Understanding Judicial Decisionmaking:
The Importance of Constrains and Beliefs in a Dynamic World

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Research in cognitive science and behavioral psychology has advanced our understanding of both individual and group decisionmaking. Three concepts have particular relevance to judicial decisionmaking. "Scaffolds" limit decisionmaking, so that certain results and actions are prohibited or controlled. The norms that limit how a judge goes about her job—such as the rules governing the use of precedent and statutory construction and the hierarchy of a judicial system—constrain many types of court decisions regardless of the personal views of the judge. This scaffold makes the law predictable in many cases. However, the non-ergodic nature of the world means that new problems, lacking answers from existing precedent or statutes, are always arising. Hence judges are often obligated to choose between competing legitimate claims. This makes the belief systems of judges so importance, especially for supreme and constitutional court justices. The greater the constraints, the less impact of the belief systems of the individual judges. However, no judicial system can be constrained enough to eliminate the effects of belief systems. Consequently, in both common and civil law countries, judicial decisions will always depend upon both the terms of the law itself and the particular people who have the final say on what the law means.

I. Judicial Scaffolds

Scaffolds help bring order to the world. By constraining conduct, they channel individuals, firms and even governmental units into socially productive action. For example, although firms do not maximize economic profit, as the neoclassical economic model assumes, they generally act as profit-maximizing entities because their actions are constrained by things like market competition and their organizational structures. Similarly, there are scaffolds that confine and channel the behavior of courts. This is true for courts everywhere in the world; the constraints just differ from the common law

system to the civil law system, as well as from country to country. Since scaffolds are made up by combinations of institutions, they involve both formal and informal components.

Courts are constrained by constitutions and statutes that define their jurisdiction. These kinds of formal institutions constrain judicial power by removing certain types of controversies from the courts. For example, in the United States, government agencies resolve a large percentage of claims for government benefits, with only a limited appellate role for courts. Jurisdictional statutes also can limit the particular courts that can hear a dispute. Specialized courts, dealing with things like taxes and patents, for example, are common throughout the world. In the United States, Congress and state legislatures apportion judicial business among the various courts. For example, competition law disputes under the federal Sherman Act cannot be heard in state courts, while federal courts cannot deal with divorce and child custody.

Rules for interpreting constitutions and statutes diminish the range of possible outcomes in court cases. This is also true for the rules that define how prior decisions are to be used in a new dispute, *i.e.*, the precedential effect of opinions interpreting constitutions and statutes or creating common law. These rules of decisionmaking would be of little value, however, without ways to enforce them. The hierarchy of a court system is a key component of the judicial scaffold. With appellate courts and a supreme court having the power to reverse lower courts, a hierarchical court system provides an important enforcement mechanism for assuring that inferior courts follow the established rules.

Substantive law, in the form of both statutory and common law, constrains what courts can do. If a statute allows public employees to collectively bargain, a court cannot prevent school teachers from bargaining for higher wages through a union. Since legislatures are the primary law makers, even in the common law world, they have great ability to force courts to act in ways they desire.

There are also forms of political control of the judiciary and of individual judges in every country in the world. The use of impeachment of judges for political reasons is a terrible, extreme example, but it has been and is still practiced in many countries. Even in the United States, where Congress's last attempt to impeach a federal judge for political reasons failed in 1804 when former state supreme court judges broke ranks with their party leader, President Thomas Jefferson, individual members of Congress have used the media to stir up popular sentiment for impeaching judges who take unpopular positions. The same holds on the state level, although it usually arises in re-election campaigns of judges rather than in state impeachment proceedings. Jurisdiction stripping is another tool for asserting political control of judges. After the United States Court of Appeals in California held that the Pledge of Allegiance unconstitutionally violated the first amendment because it contains the words "under God," successive Congresses attempted to prevent the federal courts from hearing challenges to the Pledge of Allegiance by requiring those lawsuits to be heard in state courts.

Self restraint by courts, through such things as justiciability rules, are also part of judicial scaffolds. For example, in the case challenging the constitutionality of the Pledge of Allegiance, the Supreme Court ruled that the plaintiff lacked the requisite "standing" (one of a number of justiciability requirements) to bring the lawsuit. The

plaintiff, who was suing on behalf of his minor daughter, was not the custodial parent; rather his divorced wife had custody of the daughter. This decision, make on standing grounds, vacated the lower court's judgment and removed a controversial issue from the courts—until someone with the proper standing will raise the issue again. Other judge-made justiciability rules also have the effect of removing the courts from controversial issues. For example, the "political question doctrine" in the United States keeps all courts from deciding the legality of wars, something the Supreme Court has repeatedly left to the political processes. Self-restraint is a two-way process, however, so Congress has limited its use of political tools like impeachment and jurisdiction stripping to achieve a balance with the courts.

Constrains also arise from judicial norms. For example, Judge Harry Edwards of the D.C. Circuit Court of Appeals has tried to instill collegiality among all the judges on a court and discouraged dissenting opinions. He believes that compromise among the various positions taken by individual judges leads to better decisions and helps a court to better fulfill its limited role in the government structure. In Japan, judges are promoted based upon performance evaluations by senior judges, so the standards and objectives of the senior judges constrain the actions of judges who desire promotions. Of course, ethical standards, education and self-regulation through judicial commissions also cabin judges' actions.

II. The Consequences of a Dynamic World

In the eighteen century, government leaders thought it possible to create a legal code that would provide for all contingencies with such careful minuteness that no possible doubt could arise at any future time. Roscoe Pound explained that this code

would function as "a sort of judicial slot machine. The necessary machinery had been provided in advance by legislation or by received legal principles and one had but to put in the facts above and take out the decision below." (Pound, 170.) Similar notions led to the creation of the Federal Trade Commission in the early twentieth century in the United States. Unhappy with the discretion accorded judges by the "rule of reason" in Sherman Act cases, a coalition of business leaders and progressive reformers wanted a commission that would write a "Code of Good Business Practices" establishing in advance precise rules of what was and what was not illegal anticompetitive conduct. Congress created the FTC, but the FTC could not create this kind of code. Creating a code that covered every possible anticompetitive act would be possible only in a world where the "fundamental underlying structure of the economy is constant and therefore timeless." (North, p. 16.) The Federal Trade Commission was created, but it never would write a Code of Good Business Practices. Within a few years, it gave up on the enterprise.

It is impossible to craft laws that will deal with all future events. The world is continually changing. With new products, new processes, new financial instruments, new corporate forms, new modes of communications, and on and on, the legal system must continually adopt to new kids of unanticipated disputes. MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916), is a well-known example of the law's evolution. Prior to the decision in MacPherson, people injured by a product could only sue the seller of the product, even if the real cause of the accident was the manufacturer of the product and not the retail seller. The rule was that "privity of contract" was a prerequisite for suing in negligence. The New York Court of Appeal in MacPherson allowed someone injured in an auto accident to sue the manufacturer of the automobile, even though the

victim purchased the car from an auto dealer and not from the manufacturer. This opinion began the abolition of the requirement of privity of contract in tort law. Rather than make a bold change in the law, however, the court explained that it was applying an existing legal rule to a new situation. There had been a narrow exemption to the privity requirement for products that were "inherently dangerous," such as poisons, explosives or similar products. The court in MacPherson explained that the exception was actually intended to include products whose "nature . . . is such that it is reasonably certain to place life and limb in peril when negligently made." Those "things of danger," the court said, included automobiles. (*Id*. at 389.) Although it claimed to use a recognized exception to the privity requirement, the court explained that changing times required changes in the application of the law:

> Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life require them to be. (*Id.* at 391.)

Common law decisionmaking relies heavily on analogy to past decisions. Analogy—or the use of precedent—breaks down, however, as new problems different from old answers arise. Holmes explains the problem this way:

> Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, this distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason; and at last a mathematical line is arrived at by the contrast of contrary decisions, which is so far arbitrary that it might equally have been drawn a little father to the one side or to the other, but which must have been drawn somewhere in the neighborhood where it falls.

It is in making that choice between two equally appropriate precedent cases or two different rules, objectives or policies that the belief systems of the judges become so important.

III. Belief Systems of Judges

We all view the world differently. Problems and solutions appear differently to different people. "Individuals from different backgrounds . . . interpret the same evidence differently and in consequence make different choices." (North, p. 63.) Our belief systems develop from our life experience and from a myriad of influences—from our parents and family, peers, teachers, religious leader, government leaders, public commentators, and so on. This is just as true for judges as it is for the ordinary person. It is especially important for judges because belief systems play a major role in the evolution of the law. As Holmes explained:

> The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views or public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulated convictions, but nonetheless traceable to views of public policy (stuff about discovering law and saying gee wiz, this is the way it always was). (Holmes, p. 31, emphasis added.)

The "judicial philosophy" of different judges—really, their different belief systems—affect their choice of which precedent to use, their choice of the direction to push the law, and their choice between competing policies. Some of the methods used to decide particular types of cases invite judges to act on their own belief systems. A "balancing" test, common in constitutional law, frequently requires judges to balance incomparable considerations. For example, in regulatory taking cases, a judge must

determine the outcome by balancing the harm to the aggrieved party against the benefit to society, usually when harm and benefit cannot be quantified. Another common approach requires judges to look at a number of factors and make a decision based on the totality of the circumstances. Some judges will view one factor as important; other judges will disregard that factor and concentrate on another.

The controversial case of United States v. Lopez, 514 U.S. 549 (1995), illustrates how the belief systems of judges affect the outcome of cases. Lopez involved whether Congress had the power under the interstate commerce clause to enact the "Gun-Free School Zones Act of 1990." Responding to rising crime in the nation's schools, Congress made it a federal crime to possess a firearm on or near school grounds. The Supreme Court struck the law down as unconstitutional, emphasizing that this type of criminal regulation was historically left to the states in our federal scheme of government and that violence in schools had too tenuous a relationship to interstate commerce. The dissent viewed Congress as acting within its historic authority and saw a justifiable link between less effective education (resulting from increased school violence) and diminished performance of the national economy. Both the majority and the dissent expressed legitimate concerns. The position a Justice chose depended on his or her internal preferences and rankings for (1) the appropriate allocation of power between the federal government and the States, (2) the extent of power given to Congress by the interstate commerce power, (3) the amount of discretion courts should accord Congress in judging Congress's own conclusions that it has authority to act under the constitution, and (4) the need for courts to support efforts to diminish violence in schools. Judges often do not tell us that they are choosing among various competing factors nor why they prefer one over

another. Many times their choice is unconscious. But the need to make this kind of choice illustrates why the belief system of judges are so important.

The higher the court, the more discretion of the judges, and therefore the more importance of the judge's belief systems. That is why appointments to the United States Supreme Court are much more controversial than appointments to the federal trial courts and even to the intermediate appellate courts.

IV. Conclusion

The three aspects of judicial decisionmaking—scaffolds, continuously new disputes, and belief systems—are relevant concerns for civil law judges, not just common law judges. However, the particular structure of the United States Supreme Court makes appointments to that court so controversial. Nine Justices, each with lifetime tenure, sit on the Supreme Court. Some Justices have served for over 50 years. If the same political party dominates the Executive and the Senate, there is little check on the appointment process. Most Constitutional Courts, on the other hand, are much larger, diminishing the importance of one justice's vote. Constitutional Court justices serve a fixed term of office, so new justices regularly move onto the court. Finally, many countries have an appointment process designed to provide political balance to the justices, with different government groups and political parties having a say in the appointments. As a result, many civil law countries have constrained their judges more than common law countries not just by more detailed codes but also by a different structure to their court systems.

The paper will continue with an assessment of the advantages and disadvantages of greater or lesser judicial constraints.