The Evolving View of the Law and Judicial Decision-Making

JUSTINE D'ELIA-KUEPER and JEFFREY A. SEGAL

Abstract

Attitudinalists and legal realists initially saw the law, not as something that constrained judges, but rather as a nuisance that judges could easily avoid in order to make decisions consistent with their personal policy preferences. As the study of law and judicial decision-making has evolved, however, scholars are beginning to realize that judges may actually use the law to help them secure their most favored outcomes (Bueno de Mesquita & Stephenson, 2002; Hansford & Spriggs, 2006). As scholarship on the law and judicial decision-making continues to evolve a key issue going forward will be how to measure the law. Text-based analysis and citation analysis are promising new approaches in this regard.

INTRODUCTION

For legal realists, such as Frank (1949) and Llewlleyn (1931), studying all levels of the judiciary as well as for attitudinalists, such as Rohde and Spaeth (1976) and Segal and Spaeth (1993, 2002), studying the Supreme Court law and legal reasoning was little more than a nuisance that judges and justices could readily avoid due to the ability in the common law realm to find precedents on both sides of any case that comes to court or to distinguish and if necessary overrule unfavorable precedents. In the statutory realm, the highly fluid "canons of construction" (Llewellyn, 1950) allowed judges to do the same.

These arguments, convincing as they were too many, were based entirely on anecdotal evidence, largely because scholars had trouble conceiving of falsifiable tests of the tenets of legalism. Scholarship toward the turn of the century (Segal & Howard, 2002; Segal & Spaeth, 1996) broke with this trend, albeit controversially (see Friedman, 2006 and Gillman, 2001 for critiques).

More recent scholarship, noting the potential lack of legitimacy in the decisions of unelected judges (and here, we are determined to be the first people

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to write about the potential lack of legitimacy who do not quote Hamilton's statement on this from Federalist 78), has argued that judges and justices use legal reasoning, not as a nuisance to be readily discarded on their way to reaching their policy goals, but as a tool that helps them better reach those goals (Bueno de Mesquita & Stephenson, 2002; Hansford & Spriggs, 2006).

SUMMARY AND OVERVIEW OF FOUNDATIONAL RESEARCH

There has been a considerable debate between scholars over how, and even if, the law influences judges and justices. Proponents of the legal model argue that judges make decisions based primarily on legal factors such as precedent, the plain meaning of the text, or the original intent of the founders (Bailey & Maltzman, 2011; Kahn, 1999; Scalia & Garner, 2012). Attitudinalists, on the other hand, see judges and justices as being able to get around the law and make decisions based predominantly on their personal policy preferences. The influence of policy preferences on case decisions is the strongest for Supreme Court justices, because they have complete control over their docket. As a result, the Court only hears cases in which the legal factors are inherently ambiguous. In addition, Supreme Court justices enjoy considerable independence, because of their lifetime tenure and lack of ambition for higher office, which allows them to consider their personal policy preferences when making decisions without fear of reprisal (Segal & Spaeth, 1993, 2002).

While the strong evidence linking justices' ideology to their case decisions supported the attitudinal model, the legal model often went untested. This was due, in part, to the difficulty of devising a falsifiable test of the idea that judges do use the law to guide their decision-making. This was by and large the status quo in the field, until Segal and Spaeth (1996) empirically tested one of the most important components of the legal model: the idea that justices are influenced by precedent when making case decisions. To measure the influence of precedent on the justices, the authors looked at landmark cases that established new precedents, and then considered the subsequent behavior of the justices who dissented from those decisions. If precedent had any impact at all, then they expected to find that the judges who initially dissented in the landmark case would gravitate, at least partially, toward the majority position once it had been established as an official precedent of the court. What they found instead was that precedent seemed to have very little impact. For the most part, justices who dissented from the landmark ruling failed to support the new precedent in the following cases (excepting Justices Stewart and Powell). In addition, only about 12% of the justices' votes in their sample could be classified as being precedential, whereas the other 88% of votes were better characterized as preferential. Nevertheless, Spaeth and

Segal (1999) found that the low precedential rate nearly doubled in the least salient of the Court's decisions (ordinary statutory cases, as compared with landmark or ordinary constitutional cases, and ordinary economic cases, as compared with landmark and ordinary civil liberties cases). Thus with these studies, the authors raised considerable doubts about the overall veracity of the legal model by finding little to no support for one of its main predictions that justices would be influenced by precedent.

While Segal and Spaeth's studies were significant for being the first studies to empirically evaluate and uncover a lack of evidence to support the legal model, it is important to remember that their study tested just one tenet of the legal model, the effect of precedent on the justices. Justices, however, according to the legal model, may also be influenced by the text of the constitution and the intent of the framers (Bailey & Maltzman, 2011; Cox, 2003). The effects of these legal factors on the justices were evaluated in a study by Segal and Howard (2002). Using the case briefs filed by both the respondent and the petitioner, they were able to identify arguments concerning text and intent in support of the petitioner or the respondent, and also whether the validity of these arguments was disputed by the opposing party. Then they compared the presence of these legal factors to the case outcomes and found that most justices did not support text or intent arguments that would lead them to take a position contrary to their ideological preferences. Thus they concluded that justices, rather than basing their decisions on arguments about text and intent, use these arguments selectively to support the outcome that is in line with their personal policy preferences. They did find that conservative justices were more likely to support the liberal side in a case when that party made an undisputed claim that the plain meaning of the text supported him or her. They found no similar results for conservative justices on undisputed claims about the intent of the framers or by liberal justices about either text or intent. Because Segal and Howard did not have *a priori* beliefs about that specific finding, they did not make much about this, following the inferential rule that while it is proper to claim support for a hypothesis that has been expanded in light of empirical findings if it fits more circumstances than originally believed, it is improper to claim support for a hypothesis that has been narrowed in light of empirical findings if it fits fewer circumstances than originally believed (Epstein & King, 2002, p. 54).

Bailey and Maltzman (2008) pioneered another approach to test for the influence of legal factors on judicial decision-making. They make the assumption that the president and members of Congress who take a position with respect to how a certain Supreme Court case should be decided are being influenced primarily by their personal policy preferences and not at all, or at least less, by legal factors than are Supreme Court justices. This assumption allows them to generate bridging observations and compare

the impact of legal factors, such as the importance of the First Amendment, judicial restraint, and respect for precedent, on Supreme Court justices as compared to elected officials. They find that the Supreme Court justices do differ from elected officials in ways that are predicted by the legal factors they consider. Thus, Bailey and Maltzman conclude that while Supreme Court justices are still influenced by their personal policy preferences, legal factors involving the First Amendment do matter to the justices as well.

These conclusions, that Supreme Court justices are, for the most part, not systematically influenced by precedent text, or the intent of the framers, supported the view of legal realists and attitudinalists that the justices were easily able to sidestep legal factors that threatened their ability to decide cases based on their policy preferences. In addition, these findings provided suggestive evidence that the legal model could not accurately explain the behavior of Supreme Court Justices, Cognizant of these this, some scholars have argued for a different interpretation of the legal model. This postpositive view of the legal model argues that the legal model can be true as long as the justices themselves believe that they are using appropriate legal criteria as the basis for their decisions (Gillman, 2001). This approach to the legal model, however, is nonfalsifiable and thus is not at all useful (Segal & Spaeth, 2002, p. 433). In addition, with what we know about motivated reasoning it would not be surprising if the justices did sincerely believe they were basing their decisions on legal factors, even if their personal preferences were really driving their decision-making (e.g., Baumeister & Newman, 1994; Braman & Nelson, 2007; Kunda, 1990).

While the evidence for the operation of the legal model on the Supreme Court was often lacking, scholars studying lower courts did uncover some effects of legal factors on judges. Benesh and Martinek (2002), for example, looked at a sample of confession cases decided by state supreme courts between 1970 and 1991 and found an effect of Supreme Court precedent on these decisions. Moreover, they find that this effect is not explained by the judges' desire to avoid reversal, but rather can be attributed to sincere attempts by the judges to apply the precedent of the Supreme Court. Cross and Tiller (1998) also find compliance with Supreme Court precedent by judges at the Federal Court of Appeals. They, however, find compliance is most likely when a so-called whistleblower, a judge of a different party than the other two on the panel, is present. This, they argue, is because the whistleblower can alert the other two judges to the fact that they are letting their policy preferences guide their decision-making rather than legal doctrine. Then, once this is evident to the judges, they will disregard their personal policy preferences in favor of appropriate legal factors. Songer, Segal, and Cameron (1994) likewise find evidence of the importance of

Supreme Court doctrine to judges on the United States Courts of Appeals (USCA). Looking at a random sample of search and seizure cases decided between 1961 and 1990, they find that the case facts (i.e., existence of a warrant, justification for the search, location of the search) that influence Supreme Court decisions on search and seizure cases similarly influence decision-making on the USCA. They interpret this as evidence of congruence between Supreme Court decision-making and decision-making at the USCA. They also find a high degree of responsiveness between the Supreme Court and the USCA, because as the Supreme Court gets more conservative so too does the USCA even after controlling for the makeup of the appeals court judges. Thus, although very little evidence supports the legal model at the Supreme Court level, there is some evidence to suggest that legal factors do influence lower court judges in the hierarchy of justice.

CUTTING-EDGE WORK ON THE LAW AND JUDICIAL DECISION-MAKING

Despite the lack of evidence for the legal model in early studies, scholars have responded by theorizing and testing new ways and new reasons why legal factors may influence judicial decision-making. The most prominent and controversial of these approaches is jurisprudential regime theory (JRT). Developed by Richards and Kritzer (2002), JRT argues that the justices create different regimes that structure decision-making for a particular set of cases by specifying which case facts are the most important and also which level of scrutiny the justices should apply. Richards and Kritizer test their theory by applying it to free speech cases. They identify *Grayned v. City of Rockford* (1972) as the case in which the justices created a new jurisprudential regime to govern how they would decide free speech cases in the future. The regime set up in *Grayned*, according to Richards and Kritizer, identified the type of speech as an important case fact and specified that regulations of less protected speech should be evaluated by a rational basis test, while content neutral speech regulations would be subject to intermediate scrutiny and content-based restrictions to strict scrutiny. To test and see if the impact of case facts, including type of speech, differ before and after *Grayned*, Richards and Kritizer use a Chow test to see if the slope coefficients of the case change significantly through the period of study. Using this approach, they identify several important structural breaks, with a large break occurring at *Grayned*. Thus, they conclude that there is an evidence for the existence of jurisprudential regimes, at least with respect to free speech cases. Their attempts to apply this theory to others substantive areas of law, such as establishment, administration, and search and seizure cases, have produced

mixed results (Richards & Kritzer, 2003, 2005; Richards, Smith, & Kritzer, 2006).

Although JRT identifies and tests a new way in which the law may affect judicial decision-making, this theory has not been without its critics. Theoretically, JRT has been criticized for assuming that Supreme Court decision-making as primarily stable, interrupted only by a few breaks in which new regimes are formed (Lax & Rader, 2010). In addition, although it may be shown that legal factors matter differently following a regime change, the regimes are created by the justices and thus may be affected by the policy preferences of the justices (Baum, 2011; Richards & Kritzer, 2002). Most of the criticism of JRT, however, has made methodological. Lax and Rader (2010) in particular question Richards and Kritzer's use of the Chow test, because their data clearly violates the critical assumption of independence. Lax and Rader develop a new and more appropriate randomization test, which does not require the independence assumption. By randomly shuffling the data into before and after groups, they find significant Chow test results from data that could not have any systematic differences. They thus conclude that many of the changes identified by Richards and Kritizer as significant could well have occurred by chance, with the probability of Type I errors being as high as 90%.

Beyond JRT, scholars have also been formulating other new theories about when and how legal factors will impact judicial decision-making. Bartels (2009), in particular, has articulated a new theory about when legal factors can be expected to constrain the justices from implementing their personal policy preferences. According to Bartels, this is dependent on the level of scrutiny adopted by the court. He tests two different possibilities. The first is the idea that the justices will be more constrained when there is a greater presumption about the outcome of the case. This occurs when the court uses either strict scrutiny or the rational basis test. The second possibility is that the justices will be more constrained as the level of scrutiny increases. This suggests that the justices would be the most constrained in strict scrutiny cases, followed by intermediate scrutiny cases, and lastly by cases that use the rational basis test. Bartels finds support for the idea that the justices are more constrained in strict scrutiny cases, then they are in either intermediate scrutiny or rational basis test cases. He nevertheless fails to find a difference in the extent to which the justices are constrained between intermediate scrutiny and rational basis test cases. This leads him to conclude that only in strict scrutiny cases are the justices effectively constrained from following their personal policy preferences by legal factors.

Another new approach to the study of law and decision-making is based on the idea that the justices do adhere to precedent, but do so for the policy benefits it brings, rather than out of a legal obligation to do so. This approach was

first explicated by Bueno de Mesquita and Stephenson (2002), who used a formal model to show that even justices assumed to be motivated solely by their personal policy preferences will sometimes follow precedents that deviate from their ideal points. The justices do so because there is a value in upholding precedent. Specifically, longer standing and more developed precedents communicate more information to lower courts than do new decisions. Thus, the justices are in effect compromising a little on their policy preferences in the hopes that the lower courts will be better suited to make decisions consistent with the preferences of the Supreme Court. Essentially, the upper court judges in this model use a mean squared error criterion, trading off a little bit of bias for great greater efficiency. Hansford and Spriggs (2006) similarly see precedent as something that justices can use to their own benefit. They argue that the justices use precedent to move policy closer to their ideal points and also to enhance the legitimacy of their rulings, which makes their decisions more difficult for the other branches to ignore. In both instances, the justices are able to use precedent to produce outcomes that are more favorable to their own policy preferences.

KEY ISSUES GOING FORWARD FOR RESEARCH ON THE LAW AND JUDICIAL DECISION-MAKING

Cleary, there has been a lot of progress in research aimed at understanding how, when, and why legal factors impact judicial decision-making. However, there are still many issues and exciting new avenues for further research on this topic. One issue that has yet to be resolved, but has intriguing new possibilities, is the issue of how scholars should measure legal doctrine (Friedman & Martin, 2011). One new approach that scholars in the field are beginning to use involves text-based analysis of Supreme Court opinions. Text-based analysis offers researches several advantages, including the ability to analyze large amounts of text without relying on coders and to focus on the content of opinions, where legal influences may be more apparent, rather than the just on case outcomes (McGuire & Vanberg, 2005). There are a variety of text-based analysis programs now being used by scholars. For example, Wordscores can be used to generate an ideological score for a certain piece of text. Wordscores works by first counting the words in reference texts that are prespecified by the researcher as either a liberal or conservative text. The words in the reference texts are then assigned ideological scores based on their frequency in the liberal or conservative references texts. Then the new texts can be scored by calculating a weighted average of the ideological scores of its words. This approach, however, requires the assumption that texts of similar ideological positions use similar words (McGuire & Vanberg, 2005). This program has been applied to the field of

judicial research by McGuire and Vanberg (2005) who attempt to assign ideological scores to Supreme Court opinions on free exercise cases. They find that while the program does not differentiate well between cases of different ideological directions, because of the tendency of the Court to use similar language in both types of cases, the program can deduce the relative ideological ordering of cases decided in the same ideological direction. While this study did not directly use Wordscores to examine the influence of legal factors on judicial decision-making, it is easy to see how having ideological scores of Supreme Court opinions could potentially be used to assess the impact of both the judges' ideology and legal factors on case opinions.

Wcopyfind, a plagiarism detection program, is another text-based software that has been gaining popularity in judicial research as an alternative way to measure legal doctrine. It has been used by scholars, however, to measure how legal arguments make their way through cases (Collins, Corley, & Hamner, 2013; Corley, 2008; Corley, Collins, & Calvin, 2011). This allows scholars to evaluate the legal text directly rather than just analyzing precedents, which may not be as informative (Braman & Pickerill, 2011). Corley (2008) used this software to examine whether the legal arguments made in the parties' briefs affect Supreme Court opinions. She finds that the Court does sometimes use language that is very similar to the language used in the parties' briefs. Moreover, she finds that the Court is more likely to incorporate language from the parties' briefs when the briefs are of better quality and pertain to highly salient cases. This suggests that legal factors can affect the content of Supreme Court opinions. However, there is a role for ideology to play as well. Corley also finds that the Court is more likely to use similar language when the party filing the brief is ideologically closer to the Court. Using similar methods, Corley, Collins, and Calvin (2011) examined what impact the legal arguments contained in lower court decisions had on Supreme Court opinions. They find that Supreme Court does have a tendency to use similar language to lower courts, and that the tendency is heighted when the judges on the lower court are more prestigious, when the lower court opinion is a majority opinion, and when the lower court opinion is published. This suggests that the development of legal doctrine by the federal courts is not just a top-down process, but involves bottom-up processes as well (Beim, 2013; Mak, 2009).

A more recent study also uses Wcopyfind to test whether the legal arguments used in amicus curiae briefs contain original arguments. They find that for the most part they do and speculate that this may explain why amicus curiae beliefs are so influential on the Court (Collins, Corley, & Hamner, 2013). Although Wcopyfind has been used already in several studies to see how legal arguments affect the Supreme Court, its potential is far from

exhausted. In particular, it could be used to test the new argument that precedent is a tool used by justices to help them achieve their policy preferences. This could be done by assessing whether the opinions issued by lower courts are more similar to the decisions of the Supreme Court when they are based on longer standing and more developed precedents.

Citation analysis is another new method that allows scholars to measure legal doctrine. Citation analysis involves estimating ideological scores for case opinions based on the type and treatment of the precedents cited by the various cases. The use of this type of model requires assuming that the Court is more likely to cite and treat a precedent positively if it is ideologically closer to the Court (Clark & Lauderdale, 2010). Clark and Lauderdale (2010) use this approach to score search and seizure and freedom of religion cases. They find that the opinion scores they generate are highly comparable to the directional variable in the Spaeth database. Similar to this approach is network analysis. Network analysis involves examining the relationship between different opinions based on the cases that an opinion cites and the cases that cite those opinions (Fowler *et al*., 2007). While neither of these methods have yet been applied to the study of how the law influences judicial decision-making, their potential to contribute to the debate, by making it easier to measure legal doctrine, is great.

CONCLUSION

Research on the influence of the law on judicial decision-making has come a long way since its inception. While the law was initially regarded as a nuisance that the justices were easily able to get around in order to make decisions based on their own policy preferences, scholars are now recognizing how justices may actually be able to use the law to pursue their polices preferences. In addition, scholars are constantly refining their measures of legal doctrine and the development of several new approaches, such as text-based analysis and citation and network analysis, all have the potential to contribute substantially to the field. Already as a result of better measures and methods, scholars have been increasingly able to pinpoint specifically when, how, and importantly, why legal factors might affect justices. In addition, scholars have made a lot of progress in understanding what types of courts are more constrained by legal factors and which judges from which courts are freer to let their personal policy preferences guide their decision-making. Although much is now known about how the law may influence judges and how the judges may use the law, many more questions remain unanswered and these questions await the work of future scholars.

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