

Why do Judges Grant Rehearing Requests? Evidence from the Supreme Court of Israel

Comment

by

Michael Kurschilgen*

June 2022. The Supreme Court of the United States (SCOTUS) has just decided to overrule *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), thereby returning “the issue of abortion to the people’s elected representatives.”¹ The Court’s decision was supported by a 6–3 majority, punctuating a recent trend away from unanimity. Over the last 10 years, the share of unanimous 9–0 rulings has declined from levels above 50% of all decisions in a given term to a current low of 29% (Gou, 2022). Moreover, the Court’s vote on whether the U.S. Constitution protects a right to abortion was split along ideological lines, with the six judges appointed by Republican presidents voting in the majority, and the three Democratic appointees in dissent. Unanimous decisions resonate with the idea of an *objective* interpretation of the law, according to which cases are solely judged on their legal merits. In contrast, decisions split along ideological lines suggest a *subjective* interpretation of the law, in which judges allow their political preferences to taint their judicial decision-making. Few judges, however, would willingly admit being prone to the latter. This makes empirical contributions like Givati and Rosenberg (2023) the more important.

Exploiting decisions on rehearing requests by the Supreme Court of Israel, Givati and Rosenberg (2023) provide compelling evidence for the existence of subjectivity in judicial decision-making. More profanely, the authors show that, after all, judges are humans. Following Akerlof and Kranton (2000), human behavior can be characterized by a tension between several desirable objectives:

$$U(a) = C(\pi(a)) + \gamma L(a - \tilde{a}) + \theta N(a - \hat{a}).$$

In this framework, an individual will try to choose an optimal action a^* that maximizes her overall utility U , which can have three different sources: C , L , and N . C denotes consumption utility from money π . I will assume, that the judges’ decisions examined in Givati and Rosenberg (2023) have no effect on the judges’ consumption utility (i.e., judges are not corrupt and have no *monetary* conflict of

* UniDistance Suisse, Brig, Switzerland.

¹ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 79 (2022).

interest). The utility function thus simplifies to the following:

$$U(a) = C + \gamma L(a - \tilde{a}) + \theta N(a - \hat{a}).$$

L denotes utility from conforming with the law. It relates to what the authors call “objective theory.” The smaller the discrepancy between a judge’s decision a and her conception of perfect conformity with the law $\tilde{a}$, the higher her utility L from conforming to the law. In fact, in this theoretical framework we do not need to think of *the law* as some underlying truth (but we can if we wish). It is sufficient to think of the law as a coordination game in the spirit of Krupka and Weber (2013), in which judges derive image utility from signaling their legal expertise to some relevant peer group (Kurschilgen and Marcin, 2019). In that sense the law is what most judges think their relevant peer group thinks is the law. The relevant peer group could be all other supreme court judges, or all other judges, or even the community of all judges and legal scholars. The (idea of the) law $\tilde{a}$ will exert a homogenizing effect on judges’ decisions as long as there is just one relevant peer group for the vast majority of judges. It will however lose its homogenizing function if, for instance, the relevant peer group of a liberal judge were all other liberal judges whereas the relevant peer group of a conservative judge were all other conservative judges.

As long as judges view themselves as part of one large peer group – rather than several, ideologically separated peer groups – a judge’s utility L from conforming to the law will work as a counterweight to potential idiosyncrasies of individual judges. N denotes utility from conforming with one’s personal norms (Burks and Krupka, 2012), e.g., political ideals. It relates to what Givati and Rosenberg (2023) call “subjective theory.” The smaller the discrepancy between a judge’s decision a and her personal normative ideal $\hat{a}$, the higher her utility N from conforming with one’s ideological convictions. The interesting situations are those where $\tilde{a}$ and $\hat{a}$ are at odds with each other. In those situations, a judge will trade off utility from L against utility from N . In other words, she will weigh the disutility from deviating from her legal ideal ($\tilde{a}$) against the disutility from deviating from her political ideal ($\hat{a}$).

The relative weight of these two sources of utility, γ and θ , is determined by how much wiggle room (Dana, Weber, and Kuang, 2007) the judge has to justify her decision (both in front of herself and in front of her peers). The easier it is for the judge to find a narrative (Bénabou, Falk, and Tirole, 2018) to plausibly persuade herself that she is actually conforming with $\tilde{a}$, the smaller is γ . In fact, the Israeli Law of Courts offers quite some wiggle room for the granting judge. A rehearing can be granted if the judge considers that (1) the original ruling contradicts an existing Supreme Court precedent, or (2) if the ruling is important, or (3) difficult, or (4) novel. Hence, four possible domains for self-persuading narratives.

In this framework, we would expect a judge who dislikes an original ruling for political reasons to be more likely to grant a rehearing than a judge who likes the political implications of the original ruling. And that is exactly what Givati and Rosenberg (2023) show: those judges who granted the rehearing request are

22 percentage points more likely to vote for a reversal of the original decision than new judges, who had not seen the case before.

After establishing that judges' decisions are – to some notable extent – *subjective*, Givati and Rosenberg (2023) go one step further and ask whether judges' decisions may even be *strategic*, in the sense that judges try to engineer panel decisions of their liking. In fact, the idea of strategicness was at the heart of most attempts to rationalize the leaked draft opinion of *Dobbs v. Jackson Women's Health Organization*, almost two months before its official release (Greene, 2022). Some – mostly conservative – commentators speculated that the leak came from the left to generate a public outcry that would push the court into a more moderate decision. Others – mostly liberals – theorized that the leak must have come from the right to keep conservative judges locked in and prevent a push for a more moderate decision. These contradictory interpretations illustrate how challenging it is to cleanly identify strategicness without knowing players' (i.e., judges') intentions and expectations.

Givati and Rosenberg (2023) test for strategicness by comparing the *success* of the rehearing (i.e., the reversal of the original decision) when the granting judge happens to be the chief judge (who has some discretion in the composition of the rehearing panel) versus another judge (who has no say in the composition of the rehearing panel). Their results suggest that the chief judge may indeed behave strategically when composing the rehearing panel. Givati and Rosenberg (2023) find that there is a stronger correlation between the granting judge's ruling and the ultimate outcome of the case when the granting judge happens to be the chief judge versus another judge.

In fact, taking advantage of the fact that the discretion of the chief judge is limited to choosing the total number of judges on the panel, the data may allow for an additional test of strategic behavior. The rehearing panel consists of an odd number of five or more judges (but rarely more than nine). The first three judges are the judges from the original panel (if available). The other judges are added in order of seniority. The chief judge can freely decide, however, *how many* are added. If the chief judge used this discretionary power to advance her agenda (and knew her colleagues' political orientation sufficiently well), we should observe that judges eight and nine (i.e., the two most junior judges of the panel) are more likely to vote in line with the chief judge than judges six and seven. Moreover, we should observe the votes of judges six and seven to be closer aligned with the chief judge when the panel is composed of seven judges than when the panel is composed of nine judges.

Following the theoretical framework presented above, a legal reform aimed at making judicial decision-making more *objective* would need to narrow the wiggle room that allows judges to think of themselves as conforming with the law while they are in fact trying to make their interpretation of the law fit with their personal norms. One could think of removing domains, tightening definitions, incentivizing judges to be consistent across decisions, etc. Yet, it is not clear whether a narrower wiggle room would actually be socially desirable. The discretion of judges – and,

more generally, the flexibility of the law – is most likely not a monotonic function. Too much discretion would lead to an arbitrary, unpredictable application of the law, and to rather polarized court decisions. A *moralizing* political climate could further reinforce the polarization of individual judgments (Kurschilgen, 2021), and thus the subjectivity of judicial decisions. Moreover, members of a stable *political* majority of judges, as currently in the SCOTUS, may find it easier to persuade themselves that their opinion is driven by legal and not by political reasons. On the other hand, too little discretion would lead to a heavy status quo bias, making the law very slow to adapt to social and technological progress. Either extreme could jeopardize the perceived legitimacy of the judiciary. Establishing the socially optimal degree of judicial discretion is a fascinating question for future research.

References

- Akerlof, George A., and Rachel E. Kranton (2000), “Economics and Identity,” *The Quarterly Journal of Economics*, 115(3), 715–753.
- Bénabou, Roland, Armin Falk, and Jean Tirole (2018), “Narratives, Imperatives, and Moral Persuasion,” Working Paper 24798, NBER, Cambridge (MA).
- Burks, Stephen V., and Erin L. Krupka (2012), “A Multimethod Approach to Identifying Norms and Normative Expectations within a Corporate Hierarchy: Evidence from the Financial Services Industry,” *Management Science*, 58(1), 203–217.
- Dana, Jason, Roberto A. Weber, and Jason Xi Kuang (2007), “Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness,” *Economic Theory*, 33(1), 67–80.
- Givati, Yehonatan, and Israel Rosenberg (2023), “Why do Judges Grant Rehearing Requests? Evidence from the Supreme Court of Israel,” *Journal of Institutional and Theoretical Economics*, 179(1), 6–22.
- Gou, Angie (2022), “As Unanimity Declines, Conservative Majority’s Power Runs Deeper than the Blockbuster Cases,” *SCOTUSblog*, July 3, 2022, <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/>, accessed August 31, 2022.
- Greene, Jenna (2022), “Column: Whodunit? Theories Swirl over U.S. Supreme Court’s Leaked Abortion Opinion,” *Reuters*, May 3, 2022, <https://www.reuters.com/legal/government/whodunit-theories-swirl-over-us-supreme-courts-leaked-abortion-opinion-2022-05-03/>, accessed August 31, 2022.
- Krupka, Erin L., and Roberto A. Weber (2013), “Identifying Social Norms Using Coordination Games: Why does Dictator Game Sharing Vary?” *Journal of the European Economic Association*, 11(3), 495–524.
- Kurschilgen, Michael (2021), “Moral Awareness Polarizes People’s Fairness Judgments,” Munich Papers in Political Economy Working Paper 2021/08, TUM, Munich.
- and Isabel Marcin (2019), “Communication Is More than Information Sharing: The Role of Status-Relevant Knowledge,” *Games and Economic Behavior*, 113, 651–672.

(2023) *Why do Judges Grant Rehearing Requests?* 31

Michael Kurschilgen
UniDistance Suisse
Schinerstrasse 18
3900 Brig
Switzerland
michael.kurschilgen@unidistance.ch

