Beyond Principal–Agent Theories: Law and the Judicial Hierarchy

IT IS NOW COMMONPLACE for judicial politics scholars to describe the federal judicial hierarchy in terms of a principal–agent relationship. The basic outlines of this model are familiar: the United States Supreme Court is conceptualized as the "principal" and the lower federal courts as the "agents." Given resource constraints, the Supreme Court necessarily delegates some of the work of deciding cases to other courts, but as the principal, it sets the policy that the lower courts should implement. Lower court judges, however, have their own goals and preferences, which raises the risk that they will pursue their own ends, thus creating the classic dilemma of principal–agent relationships: how to ensure that agents act on the principal's behalf and not in their own self-interest.

Like traditional attitudinal models, which hold that judges' preferences determine their voting behavior, principal–agent models assume that judges have policy goals that they seek to effectuate through their decision-making. … Although principal–agent theories recognize that institutional context affects judges' decision-making, many of these theories simply ignore the role of law. To the extent that they do account for law, they tend to understand it in instrumental terms … as merely a means for upper courts to communicate their policy preferences, or as an instrument for exercising control over lower courts. … Because the federal judiciary is organized as a hierarchy, with some resemblance to other organizational forms that utilize monitoring and incentives to achieve the principal's goals, the principal–agent model is assumed to be an apt one.

Upon closer examination, however, the principal–agent model does not map so neatly onto the structure of the judicial hierarchy. For example, the Supreme Court, to a far greater degree than most principals, is highly constrained in its ability to shape the incentives of district and circuit court judges. Moreover, there is no direct contractual relationship between Supreme Court Justices and lower federal court judges, making uncertain the basis for any duty on the part of lower courts to act in the interests of the Supreme Court. The lack of an exact fit should not be a surprise given that the concept of agency was developed by the common law to regulate representative relationships and later applied by economists and political

scientists to describe institutions such as the private firm or the government agency—all contexts quite different from the judicial hierarchy. The lack of an exact fit alone does not mean the model cannot be useful, as existing theoretical constructs may offer useful insights when applied in new contexts. Models necessarily simplify a complex reality, however, and in doing so, highlight certain features of the phenomenon under study while eliding others.

The purpose of this essay is to critically examine the use of principal–agent models to describe the federal judicial hierarchy. It explores how reliance on principal–agent theories shapes our understanding of how federal judges make decisions and interact with other actors in the judicial system. As I argue below, agency models are useful in highlighting certain aspects of the interaction between upper and lower courts—specifically, the existence of value conflicts and informational asymmetries. In other ways, however, traditional principal–agent models are a poor fit for the relationship between the lower federal courts and the Supreme Court. As a consequence, reliance on these models may limit our understanding of inter-court interactions. More specifically, these models tend to obscure important normative questions about the relationship between lower and upper courts, as well as to distort the role that law plays in judicial decision-making. …

MUCH OF THE SCHOLARSHIP on the judicial hierarchy is imbued with an implicit normative cast. Scholars write about lower court judges "shirking," "sabotag[ing]," "running amok," or, on the other hand, acting as "faithful agents" pursuing the policies of their superiors. These studies of lower court behavior purport to be asking positive questions about how circuit and district court judges decide cases. Nevertheless, the language used to frame them reveals the normative assumption that often underlies them—namely that lower court judges *should* pursue the Supreme Court's interests rather than their own or some other interests. …

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The common assumption that the lower federal courts are agents with a duty to act on behalf of the Supreme Court masks a normative question: why *should* lower federal court judges pursue the interests of the Supreme Court and not their own goals or some other interest? Perhaps federal judges are better understood as agents (in the normative sense) of Congress, particularly when they are interpreting statutes, or of the President who nominated them. Or perhaps the principal, whose interest they *should* seek to advance, is the public, or more provocatively, the law. For each of these hypothetical principals, serious questions exist regarding the extent to which it could or does control the actions of federal district and circuit court judges. However, the normative possibilities that lower court judges *should* pursue these interests deserve consideration. …

Discarding the language of principal–agent theory expands the possibilities for describing the interactions between upper and lower courts. Agency theories tend to caricature the strategies of both the Supreme Court and the lower federal courts. In these accounts, the Supreme Court is singularly focused on controlling the decisional output of the lower courts to ensure that lower court decisions comport with its preferences, while the lower courts are principally concerned with evasion in order to achieve their own policy goals. Law and doctrine are merely tools in this struggle—ways of signaling or commanding obedience on the one hand, and of feigning compliance and avoiding detection on the other. What is entirely missing from this account is any sense that courts at the various levels of the hierarchy might be engaged in a common venture—one in which cooperation offers the possibility of a joint payoff.

Taking into account this possibility requires a shift in the basic assumption that animates much of the judicial politics literature—namely, that judges are primarily motivated by their policy preferences. Instead, one might view judges as engaged in an interaction that involves both elements of cooperation and conflict in a type of mixed-motive coordination game. From this perspective, judges share a common goal—the production of a (relatively) coherent body of rules that can govern primary behavior in the real world and is viewed as authoritative. At the same time, their efforts at cooperation are plagued by conflicts over what substantive rules or policies should be instantiated in the law. They struggle over what legal policies to pursue, but if taken too far, this conflict will undermine coordination to the point that the coherence of the system unravels, leaving all worse off. …

Elevating the role of law in this way does not entail formalist conceptions of law as a determinate body of rules or a "brooding omnipresence" waiting to be discovered through legal reason. Nor does it endorse the more recent claim that judges merely act as umpires calling balls and strikes. To the contrary, this view of the judicial hierarchy argues that judges are very much engaged in the project of making law. But it argues that in doing so they are engaged in a cooperative venture. No single court has the capacity or the expertise to develop a useful body of rules alone. All have an interest in cooperating in order to enhance the quality of their output and their collective legitimacy. At the same time, articulating legal rules entails choices, and those choices often implicate policy concerns. The existence of varying policy preferences within the judiciary means that value conflicts are unavoidable, and the law is also a ground of contestation over policy. Though inevitable, these policy conflicts are cabined to some extent by the need for cooperation. …

[T]HE EFFORT OF DEVELOPING new theoretical frameworks is important to advance understanding of relationships across the judicial hierarchy. Crucial to this effort is the recognition that the Supreme Court and lower court judges are engaged in an ongoing interaction involving elements of both cooperation and conflict. And rather than seeing the law as a mere tool in their struggle, it might be more productive to view the production of law as the joint goal of upper and lower courts, as well as the grounds on which their value conflicts play out. ||||

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