

Prologue

This book deals with the decisions rendered by the United States circuit courts of appeals and with the opinions from those decisions. These courts are intermediate, between the trial courts and the Supreme Court, and they resolve appeals from the legal rulings of the trial courts as well as from some administrative agencies. The United States has twelve basic circuits of broad appellate jurisdiction, divided geographically (e.g., the first circuit governs Massachusetts, Maine, New Hampshire, Puerto Rico, and Rhode Island), plus the relatively new federal circuit, which has limited subject matter jurisdiction. When a party appeals a lower court decision, that decision is typically assigned to a panel of three circuit court judges, who will affirm or reverse it. Although cases are sometimes heard *en banc*, before all the judges of the circuit, this is rare. The overwhelming majority of decisions are rendered by three-judge panels.

While most public reportage and even scholarly research deals with the U.S. Supreme Court, the circuit courts are much more important in

setting and enforcing the law of the United States. The Supreme Court now decides only seventy-five cases a year and cannot address, much less resolve, most legal questions facing the nation. By contrast, the circuit courts resolve more than fifty thousand cases a year. Each of those decisions is binding precedent within the geographic bounds of the circuit and typically influences the application of the law even outside those bounds. When the circuit courts agree, they essentially establish the law for the entire nation. When the circuits disagree, they create a circuit split, under which the law is unsettled and geographically variant. In either situation, the circuit courts set the legal ground rules for citizens. They are the court of last resort for most litigants. Fewer than 15% of circuit court decisions are even appealed to the Supreme Court and fewer than 2% of those appeals are taken by the high court.

Thus, in large measure, it is the circuit courts that create U.S. law. They represent the true iceberg, of which the Supreme Court is but the most visible tip. The circuit courts play by far the greatest legal policymaking role in the United States judicial system. The district courts, as trial courts, hear far more disputes than do the circuit courts but district court decisions are heavily fact based and jurisdictionally limited in effect, and they do not set the significant legal precedents that make up the law. By contrast, circuit court decisions are almost always about defining the law, and they set binding precedents for the multistate area that the circuit covers. These decisions are also commonly used as persuasive precedent by courts in states outside the circuit's jurisdiction and even by the Supreme Court. Although an individual Supreme Court decision is more important than a corresponding individual circuit court decision, the very limited docket of the Supreme Court leaves U.S. law largely to the judgment of the circuits.

Despite the great importance of the circuit courts, they have been studied relatively little. Both law school researchers and political scientists have expended far more time and effort on the Supreme Court than on all the circuit courts combined. Although several valuable analyses of circuit courts have been written, no one has studied the topic in anywhere near the detail with which researchers have studied the Supreme Court. This book is a small step toward righting this balance.

Data

In analyzing the decision making of circuit courts, I draw heavily on large, publicly available data sets. This book is grounded centrally in two extremely valuable databases. The first is the United States Courts of Appeals Database (hereafter, the courts of appeals database), produced by Donald Songer of the University of South Carolina under a National Science Foundation (NSF) grant. The second is a database of judicial backgrounds, the Database on the Attributes of United States Appeals Courts Judges (hereafter, the judicial attributes database), prepared by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski under a separate NSF grant. The two are easily integrated to enable testing of the effects of judicial attributes on decisions. I have supplemented these databases with data from other sources. I am grateful to Micheal Giles of Emory University for providing me more sophisticated coding on judicial ideology and to Barak Richman of Duke Law School for providing me with data on the ideological balance of Congress over time. After combining these sources, I have introduced more data. In some instances I have transformed existing variables through calculations to create new variables that allow the testing of new hypotheses. In other instances I have accumulated additional data for many decisions in the database, such as their subsequent use as precedent.

The courts of appeals database is very large, taking at least fifteen cases per circuit beginning in 1925 and running through 1992, with more than eighteen thousand cases total. The data are organized in two ways: by the vote of each judge and by the decision of the full panel. I use both throughout the book. For each case, the database codes for numerous variables. These include the ideological direction of the decisional outcome (whether liberal or conservative), whether the decision was a reversal or affirmance of the decision below, the type of case being decided (e.g., criminal, civil rights, economic regulation, and so on), the nature of the parties to the action, and some of the legal issues presented in the case. I use many of these variables in this book, as I explain in each of my analyses.

The judicial attributes database provides considerable information about the individual circuit court judges. This information includes factors such as race, gender, religion, the identity of the appointing president, and

occupational background before elevation to the circuit court bench. These data enable empirical testing of the effect of these variables on the detailed decisional variables of the courts of appeals database.

The available data inevitably have some limitations, though the courts of appeals database is currently the gold standard for circuit court research. The courts of appeals database provides coding for only the published opinions of the circuit courts and does not cover unpublished opinions (which outnumber those that are officially published). There is dispute over the representativeness of published opinions, and some have found that unpublished decisions tend to be more complex and less legally clear¹ or of lesser practical significance.² Whether or not the published decisions are perfectly representative of the full corpus of circuit court decisions, these published opinions are the most crucial ones. Published opinions set the primary judicial precedents that make up U.S. law. The reader should bear in mind, however, that all the studies in this book contain the same caveat; they analyze published circuit court decisions and do not explicitly consider the unpublished opinions.

This book is data rich, containing scores of analyses of circuit court decisions and opinions. My approach is not methodologically complex, and I use standard techniques of basic statistics and regressions. I have sought to present and explain the results of the analyses in a manner accessible to a broad readership, including those without statistical training. I commonly refer to statistical significance, for which I use a .05 standard. This standard means that there is less than a 1 in 20 probability that the association between the variables measured is one of chance. Given the many analyses reported, though, this means that at least a few of them may be ascribed to chance. Consequently, conclusions may be confidently made only when they are supported by multiple analyses, as is the case for my central variables. In addition, the reader should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation. One must also consider the magnitude of the association.

The courts of appeals database is vast and encompasses thousands of cases and individual judge votes. This vastness has some implications for an appreciation of the reported results. With such a large-*N* database, statistically significant associations are likely to be discerned, even when those associations

are very small.³ Hence, a report of statistical significance, while meaningful, may not have great practical significance. Consequently, to understand the true importance of the association in circuit court decision making, the reader of the regressions should attend to the size of the reported coefficient and the R^2 term, which measures the extent of variance explained by the full model, including the role of all the independent variables.

The reader will notice that many of the R^2 terms are relatively small, generally at 0.10 and well below.⁴ These small R^2 terms mean that the variables isolated in the particular equations do not appear to explain a high percentage of circuit court decisions. The small R^2 terms are also to some degree a feature of the immense courts of appeals database. Although the database codes for a very large number of discrete variables, it is practically impossible to code highly detailed facts for each of the thousands of cases. It is also not possible to code for the nature of the substantive law analyzed in each case, which potentially limits the explanatory power of any models.

In addition, some relevant factors cannot be objectively measured. For example, the database can characterize outcomes as liberal or conservative but cannot estimate *how* liberal or *how* conservative that decision was. It cannot segregate moderately liberal from extremely liberal results. The coding is also contingent on the facts of the case. For example, a court may reach an outcome classified as liberal only because the alternative position was an extremely conservative one that even conservative judges found unacceptable. This inevitably creates some inaccuracies in the specification of the variables, a problem discussed in individual chapters. These specification errors typically cause an underestimation of a true relationship. Hence, the association and related R^2 terms might generally be considered an underestimate or floor of the true relationship between the variables assessed. The reader should also appreciate that a small R^2 term may be of considerable practical significance. The courts of appeals database includes all types of cases, ranging from the mundane to the very important. If a variable explains only 10%, or even 1%, of the outcomes, that small subset of cases can have extremely significant real-world effects. Even small effect sizes can be significant.⁵ As we have seen with the Supreme Court ruling in *Bush v. Gore*, one single opinion can have huge consequences in the real world.

The courts of appeals database, combined with the judicial attributes database and other sources of data, provides the essential foundation for

all the analyses of this book. I have supplemented the courts of appeals database in several ways for these studies. In some instances I calculated new variables based on the variables already in the database. For example, I calculated a variable for the ideological direction of the decision being reviewed by the circuit court. In other instances I added new variables based on other sources. For example, each judge in the courts of appeals database was assigned an ideological position, the Supreme Court justices were assigned ideological positions, and various congressional representatives were given ideological positions at different times. These ideological scales were not always consistent in direction. To make the scales and reported results easier to understand, I converted them so that higher numbers always mean more liberal and lower numbers (in some instances negative numbers) mean more conservative. Thus, a negative sign for the coefficient on all regressions means a conservative association, whereas a positive association means a liberal association.

The Study of Judicial Decision Making

Researchers have developed a number of theories of circuit court decision making that are evaluated throughout the book. These include theories of ideological decision making, strategic decision making, litigant selection effects, and others. Most of these theories have already been subjected to empirical testing, usually on smaller databases focused on a shorter period of time and a particular class of cases, with the data often developed by the authors. In each chapter I begin with a summary of the rationale underlying the theories of judicial decision making and briefly summarize the existing research on their effect.

Very few of these theories have been fully tested with the broad courts of appeals database. This book provides the first test of many of these theories using this rigorously coded and expansive database. Using quantitative empirical methods to analyze judicial decisions has some inherent limitations because it is simply impossible to control for all the relevant factors underlying a decision. Nonetheless, such analyses provide important information and are valuable as rigorous tests of theories that otherwise rely on anecdotal evidence or simple assumptions. The book tells something of a story,

in which I first measure the conventional variables used to predict judicial decisions and then elaborate those analyses by adding other variables or refining the set of cases analyzed.

The book begins by considering ideological, or political, theories of circuit court decision making. This approach is the convention for empirical research on judicial decisions; most of these studies have been conducted by political scientists oriented toward finding political explanations. A considerable body of existing research demonstrates the significance of these ideological determinants, though only a small portion of this research has analyzed the circuit courts. Chapter 1 confirms the previous studies in finding that ideology has a statistically significant effect on decisions. Judges appointed by more conservative presidents consistently produce more conservative decisions on the bench. I find that this effect varies considerably over time and by the type of case under review. Chapter 1 also begins the exploration of the nature of the ideological role, considering the effect of relatively extreme ideologies on judicial decisions.

Chapter 2 introduces the role of the law in appellate decision making. This topic has lacked sufficient attention in the existing research, probably because of the difficulty of capturing a legal variable for a quantitative analysis. I have used legal procedural requirements as a way to test the impact of the law. For example, some judicial review standards are meant to be more deferential to the lower court's decision, and I find that judges are indeed more deferential when confronted with a legal requirement to be that way. Indeed, as a determinant of decisions, the magnitude of the effect of legal deference is much greater than that of judicial ideology (though the ideological effect does not disappear). This important finding has generally been overlooked in previous quantitative analyses. Substantive legal requirements, which are much more difficult to operationalize in quantitative research, might be expected to play a role as well. The finding on legal deference testifies to the need to incorporate such variables in quantitative analyses.

In Chapter 3, I introduce other judicial background variables, such as race, gender, religion, and previous life experiences of the circuit court judges. Existing studies on the effect of these judicial characteristics have generally found that they exercise little impact on outcomes. I study the effects on judicial decisions of race, gender, previous occupational

background, American Bar Association (ABA) judicial qualifications ratings, and net wealth, with controls for the effect of judicial ideology as measured by the appointment standard. I find relatively little effect for judicial background, though female and minority judges appear more liberal in criminal cases. One new and interesting finding of these studies is that judges of greater net wealth appear to render more conservative decisions.

Chapter 4 turns to the effect of other institutions on judicial decision making and possible judicial strategy. An extremely large amount of research has been devoted to claims that judges are influenced by these institutions, which may overrule a decision or even punish the judicial branch for decisions with which the other institutions disagree. For circuit court judges, the most obvious external influence would be the Supreme Court, to which circuit court opinions may be appealed. According to this theory, circuit court judges would strategically adapt their decisions to conform to the ideological preferences of the contemporaneous Supreme Court. The most significant finding in Chapter 4 is that the circuit court judges do not so adapt but instead respond to the ideology of the recent past Supreme Court. This result is an independent confirmation of the significance of the legal model, through an admittedly imprecise capture of substantive legal standards. I also consider the prospect of adaptation to the overall composition of the circuit court and find some possibly strategic responsiveness here, as well as responsiveness to the preferences of the recent past circuit court ideology. There is little evidence that the courts respond to the preferences of Congress and the risk of congressional override, though. In general, strategic adaptation is apparently not a significant determinant of circuit court decisions, though conservatives in Congress may exert some small influence.

Chapter 5 turns to the effect of litigants on circuit court decisions. Judges are not perfectly autonomous decision makers, because they can render judgments only on the cases that reach their courts. This leaves open the possibility that strategic litigants can manipulate judicial outcomes by carefully selecting the cases heard on appeal. Such a litigant effect is supported by much theory and some limited empirical evidence. The research in this chapter demonstrates that certain categories of litigants, especially the state and federal governments, are indeed disproportionately successful before the circuit courts. To truly identify a litigant influence, though, one has to control for the other variables known to drive circuit court decision making. Although

this is difficult to do with the available data, a study of some limited areas of law finds little litigant effect beyond the ideological and legal effects.

In Chapter 6, I consider the interactive effects, called panel effects, of the three members of the circuit court panel. Under the conventional social scientific theory, decisions would be dictated by the preferences of the median panel member. If ideology is central, the most politically moderate panel member would make the call, and the preferences of the other members would be irrelevant. Psychological research suggests, however, that people may be influenced by others, and some research suggests that circuit court judges are indeed influenced by their colleagues who hear the same appeal. This collegiality effect appears to be at least as powerful as the individual judge's own preferences.

Chapter 7 begins the exploration of legal doctrine. The existing empirical research largely examines judicial characteristics as determinants of decisions and ignores the role of the law. Chapter 2 showed that the law matters in these decisions, and Chapter 7 explains how it matters. A number of legal threshold requirements, such as jurisdiction and standing, must be satisfied before a plaintiff can have his or her case heard on the merits. The analysis of cases involving these threshold rules demonstrates that they have a great effect on judicial outcomes, independent of judicial preferences, and have systematic consequences on the ideological outcomes produced.

Chapter 8 branches into another new field of legal study by examining the precedential effect of particular judicial decisions. Although a decision itself resolves only the outcome of a dispute between two parties, the accompanying opinion sets out the law to govern all future actions in the circuit's jurisdiction and influences other jurisdictions. The significance of that effect lies in the power of the opinion as precedent. This chapter examines the relative power of different precedents. It considers the types of legal rulings that yield the most precedents, ideological effects on precedents, and other factors, such as the length of the published opinion.

The book presents some striking new findings (while confirming other existing findings). The standard conclusion about ideological decision making is supported, but with considerable qualification about its impact. Some other aspects of judicial background matter, the other judges on the panel matter, and the law certainly matters. Legal rules are much better determinants of outcomes than is judicial ideology. Of course, many of the results

reported in this book might be considered preliminary or even just exploratory. I hope that they can serve as a foundation for more-detailed analyses of circuit court decisions and opinions.

I am a professor of law, not a degreed political scientist. My interests correspond closely with those social scientists who study judicial politics, though, and I have worked closely with social scientists. Given my background, the statistical analyses presented in this book are not highly sophisticated. I hope that my training and interest can lend some multidisciplinary perspective to the research and facilitate understanding between legal and political scholars.