

Group Dynamics: Group Decision Making and the Court

The Law of Group Polarization, by Cass R. Sunstein, an abstract

In a striking empirical regularity, deliberation tends to move groups, and the individuals who compose them, toward a more extreme point in the direction indicated by their own predeliberation judgments. For example, people who are opposed to the minimum wage are likely, after talking to each other, to be still more opposed. People who tend to support gun control are likely, after discussion, to support gun control with considerable enthusiasm. People who believe that global warming is a serious problem are likely, after discussion, to insist on severe measures to prevent global warming. Jurors who support a high punitive damage award are likely, after talking, to support an award higher than the median of their predeliberation judgments.

This general phenomenon -- group polarization -- has many implications for economic, political, and legal institutions. It helps to explain extremism, "radicalization," cultural shifts, and the behavior of political parties and religious organizations. It is closely connected to current concerns about the consequences of the Internet, talk radio, and highly specialized television stations. It also helps account for feuds, ethnic antagonism, and tribalism.

Group polarization bears on the conduct of government institutions, including juries, legislatures, courts, and regulatory commissions. There are interesting relationships between group polarization and social cascades, both informational and reputational. Normative implications are discussed, with special attention to political and legal institutions. "The differences of opinion, and the jarrings of parties in [the legislative] department of the government . . . often promote deliberation and circumspection; and serve to check the excesses of the majority." Alexander Hamilton 13.

Multimember courts.

Group polarization should also occur on multimember courts. Notwithstanding platitudes about judicial neutrality, judges often have a great deal of latitude, sometimes in the ultimate outcome, more often in determining the reach of their decision. If a court consists of three or more like-minded judges, it may well end up with a relatively extreme position, more extreme in fact than the position it would occupy if it consisted of two like-minded individuals and one of a different orientation.

There is little direct confirmation of this general proposition. But considerable support comes from two intriguing studies of judicial behavior on the D.C. Circuit. The first study finds a tendency toward more extreme results when a panel consists of judges from a single political party. Most notably, a panel of three Republican judges is far more likely than a panel of two Republicans and three Democrats to reverse an environmental decision at the behest of industry challengers. This is precisely what would be predicted by group polarization: a panel of three Republican judges is far more likely to go in an extreme direction than one of two Republicans and one Democrat.

The second study is a bit more complex. Under *Chevron v. NRDC*, courts are supposed to uphold agency interpretations of law so long as the interpretations are “reasonable.” When do courts obey this stricture? The second study strongly suggests that group polarization plays a role. The most important finding is a dramatic difference, on the United States court of appeals for the District of Columbia Circuit, between politically diverse panels (with judges appointed by Presidents of more than one party) and “unified” panels (with judges appointed by Presidents of only one party). On divided panels in which a majority of the court might be expected, on broadly speaking political grounds, to be hostile to the agency, the court deferred to the agency 62% of the time. But on unified panels in which the court might be expected to be hostile to the agency, the court upheld the agency interpretation only 33% of the time. Note that this was the only asymmetry in the data; when courts were expected to uphold the agency’s decision on political controls, they did so over 70% of the time, whether unified (71% of the time) or divided (86% of the time).

There is no smoking gun here, but it seems reasonable to speculate that the seemingly bizarre result – a mere 33% validation rate in cases in which the panel was unified – reflects a process of group polarization. A group of likeminded judges may well take the relatively unusual step of rejecting an agency interpretation, whereas as a divided panel, with a check on any tendency toward extreme outcomes, is more likely to take the conventional route.

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