



Law & Courts

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A Letter from the Section Chair

MEASURING JUDICIAL PREFERENCES

Jeffrey Segal

jsegal@notes.cc.sunysb.edu

State University of New York - Stony Brook



“The greatest drawback to econometrics is the fact that the data with which econometricians work are so poor” (Kennedy 1985, p.113).

Whatever the problems of measurement in economics, the problems certainly can't be any less severe in political science, where ambiguous concepts such as preferences, attitudes, and values replace real items such as wages, prices and income as key explanatory variables. These problems have been particularly acute for Supreme Court scholars, who, understandably, have been unable to get the subjects of their studies to answer survey-style questions about their attitudes in different policy domains.

Efforts at measuring judicial preferences have focused on two types of measures: endogenous measures, those derived in whole or in part from the votes justices cast; and exogenous measures, those completely independent of the votes the justices cast. Depending on one's purpose, both have their time and place.

Endogenous measures include everything from simply using summaries of the justices' votes, to scale scores from uni- or multi-dimensional scaling of the justices' votes (Rohde and Spaeth 1976; Schubert 1965, Schubert 1974), to sophisticated Bayesian ideal point estimates (Bailey 2007; Martin and Quinn 2002). The Bailey and Martin-Quinn measures are particularly valuable as they exist in both *a* common space (Bailey 2007) and in *the* Common Space (Epstein, Martin, Segal, and Westerland 2006) with the preferences of the President and Members of Congress. But because these scores derive from the votes of justices, using them to explain the votes of justices is, plain and simply, circular.

One suggested way to resolve this problem is to purge from the preference measure the votes one wishes to explain. Epstein and Mershon (1996) suggest doing this by using the justices' lagged votes to explain their voting behavior. Martin and Quinn (2005) suggest extracting the dependent votes of interest from the data and re-running ideal point estimates without those cases. They further demonstrate that doing this has only the minuscule effect on the estimates, concluding that even this step is not really necessary. Both techniques formally resolve the circularity question, but if one is interested in explaining the

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***CLICK HERE TO
NAVIGATE
TO TABLE OF
CONTENTS ON
PAGE 2***

Table of Contents

Point and Click to Navigate to Article

L etter from the Chair	pages 1,4-5
A rticle: Professor Edward S. Corwin and F.D.R.'s Court-Packing Plan by Mark O'Brien	pages 6-10
A rticle: News from the Comparative Realm by Raul A. Sanchez Urribarri	pages 11-13
R esearch Spotlight: United States Supreme Court Justices Database by Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott A. Hendrickson, and Jason M. Roberts	pages 14-15
B ooks to Watch For	pages 16-18
U pcoming Conferences and Announcements	page 19

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

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votes of the justices, the use of lagged or purged measures of votes to explain votes still begs the question of what causes the justices to behave as they do. Using purged votes on the right hand side to predict complementary votes on the left hand side gives us no explanation of what causes the votes on the left hand side except to say that whatever it is that causes the right hand side also causes the left hand side.

The same can be said of measures of Congressional ideology, be they interest-group scores from ADA, or the more sophisticated scaling scores created by Poole and Rosenthal (1997). These scores are labeled Congressional ideology scores but they are really just revealed preferences, the sum of all factors, including ideology, that account for their voting behavior. After including these scores on the right hand side, it is possible to demonstrate that party affiliation does not have an independent influence on legislative behavior (Krehbiel 1993). But this begs the question as to whether party or other factors influence the ideal point scores in the first place.

Nevertheless, endogenous preference measures can still be of great value. In many instances, it is essential to have as accurate a description as possible as to where the players fall in ideological space. For example, if we expect that the median justice will behave differently than other justices, it is absolutely essential to identify the median as accurately as possible. Or we might hypothesize that liberals and conservatives react differently to different types of First Amendment cases (Epstein and Segal 2006). Undoubtedly, the Martin-Quinn or Epstein-Mershon scores perform the task of identifying those justices better than exogenous measures do. The same would be true in cases where the dependent variable is something other than votes, e.g., if one wanted to know if the chief justice or the senior associate justice over-assigned opinions to justices who were ideologically closest to them. Such scores may also be useful when scholars are interested not in the extent of ideological effects, but in the contingency of those effects. Thus Bartels (2006) profitably uses the Martin-Quinn scores to determine whether ideological effects vary, among other things, with the salience of cases.

Conclusions

Though endogenous preference measures will undoubtedly outperform exogenous ones, the quality of a preference measure cannot be ascertained solely on its predictive ability. The usefulness of such measures depends crucially on the purposes for which the measure is being used, and the theoretical assumptions about the behavior in question. When our interests are explanatory, it is absolutely imperative that our measures be independent of the behavior in question, even if that means sacrificing predictive validity. This is not just to avoid circularity, but to avoid begging the question. When we are not interested in explaining votes, or when we need an accurate description of where justices lie ideologically endogenous measures will undoubtedly provide the most precise measurement.

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Article

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Professor Edward S. Corwin and F.D.R.'s Court-Packing Plan

Mark O'Brien

Princeton University

MBObrien@princeton.edu

On Dec. 16, 1936, Edward S. Corwin, the McCormick Professor of Jurisprudence at Princeton University, sent a letter to U.S. Attorney General Homer Cummings. The letter appeared to solve the problem that for months had stymied Cummings and his boss, President Franklin Roosevelt: How to end Supreme Court opposition to the New Deal.

Professor Corwin's letter suggested that Congress empower the president to add one justice to the U.S. Supreme Court for each of the existing six justices over seventy years of age; "A 70-year age limit would secure more rapid replacement of justices," wrote Corwin. The professor did not write, because it was understood, that the appointments would also make a new majority on the Court sympathetic to the New Deal.

The "devilish ingenuity" (Los Angeles Times) of the plan lay not in court-packing itself, which occurred numerous times in partisan disputes in the previous century, but in the operation of Corwin's 70-year appointment formula. The formula looked politically neutral; just another Progressive reform. F.D.R. could claim to be solving the "problem" of old and feeble judges on the Court, while ending the Court's opposition to the New Deal. F.D.R.'s "court-packing plan," as the press dubbed it, appeared to be a political master stroke.

Three months after sending his letter, on March 17, 1937, Corwin was sitting at a table before the Senate Judiciary Committee, testifying in support of the president's plan as the administration's lead expert witness. His testimony was a disaster. The "bespectacled modishly dressed constitutional law professor" (*The Washington Post*) with the "dictatorial manner" (*The Chicago Tribune*) alienated everyone on the Senate Judiciary Committee, even the Democrats.

The first sign of trouble came early, when Corwin used the word "hermeneutics" to describe the Supreme Court's recent definition of "regulate" – as in Congress's power "to regulate Commerce," as specified in Article 1 of the U.S. Constitution. He had meant to convey his disapproval – indeed, his contempt – for conservative, anti-New Deal justices on the Supreme Court. "Hermeneutics," a silly-sounding word if ever there was one, is used to describe jejune scholarship in the Dark Ages, when monks in fire-lit scriptoria poured over sacred texts, rearranging letters and words, reversing their order, to discover hidden messages from God.

If the Princeton professor meant to ridicule the Court's opposition to the New Deal, he missed his mark. Instead he came across to all the senators as stiff and condescending, even arrogant. This was someone to be taken down a peg or two, and on a bipartisan basis. Thus Committee Chairman Henry Ashurst of Arizona, himself a Democrat, asked Corwin, "Would you spell that word 'hermeneutics'...?" Senator William King of Utah, another Democrat, expressed doubts that the professor could.

Princeton graduates will be pleased to learn that Corwin correctly spelled "hermeneutics." Brushing aside the intended barb – and the suggestion that he was a pedant – Professor Corwin tried to make light of the spelling episode. But he wasn't successful. The senators were in no mood for levity from Professor Corwin.

At stake was the role and character of the Supreme Court. No one doubted that enlarging the Court from nine to fifteen justices would quash the Court's opposition to the New Deal and set a precedent that would change the balance of power among the executive, legislative, and judicial branches of government. But why not? Roosevelt had won a landslide victory in the 1936 presidential election, and Democrats outnumbered Republicans four to one in Congress. Clearly Roosevelt had been elected to do something about the economy, which by most accounts was very sick. And he was trying. But the Constitution kept getting in the way – or at least that was what a majority of the justices on the Supreme Court said.

In a series of decisions in the early 1930s, the Court said that there was a division of labor among the states and national government, and the presidency had to respect that – emergency or no emergency. The Court said there were checks and balances among the branches of the federal government, and that the president had to respect that, too.

But Roosevelt didn't want to hear it. And here was Professor Corwin, a constitutional expert, perhaps the greatest constitutional scholar of the century, to say that he didn't have to, that the conservative majority on the Court was out of step with the will of the people, and with the "original intent" of the framers of the Constitution. Corwin said the Court was preserving the forms of the Constitution at the expense of its substance. He said that "checks and balances" among the branches of government were just tools, not ends in themselves. In Corwin, the Roosevelt administration had found a highly credentialed, and – they hoped – useful advocate.

Prior to his Senate testimony, the 59-year-old professor was on a roll. In September 1936, Harvard University honored him at its 300th anniversary, along with the likes of Albert Einstein and Niels Bohr. Sixty-six of the world's most renowned scholars and scientists received honorary degrees, and Corwin was one of them. Only fourteen Americans wore the bronze medal with red ribbon that identified them as the special guests of Harvard University. In a letter to his mother and sister, Corwin described the trappings of his new "grandeur": "When the police saw [the bronze medal with the red ribbon], they stopped traffic and let the wearer pass."

Beyond Princeton's halls, Corwin was a frequent writer of book reviews, letters to the editor, and articles for popular magazines and newspapers, especially *The New York Times*. He wrote *The Constitution and What It Means Today* for a popular audience; it went through four editions by 1937 and is still widely available. Informed by modern authors like Freud and Darwin, Corwin's brand of constitutional interpretation seemed unsentimental, realistic, and entirely "scientific," resonating with liberal opinion leaders. It didn't hurt that Corwin followed closely in the path of his great mentor at Princeton, Woodrow Wilson.

Wilson had hired Corwin in 1905 as one of the University's first preceptors to help in the reform of the undergraduate curriculum. Both Wilson and Corwin were experts in the law, though neither graduated from law school. They were political scientists. The exciting new venture of political science called for academics to clear out the cobwebs of custom, tradition, and habit in order to fashion a "scientific" understanding of government. This was the Progressive mission, perhaps best exemplified in the academic and political career of Wilson.

But where Wilson dealt in broad strokes, Corwin focused on constitutional law. (The tradition would be continued by Corwin and his successors, Alpheus T. Mason, Walter F. Murphy, and Robert P. George, and would come to be known as the Princeton School.) In 1918, Corwin was appointed to the McCormick Chair of Jurisprudence, one of Princeton's most distinguished endowed professorships and the position that Wilson himself had occupied before ascending to the presidency of Princeton. Corwin was instrumental in starting the Department of Politics at Princeton and served as its first chairman, from 1924 to 1935. In 1931 he served as president of the American Political Science Association.

Corwin was to build on Wilson's vision of what in contemporary parlance has come to be known as "the living Constitution." That vision called for a shift from Newtonian balance to Darwinian evolution. The notion that the federal government *balanced* against state governments; the Senate *balanced* against the House; the majority *balanced* against the minority; the executive *balanced* against the legislative branch: Such checks and balances were obsolete, said Wilson – perhaps appropriate for the pre-industrial 18th century, but not for the modern industrial age. Change was the essential agent of social progress, and the Constitution had to change and evolve.

Wilson, of course, moved on to become governor of New Jersey and president of the United States. Back home, in the quiet of his library in the Old Stone House on Stockton Road in Princeton, Corwin filled in the details of Wilson's grand vision.

Writing in 1925 in the *American Political Science Review*, Corwin would call the Constitution “a living statue, palpitating with the purpose of the hour.”

So how exactly should the Court turn the Constitution into “a living statute?” Corwin said the people, and the Court, must recognize that the Constitution is a political document. Politicians – the closest to the people – should give meaning to the open-ended expressions in the Constitution like “reasonable,” “commerce,” “necessary and proper,” “due process,” and “regulate.” In striking down New Deal legislation, said Corwin, the Court was presuming to define these terms, and stepping outside its proper role.

In the short run, packing the Court would get it back to what Corwin took to be its proper role of deferring to the legislature. Beyond the short run, however, court packing had problems. The most obvious had to do with the precedent. If Roosevelt were able to enlarge the Court to 15 justices, there was no reason his successor should not have the same power. In a short time the Court could balloon into a shapeless mass, its independence and prestige destroyed.

Certainly Corwin wanted more than a short-term fix. So what was he thinking? It seems likely that he thought the mere threat of packing would shock the Court into seeing the error of its way. In a 1937 *Yale Law Review* article that appeared one month before his Senate testimony, he expressed the hope: “We must trust the Court, as we have so largely in the past, to correct its own errors.”

Debating the court-packing plan was a good way to show the Senate, and the nation, that the Court was a work in progress – an experiment, just like all government. Thus Corwin tried out a few new ideas on the senators. He suggested that Congress break the Court into three separate sub-courts or panels, each to specialize in a different kind of case. That way, the Court’s opinions would be more expert, he said, and the Court could decide more cases. Or, perhaps Corwin was simply star-struck by Roosevelt, taken by being so near to the center of power. Regardless of Corwin’s reasoning, the senators viewed the plan as at best a short-term fix and at worst a power grab. Either way, Corwin had some explaining to do.

Attempting to persuade the senators, Corwin spoke with the speed of one who has gone over the ground many times in lectures, articles, and books. The examples tumbled over one another in Corwin’s rush to convince his listeners of the correctness of his opinions and the folly of disagreement. He spoke of a “serious unbalance” in government, “resulting from the undue extension of judicial review.” The Court was vetoing legislation, properly enacted by Congress, on the basis of theories that were unsupported by history and the text of the Constitution. Corwin rushed on. The very membership of the Court was flawed. The justices were themselves too old and out of touch with reality. “Elderly men look backward,” said Corwin. “Their experience is inapplicable to changing conditions.”

Corwin spoke of the president’s court-packing plan as one way to provide for “a constant refreshment of knowledge of life and of new currents of thought ...” Most important, the plan would put the people’s needs ahead of the “economic theories or prejudices or bias or point of view or outlook” of the majority of the present Court.

His testimony swept from Locke to Blackstone to the personal letters of Alexander Hamilton, James Madison, Thomas Jefferson, John Brown, and Abraham Baldwin, to Federalist Papers # 78, #81, and #34, and the Convention of 1787. It was an impressive display of learning, with scarcely any room for a senator to get a word in edgewise. But Sen. King, the Utah Democrat, would try. He interrupted Corwin: “Did you know that the Federalist Party did not believe the federal government had a right to impose income taxes?”

“I did not know any such thing,” snapped Corwin, who then delivered an arcane explication of the difference between a direct tax and an apportionment. The senator from Utah was silenced, at least for the moment.

Corwin was not reluctant to use every date and fact at his command to support the plan. In retrospect a dash of humility and a little less learning might have worked better. The senators were powerful and proud men who had risen to their positions through careers in the law. They knew, or thought they knew, something about courts and legislatures and American history. Thus, when Corwin would say, as he did several times in technical discussions of legal principles like judicial review (courts reviewing the work of legislatures) and *stare decisis* (deference to decided opinion), “That’s not true; I made a study of this subject.” His listeners were not overly impressed.

The senators were looking for clear straight lines Corwin was comfortable with ambiguity and, at times, even contradiction – features better suited for a seminar room. In a radio address Feb. 11, 1936, just one year before his Senate testimony, Corwin had considered and dismissed court packing as “objectionable.” The apparent flip-flop excited a good deal of attention from Sen. Edward R. Burke, Democrat from Nebraska and a Harvard Law graduate: “You want us to believe now that while a little over a year ago you said the Supreme Court was large enough to properly and expeditiously handle its work . . . we should place some reliance on your statement (now) when you say the Court is not large enough. Is that a fact?” The answer was, well, yes: Corwin did want them to believe this; and he was manifestly annoyed that anyone would question his motives for changing his mind.

There were more problems. In his opening statement before the committee, Corwin questioned the legitimacy of judicial review, the power of the Supreme Court to review congressional legislation and declare it unconstitutional. At the very least, said Corwin, the present Court should be criticized for the “undue extension of judicial review.” But in earlier times Corwin had said just the opposite. In his 1914 book, *The Doctrine of Judicial Review*, he concluded that the Court had always had the power of judicial review, and that this tradition gave it legitimacy; he said that the Constitution may not spell out judicial review in plain words, but the power could still be “inferred” from the other writings and speeches of the framers.

The senators wanted to know the reason for the change in opinion. Corwin said it was a matter of fuller consideration and greater study. The senators were skeptical. Burke made a nasty aside, recalling Corwin’s earlier statements about the debilitating effects of old age and the need for a 70-year age restriction for members of the Court. Burke suggested that since Corwin was nearly 25 years younger when he wrote *The Doctrine of Judicial Review*, perhaps the committee ought to believe the younger Corwin rather than the older Corwin.

Corwin threw back his own sarcasm: “Have you got anything there I wrote when I was 6 years old?”

The questioning turned to the subject of bias and prejudice – the Court’s and Corwin’s. In his opening statement Corwin had said the majority of the Court was inappropriately biased in favor of the economic theory of laissez-faire, and that this bias affected the Court’s ruling on key New Deal legislation. The committee members returned to these words. Just exactly what did Corwin mean by “bias” and how would he propose identifying six nominees to join the Court who were not so biased?

Corwin tried to distinguish between appropriate and inappropriate bias. With this he entered a semantic quagmire where hostile listeners could easily twist his words. A bias was inappropriate, said Corwin, if it affected purely legal matters such as A’s contractual obligation to pay B, but not if extended to the political aspects of the Court’s work, such as the definition of open-ended terms like “regulate” or “reasonable.” The distinction appeared to elude the senators.

Said Sen. Tom Connolly of Texas: “You have no objection to bias if it is in your way, do you?”

Replied Corwin: “These questions just indicate that what I have said just runs off your back like water off a duck’s back.”

Corwin’s testimony did not sway any senators to support the president’s court-packing plan; if anything, his testimony worked to discredit it. *The Washington Post* editorialized on March 19, 1937, that Corwin’s testimony amounted to “a frank admission” of the Roosevelt administration’s real intention: “executive control of the judiciary.”

Corwin’s appearance before the Senate Judiciary Committee, moreover, did not catapult him to high government office as he and his supporters had hoped. There remains in the Princeton archives a short and terse letter from Attorney General Cummings to Corwin, thanking him for appearing in support of the president’s plan. That was the extent of the administration’s gratitude. Evidently Corwin’s name disappeared from the top of the Justice Department’s “dope sheet of prospective Court appointees” mentioned in a letter to Corwin by a former student working in the Justice Department. Men like Hugo Black, William O. Douglas, and Felix Frankfurter, who had kept their opinions to themselves during the court-packing episode, were appointed to fill Court vacancies.

If the Roosevelt administration lost faith in Corwin, the feeling appeared mutual. In 1940, three years after his testimony in support of the court-packing plan, Corwin publicly supported Wendell Wilkie for president “because I feel that the ban on a third term is a wholesome constitutional restraint.”

Following his testimony before the Senate Judiciary Committee, Corwin returned to Princeton where he served out his distinguished career. He retired in 1946 as the McCormick Professor of Jurisprudence but continued to publish books and articles on a range of legal subjects. In 1953 the Library of Congress published *The Annotated Constitution* under his editorship. It is a towering achievement of scholarship and enterprise, and remains an essential reference work for lawyers and scholars. When Corwin died in 1963, his name ranked in the 10 constitutional scholars most often cited in Supreme Court decisions.

Article

News from the Comparative Realm

Raul A. Sanchez Urribarri

University of South Carolina

sanchezu@mailbox.sc.edu

The year 2007 is bringing a number of noteworthy events of great interest for students of courts in comparative perspective. Here I provide a brief summary of recent examples of courts playing important roles in the political arena in three unstable polities: Ecuador, Pakistan and Venezuela. As I further discuss, all three of these cases help to shed light on important debates in the law and courts field.

The latest political transition in Ecuador seems to have courts at the “storm center” of politics. There has been an intense battle between Ecuador’s new president, Rafael Correa (a widely popular left-leaning outsider, whose proposal to create a constituent assembly to once again overhaul Ecuador’s institutions, and consolidate his power was approved on April 15th, 2007 by almost 80% of voters),¹ and the opposition, led by the more traditional political parties, who enjoy a nominal majority in Congress. Correa is Ecuador’s eighth president in a decade. In early March, more than half of Congress’s legislators (a total of 57 members) were fired for allegedly attempting to prevent the referendum for taking place, following a judgment of the country’s Supreme Electoral Court. Subsequently, the losing legislators obtained an interim relief mandamus (*amparo*) by a lower court judge; a judgment that has been supported by the Constitutional Court, but the Supreme Electoral Court is insisting that its decision is valid and standing. The judge was fired, and the legislators were left without access to Congress.²

In Pakistan, Gen. Pervez Musharraf is facing one of the most damaging political controversies since he took power in 1999. The (former) Chief Justice of the Supreme Court, Iftikhar Mohammad Chaudhry, was suspended in early March, allegedly for “abuse of power and nepotism,” but quite likely because Chaudhry has not been a consistent government supporter.³ Moreover, there are some cases challenging the legality of the “quasi-de-facto” ruler that might arrive soon in the Supreme Court.⁴ Interestingly, Chaudhry seems to count on the support of the local legal community, which has come out to show its sympathy via public demonstrations; Chaudhry has attempted to frame this confrontation as an attack on the judiciary as a whole. Pakistan has long been an interesting country to study the role of courts in Authoritarian or politically unstable polities⁵ and this last development is no less enticing for scholars.

Last but not least, Venezuela has recently witnessed an intense confrontation between the Constitutional Chamber of the Supreme Court and the country’s federal legislature, the National Assembly.⁶ The Chamber-Congress stand-off resulted from a recent ruling by the Constitutional Chamber that declared unconstitutional part of an article from the latest Income Tax Statute; the decision exempted bonuses and other non-salary earnings from taxation. Apart from the impact this has on tax monies raised using a national scale by the Venezuelan Tax Administration office, legislators say the court’s ruling constitutes an abuse of power against the National Assembly, and a “bad-faith” decision, because a large portion of the judges’ annual income comes in the form of bonuses.⁷ The Assembly passed a non-binding resolution rejecting the decision, and formed an “inquiry commission” to analyze the behavior of the judges and build a file against several of them.⁸ The opposition suggested that this move attempts to ensure that the “activist” chamber is tamed, in hopes of guaranteeing the future constitutionality of the constitutional reform process. That process is currently being planned by President Chavez and his allies, and the exercise of his generous “rule by decree” prerogatives recently granted by the Assembly. However, this event could also represent the beginning of another attempt by some legislators to control the judiciary in other important respects (such as judicial appointments). Thus, this incident could be used as a window of opportunity opened by the constitutional reform process to appoint justices linked to these legislators or even to get themselves appointed to the top judicial posts.

What general lessons can we learn from these cases? All three examples present important questions facing law and courts scholars today. In the case of Pakistan, the clash between Musharraf and Chaudhry, as some journalists have pointed out, raises questions concerning the solidity of the current regime. Is Chaudhry defecting from the current government? Is he currying favor with an incoming regime? These and other related issues can be analyzed from Helmke's Strategic Defection's theory perspective (Helmke 2005). However, what is puzzling in Pakistan's case is that, apparently, until now there had been no signs of a budding and strong opposition movement capable of overthrowing Musharraf, or forcing him to stand for elections. If this is the case, why would Chaudhry be *defecting* in favor of an incoming regime that does not seem likely to come? Quite possibly, what we are witnessing here is not only the reaction of a constrained judge against undue pressure, but also an active defiant stance against the government based on the judge's own prerogatives, popularity and legitimacy; such an event would force us to consider manifestations of strategic behavior different from the scenarios originally analyzed by Helmke.⁹ Furthermore, the great upheaval caused by Chaudhry's dismissal and the manifestations in their support could also be considered an example of how courts weather adverse political environments in unstable or non-democratic polities, a key element of which seems to be relying on public support (see Moustafa 2003; Widner 2001; Staton 2006). Lastly, our interest should not be centered only on judicial behavior, but also on politicians' attitudes vis-à-vis the judiciary. We lack a comprehensive theory of why, and under what circumstances, rulers in non-democratic regimes challenge the authority of courts; a deficiency that could be partly explained by the longstanding but wrong assumption that in these polities a total lack of judicial independence and the meaninglessness of the judicial branch for political outcomes are the norm. In this respect, the decision to act against the judiciary or not, and in what sense, is also a political deed which raises questions for comparative law and courts students, and Pakistan's case seems to provide a good starting point for it.

Ecuador, in contrast, presents other provocative puzzles of its own. This country offers a challenging scenario because it has lacked a stable political establishment for more than a decade; therefore it is difficult to pinpoint justices' positions and their specific allegiances with political actors without conducting a deeper analysis. Recently, the judiciary is clearly being used by two quarreling political factions in their struggle for political domination in the transition from a decaying regime to another. The key concern seems to be the quest for legitimate power in the eyes of other political actors, public opinion and the international community. Interestingly, similar battles on judicial turf took place at the beginning of the constituent assemblies' processes in Venezuela (1999) and Bolivia (2006). The parallel with Venezuela is particularly striking, especially with respect to the altercation between different bodies and levels of the judiciary.¹⁰ To be sure, this politicized panorama seems to cast a doubt on whether we could reasonably expect judges to be independent in circumstances of such high degrees of political polarization and inter-branch confrontation. Political fragmentation seems to increase the likelihood of observing judicialization of politics taking place (Ginsburg 2004; Rios-Figueroa 2007); but this does not necessarily mean that we will witness less biased or partisan courts. Hence, the prospects of judicial systems in this respect could still reflect the bleak view portrayed by Prillaman (2000). This is a very interesting paradox that, again, requires further research, in a broader comparative context.

Lastly, Venezuela is a further example of the problems that underlie the assumption that courts' greater political influence is necessarily associated with a greater capacity to resist pressure by other political actors. Venezuela, however, pinpoints the need for a more careful analysis of events of attacks on the judiciary by other political actors. How should we interpret the clash between the Constitutional Chamber and the National Assembly? Is it a mere 'inter-branch' conflict? In Venezuela, the overwhelming presence in the political arena of Hugo Chavez ties most questions to his rule, one way or the other; did Chavez allow or promote this open attack against judges as the opposition alleges? Is the National Assembly a proxy of Hugo Chavez's decision, or is it the other way around; that is, can this clash be attributed to a fight between the two branches to appear more or less legitimate in the eyes of the president and perhaps public opinion, in general?

The brisk increase of events like these in many polities across all divisions and levels of the world's judiciaries makes the case for an organized effort on our behalf to foster and produce cross-national work to solve these questions in a truly comparative manner. It is distressing to think about how many developments like these are continuously happening in the world but are ignored. Perhaps a good starting point would be to organize a "comparative-courts-watch" working group to detect these important situations as soon as they occur, and inform the academic community. I am sure this would enhance comparative law and courts analysis, providing grounds for original and provoking research puzzles that can be addressed to stretch and deepen our discipline's reach. Although law and courts comparative research has furthered our understanding of courts in the comparative context, there is clearly much more terrain for scholars to cover.

Notes

- ¹ Romero, Simon. "Ecuador Appears Likely to Rewrite Constitution.(Foreign Desk)." *The New York Times* (April 16, 2007).
- ² Romero, Simon. "Another Ecuador Crisis Deepens As a Judge Is Fired Ahead of Voting.(Foreign Desk)." *The New York Times* (March 30, 2007)
- ³ Sengupta, Somini. "Musharraf finds himself weakened after firing of judge stirs anger in Pakistan.(Foreign Desk)(Gen. Pervez Musharraf)." *The New York Times* (March 25, 2007): A10(L)
- ⁴ Masood, Salman. "Ousted Judge in Pakistan Urges Musharraf to 'Respect' Judiciary.(Foreign Desk)." *The New York Times* (March 29, 2007): A8(L)
- ⁵ Paula Newberg's book, *Judging the State: Courts and Constitutional Politics in Pakistan* (1995) does a remarkable job in summing up and analyzing the role of the judiciary against the country's complex political background.
- ⁶ The Chamber, an institution that has been at the storm center of politics in Venezuela since it was created following the "Bolivarian Constitution" eight years ago, has played a critical legitimizing role during Hugo Chavez's government, in particular during the years of confrontation between *Chavismo* and the opposition (2000-2004), which led to the presidential recall which Chavez ultimately won. Although the court has been under severe scrutiny for the supposed lack of independence of some of its justices (particularly vis-a-vis an over-dominant executive), it has managed to accumulate a non-trivial amount of power which has been exercised against other branches of government consistently with respect to the lower levels of the judiciary. The Constitutional Chamber, and the court more generally, was partially "packed" in early 2005, following a new statute on the Supreme Tribunal of Justice passed by the Assembly.
- ⁷ Last year, Supreme Court justices were some of the public officials singled out by Chavez and/or some of his political allies for having given themselves disproportionately high salary packages vs. the rest of the bureaucracy. Justices reduced their salaries in due course, but apparently compensated the adjustment with improved bonuses. This is part of an even broader background of the current discussion.
- ⁸ Whether any further action will eventually be brought against the justices depends on the Moral Republican Council's action, formed in turn by the National Ombudsman, the Attorney General and the Comptroller General.
- ⁹ For a preliminary analysis of strategic defection theory, and some basic thoughts for an expanded framework to study strategic behavior in comparative perspective, see Songer and Sanchez-Urribarri (2006).
- ¹⁰ For a descriptive account of the episode that involved a confrontation between the Electoral and Constitutional chambers of the Venezuelan Supreme Court, see Perez-Perdomo, 2005, p. 153.

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Research Spotlight

U.S. Supreme Court Justices Database

Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott A. Hendrickson and Jason M. Roberts

John R. Schmidhauser was a revolutionary. After publishing his landmark series of studies on the backgrounds of Supreme Court justices (1959, 1960, 1961, 1962), he archived his data with the ICPSR. Of course, it is now commonplace for judicial specialists to make their data publicly available. But not so back in the 1960s and 1970s.

With little doubt, Schmidhauser's selflessness had salutary effects for the study of judicial behavior. It was not only his pioneering work that encouraged others to explore the justices' backgrounds and attributes (an on-going project, we might add); it was the availability of his dataset as well. Among countless other scholars, Greg Caldeira (1988) put it to good use in his interesting article, "In the Mirror of the Justices," as did Neal Tate (1981) in "Personal Attribute Models..."—still a mainstay on graduate-level syllabi.

But some four decades later Schmidhauser's product is showing its age. Potter Stewart, who was appointed to the Court in 1959, is the last justice included in his database. Since Stewart's ascension to the bench, presidents have transmitted 26 nominations to the Senate, with the Senate confirming 19.

New nominees, though, aren't the only problem. Our research interests have changed, or actually broadened, as well. Perhaps because few nominations of the 1950s were contentious, scholars of the day paid them relatively scant attention. That area of study has burgeoned—especially since the failed nomination of Robert Bork. Likewise, modern-day theories of judging beg for reliable and valid measures of policy preferences. Contemporary judicial specialists have answered the call, exploiting statistical tools unavailable to their predecessors.

We could go on but by now readers get the drift: However valuable the Schmidhauser database, an overhaul was in order. With support from the National Science Foundation we undertook the task. The result is the **U.S. Supreme Court Justices Database**, available in a variety of forms at: <http://epstein.law.northwestern.edu/research/justicesdata.html>.

To provide but the briefest of overviews, the database contains information on all persons officially nominated to serve on the Court. It is not limited to those who successfully attained appointment, but it excludes persons whose nominations were not officially transmitted to the Senate for confirmation. E.g., Douglas Ginsburg, nominated by Ronald Reagan in 1987, is not included because his nomination was withdrawn before its official submission to the Senate.

For each nominee, we provide 263 pieces of information, falling roughly into five categories.

1. Identifiers. The unit of analysis in the database is the nominee or appointee (in the case of a recess appointment). Accordingly, the same person could appear more than once. E.g., William Rehnquist who was nominated in 1971 (associate justice) and in 1986 (chief justice). To help users select the set of nominees most appropriate for their analyses, we have incorporated a series of identification variables. E.g., whether the candidate was nominated for Chief or Associate Justice, whether it was a recess appointment, whether the Senate confirmed the nominee, and so on.
2. Background characteristics and personal attributes. The largest number of variables falls into this category—roughly 170. Data range from information about the nominees' family to their own educational background to pre-Court career experiences.
3. Nomination and confirmation. This portion of the database houses a wealth of information about the appointments process. We include a comprehensive set of variables on the candidates' positions at the time of nomination, as well as data

on the key participants: the president, the Judiciary Committee, the full Senate, and interest groups. E.g., for the president and the Senate, indicators of their ideology and partisanship. Finally, the database incorporates information about the process itself, such as votes at various stages and relevant dates.

4. Service on the Court. Developed primarily from Spaeth's U.S. Supreme Court Database, these variables house information about the justices' votes and opinions. E.g., the number of dissenting opinions they wrote, the number of liberal votes cast in criminal procedure cases.

5. Departures from the Court. Nine variables capture information about retirements, resignations, and deaths, including the justices' age, reason, and replacement.

Of course we hope that you and your students make use of the database, whether for current projects or those it might inspire. Should you find any errors, please report them to Lee Epstein (lee-epstein@northwestern.edu). Almost needless to write, we'd also appreciate any leads in tracking down information (primarily background data on some of the early, unsuccessful nominees) that we have been unable to locate. Finally, we encourage users to periodically check the project's web site. We'll list any changes we make, including updates for new nominees.

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BOOKS TO WATCH FOR

Keith J. Bybee

Syracuse University

kjbybee@maxwell.syr.edu

Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law (Cambridge University Press) by **Nicholas Bamforth** (University of Oxford) and **David A. J. Richards** (New York University) evaluates a form of natural law theory said to be a secular view consistent with liberal constitutionalism. The authors argue that this “new natural law” is not a secular view consistent with liberal constitutionalism or a form of argument consistent with the philosophical aims of historical Thomism. Instead, the authors argue that new natural law is tied to the defense of a highly patriarchal structure of religious authority. The authors analyze the history and culture that gave rise to such patriarchal authority (including a celibate male clergy) and question the appeal of such authority in contemporary circumstances (discussing the priest abuse scandal in the Catholic Church). The authors conclude by discussing alternative forms of Christianity that do not share the problems of the new natural law.

Federal court confirmations in the United States have become openly political affairs, with partisans lining up to support their preferred candidates. Matters in the states are not much different, with once sleepy judicial elections changing into ever more contentious political slugfests, replete with single-issue interest groups and negative campaign advertising. In **Bench Press: The Collision of Courts, Politics, and the Media** (Stanford University Press), edited by **Keith J. Bybee** (Syracuse University), figures from the academy, the bench, and the press reflect on the current state of the American judiciary. Using the results of a specially commissioned public opinion poll as a starting point, the contributors examine the complex mix of legal principle, political maneuvering, and press coverage that swirl around judicial selection and judicial decisionmaking today. Essays examine the rise of explicitly political state judicial elections; the merits of judicial appointments; the rhetoric of federal judicial confirmation hearings; the quality of legal reporting; the portrayal of courts on the Internet; the inevitable tensions between judges and journalists; and the importance of regulating judicial appearances.

Many would say that, with the most recent enlargement and proposed legal reforms, the European Union today stands on the doorstep of radical institutional and constitutional change. Despite commonly held perceptions that this situation is unique, **Rachel Cichowski** (University of Washington), in **The European Court and Civil Society: Litigation, Mobilization and Governance** (Cambridge University Press), uses quantitative data and qualitative case analyses to reveal the broader context of legal integration. Relying on detailed empirical and historical studies of gender equality and environmental protection law across fifteen countries and over thirty years, the author exposes important linkages between civil society, courts, and the construction of governance. In doing so, the author documents the consequences of institutional change for civil society and public policy reform throughout Europe.

Why did Chilean judges, trained under and appointed by democratic governments, facilitate and condone the illiberal, antidemocratic, and antilegal policies of the Pinochet regime? In **Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile** (Cambridge University Press), **Lisa Hilbink**, (University of Minnesota) presents a longitudinal analysis of judicial behavior across regimes in Chile that challenges the common assumption that adjudication in nondemocratic settings is fundamentally different in democratic regimes. After considering the relevance of judges’ personal policy preferences, social class, and legal philosophy, the author argues that institutional factors best explain the persistent failure of judges to take stands in defense of rights and rule of law principles. Specifically, she argues that the institutional structure and ideology of the Chilean judiciary furnished judges with professional understandings and incentives that left them unequipped and disinclined to take stands in defense of liberal democratic principles, before, during, and after the authoritarian interlude.

God and Country: America in Red and Blue (Baylor University Press) by **Sheila Kennedy** (Indiana University) examines the political divides in American culture from the perspective of religious history to ascertain the causes for political division. The author offers a two-fold explanation for why Americans increasingly think in terms of “red and blue.” First, Americans occupy substantially different realities; realities rooted in both our common history and our distinctive religious cultures. Second, our frequent inability to bridge those differences and communicate with each other is exacerbated by a misunderstanding of the ways in which our religious roots manifest themselves.

Michael Meltsner (Northeastern School of Law) was 24 years-old when he began to work for Thurgood Marshall as the second white lawyer on the staff of the NAACP Legal Defense Fund. “It was not until I arrived at the NAACP Legal Defense and Educational Fund that I learned my profession, how to work with colleagues and clients, and how it might feel to grow up in the law.” So begins the author’s combination memoir and critical study, **The Making of a Civil Rights Lawyer** (University of Virginia Press). Alongside recollections and first-hand accounts, the author provides a critical analysis of early civil rights efforts to achieve social change through litigation while also providing the wider context of the personalities, policies, and tactics that continue to shape reform efforts today.

In **Queers in Court: Gay Rights Law and Public Policy** (Rowman & Littlefield), **Susan Mezey** (Loyola University Chicago) weighs the effectiveness of litigation in furthering the goals of the gay community. The author examines state and federal court rulings in gay rights cases, including equality and privacy rights, same-sex marriage, the exclusion of gays from military service, and employment discrimination.

In **Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory** (Ashgate Publishing), **Eric J. Mitnick** (Thomas Jefferson School of Law) offers a comprehensive treatment of group-differentiated rights. The author addresses particular examples of group-differentiated citizenship, including ascriptive statuses such as slavery and alienage, affirmative classifications such as those apparent in the contexts of civil unions and affirmative action, and the claims of religious and other cultural groups for official recognition and accommodation. Examining analytical, constitutive, and liberal theory, as well as the relationships to human identity, the author considers whether group-differentiated rights should be a cause for concern.

When it comes time to nominate a Supreme Court Justice why is one person selected from a pool of presumably qualified candidates? In **Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush** (University of Virginia Press), **Christine Nemacheck** (College of William and Mary) makes extensive use of presidential papers to reconstruct the politics of nominee selection from Herbert Hoover’s appointment of Charles Evans Hughes in 1930 through President George W. Bush’s nomination of Samuel Alito in 2005. Examining the process from initial stages of formulating a short list through the president’s final selection of a nominee, the author argues that although presidents try to maximize their ideological preferences and minimize uncertainty about nominees’ post-confirmation conduct, institutional factors such as divided government and the presidency itself, shape and constrain presidential choices. By revealing the pattern of strategic action which permeates the selection process from its earliest stages, the author sheds new light on this critically important part of our political system.

Belva Lockwood: The Woman Who Would be President (NYU Press) by **Jill Norgren** (City University of New York). Belva Lockwood (1830-1917) was the first woman to conduct a full campaign for the U.S. presidency (1884), the first woman to be admitted to the U.S. Supreme Court bar (1879), and the first woman to argue a case before the Supreme Court (1880). This is the first biography to be written about this extraordinary American who, with great daring, challenged women’s exclusion from politics and the profession of law.

Should the Supreme Court have the last word when it comes to interpreting the Constitution? The justices on the Supreme Court certainly seem to think so — and their critics say that this position threatens democracy. But **Keith Whittington**

(Princeton University) argues in **Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History** (Princeton University Press) that the Court's justices have not simply seized power and circumvented politics. The justices have had power thrust upon them — by politicians, for the benefit of politicians. In a comprehensive political history of judicial supremacy in America, Whittington shows that presidents and political leaders of all stripes have worked to put the Court on a pedestal and have encouraged its justices to accept the role of ultimate interpreters of the Constitution.

The U.S. Supreme Court has decided that states may require parental involvement in the abortion decisions of pregnant minors as long as minors have the opportunity to petition for a bypass of that involvement. Virtually all of the 34 states that mandate parental involvement have put judges in charge of the bypass process. In **Girls on the Stand: How Courts Fail Pregnant Minors** (NYU Press), **Helena Silverstein** (Lafayette College) examines how the bypass process actually functions. She finds that institutional ignorance, bureaucratic roadblocks, and ideological opposition plague the bypass route. She also finds bold acts of judicial discretion, wherein judges structure bypass proceedings in an effort to communicate their religious and political views and persuade minors to carry their pregnancies to term.

In **The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court** (Rowman & Littlefield), **Jim Staab** (University of Central Missouri) contends that Justice Scalia's jurisprudence is influenced by Hamiltonian political principles. The book begins with a discussion of six schools of conservative thought in the legal community today: Burkean traditionalism, conservative pragmatism, Legal Process, libertarianism, natural law, and originalism. The author then examines and compares Hamilton's and Scalia's views in the areas of separation of powers, executive power, administrative

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Announcements

Artemus Ward, Assistant Professor at Northern Illinois University, has been selected as the next Editor of the Law & Courts newsletter. Professor Ward will assume editorial responsibilities beginning with the Winter 2008 (Vol. 18) issue.