



# THE (MULTIPLE) PATHS OF DISSENT

## ROLES OF DISSENTING JUDGES IN THE JUDICIAL PROCESS



*The Behavior of Federal Judges, while interesting and provocative, does not fully account for various roles that judges play in the resolution of a case. The authors' emphasis on personal motives as opposed to a more holistic view of how dissent can influence a majority opinion and the development of the law raises questions about the validity of the metric and the model. A more complete and balanced approach to understanding and depicting a judge's work would likely yield different conclusions.*

by **EVA M. GUZMAN** and **ED DUFFY**

In *The Behavior of Federal Judges*, Lee Epstein, William Landes, and Richard Posner (collectively “the Authors”) tell us why appellate judges do what they do, using a provocative empirical backdrop to support the underlying theories and models. The idea of explaining judicial decision making from data com-

pilations seems such an impossible mission that one cannot help but laud the effort. Yet, the final product is ripe for critique. Though these scholars support their findings with empirical evidence, some may conclude that their model of judicial behavior and its associated theories do not fairly depict or explain why

or how judges make decisions. That is the conclusion of this 15-year

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member of the Texas judiciary.

The Authors have served up some interesting approaches to explaining how judges work, but they have failed to account for a broad range of judicial behavior, much of which is informal and occurs behind the scenes. Because the Authors do not consider a significant amount of the day-to-day work of appellate judges, their model could hardly be expected to provide an accurate picture. And it does not. Instead, the model produces a distorting effect, born of the Authors' oversimplification of a multi-faceted process. The Authors' core premise is that judges may be categorized as "liberal," "moderate," or "conservative" government "workers" in the judicial labor market, and that as workers, judges function no differently than other "government employees," who presumably are motivated and constrained primarily by economic, institutional, and social factors.<sup>1</sup> These factors, according to the Authors, include "personal and institutional concerns," and "costs and benefits both pecuniary and non-pecuniary."<sup>2</sup> The Authors argue that judges are motivated primarily by the latter, which includes factors such as "leisure, esteem, influence, self-expression, and being a public figure—a celebrity—and opportunities for appointment to a higher court."<sup>3</sup>

There are two primary and related problems with the Authors' overall approach. First, they assume a majority of judges are not constrained by their judicial oaths or motivated by a faithful adherence to the values inherent in the rule of law, but instead are stirred to action—or inaction—chiefly by desires for leisure, prestige, and the like. The Authors do not provide a methodology for weighing the relative influence of each of these factors on judicial behavior, nor do they seem to account for the underlying causal relationship between such factors and judicial behavior.<sup>4</sup> Second, the empirical evidence upon which the Authors rely to support their premise is based in large measure on overgeneralizations and does not fully consider key

explanatory variables. For example, describing judges with a one-word ideological label ignores the many divergent views within each of these three categories. These problems are especially notable in their treatment of judicial dissent rates in Chapter 6.

The Authors explain dissenting behavior predominantly through motives associated with "work" in general, for example, an appellate judge's ostensible desire to maximize "leisure," despite the fact that dissenting behavior is often the product of a judge's efforts to effectively adhere to the values inherent in the rule of law. The Authors correctly note that, unlike majority opinions, which are largely obligatory, dissenting opinions are optional and within a judge's discretion—a judge can choose whether or not to dissent in a particular case.<sup>5</sup> The core premise of the "dissent aversion" theory is that a judge will not dissent unless she anticipates a benefit that will offset the cost.<sup>6</sup> Hence, this model of judicial behavior provides that a judge will not write separately despite disagreement with a decision unless the judge anticipates that the dissent will: (1) undermine the influence of the majority opinion; (2) have some actual or perceived influence; or (3) enhance the reputation of the dissenting judge.<sup>7</sup> The costs are primarily identified as the: (1) erosion of collegiality; (2) increased workload; and (3) publication of ideological positions that may limit or diminish potential for promotion.<sup>8</sup> Disappointingly, the Authors do not ascribe much value to the maxim that a judge's decision to dissent may be based on a genuine desire, as a member of the judiciary, to pursue

a separate writing because in some manner it will further the interests promoted by the rule of law.<sup>9</sup> Before taking office, a judge takes an oath. For example, each federal judge must swear that she "will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . will faithfully and impartially discharge and perform all the duties incumbent upon" her.<sup>10</sup> The dissents in cases involving racial discrimination, such as *Plessy v. Ferguson*<sup>11</sup> or *Korematsu v. United States*,<sup>12</sup> demonstrate judges acting upon their oaths and dissenting in an effort to foster progress in the law.<sup>13</sup> Justice Jackson, dissenting in *Korematsu*—in which the majority upheld Japanese internment during World War II—eloquently articulated that the effect of a judicial opinion extends well beyond the dispute at hand:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.<sup>14</sup>

The Authors' model largely disregards the possibility that a decision to dissent and the ensuing opinion are often useful in promoting the evolution of the law. This failure goes to the heart of the problem; as Justice

higher court or legislative intervention.

8. Epstein et al., *supra* n. 1, at 328.

9. Judge Diane Wood of the United States Court of Appeals for the Seventh Circuit suggests three potential reasons for issuing a dissent. See Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1465–75 (2012).

10. 28 U.S.C. § 453.

11. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

12. 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

13. *Id.* at 242.

14. *Id.* at 246.

1. Lee Epstein, William M. Landes, & Richard A. Posner, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 29 (CAMBRIDGE, MA: HARVARD UNIVERSITY PRESS 2013).

2. *Id.* at 5.

3. *Id.*

4. Renee Cohn Jubelirer, *The Behavior of Federal Judges: The "Careerist" in Robes*, 97(2) JUDICATURE 98 (2013).

5. Epstein et al., *supra* n. 1, at 256.

6. *Id.* at 256–57.

7. *Id.* at 327. For intermediate appellate courts, the potential benefits from a dissent are said to also include increased odds of review by a

Ginsburg wrote, separate opinions can “contribute to the improvement or progress of the law.”<sup>15</sup> Such considerations may significantly alter a judge’s cost-benefit analysis from that proposed by the Authors. Indeed, a judge is often motivated to write separately by the fervent hope that her efforts will enrich the jurisprudence of the state—if not today, then in the future.

To judge the “benefit” or “influence” of a dissent, the Authors chiefly rely on the number of citations to the dissenting opinion.<sup>16</sup> Though citation counts might provide some valid measure of the benefits of a dissent in Supreme Court cases like *Korematsu*, they are not a sound proxy for measuring the benefits or influence of a dissent in lower courts, particularly at the state intermediate court of appeals level, where review is not discretionary. In these intermediate courts there are often recurring issues that will require a judge who initially dissented to confront the same issue again when similar, but distinguishable, cases are before the court. Dissents in these circumstances not only ensure consistency and preserve the integrity of the judge’s record, but also may promote or foster rule-of-law principles and mitigate against further expansion of the legal analysis from which the judge originally dissented. Surely an uncompromising adherence to a legal principle is not always self-serving. In fact, a principled judge might well ignore whether the dissent is frequently cited and instead focus on ensuring that the issue is preserved for review either by the higher court

or by the intermediate court sitting en banc. Thus the value of a dissent cannot simply be measured by the number of citations it garners; it must also be measured by how often a recurring dissent is a catalyst for change, whether in the lower court sitting en banc or through intervention by the higher court or the legislative process. The Authors do not seem to account for these important aspects of a judge’s decision to dissent.

The second troubling aspect of the Authors’ model is that it is principally dependent on overgeneralizations and largely fails to consider the important influence of a judge’s unwritten dissent. Though the Authors are mainly concerned with *whether* a judge will dissent in a given case, they miss an equally important issue: *how* a judge can dissent in a particular case. This oversight creates a number of problematic assumptions within the Authors’ analysis of judicial dissent. For one, the Authors acknowledge that a judge writing a majority opinion may need to make revisions, in light of a dissent, to retain the votes of other judges on the panel; but the Authors posit that judges will find this process cumbersome, rather than informative and beneficial.<sup>17</sup> Additionally, the Authors’ model seems to assume that a signed and published dissenting opinion is the only way that a judge can voice dissent in a given case. The Authors do not consider or assess other important means of registering dissent nor do they seem to take into account the role of written dissents that are ultimately withdrawn by the dissenting judge before publication. In practice, the judicial process involves essential means of dissent that the Authors’ model simply does not (and likely cannot) take into account.

The Authors treat dissents as something of an afterthought in the judicial process—that is, an opinion written only after it is clear that the majority opinion will carry the day and there is no hope of persuading the remaining judges on the panel (or even the author of the original major-

ity opinion) to vote differently. This representation of the judicial process does not fully reflect actual practice. In contrast to the Authors’ assumptions, a dissenting opinion (whether written or unwritten) plays a crucial role from the outset in a more dynamic and interactive process.<sup>18</sup> The Authors note that Judge Henry Friendly, one of the foremost court of appeals judges in history, dissented at a relatively high rate, attributing this high rate to a lack of oral deliberation and memos exchanged prior to the assignment of the opinion, which could harden judges’ positions and make dissent more likely.<sup>19</sup> Despite this important observation, indicating that the particulars of the adjudicative process play a key role in the frequency of dissenting opinions, empirical analysis omits this variable. Furthermore, experience teaches that dissenting judges tend to engage in a thorough analysis of the relative strengths of their arguments and search for any potential common ground (or, conversely, the potential to “flip” the case).<sup>20</sup> As an integral part of this process, a dissenting judge will likely consider the overall impact on the majority’s proposed draft opinion and assess her own points and potential contribution to the jurisprudence. In addition, a dissenting judge typically will have put considerable effort into reading the briefs, preparing for oral argument and post-submission conference, and conferencing the proposed majority opinion. This process embodies and reflects a principled adjudication of cases and stands in sharp contrast to the Authors’ asserted notions of “dissent aversion.”<sup>21</sup> Thus, although there are certainly costs and benefits associated with dissenting opinions, the Authors’ model misses the mark because it does not consider that these decisions are not made in a vacuum. More importantly, the model does not capture the reality that many of these decisions are made in spite of the “costs” and with little regard for personal “benefits.”

Beyond this, the model fails to account for the dissent driven by a judge’s desire to influence the devel-

15. Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399, 1415 (2009).

16. Epstein et al., *supra* n. 1, at 256.

17. Epstein et al., *supra* n. 1, at 261.

18. Judge Marsha Berzon provides interesting insights on how the simple *possibility* of separate opinions plays a crucial role in the judicial decision-making process by fostering what she terms “adversarial collaboration.” See Marsha S. Berzon, *Dissent, ‘Dissentals,’ and Decision Making*, 100 CALIF. L. REV. 1479 (2012).

19. Epstein et al., *supra* n. 1, at 272–73.

20. Indeed, it is not uncommon for a dissenting opinion to have originated as a majority opinion, and for a majority to have started as a dissent.

21. Epstein et al., *supra* n. 1, at 256–57.

opment of the legal rule at issue in a particular case through means other than a published dissenting opinion. Judges have ample opportunity to voice their objections to a colleague's majority opinion in an effort to persuade the author to modify the opinion by changing or removing the offending portions. In this way, appellate judges can check one another to ensure that they do not overlook particular factual or legal issues; identify dicta in opinions that, if not removed, unnecessarily would prompt a dissenting opinion; and resolve potential areas of disagreement through collegial conversation before the opinion is issued, thereby obviating the need for dissent.

The judicial process at the Supreme Court of Texas provides examples of at least two additional methods of registering dissent that are not tracked by the Authors' analysis. First, the court issues *per curiam* opinions—that is, unsigned opinions rendered without oral argument. These often entail some disagreement on the issues presented, which results in a narrow writing. Dissenting judges may play a role in constricting the scope of the issues decided in *per curiam* opinions. Second, as a court of discretionary review, the Supreme Court of Texas invests considerable time determining which cases it will hear. When the court declines to exercise review,<sup>22</sup> a judge may issue a dissenting opinion from the denial. Sometimes, when a judge circulates such a dissent, the other judges will take a second, harder look at the case and after reconsideration, may change their minds and vote in favor of granting the petition for review.<sup>23</sup> This is another example of a judge exercising influence via an alternative mode of dissent. Had the Authors more fully appreciated these methods for registering dissent and influencing majority opinions and other binding decisions, they might have reached a different conclusion. Perhaps they would have recognized that while a court's workload may affect

the *manner* in which a judge dissents (*i.e.*, a busy court may have fewer signed dissenting opinions), its workload may have little effect on the overall *rate* of dissent if all potential methods for registering dissent are considered.

Similarly, the model generally ignores the number of dissenting opinions that are withdrawn before publication. The reasons underlying a judge's decision to withdraw a dissent in a state's high court are often rooted in concerns for the court as an institution. For instance, in making the ultimate decision to publish a dissent, a judge may very well consider the overarching impact of a fragmented high court with respect to public perception and decline to publish out of concern for maintaining public confidence in the court as an institution. The actions of Justice Brandeis serve to illustrate this point well. As Judge Jerome Frank observed:

Brandeis was a great institutional man. He realized that the Court is not the place for solo performances, that random dissents...weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents...need to be saved for major matters if the Court is not to appear indecisive and quarrelsome, [for] the appearance of indecision and quarrelsomeness are drains on the energy of the institution, leaving it in weakened condition at those moments when the call upon it for public leadership is greatest....To have discarded some of [his separate] opinions is a supreme example of sacrifice to strength and consistency of the Court. And he has his reward: his shots are all the harder because he chose his ground.<sup>24</sup>

By tracking only *published* dissents, the Authors' model is incomplete: Decisions grounded in concerns for preserving the strength of the court as an institution are a necessary but unaddressed part of the equation.

These examples illustrate important judicial work and decision-influencing factors existing outside of the Authors' economic model. Much of this work occurs behind the scenes and offers no benefit what-

soever to the laboring judge—other than the quiet satisfaction of fulfilling one's judicial oath. These efforts are unacknowledged in the Authors' metric. But these informal, candid discussions among judges play an integral and powerful role in the judicial process and generally are more effective in developing the law than are published dissenting opinions. The Authors' model simply cannot capture the such work done by judges, nor can they identify all the pertinent variables. Without taking account of this discrete work, it is impossible to accurately assess the "how" and the "why" of a judge's decision to dissent.

Although the flaws in the model limit the Authors' conclusions about judicial motivations and decision making, their work does add an interesting dimension to the growing body of scholarship devoted to the subject. Some will embrace it and others will reject it, but most certainly, the thesis will be a catalyst for valuable discussion. ★

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22. Four judges must vote to grant review.

23. Lee Epstein, along with Jack Knight, document this behavior at the United States Supreme Court in *THE CHOICES JUSTICES MAKE* (Washington, D.C.: CQ Press 1998).

24. Judge Jerome Frank, Book Review, 10 J. LEGAL ED. 401, 404 (1958) (reviewing Alexander M. Bickel, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957)).