
important contributions (George 1998, 1999) to examine further the activity leading up to en banc sittings, judges' voting within them, and their outcomes. In discussing the relationship between the Supreme Court and the courts of appeals to which Benesh draws our attention, we also need to learn about the relationship between the courts of appeals and the district courts. That relationship is important because the district court creates the record the court of appeals reviews, and is particularly important in those situations when the court of appeals reverses the district court and is itself in turn reversed by the Supreme Court, thus upholding the district court's position.

My other comment relates to the question, "How many circuits should one study?" The first, easy answer might be "all of them," combining data across circuits. However, the procedural differences to which Lindquist has drawn attention should make us pause, as those differences raise concerns about whether we can conduct cross-circuit comparisons when the courts' practices, for example, as to sitting en banc or the rate at which they publish decisions, differ. The best answer may be that we should pursue a mix of studies in which some draw on data from all the circuits, others focus on a limited set of circuits just as Richardson and Vines (1970)

and Howard (1981) did, and still others are intensive analyses of individual circuits or aspects of them, as can be seen in the study of the division of the "old Fifth" (Barrow and Walker, 1988) and the collection of articles about the Ninth Circuit edited by Hellman (1990), perhaps using papers from the courts where those are available.

NOTE

Those whose work appears here have benefitted from the additional comments made at the roundtable by Tracey George of the University of Missouri School of Law (soon to be at Northwestern University Law School), and the comments of Reggie Sheehan, Michigan State University, who was unable to take part. The author of this introduction thanks his colleagues for their observations about his remarks as well as their cooperation in getting this collection ready for publication.

Please note the use of a "master" list of references at the symposium's conclusion.

THE HIERARCHY OF JUSTICE AND NONPUBLICATION*

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Our understanding of the U.S. Courts of Appeals has grown in leaps and bounds since Howard's influential book (Howard 1981). However, in order to fully understand these courts, I think the most fruitful start is to clearly understand the influence of the United States Supreme Court on them. I discuss here extant theories of judicial behavior and how they apply to and increase our understanding of the courts of appeals, ending with a call to action for scholars to dig more deeply into the relationship between the Supreme Court and the courts of appeals. As a related aside, I also discuss the advantages and pitfalls in using only published decisions in our analyses and our general lack of understanding of the effects of doing so. The possibilities for future research appear to be endless.

Models of Judicial Decision Making

When thinking about decision making on the U.S. Courts of Appeals, we have several theoretical tools at our disposal. Certainly we benefit from the work of Segal and Spaeth and

others in delineating the attitudinal model (1993). It seems likely that attitudes at least partially influence court of appeals decision making. However, it also seems likely, as Segal and Spaeth point out, that these lower federal courts are different and that their decision making is not so simple as that found at the United States Supreme Court. The Supreme Court can control its docket; it is beholden to no one; and it cannot be reversed by a superior court. Because the position of a courts of appeals judge is different, there is an indication that decision making on that bench will not be so straight forward. We move, therefore, to the theoretical tool of new institutionalism in attempts to explain this seemingly more complex court.

New institutionalism has helped judicial scholars to understand that, while attitudes matter, there is more to judicial decision making than merely implementing preferred policies. This is especially true at levels other than the U.S. Supreme Court, although institutions do affect even that body (Clayton and Gillman 1999). We are told that selection systems matter

(Brace and Hall 1997), that docket control matters (Brace and Hall 1990), and that informal norms matter (Brace and Hall 1990). While not all these apply to the courts of appeals, we certainly might delineate some institutional features that may impinge on the extent to which these courts can enact their preferred policy prescriptions. For example, the courts of appeals must hear every case brought to them, and their limited docket control may affect their latitude for policy making. In addition, these courts are in an intermediate position which forces them to consider other actors, namely, their superior, the Supreme Court, and their inferiors, the U.S. District Courts. They may take Supreme Court ideology (manifested in the ideological bent of its decisions) and precedent into account while also caring about the implementation that the inferior district courts will give their decisions. Within their own courts, they may also consider the possibility of en banc review.

That courts of appeals usually sit in rotating panels of three may also affect their decision making. Instead of having a collegial, unchanging body like the Supreme Court, these judges must constantly adjust their expectations to account for the differential makeup of their current panel in any given case. Their predictive and strategic difficulties are exacerbated by the fact that sometimes the judges on the panels are not even judges from their circuit, or circuit judges at all.

Talk of strategic capabilities brings us another theoretical tool – the strategic model. This model has been variously espoused, mostly with reference to the U.S. Supreme Court (see, e.g. Epstein and Knight 1998, and Maltzman, Spriggs, and Wahlbeck 2001). However, it is not controversial to submit that the courts of appeals judges may also behave strategically in some instances (Van Winkle 1996). They possibly behave strategically in opinion writing and the presiding judge may behave strategically in opinion assignments. We would imagine also that they behave strategically with respect to the Supreme Court, which brings us to our final theoretical tool: principal-agent theory.

Principal-agent theory was introduced by Songer, Segal and Cameron (1994) to explain the relationship between the courts of appeals and the Supreme Court. In their influential paper, they argued that courts of appeals are able both to follow Supreme Court precedent and to remain true to their own policy preferences. However, no work has been published since then that squarely deals with the questions which arise from this sort of principal-agent formulation. The largest question that continues to loom is, “Why do the courts of appeals comply with Supreme Court precedent when there are seemingly few good reasons to do so?” Many have argued that while the courts of appeals are formally beholden to the Supreme Court, in practice, the existence of the Supreme Court is not a real threat to the lower court judge. Indeed, the

justices hear less than one half of one percent of all cases heard in the U.S. each year and reverses fewer than that.

This lack of Supreme Court review makes it difficult to understand the motivation of these judges. By all indications, they should not comply with Supreme Court precedent (Benesh 2000). Perhaps we need to turn to sociology and examine role theory more carefully to begin to comprehend why a lower court judge, rarely reviewed much less overturned by the highest court in the land, would nonetheless continue faithfully to implement its policy prescriptions. Such behavior simply does not seem rational until we bring to bear some sort of role perception for the judges to behave this way. What we are left with is a lower court which should never comply but nonetheless does so, and a Supreme Court which does little to induce compliance but which nonetheless receives it. This seems to me to be the biggest puzzle facing courts of appeals scholars today and something for which some creative thinking is needed if we are to solve it.

We might begin thinking about this puzzle by discussing the utility functions of courts of appeals judges and what composes such functions. In other words, what do judges value and what are they trying to maximize? There has been some work done in this area on which we might draw to begin to conceptualize this issue (Posner 1993, for example). Potential components of circuit judge utility functions may include the following: policy preference, workload, reputation, leisure, legal preference, independence, and good relations with colleagues. Seemingly one could derive a utility function that weights certain values to induce Supreme Court compliance. For example, the judges may very highly value “getting it right,” striving most valiantly to make the decision their colleagues will see as legally sound and correct. If that were the case, perhaps they would more likely comply with Supreme Court precedent, particularly if they think its decisions would be more likely to be legally sound. A high value on legal socialization may also induce compliance, because a judge who deems his role as a circuit court judge to be one of subservience to the Supreme Court would likely not stray far from its jurisprudence. Searching out the composition of judicial utility functions seems to be our next step in fully understanding the relationship between the Supreme Court and the courts of appeals, which I argue is essential to understanding circuit court decision making.

Although I have focused on what the lower court judges may do, we must also recognize the possibility that there is real monitoring taking place at the Supreme Court level – behavior that we are incorrectly not categorizing as such. Indeed, we know very little about the cases that the Supreme Court declines to review. Might it not be the case that the Court is taking a representative sample of the cases being appealed to it each year, in effect deciding cases in all issues

under litigation in the courts of appeals, thereby providing guidance and monitoring to all circuits deciding a similar case? An analysis of the Supreme Court's rejected cases would allow us to capture fully the extent to which the Supreme Court is actually monitoring court of appeals decisions and allow us more fully to understand its role in courts of appeals decision making.

Also relevant to the analysis of the Supreme Court – circuit court relationship is the failure of the courts of appeals to publish all of their decisions. Most work on the U.S. Court of Appeals assumes implicitly that only published cases are necessary for inclusion in studies of decision making. That assumption, however, is quite tenuous and scholars have begun to note problems deriving from such an assumption. In fact, overall the U.S. Courts of Appeals report less than one-third of their decisions. It is not at all certain that if one is interested in the relationship between the U.S. Supreme Court and the courts of appeals, it is unnecessary to worry about the exclusion of the unpublished cases. Indeed, examining them is important as one might, for example, miss outright defiance of the Supreme Court buried in an unpublished case. If nothing else, it is an empirical question to be answered.

Perhaps unpublished cases are less “important,” less “difficult,” and less “controversial.” In order to test this hypothesis, one could choose an area of the law, find both published and unpublished decisions, at least for those circuits that allow LEXIS or WESTLAW to report them, and trace their treatment by the Supreme Court. While many circuits do not allow citation of these cases, judges do sometimes cite them in their opinions. If it turns out that either many unpublished decisions are cited by the judges themselves, produce dissents by members of the court of appeals panel hearing them, or are reviewed by the Supreme Court, the assumption that these are unimportant cases will have been found to be invalid. If, on the other hand, these are the easy

cases and are almost without exception unanimous, and if certiorari is seldom sought by parties to them, their exclusion has no bite, especially when dealing with research questions about legally binding precedents or policy pronouncements.

The question of the role of unpublished cases is extremely timely given Judge Arnold's recent opinion in the Eighth Circuit in *Anastasoff v. United States* (2000 U.S. App. LEXIS 32055) that rules treating unpublished cases as nonprecedential are unconstitutional expansions of judicial power. Although Judge Arnold's opinion was vacated, were this rule to dominate, we would have little justification for continuing to ignore such cases. If, on the other hand, other circuits and the Supreme Court were to disagree with Judge Arnold's position, it would provide further justification for the exclusion of unpublished cases for, if they are nonprecedential, they can arguably be excluded from decision-making analyses. Either way, we need to know more about these cases and need to make the decision over their inclusion or exclusion in a more informed manner.

As this symposium suggests, there are many methodological as well as substantive puzzles one must solve before adequately modeling and understanding decision making on the U.S. Courts of Appeals. Hopefully, to make efforts in that direction will seem an exciting challenge that will incite further research rather than an overwhelmingly arduous and hopeless task depressing production of good work on the subject.

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