



To elect or to appoint? Bias, information, and responsiveness of bureaucrats and politicians[☆]

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ABSTRACT

In this paper, we address empirically the trade-offs involved in choosing between bureaucrats and politicians. In order to do this, we map institutions of selection and retention of public officials to the type of public officials they induce. We do this by specifying a collective decision-making model, and exploiting its equilibrium information to obtain estimates of the unobservable types. We focus on criminal decisions across US states' Supreme Courts. We find that justices that are shielded from voters' influence ("bureaucrats") on average (i) have better information, (ii) are more likely to change their preconceived opinions about a case, and (iii) are more effective (make less mistakes) than their elected counterparts ("politicians"). We evaluate how performance would change if the courts replaced majority rule with unanimity rule.

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1. Introduction

The basic principle of representative democracy dictates that all legislative and top executive positions in public office are to be occupied by elected representatives (politicians). But besides this broad guiding principle, the idea of representation in the operation of government is much more muddled. In all modern democracies, a number of public positions of great influence are held by non-elected officials (bureaucrats). Examples for the US include the Supreme Court, the Federal Reserve Board, and federal agencies.

The different methods of selection and retention of public officials induce differences in the performance of government. Working well, elections may induce public officials to act in the public interest, even when their preferences are not aligned with those of the public; this is the *disciplining* role of elections. Working badly, elections can also induce an official who has more information than the public to *pander* to the public, choosing not the appropriate action, but instead the most popular action; elections can also induce officials to divert resources away from developing expertise.

Given these various competing effects, it is ultimately an empirical question how politicians and bureaucrats differ in type and performance. Do voters select different *types* of public officials – more or less biased, better or worst at gathering and processing information – than government officials? Do reelection concerns induce public officials to improve their proficiency to deal with the flow of information of each decision? Are bureaucrats more *effective* than politicians?

In this paper, we tackle these questions. We build on the foundations laid by a large literature, which provides overwhelming evidence that bureaucrats and politicians produce different public policy outcomes. Our starting premise is that in order to understand the trade-offs involved in choosing between bureaucrats and politicians, we need to map institutions to the type of public officials they induce. The difficulty, of course, is that this type is unobservable. We bridge this gap by specifying a model of voting in committees, and using equilibrium information to recover the unobservable types. The main idea is to exploit the information contained in the joint observation of the individual decisions of members of committees that deal with issues involving both ideological considerations and common values. The underlying common value induces correlation in votes in equilibrium, which allows us to disentangle bias and quality of information.

We focus here on criminal decisions in US states' Supreme Courts. The application suits the approach perfectly for two reasons. First, selection and retention methods vary across states: while in some states Supreme Court justices are elected, in others they are appointed by elected officials. Moreover, non-elected justices are appointed for life in some states, but must face a political reappointment or an

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up-or-down retention election by voters in other states. Second, as other high courts, state Supreme Courts are committees making decisions on issues in which there is an underlying common value component; a correct decision under the law, even if this can be arbitrarily hard to grasp.¹

Incorporating elements of common values does not mean ruling out disagreement. Without full certainty in how the law applies to the particulars of each case, the decision of the court will typically balance the members' goal of reaching a correct decision, with conflict among them in terms of what is the correct decision in each case. This conflict arises naturally in the relatively complex cases considered by the high courts because of differences in the information processed by each justice, because of differences in their ability to produce and evaluate case-specific information, and because of idiosyncratic biases in how justices approach different cases.²

In the model, we assume that the goal of any justice i in any given case t is to rule according to i 's own best understanding of how the law applies to the particulars of the case. Specifically, we assume that in each case t , a justice's understanding of the particulars of the case is summarized by a private signal, with precision θ_{it} . The imprecision of the signal leaves room for interpretation, which in turn allows justices' idiosyncratic biases to come into play. In the model, individual i 's bias reflects the different weights that i gives to different types of decision-making errors in case t : π_{it} is the cost for i of wrongly overturning the decision of the lower court, and $(1 - \pi_{it})$ the cost of wrongly upholding the decision of the lower court. In this case justice i prefers to overturn in case t if and only if the probability that the law favors the Petitioner is at least π_{it} . Information precision and bias then interact to produce outcomes. Higher precision means that it is typically more clear for the justice whether the court should overturn or uphold the decision of the lower court. A larger bias means that despite her case-specific information, a justice persists in going with her preconception of how to rule in a case like this.

In this framework, electoral institutions can sway a judge's vote by changing the θ or π with which she makes her decision. Whether electoral concerns affect θ or π more prominently is an important distinction; for instance, from the point of view of committee design, it is important to know whether electoral concerns cause judges to vote less informedly (i.e., lower θ) or become more inclined to uphold or overturn the decisions of the lower courts (i.e., increase or decrease π , respectively).

Using a structural estimation approach, we disentangle the effects of electoral concerns on bias π and quality of information θ . In particular, we recover the values of $(\theta_{it}, \pi_{it}) | X_t$ for each justice i conditioning on observable characteristics of the cases and the justices, including experience variables (prior judicial and political experience, experience in the state Supreme Court), context variables (measures of the political preferences of voters and politicians at the time of appointment and at the time of decision), and, most importantly, the institutional variables (whether the justice was elected, appointed for an original term subject to a political reappointment or a retention election, or appointed for life). We do this for two variants of the model: the expressive voting model (where justices care about getting their decision own right), and the strategic voting model, where

justices are concerned about getting the court's decision right, and therefore "learn" from their peers in equilibrium.³ Given our estimates of θ and π , we can also simulate effects of counterfactual voting rules and electoral institutions on vote outcomes.

The main results clarify the trade-offs inherent in choosing between bureaucrats and politicians. First, justices that are shielded from voters' evaluations ("bureaucrats") on average have higher quality of information than justices that face either reelection or retention elections ("politicians"). In fact, the quality of information of justices that are shielded from voters' influence is on average 33% larger than that of justices facing retention elections, and 39% larger than that of justices that are elected. Institutions of selection and retention of justices also affect justices' bias. In particular, we find that elected justices are also typically more inclined to overturn the decision of the lower court than those who do not face a voter evaluation after being appointed.

These two components of justices' type – quality and bias – affect how justices' information is reflected in their voting behavior. We find that justices who are shielded from voters' evaluation not only have better information, but are also more likely than elected justices to change their preconceived opinions about a case. We quantify the flexibility of a judge to incorporate case-specific information with the FLEX measure introduced in Iaryczower and Shum (2012). This is the probability that a judge votes differently than what she would have voted for in the absence of case-specific information. We show that the average FLEX scores for elected justices (0.37) and justices facing retention elections (0.36) are significantly lower than the corresponding FLEX scores for appointed justices facing political reappointment (0.48), and for justices appointed for life (0.60).

Our estimation approach also allows us to assess the effect of institutions on the performance of the court, as measured by the probability that the court reaches an incorrect decision. While these error rates are small overall, we find that justices appointed for life and appointed justices with a political reappointment on average have a lower probability of reaching an incorrect decision (0.1%) than both justices that face retention elections (0.5%), and justices that are elected (0.3%). The pattern of mistakes, moreover, is highly asymmetric. At both the individual level and at the court level, on average justices tend to wrongly overturn more often than wrongly uphold lower courts' decisions.

The asymmetry in mistakes begs the question of how the effectiveness of the courts would change if simple majority rule were replaced by unanimity rule, requiring the consent of all Supreme Court justices to overturn the decision of the lower court. Our results imply that this change would have major consequences for the effectiveness of the courts, particularly in the expressive voting model. When justices care about their vote only, the shift to unanimity achieves the purpose of reducing the probability of overturning incorrectly, but only by dramatically increasing the probability of incorrectly upholding the lower court (reaching 43.6% for elected justices, and 39.4% for non-elected justices facing retention elections). The strategic voting model predicts relatively large changes (although less dramatic) in the opposite direction. Because strategic justices would modify their voting strategy in response to the change in the voting rule, becoming more inclined to overturn, changing from majority to unanimity rule would actually increase the probability that the court incorrectly overturns the decision of the lower court (reaching 2.8% for elected justices, and 2% for justices facing retention elections).

The rest of the paper is organized as follows. Section 2 contains a literature review. Section 3 introduces the theoretical model of collective decision-making in the court and characterizes equilibrium outcomes. Section 4 describes the estimation procedure. Section 5

¹ Decision-making in the court is different than in a legislature. As Supreme Court Justice Ruth Ginsburg put it, "[E]ach case is based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives choose to present." (From the statement submitted to the Senate Committee on the Judiciary by Justice Ruth Ginsburg.) This distinction is also emphasized by Cameron and Kornhauser (2008), among others.

² Justices' biases can, but do not necessarily reflect ideological considerations. These preconceptions about how the law maps to the particulars of each case can also reflect ingrained theoretical arguments about the law, personal experiences, and other determinants for a non-neutral approach to this case.

³ In the law and economics literature, this distinction is referred to as whether judges are consequentialist or non-consequentialist (see Cameron and Kornhauser (2008)).

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