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Deciding When To Decide - Appellate Procedure and Legal Change

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Deciding When To Decide - Appellate Procedure and Legal Change

Suppose you are a judge on the court of appeals. The case before you concerns some rule or doctrine from a thirty-year-old case, *X v. Y*. A couple of months ago, the Supreme Court granted certiorari in a case that also concerns the rule in *X v. Y*. You are almost certain the Supreme Court will repudiate *X v. Y*. (Perhaps last year the Court harshly criticized the old rule in considered dicta and suggested it was ripe for overruling in an appropriate case.) What should you do?

A helpful agent might suppose that the best approach is to decide every case by asking, What would SCOTUS do? If that is the right question to ask, it would be clear to you that you should not follow *X v. Y*. All the same, you also know that the Supreme Court itself has cautioned that lower courts should not be proactive in overruling but should instead wait for the Court itself to deal the final blow to a staggering precedent. So, dutifully, you follow the existing precedent of *X v. Y*. A few months later, the Supreme Court inters *X v. Y*.

When commentators discuss this problem, the issue is typically framed in terms of whether anticipatory overruling is desirable or appropriate; more generally, the debate concerns whether lower courts should attempt to predict how the Supreme Court would decide a case or instead must strictly follow existing precedents. Those are good questions, but framing the problem this way overlooks another dimension of the problem. Rather than now ruling in either direction, the lower court could just wait until after the Supreme Court decision and then rule accordingly. To be sure, waiting might not always be the right choice. The point is just that the lower court has to choose not just which way to decide, but *when* to decide.

If this problem interests you, I have just posted a draft paper addressing these topics [here](#). The abstract follows:

Legal change is a fact of life. The need to deal with legal change has spawned a number of complicated bodies of doctrine. Some of these issues have been studied extensively, such as doctrines concerning the retroactivity of new law and the question whether inferior courts can anticipatorily overrule a moribund superior court precedent. How such questions are answered affects the size and the distribution of the costs of legal change. Less appreciated is the way that heretofore almost invisible matters of appellate procedure and case handling also allocate the costs of legal transitions. In particular, this Article focuses on lower courts' discretionary decisions about when to decide the cases that come before them: should lower courts continue to decide cases in the regular course even when a change in law is in the offing, or should they delay adjudication until after the dust has settled?

The Article has both positive and normative aspects. It begins by drawing together several bodies of doctrine in order to present a unified account of what we can call our system's law of legal change. The Article then presents a case study of the six-month interval between *Blakely v. Washington*, which invalidated a state sentencing scheme and cast substantial doubt on federal sentencing guidelines, and *United States v. Booker*, which then held *Blakely* applicable to the federal system. A majority of the appellate courts that addressed the question upheld the federal guidelines during this transitional interval. Beneath the surface, however, the various courts upholding the guidelines managed cases very differently. Some circuits bore much of the cost of legal change themselves, while others shifted some of the cost to litigants and other courts. Based on the insights gleaned from this episode, I suggest a framework for evaluating and perhaps improving how courts process cases during transitional periods. Case management decisions are highly context-specific, which makes it difficult and perhaps undesirable to formulate general rules, but we might be able to improve courts' handling of such matters by altering the institutional environment and modifying incentives.

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