

How judges think in the Brazilian Supreme Court: Estimating ideal points and identifying dimensions[☆]

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Abstract

We use NOMINATE (Nominal Three Step Estimation) (Poole and Rosenthal, 1983, 1997) to estimate ideal points for all Supreme Court Justices in Brazil from 2002 to 2012. Based on these estimated preferences we identify the nature of the two main dimensions along which disagreements tend to occur in this Court. These estimates correctly predict over 95% of the votes on constitutional review cases in each of the compositions of the Court which we analyze. The main contribution of the paper is to identify that the main dimension along which preferences align in the Brazilian Supreme Court is for and against the economic interest of the Executive. This is significantly different than the conservative-liberal polarization of the US Supreme Court. Our estimates show that along this dimension the composition of the Court has been clearly favorable to the Executive's economic interests, providing the setting in which the dramatic transformation in institutions and policies that the country has undergone in last two decades could take place.

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Resumo

Este trabalho usa o procedimento NOMINATE (Nominal Three-Step Estimation) (Poole and Rosenthal, 1983, 1997) para estimar pontos ideais que representem as preferências de todos os ministros do Supremo Tribunal Federal no Brasil de 2002 a 2012. Estas preferências estimadas são usadas para identificar a natureza das duas principais dimensões ao longo das quais discordâncias tendem a se manifestar neste tribunal. Estas estimativas preveem corretamente mais de 95% dos votos em casos de revisão Constitucional (ADINs). O trabalho mostra que a principal dimensão na qual se alinham as preferências diz respeito a questões de interesse econômico do Executivo, refletindo a estrutura das instituições políticas no Brasil. Isto é significativamente diferente da polarização conservador-liberal que se observa na Suprema Corte dos Estados Unidos. Os resultados mostram que ao longo desta dimensão

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a Corte tem sido claramente favorável aos interesses econômicos do Executivo, criando condições propícias para a dramática transformação em instituições e políticas pela qual o Brasil tem passado nas últimas duas décadas.

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Palavras chave: Supremo tribunal; Preferências; Instituições políticas; Direito e economia

1. Introduction

Models of judicial decision making for the American judicial system have established a series of stylized facts about the Supreme Court that are widely accepted even when there are disagreements about what drives those characterizations or how they are to be understood. It is accepted that the justices' preferences fall within a single conservative to liberal dimension. It is believed that this single dimension accounts for enough of the variance in judicial voting that preferences along this dimension can be treated as a sufficient metric of judicial ideology for the purpose of the analysis of a series of issues related to the justices' choices and behavior (Martin and Quinn, 2002; Martin et al., 2005; Epstein et al., 2007a,b). It is also believed, though less consensually, that there is considerable drift of the justices' preference over time (Epstein et al., 2007b).

Although the area of Judicial Politics in which these characterizations have emerged has in the past decade been the stage of lively debates and great advances in the use of statistical methods and formal theory, the focus of attention and consequently the results, have been limited almost exclusively to the US Supreme Court. Wetstein et al. (2009) argue that 'there is no recent scholarship that has demonstrated that a similar unidimensional framework adequately explains the voting behavior of judges on the high courts of other countries.' Their analysis of the Canadian Supreme Court concludes that although an attitudinal model based on notions of left–right ideology do explain judicial behavior in some areas of Canadian law, this is not true across all areas, and they warn against an 'American fascination with simplistic notions of liberal-conservative voting and position taking' (Wetstein et al., 2009: 30).

In this paper we contribute to the field of Comparative Judicial Politics by analyzing the Brazilian Supreme Court with the use of formal theory and empirical methods that have been developed for and applied mostly to the American judicial system. Political institutions in general, and the judicial system in particular, are sufficiently similar to those in the US that those methods and theory are relevant for Brazil, yet there are sufficient differences to make the exercise interesting and insightful both for the testing the robustness of the theory and methods as well as for gaining a better understanding of the Brazilian institutions. Like the US, Brazil is a presidential system where the Executive faces a similar division of power with a Congress and a Judiciary, with rules set by a Constitution. The judicial system is composed of several higher federal courts and a series of lower state courts, with the Supreme Court as the final word on constitutional issues. The Supreme Court is composed of 11 justices, who are appointed by the President and subject to approval by a committee of the Senate. The decisions made in the Supreme Court frequently have high profiles, are closely followed by the press and society, and have great impacts on the nation's destiny. Despite all these similarities with the judicial system in the US and many other countries there are also several particularities and idiosyncrasies specific to Brazil. It is these simultaneous similarities and peculiarities that make it interesting to apply to the Brazilian context the methods of the Judicial Politics literature.

There is already a large literature on the judicialization of politics in Brazil, which examines the political involvement of courts and explores how judges make decisions and affect policy outcomes (Carvalho, 2009; Vianna et al., 2007; among others.) Yet, as Kapiszewski and Taylor (2008: 752), argue in a review of the burgeoning Latin American literature on the study of the court as a political actor, 'few pieces make effective use of the many excellent research tools that are available to carry out qualitative causal analysis, or the equally useful set of quantitative analytical techniques.' Exceptions for the case of Brazil are Leoni and Ramos (2006) and Lannes et al. (2012) both of which use spatial methods to estimate the ideal points of Supreme Court judges. That both of these papers are still unpublished is evidence of the novelty of applying these methods to the Brazilian Supreme Court.

In this paper we use a database of 756 Direct Actions of Unconstitutionality (ADI) judged by the Brazilian Supreme Court (STF) from 2002 to 2012 to analyze the judicial behavior of this court's justices. ADIs can be initiated by a relatively broad list of actors (the President, the Attorney General, Governors, the speakers of the House and the Senate, political parties, the Bar Association, other professional organizations and unions) to strike down federal or state laws

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