to determine the quality of a student's paper from a teacher's written comments, but not the actual paper. While not perfect, we believe that this methodology captures the essence of the underlying facts, and in Section 3, we furnish our statistics with examples of cases for illustration. Using this methodology, we graphically illustrate the facts of cases in two dimensions that are always discussed by authoring judges. This allows us to make simple comparisons of facts in two different cases.

   Readers may be concerned may be that the authoring judge has discretion to emphasize only those facts that support the disposition (see *e.g.*, Frank, 1930; Gennaioli & Shleifer, 2008). That is, an authoring judge who decides that an arbitration clause should be found unconscionable may only discuss facts support this legal outcome in the opinion, leaving other facts omitted. Such fact discretion, however, merely biases *against* a finding of inconsistency. That is, it would merely reduce the appearance of inconsistency between written opinions.
(3) We introduce a methodology for comparing each case with each precedent, described in detail in Section 4. Our methodology emphasizes the importance of the order of cases. The prior literature commonly regresses outcomes on facts and/or politics.[3] Very few studies have explicitly taken advantage of the sequential nature of legal decisions to explore how law evolves over time.[4] Our framework is more nuanced. We explicitly compare each case to every single case that came before it. We ask whether the case is inconsistent with each prior decision. Our method is more in line with the incremental nature of the evolution of the common law.

To emphasize the importance of this point, consider the following. A simple regression of outcomes on facts and politics in our dataset suggests that the political ideology of judges is *not* a factor: The simple regression suggests no correlation between the appointing governor of a judge and the outcomes of cases. The empirical methods used to evidence the attitudinal model of judging would suggest that politics plays no role in this particular sphere of law. The influence of politics does, however, manifest itself once we introduce our methodology and the sequence of cases is taken into account. Put simply, path dependence and the sequence of cases matters greatly. Our framework captures the essence of inconsistency with greater precision than previous related empirical literature.

The paper is structured as follows. In the next section we outline the law under examination and summarize our data. Section 3 describes our methodology for mapping the facts of cases and provides illustrative examples. Section 4 describes our empirical framework. We show how our dataset, directly comparing cases and precedents, is created. We outline the extent of inconsistency in the law. Section 5 investigates the factors that correlate with inconsistency. A final section concludes.

2. Data

2.1. Unconscionable arbitration clauses

We examine inconsistency in the enforcement of arbitration clauses found in standard-form contracts in California. Specifically, we focus on the unconscionability doctrine. Unconscionability is a judicially created doctrine that is notoriously difficult to define.[5] Crudely put, the doctrine stipulates that contracts will not be

property or commercial contract cases future decisions (in suits not yet commenced) are nicely predictable... All future lawsuits are gambles." (Frank, 1931, p. 235). On legal realism generally, see Leiter (1996).

[2] Although in practice this 12% number is difficult to compare the 23% inconsistency found in the current paper, we take this as being suggestive evidence that the levels of inconsistency are greater when adjudicating a standard (such as unconscionability) compared to adjudicating a rule (such as the economic loss rule).

[3] See *e.g.*, Kort (1957), Segal (1984), George and Epstein (1992), Kritzer and Richards (2003), and Segal and Spaeth (2002), among many others.

[4] Wahlbeck (1997, 1998) and Kastellec (2007) are exceptions. Wahlbeck (1997) and Kastellec (2007) use the search and seizure cases from Segal (1984) to analyze changes in the law over time. Cross and Lindquist (2005) break their data on civil rights cases into three distinct periods to examine the evolution of precedent and the influence of judicial politics.

[5] *E.g.*, the Uniform Commercial Code does not offer a definition of unconscionability, and an appeals court in New York noted: "deciding the issue [of