

Appellate PRACTICE JOURNAL

Winter 2011
Volume 30, Number 2

SECTION OF LITIGATION | AMERICAN BAR ASSOCIATION

Does “Motivated Reasoning” Help Explain How Judges Decide Cases?

By Steve Sanders

Five federal district courts have so far considered challenges to President Obama’s signature healthcare overhaul. Two decisions by Republican-appointed judges have declared a key provision of the law unconstitutional. But three decisions by Democratic appointees have rejected similar challenges. Commentators are beginning to ask: Are these decisions about law or politics?

Lawyers tend to assume that most of the work on how judges think about and decide cases is done in law schools. After all, that’s where we study legal doctrine and jurisprudence. But important insights

about law and judicial decision making also come from other academic departments, particularly political science. One of the main contributions of political science has been attempting to test, explain, and understand whether and how political views and policy preferences affect a decision maker’s legal judgments.

Eileen Braman, associate professor of political science at Indiana University Bloomington, has done groundbreaking work in this area for her book *Law, Politics & Perception: How Policy Preferences Influence*

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ANNUAL CONFERENCE PANEL EXAMINES “THE CHANGING SUPREME COURT”

As part of the ABA Section of Litigation Annual Conference in Miami, the Appellate Practice Committee will present a special program April 15, 2011, on the U.S. Supreme Court. “The Changing Supreme Court” will feature leading Supreme Court advocates, including Maureen Mahoney of Latham & Watkins and Kannon Shanmugam of Williams & Connolly, as well as Jeff Rosen, a leading Supreme Court commentator and author. The panel will discuss trends in Supreme Court practice, focusing on changes in the selection of cases, the conduct of oral argument, and the Court’s jurisprudence. Please plan to join us for this extraordinary panel.

Interlocutory Review of District Court Orders after *Mohawk Industries*

By David M. Eisenberg

Our federal courts of appeal have jurisdiction of appeals from all “final decisions” of the district courts. 28 U.S.C. § 1291. Final decisions include, of course, judgments that terminate an action, such as a money judgment or a dismissal with prejudice. But they also include a “small class” of prejudgment orders that are “collateral to” an action’s merits and “too important” to be denied

immediate review. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–46 (1949).

In *Mohawk Industries v. Carpenter*, ___ U.S. ___, 130 S.Ct. 599 (2009), the U.S. Supreme Court addressed the question of whether disclosure orders adverse to the attorney-client privilege qualify for

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The best way to review such a book as this is to pursue an appeal using it as your guide. This is what we have done, with a civil appeal in the U.S. Court of Appeals for the Eighth Circuit. After that case was submitted, we then turned our attention to the chapters we had not needed for guidance with that case, and we also reread the whole of some chapters we had consulted.

One note on style: The chapters do vary in tone. This is a product of each chapter having a different author or authors. This is not a criticism; it is merely a distinctive characteristic that contrasts with the unvaried tone of *Supreme Court Practice*. Excessive cross-referencing is avoided by covering numerous aspects in several chapters. This duplication is helpful to the practitioner who will be using the book as problems arise and not as a book to be read cover to cover.

This is a very fine book. It successfully deals with “a comprehensive array of the issues that a federal appellate practitioner must confront.” Its range is broad, its treatment deep, its writing crisp, well-edited, and consistently clear. One of the strong points of this book is its sure, deft handling of a number of rules that can be quite difficult to apply in practice. The depth of experience of the contributing authors is shown again and again.

All in all, this is a most impressive work. If you do not own a book devoted to federal appellate practice, this would be a good one to begin with. And you should not need many other practice manuals to finish with, either. ■

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“Motivated Reasoning”

Continued from front cover



Eileen Braman

Legal Reasoning, which recently won the American Political Science Association’s C. Herman Pritchett Award for best book on law and courts. In the book, Professor Braman confronts the question, are judges’ decisions best explained by personal inclinations or legal authority? She concludes that the answer likely involves a complex interplay of both.

Professor Braman answered questions

Judges should be able to separate “reason” from “passion” in their judgments.

about her work in the edited interview that follows.

Q: Political scientists who study judicial decision making have developed what’s called an “attitudinal model” and a “legal model” to explain how judges decide cases. Your work seeks to bridge these two explanations for how judges make decisions. First, can you briefly explain these two theories and how they differ?

A: The legal model is consistent with doctrinal approaches to interpretation. Basically, the idea is that decision makers should come to cases as neutral arbiters, making judgments using appropriate tools of legal analysis—what I sometimes refer to in my judicial politics class as “the holy trilog” of text, statutory or constitutional intent, and precedent. Judges are experts socialized in norms of legal decision mak-

ing. This training in appropriate tools of analysis should enable judges to separate “reason” from “passion” in their judgments. Personal policy preferences should not come into play.

With the rise of legal realism, scholars like Holmes, Frank, and Llewellyn came to acknowledge that personal factors can (and do) make a difference in the decisions of judges. Still, according to adherents of legal approaches to decision making, those factors matter at the margins, as judges are primarily concerned with coming to the “right” legal conclusion in most cases.

Adherents of the “attitudinal” model of legal decision making believe that the law does not matter in how judges make judgments. Rather, judges are *primarily* motivated by personal policy preferences or ideology. The model was pioneered by two scholars, Jeffery Segal and Harold Spaeth, in their 1993 book *The Supreme Court and the Attitudinal Model*, based on their analysis of Supreme Court decisions and building off many years of behavioral research in the social sciences tending to show that judges disproportionately vote in cases in ways that are consistent with their political ideology. Segal and Spaeth have consistently stated that their theory applies to justices on the Supreme Court, not necessarily to judges on lower courts.

The basic idea is that judges make choices between parties based on their personal preferences and only use the law as a post hoc justification for policy choices. Segal and Spaeth are vague about whether they believe judges are doing this intentionally. But the theory turns democratic theory on its head by arguing that Supreme Court justices are free to act in accordance with their preferences because they are not elected and they have life tenure. Thus, measures that the Framers took to ensure judges could act in accordance with their expertise have the exact opposite effect, according to the attitudinal model. The fact that judges are acting in an adversarial context aids attitudinal decision making because they can pick and choose from arguments made by litigants—endorsing those that are consistent with their preferences.

Many scholars have criticized the at-

titudinal model, arguing that by focusing on “hard” Supreme Court cases where there are valid legal arguments on both sides and reasonable legal minds can come to different conclusions, this theory may overestimate the role of ideology; there should be more constraint on lower courts, where judges have less latitude to follow their preferences because of controlling precedent.

Q: The premise of your book is that both theories of judicial decision making are too simplistic and that a better explanation must account for both. You argue that judges engage in “motivated reasoning.” Explain that.

A: Before I went to graduate school, I got a law degree and practiced for a couple of years. So when I got to graduate school and heard about how social scientists were studying judicial decision making—by looking at votes and not doctrine—it seemed strange to me. Hearing that political scientists put all of this importance in judges’ policy preferences as a determinant of outcomes seemed kind of wrong-headed, because the way I understood legal decision making—that judges sincerely tried to use law to come to legal conclusions. Yet there certainly was quite a bit of empirical evidence that policy preferences seemed to make a strong and consistent difference.

So the question for me became: How can decision makers who think they are being objective in using tools of legal reasoning reach conclusions that are consistent with their policy preferences most of the time? I was familiar with the psychological phenomenon of “motivated reasoning” from work I had done as an undergraduate and in graduate school. The idea is that even when people think they are being objective, they may come to see evidence that supports their predispositions as more convincing or relevant than evidence that does not.

It’s like when you’re watching a baseball game. If you are a Yankees fan and the Red Sox make a close play at the plate, you are likely to see the runner as safe. If you’re a Red Sox fan, you can look at the same play and swear the runner was out. People’s predispositions actually influence their perceptions of the same thing.

I argue that it may be the same with

legal phenomena—especially where the law and/or facts are ambiguous or open to interpretation. The real “value-added” of the theory in my view, however, is that “motivated perceptions” are not without boundaries. Reality tends to limit our ability to see what we want. So at the same time it allows for motivated interpretation, the theory posits that the law can constrain decision makers where rules or precedent is sufficiently clear. For me, the theory is a way to reconcile the notion that policy preferences matter with the fact that judges sincerely believe they are doing their best to be objective. Both can be true.

Q. So how have you tested your theory, and what results have you seen?

A: Part of the puzzle for me is figuring out how legal decision makers think. The main way to do that in psychology has

There must be some ambiguity as to how on-point a precedent really is in order for motivated reasoning to occur.

been thorough experimental methods. Obviously, it would be hard for me to do experiments with judges for several reasons. For example, judges aren’t comfortable divulging policy views, especially about issues in cases they are asked to decide. Another problem is that there are norms against making decisions in hypothetical cases that involve no real case or controversy.

So in my experiments, I use as proxies law students who have been trained in norms of legal decision making. All participants in my experiments are at least in their second year. This is obviously not ideal, but as I am interested mainly in “legal reasoning” and they are trained to use appropriate tools of interpretation, I can see how attitudes influence their choices

in specific contexts. (But I would love to be able to do some of these experiments on attorneys or judges one day.)

I test two “mechanisms” of motivated reasoning in the legal context. The first involves the perception of precedent. Consistent with my theory, I find that legal decision makers tend to see precedents as more applicable when decisions in those cases support their desired outcome, and less similar when outcomes do not support their desired outcomes.

Importantly, there is a critical “zone” where such motivated reasoning occurs. For instance, if precedents are very similar to the case the decision maker is being asked to decide, then I find that all decision makers, regardless of policy preferences, will see them as applicable, notwithstanding whether it helps them reach some desired conclusion. In other words, there must be some ambiguity as to how on-point a precedent really is in order for motivated reasoning to occur. Where that ambiguity exists, my research suggests decision makers with different preferences can “see” identical case facts quite differently.

The second mechanism I test involves decisions on threshold legal questions. Do decision makers choose to dismiss cases based on standing grounds when they are hostile to the plaintiff’s claim? Or alternatively, do they find a sufficient “injury in fact” when they are sympathetic to a plaintiff’s arguments on the merits? Again, my research suggests that decision makers will engage in motivated reasoning when they have sufficient latitude to make threshold decisions in line with their preferences. Specifically, they are more likely to engage in such behavior in a jurisdiction where there is no controlling precedent on the threshold issue compared to a jurisdiction where there is directly controlling precedent.

Q. It sounds as though a theory of judicial decision making based on “motivated reasoning” would have the most applicability where courts are required to work with unclear, inadequate, or conflicting precedents. Do you agree?

A: I think it’s true that the theory is most applicable on courts where there is both constraint (in the form of obligatory prec-

edent) as well as some ambiguity. Often judges will be obligated to make outcome choices where the law is sufficiently clear. But my main premise is that where the law is less clear, attitudes can come into play in the interpretation of legal doctrine and evidence.

But in the book I also use the theory to look at the votes of different justices on the Rehnquist court concerning the Commerce Clause. While that chapter is somewhat anecdotal compared to the empirical chapters—because it is impossible to “get inside the heads” of decision makers at such a distance—the theory seems to fit the behavior of the Supreme Court justices in that context quite well.

At bottom (and I am quite explicit about this in the book), I use motivated

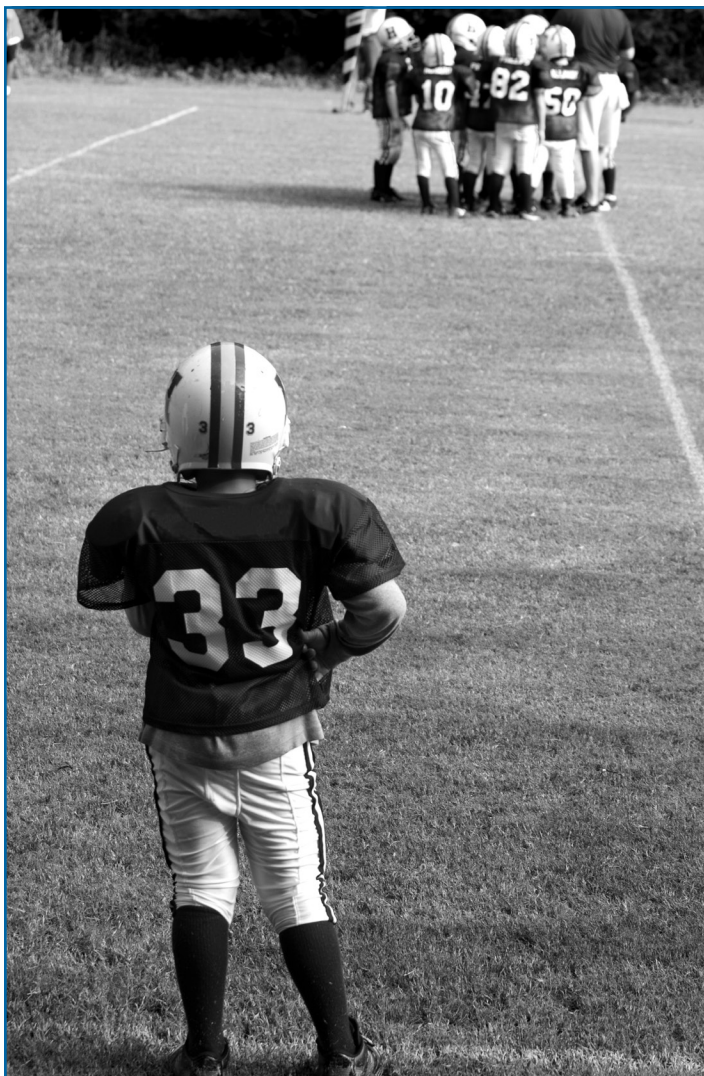
reasoning to study legal decision making, rather than judicial behavior per se. Certainly the intuitions come from research on findings in the social sciences about how judges vote in cases. But my interest has always been more about how decision makers think in the context of specific norms when given certain types of legal authority.

So I think the theory potentially has applicability at all levels of the judiciary, although it is true that sometimes the factors “constraining” judges from engaging in directional decision making according to their preferences may vary in form and intensity. While it is true that Supreme Court justices are less constrained by precedent than other judges, because of the high profile of the institution, the justices may feel constrained by other

factors that don’t operate on other judges, like appearing to be consistent in their jurisprudential approach.

In summary, we know that judges make decisions according to their preferences. My puzzle has always been to figure out how that happens. It seems the application of analogical reasoning and nested threshold decision making *enable* attitudinal choices, while decision makers are still able to cling to the notion that they are applying role-appropriate norms in an objective manner. ■

Steve Sanders is a lecturer at the University of Michigan and University of Chicago law schools, and an editor of the Appellate Practice Journal.



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