Law & Courts

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A Letter from the Section Chair

James F. Spriggs II

University of California, Davis

jfspriggs@ucdavis.edu

It has been about two years since we moved the Newsletter to an electronic format. I want to thank John Gates for making the transition a successful one. I also want to welcome our new editor, Mitch Pickerill, who is sure to put together a series of great publications.

Raising the Profile of the Field of Law and Courts

In my previous column, I suggested that we develop new measures to assist the professional development of young law and courts scholars. I want to build on that idea and challenge us to consider ways to foster the quality and reputation of the Law and Courts Section as a whole. In so doing, we can take what I see as a strong Section and make it even more vibrant.

Let me begin by stating the obvious. The Section contains a wealth of fabulous scholars who are conducting research that is of broad interest to individuals both within and outside the Section. I, however, suspect that recognition of this fact is not as widespread as it could be. I do not mean to suggest that the Section is not respected by other scholars, but rather that it is most likely not seen as being as intellectually relevant for other areas as it should be.

How, then, can we promote the prominence of the Section within the discipline of Political Science (and possibly even related fields)? The benefits of enhanced reputation could include, for example, an increase in the number of faculty positions in the area of law and courts, a greater tendency for scholars outside of our area to draw on our theories and data, a rise in the number and quality of graduate students interested in public law, and an increase in the likelihood of our research being published in premier outlets. We can thus all benefit from a Section that is viewed as more central to the discipline.

First, and most obviously, one essential means to achieve this goal is by training new scholars to produce cutting-edge research that speaks to a broad array of political scientists. The future of the Section depends on the quality of the new scholars joining it, and thus mentoring young scholars is of key importance. The reputation and prominence of the Section is a function of the quality and quantity of research produced by its members. We

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General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer). Contributions to **Law and Courts** should be sent to the editor:

J. Mitchell Pickerill, Editor
Law and Courts
Department of Political Science
Washington State University
801 Johnson Tower
Pullman WA 99164
mitchp@wsu.edu

Articles, Notes, and Commentary

We will be glad to consider 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 electronically as either an MS Word document or as a PDF file. Contact the editor or assistant editor if you wish to submit in a different format. Graphics are best submitted as separate files. In addition to bibliography and notes, a listing of website addresses sited in the article with the accompanying page number should be included.

Symposia

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 possible. Finally, authors should notify ***BOOKS TO WATCH FOR EDITOR***:

Keith Bybee, kjbybee@maxwell.syr.edu,

of publication of manuscripts or works soon to be completed.

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2005 Con. Law & Jurisprudence Chair
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(Chair's Column, continued from Page 1)

should therefore continue to develop ways to facilitate the professional growth of new scholars.

Second, we must think of ways to demonstrate to scholars outside of our area that our ideas are relevant for their understanding of political phenomenon. It is certainly true that, for example, students of American institutions are recognizing that courts are an essential decision maker to consider when examining the behavior of coordinate branches of government. But, I nonetheless suspect that too few scholars outside our area are aware of the richness of theory and data that we have that could benefit their own research. The question is how the Section can promote the scholarship of its members to those outside the field. I hope that some of you have ideas on this front.

A conference dedicated to public law is a third item that could potentially strengthen the Section. One of the downsides of the APSA conference (and increasingly even regional conferences) is that it is so large that we often mainly connect by waving at one another in the hallways. A smaller conference, dedicated solely to political scientists studying law and courts, would provide a venue for us to engage in more meaningful interaction. I see this as important because, at present, I do not think there is as strong a community bond among judicial scholars as there could be. My speculation is that a conference of this nature can provide one way for us to develop a stronger identity as a group of scholars.

Fourth, we could seek greater representation in APSA governance positions. Data from APSA indicate that public law scholars have occupied about 3% of council seats since 1970, with the exception of the mid-1980s, when we held approximately 14% of positions (http://www.apsanet.org/imgtest/APSAdata.pdf). Perhaps greater presence on the Council would enhance the reputation of the Section.

The above suggestions are simply my ruminations on a few ways to proceed. My basic point is that I think it would be valuable for us to consider ways to enhance the profile of law and courts within the broader political science community. I encourage each of you to think about this issue and suggest ways for us to proceed.

Syposium:
Explaining the Rehnquist Court

Introduction to Symposium on Explaining the Rehnquist Court

Thomas M. Keck
The Maxwell School of Citizenship & Public Affairs
Syracuse University
tmkeck@syr.edu

In September of 2004, with the Rehnquist Court about to open its nineteenth annual term, I invited a panel of five distinguished scholars to try their hand at explaining this Court's decision-making and jurisprudence. Each of these scholars has been advancing our collective understanding of the Court for some time now, from John Brigham's *The Cult of the Court*, published at the very outset of the Rehnquist era, to Mark Tushnet's *A Court Divided*, published just this year. Representing a variety of disciplinary perspectives, Brigham, Tushnet, Lee Epstein, Jeffrey Segal, and Michael Greve have produced a set of essays that are now more timely than ever. With Chief Justice Rehnquist's retirement imminent, this symposium represents an early retrospective on the Court that he has led.

Is there a coherent Rehnquist Court?

To explain the Rehnquist Court, of course, we need first to settle on a descriptive account of what it has been doing. That task has often proven surprisingly contentious, but the panelists have gone a long way in this regard. Within the legal academy, many liberal scholars have described the Rehnquist Court as extremely conservative (Balkin and Levinson 2001), while some of their conservative colleagues have objected that the Court is in fact quite liberal (Graglia 2003). As I have noted elsewhere, moreover, there are some pretty clear differences between the early and late Rehnquist Courts (Keck 2004).

Lee Epstein, Andrew Martin, and Kevin Quinn take this latter point as their key concern: whether we can accurately characterize the Rehnquist Court as a coherent era. Beginning with Thomas Merrill's widely noted recent argument that there have been two Rehnquist Courts—pre-1994 and post-1994—Epstein and her coauthors go even further, contending that the Court's fundamental character has changed on several occasions since 1986. Using an innovative methodology to identify the ideological location of the Court's median justice during each term, Epstein, et al. identify a fairly sharp leftward shift on the Court during Rehnquist's tenure as chief. Even the ostensibly stable natural court of the past ten years, they point out, has not really been one unified court.

Brigham raises this issue as well, noting that we rightly refer to the Court of the late 1930s and early 1940s as the "Roosevelt Court" rather than the "Hughes Court" or "Stone Court" and suggesting that the "Rehnquist Court" may not be a useful moniker for the Court of the past twenty years. Brigham suggests that we think of the Court of the past ten years or so as the "O'Connor Court." This fits with the analysis of Epstein, Martin, and Quinn, who identify O'Connor as the current Court's median justice, and Tushnet, who emphasizes her decisive role in thwarting some of the goals of Scalia, Thomas, and Rehnquist. Greve (2003) has elsewhere endorsed the "O'Connor Court" thesis as well.

If the post-1994 Court can be thought of as O'Connor's Court, the question remains whether we can come up with any coherent description of this Court's jurisprudence. Segal begins his essay by describing the Rehnquist Court as "a conservative, activist Court," but Tushnet notes that the Court has chosen not "to advance dramatically in either a liberal or a conservative direction." Epstein, Martin, and Quinn emphasize the Court's increasing liberalism, which has been particularly striking in the past few years, and Brigham goes so far as to call the current Court "something of a Gay Court." Ultimately, the panelists might all agree that the Rehnquist Court's record has been moderately conservative and that it is likely to become more conservative over the next few years; Brigham notes that in the wake of the 2004 election

results and the pending vacancies on the Court, it will not be long before he is looking back with fondness on the "mixed bag" that was the Rehnquist Court. Still, it remains both noteworthy and curious that this conservative Court has issued so many landmark liberal decisions, with the gay rights cases being the best examples. It is the Court's mixed pattern of liberal and conservative decisions that, to my mind, poses the biggest challenge to those seeking to explain the Rehnquist Court.

Judicial attitudes, the election returns, . . . or law?

Segal and Tushnet offer the most explicit explanations for the Rehnquist Court's decisions. Segal advances his familiar argument that the Court's decisions can be explained by the ideological values of the justices, contending that it is easy to explain the current Court's relative conservatism on the basis of the individual justices' attitudes. Explaining the Court's relative activism is a bit more complex, but ultimately comes down to the same thing - at least with respect to activism toward Congress. The Court's relative willingness to strike down federal laws, Segal argues, is traceable to its relative conservatism, in the context of a federal welfare-administrative state whose lawmaking has leaned in a liberal direction for half a century. Tushnet, in contrast, traces the Rehnquist Court's decisions to the views of the governing coalition in national party politics. Endorsing Dahl's argument that the Court reflects (and is indeed part of) the dominant governing coalition, Tushnet notes that if that coalition is divided—as the GOP is divided between "traditional" and "modern" Republicans—then those divisions are likely to be reflected on the Court. In short, while Segal insists that the justices follow their own political preferences, Tushnet argues that they follow the election returns.

Both of these explanations emphasize politics, of course, as the rightward turn of constitutional law during the Rehnquist era has tended to reinforce political explanations of the Court. Tushnet's essay, in particular, evinces the legal academy's accelerating turn away from law as an explanation for Supreme Court decision-making. This development need not have been so. After all, the success of the conservative constitutional revolution has in fact been quite mixed, and other possible explanations for the full pattern of Rehnquist Court jurisprudence might place more weight on legal ideas. Greve suggests one such explanation for the divisions on the Rehnquist Court: an ongoing legal debate between advocates of a formalist rule-based jurisprudence, on the one hand, and a more pragmatic jurisprudence of standards, on the other (see Sullivan 1992). Cass Sunstein has recently suggested another, contending that "the real divisions in the Rehnquist Court involve two radically different approaches to constitutional law. In a nutshell: O'Connor and Kennedy are incrementalists, reluctant to make large-scale changes in existing understandings of the law. Scalia, Thomas, and (to a lesser extent) Rehnquist are legal fundamentalists, or 'movement judges,' eager to insist on the supremacy of their own view of the Constitution, whatever the precedents say" (2004). Tracing the interaction of these political and legal factors during the Rehnquist era should keep Court-watchers busy for many years to come.

Nino Scalia, Postivist: The Court Made Him Do It

Michael Greve
American Enterprise Institute
greve@aei.org

Justice Antonin Scalia's jurisprudence has undergone a shift from legal formalism and constitutional structuralism to legal and constitutional positivism. The shift is a matter of emphasis, but it is big enough to have affected his substantive position on important legal questions. The most likely explanation for this striking shift is that formalism's plausibility depends on the Supreme Court's ability to draw and abide by intelligible legal rules and distinctions. That project has collapsed at all ends, and Justice Scalia is no longer willing to entrust the judiciary, emphatically including his own Court, with any distinction that he cannot explain to a three-year-old. His positivist turn is best understood as a desperate—and doomed—attempt to tether the Court to the law.

The Early Scalia …

In a terrific 1992 article, Kathleen Sullivan (1992) argued persuasively that Antonin Scalia was never a true constitutional originalist (or traditionalist, or textualist). Rather, Sullivan identified Scalia as the leading modern proponent of legal formalism. Sullivan does not doubt Scalia's commitments to textualism, original meaning, and historical tradition, but she rightly describes them as "contingent and secondary" (82–83). "[F]or Justice Scalia, the rule's the thing; originalism and traditionalism are means, not ends" (78).

Justice Scalia himself brought his formalist vision to the point in the title of his Oliver Wendell Holmes lecture in 1989: "The Rule of Law as a Law of Rules." Legal formalism's point is to reduce judicial discretion and, correspondingly, to make room for democratic decisionmaking. It is in that sense a "democratic formalism" (Sunstein 1997). It is opposed to a law of "standards," which rests on a concern over the over- and under-inclusiveness of formal legal rules. In 1992, Sullivan identified Justices Stevens, O'Connor, Kennedy, and Souter as adherents of this view (88-91).

Rules have consequences, as do standards. Formalism implies line-drawing, rather than balancing: "Categorization corresponds to rules, balancing to standards" (Sullivan 1992). Moreover, formalism implies an emphasis on constitutional or statutory structure, as opposed to a broader context that often includes factual, social or political considerations—"th'ole 'totality of the circumstances' test," as Justice Scalia has sneered *(U.S. v. Mead*, 533 U.S. 218, 241 2001).

…and the Common Law

Sullivan's article identifies a jurisprudence of standards with the common law and formalism, with a kind of anti-common law, or positivism. That is undoubtedly correct if by "common law," one means intensely fact-bound case-by-case adjudication, constrained (if at all) by precedents but not rules. Antonin Scalia has always and uncompromisingly opposed common law in *that* sense. But there are far more rule-like versions of common law. The law merchant and the federal common law of *Swift v. Tyson*, 41 U.S. 1 (1842), derived tolerably clear rules from the actual practices of private actors and from a remarkably clear-headed (if often intuitive) understanding of how private orderings work. Richard Epstein (1997), the most forceful contemporary proponent of this perspective, has mobilized the apparatus of modern economic theory in its defense. His project is "Simple Rules for a Complex World", not "Improvisation for a Better Tomorrow." Similarly, though (still) more controversially, the justices of the nineteenth century believed in a "federal common law" that courts may find under their own jurisdictional steam—which also yields rules, provided the justices have a clear understanding of the constitutional structure.

My point is not to defend the old common law in either the private or the constitutional version. My point is that the early Antonin Scalia believed in the possibility of such a common law and, at times, aggressively mobilized it (no less than text or original meaning) as a means of generating rules. Four Scalia opinions in important and intensely contested cases illustrate the point.

In *Boyle v. United Technologies*, 487 U.S. 500 (1988), the question was whether the estate of a U.S. soldier killed in a helicopter crash could sue the equipment manufacturer under Virginia state law. Congress had repeatedly considered but declined to enact liability shields for military contractors, and the Court held that the so-called *Feres* doctrine, which shields the United States government from liability for service accidents, did not apply to cases against private contractors. Still, writing for a 5-4 majority, Justice Scalia declared that the state law claims were barred *under federal common law*—that is to say, law created or found by the Court itself, under its jurisdictional authority and directly under the Constitution. Having so found, Justice Scalia's majority opinion explicated the substantive federal common law rule that would henceforth govern contractor liability. That rule and its derivation sound like the product of the Chicago Law School (where Justice Scalia once taught): it aims to harmonize socially optimal liability with optimal disclosure incentives.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), addressed the "standing" rights of environmental litigants to challenge federal agency actions in court. Writing for the majority, Justice Scalia declared in the critical portion of his opinion that the intended beneficiaries of federal statutes must, for constitutional reasons, establish a concrete "injury in fact" to gain access to court. In contrast, *regulated* parties (such as business) need not establish such an injury: they are presumed to be harmed simply by virtue of being regulated. In other words, restrictions on doing business as one wishes automatically count as judicially recognizable harms, whereas the loss of statutorily conferred rights to environmental amenities does not. Cass Sunstein (1992) sharply criticized the *Lujan* majority opinion for "inject[ing] notions of common law conceptions of harm into the Constitution" (167). Put aside the tendentious verb, and the analysis is exactly right (Greve 1996).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), one of several important Scalia opinions in major "takings" cases, held that just compensation is owed whenever government deprives an owner of all economically viable uses of his property, unless the rule that effects the taking can be classified as a form of nuisance abatement. This *per se* rule broke sharply with then-extant precedents, which balanced the owner's property rights with various other considerations. The rule is ostentatiously formalist, and it rests explicitly on traditional common law notions: in distinguishing nuisance abatement (for which no compensation is owed) from other forms of regulation (where compensation *is* required), courts are instructed to look to the "background principles" of (state) common law.[1]

In *BFP v. Resolution Trust Corp*., 511 U.S. 531 (1994), the Supreme Court examined a clause of the Federal Bankruptcy Code that forbade constructively fraudulent transfers of assets subject to bankruptcy proceedings, including asset sales for "less than a reasonably equivalent value." The question was whether a foreclosure sale—which typically yields less than the price that would be obtained in a transaction under less trying circumstances—could be second-guessed by federal agencies and courts as being "constructively fraudulent." No, said the Supreme Court. The common law, Justice Scalia wrote for a 5-4 majority, had always treated foreclosure sales as non-fraudulent (and so harmonized fraud and foreclosure law). The Federal Bankruptcy Code should not be read to change that understanding, despite some statutory language that would indicate an independent judicial standard of fraudulent conveyance. Why not? Because "*statutes that invade common law must be read with [a] presumption favoring retention of long-established principles*" (*BFP*, 511 U.S. at 543).

The New Scalia

"If this is a positivist interpretive rule, it stretches positivism awfully far," Kathleen Sullivan wrote of Justice Scalia's *Lucas* opinion (1992, 81). Put more directly: Scalia was no real positivist at the time. He still believed in the possibility of deriving rules from the general logic of private orderings and the constitutional structure.[2] But Justice Scalia *is* a positivist now.

A near-Popperian critical test and experiment is the 2004 decision in *Sosa v. Alvarez-Machain*, 124 S.Ct. 1627 (2004). The here-relevant part of that case addressed the question of whether the Alien Tort Statute (ATS), originally enacted as part of the Judiciary Act of 1789, authorizes foreign citizens to bring tort claims in U.S. courts. Justice Souter's majority opinion argued that the Congress that enacted the ATS way back when probably meant to recognize well-established claims under the customary law of nations—those arising over piracy, violations of safe conduct, and infringement on the rights of ambassadors. Justice Scalia's separate opinion, joined by Justice Thomas and Chief Justice Rehnquist, agreed with that analysis. But while the *Sosa* majority would leave the courthouse doors open for "well-established" international law claims, Justice Scalia would shut those doors. Judicial recognition of such claims is a species of

"federal common law"—that is, common law that can be divined by federal courts without a specific congressional grant of authority. The legitimacy of that undertaking, Scalia argued, was conclusively rejected in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Justice Brandeis's landmark *Erie* opinion, which overturned *Swift v. Tyson* and its entire progeny, rested on the legal positivism of the time, encapsulated in Justice Holmes's earlier dictum that the common law is no "brooding omnipresence in the sky" but the will of a sovereign with the authority to decree it. The new Antonin Scalia wants to hold the Court to that positivist command: without congressional authorization, his *Sosa* opinion insists, the Court lacks the authority to create common law causes of action.

If *Erie* forecloses that option, why did it fail to do so in *Boyle*? The two Scalia opinions are irreconcilable. *Boyle* confidently lays down a new rule of federal common law; the *Sosa* opinion categorically denies that there can be any such thing (although already-created federal common law rules may merit grudging respect on *stare decisis* grounds). What gives?

Explaining the Shift

The most tempting explanation—certainly for the proponents of an attitudinal model of judicial behavior—is to ascribe Justice Scalia's about-face from *Boyle* to *Sosa* to extra-judicial policy preferences. Federal common law cut in favor of corporate America in *Boyle* and against it in *Sosa*. The Supreme Court Database codes "pro-business" as a conservative value, and Justice Scalia is a conservative (Spaeth 2004, 58–59).

Not quite. The "new" Justice Scalia has inveighed (or at least voted against) federal common law even when the results were distinctly anti-business. The clearest example is *Norfolk & Western Railroad Co. v. Ayers*, 538 U.S. 135 (2003), where the Supreme Court held that the asbestos liabilities of employers covered by the Federal Employers' Liability Act are governed by state rather than federal law. Justice Scalia voted with the 5-4 majority—and never mind that the federal statute at issue practically *commands* courts to create federal common law.

A far more plausible interpretation (to my mind) is that the formalist quest for rules has collapsed on all of the axes where Scalia has looked for rules. The common law-like rule of *Lucas* has been eviscerated in subsequent decisions (Blumm 2002); the same fate has befallen the rule of *Lujan* (Greve 2001). The federal common law of *Boyle* has come to serve as a gateway for international law claims in U.S. courts. From Justice Scalia's perspective, it is hard to tell whether the evisceration or the expansion is worse.

Formalism has fared no better along other axes. Justice Scalia was a principal architect of the pristinely formalist *Chevron* doctrine, which commands (or rather commanded) judicial deference to "reasonable" administrative agency actions unless Congress itself, in the text of a statute, has decided the question at hand. The doctrine has been cut to pieces, to the point where Justice Scalia remains its only defender. Similarly, one can now find statutory interpretation cases where Justice Scalia is a lone formalist dissenter (*Koons Buick Pontiac GMC, Inc. v. Nigh*, No.03-377 [2004]), on matters of free speech, the free exercise of religion, and racial discrimination, Justice Scalia has consistently defended a formalist baseline of neutrality; in all those areas, the baseline has collapsed. In free speech cases, neutrality has long gone by the boards when it comes to speaking about abortion (see Scalia's dissent in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 [1994]). In free exercise cases, the Court has held that a bit of discrimination is just fine (*Locke v. Davey,* 540 U.S. 712 [2004]). In racial discrimination cases, the Court has held that a lot of discrimination in the right direction will be fine—until 2028, when it will stop altogether (*Grutter v. Bollinger*, 539 U.S. 306 [2003]). Formalism still wins when liberal, pragmatist judges like the outcomes: that explains the otherwise curious results in cases involving federal sentencing guidelines or the confrontation clause (*Apprendi v. New Jersey*, 530 U.S. 466 [2000]; *Blakely v. Washington*, 124 S.Ct. 2531 [2004]; *Coy v. Iowa*, 487 U.S. 1012 [1988]). But the pragmatists' willingness to tolerate formalist arguments when they yield liberal outcomes does not carry over to the next case, where the outcome may be conservative (or perhaps merely insufficiently context-sensitive). In other words, formalism does not really constrain judges, or at least not these justices.

Once that becomes obvious, what is the formalist's next move? Answer: resort to the one thing that the justices of standards are bound to respect—precedent, preferably venerated precedents or the justices' own opinions. In *Sosa*, Justice Scalia tried to hold Justice Brandeis's modern heirs to *Erie Railroad*. In *Grutter*, he attempted to hold Justice O'Connor to her own earlier opinions in racial discrimination cases. The positivist move compromises a central tenet of

formalism, which dictates a rather more relaxed attitude toward precedent (Sullivan 1992, 113). Evidently, though, Justice Scalia has felt compelled to sacrifice formalism's form to its purpose.

Why?

If I am right so far, Antonin Scalia's positivist move is an admission that formalism has lost. But *why* has it lost? At one level, the answer is painfully obvious. Sullivan (1992) counted one justice for rules (Scalia) and four for standards. That Term featured the brutally anti-formalist decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Sullivan argued that Scalia should have seen that coming as early as 1989 (79). In retrospect, her assessment seems justified. What it slights is that the formalist Scalia was still winning cases in 1992 and, for that matter, even in 1994. Subsequently, though, the four justices of standards were joined by a fifth (Ruth Bader Ginsburg) and then by a sixth (Steven Breyer). If Kathleen Sullivan is right about the foundational quality of jurisprudential models (as I believe she is), those appointments practically guaranteed a court of standards.

Quite probably, Antonin Scalia would readily acknowledge that formalism has failed to constrain the Court. In countless dissents, he has sharply criticized his colleagues for their willfulness, adhockery, and the persistent slighting of elementary legal distinctions. Anti-formalism, to Scalia's mind, corresponds to judicial imperialism. That is probably true, but it may not be the entire truth. In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the campaign finance case, the Supreme Court cheerfully permitted Congress to ration political speech, especially during election campaigns. In the Michigan affirmative action cases, it authorized (and encouraged) public universities to ration valuable privileges on the basis of race. The majority opinions in these cases are improvisational and anti-formalist to the point of parody (and Justice Scalia dissented in each case). However, rule-lessness here did not liberate the Court; it liberated political institutions. The obverse rulings would not have constrained the Court; foremost, they would have constrained politicians. The problem here is judicial abdication rather than imperialism.

Perhaps, Scalia's formalism has failed because it has always been a halfway house. At one end, as just seen, it has proven excessively constraining both for the Court and for political institutions. At the other end, it has lacked robustness. In interpreting the Commerce Clause, for instance, a formalist will want to draw a line between interstate "commerce" (which Congress may regulate) and, say, "production," which cannot be interstate and which (on this formalist view) is beyond the scope of congressional power. If that means the end of the administrative state, by all means let us have at it. Justice Thomas has taken that position; Justice Scalia has not (*U.S. v. Lopez*, 514 U.S. 549 [1995]). Hysterical denunciations notwithstanding (e.g. Schultz and Smith 1996), he has always accepted the New Deal as a done deal. That may well be the right course of action; but one must then doubt the normative force of the formalist commitment (cf. Lawson 1994). Formalism becomes form without constitutional substance.

If there is reason to ponder matters at this level of theoretical abstraction, it is this: the desperate lurch into precedent and positivism will no more constrain the Court than the discarded formalism. That is not a prediction; it is already a fact.

Notes

1 The structure of the Lucas argument, which tests state court decisions for their compatibility with common law "background principles," bears an uncanny resemblance to *Gelpcke v. City of Dubuque*, 68 U.S. 221 (1864), a precedent-setting bond case decided in the federal common law heyday of *Swift v. Tyson* regime. *See* Bridwell and Whitten (1977, 116–17).

2 I believe that this interpretation is at variance with Sullivan's take on the *Lucas* case. However, I can only flag—but not fully discuss—the disagreement here.

A Divided Court in a Divided Government

Mark Tushnet*
Georgetown University Law Center
tushnet@law.georgetown.edu

During most of Chief Justice William Rehnquist's tenure the nation experienced formally or functionally divided government, with Republicans and Democrats occupying veto points in the political branches. Legislative policy during divided government can be quite substantial, if the parties locate policies on which there is consensus. Judicial policy-making during such periods could also be quite substantial. The Supreme Court could, at least in theory, get away with policies more liberal or conservative than the median liberal or conservative positions in Congress, because it takes a two-thirds vote in both houses even to begin the process of amending the Constitution to overturn a Court decision.[1] The Rehnquist Court's flag-burning decisions illustrate the phenomenon: Obviously no majority in Congress would have voted as the Court did, but opponents of the Court's decisions were unable to muster a two-thirds majority in both houses for a constitutional amendment on the question.

Strikingly, though, the Rehnquist Court did not use the freedom it had to advance dramatically in either a liberal or a conservative direction. Even the so-called federalism revolution, which commentators treat as the Court's most substantial manifestation of conservative commitments, actually amounted to relatively little. The Court invalidated two statutes as beyond Congress's power under the Commerce Clause, one of which – the Gun Free School Zones Act – was by common agreement a trivial policy adopted because members of Congress wanted to play to the grandstand by showing their constituents that they too cared about gun violence in schools.

The Court also restricted Congress's power to impose monetary liability on state governments as a means of enforcing statutes designed to ensure that constitutional rights would be respected by creating a protective zone around such rights, covering actions that did not themselves violate the Constitution. But, the Court left untouched Congress's power to impose new substantive obligations on state governments, to be enforced by actions by the federal government or, more important, by forward-looking injunctions in suits brought by private litigants.

What accounts for the Court's limited use of the freedom it had in divided government? Pretty clearly, as I argue in detail in *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005), the reason is that the Court itself was divided. Obviously the Court was divided between liberals and conservatives, but the division that drove the Court's decisions was a division within the group of justices appointed by Republican presidents. Justice William Brennan and, following him, Justice John Paul Stevens kept the Court's liberals reasonably united by means of their manifest integrity and their personal charm. The liberals, then, simply waited around for those cases in which division among those usually regarded as conservative manifested itself.

I describe the division among the Republican appointees as one between traditional and modern Republicans. The Supreme Court's traditional Republicans are perhaps the sole remaining heirs to northeastern or Rockefeller Republicanism. They include Justices Stevens and David Souter, of course, but more interestingly they include Justices Sandra Day O'Connor and, to some extent, Justice Anthony Kennedy. The modern Republicans were shaped in a Republican Party transformed by Barry Goldwater and Ronald Reagan. The Court's modern Republicans are Chief Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas.

Traditional and modern Republicans find common ground in suspicion of the power of large national bureaucracies, which may account for their unity on the issues in the federalism revolution, and in concern about the impact of government regulatory programs on the efficient operation of the nation's businesses, which may account in part for the Court's vigorous enforcement of doctrines of national preemption of state regulatory programs, sometimes described as inconsistent with the federalism revolution.[2]

Traditional and modern Republicans divide over what have come to be called the social issues, including abortion, gay rights, and some aspects of religious symbolism as part of public life. The reason, I believe, is that traditional Republicanism

contained a strong strain of upper class *noblesse oblige* and anti-Catholicism, which manifested itself as toleration for the foibles of those less able than the elites to control themselves and as hostility to the role of religion – meaning Catholicism when traditional Republicanism developed its constitutional vision – in the public domain. In addition, the traditional Republicans carry forward the tradition of Republican internationalism in their willingness to incorporate references to non-U.S. law in their constitutional analyses.

The differences between traditional and modern Republicanism may explain why the Republican appointees to the Supreme Court disagreed among themselves, and gave the liberals opportunities to pick up some victories, particularly on cases implicating the social issues. Yet, in light of the facts that Justices O'Connor and Kennedy were appointed by Ronald Reagan, that Justice O'Connor was politically active in the Arizona Republican Party when it was already dominated by Barry Goldwater, and that Justice Kennedy was an important lobbyist allied with Ronald Reagan in California, something still needs to be explained on the personal level.[3]

For Justice O'Connor, I believe, the explanation is that her location in Arizona was essentially an accident. After her husband completed his military service, Justice O'Connor and her husband decided to return to the Southwest where she had been raised. She had a small law practice, from which she withdrew – briefly – when her children were born. She was a typical suburban Republican woman, though with a professional degree, in the late 1950s and 1960s. Like many such women, she became involved in a range of civic activities, many with a "good government" and social responsibility cast, and then devoted her energies to Republican activism. Except for the fact that she was an activist in Arizona, Justice O'Connor's biography would readily fit her into the category of traditional Republicans. And, even as a Republican activist, she found herself the leader in a closely divided legislature, where her success depended on her ability to accommodate the views of the state's Democrats.

Another reason for Justice O'Connor's traditional Republicanism may derive from her relations on the Court itself. She was of course the Court's first woman justice, and her new colleagues initially found her a bit stiff and hard to read. As with many justices, it took her several years to settle into her new job. And, just as she became comfortable on the Court, Antonin Scalia arrived. It seems reasonably clear that Justice O'Connor rather quickly came to regard Justice Scalia as something of an intellectual bully. She expressed the opinion that Justice Scalia was "not a very polite man" – and, by casting her evaluation in terms of "politeness," indicated one of the ways in which she was indeed a traditional Republican.

Relations between Justices O'Connor and Scalia seem to have permanently soured in 1989, when Justice Scalia was infuriated by Justice O'Connor's failure to indicate from the outset of the *Webster* abortion case that she would not join an opinion that substantially undermined *Roe v. Wade*. As Justice Scalia saw things, Justice O'Connor's dithering had had the effect of inducing Chief Justice Rehnquist to draft an opinion that was less anti-*Roe* than it would have been had everyone known from the beginning where Justice O'Connor would come out. Finally, the addition of Justices Ruth Bader Ginsburg and Stephen Breyer to the Court bolstered Justice O'Connor in her traditional Republicanism, the former simply by being another woman on the Court, the latter by providing a substantial intellectual counter to Justice Scalia.

Justice Kennedy's position is harder to describe, and it may be misleading to call him a traditional Republican at all. An alternative would be to say that he represents the libertarian strand within the modern Republican Party. That certainly would account for his anti-regulatory positions, his vigorous stance in favor of broad free expression rights, and, of course, his position on gay rights.[4] The difficulty is that Justice Kennedy is *not* a consistent libertarian. Indeed, his opinions and his extra-judicial statements indicate that he has a genial but quite robust trust in the good sense of the American people. Reconciling that trust with his libertarian impulses is obviously difficult: In each case, Justice Kennedy has to ask himself, "How could such a sensible people have done such a liberty-restricting thing?" The result is a certain hand-wringing in Justice Kennedy's work, most notably in his concurring opinion in the Court's first flag-burning decision, where he simultaneously asserted his personal responsibility for the decision and blamed the framers for forcing him to invalidate anti-flag-burning statutes.

The effect of Justice Kennedy's internally inconsistent impulses is to lead him to behave like a traditional Republican even if he is not really one of them. He will be anti-regulatory, but not too strenuously, expressing some nervousness about the Court's federalism revolution even as he participates in it. He will be libertarian, within limits: preserving the

"core holding" of *Roe v. Wade* in the *Casey* decision, but voting to uphold a restriction on late-term abortions in *Stenberg v. Carhart*.

The divisions within the Supreme Court's Republicans during Chief Rehnquist's tenure produced a divided Court that mirrored the divided government elsewhere. In a curious way, the Rehnquist Court might be seen as confirming Robert Dahl's assertion a half-century ago that the Supreme Court was never going to be substantially out of line with the views of the nation's governing coalition – even at a time when there was no such coalition.

Notes

***** Carmack Waterhouse Professor of Constitutional Law

1 I put aside here the ineffective methods of political control through legislation restricting the courts' jurisdiction and the like, except to note that those methods, unlike constitutional amendment, bring the President into the process and thereby insert another veto point.

2 I should note, though, that the Chief Justice and Justice Thomas are consistent in their pro-state positions in most preemption cases.

3 Justice Stevens was appointed by Gerald Ford, a traditional Republican President. Justice Souter, whose background makes it clear that he is a northeastern Republican, was appointed by George H.W. Bush, who – despite the transformations within the Republican Party that had occurred by the time he became President – probably should be described as a traditional Republican as well.

4 On the last, I think it important that everyone around the Supreme Court knew, essentially from the moment of Justice Kennedy's arrival, that he believed *Bowers v. Hardwick* to have been wrongly decided and that he wanted it overruled at the earliest opportunity.

The Rehnquist Court

Jeffrey Segal
Stony Brook University
jeffrey.segal@stonybrook.edu

The most succinct description of the Rehnquist Court is that it is a conservative, activist Court. How conservative? How activist? And what might explain its conservatism? Its activism? Those are the questions I will address in this essay.

I first examine the decisional conservatism of the Rehnquist Court by examining the annual percentage of conservative decisions reached by the Court in both civil liberties and economics cases. Civil liberties scores include the Court's vote in criminal procedure, First Amendment, civil rights, due process, privacy and attorneys cases. Liberal decisions are those that are pro-defendant in criminal cases, pro-women or –minority in civil rights cases, pro-individual or anti-government in First Amendment, due process, and privacy cases, and pro-attorney in attorneys' cases. Economic cases involve commercial business activity, litigation involving injured persons or things, employee actions toward employers, and zoning and other governmental regulations. Liberal decisions in these cases represent pro-government votes against challenges to federal regulations, plus pro-competition, anti-business, pro-liability, pro-injured person, and pro-bankruptcy votes (Epstein et al. 2003, 230). Figure 1 presents the data, not just for the Rehnquist Court, but for the 1949 through 2002 Terms of the Court.

Annual support scores, needless to say, only tell part of the story about the Court's policy making. They do not distinguish landmark from ordinary cases. Nor do they measure the output of the Court's written opinions. But it is worth noting

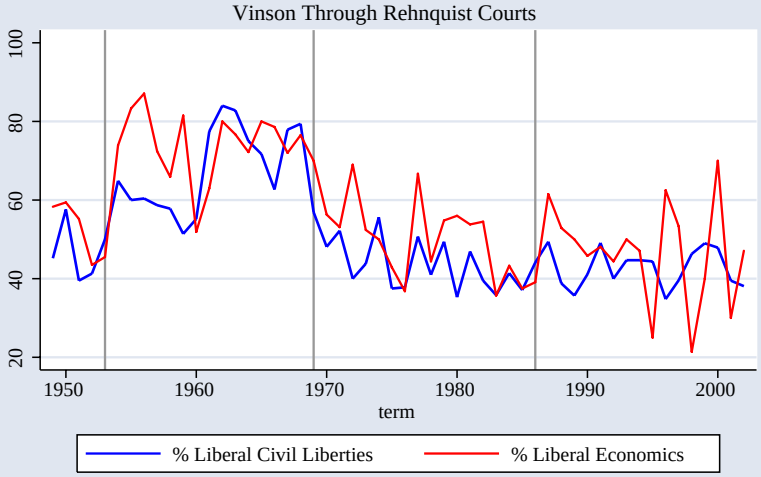
that existing evidence demonstrates that these support scores covary at very high levels with measures derived from textual analyses of court opinions (Wenzel 1995). Finally, these measures do not control for annual aggregate-level changes in case stimuli. But these scores correlate extremely well with the preferences of the median justice (Segal and Westerland 2005), something that would not happen if differences in case stimuli substantially corrupted these scores.

The percent liberal scores depicted in Figure 1 vary from a high of 84%, achieved during the 1962 Warren Court Term, to a low of 34.8%, achieved during the 1996 Term. Indeed, while this nadir was achieved during the Rehnquist Court, the Rehnquist Court does not stand out in these data as being particularly conservative. Rather, only the Warren Court stands out over this 54-year period, as being particularly liberal. The Rehnquist Court's moderately conservative behavior, of course, is consistent with its generally conservative tenor on the one hand, but an unwillingness to overturn *Roe v. Wade*, *Miranda v. Arizona*, or *Bakke v. California* on the other. Nevertheless, the Rehnquist Court has voted consistently conservatively in civil liberties cases, as demonstrated in figure 1.

The Rehnquist Court shows much more variance in economics cases, ranging from a low of 21.4% in the 1998 Term, to a high of 70% during the 2000 Term. This variance is largely due to a small number of economics cases being heard each term. For example, in the 2000 Term, the Court decided seven of ten cases in the liberal direction; in the 2001 term it decided three of ten cases in the liberal direction. The high point for economic liberalism was the 1956 Term of the Warren Court, which decided 87.1% of its cases in the liberal direction.

Figure 1. Liberalism in Civil Liberties and Economics Cases

Vinson Through Rehnquist Courts



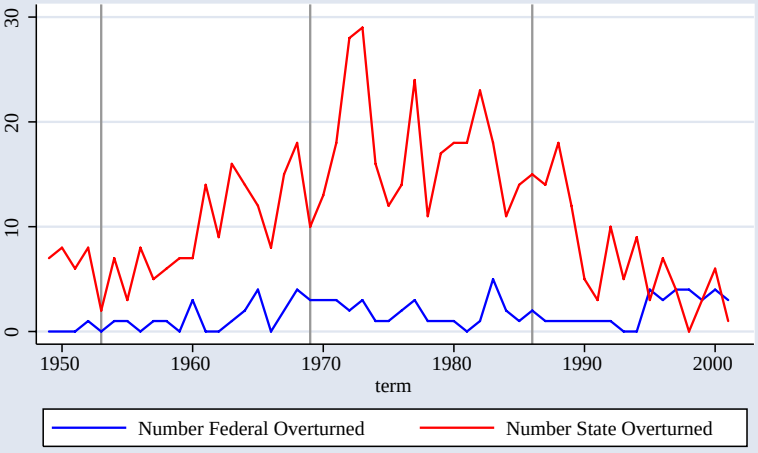
Data from Epstein et. al. 2003 pages 231-235 and updated by author from the Supreme Court database

The Rehnquist Court is also known for its activism (Keck 2004; Segal and Spaeth 2002). Keck, for example, entitled his book *The Most Activist Supreme Court in History.* While activism can be defined along many dimensions (Canon 1983), one of the most common, and perhaps the most important, is the willingness of the Court to exercise the power of judicial review.

Figure 2 presents the number of cases in which the Supreme Court has struck state (including municipal) or federal laws between the 1949 and 2001 Terms. Determining whether a federal or state law has been struck is not a clear cut task. I rely here on the cases listed in Epstein et al., 2003 (pp. 163-193). Epstein et al., in turn, rely on two main sources: the Congressional Research Service and the U.S. Supreme Court database.

Figure 2. Federal and State Declarations of Unconstitutionality

Vinson Through Rehnquist Courts



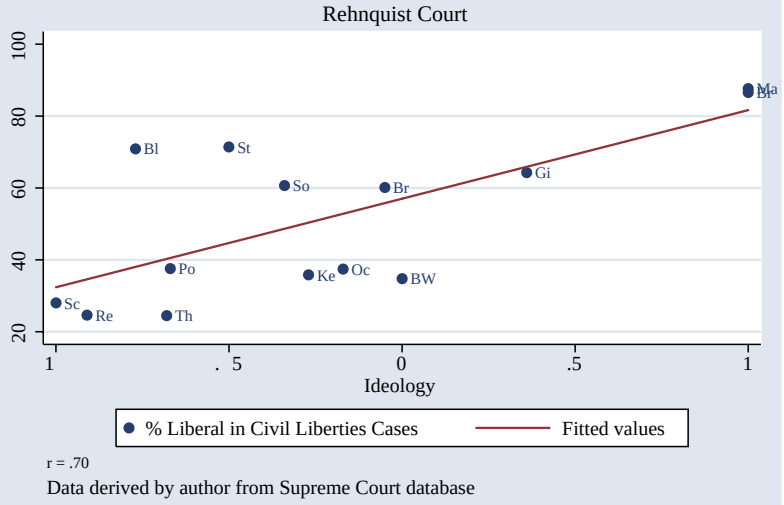
Data from Epstein et. al. 2003 pages 163-166

The Rehnquist Court's activism in terms of judicial review is clearly limited to the striking of federal statutes. Though the raw numbers are low, only three or four per year since the 1995 Term, this is more than two-and-a-half times greater than the per-Term average prior to the 1995 (1.3). In terms of declarations against state and municipal laws, the Rehnquist Court has struck fewer laws per term (7.2) than either the Warren Court (9.4) or, on this dimension, the hyperactive Burger Court (17.3).

I have thought long and hard about what might explain the voting behavior of the Rehnquist Court. Eventually it occurred to me that maybe, just maybe, the voting behavior might be explainable by the ideological values of the justices. While I was recently excoriated at a conference by a distinguished law professor who insisted that neither he nor anyone else who ever clerked at the Court believed that this had anything to do with the justices' decisions, I decided nevertheless to examine the hypothesis.

Figure 3 presents the relationship between the justices' ideological values, as measured by the Segal-Cover scores (Epstein et al. 2003, 485), and their votes in civil liberties cases during the Rehnquist Court, as derived from the U.S. Supreme Court database.[1] As can be seen, the justices' ideological values do a very good job of explaining the justices' voting behavior in civil liberties cases (r=.70). The worst-fitting justices are Stevens, who always voted more liberally than he was perceived to be when he joined the Court; Blackmun, who began as a conservative but drifted to the left; and White, who began as a moderate but drifted to the right. As Martin and Quinn (2002) demonstrate, time-varying ideological estimates will outperform static ones such as the Segal-Cover scores, but of course, it's hard to imagine time-varying scores that are not endogenous to the justices' votes.

Figure 3. Ideological Values and Votes in Civil Liberties Cases



Data derived by author from Supreme Court database

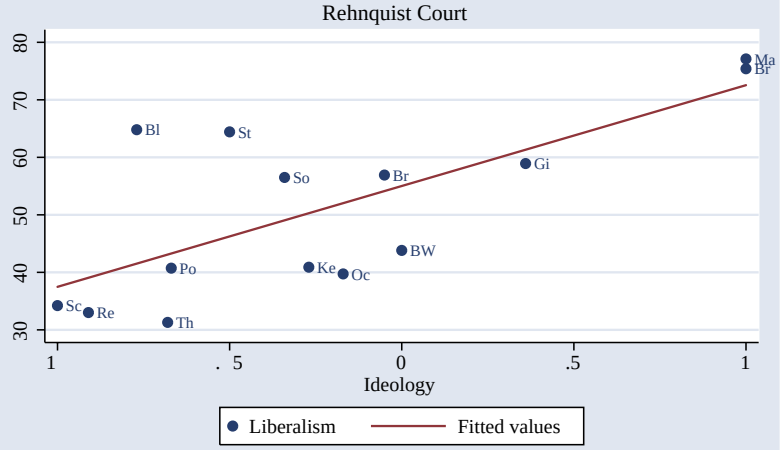
Next, because Howard Gillman may be reading this, I provide the fit between the justices' ideological values and their votes in all cases.[2] The fit here, judging by the coefficient of correlation (.72), is a bit higher than in just the civil liberties cases. Overall, though, consistent with the attitudinal model (Segal and Spaeth 2002), the votes of the Rehnquist Court justices are well explained by their ideological values.

The explanation for the Rehnquist Court's activism is a little more complex. In a forthcoming article, Chad Westerland and I estimated a series of event count models to examine the determinants of the Supreme Court's propensity to strike federal laws between 1949 and 2001 (Segal and Westerland 2005). Briefly, and in contrast to the gist of recent work by Harvey and Friedman (2003), we find no relationship between the Court's likelihood of striking federal laws and the Court's ideological distance from either the Congressional median or the President. Alternatively, we find a strong and

robust relationship, controlling for a variety of other factors, between striking federal laws and the conservatism of the Supreme Court. Thus, these findings reject the notion, for those who still need clarity on this issue, that judicial activism is a liberal phenomenon.

We do not believe, though, that the finding that the Court strikes down more laws as it becomes more conservative is inherent in the nature of Supreme Court-Congressional relations. During the past 50 years, the federal government has taken the lead, among other things, in protecting civil rights and providing social welfare benefits, at least compared to the states. Were the federal government to move consistently in the opposite direction, liberal Courts might be more inclined to strike federal laws.

Figure 4. Ideological Values and Votes in All Cases



r = .72

Data derived by author from Supreme Court database

Notes

1 I used citation plus split votes as the unit of analysis, and orally argued cases, whether decided with written opinions, per curiam, or by judgment of the court, as decision type.

2 Well, virtually all cases. I exclude the small number of interstate relations (usually territorial disputes) and miscellaneous disputes, which are not coded directionally.

The "Rehnquist" Court (?)*

Andrew D. Martin *Washington University*
Kevin M. Quinn *Harvard University*
Lee Epstein† *Washington University* epstein@artsci.wustl.edu

As the Rehnquist Court era draws to a close,[1] scholars will deploy a diverse set of tools to explore an equally diverse set of questions. We can imagine large-scale quantitative studies designed to investigate the degree to which the Court opted out of the "Court/Congress/President" game (Eskridge 1991; Segal 1997), as well as complimentary historical and doctrinal analyses assessing the extent to which "judicial supremacy" under the Rehnquist Court became "judicial sovereignty" (Kramer 2001, 13). Already receiving their fare share of scrutiny are particular decisions but especially *United States v. Lopez* (1995) (e.g., Symposium 1995; Frickey and Smith 2002), *Bush v. Gore* (2000) (e.g., Gillman 2001; Posner 2001), *Grutter v. Bollinger* (2003) (e.g., Symposium 2003; Devins 2003), and *Lawrence v. Texas* (2003) (e.g., Franke 2004; Koppelman 2004). More will inevitably follow—as will work on the various theories of constitutional and statutory interpretation expounded by the Chief Justice and his colleagues.

Here we take on nothing so grand. What we do instead is make use of a relatively new technology—Andrew Martin and Kevin Quinn's method of assessing the policy preferences of the justices—to explore whether we can fairly characterize the terms between 1986 and 2003 as part of a coherent era, the "Rehnquist Court era." As the legal scholar Thomas Merrill (2003) recently wrote:

> The Supreme Court is implicitly assumed to have a certain unity of character under each Chief Justice. Hence, we refer to the "Marshall Court," the "Warren Court," and the "Rehnquist Court." A closer look at history reveals that this assumption of a natural Court defined by the tenure of each Chief Justice is often misleading. The Marshall Court had a different character late in its life than it did in its early years. Similarly, the Warren Court became distinctively more liberal and activist after 1962 when Felix Frankfurter retired and was replaced by Arthur Goldberg. Ought we add the "The Rehnquist Court" to this list or has it been more uniform in its decision making than the others Merrill identifies?

Martin & Quinn's Approach to Assessing Policy Preferences

Before turning to this question, a few words are in order about the Martin & Quinn (hereinafter "M & Q) method—but only a few since we provide the details elsewhere. [For a technical description, see Martin and Quinn (2002); for a more conceptual, accessible explanation, see Martin, Quinn and Epstein (2005).] A chief goal of the M & Q method is to supply students of judicial politics with several quantities of interest— including an estimate of the ideal point of each justice in each term, an estimate of the location of the median justice for each term since 1937, and the identity of the justice most likely to have been the median, along with (and crucially so) an assessment of the degree of uncertainty that a particular justice was the median. So, for example, by invoking this method to characterize the 2003 term, we can say with probability 0.999, as Figure 1 shows, that Justice O'Connor was the Court's median justice; the only other justice with a non-zero probability of holding that key position was Kennedy (.001).

In the case of the 2003 term, then, O'Connor (to no one's great surprise) was the clear median justice: the M & Q estimates of her ideal point and that of the Court's median are virtually indistinguishable. But such is not always or even usually the case. Moving back just ten terms, to 1993, we can see (in Figure 1) that Martin and Quinn estimate the location of the median at 0.692. O'Connor is quite close, with an ideal point estimate of 0.845. Nonetheless, it is Kennedy (0.716) who was the most likely median that term; in fact, based on the M & Q estimates we can say that Kennedy was 3.24 times more likely than O'Connor to have been the pivotal justice in 1993.

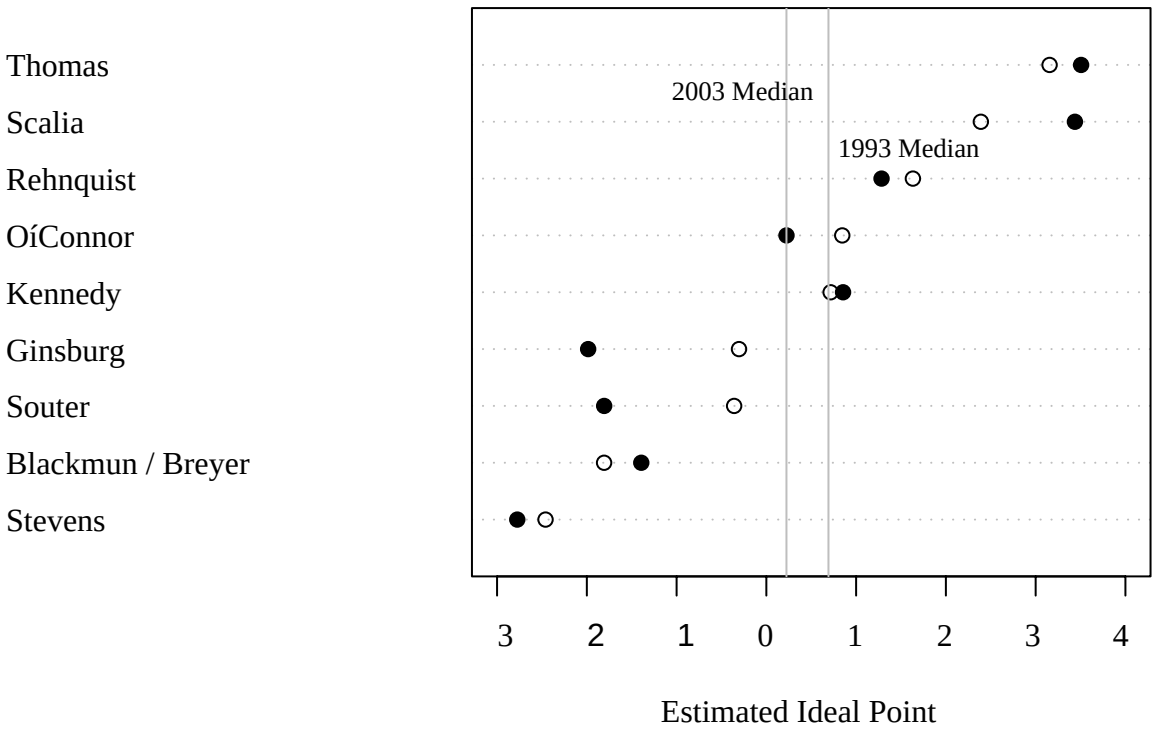


Figure 1: Estimated ideal points for the 1993 and 2003 terms. The hollow circles are the estimates for the 1993 term; the solid circles are those for the 2003 term. The gray vertical line on the left depicts the estimated location of the median justice in the 2003 term; the one on the right shows the same for the 1993 term. The data are available at: http://adm.wustl.edu/supct.php.

Enabling researchers to make rational and coherent probability claims—such as those pertaining to the identity of the justice with the highest posterior probability of being the median (along with that probability)—is just one attractive feature of the M & Q approach; elsewhere we delineate others (see Martin, Quinn and Epstein 2005). But how does the approach work? E.g., how do the researchers arrive at the scores we present in Figure 1? Again, given explications of the approach in other fora, suffice it to note here that Martin and Quinn base their method on (1) a spatial model of voting on the Court, which they in turn use to derive (2) a probability model in which the votes of the justices are the dependent variables. The spatial model assumes that justices have a choice between two alternatives, each of which has policy consequences that we can represent by points in an issue space. Justices evaluate these policy consequences with utility functions that are single-peaked around some ideal policy point specific to each justice. The probability model is a means of accounting for variability in the votes of justices in relatively parsimonious terms. Its central building block is that the probability of justice j voting for the alternative coded 1 in case k is given by:

$$\phi (\alpha_k + \beta_k \theta_j)$$

where $\phi(\cdot)$ is the standard normal cumulative distribution function, α_k and β_k are deterministic functions of the policy locations of the two alternatives, and θ_j is the ideological location of justice j's most preferred policy (her ideal point). Because of the dichotomous nature of each justice's decision, the probability that justice j votes for the alternative coded 0 in case k is given by:

$$1 - \phi (\alpha_k + \beta_k \theta_j).$$

The mathematics involved here follow directly from the theoretical model of voting and are just a representation of the fact that, under the theoretical model, justice j will vote for the option generating the policy consequences she most prefers.

Martin and Quinn analyze this model from a Bayesian perspective, which is simply a means of rationally learning about the probable values of the model parameters. As a practical matter, this is very similar to finding the values α_k, β_k, and θ_j for all cases and justices that were most likely to have generated the observed votes (i.e., classical maximum likelihood estimation). A subtle (but important) difference between Bayesian inference and classical likelihood inference is that the former involves summarizing the joint probability distribution of all model parameters given the observed data, whereas classical inference involves the use of an estimator to pick a unique estimate of the model parameters along with an assessment of how this estimator would behave if new data samples were taken from the population of interest.

Deploying the M & Q Scores to Study the Court

Resulting from the Martin and Quinn analyses are the estimated ideal points and other quantities of interest for all justices (and Courts) serving since 1937. We have posted these data (at http://adm.wustl.edu/supct.php) in a variety of forms (Excel, Stata, SPSS, et al.) with the hope of encouraging a range of researchers to deploy them to address an equally searching set of questions—whether on the Court's relationship with the other branches of government, the lower courts, or the states; the extent of (revealed) preference change among the justices; the factors affecting case selection; explanations of opinion assignment; and, the effect of public opinion, the economy, and crime (to name but a few socio-legal factors) on the decisions of particular justices. More to the point, virtually any research project that has previously relied on votes, party affiliations, or the Segal & Cover scores (Segal and Cover, 1989) to identify the ideal points of the justices, the median justice, and so on can now invoke the M & Q estimates—and can do so without confronting the substantial drawbacks of those other approaches. So, for example, the M & Q method does not suffer from the problem of "circularity" that plagues the use of votes (Segal and Spaeth 2002): By purging the particular issue area of interest and recomputing the M & Q estimates, they are perfectly appropriate for analyses of Court decision making; employing them in this way does not, in other words, amount to using votes to predict votes.[2] Nor are the M & Q estimates more or less suitable for investigating particular areas of the law, a possible drawback to the Segal & Cover scores (see, e.g., Epstein and Mershon 1996).

In light of their versatility (and despite their relatively recent appearance), it is perhaps not so surprising that scholars already have deployed the Martin & Quinn scores to study Court-Congress interactions (Sala and Spriggs 2004; Friedman and Harvey 2003; Baird and Horowitz 2004, e.g.); and we ourselves have put them to use to describe the Court's median over time, as well as to analyze the extent to which President Bush will be able to remake the current Court via the nominations process (Martin, Quinn and Epstein 2005). Here we turn to another dimension of the Rehnquist Court: whether we can fairly characterize it as a singular, coherent era.

Emerging conventional wisdom suggests that we cannot. Earlier we quoted Merrill on the inadvisability of assuming "a certain unity of character . . . of Courts under the leadership of John Marshall and Earl Warren." Merrill speaks for many legal academics when he makes the same claim about the present Court:

Although the Rehnquist Court is still with us, we can already perceive that there have been two Rehnquist Courts. The first Rehnquist Court lasted from October 1986 to July 1994. It featured frequent membership changes, a relatively full (but declining) calendar of argued cases, and majority coalitions that shifted from issue to issue. . . . The second Rehnquist Court started in October 1994 and is still with us.

These words would resonate with political scientists as well. Over the course of Rehnquist's years at the helm, the Court experienced five membership changes, resulting in six "natural courts" (see Figure 2). Surely such turnover, virtually all judicial specialists would argue, ought lead to alterations in the results reached by the Court, not to mention in its jurisprudence.

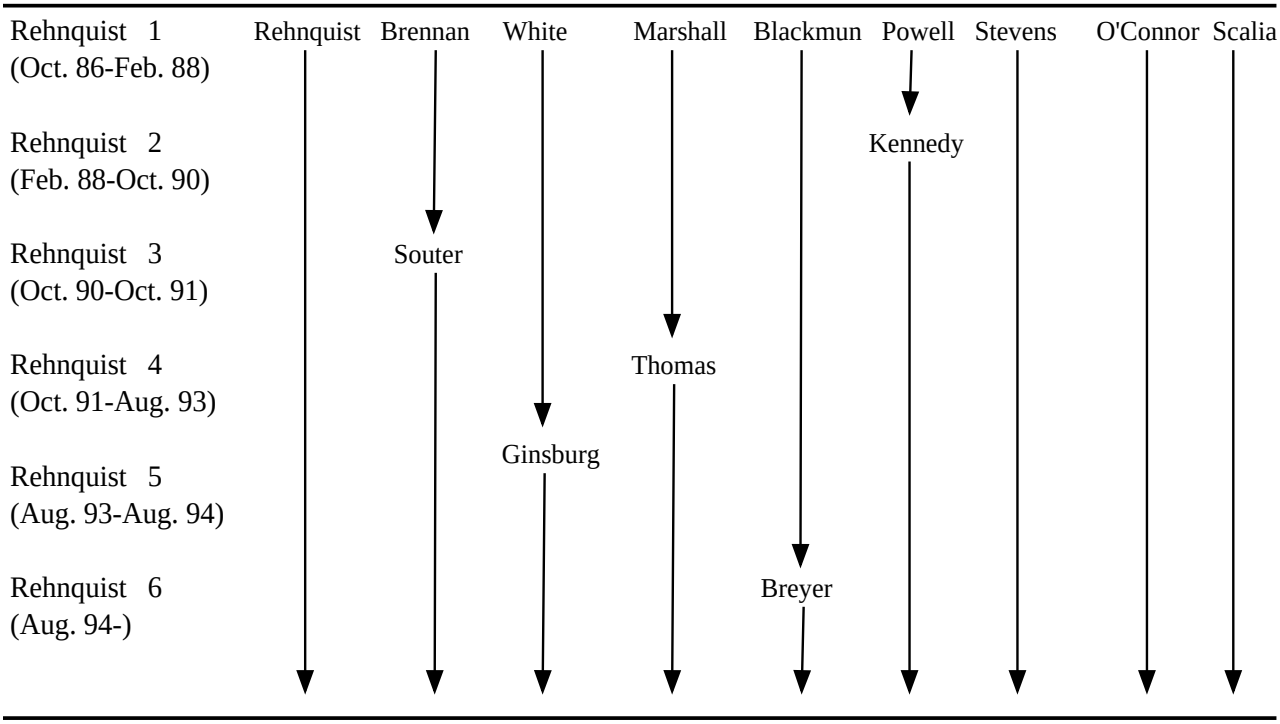


Figure 2: Membership turnover during the Rehnquist Court, 1986-2004terms. Data Source: Epstein et. al. 2003 (379-80).

To assess this contention we depict, in Figure 3, the Martin & Quinn estimates of the location of the median justice in each term since 1986, as well in the various natural courts (shown in the vertical gray lines). Although we could offer any number of observations about these data, two seem relevant. First, the conventional wisdom appears to have some basis in fact: It would be difficult to characterize the era as uniform in its decision making. Over the course of the last 17 terms, the median has been as conservative as 1.007 (1988 term) and as liberal as 0.224 (2003 term)—though "liberal," at least historically, is hardly an accurate term. While the Rehnquist Court was, in 1988, among the most conservative to have sat since 1937, its "liberalness"—even in the 2003 term— pales in comparison to, say, the 1963 Court (with a median M & Q score of -0.791).[3] Second, we do not even observe stability within natural court eras. To take the current one (1994-present) as an example, we see a clear linear trend toward the left: Over the last decade or so, the Court's median—as derived from the same set of justices—has moved from a relatively conservative 0.577 to a more moderate 0.224.

Of course and once again this is not to say that the current Court is "liberal"; comparatively, that is not the case. It is rather to call attention to the (apparently) changing (revealed) preferences of the contemporary justices—and to the possible effect of those changes on the law. To see this last point, return to Figure 3 and observe the horizontal line indicating the "cutpoint" for *Grutter v. Bollinger* (2003), such that points above the line indicate a probability of greater than 0.500 of voting to strike down the affirmative action program, while those below the line indicate a greater than 0.500 probability of voting to uphold the program. Only in the last three terms—despite the lack of membership change in the previous seven—did the median justice fall on the side of the University of Michigan. Likewise, if we consider (in the counterfactual world) how the Court as a whole would have approached *Grutter* in, e.g., 1988, the model suggests only a 0.136 probability of reaching the outcome that it did in the 2002 term. That figures increases to 0.239 in 1993 but only exceeds 0.500 in 2001 and beyond.

Figure 3: Martin & Quinn's estimates of the location of the median justice, 1986-2003 terms. The gray vertical lines represent natural court eras (see also Figure 2). The dashed line is the estimated cut point for Grutter v. Bollinger. The data are available at: http://adm.wustl.edu/supct.php

Discussion

In a separate paper we speculate on the reasons behind this particular shift—primarily O'Connor's move to the left (Martin, Quinn and Epstein 2005)—but several more general lessons emerge here. First, to Merrill's list of "Chief Justice"-labeled eras that changed in character over time we could add Rehnquist: the Court of today is distinct in its decision making from the Court of 1986 or even of 1994. Second and relatedly, the data draw attention to the utility of the "natural court" as a conceptual and analytic device. For decades now scholars have assumed that during periods of stability in Court membership little, if any, change in the median's location occurs. Our analysis, however, supplies cause for pause this assumption: At least during the Rehnquist Court years, the location of the median fluctuated considerably over and even within the six natural courts.

Whether this holds for other "eras" remains to be seen but the Martin & Quinn estimates provide one plausible method for so determining.

Notes

*Please send all correspondence to Lee Epstein. Email: epstein@artsci.wustl.edu; Phone: 314.935.8580; Post: Department of Political Science, Washington University, CB 1063, 1 Brookings Drive, St. Louis, MO 63130.

†Andrew D. Martin (http://adm.wustl.edu) is Associate Professor of Political Science at Washington University in St. Louis; Kevin Quinn (http://www.people.fas.harvard.edu/_kquinn/) is Assistant Professor of Government at Harvard University; Lee Epstein (http://epstein.wustl.edu) is the Edward Mallinckrodt Distinguished University Professor of Political Science and Professor of Law at Washington University in St. Louis. http://adm.wustl.edu/supct.php houses all

information necessary to replicate the empirical results in this article. For research support, we thank the National Science Foundation, the Washington University School of Law, and the Weidenbaum Center on the Economy, Government, and Public Policy. We adapted some of the results we report here from a paper on the Court's "center"—"The Median Justice on the U.S. Supreme Court"— which will appear in the North Carolina Law Review and is now available (in a pre-copy-edited form) at: http://epstein.wustl.edu/research/medianjustice.html. For useful comments on that paper, we thank participants at North Carolina Law Review's symposium on Locating the Constitutional Center, at a faculty workshop at Washington University School of Law, and at a roundtable on the Rehnquist Court held during the 2004 meeting of the American Political Science Association.

1 We suppose we should qualify this with an "in all likelihood," though by all indications it seems that Chief Justice Rehnquist will retire by the end of the term if not before.

2 See Martin and Quinn (2004). On the other hand, this paper demonstrates that as an empirical issue, it matters not if scholars invoke the purged estimates or those based on all votes.

3 On the other hand,, across the entire Rehnquist Court period the difference between the most liberal and most conservative locations of the median justice was just 0.791. The figures for the Warren (1953-1968 terms) and Burger (1969-1985) Courts, by contrast, were 1.497 and 1.005, respectively.

Let's Not Call It "The Rehnquist Court"

John Brigham
University of Massachusetts, Amherst
brigham@polsci.umass.edu

I begin by thanking Tom Keck for the invitation to participate in this symposium and for mentioning my monograph, *The Cult of the Court* in the introduction. That book, published in 1987, the year of the Constitution's bicentennial, now feels almost as old as the document we were celebrating. My reference to a "cult" then was meant to suggest that commentators generally and Political Science scholars in particular be more critical of the High Court. Eighteen years ago, the lack of distance and critical perspective with regard to the treatment of civil liberties, were frustrating. In the field of Political Science that studied the Constitution, then called Public Law, reverence for the institution led many scholars to perpetuate the progressive image initially associated with the Roosevelt Court and the Due Process Revolution. Since *The Cult of the Court* was published we are less likely to see the Court with such equanimity.[1]

While *The Brethren*, published in 1979, stimulated the evolution toward more critical and informed opinion about the Court, that change intensified when William Rehnquist was elevated to the Chief Justice's chair in 1986. With the importance of the last 19 years in mind and because the participants in this symposium comprise such a distinguished group, I was pleased to be a part of it at the original APSA panel, and I am eager to put my comments in writing. As it turned out, the panel was more critical than I had anticipated and those who preceded me have already laid a conceptual, empirical and social foundation for what I had intended to say. I was fortunate to present last. Let me offer my observations on the Supreme Court under the Chief Justiceship of William Rehnquist, building at least in part on what my colleagues have already put forth.

As a student of institutions, I am drawn to the project because of an interest in the concept of a "Rehnquist Court" itself. That is, I cannot help but wonder about the practice of naming a Court for its Chief Justice and the legal category that results. This practice is an aspect of the institutional life that we have been asked to discuss. My mentor, Charles Herman Pritchett, wrote an important book about the group of justices on the Supreme Court in the late 1930s and early 40s. He did not refer to the Court by referring to its Chief Justice. He called it *The Roosevelt Court* (Pritchett 1943). Pritchett followed that book with one on civil liberties and what he called "the Vinson Court." I don't remember Pritchett saying why his book, "The Roosevelt Court," was not called the Hughes Court or the Stone Court, after the appropriate Chief Justices, but it seems obvious given the nature of Pritchett's interest in Court dynamics his focus was on the justices, figures like William O. Douglas and Felix Frankfurter, and indeed, President Roosevelt himself. His interest in *The Roosevelt Court* was not on the Chief.

So, what of "the Rehnquist Court?" Actually Lee Epstein and Tom Walker, in their very good casebooks on constitutional law, call the period of the Court under Burger and Rehnquist, "the Republican Court Era" (2004). Epstein and Walker count this era from 1969 with the appointment of Warren Burger. Alternatively, we might say that the era of Republican Courts starts in the early 1970s, after *Furman* in '72, *Roe* in '73, and the Nixon tapes case in '74. Though William Hubbs Rehnquist became Chief Justice on September 9, 1986, the Epstein and Walker characterization is a way of recognizing that the Supreme Court never really became Rehnquist's in the senses that matter most, the development of constitutional doctrine.

Last summer, during the panel, I wondered how long we would have to give the Court over to the Republicans, how long the Republican era would last? The election was looming and change seemed to be in the air at least at the APSA Convention in Chicago. Rehnquist followed Burger as the second of the Republican Era Chief Justices. It is pretty clear if that is all there is to it. But, it looks like the Republicanness of the Court is more complete and has had a longer history in some areas than in others. In the matter of free speech it is hard to tell the Republican era from the eras immediately preceding it. I have trouble imagining a new free speech jurisprudence coming from potential appointments on the horizon no matter how inevitably Republican they would now seem to be. In abortion, the Court has not been all that Republican since *Casey* in 1992. That could change, but it does not seem likely. In matters of federalism and in partisan situations, from *Clinton v. Jones* to the 2000 Election Cases, the Republican Court is more obvious and still in operation.

Since the election of 2004 it is easy to suppose that that fact may have contributed to the relatively quick Kerry concession the morning after the vote.

But, federalism may be a special case. One thing about federalism is Sandra Day O'Connor and what she represents. She has shown us the Court can be connected to the Country. From cowgirl to state legislator to her sensitivity to what states want or think they need to do, it does seem like she is in touch with the country. And, sometimes the other Justices appear to just live in it (Greve 2003). Justice Scalia seems unusually comfortable in his usually contentious sort of way in contexts as diverse as Louisiana Duck blinds and the podium of Johnson Chapel at Amherst College.[2] Indeed, since O'Connor is important on federalism, women's issues and as a symbol, there is a case for an "O'Connor Court," at least since the early 1990s. I cannot see the academy making this designation. My colleague on the panel, Michael Greve, is particularly disparaging about her contribution to reasoned discourse on the Constitution. But I wonder if we can imagine the country calling it her Court. The GSA gave her a nice new courthouse in Phoenix after all. I like the idea of an O'Connor Court in part because Justice O'Connor is the most visible of the justices.[3] I also like it because it makes America, the country, and perhaps even the center on the Court more important to the naming process. It suggests, in fact, that institutional naming can come from many quarters and for a variety of reasons.

For instance, it seems like the American Supreme Court lately has gotten to be something of a Gay Court in giving us *Lawrence* and, ultimately, if you live in Massachusetts or San Francisco, same sex marriage. It's hard for me not to want to feature this contribution in characterizing the Court. I am excited by recognition of this distinctive aspect of the institution lately. Rather than a Rehnquist Court we could think of the institution as a Queer Court. And, since this Court continues to refuse to be televised but increasingly makes oral arguments available it has become something of an Audio Court.

Clearly, it is a very complex institution and in that regard perhaps it deserves a designation reflecting that complexity rather than the Rehnquist designation. For instance, because this Court is characterized, in a noble sense, by an O'Connor-Souter-Kennedy inclination to stand behind the law we could use all three names. These Justices, by standing somewhat in the shadows of partisan and doctrinal glitz, represent something that deserves recognition. There is a case for calling the Court for the last fifteen years, again outside of purely partisan matters, a Constitutional Court or even a Law Court, because it is too clumsy to refer to an O'Connor-Souter-Kennedy Court.

One thing the current Supreme Court is not is a Scalia Court. In fact, for a while the case could be made that what we have is an "unScalia Court". That is what I take from the duck hunting adventures of last year as well as the doctrinal isolation characteristic of Scalia and Rehnquist. Scalia was widely criticized and lampooned for his failure to recuse himself in *Cheney v. U.S. District Court.* After the 2004 election, the rumor of a Scalia nomination to become Chief Justice surfaced but it seemed to have more strategic significance than political currency. Perhaps as a trial balloon for Justice Thomas or someone even more conservative and without Thomas' interesting blackness.

Perhaps it is not even a "Court" at all that it makes sense to speak of, but distinctive aspects or groups within. That is, by the search for a Rehnquist Court, maybe we are not assessing some sort of comprehensive institution but instead some mix of institutional life and policy. With Rehnquist, Scalia and Thomas, the distinctive entity that deserves note might be "the Rehnquist Bunch" or the Republican appointees. This would be the ultraconservative trio that has been around for some time now. So, for the most part, except in matters of partisan concern as with *Bush v. Gore*, we have had something other than a Rehnquist Court and probably something other than a Republican Court for at least ten years. Of course, since the panel met in the late summer the outlook has changed, probably considerably.

The Rehnquist mark on the Court and constitutionalism began with his memo against *Brown* and continued with an out of the mainstream, dangerous and anachronistic conservatism. I was reminded this summer that I actually went to part of the convention that nominated Barry Goldwater for President in 1964. I was just out of high school. This is Rehnquist's group and we have been hearing from them on the bench for four decades after Goldwater brought us Reagan who bequeathed us the Bushes and Rehnquist, Scalia and Thomas. It could have been Bork too. Or Posner and some others. And it may still be. But it is bad enough that this bunch is there to write about kulturekampf and colorblindness.

We all knew at our panel over Labor Day weekend 2004 that the election in November would matter. One pleasure of returning to the text for that presentation is that the optimism or sense of possibilities that we felt then is still evident, in

the words. One could imagine, then, or hope for, a Ginsburg or Breyer Court if Kerry were elected, or any number of interesting developments. And a full blown conservative Court, a real Bush, Bush, Reagan, Goldwater Court was only a nightmarish possibility at the time.

Now, we gaze with nostalgia on the conservative-leaning mixed bag that we may remember fondly as the Rehnquist Court.

Notes

1 At least one reviewer of the manuscript, cautioned against using Supreme Court and "cult" in the title.

2 He quacked at both in 2003-2004.

3 The panel fielded a bizarre question from the audience after the presentations asking how many of us had met a Supreme Court Justice. The speaker said he had and he thought that this was important in order to understand the Court. I did not think it was important but along with other members of the panel I had met some of the Justices.

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Books To Watch For

Keith J. Bybee
Syracuse University
kjbybee@maxwell.syr.edu

Readers looking for an introduction to the basic concepts of civil law might consider **Understanding Law in a Changing Society**, **3rd ed.** (Paradigm Publishers) by **Bruce Altschuler** (SUNY Oswego), **Celia Sgroi** (SUNY Oswego), and **Margaret Ryniker** (SUNY Oswego). Relying on cases and other materials, the book features chapters on the American Court system, due process of law, precedent, the limits on courts, property, contracts, torts, equity and family law.

Freedom of the Press: Rights and Liberties under the Law (ABC-CLIO's America's Freedoms series) by **Nancy C. Cornwell** (Linfield College) chronicles the development of freedom of the press from its earliest philosophical origins to its contemporary construction in modern times. Key court decisions are traced within the context of shifting technological, economic, political and cultural conditions. Particular attention is paid to the long-term relationship between the press and the military during wartime — a relationship that has shifted with innovations in media technology. **Cornwell** concludes with a chapter devoted to new and emerging influences on press freedoms, such as SLAPP suits, business disparagement lawsuits, journalism blogs, deregulation, media conglomeration, and government backlashes against media content.

Cash, Color, and Colonialism: The Politics of Tribal Acknowledgment (University of Oklahoma Press) by **Renee Ann Cramer** (California State University, Long Beach) provides a comprehensive analysis of the administration of the federal acknowledgment process for American Indian tribes. The author argues that we cannot fully understand the acknowledgement process until we understand the three contexts within which it operates: the growth of casino interests since 1988, the prevalence of racial attitudes concerning Indian identity, and the colonial legacy of U.S.-Indian law.

The Founders on God and Government (Rowman & Littlefield), edited by **Daniel L. Dreisbach** (American University), **Mark D. Hall** (George Fox University), and **Jeffry H. Morrison** (Regent University), explores the relationship between church and state through biographical portraits of the American founders. Each chapter profiles a founder by providing a brief biographical sketch, identifying the founder's religious beliefs and denominational affiliations, examining the relationship between the founder's faith and political views, and presenting an original document written by the profiled founder, illustrating his views on the intersection of religion and public life. The volume features a bibliography.

Whose interest do college speech codes serve? Opponents of speech codes often argue that the codes are instruments of liberal political correctness. But **Jon B. Gould (**George Mason University) in **Speak No Evil: The Triumph of Hate Speech Regulation** (University of Chicago Press) argues that the real reasons for speech codes are to be found in the pragmatic calculations of college administrators. Drawing on empirical research, **Gould** shows that speech codes are often simply a symbolic response by university leaders designed to convey a commitment against intolerance. Although the codes are not necessarily supported by a deep belief in the merits of regulation, the codes nonetheless exert a powerful influence. According to **Gould**, the codes chill speech beyond the university and shape common understandings of constitutional norms.

Linda Greenhouse, known to all of us as the Pulitzer Prize-winning *New York Times* correspondent responsible for covering the Supreme Court, has authored **Becoming Justice Blackmun** (Henry Holt and Co. Times Books). Greenhouse was the first print reporter to have access to Blackmun's papers. From this trove she has crafted a narrative of Blackmun's years on the Court and documented how he came to question his own views of abortion, the death penalty, and sex discrimination. Greenhouse also tells the story of how Blackmun's lifelong friendship with Chief Justice Warren E. Burger declined over the years as their political differences eventually became personal.

If each justice's behavior on the Supreme Court were motivated solely by some kind of "liberal" or "conservative" ideology, what patterns should be expected in the Court's decision-making practices and in the Court's final decisions?

Thomas H. Hammond (Michigan State University)**, Chris W. Bonneau** (University of Pittsburgh)**,** and **Reginald S. Sheehan** (Michigan State University) take up this question in **Strategic Behavior and Policy Choice on the U.S. Supreme Court** (Stanford University Press). The authors provide the first comprehensive and integrated model of how strategically rational Supreme Court justices should be expected to behave in all five stages of the Court's decision-making process.

In 2003, the Supreme Court decision *Lawrence v. Texas* overturned state sodomy laws, the principle legal tool used for decades to outlaw same-sex intimacy and to justify other forms of discrimination against those engaging in same-sex intimate behavior. In short order, the Massachusetts Supreme Judicial Court, drawing on the reasoning of *Lawrence*, allowed same-sex marriage, thereby catapulting the issue of gay marriage, and gay rights more generally, to the center of national political debate. The meaning of these developments is assessed in **The Future of Gay Rights in America** (Routledge), edited by **H.N. Hirsch** (Macalester). The volume features 15 chapters that examine everything from the doctrinal details of *Lawrence* to the social significance of marriage. Contributors include: John Brigham, Keith J. Bybee, Sean Cahill, Dale Carpenter, Jo Ann Citron, John D'Emilio, David O. Erdos, H.N. Hirsch, Ronald Kahn, Ethel D. Klein, Andrew Koppelman, Sanford Levinson, Joe Rollins, Mary Lyndon Shanley, and Kenneth Sherrill.

Class action lawsuits are an American phenomenon, but they are not only an American phenomenon. In **The Class Action in Common Law Legal Systems: A Comparative Perspective** (Hart Publishing), **Rachael Mulheron** (Queen Mary, University of London) compares and contrasts class action lawsuits in Australia, the United States and Canada. **Mulheron** examines the concept of class action, critiques of class action, the various criteria and factors governing commencement of a class action suit, and matters pertaining to conduct of the action itself. The book is written with both practicing lawyers and legal scholars in mind.

When and to what extent should the United States participate in the international legal system? **Jeremy Rabkin** (Cornell University) in **Law without Nations?: Why Constitutional Government Requires Sovereign States** (Princeton University Press) argues that the value of international agreements must be weighed against the threat they pose to liberties protected by strong national authority and institutions. The author maintains that liberties could be fatally weakened if we go too far in ceding authority to international institutions that might not be zealous in protecting the rights Americans deem important. Similarly, any cessation of authority might leave Americans far less attached to the resulting hybrid legal system than they now are to laws they can regard as their own.

The 1998 arrest of General Augusto Pinochet in London, coupled with the subsequent extradition proceedings, sent a wave through the international community, touching off a series of new investigations and prosecutions on the crimes of the Chilean and Argentine militaries in Latin America, Europe and the United States. **The Pinochet Effect: Transnational Justice in the Age of Human Rights** (University of Pennsylvania Press) by **Naomi Roht-Arriaza** (University of California, Hastings College of Law) tells the stories behind these cases: how the Pinochet affair began, who the players were, and how they changed international law, setting the stage for major breakthroughs in the fight against legal impunity in Chile and Argentina. The author situates these transnational cases within the context of an emergent International Criminal Court and considers the effectiveness of international law, lawyers, judges, exiles and activists.

Lawyers and Regulation: The Politics of the Administrative Process (Cambridge University Press) **by Patrick Schmidt** (Southern Methodist University) examines the influence lawyers have on regulation. Focusing on the case of occupational safety and health, the author examines rulemaking, rulemaking litigation, enforcement, and compliance counseling in order to understand how legal intermediaries shape public-private interactions. The author draws on a wide range of interviews and demonstrates that the American way of law marks regulatory politics in a host of distinctive ways.

The **Encyclopedia of the Supreme Court** (Facts on File), compiled and edited by **David Schultz** (Hamline University), has been published. Covering the period from the Court's inception to the present day, the encyclopedia discusses nearly 600 key cases, concepts, personalities, and themes. Over 150 writers, many of them Law and Court members, contributed to the volume.

The Supreme Court in the American Legal System (Cambridge University Press) **Jeffrey A. Segal** (SUNY Stony Brook), **Harold J. Spaeth** (Michigan State University), **Sara C. Benesh** (University of Wisconsin – Milwaukee) examines the American legal system, giving consideration to state courts, the U.S. District Courts, the U.S. Courts of Appeals, and the U.S. Supreme Court. The authors analyze these courts from a legal/extralegal framework, drawing different conclusions

about the relative influence of each based on institutional structures and empirical evidence. The book also features extended coverage of the legal process, with separate chapters on civil procedure, evidence, and criminal procedure. The authors write for an undergraduate audience and strive to make their work accessible: their research is presented at a level that does not require methodological sophistication and all their data (including all commands necessary to run the analyses) are provided on the book's web site.

Who is Justice Souter and what will be his legacy on the Supreme Court? **Tinsley E. Yarbrough** (East Carolina University) answers this question in **David Hackett Souter: Traditional Republican on the Rehnquist Court** (Oxford University Press). Sifting through Souter's opinions, the papers of the Justice's contemporaries, and other relevant records and interviews, **Yarbrough** argues that Souter is a traditional New England Republican deeply tied to the party's historic roots in the union and civil rights. As such, Souter has become the principal Rehnquist Court opponent of the originalist, text-bound jurisprudence that many of his more conservative colleagues champion. Tracking Souter's career on the high bench, **Yarbrough** paints a picture of a Court often stymied in its attempt to create a coherent legacy.

In **Injustice for All: Mapp vs. Ohio and the Fourth Amendment** (Peter Lang Publishers) **Priscilla H. M. Zotti (United States Nava Academy)** details the historical, legal, and political significance of the famous search and seizure case *Mapp vs. Ohio*. Drawing on original documents and extensive interviews, the author provides a window onto the policy agenda of the 1960s and argues that the change of course that took place *Mapp vs. Ohio* may be ripe for alteration again.

Section News & Awards

CQ Press Award Committee

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. To be considered for this year's competition, a copy of the nominated paper should be submitted to each member of the award committee (e-mail attachments, in the form of .pdf files, are acceptable). The nomination deadline is June 1, 2005.

Emery Lee, Chair
Department of Political Science
Case Western Reserve University
11201 Euclid Ave
Cleveland OH 44106-7109
Phone: 216 368 1015
E-mail: eg14@case.edu

Mark Kemper, Member
Department of Political Science
Bridggewater State College
Summer St. House, 180 Summer St.
Bridgewater MA 02325
Phone: 508 531 1387
E-mail: mkemper@bridgew.edu

Rachel Caufield
Department of Politics & Int'l Rel.
Drake University
2507 University Ave, Meredith 227
Des Moines IA 50311
Phone: 515 271 1924
E-mail: rachel.caufield@drake.edu

Announcements

Position Annoucement

The Law and Courts Section of the American Political Science Association invites applications for the moderator of the Law and Courts Discussion List. The Discussion List is a vital source of communication among scholars interested in law and politics. The moderator, who is in charge of the maintenance of this electronic forum, serves a three-year term (with the possibility of renewal). Please send a letter of application to the chair of the search committee, Larry Baum (Department of Political Science, The Ohio State University), by June 1, 2005. He can be reached at baum.4@osu.edu.

Conferences & Events

Law & Society Annual Meeting
(http://www.lawandsociety.org)
June 2-5, 2005 Las Vegas, NV

Law & Humanities JR Scholar Interdisciplibary Workshop
(http://www.law.columbia.edu/center_program/law_culture/lh_workshop)
June 12-13, 2005 Georegetown University Law Center
for information contact: Jinah Paek, 212.854.2511 or culture@law.columbia.edu

American Poltical Science Association
(http://www.apsanet.org/section_222.cfm)
September 1-4, 2005 Washington DC
Law & Courts: Cornell W. Clayton *Washington State University* cornell@mail.wsu.edu
Const. Law & Jurisprudence: Susan R. Burgess *Ohio University* burgess@ohiou.edu

Pacific Northwest Political Science Assocation
(http://www.lclark.edu/~pnwpsa/)
October 13-15, 2005 Couer D'Alene, ID
Law & Courts: Jim Foster *OSU, Cascade Campus* James.foster@osucascades.edu
Supreme Court Roundtable: Jim Foster *OSU, Cascade Campus* James.foster@osucascades.edu

Gerogia Political Science Assocation
(http://web2.mgc.edu/gpsa)
November 10-11, 2005 Savannah, GA
All Proposals: Sudha Ratan *Augusta State University* gpsa05@aug.edu

Call for Papers: Southern Political Science Association

Southern Political Science Association announces the deadline for proposal submission for its annual conference to be held January 5-7, 2006 in New Orleans, Louisiana.

For best consideration submit proposals by May 15, 2005; Final Deadline for submission is June 1, 2005. For more information and to download proposal forms visit: http://www.spsa.net/proposalform.html.