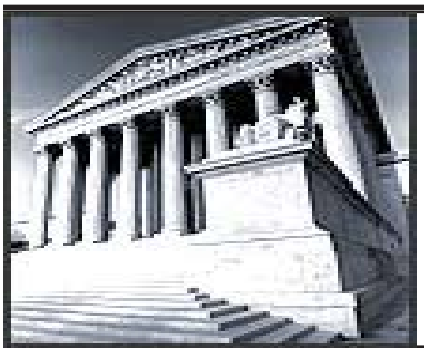

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FROM THE SECTION CHAIR:

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Past, Present, and Future with the "Comparative Advantage": Part I, 1892-1989

Some three years ago one of my predecessors as Chair of the Law and Courts Organized Section, Lee Epstein, urged her colleagues (in her column in this *Newsletter*) to grasp the "comparative advantage" in their research (Epstein 1999). Epstein lamented: "We judicial specialists continue to focus on the U.S. Supreme Court, despite its (potentially) decreasing importance, and continue (with limited exceptions) to ignore courts abroad, despite their increasing prominence" (Epstein 1999:1). She went on to quote with approval the lament of Gibson, Caldeira, and Baird (1998) that "comparativists know precious little about the judicial and legal systems in countries outside the United States" and that "The degree to which the field of comparative politics has ignored courts and law is as remarkable as it is regrettable."

These complaints had been uttered before in a variety of contexts.[2] Today, however, a vibrant new interest in "comparative judicial" pervades the field and the choir to which the complainers preach has grown considerably larger.

If comparative judicial politics has arrived, it was not always so. Nevertheless, for decades studies that might fairly be called analyses of comparative judicial politics remained a small segment of the broader field of public law, an important heritage for the contemporary interest. This column examines some of the possible forgotten history of "comparative judicial" from its beginnings through the 1980s.

Beginnings

Judicial scholars writing in English have paid some attention to the organization and operations of foreign judicial systems from the very early days of political science. *Political Science Quarterly*, the first American political science scholarly journal, had published by 1915 reports or articles on the courts of Russia (Hourwich's 1892), the Anglo-Saxons (Zinkeisen 1895), the German Empire (Garner 1902, 1903) and France (Duguit 1914).

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Instructions to Contributors

General Information

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Articles, Notes, and Commentary

We will be glad to consider brief articles and notes concerning matters of interest to readers of **Law and Courts.** Research findings, teaching innovations, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review.* Please submit two copies of the manuscript; enclose a diskette containing the contents of the submission; provide a description of the disk's format (for example, DOS, MAC) and of the word processing package used (for example, WORD, Wordperfect). For manuscripts submitted via electronic mail, please use ASCII or Rich Text Format (RTF).

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Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when posible. Finally, authors should notify *Helena Silverstein* at silversh@mail.lafayette.edu, of publication of manuscripts.

A newcomer, T*he American Political Science Review* (APSR), soon entered the comparative judicial game with accounts of "The Tenure of English Judges" (McIlwain 1913) and "Judicial Control of Legislative and Administrative Acts in France" (Garner 1915).

The early scholarly interest in the courts of Imperial Germany (Garner 1902, 1903) continued and expanded during that nation's Weimar, Nazi, and postwar manifestations. The principal political science journals from the 1920's through the 1950's printed a fascinating series of articles on: judicial review in Germany (Blatchley and Oatley 1927, Friedrich 1928), the German Labor Courts (Davis 1929; Cole 1941, 1956) and Nazi "Social Honor" Courts (Pelcovits 1938), "The Judicial System of the Nazi Party" (Mason 1944), and the then new Federal Constitutional Court (Leibholz 1952, Cole 1958).

Occasionally, a major political science journal published a study or commentary on the judiciary or judicial review in other countries, including Austria (Grant 1920), Guatemala (Grant 1947), Colombia (Grant 1948), and Australia (Vile 1957), or comparative accounts of judicial review (Haines 1930, Kelsen 1942, and Deener 1952).

Given their publication dates, these articles were naturally largely historical and formal-legal in their approach. Nevertheless, they document substantive interests – judicial review, interbranch relations, the roles of judiciaries in old and new democracies and in dictatorships — that are surely as vital today as they were 50 to 100 years ago.

The Beginnings of Modern Comparative Judicial Politics

A journal article that one might use to mark the beginning of modern political science exploration of comparative judicial politics is Taylor Cole's American Political Science Association presidential address "Three Constitutional Courts: A Comparison," a structural-functional and doctrinal decision making analysis of the West German, Italian and Austrian constitutional courts. Cole established himself as the first modern scholar to urge his colleagues to increase their study of comparative judicial systems, noting that the courts represented an "area which has received too little attention and which is deserving of more study in the future" (1958: 965). Cole's presidential address was soon followed by the publication in major political science journals of other historical analyses of non-U.S. judicial systems, including Japan (Dionisopoulos 1960), and, again, West Germany (Baade 1961, Reich 1963).

It was not long after the publication of Cole's address until sociological/empirical (as opposed to formal-legal/historical) research that warrants the label comparative judicial politics/behavior began to emerge. The first comparative judicial articles to be brought to the attention of American scholars were authored by indigenous investigators, not by Americans.[3] Aubert's (1963) study of the decisions of Norwegian military courts in conscientious objectors cases and Torgersen's (1963) assessment of the background of the judges of the Norwegian Supreme Court were reproduced in English in Schubert's *Judicial Decision-Making* (1963), the first judicial behavior collection published. Aubert's article actually appeared in Norway in 1956, two years before Glendon Schubert's own first published judicial behavior article (1958).

Only one year later (1964), Schubert published his magisterial *Judicial Behavior: A Reader in Theory and Research*, an anthology with comparative content. Schubert hoped that the publication of the volume would bring the judicial behavior movement "to the attention of scholars in other countries, some of whom may be stimulated to undertake similar inquiries into the behavior of judges in their own countries. Such work in other countries will be essential to the development of a science of comparative judicial behavior." The reprinting in *Judicial Behavior* of Hayakawa's (1962) scalogram analysis of civil liberties in the Japanese Supreme Court marked the first scholarly attempt to apply the psychometric methods of the American judicial behavioralists to a non-U.S. court and was evidence that Schubert's hope might become reality.[4]

After this promising beginning, no original comparative judicial research of any kind was published in the next two years. In fact, this temporary disappearances of comparative judicial research from the literature was misleading. Schubert was already hard at work doing research on the Australian High Court and encouraging judicial behavior research among a cohort of colleagues at his new home, York University in Toronto. Schubert's work and proselytizing and the presumably independent research of others led to a vigorous reappearance of comparative judicial politics research, beginning in 1967 and continuing for several years.

1967 was a turnaround year. In that year, Becker published a forerunner to his *Comparative Judicial Politics* (1970) in which he attempted to provide measurable definitions of the structure and functions of "courts" and "judging," Dator (1967) reported survey responses of Japanese Supreme Court judges that assessed liberal/conservative attitudes, and Sheldon (1967) reported a genuinely comparative assessment of the relationship between Supreme Court rulings and public opinion in the United States, Australia, Canada and Germany that suggested that courts were responsive to public opinion, except in Australia (1967: 360).

Schubert's Canadian evangelical efforts bore their first fruit with the publication by law professor Sidney Peck of an article laying out the basis for applying scalogram analysis to the decisions of the Canadian Supreme Court (1967a) and applying that analysis to the decision making of that Court for the period 1958-1966 (1967b).

Finally, 1967 was the year of the publication in the United Kingdom of Abel-Smith and Stevens' *In Search of Justice: Law, Society and the Legal System*. Strictly speaking, this book was not a study in comparative judicial politics; it was, however, the first serious effort to analyze the British legal system, including its judges, from a social science perspective. It was a foundation of the law and society movement in Britain and laid the groundwork for subsequent comparative judicial analyses.

Schubert's first publications on Australia appeared in 1968 in the *Australian and New Zealand Journal of Sociology* (1968a) and *Politics* (1968b). Following the lead of his U.S. work, these articles analyzed political ideology and interjudicial opinion agreement on the High Court. Also appearing in 1968 was Hensley's "National Bias and the International Court of Justice," which demonstrated the significance of nationality differences in the voting of a supranational court.

Three Landmark Monographs Bring in the 1970s

The turn of the decade of the 1960s saw the publication of three monographs that were landmarks in the development of comparative judicial politics. *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West* (1969) and *Frontiers of Judicial Research* (1969) were edited collections containing original data-based research on courts and judges in several non-US countries. Each had emerged from a series of important scholarly conferences and workshops held in the 1960s.

Comparative Judicial Behavior was impressive. It included original chapters analyzing the Korean legal system, "Empirical Jurisprudence in Japan," the Japanese, Philippine, Indian, Canadian, and Australian high courts, and exploring simulated judicial decision-making in Hawaii and the Philippines. For Korea, India, and the Philippines, these were the first empirical analyses of judicial behavior ever to have been published.

Most of the contributions in *Frontiers of Judicial Research* focused on the United States legal system; however, in a demonstration of catholicity, it also included analyses of "The People and the Court in Japan," of ". . . Opinion and Voting Behavior of the Australian High Court," "The Federal Constitutional Court in the West German Political System," and " . . . Judicial Decision-Making and Recruitment" in the Swiss Federal Court.

The third monograph in this trio, *Comparative Judicial Politics* (1970), attempted to present a conceptual and theoretical approach to analyzing courts, not judges. While the grounding of this work in structural-functionalism may ultimately have limited its appeal, it was a valiant effort to organize an inchoate field that included rigorous attempts to introduce and explore a very useful set of concepts.

Outside the covers of *Comparative Judicial Behavior* and *Frontiers of Judicial Research* a number of other publications also marked the continued flowering of comparative judicial studies at the turn of the 1960s. Holmes and Rovet (1969) made an important contribution by extending judicial behavior analyses to a Canadian provincial court, the Ontario Court of Appeals. Schubert (1969a) separately analyzed the decision making of the Dixon court in Australia. Gadbois expanded his Indian research in articles appearing in *Law and Society Review* (1969a) and the Indian journal *Economic and Political Weekly* (1970). Russell's *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1970) brought at least some trace of judicial behavior empiricism to a government commission report on a politically sensitive issue. Johnston (1969) and McWhinney (1969) marked a renewal of more traditional comparative judicial work with their books on judicial review in the British Commonwealth.

Limited Progress in the 1970s

By the end of the 1960s, the leading American judicial scholars had embraced empirical and, with perhaps some confusion, theoretical analyses of courts and judges. They had pushed the boundaries of judicial scholarship and produced an emerging core of cross-cultural work that held tremendous promise for a truly comparative theory of judicial decision-making. It might have seemed that comparative judicial politics was certain to be an exciting, growing, and influential field. Alas, it was not to be. While comparative judicial work continued to appear with some regularity in the 1970s, many of the scholars who had pioneered it in the 1960s abandoned their commitment to empirical comparative work. By and large, the Law and Courts field largely ignored the call for greater comparative focus. The momentum toward building comparative judicial theories slowed substantially during the 1970s.

That is not to say that nothing happened. There were certainly notable developments in the 1970s, many of which were direct heritages of the comparative judicial ferment of the late 1960s: Among the most important works certainly

were Fred Morrison's *Courts and the Judicial Process in England* (1973), Kommers' *Judicial Politics in West Germany* (1976); and Murphy, Tanenhaus and Kastner's (1973) *Public Evaluations of Constitutional Courts*. Empirical articles in French by Bouthillier (1971, 1972, 1977, 1978), Herard (1971), and Pelletier (1971), Russell's "The Political Role of the Supreme Court of Canada in Its First Century" (1975b) and Adams and Cavalluzzo (1979) "biographical study" of the Canadian Supreme Court joined the list of Canadian judicial politics studies. Quantitative decision-making analyses by Blackshield on Australia (1972) and Tate on the Philippines (1972) introduced Asian lawyers to judicial behavior research. Also noteworthy were a comparative empirical analysis of international courts and organizations by Coplin and Rochester (1972) and Toharia's (1975) analysis of judicial independence in authoritarian Spain, one of the first empirical pieces to focus on the judiciary in a non-democratic country.

In other work, Tate (1975) published a statistically innovative probing of political recruitment to the higher British judiciary, renewing the analysis of judicial elites; Schubert published reports (1977, 1980) on the comparative South African and Swiss project he had conducted in the late 1960s; Wenner, Wenner, and Flango (1978) reported on a two court comparative survey of Austrian and Swiss judges, specifically comparing their results with previous results for common law judges. Finally, Shapiro's important review article "Courts" the basis for book of the same name (1980), appeared in the *Handbook of Political Science* (1975). Drawing on the author's vast knowledge of the history and practice of law and courts around the world, Shapiro's "Courts" (or *Courts*) was the most important conceptual work of the 1970s.

The 1970s also saw the publication of a variety of other works that dealt with non-American courts and legal systems, from a variety of perspectives. Among these were Bartholomew's *The Irish Judiciary* (1971), Becker's collection on *Political Trials* (1971), Becker and Feeley's compilation of studies on the impact of supreme court decisions (1973), Drewry's commentary on the English legal system *Law, Justice, and Politics* (1975), Ehrmann's *Comparative Legal Cultures* (1978), David and Brierly's *Major Legal Systems in the World Today* (1978), Steven's politically-aware history of the British House of Lords in its judicial capacity (1978), and two historical doctrinal articles published in *The American Political Science Review* (Fried 1976; Nova 1976).

Turmoil surrounding the rule of Indira Gandhi in India and her conflicts with the courts let to a proliferation of politically aware works on the Indian Supreme Court and judiciary by several brilliant indigenous scholars (see such works as Baxi 1980; Dhavan 1976, 1977, 1978; Dhavan and Jacob 1978, 1980). The violent first decade of Nigeria's independence form a compelling backdrop for another fascinating, if relatively legalistic, collection on the Supreme Court of Nigeria (Kasumu 1977).

All these works were informative, even useful to anyone interested in better understanding the role of courts in politics.

Rolling Along in the 1980s: The Journals

In the scholarly journals, the 1980s began as the 1970s had ended. Comparative judicial politics studies continued to appear, but the excitement of the 1960s had not returned. Certainly one of the most interesting articles of the 1980s was David Robertson's (1982) "jurimetrics analysis" of the Law Lords, one of the national supreme judiciaries that had previously been least likely to draw the attention of social science analysts and presumed to be of little value as a subject for judicial behavior-oriented analyses. Also worthy of attention was Van Koppen and ten Kate's (1984) survey experiment that explored the impact of personality, role orientations and other factors on the decisions of 114 judges of the Dutch Cantonal and Trial Courts in fictional civil cases.

Little noted but interesting for their empiricism were Peter McCormick's articles on the case load and output of the provincial Courts of Appeal in Manitoba (1986) and Saskatchewan (1989), Maurice Sunkin's (1987) "What is Happening to Applications for Judicial Review?," and Tate and Sittiwong's (1986) analysis of "The Supreme Court and Justice in the Marcos Era." Also focusing on Canada, with a much more theoretical and statistical focus, was Tate and Sittiwong's (1989) extension of the personal attributes model to the voting of the Canadian Supreme Court justices. Examining the British Court of Appeal was Burton Atkins in "Judicial Selection in Context: The American and English Experience" (1988-89). Lastly, Giles and Lancaster's (1989) macro-level analysis of increasing litigation rates in Spain during periods of economic and political development marked the first appearance of an empirical comparative legal systems study in the *American Political Science Review*.

There were other journal articles published in the 1980s that expanded our knowledge of comparative judicial politics, though they were not as strongly empirically based as the ones just discussed. Beller's (1983) case study of the "Assertion of Supreme Court Authority in Democratic India" was a notable example, as was Landfried's (1985) treatment of "The Impact of the German Federal Constitutional Court on Politics and Policy Output" and Manfredi's (1989) analysis of "Adjudication, Policy-Making and the Supreme Court of Canada." Three studies of Italy's constitutional

court appeared at the end of the 1980s (Furlong 1988; Volcansek 1988, 1989). An important summary effort was Verner's (1984) assessment of judicial independence in Latin America. Finally, the first statement of the important work of Alec Stone Sweet appeared in 1989 in *West European Politics*.[5]

Rolling Along in the 1980s: The Beginnings of the Monograph Explosion

The mid-1980s saw the beginning of what has become a virtual comparative judicial monograph explosion that has continued with force through the 1990s and until the present. The most important empirical comparative judicial behavior monograph published in the 1980s should have been Schubert's (1985) two-volume work *Political Culture and Judicial Behavior*. This study reported on Schubert's investigations conducted in South Africa and Switzerland a decade and a half earlier. Perhaps it was because of this delay in publication, Schubert's shifted research interests, the book's less-distinguished publisher, or its complicated and difficult style that *Political Culture and Judicial Behavior* never had the impact on the field that Schubert had anticipated, despite its distinguished and influential author and its interesting and innovative research design.

Another book of the 1980s that deserves mention for its empirical content is Alan Paterson's *The Law Lords* (1982). Though written by a law professor and generally legalistic in its orientation, Paterson's work was distinguished by its foundation in data drawn from personal, semi-structured interviews with Britain's highest judges.

Noteworthy at least for its limited empirical foundation was Landfried's (1984) treatise on the German Constitutional Court, *Bundesverfassungsgericht und Gesetzgeber.* Although Landfried's book has not to my knowledge ever been translated into English, its theme and some of its findings have been expostulated by its author in English on a number of occasions. Also noteworthy because of its historical/empirical concentration on the judiciary of apartheid South Africa was Corder's (1984) *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-50.*

Next on our list of noteworthy comparative judicial politics books of the 1980s is Mary Volcansek's initial contribution to the field, *Judicial Politics in Europe: An Impact Analysis* (1986). Though not heavily quantitative in approach, *Judicial Politics in Europe* brought to its study a theoretical awareness and a learned empiricism that clearly set it apart from the more legalistic works in the field.

The next year saw the publication of two volumes that reflected the influence of the prominent Canadian judicial scholar and constitutional politics authority, Peter Russell. Russell himself (1987a) brought together decades of expertise to produce *The Judiciary in Canada: The Third Branch of Government*, a thorough guide to its subject. Russell's former student Brian Galligan (1987) similarly enlightened the scholarly community about the top court in his native Australia with *Politics of the High Court: A Study of the Judicial Branch of Government in Australia.*

There were other books and monographs published in the 1980s that, like those of the 1970s, were informative and sometimes useful to comparative judicial politics students and scholars. Guarnieri's *L'indipendenza della Magistratura* is little known to scholars who do not read Italian, but its themes are important and, as in the case of Landfried, have been discussed in a number of English articles and chapters by the author. Millar and Baar treated *Judicial Administration in Canada* (1981). Katz (1986) edited a reference *Legal Traditions and Systems: An International Handbook*. The Indian situation produced more commentaries (see Raina 1986; Sharma 1986; Siwach 1986).

Before wrapping up our discussion of the 1980s, we must note the publication of two more volumes, Schmidhauser's (1987b) *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, and Waltman and Holland's anthology *The Political Role of Law Courts in Modern Democracies* (1988), and a brief journal symposium "International Perspectives on Civil Court Reform" (Provine and Seron 1988).

Comparative Judicial Systems was an uneven collection of work originally presented at meetings of the International Political Science Association's Research Committee on Comparative Judicial Studies that included the previously mentioned assessment of the field by Tate (1987) and an important conceptual chapter by Schmidhauser (1987a), among other works. Waltman and Holland's volume presented for the student and teacher basic information about the system of courts and their political role in each of nine countries. Provine and Seron's civil court reform symposium brought comparative focus to the study of judicial administration.

The Political Role of Law Courts in Modern Democracies and *Comparative Judicial Systems* mark the take off point for what became in the 1990s a remarkable flowering of anthologies on non-U.S. courts and legal systems that appeared in journal symposia and edited books. That flowering and the concomitant rejuvenation of comparative judicial politics in other publishing venues are the subject of part II of this essay.

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Notes

1 This article is adapted from C. Neal Tate and Stacia L. Haynie, "Comparative Judicial Politics: Intellectual History and Bibliography," prepared for the Law and Courts Short Course on Comparative Judicial Systems and Politics presented at the Annual Meeting of the American Political Science Association, San Francisco, August 29, 2001.

2 Some of my own whining on this point can be found in Tate (1983, 1987, 1989, 1992).

3 Here we encounter for the first time the perennial problem that the term "comparative," as used in American political science, refers to studies of "foreign" political systems and their actors. From the point of view of their authors, these were not "comparative" articles at all, since they were not studies of "foreign" courts.

4 Ju*dicial Behavior* also contained excerpts on tribal African judiciaries drawn from the works of the legal anthropologists Gluckman (1964) and Bohannon (1964). These excerpts were intended to serve as illustrations of the contributions to the understanding of judicial behavior that could be made by studies employing the largely ethnographic methods of cultural anthropology. Such investigations (though not just of tribal systems) continue to form an important part of the efforts of contemporary sociolegal scholars. For the sake of topic manageability, we do not pursue them here.

5 To avoid straying too far from our theme and to save space, I do not discuss the considerable amount of comparative legal systems/law and society work that was appearing in *Law & Society Review* at this time.

GETTING READY FOR GARZA? JUDGE EMILIO GARZA, CIVIL LIBERTIES AND THE POLITICS OF JUDICIAL SELECTION

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Fifth Circuit Court of Appeals Judge Emilio M. Garza is considered a front-runner to be nominated to the U.S. Supreme Court. A finalist for the nomination which eventually went to Clarence Thomas in 1991, Garza is widely discussed as a leading candidate to be picked by President George W. Bush should a vacancy appear on the Court.[1] Part of Judge Garza's appeal appears to be that while he is known as a conservative judge, "he is thought not to veer too far to the right," as the *National Law Journal* wrote in 1991.[2] Indeed, one commentator argued that Judge Garza is likely to be nominated to the Court because while he has strong conservative views, "he's shrewd enough not to wear them on his sleeve."[3] Political and ideological compatibility play a central role in judicial selection today, and Judge Garza may be just the type of conservative that President Bush would like to nominate.

This essay brings the tools of political science research to bear on an important contemporary issue—that is, an important contemporary figure—in American judicial politics. I do not speculate as to how "shrewd" Judge Garza may be, but I do report evidence showing that Garza is in fact a very conservative judge. His voting record in recent, published civil liberties and criminal cases reveals that Judge Garza decides far fewer cases in favor of plaintiffs than research on Republican Courts of Appeals judges would predict. Behavioral jurisprudence is dominated by the search for trends among groups of jurists and by efforts to develop generalizable theories of the activity of judging, and it has produced methods and benchmarks by which individual judges can productively be assessed. This article, then, applies techniques commonly used to study cohorts of judges to an examination of a single member of the bench.

Moreover, I find it necessary to adopt a way of studying judicial behavior which combines quantitative analysis of voting records with qualitative evaluation of opinions. For Judge Garza's votes do not offer a sufficiently full picture of his judicial character and ideology. First, in a few crucial cases—dealing with the death penalty, abortion, and church and state—Garza's opinions reveal much more about his views than do his votes. Second, attention to those opinions reveals an intriguing shift in style. In virtually every sampled opinion, Judge Garza's voice is the very model of restraint: neutral, direct, and colorless in style. He rarely uses analogy or metaphor, sticks closely to the law, precedents, the facts of the case, and emphasizes deference to other courts and legislatures. His quiet, efficient opinions almost never extrapolate to hypotheticals, employ the first person, or examine law's relationship to political or moral issues. In reading these opinions, one begins to wonder whether a "mechanistic" jurisprudence may exist after all.

Perhaps this is the style one might expect from a politically-conservative judge who in 1988 told the Senate, "[i]t is not for me to decide or to make my own judgments on legal matters. It is for me to read the law, to understand it as best as I am capable of understanding it."[4] Indeed, Garza's public descriptions of his role closely fit the statements of J. Woodford Howard's "interpreters" (Howard 1977). But in a handful of cases, Judge Garza's judicial voice changes. His language becomes more personal, normative, and forceful, and his opinions consider issues beyond the immediate case; one senses that Garza may be writing to reach audiences outside the courtroom. To be sure, even here Judge Garza remains more rhetorically moderate than Justice Antonin Scalia, who so often devotes important opinions to "wailing about the sinfulness of society" (Brisbin 1997). But in these opinions—almost all of which are quite conservative—Judge Garza appears willing to abandon his muted, neutral, deferential voice for a much more powerful one. And in two politically-sensitive areas of civil liberties law—the Establishment Clause and the right to abortion—Garza makes no secret of his disagreement with his colleagues and even with the U.S. Supreme Court.

I. Judge Garza's Background

After earning B.A. and M.A. degrees from Notre Dame, Emilio M. Garza served three years' active duty as a Captain in the U.S. Marine Corps, then attended law school at the University of Texas.[5] From 1976 to 1987, Garza was a civil litigator with

a 15-partner San Antonio firm, where he represented the defense in malpractice, negligence, and products liability cases. Garza served as a state district judge for about a year, and was 40 when President Reagan nominated him for a federal district judgeship in western Texas in 1988. When Garza was elevated to the 5th U.S. Circuit Court of Appeals in April 1991, the Texas Lawyer wrote that the choice "follows the pattern of tapping young conservatives with experience in corporate firms that Bush and Reagan have used in most of their choices to appellate courts." Garza was instantly seen as a potential high court nominee: before Clarence Thomas was nominated for the seat vacated by the retirement of Thurgood Marshall, the New York Times reported that President Bush was "leaning" towards Garza. By all accounts, Garza was one of three or four finalists for the nomination.[6] Garza, who is single, is a devout Catholic and is said to regularly attend Mass during his lunch hour. Associates report that he maintains a "priestly" bearing in the courtroom, "very dignified, very formal," according to one member of the Texas legal community.[7]

II. Methodology.

The factual and legal questions presented by discrete cases vary greatly, but tallying which side wins and loses in each case can reveal an underlying political dimension of judicial decision, and meaningful measurements of a judge's political ideology can be produced by examining her voting record across a sufficiently large set of cases.[8] A generation of scholarship in judicial politics has operated on the consensus that certain decisions—expanding civil liberties protections, for example, or upholding government regulation of economic activity—can be classified as "liberal," while decisions opposing such claims can be described as "conservative."

In order to capture a significant sample of Judge Garza's civil-liberties and criminal-procedure decisions which would also be accessible and manageable, I gathered data from all published decisions in which Judge Garza participated during calendar years 1998-2000; to increase the number of civil liberties cases in the sample, I added such cases from calendar year 1997 as well.[9] Of course, a sample of this size offers only "a glimpse of decisional tendencies in a limited number of issue areas over a limited period," but such glimpses can be very useful (Gottschall 1986). I also read all abortion and Establishment Clause cases in which Judge Garza participated after 1991, when he joined the Fifth Circuit. The abortion views of judicial nominees, of course, draw a great deal of scrutiny today, and because President Bush has made clear that more closely connecting social policy and education with religious organizations will be a priority of his Administration, Judge Garza's Establishment Clause views are important.

I measured Judge Garza's voting record on the Fifth Circuit by the well-established "percent liberal" standard.[10] Fortunately, there is strong, recent scholarship gauging Courts of Appeals voting behavior by this technique. In *Continuity and Change on the United States Courts of Appeals* ***(2000),*** Songer and his colleagues show that between 1970 and 1988, Republican judges on the U.S. Courts of Appeals voted in the liberal direction in about 27% of civil rights and civil liberties cases, and in about 21% of criminal cases.[11] An earlier study produced similar figures. In an assessment of Democratic and Republican appointees on the U.S. Courts of Appeals, Jon Gottschall examined almost four thousand cases decided in 1983 and 1984 (Gottschall 1986). Gottschall found that Nixon, Ford, and Reagan appointees to the Circuit bench voted in the liberal direction in about 35% of criminal justice cases and in a slightly lower percentage of civil-liberties cases.[12] Taken together, these studies predict that a Republican-appointed judge sitting on the Courts of Appeals will likely vote in the liberal direction in between one-fifth and one-third of criminal and civil liberties cases.[13]

III. Results and discussion*

Table I.: Civil liberties and criminal justice decisions in which Judge Garza participated, 1997-2000: (N = 138)

% of panel majority's decisions which were liberal: 16 %
% of Judge Garza's positions which were liberal: 8 %

[**Data reported in all tables includes all published non-economic decisions from 1998-2000, and only non-criminal civil liberties cases from 1997. Judge Reynaldo G. Garza also sits on the Fifth Circuit bench; in this article, "Judge Garza" refers to Judge Emilio M. Garza.*]

Table II. Non-criminal-justice civil liberties decisions in which Judge Garza participated (N = 65)

% of panel majority's decisions which were liberal: 18 %
% of Judge Garza's positions which were liberal: 6 %

Table III. Criminal-justice decisions in which Judge Garza participated (N = 73)

% of panel majority's decisions which were liberal: 14%
% of Judge Garza's positions which were liberal: 7 %

Table IV.: All non-unanimous decisions in which Judge Garza participated (N = 33)*

% of panel majority's decisions which were liberal: 39 %
% of Judge Garza's positions which were liberal: 9 %

[**The sample included nineteen non-unanimous civil-liberties decisions and fourteen non-unanimous criminal cases. The panel majority voted in the liberal direction in 45% of non-unanimous civil liberties cases, and 36% of non-unanimous criminal cases; Judge Garza cast liberal votes in 5% of non-unanimous civil liberties cases, and 14% of non-unanimous criminal cases.*]

Table V.: Decisions in which Judge Garza participated which reversed, reversed in part, or vacated a lower court decision (N = 55)

% of panel majority's decisions which were liberal: 25 %
% of Judge Garza's positions which were liberal: 11 %

a. Judge Garza's Voting Record

These data suggest that Emilio M. Garza is a very conservative judge. Previous research would lead us to predict that a Republican-appointed judge on the Courts of Appeals would choose the liberal position in at least one-fifth of criminal cases and one-quarter of civil liberties cases. But overall, Judge Garza has voted in the liberal direction in fewer than eight percent of recent criminal justice and civil liberties cases.[14] The record of the Fifth Circuit as a whole in these cases appears to be more conservative than we might expect, although the Circuit majority's liberal percentages in non-unanimous cases and reversals are within the predicted range. In non-unanimous cases, Garza's liberal percentage is one-fifth that of the majority overall, and just one-ninth that of the majority in non-unanimous civil liberties decisions. He registers his highest liberal percentage, fourteen percent, in non-unanimous criminal cases, but this is still well below the range previous research would lead us to predict for a Republican Circuit judge. Finally, in seventeen decisions in the sample from which Judge Garza dissented, dissented in part, or joined a dissenting opinion, he cast no liberal votes.

b. Capital Punishment

In a few important areas, the gap between Judge Garza's positions and those of his colleagues narrows. Death penalty appeals are one example. In seventeen death penalty cases, just 12% of the panel majority's decisions were liberal, and only 6% of Judge Garza's votes were liberal. We would predict that a strong conservative such as Judge Garza would reject most capital appeals, and indeed he does so. Three decisions in particular merit mention, all of them dealing with jurors in capital cases. In two recent cases—*Fuller* v. *Johnson* and *McFadden* v. *Johnson*[15] —Texas convicts challenged their sentences because jurors had been excluded for bias without sufficiently precise questioning of their beliefs about the death penalty, but Judge Garza and his colleagues affirmed their sentences. In both cases, jurors stated that they opposed the death penalty. As the Supreme Court has held, however,

> not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve . . . so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.[16]

Would these jurors—each of whom said they could sentence a repeat murderer to death, but not someone who killed just one person—have set aside their own beliefs if instructed to do so? Neither was asked directly, but both were excluded for bias. In these cases, Judge Garza ruled with his colleagues that the evidence was insufficient for them to overturn the sentence of death. Writing for the court in *Fuller*, Judge Garza acknowledged that neither the district attorney nor the court "determined clearly that [the juror's] view would impair her in answering the two special issues that determine sentencing in Texas capital cases."[17] Garza called this omission "unfortunate," but held that the sentence should not be overturned because Fuller had not presented enough evidence to "rebut the presumption that the trial court was correct."[18]

In *Thompson v. Cain*, the Fifth Circuit minimized the obligation of trial courts to "insulate jurors from coercion."[19] It appears to have been a difficult case. After the jury deadlocked over sentencing, they were brought back into the courtroom, where the judge inquired into the numerical division of the jury. Told that the jury was split eleven to one, he asked if the jury might reach a verdict with further deliberation; the foreperson replied that they could not. During those moments in the courtroom, the holdout juror felt coerced by her colleagues. She filed a post-trial affidavit stating that,

> it was a horrible, emotional moment for me, and I began to cry in front of everyone. . . . [E]veryone was staring at me and blaming me . . . The foreperson actually turned around and whispered to me that it would help to go

> back in. I knew that everyone was looking at me, and I was upset, so I whispered to the foreperson "yes" so that we could get out of there and stop everyone from looking at me.[20]

The Fifth Circuit's denial of Thompson's appeal acknowledged that the holdout juror was pressured in an "unfortunate and regrettable" way. But because there was no "coercive activity on the part of the court," the sentence stood.[21]

These are provocative cases, but they offer only a partial picture of Judge Garza's approach to capital punishment. Three others suggest not only that Judge Garza is open to death penalty challenges, but that he may have deep misgivings about capital punishment's administration today. In two decisions, the Court of Appeals found that lawyers had "rendered constitutionally deficient performance." In one case—*Moore v. Johnson*—the Court ordered either a new sentencing trial or a new sentence less than death, while in *Perillo v. Johnson*, the Court vacated both guilt and punishment judgments because the defense lawyer had a conflict of interest.[22]

Flores v. Johnson may be the most important death-penalty case in Judge Garza's record.[23] In *Flores*, the Court unanimously rejected the *habeas* petitions of a Mexican national sentenced to death. But Judge Garza, in a special concurrence, launched a sustained, careful, and even passionate attack on the court psychiatrist's "future dangerousness" testimony, which played a key role in Flores' sentencing. Judge Garza—who normally decides cases on the narrowest possible ground—did so despite the fact that Flores' counsel on appeal never argued that the testimony was flawed. Judge Garza assailed the expert witness in the case, noting critically that he had never met the defendant and that in twenty-two cases in which he had been asked to testify as to whether a convict posed a threat, he had returned a "yes" verdict every time. Moreover, Garza called all future dangerousness testimony "unreliable and unscientific," quoting an opinion arguing that "psychiatric predictions of long-term future violence are wrong more often than they are right." Garza repeatedly put "future dangerousness," "expert," and "objective" in scare quotes in his criticism of the testimony.

What is most striking, however, is the opinion taken as a whole. Garza's special concurrence reads like a handbook of citations and catchphrases designed for the use of death penalty opponents, not supporters, and concludes with this strong language:

> I recognize the viciousness of Flores's crime. I also recognize the jury's statutory right to impose death as an appropriate punishment. However, what separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes. If that process is flawed because it allows evidence without any scientific validity to push the jury toward condemning the accused, the legitimacy of our legal process is threatened.[24]

Judge Garza's comparison of executioner and murderer does not mean he opposes capital punishment, of course, but these are not the terms death penalty advocates usually choose to argue on. Moreover, the opinion is remarkable because it is one of only a very small number of cases in which Garza chooses to strike out on his own, focusing on what *he* believes are the core issues raised by a case rather than the clear facts and obvious precedents. Both when he writes for the majority and for himself alone, Judge Garza's opinions tend to be brief, composed in neutral prose, and closely focused on the case at hand; even in important, divided cases, Judge Garza rarely speaks in the first person or uses opinions to think about broader issues of law and policy. His special concurrence in *Flores*—six times the length of the majority's opinion in the case—is an important exception. The Supreme Court has shown some willingness to re-examine the application of the death penalty in recent years, and Garza—another conservative, Catholic judge—could add a measure of unpredictability to the Court's capital-punishment deliberations.

c. Search and Seizure.

On Fourth Amendment cases, Judge Garza's record loses its mixed character. Here he is consistently conservative, adopting the most permissive interpretation of search-and-seizure law almost without exception. Only one of the Fifth Circuit majority's nine decisions included in my sample were liberal, and none of Judge Garza's votes in these cases were. This is a small sample, but it clearly indicates that Judge Garza is very unlikely to find searches and seizures unconstitutional under the Fourth Amendment. Moreover, while the majority adopted a mixed or moderate position in a third of these cases, Judge Garza chose the moderate position in just one Fourth Amendment case over a three-year period.

In two search-and-seizure cases—one in which Judge Garza dissented, the other in which he wrote for a divided *en banc* panel—Judge Garza has taken controversial positions advocating expansion of government's search-and-seizure power. In *U.S.* v. *Lopez-Valdez*, the Fifth Circuit overturned the conviction of a woman who had transported illegal aliens into the U.S. because her car was unlawfully stopped. A state trooper and a border patrol agent, riding together,

were suspicious about Lopez-Valdez' car because they were near the border, on a road circumventing a checkpoint, and her car was clearly full of passengers. But they stopped her Buick because it had a damaged taillight: part of the red plastic lens was missing, while the bulb was intact.

The majority of the Fifth Circuit panel held that because Texas law clearly states that "a broken lens causing a taillight to emit both red and white light does not constitute an offense," it could not serve as the basis for a traffic stop. The other factors which the state argued justified the stop—proximity to the border, numerous people in the car—could not be held to be considered "reasonable suspicion." The evidence gathered subsequent to the stop was therefore excluded, and Lopez-Valdez' conviction overturned. Judge Garza, in a brief dissent, argued that the officers' suspicions were entirely reasonable, and that their error in misunderstanding Texas taillight law should be excused under the good-faith exception to the exclusionary rule.[25]

Another Garza decision would eventually receive national attention after the Supreme Court heard its appeal. *Atwater v. City of Lago Vista* [26] is the case of a Texas woman who was arrested, handcuffed, and temporarily jailed for failing to wear her seatbelt and failing to secure her children in seatbelts as the family returned home after soccer practice. Judge Garza, in a brief majority opinion for a divided *en banc* panel, argued that the officer had probable cause to arrest Gail Atwater and did not conduct the arrest in an "extraordinary manner." But four separate dissents argued that the majority was wrong "in not dividing an arrest or a stop and the seizure of the person arrested or stopped," as Judge Reynaldo G. Garza wrote. Calling on his sixty years as a lawyer in Texas and writing of his oath to uphold the Constitution, Judge Reynaldo Garza pointed out that Atwater's offense was punishable by only a $50 fine, did not endanger the public, and was not an infraction for which a motorist should be seized and detained. Moreover, the arresting officer—who had twice failed psychological tests for his "lack of maturity" before joining the squad—had stopped Atwater previously, and this time shouted "I've seen you before!" as he handcuffed the woman.[27] In April of 2001, the U.S. Supreme Court upheld the Fifth Circuit's controversial decision by an unusual 5-4 vote—former New Hampshire Attorney General David Souter wrote for the conservative majority, and Justice O'Connor filed a forceful dissent.[28]

d. Civil rights and Discrimination Cases.

Judge Garza's positions in civil rights and discrimination cases are close to those of his colleagues on the Fifth Circuit. The records of these decisions suggest not that Judge Garza is more liberal in these areas, but rather that the Fifth Circuit as a whole is more conservative. In thirteen civil rights decisions—those not easily classifiable elsewhere, but in which civil rights were clearly at issue [29] —both the majority and Judge Garza voted in the liberal direction just once. In twenty-five cases dealing with alleged discrimination on the basis of race, sex, age, and disability, the panel majority decided 12% of cases in the liberal direction, while Judge Garza voted liberal in just 8% of cases.

While the tilt of the data here is unmistakably conservative, the two cases in which Judge Garza adopted liberal positions merit mention. In *Williamson v. City of Houston*, Judge Garza joined a unanimous panel opinion which strengthened sexual-harassment protections by finding a city liable for failing to respond to the harassment complaints of a female employee.[30] Despite the fact that Linda Williamson was harassed by a co-worker rather than a supervisor, the three-judge panel held that because the supervisor knew of the harassing conduct, the employer itself could be held liable. One account of the decision described it as "wake-up call" to employers, with the message that "sexual harassment claims are serious business."[31] In a second case, Garza agreed with a panel majority—over the furious dissent of Judge Edith H. Jones—that a woman dismissed as a school bus driver because of a hearing impairment could sue under the Americans with Disabilities Act.[32] These high-profile cases may have contributed to the public perception of Judge Garza as a judicial moderate.

e. The Establishment Clause.

On the separation of church and state, Judge Garza's record during his first decade on the Fifth Circuit is one of unblemished conservatism. From 1991 through 2000, while the Fifth Circuit majority voted in the liberal direction in six of seven published Establishment Clause cases,[33] Judge Garza adopted the conservative position in every decision but one—an egregious case involving a middle-school basketball coach who required his players to join him in prayer at center court before home games, and on the school bus before away games.[34] In this area, however, the numbers do not adequately capture Judge Garza's judicial character. For in Establishment Clause cases, Judge Garza's opinions take on an energy and force absent from the vast majority of his decisions. Most important are four dissents—one which Judge Garza wrote, the others of which he joined—from decisions involving religion in public schools.

In *Freiler v. Tangipahoa Parish Board of Education*, Judge Garza joined a dissent from a refusal to review *en banc* its decision striking down a local Louisiana policy requiring a disclaimer to be read before any lesson on evolution. The majority found the disclaimer to pursue "the protection and maintenance of a particular religious viewpoint," and

therefore to have the primary effect of advancing religion in an unconstitutional manner. But in a dissenting opinion joined by Garza and five others, Judge Rhesa Hawkins Barksdale dismissed the majority's opinion as "palaver" which "does far more harm than good" and effectively "transformed neutrality into intolerance."[35] Judge Garza also joined pungent dissents in cases dealing with religious statements by students in graduation messages[36] and voluntary student prayer. In *Ingebretsen v. Jackson Public School District*, the Circuit declined to review its decision striking down Mississippi's voluntary, student-initiated school-prayer law. Judge Edith H. Jones—who is also mentioned as a possible Supreme Court nominee—denounced the majority for having "transformed the Establishment Clause from a shield against government religious indoctrination into a sword attacking personal religious behavior." Jones aimed her criticism at higher judges, as well, arguing that the Supreme Court's Establishment Clause jurisprudence offered a "lack of guidance" since its decisions "more closely resemble ad hoc Delphic pronouncements than models of guiding legal principles." Jones—whose no-holds-barred opinions remind one of Supreme Court Justice Antonin Scalia much more often than do those of Judge Garza—attacked what she calls "the elites' tin ear for religious belief," and wrote that *Ingebretsen* was "the latest in a long line of cases whose inevitable consequence has been to remake society in a secular image."[37]

Judge Garza himself took a turn denouncing the Fifth Circuit majority in *Doe by Doe v. Beaumont Independent School District*. The majority of a three-judge panel in *Beaumont* struck down a "Clergy in Schools Program," which invited religious people into schools for character-education sessions. Citing Jones' opinion in *Ingebretsen*, Garza wrote that character education is "the ultimate casualty of the courts' careless Establishment Clause jurisprudence." His long dissent treats the *Lemon* test with some respect, but grants at least as much attention to showing that the Clergy in Schools program satisfied the more lenient endorsement and coercion tests articulated by Justices O'Connor and Kennedy. Garza used stronger language than one finds in most of his opinions, accusing the majority of doing "serious harm to our Establishment Clause jurisprudence," and calling its logic "wrong" and "incomplete."[38] Perhaps most surprising, he volunteered that under the rationale employed by the majority in rejecting the program, "luminaries such as the late Reverend Martin Luther King Jr., and Archbishop Desmond Tutu" would be barred from the schools. By reaching for this hypothetical, Garza allowed himself a creative legal luxury absent from his other opinions. Indeed, the majority in the case clearly thought Garza had lost his moorings: the opinion describes his claims as "remarkable" and "specious," replying to "the most important errors" "lest they go undetected."[39]

There is no mistaking Judge Garza's greater personal engagement with this issue than with almost every other. Taken together, Garza's contributions to these cases suggest that he would be willing and even eager to change the direction of Supreme Court jurisprudence on the Establishment Clause.

f. Abortion.

The next nominee to the U.S. Supreme Court is sure to face intense scrutiny over abortion rights. Judge Garza's views on abortion are clear, but we can only understand his position—and predict how he might vote on the Supreme Court—by turning from tallying votes to analyzing the content of his opinions. For in the abortion cases he has heard on the Fifth Circuit, Judge Garza's written opinions forcefully contradict his liberal votes. In two of three abortion cases in which he has participated, Judge Garza joined the majority and voted in the liberal direction. But in both *Sojourner v. Edwards* and *Causeway Medical Suite v. Ieyoub*, Judge Garza wrote special concurrences in which he denounced Supreme Court precedents and explicitly disavowed his own votes in the cases.[40]

Sojourner tested a Louisiana law which criminalized most abortions. The statute had been thrown out in the district court; shortly after the Fifth Circuit heard the state's appeal, the Supreme Court handed down *Casey*, which declared that *Roe v. Wade* is still good law.[41] Therefore, Garza and the Fifth Circuit made short work of the Louisiana statute, overturning it under both *Roe* and the "undue burden" test articulated in *Casey*. Judge Garza's special concurrence in *Sojourner* is short, direct, and uncharacteristically bold; he addressed it almost entirely to the Supreme Court. After acknowledging that *Casey* controlled him in deciding *Sojourner*, Judge Garza wrote that *Casey* "is not about abortion; it is about power"—that of the Supreme Court itself, given the absence of language about abortion in the Constitution. Garza quoted Justice Scalia's dissent in *Casey*, which contended that the decision "decorates a value judgment and conceals a political choice," and agreed with Scalia that the decision characterized a Court "systematically eliminating checks upon its own power." The heart of the abortion debate, wrote Judge Garza, is "whether States have the constitutional power to make this ontological choice"—to "decide for themselves whether viability makes an ontological difference." His conclusion leaves no doubt where he stands not only on *Casey*, but also on *Roe v. Wade*: "Because the decision to permit or proscribe abortion is a political choice, I would

allow the people of the State of Louisiana to decide this issue for themselves."[42] Indeed, Garza's words were so direct—and so much in agreement with the Bush Administration's position on abortion law—that the *New York Times* accused him of "shamelessly" campaigning for a Supreme Court nomination.[43]

Five years later, in *Causeway*, Judge Garza picked up right where he left off in *Sojourner*. "For the second time in my judicial career," his special concurrence began, "I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution." *Causeway* dealt with a Louisiana statute altering the state's judicial bypass procedure allowing a minor to have an abortion without notifying her parents; it restricted a judge's authority and discretion in deciding if such a bypass were permissible. Under the Supreme Court's decision in *Bellotti v. Baird*,[44] the Fifth Circuit was clearly compelled to reject the Louisiana statute, and Judge Garza joined his colleagues in doing so. But in his concurring opinion, Judge Garza wrote, "I respectfully disagree with the *Bellotti II* Court that the Constitution requires the result we reach today." His argument ranges much farther afield into constitutional interpretation than do most of his opinions, and makes three broad claims. The first, which he links to both *Bellotti II* and *Casey*, is that "substantive due process" under the Fourteenth Amendment cannot withstand the pressure that abortion cases put on it. Our understandings of the Constitution should be flexible, Judge Garza acknowledges, but to say this "is emphatically not to say that changed values gain constitutional precedence to govern changed circumstances." The drafters of the Fourteenth Amendment, Garza wrote, "certainly had more modest goals in mind by using the term 'liberty' than the modern Supreme Court has," and the Amendment "was not intended to include abortion."

Judge Garza's second claim is an important indicator of how he might view abortion cases as a member of the Supreme Court. He argued that while *Casey* does uphold *Roe*, "it is unclear to me that the Court itself still believes that abortion is a 'fundamental right' under the Fourteenth Amendment." Indeed, Garza interprets recent decisions to mean that the Supreme Court *already* believes that "Roe is no longer the best interpretation of the Constitution." In other words, Judge Garza believes that an explicit reversal of *Roe* would be neither a surprise nor a dramatic shift in Supreme Court jurisprudence. Finally, Judge Garza returned to the premise which anchored his *Sojourner* opinion: he objects to "courts substituting their judgments about this type of policy question for the decisions of legislatures." Pulling no punches, Garza invoked an infamous litany of failed Supreme Court decisions: "*Dred Scott*, *Plessy*, and *Lochner*," three cases in which "the Court made things worse by inserting itself into, and preempting, the national debate." Debate over such "fundamental, personal, ontic issues" such as abortion, Judge Garza argued, "is better left to Congress or the states." In conclusion, Garza called for the Supreme Court to "extricat[e] itself from the substantive due process morass of abortion cases and return the debate to the people."[45] While his abortion votes might be liberal, then, the direction and rhetoric of these opinions leave no doubt as to how Judge Garza would vote on abortion should he reach the Supreme Court.

V. Conclusion

Emilio M. Garza's recent voting record in published civil liberties and criminal-justice cases strongly suggests that he is a very conservative judge. That voting record alone, however, does not enable us to imagine what type of Supreme Court Justice Judge Garza might become, nor even to predict his votes on key questions before the Court. On abortion, his conservative opinions belie his liberal votes, and his writing in a handful of abortion, church and state, and capital punishment cases seems to reveal a far greater personal involvement with those issues than with many others. Garza's example suggests that if scholars are to understand appellate judges and their approach to political and legal issues more fully, we need to observe carefully not only their voting behavior but also the language and style of their opinions.

Given that Judge Garza's potential as a Supreme Court nominee sparked this research, a bit of political speculation is in order. At least since the failed nomination of Judge Robert Bork to the Supreme Court, Presidents have tried to avoid picking judges whose opinions on important issues might lead to long, politically-costly confirmation campaigns (Yalof 1999).[46] But Judge Garza's rejections of *Roe*, *Casey*, and *Bellotti II* have been emphatic, and a judge could hardly indicate more clearly that he would vote to overturn *Roe*. As a result, debate over his nomination could well turn into a referendum on abortion rights in the U.S. Senate, with other issues—including Garza's conservative views on criminal justice and the Establishment Clause, and his potential to be the Court's first Hispanic justice—obscured or ignored. Should one of the Justices who have voted to uphold *Roe* leave the Court, President Bush will have to decide if that is a battle he wishes to fight.

* I am deeply indebted to Sheldon Goldman for upporting this project, and I would also like to thank Cornell Clayton for his helpful editorial suggestions. Any errors which remain are my responsibility. A previous version of this essay won the 2000 CQ Press Award.

Notes

1 See, e.g., Neil A. Lewis, "The 2000 Campaign: The Judiciary," *N.Y. Times*, Oct. 8, 2000, p. A28 (referring to Judge Garza as Bush's "leading Hispanic candidate"); Gregory Rodriguez, "Reflections of America," *L.A. Times*, Jan. 14, 2001, p. M1 (noting that Bush was "rumored" to be considering both Garza and White House Counsel Alberto R. Gonzalez for Court nominations); Laura Ingraham, "It's Spring Training for High Court Fights," *L.A. Times*, Feb. 20, 2001, p. B7 (referring to Garza as among the "well-tested candidates" for nomination by Bush); Alexander Wohl, "Contenders for the High Court," *The American Prospect*, Nov. 20, 2000, p. 30 (naming Garza first in a list of contenders and noting that Bush "would love to appoint the first Hispanic to the Court").

2 Sherry R. Sontag, "Contenders: Conservative and Young," *National Law Journal*, July 8, 1991, p.30.

3 *See Wohl*, supra *note 1*.

4 *Confirmation Hearings on Appointments to the Federal Judiciary and the Department of Justice*, before the Committee on the Judiciary, U.S. Senate, March 28, 1988, at 844-845. In 1991, Garza told the Senate, "We are not elected to be legislators . . . if I wanted to do something like that, then I could stand for election. We are appointed to follow the law, and that is what I intend to do." *Confirmation Hearings on Appointments to the Federal Judiciary*, before the Committee on the Judiciary, U.S. Senate, May 15, 1991, at 793. Texas Republican Senator Phil Gramm said in 1991 that Judge Garza shared his belief in Constitutional "strict construction," and in the "belief that Congress, not the courts, makes the laws." Mark Ballard, "Next Stop: U.S. Supreme Court," Texas Lawyer, April 15, 1991, p.10. See also "Sessions' Successor Named," Los Angeles Times, February 3, 1988, p. 19; Paul Richter, "A Look At Possible Supreme Court Nominees," Los Angeles Times, June 29, 1991, p. 18.

5 Garza was active in the Reserve corps until 1979, when he received an honorable discharge. The military remains an important part of Garza's social life: he reported on a Senate questionnaire in 1991 that he was a member of the Officers' Club at Randolph A.F.B. in Texas, the only social club or group in which he reported membership. And at his confirmation hearings in 1991, Garza introduced two sets of personal guests: a few members of his immediate family, and the commanding officer from his tour of duty on the U.S.S. Columbus in 1971. See *Confirmation Hearings on Appointments to the Federal Judiciary and the Department of Justice*, before the Committee on the Judiciary, U.S. Senate, May 15, 1991, at 827, 786.

6 Mark Ballard, "Next Stop: U.S. Supreme Court," Texas Lawyer, *April 15, 1991, p.10; Michael Wines, "Bush Aides Say 4 Are on Court List,"* N.Y. Times, *July 1, 1991. See also Sherry R. Sontag, "Contenders: Conservative and Young,"* National Law Journal, *July 8, 1991; Jack Nelson, "A Conservative Black Picked for High Court,"* N.Y. Times, *July 2, 1991, p.1. Nelson wrote, "several Administration sources had said that they expected Bush to make his mark on history by naming Garza the first Latino Supreme Court justice." The* New York Times *also interpreted a 1992 abortion opinion by Judge Garza as a bid for a nomination by the first Bush Administration. See* infra *note 45 and accompanying text.*

7 *Ballard,* op cit. *Judge Garza's faith appears to be an important part of his life. He identifies himself as Catholic in professional biographies; earned both undergraduate and graduate degrees from the University of Notre Dame, a Catholic institution; and wrote on Senate questionnaires in both 1988 and 1991 that he had often done* pro bono *work for "charitable and religious organizations" in San Antonio. See Marie T. Finn et al., eds.* The American Bench: Judges of the Nation, Eleventh Edition, 2000-2001 *(Sacramento: Forster-Long, Inc., 2000), p. 41; Thomas M. Bachmann et al., eds.* Who's Who in American Law, Eleventh Edition *(New Providence, NJ: Marquis Who's Who, 2000), p. 298;* Confirmation Hearings on Appointments to the Federal Judiciary and the Department of Justice, *before the Committee on the Judiciary, U.S. Senate, March 28, 1988, at 904;* Confirmation Hearings on Appointments to the Federal Judiciary, *before the Committee on the Judiciary, U.S. Senate, May 15, 1991, at 859.*

8 See Goldman 1975, 491, 494, 495; Goldman, 1969, 376. In their recent study of U.S. district courts, Stidham and his colleagues included "[o]nly those cases that fit easily into one of 27 types and contained a clear underlying liberal-conservative dimension". See Stidham et al., p. 16. Such clarity is appealing, but making judgments as to which cases "fit easily" or contained a sufficiently "clear" underlying dimension was a task I felt unprepared to take on, and which offered too many opportunities for subjective judgment. Therefore, my data includes all published decisions in which civil liberties or criminal justice issues were resolved by the court. In marginal cases, I looked to the West headnotes to determine if the court's findings included substantive rulings of civil liberties law. For example, an apparent civil liberties case which dealt solely with jurisdictional matters would be discarded, but a tax case that addressed the scope of constitutionally-protected privacy would be included.

9 Lexis was used to locate decisions in which Garza participated. Keyword search narrowed the set of decisions to

only those dealing with criminal procedure and civil liberties; a large number of search terms was used, in order to be sure to capture every relevant case. Decisions in which any of the following terms appeared were captured: First Amendment; Fourteenth Amendment; due process; equal protection; race; gender; sex; age; privacy; disability; abortion; free exercise; habeas corpus; prisoner. Many of the decisions reported by the search dealt with business and economic claims, and were discarded. These search terms are largely adopted from the standards used by Epstein and Knight. See Epstein and Knight, p. 34. I did not include cases dealing with the Takings Clause of the Fifth Amendment, nor those dealings with the Attorneys issue area. I also enlarged the Criminal Procedure category, by including cases dealing with the due process rights and *habeas corpus* claims of prisoners. West's *Federal Reporter* was used to determine what issues were raised and how Garza voted; the West headnotes were used to help determine which issues were resolved in each decision. The essentials of each case—including citation, participating judges, issues presented, disposition, and whether it was a split or unanimous decision—were entered into a database constructed for this project. As readers of this newsletter know, there are potential pitfalls in using only published decisions in this type of study. See, for example, Sara Benesh, "The Hierarchy of Justice and Nonpublication," *Law and Courts* Summer 2001, p. 5. More research is needed on whether systematic differences exist between published and unpublished decisions. However, as Benesh acknowledges, most research on the Courts of Appeals utilizes published opinions, and I follow that course here.

10 I also scored both the majority's decision and Garza's vote in each case on the three-point scale utilized by Sheldon Goldman in his pioneering research on the U.S. Courts of Appeals. This scale captures with greater accuracy the mixed nature of many decisions: in addition to scoring conservative votes at 0 and liberal votes at 2, Goldman's scale assigns the value 1 to a vote which adheres in part to the liberal position but does not embrace it entirely. See Goldman 1969, Goldman 1975. For the sake of brevity, I do not report those results in this article. However, they broadly confirm findings based on the percent-liberal standard, as Judge Garza's average scores are only about one-half what Goldman's results would lead us to predict, both overall and in specific issue areas.

11 See Donald R. Songer et al., p. 115, 117. Democratic judges chose the liberal outcome in 33.5% of civil rights and civil liberties cases and 26.1% of criminal cases, respectively. Reagan appointees supported the liberal outcome in 25.7% of civil rights and civil liberties cases and 19.0% of criminal cases over the period. We have a great deal of data on U.S. Supreme Court decision-making over the last fifty years. However, the quantitative standards established in this research are generally not applicable to the Courts of Appeals, because the Courts of Appeals lack the docket control and finality possessed by the Supreme Court. As "policymakers," circuit judges lack both important powers possessed by Supreme Court judges.

12 Gottschall, 54. Reagan appointees were slightly less likely to cast liberal votes than were those appointed by Presidents Nixon and Ford. In civil liberties cases, Gottschall found that Nixon and Ford appointees voted in the liberal direction in about 34% of cases, while Reagan appointees voted in the liberal direction in about 31.5% of civil rights and civil liberties cases. Democrat-appointed judges cast liberal votes in ten to fifteen percent more cases.

13 J. Woodford Howard Jr.'s influential study of role perceptions and voting behavior on the Courts of Appeals also merits note here. In Howard's study of thirty-five judges sitting on the Second, Fifth, and District of Columbia Circuits between 1969 and 1971, "Innovators" voted in the liberal direction 65% of civil rights cases; "Realists" did so in 57% of cases, and "Interpreters" cast liberal votes in 48% of cases. On prisoner petitions, Howard's percent-liberal figures were 34% for "Innovators," 25% for "Realists," and 23% for "Interpreters." In criminal cases generally, Howard's percent-liberal results were 36% for "Innovators," 22% for "Realists," and 17% for "Interpreters." With the exception of the civil rights figures, Howard's data are broadly consistent with the results obtained by Songer et al. and Gottschall. See Howard 1977, p. 919, 924, 932. Like other measurement techniques, using only those cases in which a given judge participates has its flaws. For example, if the data analyzed includes only those cases, the panel's mean will be pulled towards the average of that judge, *ceteris paribus*. However, such comparisons remain useful for establishing where a given judge's voting behavior stands in relation to that of his colleagues on the bench.

14 Judge Garza chose the liberal position in only eleven decisions, eight of which were unanimous.

15 *Fuller v. Johnson*, 114 F.3d 491 (1997); *McFadden v. Johnson*, 166 F.3d 757 (1999).

16 *Lockhart v. McCree*, 476 U.S. 162; cited in *Fuller v. Johnson*, 114 F.3d at 500.

17 *Fuller*, at 500.

18 *Fuller*, at 501.

19 *Thompson v. Cain*, 161 F.3d 802, 809 (1998).

20 *Thompson*, at 809.

21 *Thompson*, at 810.

22 *Moore v. Johnson*, 194 F.3d 586 (1999); *Perillo v. Johnson*, 205 F.3d 775 (2000).

23 *Flores v. Johnson*, 210 F.3d 456 (2000).

24 *Flores v. Johnson*, 457; 458; 463; 469-470. Garza's opinion made news. See Henry Weinstein, "Death Penalty Debate—Can New Violence Be Predicted?", *L.A. Times*, Nov. 6, 2000, at A1 (noting that "the sharpest recent criticism" of future-danger evidence had come from Judge Garza's concurrence in *Flores*). In another controversial, high-profile death penalty case, however—one decided after the period examined in this article—Judge Garza took a decidedly conservative position. In *Burdine v. Johnson*, 262 F.3d 336, Garza joined a dissent from an *en banc* panel decision ordering a new trial for a man whose lawyer slept through several parts of his first trial. The dissent argued that the lawyer had not napped at sufficiently important moments, and that he may have feigned unconsciousness as part of a "trial strategy." See *Burdine*, 262 F.3d at 357.

25 *U.S. v. Lopez-Valdez*, 178 F.3d 282, at 285; 288; 289-90.

26 Atwater v. City of Lago Vista, 195 F.3d 242.

27 Atwater, 195 F.3d at 244; 245; 246; 247.

28 Atwater v. City of Lago Vista, 532 U.S. 318 (2001). *Atwater* made front-page news and was treated as a surprising decision. See Linda Greenhouse, "Divided Justices Back Full Arrests on Minor Charges," *N.Y. Times*, Apr. 5, 2001, at A1; Ross E. Milloy, "For Seat-Belt Violator, a Jam, a Jail, and Unmoved Justices," *N.Y. Times*, Apr. 28, 2001, at A7.

29 The West Federal Reporter listed "Civil Rights" as a key legal aspect of each case. Examples include school liability for the rape by a janitor of a student; a claim by an inmate that being strip-searched by a female guard violated his right to free expression of religion; suicides (and a horrific self-blinding) by detainees; and a racial epithet used in an arrest.

30 See *Williamson v. City of Houston* 148 F.3d 462 (1998).

31 See Nathan Koppel, "Court Clarifies Employer Liability for Sexual Harassment," *Texas Lawyer*, Aug. 3, 1998, p.2.

32 See *Rizzo v. Children's World Learning Ctrs., Inc*. 213 F.3d 209 (2000).

33 The majority's only conservative establishment decision was in *Flores v. Boerne*, which focused on the free exercise of religion rather than its establishment. See *Flores v. Boerne*, 73 F.3d 1352 (1996). *Flores v. Boerne* is best known as a Free Exercise case; it dealt with the Establishment Clause in that RFRA was alleged to single out religious behavior for protection in a manner violating the prohibition on establishment of religion. The Court of Appeals rejected this argument specifically in upholding RFRA—a "conservative" vote by the standards with which I scored cases. The U.S. Supreme Court, of course, overturned this decision, in the process invalidating the Religious Freedom Restoration Act. Senator Orrin Hatch filed an *amicus* brief in the case when before the Fifth Circuit, and Judge Garza and his colleagues decided the case in the direction Senator Hatch hoped for. However, it is not only a conservative Senator like Hatch who likely would have approved of the Fifth Circuit's decision in *Flores v. Boerne*. Since it endorsed Congress' statutory authority to write standards of constitutional interpretation, liberal as well as conservative Senators would presumably find the decision of the Fifth Circuit—and that of Judge Garza—congenial.

34 *See* Doe v. Duncanville Independent School District, *994 F.2d 160 (1993)*.

35 *Freiler v. Tangipahoa Parish Board of Education*, 201 F.3d 602 (2000), 604; 605; 608. Despite appearing before the court merely as disputes over whether to re-hear the case, this and other decisions were classified as Establishment Clause cases because opinions dealt with the merits in great detail.

36 *Doe v. Santa Fe Independent School District*, 171 F.3d 1013 (1999), at 1016. Dissenting in *Santa Fe*, Judge E. Grady Jolly accused the majority of treating precedent as "no more than a puff of wind" and "simply advancing personal philosophy." *Doe v. Santa Fe*, 171 F. 3d at 1016.

37 *Ingebretsen v. Jackson Public School District*, 88 F.3d 274 (1996), at 282, 286, 288. Jones concluded her dissent by writing, "[p]araphrasing George Orwell, we have sunk to the point at which it becomes one's duty to restate the obvious." Disputes like this, she argues, are better handled by the political than the legal process.

38 *Doe by Doe v. Beaumont Independent School District*, 173 F.3d 274 (1999), 296, 301

39 *Beaumont*, at 313; 308; 309; 294; 295; 294.

40 *Sojourner T. v. Edwards*, 974 F.2d 27 (1992); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (1997).

41 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
42 *Sojourner T. v. Edwards*, 974 F.2d 27, at 31; 32.

43 "No Litmus Test Needed Here," *New York Times*, Sept. 25, 1992, p. A12.

44 *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*).

45 *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, at 1113; 1116; 1117; 1118; 1119-20; 1121; 1124; 1123.

46 Garza's strong conservative views may not be an obstacle to his nomination: one adviser to President Bush has indicated that Bush will "try to choose candidates with established records on the major issues," in an effort to heed the "no more Souters" refrain of some conservatives. See Lewis, *supra* note 1.

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BOOKS TO WATCH FOR

HELENA SILVERSTEIN
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The Social Construction of Sexual Harassment Law, by **Mia L. Cahill** (New York University), exposes the relationship between law and its social context. Taking a theoretical approach, this cross-national study explores perceptions of sexual harassment law within national, corporate and the individual contexts, analyzing the potentials of each level to influence the social understanding of law and the wider role of law in society itself. Cahill's examination of sexual harassment laws was published in 2001 by Ashgate Press.

The Japanese Way of Justice: Prosecuting Crime in Japan, by **David T. Johnson** (University of Hawaii), has just been released by Oxford University Press. The first book in English to analyze how Japan's 2000 prosecutors exercise their formidable powers, *The Japanese Way of Justice* paints an empirical sketch of prosecutors at work, the contexts in which they investigate, charge, and try cases, and the content of the decisions thereby rendered. Since prosecutors wield vast discretion at every stage of the criminal process, and since criminal proceedings constitute one of the principal indicators of the character of a society, this study offers a window onto Japan. Since this book is comparative, chiefly with the United States, it also affords insights into American law and society.

Contrasting Criminal Justice, a collection of articles edited by **David Nelken** (University of Macerata, Italy, and Cardiff Law School, UK), is now available from Ashgate Press. The articles presented in this volume address a variety of issues raised by comparative research into criminal justice. Via such things as collaboration, research visits and expatriation, the contributors consider and illustrate different ways of doing comparative research into legal cultures. The countries studied include Japan, Germany, France, Spain, Italy, the United Kingdom, Canada, and the West Indies.

Adapting Legal Cultures offers a collection of articles that explore the theory and practice of legal borrowing and adaptation in different areas of the world. Edited by **David Nelken** (University of Macerata, Italy, and Cardiff Law School, UK) and **Johannes Feest** (University of Bremen), the collection covers Europe, the United States, Latin America, Southeast Asia and Japan. With a theoretical focus, the articles address such questions as: What are legal transplants? What are the conditions of successful legal transfers? How is globalisation changing these conditions? *Adapting Legal Cultures* was published in 2001 by Hart Publishing.

Ashgate Press recently announced the release of *Law's New Boundaries: The Consequences of Legal Autopoiesis*. This collection of essays edited by **Jirí Pribán** (Charles University, Prague, and Cardiff Law School, UK) and **David Nelken** (University of Macerata, Italy, and Cardiff Law School, UK), explores autopoietic theory of law. Contributors to this volume include Gunther Teubner, Peter Fitzpatrick, Tim Murphy, Roger Cotterrell, and Jiri Priban.

The collapse of authoritarian regimes and the global resurgence of liberal democracy has led to a renewed interest in constitutions and constitutionalism among scholars and political activists alike. In *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*, **Nathan J. Brown** (George Washington University) uses the Arab experience to explain the appeal of constitutional documents to authoritarian regimes and assesses the degree to which such constitutions can be used in the effort to make the regimes more accountable. *Constitutions in a Nonconstitutional World* was published in November 2001 by SUNY Press.

The Supreme Court and the Attitudinal Model Revisited, by **Jeffrey Segal** (SUNY Stony Brook) and **Harold Spaeth** (Michigan State University), will be available early this summer from Cambridge University Press. Like *The Supreme Court and the Attitudinal Model*, the purpose of the book is to scientifically analyze and explain the Supreme Court, its processes, and decisions from an attitudinal perspective. While updates and changes occur throughout the manuscript, two specific changes bear mention. First, while the original book contained no discussion of the then-nascent application of rational choice theory to Supreme Court decision making, this now-burgeoning field undergoes extensive analysis and testing, with particular attention paid to the separation-of-powers model. The second change concerns the rise in the testing of legal variables. The original book relied exclusively on the Court's view of the legal model, ignoring the modern scholarly literature on legal decision making. The new book rectifies this omission with a discussion of the legalistic positions taken from scholars in political science, economics, and law. Based on a more refined explanation of the legal model, Segal and Spaeth also provide tests of some of its tenets. The result is a newly titled book that in name and substance will be familiar to readers of *The Supreme Court and the Attitudinal Model*, but which nevertheless provides important new material.

In *Civil Servants and Their Constitutions*, **John A. Rohr** (Virginia Polytechnic Institute) further develops his views on the constitutional underpinnings of public administration. Emphasizing the importance of the constitutional character of administration, Rohr critiques the National Performance Review and demonstrates the excesses of the New Public Management movement. He does so through a comparative study of cases in four countries: France, the United Kingdom, Canada, and the Unites States. *Civil Servants and Their Constitutions* is due out in March from the University Press of Kansas.

Forthcoming in June 2002 from CQ Press is *The Declaration of Independence: Founding Principles and Current Impact*. Edited by **Scott Gerber Pettit** (College of Law Ohio Northern University), the collection includes articles written by political scientists, law professors, historians, and English professors. Articles in the collection cover such things as the political theory of the document, the drafting of the Declaration of Independence, and the document's use by presidents and Congress. Also included are articles on the Declaration and Native Americans, Women and the Declaration, and the document's promise of equality for African Americans.

Judicial Independence at the Crossroads: An Interdisciplinary Approach, edited by **Stephen Burbank** (University of Pennsylvania) and **Barry Friedman** (New York University School of Law), is forthcoming in April 2002 from Sage Publications/American Academy of Political and Social Science. This collection of essays seeks to break down the disciplinary barriers that have impeded scholarly analysis of, and public policy debates concerning judicial independence. Concerned that scholars in different

disciplines were talking past each other and that, in part as a result, policy debates concerning methods of selection for and other arrangements affecting judicial independence were impoverished, the editors convened a conference of scholars from the disciplines of law, political science, history, economics and sociology. In this book, they present eight papers that reflect both the different disciplinary perspectives of the authors and the shared understanding emerging from that conference, together with their own chapter which highlights both the progress made and the (very considerable) gaps in analysis and understanding remaining. Given the contentiousness of federal judicial selection and the problems of money and campaign speech in judicial elections, this book is designed to offer both scholars and politicians a guide to more fruitful research and sounder public policy concerning the judiciary.

The U.S. Court of Appeals and the Law of Confessions: Perspectives on the Hierarchy of Justice by **Sara C. Benesh** (University of Wisconsin, Milwaukee) will be available in April 2002 from LFB Scholarly Publications. Through the use of formal models and empirical analysis, Benesh explores the relationship between Supreme Court and Court of Appeals decisions in confession cases. She finds that, while the Supreme Court does little to induce Court of Appeals compliance in the confession cases, the lower court nonetheless makes decisions in accordance with Supreme Court policy prescriptions on point. Compliance is not perfect—the ideological predisposition of the judges of the Court of Appeals does matter—but the High Court influences the lower court. In short, the courts are faithful agents and ideological actors, and the law of confessions is greatly influenced by their behavior.

The paperback edition of *First Principles: The Jurisprudence of Clarence Thomas* will be available from NYU Press in March 2002. Written by **Scott Gerber Pettit** (College of Law Ohio Northern University), the paperback edition includes an Afterward assessing what Justice Thomas has done, and the reaction to what he has done, since his acclimation period ended.

Soon to be published by Peter Lang is *Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance*, by **Joyce Baugh** (Central Michigan University). The book examines predictions about the impact of the Bork controversy by focusing on the four subsequent nominations to the Supreme Court: David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. It examines the nomination and confirmation process for each of these justices and looks at their subsequent performance on the Court.

Rules of apportionment are vital elements of every social, political and legal order, affecting not only how collective decisions are made and by whom, but also how and why a particular constitutional order develops over time. In *Recreating the American Republic: Rules of Apportionment, Constitutional Change, and American Political Development 1700-1870*, **Charles A. Kromkowski** (University of Virginia) provides a far-reaching analysis of when, how, and why these rules change and with what constitutional consequences. The book reveals the special import of apportionment rules for pluralistic, democratic legal orders by engaging three critical eras and events of American constitutional history: the colonial era and the American Revolution; the early national years and the 1787 Constitutional Convention; and the nineteenth century and the American Civil War. Revisiting and systematically comparing each seemingly familiar era and event, Kromkowski reveals new insights about each and a new metanarrative of American political development from 1700 to 1870. *Recreating the American Republic* will be available this August from Cambridge University Press.

The Elmo B. Hunter Citizens Center for Judicial Selection of the American Judicature Society is proud to publish the second volume in its series *Research on Judicial Selection*. For nearly nine decades the American Judicature Society has published articles on judicial selection issues in its journal, *Judicature*. This series is intended to accommodate and centralize the growing literature in the field and to provide a forum for the publication of longer, more data- rich articles. The three articles in this volume represent the kinds of social science research being conducted nationwide on a broad range of unexplored or under- explored facets of judicial selection. While these three articles focus on issues pertaining to state judicial selection, it is expected that future volumes will examine federal judicial selection issues as well. To order Volume 2 at a cost of $25, or to order *Research on Judicial Selection: 1999* at a discounted cost of $10, please visit www.ajs.org/rjs.html, or call (312) 357- 8821. The Hunter Center also invites submissions for the next volume of *Research on Judicial Selection.*

Send Information About Your Forthcoming Work to Helena Silverstein at: silversh@lafayette.edu

Section News and Awards

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The CQ Press Award

The CQ Press Award is given annually for the best paper on law and courts written by a graduate student. To be eligible the nominated paper must have been written by a full-time graduate student. Single- and co authored papers are eligible. In the case of co-authored papers, each author must have been a full-time graduate student at the time the paper was written. Papers may have been written for any purpose (e.g., seminars, scholarly meetings, potential publication in scholarly journals). This is not a thesis or dissertation competition. Papers may be nominated by faculty members or by the students themselves. The papers must have been written during the twelve months previous to the nomination deadline. The award carries a cash prize of $200. Next year's nomination deadline is June 1, 2002. To be considered for the competition, a copy of the nominated paper should be submitted to each member of the award committee:

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Formal and Empirical Applications in the Study of Judicial Politics
2002 APSA Short Course
Law and Courts Section, APSA

Date: Wednesday August 28, 2002 Time: 1:30 p.m.
Moderator: Wendy L. Martinek
Participants: Jeffrey A. Segal, SUNY – Stony Brook
David M. Nixon, Georgia State University
Christopher J.W. Zorn, Emory University
Georg Vanberg, University of Wisconsin – Milwaukee

Description: A perusal of the recent judicial politics and behavior research reveals an increasing use of sophisticated techniques, both in terms of empirical estimation and formal modeling. While these developments are to be welcomed, fully realizing the potential promise attendant with them depends upon fostering a more widespread understanding of the underlying issues and a greater dissemination of necessary tools among students of law and the courts. The benefits of doing so for theoretical development in the field are two-fold. First, and most obviously, more scholars will have the necessary tools to appropriately evaluate both established and emerging theories in the field. Second, and of equal importance, more scholars will have the requisite background to intelligently critique research using such techniques as well as use such techniques themselves as appropriate.

The purpose of this short course is to provide students of judicial politics and behavior, as well as interested others, with a basic understanding of some of the advanced methods and approaches being used with increasing frequency in the study of law and courts. Presenters will focus on specific formal and empirical applications (e.g., hazard models, game theory) in the study of judicial politics, illustrating their use and application. The goal is to provide participants in the course with a new (or renewed) understanding of important issues in the use of emerging methodologies and, hopefully, a foundation from which to build in adding some of these tools to participants' own research toolbox.

For more information, you may also contact the short course organizer, Wendy Martinek, Department of Political Science, Binghamton University – SUNY, P.O. Box 6000, Binghamton, NY 13902-6000, Phone: 607 777 6748, e-mail: martinek@binghamton.edu, webpage: http://bingweb.binghamton.edu/~martinek/

To register, send the following form and a $15 check (payable to the Law and Courts Section of the American Political Science Association) to Reggie Sheehan, Law and Courts Secretary-Treasurer, Department of Political Science, Michigan State University, East Lansing, MI 48824.

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Formal and Empirical Applications in the Study of Judicial Politics
Law and Courts Section Short Course

Registration Form

Name: _____

Institutional Affiliation: _____

Call for Law and Courts Book Review Editor

The Law and Politics Book Review is vital to the Section and is an excellent opportunity to make an interesting and important contribution to the Sections intellectual life. If you are interested or think someone else might be interested please contact Mark Graber, Chair of the Search Committee, at mgraber@gvpt.umd.edu. You may also contact the other members of the Search Committee, Richard Brisbin at rbrisbin@wvu.edu or Sally Kenney at skenney@hhh.umn.edu.

Announcements and Calls for Papers

NSF Seeks Director for Law and Social Science Program

The National Science Foundation invites applications for the position of Program Director for Law and Social Science Program. This program fosters empirical research on law and law-like norms and systems in local, comparative, and global contexts. The appointment will begin on or about January 2003 and will run for one year, with the possibility of renewal for the following year. The Director manages the Law and Social Science Program, providing intellectual leadership in its various activities, encouraging submissions, and taking administrative responsibility for evaluating proposals. The position entails working with directors of other programs and other divisions at NSF in developing new initiatives and representing the agency in other settings. Applicants should have a Ph.D. or equivalent in one of the social or behavioral sciences and a record of at least six years of scholarship and research experience. Applicants should also be able to show evidence of initiative, administrative skill, and ability to work well with others. More information about the position is available from Paul J. Wahlbeck, the current director (pwahlbec@nsf.gov, telephone: 703-292-8762) and from Daniel Newlon, Acting Director of the Division of Social and Economic Sciences (dnewlon@nsf.gov, telephone: 703-292-8760). Information about the Law and Social Science Program can be found on the Program's web page, http://www.nsf.gov/sbe/ses/law.

Applicants should send a letter of interest, a curriculum vitae, and the names and addresses of at least three references to the Law and Social Science Program, c/o Program Assistant Carolyn McKinnon, Room 995, Division of Social and Economic Sciences, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Qualified persons who are women, ethnic/racial minorities, and persons with disabilities are strongly encouraged to apply. NSF is an equal opportunity employer committed to employing a highly qualified staff that reflects the diversity of our nation.

Joint AALS and APSA Conference on Constitutional Law to be held in June

The AALS and the American Political Science Association Conference on Constitutional Law will be held Wednesday, June 5 through Saturday, June 8, 2002, in Washington, D.C.

Where has the Rehnquist Court taken constitutional law? Where will globalization take constitutional law in the future? How will the internet affect First Amendment doctrine? Are we all originalists now? Is it time to re-think *Lochner*? Is there constitutional law after *Bush v. Gore*? There is much to talk about since the last AALS constitutional law conference held nearly a decade ago.

The Conference, jointly sponsored by AALS and the American Political Science Association, will seek to foster interdisciplinary approaches to constitutional law. Members of both professions will participate on the plenary panels and in small group discussions. The first day of the Conference will focus on the work of the Rehnquist Court, examining federalism, congressional power under the Reconstruction Amendments, and protection groups. Small group discussion will consider other doctrinal areas, such as the Second Amendment, the death penalty, gender, and religion. The second day will look to the future of constitutional law. Plenary sessions will discuss protection afforded new forms of speech, comparative constitutional law, and globalization and constitutional law. A session will also be devoted to recent revisionist scholarship on the *Lochner* era. The final day will pursue new directions in constitutional theory regarding "law outside the courts" and the "new originalism."

The Conference has ambitious goals-broad, deep, and interdisciplinary. Come, bring your ideas, and be a part of a collaborative community. Conference topics include: Regime; Rehnquist Court; Federalism (Violence Against Women's Act); Second Reconstruction; Media and the Court; Protection of Groups; Small Group Discussions (Criminal Procedure and Race; The Current State of the Second Amendment Debate; Religion; Separation of Powers; Sovereignty; Gays & Lesbians; Death Penalty; Gender; Litigating Cases; Clerktalk; Legal Ideas & Realism); The Constitution and New Forms of Speech; The Function of Constitutional Courts; Concurrent Sessions (Globalization; Lochner Revisionism); Law Outside the Courts: Judicial Supremacy Implementation, Citizenship Interpretation; New Originalism; and Is There Constitutional Law After Bush vs. Gore. Updated Conference information and registration forms are available at: www.aals.org/profdev/constitutional/

Conferences and Events

Upcoming Conferences

Conference	Date	Location	Chair
APSA	Aug 29-Sept 1	Boston, MA	Law & Courts Susan Haire cmshaire@arches.uga.edu
			Con Law & Jurisprudence Rogers M. Smith roserss@sas.upenn.edu
Pacific Northwest PSA	Oct 17-19	Bellevue WA	Julie Novkov novkov@oregon.uoregon.edu
Southern PSA	Nov 6-9	Savannah GA	Rorie Spill spill@csbc.uni.edu
Northeastern PSA	Nov 7-9	Providence RI	Mark Wrighton mark.wrighton@unh.edu

Visiting Scholars
Center for the Study of Law and Society
University of California, Berkeley

The Center for the Study of Law and Society, founded in 1961, fosters empirical research and philosophical analysis concerning legal institutions, legal processes, legal change, and the social consequences of law. The Center invites applications from scholars with interests in all aspects of law and social ordering/social change. Visiting scholars will be part of a scholarly community that includes fellow visitors and a faculty of distinguished socio-legal scholars in law and economics, legal history, sociology of law, political science, criminal justice studies and legal and social philosophy. Core faculty members of the Center include Robert Cooter, Lauren B. Edelman, Malcolm M. Feeley, Robert A. Kagan, Christopher Kutz, David Lieberman, Kristin Luker, Robert MacCoun, Daniel L. Rubinfeld, and Harry N. Scheiber.

Application Requirements

1. Applicants must possess a Ph.D. or J.D. (or foreign equivalent).
2. Applicants must submit a full curriculum vitae.
3. Applicants must submit a cover letter which specifies the time period in which they wish to be in residence at the Center and which describes their proposed program of research or study. Applicants must pursue a program of research or study which is of mutual interest to faculty members at the Center for the Study of Law & Society.
4. Applicants must indicate the source of funding while visiting Berkeley, e.g. sabbatical pay, scholarship, government funding, personal funds, etc. Monthly minimum requirements for foreign exchange scholars are: $1600 per month for the J-1 scholar, $500 per month for the J-2 spouse, $200 per month for each J-2 child.

Among privileges and opportunities of Center visiting scholars are: library privileges at the Law School and at all campus libraries; access to a weekly luncheon-speaker series and other scholarly exchanges; other campus privileges, including athletic facilities; and, when possible, assignment to shared or other office accommodations.

The Center will consider applications for varying time periods, from two weeks duration to the full academic year. Applicants should submit the information listed above by post or e-mail to: Visiting Scholars Program, Center for the Study of Law and Society, University of California, Berkeley, CA 94720-2150, **csls@uclink.berkeley.edu**. Inquiries to the Acting Director, Professor Harry N. Scheiber, **scheiber@uclink.berkeley.edu** are also welcome. The Center's Web site is: **www.law.berkeley.edu/institutes/csls/**

Law and Courts is the newsletter of the Law and Courts Section of the American Political Science Association.

Subscriptions to **Law and Courts** are free to members of the APSA's Law and Courts Section. Please contact the APSA to join the Section.

The deadline for submissions for the next issue of **Law and Courts** is July 15, 2002.

Law and Courts

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