



A Letter from the Section Chair:

Wendy L. Martinek

Binghamton University (SUNY)

martinek@binghamtom.edu

Like most of you, I have a stack of reading that never seems to diminish. New books just out, old classics I never got the chance to read before but am determined to read now, journal articles hot off the presses, intriguing conference papers ... sometimes I feel like Sisyphus.¹ But you will hear no complaints from me since my very enjoyable task is to read a never-ending supply of quality scholarship rather than repeatedly roll a boulder up a hill like Sisyphus. In any event, with a little bit of embarrassment, I have to admit that I did not have the chance to read some of the work that won Law and Courts Section awards for the 2011-12 award cycle until very recently. It felt like a real luxury when I unexpectedly had a window of time to do this, and I was amply rewarded for devoting that time to reading this work by the uniformly high quality of it. My purpose here is to highlight some of the winning scholarship from the 2011-12 award cycle.² If you have not already done so, I hope you will carve out some time to read them, too ... just in time to make room on your to-read stack for the 2012-13 award winners who will be announced in the next few months!



Inside this issue:

Michael C. Tolley, Rhonda Evans Case, Nicole Scicluna and Raul A. Sanchez-Urribarri, Bruce Peabody, Anna E. Hoylan and Tobias T. Gibson, and Wayne Batchis

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Books to Watch For

¹ Except for the part about killing travelers, of which Sisyphus was purportedly fond. I am generally not inclined to homicide.

² All of the winners of Law and Courts Section Awards for the 2011-12 award cycle will be recognized (along with the winners from the 2012-13 award cycle) at the business meeting that will take place at the APSA meeting scheduled for 2013 in Chicago.

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Kirk Randazzo

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E-Mail: randazzo@mailbox.sc.edu

Assistant Editor

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Books to Watch For Editor

Drew Lanier

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E-Mail: parker@truman.edu

Law and Courts Listserv Moderator

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General Information

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Kirk Randazzo, Editor

Law and Courts

Department of Political Science

University of South Carolina

329 Gambrell Hall

Columbia, SC 29208

randazzo@mailbox.sc.edu or kirk.randazzo@gmail.com

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 your manuscript electronically in MS Word (.doc) or Rich Text Format (.rtf). 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 cited 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**:

Drew Lanier, of publication of manuscripts or works soon to be completed.

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As Law and Courts Section members know, the C. Herman Pritchett Award is given to the best book on law and courts written by a political scientist. The members of the award committee for the 2011-12 award cycle (for a book published in 2011) selected Matthew K. Hall's *The Nature of Supreme Court Power* as the winner, with Michael A. Bailey and Forrest Maltzman's *The Constrained Court: Law, Politics, and the Decisions Justices Make* singled out for an honorable mention.³ Both are well worth reading for a host of reasons but, first and foremost, they are worth reading because they tackle two of the questions that are at the heart of much of law and courts scholarship: can the Supreme Court exercise influence over policy implementation and how dominant are attitudes for understanding the decisions of the justices?

The appeal of *The Nature of Supreme Court Power* lies in the fact that it directly challenges the dominant perspective established by Gerald Rosenberg's classic *The Hollow Hope* but does so while demonstrating great sensitivity to the conditional nature of Supreme Court influence. The short version of the argument (and I am surely doing a good deal of violence to it by this oversimplification) is that the Court can be very influential when implementation falls to the lower courts or, when implementation is left to others, public opinion is not opposed to the Court's ruling. The question in my mind is how conditional can power or influence be before it is inaccurate to say that an institution or actor possesses it? I am not sure of the answer. I do know, however, that I look forward to simultaneously assigning *The Nature of Supreme Court Power* and *The Hollow Hope* in my classes and watching the sparks fly as students work through the contending pieces of evidence offered and take sides accordingly.

I also see *The Constrained Court* as a book that can be profitably juxtaposed with a classic in the literature. In particular, it contrasts nicely with Jeffrey A. Segal and Harold J. Spaeth's *The Supreme Court and the Attitudinal Model, Revisited*. *The Constrained Court* develops a sophisticated and innovative measurement strategy to better grasp when and how the Court is constrained in its decision making by the law as well as the strategic influence of Congress and the president. The measurement strategy (which involves the use of public statements by a variety of actors) is a significant contribution in its own right. But what I particularly like about this volume is that it takes seriously the contending theoretical arguments, grappling with them on their own terms. And, in the process, it advances our understanding of what makes the justices behave the way they do.

Similarly, the winner of the Best Journal Article Award for the 2011-12 award cycle offers a novel methodology but does so in the service of helping us better understand an important substantive question. That article, "Lower Court Influence on U.S. Supreme Court Opinion Content," was authored by Pamela Corley, Paul Collins, and Bryan Calvin and uses plagiarism detection software to compare the text of lower court decisions with the text of Supreme Court decisions. The authors' argument begins from the premise that the justices are motivated to make good law and good policy. Accordingly, the opinions they write are critical since they are the vehicle by which good law is made and good policy is articulated. To craft "legally sound decisions that further their personal policy preferences and promote the coherence and consistency of the law" (34), the justices will avail themselves of the best available materials to aid them in their task. One source of such materials are the opinions of the lower courts, since those opinions represent the reasoning of the lower court judges who have already pondered and wrestled with the issues in the case. What Corley and her colleagues find is that Supreme Court opinions do systematically incorporate language from lower court opinions and the characteristics associated with what is incorporated are consistent with indicators that the justices are looking to make good law and good policy. Like

³ The committee consisted of Charles Smith of the University of California-Irvine (chair), Joe Ura of Texas A&M University, and Eric Waltenburg of Purdue University.

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the Bailey and Maltzman book, this article employs a novel and creative method. But, also like the Bailey and Maltzman book, the contribution of this article is not in the method but in the substance. It gives us a better understanding of the interrelationship between superior and inferior courts as well as new insights on the content of court opinions.

The quality of the winning entries for published work is matched by the quality of the winning entries for unpublished work (i.e., Best Conference Paper and Best Graduate Student Paper).⁴ The Best Conference Paper Award was given to Quinn Mulroy's "Enforcing Rights Protections: The Regulatory Power of Private Litigation and the Equal Employment Opportunity Commission." In this paper, the author examines the EEOC and traces its transformation from a weak, under-resourced organization to an organization that serves as an active (and often independent) agent of public policy development. The award committee⁵ characterized the paper as "an exemplary use of history to test new political theories" and the committee was exactly right. The paper represents high quality interdisciplinary research (bringing together insights from law and society, sociology, and political science) and illustrates just how effective American political development can be as a research tool.

Also notable is the Best Graduate Student Paper Award winner, Maya Sen's "Is Justice Really Blind? Race and Appellate Review in U.S. Courts."⁶ The author focuses on a unique dimension of the intersection of race and appellate review. In particular, she examines how court of appeals judges treat district court decisions based on the race of the district court judge. Through her systematic analysis of court of appeals decisions, and controlling for a host of factors, Sen finds that African American judges are more likely to be overturned than white judges. The real value of this study is in its implications for judicial appointments as well as judicial decision making. Additionally, the award committee identified an honorable mention for the Best Graduate Student Paper Award: Richard Price's "Arguing *Gunwall*: Can a State Supreme Court Force Its Lawyers to Argue State Constitutional Claims."⁷ In this paper, the author explores the ability of state high courts to foster the development of a support structure for state constitutional law through the articulation of a clear state constitutional theory. Using a painstakingly constructed dataset drawing from decisions of Washington Supreme Court, the author finds that, indeed, lawyers are more likely to make state constitutional arguments that are independent of federal law when the high court has signaled an independent state constitutional doctrine. Both the Sen and Price papers are well worth the time to read for the arguments they develop and the insights they offer. But they are also well worth the time to read because they provide evidence of just how fortunate the Law and Courts Section is in terms of its younger scholars.

⁴ My focus here is on the very most recent work of Law and Courts scholars, however, I would be remiss if I did not also note the winner of the Lasting Contribution Award: Shep Melnick's *Between the Lines: Interpreting Welfare Rights*. The staying power of this book in terms of its relevance and its importance as a foundation for work on statutory decision making by courts made it the ideal choice for the Lasting Contribution Award. That award committee was chaired by John Winkle of the University of Mississippi. The other committee members were Justin Wert of the University of Oklahoma, Steve Teles of Johns Hopkins University, Amy Steigerwalt of Georgia State University, and Marcus Hendershot of the University of Florida.

⁵ The committee consisted of Nancy Scherer of Wellesley College (chair), Charles Cameron of Princeton University, and Richard Vining of the University of Georgia.

⁶ Sen was a graduate student at Harvard University when her award-winning paper was produced and is now Assistant Professor of Political Science at the University of Rochester.

⁷ Price was a graduate student at Syracuse University when this paper was produced and is now Assistant Professor of Political Science at Weber State University.

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Time seems always to be in short supply and we all have multiple demands for any given window of time we do have. Your time will be well spent, however, if you use a bit of it to read these very fine pieces of scholarship. And, don't forget to attend the business meeting and reception at APSA 2013 in Chicago to help celebrate these (and all of) the 2011-12 award winners as well as the 2012-13 award winners!

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Data Sets in the Field of Law and Courts: Advancing Empirical Judicial Research

Michael C. Tolley

Associate Professor
Department Political Science
Northeastern University

"[T]he blackletter man may be the man of the present, but the man of the future is the man of statistics..." Oliver Wendell Holmes, Jr., "The Path of the Law," 10 *Harvard Law Review* 457 (1897), at 469.

"Big Data will produce progress—eventually. How quickly it does, and whether we regress in the meantime, will depend on us." Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail—But Some Don't* (New York: The Penguin Press, 2012), p. 12.

History may have confirmed Holmes' prediction that the future belongs to the "man of statistics," but Silver's recent admonition usefully reminds us of the contingency of progress. The field of law and courts owes much to the dedicated teams of scholars who developed the data sets we commonly use in our research and teaching. Their frequent use in articles appearing in the leading journals and in the books published each year by law and court scholars attests to their lasting contribution to empirical legal and judicial scholarship. One needs only to think of the advancements in our explanations of judicial decision making resulting from work in these data sets. But if that is not enough, then a quick glance at the first issue of the *Journal of Law and Courts* (March 2013), the field's much anticipated and long overdue publication, would reveal that four of the six articles used four of the data sets which are the subject of this article.

Building these data sets is expensive, and thus requires considerable financial support from foundations such as the National Science Foundation (NSF). Data set creation, including the collection, coding and cleaning of data, is time consuming, labor intensive, and, as a result, costly. Waning commitments from either the scholars who build them or the foundations that fund them threaten the underpinnings to the development of new, innovative works on law, courts, and judicial behavior.

Few law and courts scholars would doubt the valuable insights gleaned from work in data sets developed with financial support from the NSF and other funding sources. But in 2012 the U.S. House of Representatives voted 218 to 208 on an amendment to an appropriations bill (H.R.5326) prohibiting "the use of funds to carry out the functions of the Political Science Program... of the National Science Foundation" (H.AMDT.1094). This bill's imminent threat to NSF funding may have ended with the 112th Congress, but the future of government support of social science research remains at risk. In February 2013, House Majority Leader Eric Cantor delivered a speech at the American Enterprise Institute which again targeted government support for social science research: "Funds currently spent by the government on social science, including on politics, of all things, would be better spent helping find cures to diseases." (Rep. Eric Cantor, "Making Life Work," Speech to the American Enterprise Institute, February 5, 2013, at p. 10, http://www.aei.org/files/2013/02/06/-event-transcript_133044172988.pdf)

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The recent threat to NSF funding seems to me to be the ideal occasion to take stock of the valuable contributions made by those who made these data sets available to others in the field. Imagine where we would be today if NSF had not funded the data sets listed below? The law and courts community is clearly not the only beneficiary of the work of those who created these data sets, but we pause to acknowledge the valuable contribution they have made and are making to the advancement of knowledge about courts and judicial behavior.

The list that follows provides basic information on the data sets commonly used by scholars interested in empirical research on law, courts, and judicial behavior in the United States and elsewhere. Space limits and the desire to provide information on data sets available for a variety of courts outside of the United States mean that some valuable data collections used by law and courts scholars will not be listed here. Included are brief descriptions of the data sets, the principal investigators who created them, web site addresses for accessing them, and their sources of funding. My aims in compiling this information are to acknowledge the contributions made by those who developed these valuable resources and to encourage others to work in them.

As impressive as this list seems to be at first glance, a closer look will reveal that there is much more work to do. Data sets on the work of courts in most countries of the world simply do not exist. In my opinion, the field of comparative judicial studies is developing better theoretically than it is empirically, and would benefit from more national judicial databases. The recent effort to create data sets for the work of eleven high national courts is a promising development (see High Courts Judicial Database). It may be axiomatic, but as data on the work of courts in more countries become available, more cross-national studies of various judicial phenomena will be possible. Also needed are data sets on the work of courts below the high national/constitutional courts in the national judicial system and, in federal systems, the work of subnational courts. As described below, scholars have begun to fill that gap in the United States (see U.S. Courts of Appeal Database and State Supreme Court Data Project), but unfortunately that effort has not been matched elsewhere.

The development of data is critical to advancements of knowledge in the field of law and courts. Progress, to use Nate Silver's words quoted in the epigraph, will "depend on us" if, and only if, "us" is understood to mean both the community of scholars dedicated to developing and working in new data sets and the funding agencies willing to support them. If the field is to continue to flourish, then law and courts scholars may need to redouble their efforts to secure stable funding of these data collection projects.

United States

Federal Courts: U.S. Supreme Court

1. The Supreme Court Database

Description: Each case decided by the U.S. Supreme Court between 1953 and the present has been coded for over 200 variables. The database includes both case-centered and justice-centered data in six categories: (1) identification variables (e.g., citations and docket numbers); (2) background variables (e.g., how the Court took jurisdiction, origin and source of the case, the reason the Court agreed to decide it); (3) chronological variables (e.g., the date of decision, term of Court, natural court); (4) substantive variables (e.g., legal provisions, issues, direction of decision); (5) outcome variables (e.g., disposition of the case, winning party, formal alteration of precedent, declaration of unconstitutionality); and (6) voting and opinion variables (e.g., how the individual justices voted, the direction of their votes).

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Principal Investigator(s): Harold Spaeth (with contributions made subsequently by Lee Epstein, Andrew D. Martin, Jeffrey Segal, Ted Ruger, and Keith Whittington)

Web Site Address: <http://supremecourtdatabase.org/>

Source of Funding: NSF

2. The Vinson-Warren Court Database, 1946-1968

Description: Includes data on the conference votes of the Vinson and Warren Courts. The database contains eight vote variables which consist of one that specifies the type of vote the variable contains and a separate variable for each justice that contains his vote.

Principal Investigator(s): Jan Palmer

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/sct.htm> http://artsandsciences.sc.edu/poli/juri/vinwar_codebook.pdf

Source of Funding: NSF

3. The Expanded Burger Court Judicial Database, 1969-1985

Description: This database contains conference vote data as well as final vote and relisted case data. It also includes a random sample of cases denied review, lower court data for all accepted cases, and lower court data for the sample of denied petitions.

Principal Investigator(s): Harold J. Spaeth

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/sct.htm>
http://artsandsciences.sc.edu/poli/juri/burger_codebook.pdf

Source of Funding: NSF

4. The Supreme Court Justice Centered Judicial Databases: The Warren, Burger, and Rehnquist Courts (1953-2000 Terms)

Description: These databases include information on the justices and their votes from 1953 to 2000. The unit of analysis is the individual justice. The data were derived from the Warren, Burger, and Rehnquist Court portions of the *Original United States Supreme Court Judicial Database*. Sara Benesh transformed the data from case-centered to justice-based.

Principal Investigator(s): Sara C. Benesh and Harold J. Spaeth

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/sct.htm>
<http://artsandsciences.sc.edu/poli/juri/flpdcdebk.pdf>

Source of Funding: NSF

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5. U.S. Supreme Court Justices Database

Description: This database contains information on individuals nominated (whether confirmed or not) to the U.S. Supreme Court, beginning with John Jay and ending with Sonia Sotomayor. Specifically, the database includes 263 variables, which may be grouped into five categories: identifiers, background characteristics and personal attributes, nomination and confirmation, service on the Court, and departures from the bench.

Principal Investigator(s): Lee Epstein, Principal Investigator; Thomas G. Walker, Principal Investigator; Nancy Staudt, Co-Principal Investigator; Scott Hendrickson; Jason Roberts

Web Site Address: <http://epstein.usc.edu/research/justicesdata.html>

Source of Funding: NSF

6. Merged Phase I and Phase II Supreme Court Database

Description: Includes merged Spaeth and Gibson United States Supreme Court Judicial Databases Phase I and II. It also includes aggregated data, variables from Baumgartner and Jones *Policy Agendas Database*, Songer's *Courts of Appeals Databases*, various measures of landmark and salient decisions, and Martin and Quinn scores.

Principal Investigator(s): Vanessa A. Baird

Web Site Address: <http://sobek.colorado.edu/~bairdv/research.html#Data>

Source of Funding: The data used were compiled from a variety of sources funded by the National Science Foundation by Vanessa A. Baird at the University of Colorado at Boulder, and were distributed through the Department of Political Science at the University of Colorado, Boulder.

7. The Burger Court Opinion-Writing Database

Description: This database includes information about the memos and draft opinions the Burger Court justices circulated to their colleagues in the course of the opinion-writing process. The information appears in two forms: (1) data on each document, including the identity of the authoring justice, the recipients, the date of the document, the case(s) related to the document, and a coding of the document's content, can be obtained from a spreadsheet in the Dataset Archive page and (2) scanned images of the documents can be obtained from the Document Archive by using search terms, such as case name, docket numbers, document content, term, and justice.

Principal Investigator(s): Paul J. Wahlbeck, James F. Spriggs II, and Forrest Maltzman

Web Site Address: <http://supremecourttopinions.wustl.edu>

Source of Funding: NSF

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8. U.S. Supreme Court Amicus Curiae Database, 1946-2001

Description: This database contains data on amicus curiae briefs filed in cases heard by the U.S. Supreme Court from 1946-2001. It includes information on amicus curiae participation in the U.S. Supreme Court, including the number of amicus briefs filed for the petitioner, respondent, and those failing to identify their preferred disposition; the number of amicus briefs advocating for the liberal and conservative positions; as well as data on the amicus curiae activity on the U.S. Solicitor General.

Principal Investigator(s): The data on amicus curiae briefs filed from 1946-1995 were collected primarily by Joseph D. Kearney and Thomas W. Merrill ["The Influence of Amicus Curiae Briefs on the Supreme Court." *University of Pennsylvania Law Review* 148(3): 743-853 (2000)]. The data on amicus curiae briefs from 1995-2001, in addition to those cases missing from the Kearney and Merrill (2000) database, were collected by Paul M. Collins, Jr. [*Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. New York, NY: Oxford University Press, 2008].

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/databases.htm>
<http://www.psci.unt.edu/~pmcollins/FOSC.htm>

Source of Funding: NSF

9. Supreme Court Certiorari Study, 1947-1956

Description: This database provides information on the votes for certiorari cast by 15 Supreme Court justices between 1947 and 1956. The data were collected from the Harold Burton Papers at the Library of Congress.

Principal Investigator(s): S. Sidney Ulmer

Web Site Address: <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/7611>

Source of Funding: NSF

10. Policy Agendas Project: Supreme Court Data

Description: This data set contains information on each case on the U.S. Supreme Court's docket from 1944 to 2009 (8,920 records). Cases are coded from a policy perspective including variables for the policy issues raised in the cases.

Principal Investigator(s): Frank R. Baumgartner and Bryan D. Jones

Web Site Address: http://www.policyagendas.org/page/datasets-codebooks#supreme_court_cases

Source of Funding: NSF

(Continued from previous page)

United States

U.S. Courts of Appeals

11. The U.S. Courts of Appeals Data Base

Description: This database provides information on the votes of judges and the decisions of the U.S. Courts of Appeals. Cases decided by the U.S. Courts of Appeals are coded for a wide range of variables and now include, as a result of updates, the years 1925 to 2002.

Principal Investigator(s): Donald R. Songer

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/appct.htm>

Source of Funding: NSF

12. Update to Appeals Courts Database, 1997-2002

Description: See U.S. Courts of Appeals Data Base

Principal Investigator(s): Ashlyn K. Kuersten and Susan B. Haire

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/appct.htm>

Source of Funding: NSF

13. Data Base on the Attributes of U.S. Appeals Courts Judges, 1801-2000

Description: This database collects information on the personal, social, economic, career, and political attributes of all the judges who served on the United States Courts of Appeals from 1801 to 1994. Updates have expanded the data to include information on federal appeals court judges who served from 1801-2000 (with partial information on judges through 2004) and on district court judges who sat from 1789 to 2000 (with partial information on judges through 2004). Data are coded for the usual social background variables such as appointing president, religion, political party affiliation, education and prior experience. Also included are such items as when and why the judges left the bench, gender, race and ethnicity, net worth, and American Bar Association rating.

Principal Investigator(s): Gerald S. Gryski and Gary Zuk

Web Site Address: http://artsandsciences.sc.edu/poli/juri/auburn_appct_codebook.pdf

Source of Funding: NSF

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United States

U.S. District Courts

14. Data Base on the Attributes of U.S. District Court Judges, 1789-2000

Description: See Data Base on the Attributes of the U.S. Appeals Courts, above

Principal Investigator(s): Gerald S. Gryski, Gary Zuk and Sheldon Goldman

Web Site Address: http://artsandsciences.sc.edu/poli/juri/auburn_dct_codebook.pdf

Source of Funding: NSF

15. Lower Federal Court Confirmation Database, 1977-2004

Description: This database contains information on nominations to the U.S. District Courts and the U.S. Courts of Appeals from 1977 to 2004. The database contains two files: one includes data related to the processing of nominations in the Senate and the other includes data related to the processing of the nominations by Presidents Carter through George W. Bush.

Principal Investigator(s): Wendy L. Martinek

Web Site Address: <http://cdp.binghamton.edu/lfccd.htm>

Source of Funding: Constitution Project

16. Federal Court Cases: Integrated Data Base, 1970-2000

Description: This database provides information on the work of the federal courts collected from the 94 district and 12 appellate court offices throughout the United States.

Principal Investigator(s): Federal Judicial Center

Web Site Address: <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/08429>

Source of Funding: Agencies of the U.S. Department of Justice: the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention

17. Institutional History of the U.S. District Courts

Description: This database provides information on the changing nature of the U.S. District Courts and the judges who sat on them, including the numerous expansions and reorganizations since 1789.

Principal Investigator(s): Gerard S. Gryski, Gary Zuk and Sheldon Goldman

Web Site Address: <http://artsandsciences.sc.edu/poli/juri/history.htm>

Source of Funding: NSF

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United States

Federal Agencies

18. EEOC Litigation Project

Description: This database includes detailed information on federal court litigation (the participants, motions, outcomes, etc.) brought between 1997 and 2006 by the Equal Employment Opportunity Commission, the federal agency charged with enforcing the laws forbidding discrimination by private employers on the basis of race, color, religion, sex, national origin, age, and disability.

Principal Investigator(s): Pauline Kim, Margo Schlanger and Andrew Martin

Web Site Address: <http://eeoclitigation.wustl.edu/>

Source of Funding: NSF

United States

State Courts

19. State Supreme Court Data Project

Description: This database contains information on the decisions of the courts of last resort in all fifty states between 1995 and 1998. It also includes biographical data on the judges.

Principal Investigator(s): Paul Brace and Melinda Gann Hall

Web Site Address: <http://www.ruf.rice.edu/~pbrace/statecourt/>

Source of Funding: NSF

20. The Judicial Elections Data Initiative

Description: This database contains information on the election of state judges to the courts of last resort between 1990 and 2010. Included are data on the races (date of election, partisan/nonpartisan, retention election, etc.), vote outcomes, and information on campaign spending and the candidates themselves.

Principal Investigator(s): Andrew D. Martin

Web Site Address: <http://jedi.wustl.edu/data.php>

Source of Funding: A collaborative data collection project initiated by scholars at Washington University, St. Louis with contributions from the National Institute for Money in State Politics.

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National Courts Outside United States

21. High Courts Judicial Database

Description: This database provides information on the decisions of eleven high national courts. The data available for each country and court are as follows: Australia – High Court 1969-2003; Canada – Supreme Court 1969-2003; India – Supreme Court 1970-2000; Namibia – Supreme Court 1990-1998 (N = only 17); Philippines – Supreme Court 1970-2003; South Africa – Supreme Court of Appeal 1970-2000 and Constitutional Court 1995-2000; Tanzania – Court of Appeal 1983-1998; United Kingdom – Appellate Committee of the House of Lords (Law Lords) 1970-2002; United States – Supreme Court 1953-2005; Zambia – Supreme Court 1973-1997; Zimbabwe – Supreme Court 1989-2000.

Principal Investigator(s): Stacia L. Haynie, Reginald S. Sheehan, Donald R. Songer, and C. Neal Tate

Web Site Address: http://artsandsciences.sc.edu/poli/juri/HCJD_codebook.pdf

Source of Funding: NSF

22. New Zealand Supreme Court and High Court of Australia Databases

Description: The decisions of both courts are being analyzed and coded for the variables used by the Comparative Agendas Project (CAP). The CAP grew out of the American-focused Policy Agendas Project that is now housed at the University of Texas at Austin (See Policy Agendas Project: Supreme Court Data, above). Although the High Courts Judicial Database (HCJD) includes the High Court of Australia and also codes the policy content of the Court's decisions, its coding scheme differs from the one employed by the CAP. The Clark Center joins a team of researchers who are collecting data on the agenda-setting role played by other branches of government in Australia. Because the New Zealand Supreme Court is not included in the HCJD, the Center is coding all of its decisions, including both merits and special leave decisions, using both the CAP and the HCJD's coding schemes.

Principal Investigator(s): Comparative Agendas Project

Web Site Address: <http://www.comparativeagendas.org/>

Source of Funding: Edward A. Clark Center for Australian and New Zealand Studies at the University of Texas at Austin

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International and Supranational Courts

Court of Justice of the European Union

23. The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234), 1961-2006

Description: This database provides information on all of the Article 234 preliminary references filed with the European Court since the first reference in 1961. The most recently collected data are complete through 2006. The over 5000 references filed are coded for date, member state, court of referral, legal domain or subject matter (e.g., competition, environmental protection, free movement of goods), and the official European Court Reports citation.

Principal Investigator(s): Alec Stone Sweet, Tom Brunell and Carol Harlow

Web Site Address: http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26

Source of Funding: New Modes of Governance Project funded by the European Union

24. The European Court and Enforcement Actions: Data Set on Infringement Proceedings (Art. 226), 1958-2005

Description: This data set provides information on the over 2000 infringement proceedings (enforcement actions) under Article 226. The data include such information as date, the target Member State, the legal domain or subject matter (e.g., competition, environmental protection, free movement of goods), and the official docket number given to the case by the European Court of Justice.

Principal Investigator(s): Alec Stone Sweet, Tom Brunell and Carol Harlow

Web Site Address: http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26

Source of Funding: New Modes of Governance Project funded by the European Union

25. The European Court and Actions for Annulment: Data Set on Actions under Article 230, 1954-2006

Description: This data set provides information on actions for annulment – applications for the judicial review of the legality of Community acts under Article 230 – filed with the European Court of Justice. The data include such information as date, the target Member State, the legal domain or subject matter (e.g., competition, environmental protection, free movement of goods), and the official docket number given to the case by the European Court of Justice.

Principal Investigator(s): Alec Stone Sweet, Tom Brunell and Carol Harlow

Web Site Address: http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26

Source of Funding: New Modes of Governance Project funded by the European Union

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International and Supranational Courts

European Court of Human Rights

26. European Court of Human Rights Data

Description: This database includes information on over 7,000 cases decided by the European Court of Human Rights. It contains information on the cases and the characteristics of judges up to 2006. This database was compiled by Erik Voeten from the HUDOC database, which provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments, decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions) <http://www.echr.coe.int/echr/en/hudoc>.

Principal Investigator(s): Erik Voeten

Web Site Address: http://www9.georgetown.edu/faculty/ev42/ICdata_files/Page364.htm

Source of Funding: Unknown

International and Supranational Courts

World Trade Organization

27. WTO Dispute Settlement Database

Description: This database covers the WTO disputes initiated through the official filing of a *Request for Consultations at the WTO* between 1995 and 2006. Information is provided on all stages of dispute settlement proceedings from the time consultations are requested to the implementation of the rulings.

Principal Investigator(s): Henrik Horn and Petros C. Mavroidis

Web Site Address: http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DisputeSettlementData_Manual_03062008.pdf

Source of Funding: The World Bank

International and Supranational Courts

International Court of Justice

28. International Court of Justice

Description: This data set includes information about the work of the International Court of Justice from 1946 to 2004. Data are collected about the types of decisions under consideration, the background of the judges, the votes of individual judges, and national characteristics of judges and disputants.

Principal Investigator(s): Eric Posner and Miguel de Figueiredo

Web Site Address: http://www9.georgetown.edu/faculty/ev42/ICdata_files/Page580.htm

Source of Funding: Unknown

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International and Supranational Courts

International Criminal Tribunals

29. International Criminal Tribunals Database

Description: This database includes information on the cases and decisions made by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

Principal Investigator(s): James Meernik

Web Site Address: <http://www.psci.unt.edu/~meernik/International%20Criminal%20Tribunals%20Website.htm>

Source of Funding: Unknown

International and Supranational Courts

National Constitutions

30. Comparative Constitutions Project

Description: This database provides information on the characteristic features of written constitutions for most of the independent countries since 1789. Each “constitutional event” is coded and the result is a cross-national historical dataset with detailed information on the general characteristics of the constitution, amendment provisions, legislature, executive, judiciary, federalism, electoral provisions, regulatory and oversight institutions, international provisions, duties, rights, criminal procedure provisions, and special issues, such as protection of the environment, treatment of the mass media, and regulation of the military.

Principal Investigator(s): Zachary Elkins, Tom Ginsburg and James Melton

Web Site Address: <http://www.comparativeconstitutionsproject.org/>

Source of Funding: Financial support from the University of Illinois, the Cline Center for Democracy, the University of Illinois College of Law, the University of Chicago, the University of Texas, and the NSF.

Comparative Judicial Studies at the 2012 World Congress of Political Science

Rhonda Evans Case*

Adjunct Associate Professor and
Interim Director of the Edward A. Clark Center for Australian and New Zealand Studies
University of Texas, Austin

Associate Professor
East Carolina University
evanscaser@austin.utexas.edu

In July 2012, the International Political Science Association (IPSA) convened the XXIInd World Congress of Political Science in Madrid, Spain. Its Research Committees, now numbering 52, play an important role in coordinating the biennial meeting's program. Among them, the Research Committee 09 (RC09) on Comparative Judicial Studies promotes study of law, courts, and judicial processes from a comparative perspective. Its creation in 1973 was an important step in the development of a subfield devoted to such research. In the World Congress' "off years," RC09 has convened its own more intimate gatherings, some of which have generated publications (Schmidhauser, ed. 1987; Tate and Vallinder, eds. 1995; Jackson, et al., eds. 2012; Smith, ed. 2012). Although RC09 is not the only forum for comparative judicial scholars to present their work, it serves as an important vehicle for advancing comparative judicial studies internationally, and it featured prominently in the Madrid proceedings.

This article takes stock of the Committee's 2012 program. Recognizing that scholars often use conferences as opportunities to solicit feedback in early stages of research, this article refrains from critiquing individual papers.¹ Instead, it pursues two more general objectives. First, the article provides an overview of research presented on RC09's panels. In so doing, it surveys subjects under study, the papers' comparative scope and research styles, and particular characteristics of the authors. Second, the article assesses the extent to which RC09's panels collectively advance core objectives of the comparative judicial studies subfield. It finds that RC09 is accomplishing its objectives reasonably well, and it identifies specific ways in which the Committee might do better.

Most (77 percent) of the RC09's papers may be accessed online at the IPSA's website.² In order to provide a full picture, this article considers papers that were presented in Madrid regardless of whether they appear online. Where full-length papers are not available, it relies on abstracts submitted by authors to the IPSA. Abstracts admittedly offer a less robust source of information, but they generally illuminate the specific subject under study, research questions posed, and theory and methods employed—the main features of interest here. Given the international nature of this conference, surprisingly, only one paper was submitted in a language other than English (Noselli, et al). Because English is my only language, I was unfortunately unable to read this paper. I was, however, able to ascertain basic information about its content, and I include these observations in the analysis.

* The author joined the RC09's Executive Board in 2012 and remains a member.

¹ Indeed, many of the papers that are available online are expressly marked "drafts." I have respected the wishes of those authors who expressly request that their permission be obtained before "citing." I do not quote from any of the papers.

² See <http://www.ipsa.org/my-ipasa/events/paper-room>.

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Three main sections follow. The first of these elaborates key elements of the comparative judicial studies research agenda and debates among scholars over the direction of the subfield. A second section presents a descriptive analysis of the papers that were presented in Madrid and the scholars who authored them. The final section offers concluding thoughts and matters for further consideration.

What is Comparative Judicial Studies?

The boundaries and intellectual terrain of disciplines and subfields are continually contested. This, it would seem, is necessarily so as scholars seek to contribute their individual labor to advancement of some larger, collective endeavor. In charting the nature of this endeavor, three key questions loom large. First, what phenomena serve as appropriate subjects of study? Second, how should these subjects be studied? In other words, what theoretical principles and methods should be employed? And finally, to what ends—what are the big, pressing questions for which answers are sought? This section outlines the ways in which the subfield of comparative judicial studies has engaged these questions. It begins with the formation of RC09 in 1973 and discusses more recent debates.

RC09 grew out of efforts in the mid-1960s by a “small band of brothers” who saw value in a more organized approach to comparative judicial studies (Abraham 1987).³ Its founders pursued a well-defined intellectual mission. They sought to promote judicial studies of countries other than the United States, the traditional domain of such research. Beyond cross-national variety, RC09’s creators gave the Committee a broad mandate that encompasses study of judicial systems, institutions, processes, and actors at all levels of government (Schmidhauser 1987, 4). Indeed, the Committee’s name, *Comparative Judicial Studies* (as opposed to *Politics* or *Behavior*), suggests a deliberately broad ambit (Tate 2007, fn. 1). Although RC09’s founders embraced all sorts of theoretical and methodological approaches, they urged scholars to eschew formalistic, purely descriptive accounts and analyze judicial phenomena in expressly *political* terms (Tate 1987). Finally, they maintained that comparative judicial studies would not only enhance our understanding of law and courts but that it would also reciprocally enrich the wider field of comparative politics (Tate 1987, 7-8).

The world has obviously changed significantly since the RC09’s inception, and many of these changes have had implications for comparative judicial studies. Most notably, a third wave of democratization swept the world. The resulting democracies adopted various types of rights protections and created different sorts of courts, as well as other types of institutions, to protect these rights. Many of these tribunals were given power of constitutional judicial review. In addition, the volume of international law grew exponentially and supranational courts and quasi-courts proliferated. Human rights activists, in particular, have displayed growing readiness and capacity to exploit the opportunities these new laws and tribunals present. In sum, growth of law, courts, and legal mobilization expands the possibilities for examining the ways in which law and courts influence the behavior of legal and judicial actors as well as policymaking outcomes.

Scholars have periodically evaluated the extent to which the subfield has realized the RC09’s objectives in this ever-changing environment. Fifteen years ago, scholars echoed a familiar refrain as they bemoaned a scholarly failure to look beyond American courts (Gibson, Caldeira, and Baird 1998; Epstein 1999). More recent assessments acknowledge progress on this front, as scholars have expanded their focus beyond the world’s longstanding democracies to include courts in democratizing countries across Latin America, Eastern Europe, and Asia (Tate 2007; Hilbink 2008; Whittington, et al. 2008). Yet, as C. Neal Tate (2007, 27) observed in his review of comparative judicial politics literature,

³ It included Theodore L. Becker, David J. Danelski, Donald J. Fleming, Glendon Schubert, and Henry J. Abraham.

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treatment of countries in Africa and Asia, historically under-studied regions, remains relatively thin.

Despite improvement in cross-national coverage, concern exists that scholars are studying too narrow a swath of judicial phenomena. Lisa Hilbink (2008, 1098), for example, worries that comparativists “are, perhaps unwittingly, reproducing some of the existing pathologies of the law and courts subfield [of American political science].” She laments a tendency to fixate on “high courts and constitutional decision-making” and overlook more varied opportunities to explicate the role of legal institutions in governance. Hilbink challenges comparativists to pursue a more holistic approach that attends to the full cast of legal actors and thus includes litigants, lawyers, and legal academics as well as judges. While the “law and society movement” covers much of this terrain, one could nevertheless reasonably argue that RC09’s proceedings are diminished to the extent that they do not engage the full range of judicial studies.

Hilbink’s concern also extends to the balance—or in her view, the imbalance—that scholars seem to be striking between law and politics in their analyses. RC09’s commitment to a distinctly political approach to judicial studies was driven by a desire to eschew the legal formalism that had dominated early work. Hilbink (2008, 1099-1101) does not call for a return to legal formalism, but rather she observes a tendency among comparative law and courts scholars “to caricature and dismiss arguments that highlight factors internal to law or legal institutions.” She credits this trend, at least in part, to overreliance on rational choice assumptions that attribute judicial phenomena to the actions of self-interested actors who seek to maximize “their personal, partisan, or institutional power.” Hilbink urges scholars to consider the possibility that in some instances law can influence the behavior of judicial and other legal actors. Illuminating such examples, she observes, requires unpacking complex processes through which historically situated actors perceive their interests and strategically mobilize ideas.

The preceding critique touches a deeper debate concerning epistemology and methodology. Should, as some scholars advocate, comparative judicial studies seek to discover “broad generalizations about courts, their operation, and political and policy significance in societies” (Tate 1987, 7-8; Epstein 1999)? Or, should it endeavor to produce research of a more interpretive, historical, and ethnographic nature (Gillman 1994)? Early on, key figures involved in RC09 advocated for creation of cross-national, quantitative data collections that would facilitate testing of falsifiable hypotheses (Tate 1987, 26). Using such data, Tate and Stacia Haynie (1993) charted new territory with a study that examined the role of courts in authoritarian regimes. Publication of their findings sparked a reaction from Howard Gillman (1994, 356), who welcomed comparative study of courts but warned against a search for an empirically based, universal theory of courts. Gillman worried about the example that Tate and Haynie’s work set for graduate students embarking on this (then) new line of inquiry.

Comparative study of law and courts is generally thought to contribute to social science in two main ways (Epstein 1999). First, it offers new opportunities to test or evaluate the way in which particular features of a judicial system operate in different settings. This is important considering that much of the theorizing about judicial behavior and courts derives from the American example. Given the distinctive nature of the US system—its separation of powers, federal structure, and bill of rights—opportunities to assess the extent to which theories travel (if at all) are welcomed. Second, incorporation of law and courts into study of large-scale processes potentially offers new leverage on understanding and explaining phenomena such as democratization, economic liberalization, internationalization, and judicialization (Whittington, et al. 2008, 40). Tate and Torbjörn Vallinder (eds., 1995) spotlighted the last of these in their influential volume, *The Global Expansion of Judicial Power*, which, it should be noted, emanated

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from RC09's activities. Both lines of inquiry provide ample grist for the mill regardless of scholars' disparate theoretical, methodological, and epistemological commitments.

Comparative Judicial Studies at the 2012 World Congress

RC09 was an important presence in Madrid. It organized eleven panels that featured 44 papers. By comparison, IPSA's Research Committees averaged eight panels apiece; the Committee on Comparative Public Policy proved most active by far with 32 panels. Panel titles capture broad themes around which scholars are working. Overall, the titles of RC09's panels, which appear in Table 1, suggest that the proceedings addressed the full range of judicial phenomena that comprise the subfield's ambit. Panels one and two clearly engage the emergence of supranational law, institutions, and processes. With their focus on *High Courts and Judicial Governance*, panels three and four suggest that supreme courts draw disproportionate attention to the judiciary's policymaking capabilities. Yet, two other panels (five and six) seem to strike a balance by showcasing activists and lawyers who animate judicial proceedings. A trio of panels focuses specifically on developing or non-democratic regimes. Only panel ten strictly pursues issues concerning institutional design. And finally, one panel extends the RC09's ambit to include analyses of important non-judicial actors that by law are assigned important rights-protecting functions.

Table 1: RC09 Panels, Madrid 2012

Panel 1	Courts and Community Rights in Multinational, Federal, and Supranational States
Panel 2	Transnational and International Legal Institutions and Processes
Panel 3	High Courts and Judicial Governance: Activism, Litigation, and Policy Outcomes
Panel 4	High Courts and Judicial Governance: Dialogue and Rights Review
Panel 5	Judicialization and Legal Mobilization: Voting and Environmental Politics
Panel 6	Legal Mobilization and Legal Professionals
Panel 7	Institutional Change and Supreme Courts: Trajectories in Developing Countries
Panel 8	Judicial Review in Authoritarian Regimes
Panel 9	Marxism and Law: Political Theory and Developing Countries
Panel 10	Institutional Design and Selection of Judges in an Age of Judicial Power
Panel 11	Ombudsman, Human Rights Commissions, and Other Non-Judicial Institutions

Although RC09's participants traversed an impressive range of countries—from Argentina to Zimbabwe—their treatment of countries from historically under-studied regions was quite thin. Setting two large-*n* studies aside for the moment (Mayoral; Sandholtz), papers analyzed 35 different nation-states. Table 2 identifies them by region. It locates the three “settler” nations of Australia, Canada, and the US alongside Europe within a Western category. Notably, only one Post-Soviet state (Slovakia) attracted scrutiny. Scholars examined equal numbers of Asian and African countries (eight apiece), whereas a narrower range of Latin American countries drew their attention. Finally, participants examined only two Middle Eastern states, Israel and Egypt.

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Table 2: Countries Examined by Region

Africa	Asia	Western	Post-Soviet	Latin America	Middle East
Benin	India	Australia	Slovakia	Argentina	Egypt
Mali	Indonesia	Belgium		Brazil	Israel
Namibia	Japan	Canada		Chile	
Senegal	Malaysia	France		Columbia	
South Africa	Philippines	Germany		Mexico	
Tanzania	Singapore	Ireland		Paraguay	
Zambia	South Korea	Italy			
Zimbabwe	Thailand	Spain			
		United Kingdom			
		United States			

In terms of the frequency with which these countries were examined in the papers, Western and Latin American countries received a disproportionate share of participants' attention. Twenty papers, representing nearly half (45.5 percent) of the 44 papers presented, addressed at least one Western country within their analysis. A dozen papers (27.3 percent) included analysis of a Latin American country. By contrast, far fewer papers examined countries from the remaining regions. Coverage of African countries was concentrated in just two papers, representing 4.5 percent of papers overall. Twice as many papers devoted attention to Asian and Middle Eastern countries, respectively.

Looking more closely at the specific countries reveals additional disparities. Brazil, which served as the subject of nine papers, received the most attention not only within Latin America but also across the board. Only two papers, by contrast, examined the US. Instead, the United Kingdom (UK) and Canada drew the most scrutiny within the Western category. Of the four papers that analyzed Middle Eastern countries, three focused on Israel. All of the African and Asian countries were addressed in single papers with the exception of South Korea and Indonesia, which were each addressed in two separate papers.

As the panel titles suggested, RC09's participants examined a wide range of legal actors and judicial phenomena. One set of papers analyzed various mechanisms of judicial selection across both common law and civil law systems, including Ireland (McAuley), Argentina and Brazil (Linares and del Rio), Columbia (García), and France and Italy (Benvenuti). Another group of papers emphasized legal mobilization by litigants for purposes of accomplishing policy objectives in Brazil (Carvalho, et al.); Germany (Soennecken); Israel (Hofnung, Dotan); France, Germany, and Italy (Hermanin); and Spain, Belgium, Canada, and the US (Paternotte and Mezey). Judicial behavior, too, garnered attention, with studies of judicial decision-making by the Spanish Supreme Court (Garoupa, et al.) and the Supreme Court of the UK (Tiede). And finally, various implications of law featured prominently in several others (Pompeu and Néry; Smith and Sniderman).

Even so, overall, national-level high or constitutional courts drew considerable attention. They featured prominently in more than half (59.1 percent) of the papers. Five papers attended to various issues

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concerning supranational tribunals. The International Criminal Court (ICC) and the European Court of Human Rights (ECtHR) served as the subject of two papers apiece. Single papers examined the Inter-American Court of Human Rights (IACHR) and the European Court of Justice (ECJ). Notably, only one paper examined local courts (Clark).

In terms of research design, monographic studies and qualitative methods predominated. Single-country case studies outnumbered those that employed expressly comparative approaches by slightly more than two to one. Among the 14 papers that devoted significant attention to analyzing two or more countries, most compared countries that inhabit the same region. Notable exceptions include paired comparisons of Canada and Argentina (Carnota), the UK and Israel (Cohn), and South Korea and Germany (Mosler). A number of papers painted empirically rich portraits of judicial phenomena using original data collected by the authors (Carvalho, et al.; Dotan; Gomes, et al.; García; Pierce, et al.). Nearly all of the papers (84.1 percent) employed an essentially qualitative approach. Seven papers combined quantitative data and statistical methods to test general hypotheses concerning a single country (Dotan; Engst and Hönnige; Garoupa, et al) or across two or more countries (del Rio; Mayoral; Sandholtz; Sheehan and Meyers).

Notably, two papers drew from the High Courts Judicial Database (HCJD) that became publicly available in 2007.⁴ The HCJD, made possible by funding from the National Science Foundation, contains systematically-coded data concerning decisions by the supreme courts of eleven countries: Australia, Canada, India, Namibia, the Philippines, South Africa, Tanzania, the UK, the US, Zambia, and Zimbabwe. Development of cross-national judicial datasets has served as an important project within comparative judicial studies in recent years, fueled by expectations that availability of such data will foster comparative inquiry and rigorous statistical analyses (Tate 1987: 26). Reggie Sheehan and William Meyers' paper fits this bill. By contrast a second paper that focuses exclusively on the High Court of Australia illustrates the descriptively rich insights that the HCJD can also yield (Pierce, et al.). It uses new data that the authors collected to extend the HCJD's coverage of Australia through 2008.

By far, the related concepts of *judicialization* and *juridification* served as the predominant theme. They were invoked in no fewer than 13 papers. In this area, participants displayed greatest interest in examining causes of judicial empowerment. Benjamin G. Engst and Christophe Hönnige employed statistical methods to test competing explanations for why opposition parties initiate abstract review in the French Constitutional Council. In their quantitative study, Sheehan and Meyers emphasized institutional factors in evaluating propensity for courts to exercise judicial review in presidential versus parliamentary systems. Another pair of papers, both on the UK, showcases a different approach. Erin Delaney theorized how interaction among institutional reforms—namely passage of the *Human Rights Act 1998*, devolution of power to the regions, and creation of a Supreme Court—can enhance judicial power. Michael Tolley linked expanded judicial power to juridification, which includes proliferation of rules and legal formalities and growth of administrative judicial review.

Rounding out the judicialization theme, another set of papers addressed the dynamics and consequences of judicial involvement in policymaking processes. Policy areas examined include refugee policy (Evans Case), health policy (Carnota), same-sex marriage (Paternotte and Mezey), prisoners' voting rights (Hiebert), embryo stem cell research (Marona and Mendes), language rights (Kelly), and rules regulating political parties (Mosler). These papers emphasized an array of institutional and ideational variables. Scholars also engaged the role of courts in negotiating relations between national (in this case, Spanish) and Islamic law (Casajús).

⁴ For a discussion of this database, see pp. 16 in this issue.

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Several papers showcased judicial and political reactions to assertions of judicial power. For example, Jose Mario Wanderley Gomes, et al. described how Brazilian judges increasingly use writs of suspension to block “activist” decisions of lower courts, and as a result, advance the *executive’s* interests. And, in his study of language rights, James B. Kelly showed how the Quebec National Assembly, in effect, reestablished policies that had been invalidated by the Supreme Court of Canada as inconsistent with the Charter of Rights and Freedoms. His findings challenge conceptualization of Canada as a strong-form system of judicial review. Both papers offer a fuller depiction of the wider consequences of expanded judicial power.

Five papers explored the realm of supranational law and courts. Mary Volcansek and Don Jackson unpacked the meaning of “political legitimacy” and explored various ways of measuring the concept’s component parts within the context of the ECJ and the ECtHR. Two papers examined how supranational bodies, namely the IACHR (Assis and Pementel) and the EU (Hermanin) affect domestic-level policymaking and implementation. Using a large dataset and event history models, Wayne Sandholtz examined why sovereign states confer authority upon the ICC. By contrast, focusing on the issue of affirmative defenses that mitigate responsibility, Charles Smith and Adam Shniderman considered dilemmas engendered by the way in which the ICC has institutionalized the concept of individual responsibility for gross human rights violations. Together, these papers amply illustrate key conceptual, political, and policy issues that internationalization of law and courts presents.

A half-dozen papers directly engaged the role of courts in non-democratic and democratizing regimes. They include empirical studies as well as empirically-informed efforts to develop new theoretical approaches. Mamoud Hamad traced the Egyptian judiciary’s important role in processes that led to the Mubarak regime’s collapse. Looking at six Asian countries, Bjoern Dressel emphasized the interactive effects of institutional, ideational, and agential variables on the role of courts in democratic governance. Juan Mayoral, by contrast, employed quantitative methods and a dataset of authoritarian regimes encompassing years 1981 to 2002 to show that high courts, by interacting with powerful political oppositions, can undermine autocratic regimes. David Kosar used Slovakia as a case study for examining performance of different mechanisms for promoting judicial accountability. Looking at Indonesia, Samuel Clark offered a theoretical account of the conditions under which local authorities prosecute allegations of political corruption in local courts. And, finally, taking African and Asian countries as their focus, Alexander Stroh, et al. presented a conceptual scheme to facilitate more systematic analysis of political interference in judiciaries of new democracies.

Because RC09’s founders sought to incorporate comparative judicial studies into mainstream comparative political research, it is worth considering the extent to which comparative judicial scholars presented their research on *non-RC09* panels in Madrid. A title-search of the IPSA’s online paper database—using the search-terms *court*, *judicial*, *judiciary*, *judge*, *lawyer*, *legal*, and *law*—returned six papers that would have been suitable for RC09 but were instead presented at panels organized by other Research Committees or at a general Congress Session. Two of these examined the role of judicial institutions in processes of democratization and democratic consolidation (Kneip; Vodo). Two others considered, respectively, the role of international legal bodies in promoting compliance with international law (Schlueter) and whether the ICC could be replicated in other areas (Labuschagne). The remaining papers addressed enforcement of Indigenous peoples’ rights in Southeast Asia (Ortiz) and accessibility of legal services in Ukraine (Sheiko). These papers provide some evidence that comparativists more generally appreciate the important role that courts play in an array of broader phenomena.

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In furtherance of the IPSA's broader goals, RC09 is committed to promoting "national diversity" among its membership. This section, therefore, concludes with a general survey of the scholars who presented their work in Madrid. Of course, not all Committee members necessarily present their work at every meeting, and we could operationalize "national diversity" in a number of ways. If, however, we focus on the country in which a scholar's institution is located, we find that RC09's 66 authors represented 14 different countries. Predictably, most (59.1 percent) were affiliated with institutions located in Western countries, with the lion's share of them coming from the US. Scholars associated with institutions in Latin American countries accounted for the second largest share of participants—34.8 percent, and within this region, Brazil predominated. In fact, just over half (54.5 percent) of all participants identified with institutions in either the US or Brazil. With seven scholars, Germany rounded out the top three source-countries. The remaining 23 authors traveled from eleven different countries. No scholars from institutions in Asia or Africa participated in the RC09's program.

Finally, it is also worth considering the degree of gender and professional diversity among the Madrid participants. No fewer than half of the 44 authors were women, an interesting finding in light of RC09's male-dominated origins. In addition, available data suggest that a significant number of participants were graduate students. According to professional credentials included in papers and abstracts or on the IPSA's website, 16 (24.2 percent) authors did *not* hold a Ph.D. at the time of the meeting. This suggests that RC09 offers opportunities for professional development and socialization. RC09 thus performed reasonably well on both of these scores.

Concluding Thoughts

Conclusions from an overview such as this one must be tempered by two caveats, one temporal and the other personal. First, because this assessment focuses on a single year, it can hardly be said to indicate trends within the subfield. Various idiosyncratic as well as systematic factors contribute to the final form that conference proceedings take. Therefore, one should not presume that the 2012 IPSA World Congress represents the subfield as a whole. At best, an assessment such as this offers a snapshot of a moving object. Second, the fact that I am a Westerner who was trained in American political science programs necessarily informs my perspective. The lens through which I view the papers is clearly shaped by priorities and concerns that animate scholarly debates within the US. The extent to which similar priorities and concerns characterize debates elsewhere should be questioned rather than presumed.

This assessment of RC09's offerings at the IPSA's 2012 World Congress finds that Committee is fulfilling its core objectives reasonably well. The US featured in only two papers. Scholars instead analyzed a wide range of countries. Yet, the historically under-studied regions of Africa and Asia received relatively light treatment. Although national high courts attracted disproportionate attention among the papers, a wide array of actors, processes, and issues also received consideration. Scholars clearly employed a *political* approach to studying law and courts. In so doing, they drew from various theoretical approaches and engaged a variety of major themes. In sum, it appears that RC09 operates as the "broad church" that its founders intended.

Two more specific observations may be made about the approaches employed by RC09 participants. First, quantitative, positivist studies comprised a relatively small portion of the 2012 program. The Madrid proceedings suggest that the full potential of the HCJD has not yet been realized. Only two

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papers drew from this data, and both were co-authored by individuals associated with the database's creation. Reginald S. Sheehan was among the quartet of scholars who received a National Science Foundation grant to create the HCJD, and Rebecca D. Gill worked on the project as a graduate student.⁵ Second, although a number of studies drew from rational-choice and strategic theories, the analyses of many more were informed by richly descriptive accounts that traced various processes, attended the sequence of events, and assigned important roles to ideas as well as interests. A significant number of papers presented original data on various judicial processes.

A larger question concerns the contribution of RC09's panels to addressing the big questions that concern comparative judicial scholars. Here, as one might expect, given the size of the IPSA World Congress, the RC09 fared less well. By their very nature, large, international conferences tend to generate unwieldy programs as organizers confront the challenge of fitting often disparate papers onto broadly thematic panels. The panel on judicial selection (panel ten) most closely realized the goal of bringing a comparative perspective to study of a specific issue, here a critical issue of institutional design. Yet, even so, the papers lacked the sort of singular focus that would make for a cohesive whole. It would seem that this sort of limitation inheres in nature of such gatherings.

Several implications follow from this analysis. First, the World Congress offers a chance for scholars to forge and maintain relationships with their colleagues around the world. From such networking, opportunities for more focused, comparative collaboration may be identified and pursued at the next's year's smaller, interim meeting. These events operate more like workshops. Indeed, as noted at the outset of this article, the interim meetings have generated a number of publications. Second, although excessive navel-gazing should be avoided, it may be useful for the RC09 to periodically undertake the sort of exercise performed here. If this is to be done, I would suggest soliciting assessments from a pair of scholars that would bring different perspectives to the task.

Third, to the extent that a dearth of work on Africa and Asia in fact constitutes a trend, then RC09 may want to consider more aggressive outreach to scholars working in these areas. This may involve encouraging participation by scholars from these regions. Consider that Brazil, the country that attracted the most attention across the papers, also sent the largest contingent of scholars to Madrid. Of course, scholars do not necessarily study courts of the country within which they live; but, in this case, all of the authors who work for Brazilian institutions wrote about Brazilian law and courts. Some scholarly associations have programs that subsidize, in whole or in part, conference travel for scholars from the developing countries. IPSA has a Global South Solidarity Fund for this purpose. RC09 may want to consider pursuing opportunities to diversify its program.

A fourth implication of this assessment concerns the HCJD that features prominently in this issue of the *Newsletter*. Perhaps RC09 should consider convening a special panel at the next World Congress on work that has drawn from the HCJD (e.g., Sheehan, et al. 2012). Such a panel could provide a forum for publicizing the database, showcasing the contributions that it has facilitated, and discussing the challenges that its use presents. Perhaps short-courses could be offered for scholars who seek to use the HCJD in their own work as well as for those who seek to construct similar datasets. The latter could focus on "lessons learned" and facilitate more efficient construction of datasets and perhaps improve coding and content. Each year, for example, the Comparative Agendas Project holds an annual meeting at which participants present research and discuss nuts and bolts issues that derive from the enterprise of

⁵ The other three scholars include Stacia Haynie, Donald Songer, and C. Neal Tate.

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constructing and maintaining datasets. RC09 would seem to offer an ideal vehicle for similar such efforts.

Finally, this assessment found papers on non-RC09 panels that engaged issues of interest to comparative judicial scholars. Several of these addressed the broad themes of democratization and internationalization. Encouraging incorporation of courts into mainstream political science served as a key objective of RC09's founders. The Committee may want to explore strategic opportunities to co-sponsor panels with other IPSA research committees. For example, working in conjunction with RC13, which focuses on Democratization in Comparative Perspective, a panel might focus on the role of courts in democratization processes; or, working with RC30 on Comparative Public Policy, a panel could focus on the role of courts in policymaking processes. Co-sponsorship would emphasize the role that courts play in these wider processes and foster cross-disciplinary collaboration.

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Governing Europe from the Bench? Assessing the German Constitutional Court's ESMT Ruling

Nicole Scicluna

La Trobe University
n.scicluna@latrobe.edu.au

Raul A. Sanchez-Urribarri
La Trobe University
r.sanchezu@latrobe.edu.au

In September 2012, the German Constitutional Court (GCC) soundly rejected an injunction sought by some 37,000 plaintiffs (including ordinary citizens and parliamentarians from the far left party *Die Linke*), which attempted to prevent the German Federal government from completely ratifying the European Stability Mechanism Treaty (ESMT) and the Fiscal Compact.¹ This would have rendered the Euro-Zone's rescue fund and budget pact ineffective. The controversial decision was much welcomed by investors (and certainly brought deep relief to politicians in Brussels and most European capitals), whilst it was attacked on a variety of grounds, more generally the claim that it authorized the German State to give away critical powers of sovereign economic policy.

The ruling was a salient exercise of judicial authority on a highly contested topic. It was particularly sensitive for the political development of both Europe and Germany and, thus, it merits further consideration. Yet, as we explain below, it should not be understood as an unbounded use of judicial power. Rather, it should be best analyzed in the context of previous case-law, and in terms of the political context surrounding the controversial judgment.

First of all, the Court's ruling did not take place in a vacuum. It is directly linked to the GCC's long-standing relationship to European Union (EU) law and to the integration process. The EU's constitutional framework has been shaped over several decades by a dynamic of 'resistance and response' between national and European level actors (Davies 2012, 7). This dynamic has been well studied by scholars from different vantage points (for instance, see essays in Slaughter et al 1998; Lasser 2009). More importantly, the process has had courts as central actors from the beginning, leading to the effective judicialization of the European policy space (Stone-Sweet 2000, 2010).

At the European level, integration through law was driven by the European Court of Justice (ECJ), above all through its path breaking doctrines on the direct effect² and supremacy³ of Community law. Concurrently, at the national level, the GCC has been amongst the ECJ's most active, and quarrelsome, interlocutors. Doctrines expounded by the GCC have made a real difference to European-level legal and political practices, for example, in relation to fundamental human rights protections (Hartley 2010, 143-151). Additionally, a series of systemic transformations have taken place at the domestic and European levels, which encourage the use of domestic and European courts to solve significant policy questions, including a growing and increasingly complex support network for litigation (Cichowski 2007), and rules

¹ BVerfG, 2 BvR 1390/12 vom 12.9.2012, Absatz-Nr. (1 - 248), available at http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

² *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (Case 26/62).

³ *Costa v ENEL* [1964] ECR 585 (Case 6/64).

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that are designed to favor litigation as the preferred mechanism to enforce EU Law (Kelemen 2011). Such transformations facilitate, encourage and, more importantly, legitimize the use of the GCC as an acceptable venue to decide questions of political import – including the entering into force of the ESMT treaty.

The GCC's ruling is also anchored in established German constitutional practice. When playing its ever important scrutinizing role, the Court is fulfilling an institutional mission that is strongly informed by its role as ultimate legal adjudicator, but without setting aside the different political forces at play in Germany. The GCC's outlook is chiefly informed by its reading of Germany's constitution, the Basic Law (*Grundgesetz*), and its need to reconcile the integrity of that document with European integration. This is not a straightforward task. The Basic Law enshrines Germany's democratic statehood and the sovereignty and right to democratic representation of the German people (Art. 20(1) and (2) of the Basic Law, further entrenched by the 'eternity clause' in Art. 79(3)). The Court has repeatedly warned that the process of European integration cannot be allowed to compromise these values, as would happen, for example, if too much of the German government's sovereign power was transferred to the European Union, which lacks democratic legitimacy because of the weakness of its main representative body, the European Parliament. Yet, on the other hand, the Basic Law also evinces a pro-integration disposition ('*Europarechtsfreundlichkeit*'), primarily in Article 23, which compels German institutions to participate constructively in the development of the EU.

These apparent contradictions have given grounds to a jurisprudence that is confrontational – even hostile – in word, but accommodating in deed. The GCC's verdicts on integration-related matters are, in fact, a series of conditional approvals. In its 1974 *Solange I*⁴ judgment the Court placed limitations on the supremacy of Community law relating to the protection of fundamental rights. The Court went even further in its Maastricht⁵ and Lisbon Treaty⁶ verdicts, when it claimed for itself the authority to subject EU law to *ultra vires* review (in direct contradiction to the ECJ's declarations that it is the sole arbiter of the validity of Union legal measures, see also Kommers 1997, 107 ss.). However, the GCC has never exercised this jurisdiction, having time and again passed on opportunities to do so (Doukas 2009, 868-869).

The present case continues this pattern, but also shows a Court willing to use its powers cautiously. In essence, the GCC's answer to the question of whether the ESMT and Fiscal Compact were compatible with German law was another 'yes, but...'. In contrast to the occasionally expansive rhetoric of previous decisions, this time the GCC explicitly restricted itself to legal questions, leaving high politics to Europe's national and supranational political leaders. In announcing the decision, Court President Andreas Voßkuhle made clear that the judges had not ascertained the suitability of the rescue package, which 'is and remains the task of politics' (Jahn 2012). The Court held that the ESMT and accompanying German laws did adequately safeguard the German Parliament's constitutionally mandated budgetary responsibility, though it did stipulate two conditions, both aimed at further strengthening the *Bundestag*'s role in the ESM's operation. Similarly, the Court rejected the plaintiffs' objections to the Fiscal Compact, the ratification of which was not made subject to any conditions.

⁴ *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel (Solange I)* [1974] 2 CMLR 540.

⁵ *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

⁶ BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421) available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

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In addition to deciding the case following a well-established series of precedents without directly contradicting them – a factor that, in itself, enhances judicial authority – there are other factors that need to be taken into account. Scholars suggest there are common features that help to explain why, and under what circumstances, High Courts are willing to engage with significant political questions and, on occasion, challenge power-holders' policy preferences. In the case of the GCC, it is a court that has already accumulated a nontrivial amount of influence for a long time. This has often involved keeping an eye on the surrounding political atmosphere before issuing a decision, especially public opinion (Vanberg 2005). Additionally, the Court's engagement with this question should have been affected by the sense of emergency then (and currently) prevailing in the EU and, particularly, the Euro-Zone. Further analysis of this ruling should explore to what extent this political environment conditioned the judges' decision, its content and implementation.

Thus, the GCC's decision is best seen as the most recent manifestation of its willingness to remain a key arbiter on arguments concerning Germany's commitment to the European integration project. Although controversial, it is not really a new development – the GCC has been a key player in the broader European political debate for many years. Although the specific conditions that facilitated the GCC's exercise of judicial power might not be present in the future, we can rest assured that the ESMT case will not be the Court's last foray in this ongoing debate. More importantly, it is misleading to see it as an instance of unfettered 'juristocracy'. Future analyses of the key arguments explained above could offer valuable insights, not only in this case, but for the growing field of Comparative Judicial Politics.

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Tea and Sympathy: Commentary on Courts in the 111th and 112th Congress

Bruce Peabody

Fairleigh Dickinson University
bpeabody@fdu.edu

Kyle Morgan
kmorgan89@gmail.com

Few legal battles have generated the tsunami of attention—amongst pollsters, political commentators, politicians, and public officials—as that unleashed by the litigation culminating in *National Federation of Independent Business v. Sebelius* (Peabody and Woolley 2012). Many have already speculated about the case's impact on everything from the legacy of Chief Justice John Roberts to the future of Congress's taxing power.

We believe the legal challenges to the Patient Protection and Affordable Care Act (PPACA) provide an important prompt for investigating another, less discussed aspect of the struggle over health care: the status of congressional-judicial relations in the early 21st century. In this research note, we report on preliminary results indicating that Democratic and Republican attitudes towards judges and courts may be in flux, at least in the House of Representatives.¹

According to a number of scholars, recent decades have produced salient congressional challenges and, at times, outright hostility to court rulings, judicial power, and even individual judges and justices (Clark 2009; Collett 2010; Geyh 2008; Miller 2009). Two major factors suggest to us that recent congresses provide an important milieu for scrutinizing this dynamic: first, the rise of the "Tea Party" movement in 2009, which has emphasized constitutional constraints on spending and other government powers, and second, as already indicated, the passage of the PPACA in 2010 and its subsequent challenge in court.

With this backdrop in mind, we present a picture of commentary about courts and judges by members of the House of Representatives during the 111th (2009-2011) and 112th (2011-2013) congresses. We focus on this span because we believe it covers an especially important set of political developments

¹ This research note is based on our work in Bruce Peabody and Kyle Morgan, "Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium: Assessing the Relationship between Parties, Congress, and Courts in Tea Party America," *British Journal of American Legal Studies* (in press).

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including the ascendancy of the Tea Party,² and the period of most intense discussion over the judicial fate of “Obamacare.”

Methodology

In June 2010, in late-February and early March 2012, and then again in early July 2012, we engaged in three separate surveys of the public statements of all members of the U.S. House of Representatives. Specifically, we sought and recorded evaluative website commentary about judges, courts, the judicial system, and court decisions. While somewhat narrow, our inquiry encompasses periods of “unified” (the 111th Congress) and divided (the 112th Congress) government rule, and a time span in which the Tea Party was an important force in state and national politics. Finally, it offers snapshots of lawmaker attitudes both in the midst of and in the immediate aftermath of litigation challenging the constitutionality of PPACA—our third appraisal of congressional attitudes occurred just a few weeks after the Supreme Court handed down the *Sebelius* decision.

For each of our three investigations of House websites, our content search was executed in the same manner: we examined “official” (identified by “house.gov” in their URL suffixes) websites of all members of the House of Representatives over the periods indicated. This website orientation focused on what we believe is a particularly responsive and constituent centered communication tool for members of Congress. We considered only House (rather than Senate) websites in part because, given the rather confined scope of our inquiry; we believed that the House would serve as a more sensitive barometer of lawmaker attitudes in light of evolving political circumstances. We note, for example, that many Senators serving in the 111th Congress were elected before the Tea Party was an active participant on the U.S. political scene—making these legislators arguably less responsive to the concerns and agenda of this movement.

Within an individual House member’s website, we used both provided “internal” search engines as well as targeted examinations of lawmaker “policy” and “news” tabs or sections. Our search relied on broad, truncated search terms: “court” and “jud”—which led to words and phrases such as “courts,” “court,” “Supreme Court,” “judiciary,” and “judges.” When we received “hits” on dated material (such as a press release), we excluded any judicial references that were older than a year from the date of our search.

After compiling these results, we identified “positive” and “negative” mentions of courts and the judiciary, following a list of evaluative terms. We counted, separately, multiple discussions of the same decisions or judges so long as these references were in distinct sources (such as a policy statement on a website and an excerpt from a floor statement). We did not count multiple “positive” or “negative” within one reference.

Results

Overall, remarks about the judiciary on House websites has been fairly common, and, not surprisingly, increased after the passage of PPACA and its subsequent challenge in courts. In the 111th Congress, a little over two in five House websites made some reference to courts and judicial rulings, a figure that

² The congressional Tea Party Caucus was formed in July of 2010.

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rose to 64% in the winter of 2012 and peaked at 81% over June and July 2012 (as the Supreme Court handed down major decisions at the end of its 2011 term).

Table 1: Website Commentary on the Judiciary: 111th-112th Congresses

<i>Congress</i>	<i>Positive Comments</i>	<i>Negative Comments</i>
111th (June 2010)		
Overall	183	220
Democrats	61 (33% of all positive comments)	92 (42% of all negative comments)
Republicans	122 (67% of all positive comments)	128 (58% of all negative comments)
112th (Feb./March 2012)		
Overall	489	342
Democrats	171 (35% of all positive comments)	181 (53% of all negative comments)
Republicans	320 (65% of all positive comments)	161 (47% of all negative comments)
112th (July 2012)		
Overall	247	292
Democrats	207 (84% of all positive comments)	46 (16% of all negative comments)
Republicans	40 (16% of all positive comments)	246 (84% of all negative comments)

Table 1 provides other information from the three sounding points comprising our preliminary study. Republicans made more overall comments (positive and negative) about courts, although both parties were fairly active participants in this discourse. For example, before *Sebelius*, Republicans in the 112th Congress offered 58% of all website commentary on courts.

Perhaps most interestingly, the table shows greatest support for courts by Republicans, at least before the issuance of the *Sebelius* decision on June 28, 2012. Prior to the PPACA ruling, roughly two-thirds of all positive comments about court decisions and judicial power came from the G.O.P. This support reflects, among other things, satisfaction with decisions in such areas as the Second Amendment (embodied by rulings including *D.C. v. Heller* and *McDonald v. Chicago*), partial birth abortion (*Gonzales v. Carhart*), and campaign finance (*Citizens United v. FEC*), along with praise for Republican appointed

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Justices such as Alito and Roberts. While Republican lawmakers in the 111th Congress were both more likely to praise and criticize the judiciary than their partisan opponents, by 2012, Democrats supplied a greater number of critical comments—reflecting their displeasure with many of the same opinions lauded by Republicans as well as emerging anxieties about the status of the health care legislation.

Indeed, some amount of Republican enthusiasm for the judiciary in the 112th Congress was likely attributable to projected hopes with respect to the health insurance law. Many G.O.P. lawmakers explicitly cited their approval of lower court decisions invalidating aspects of PPACA, and communicated their desire that the Supreme Court would, similarly, strike down portions of the law or the measure in toto.

The connection between House Republican attitudes towards the courts and the fate of the health care legislation is underscored by our most recent picture of website commentary. In contrast with our other readings of Congress, the aggregate picture of House websites in July 2012 is distinctive. This period, defined by lawmaker reaction to cases handed down at the very end of the term, was charged not only by the *Sebelius* ruling, but also by *Arizona v. U.S.* (in which the Court struck down three provisions of a state law creating criminal regulations regarding illegal immigrants), and other significant (although less reported) cases. In the face of *Sebelius*, which upheld the heart of the Obama administration's health care legislation, many Republican lawmakers expressed their objection to and "disappointment" with the Court (and its Chief Justice, the author of the opinion and, of course, a Republican appointee). Overall, of the 247 positive comments we recorded in July 2012, 84% came from Democrats (mostly praising the *Sebelius* decision) while, conversely, Republicans provided 84% of the negative commentary.

Analysis

This research note is based on three sets of observations from only two congresses. Consequently, it is premature to offer anything beyond a speculative statement about the conclusions we can draw. That said, it seems safe to contend that Congress was not immune from, and indeed, contributed to, widespread interest in the Obamacare legislation and its judicial fate. As indicated, in the weeks after the Court upheld the PPACA, more than four out of five lawmakers posted comments either praising or condemning the decision. More intriguingly, our results point to extensive Republican support and seemingly growing Democratic skepticism towards courts. Again, some of this dynamic reflects the aspirations of conservatives (including a high number of lawmakers linked to the Tea Party movement)³ who expressed their hopes, during the early months of 2012, that the courts would invalidate the health care legislation.

But explaining G.O.P. interest in (and support for) courts by focusing on animus against the health care law only goes so far. As suggested earlier, House commentary in 2010 and 2012 went beyond this issue and included Republican praise for court decisions in areas such as civil liberties, affirmative action, and abortion, as well as Democratic disappointment and even recrimination on these and other topics.

Even after *Sebelius*, despite the lopsided partisan commentary (with overwhelming criticism of the health care decision coming from Republican lawmakers), we note that much of this discourse was

³For example, House members who self-affiliated with the congressional Tea Party Caucus offered almost twice as many positive statements about courts than rank and file lawmakers.

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tempered. Instead of using *Sebelius* as a touchstone for a wider critique of the Court or Chief Justice, many disapproving House members focused their ire on PPACA as “bad” policy, and trained their blame on President Obama rather than the Supreme Court. Moreover, still other Republicans expressed their “respect” and support for the Court’s authority even while stating how “unhappy” they were with the specific decision. Post-*Sebelius* commentary did not obviously indicate that G.O.P. diffuse support was undone by the ruling.

Finally we note that if one focuses on July 2012 commentary about courts that is unrelated to the health care decision, we find a mixed picture of lawmaker evaluation that reflects some of our earlier observed dynamics. Thus, once we set aside “health care” mentions on congressional websites, we find Democrats offering 74% of the negative commentary about courts on other topics and cases, reflecting disapproval of many rulings from the 2011 term.

Conclusions

Given the wider context of post-New Deal Democratic support of (and Republican skepticism towards) the judiciary (Miller 2009; Peabody 2010), the results in this research note open up the possibility we may be at a critical new juncture for legislative-judicial relations. For Democrats, the judiciary no longer seems as reliable an ideological and policy ally as it once was in such core areas as privacy, free speech, affirmative action, criminal procedure, and federalism. For many Republicans, *Sebelius* notwithstanding, the U.S. judicial system offers a more promising political forum than in the past, and is worth buttressing, at least with one form of very public, electronic communication. Our scrutiny of lawmaker websites is ongoing and will help to establish whether these relationships have genuinely shifted, perhaps as the result of sustained conservative strategies to reshape the courts (Teles 2010), or whether the dynamics we observe are more situational and contingent.

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Surveillance, Law and Policy in the 21st Century

Anna E. Hoylan
Westminister College

Tobias T. Gibson
Westminister College

Under the Obama administration, the United States has made the deployment of unmanned aerial vehicles (UAVs, or more popularly “drones”) a staple in the global struggle against terrorism. The Obama administration has used drones to eliminate much of the al-Qaeda leadership in the Middle East, kill radical Muslim cleric Anwar al-Awlaki (an American citizen), and has increased the use of drones outside of the war theaters of Afghanistan and Pakistan to include targeted killings in Yemen and Somalia, and surveillance drones in locations such as Egypt (Rise of the Drones).

More concerning, perhaps, is the current and future uses of drones domestically by the current administration and those that follow. Recently, Congress required the Federal Aviation Administration (FAA) to clear airspace for up to 30,000 unmanned aircraft over the United States in the next ten years. Drones have been used to patrol the northern and southern borders of the United States since 2005 (Zenko, A), and the INS will loan state and local law enforcement agencies these drones. Police departments are looking to purchase and employ drones, raising still further civil liberty concerns related to privacy and surveillance (Vogel). Domestic law enforcement agencies’ use of drones as tools of surveillance took on increased importance last year when, for the first time, evidence gathered by drone surveillance was admitted into court (Koebler).

This article proceeds as follows: we discuss seminal electronic and aerial surveillance cases which we believe can provide the framework to establish a legal principle to guide the use of drone surveillance; we then provide particular concerns about current and future domestic surveillance with drones; and we conclude by calling for a high profile public discussion by citizens and their elected officials.

Relevant Case Law (electronic surveillance)

Justice Louis Brandeis’ comment, stating, “the progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping” seems prophetic, given the creation of technology such as drones monitoring American skies and the construction of a massive National Security Agency data collection center in Utah (*Olmstead v. US*). If the Supreme Court justices in the 1920s could hardly conceive of technology that would allow law enforcement officials to intercept private phone conversations, they would not believe the current “means of espionage” being conducted by the government on its citizens every day.

Questions of the constitutionality of electronic surveillance began in 1928, with the Supreme Court decision in *Olmstead v. United States*. With national prohibition in full effect through the Volstead Act of 1919, federal law enforcement agents found themselves entrenched in a dilemma. An increase in the amount of alcohol related crime meant more work for law enforcement agents and redefined the

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the relationship between government and the lives of private citizens (Hamm). Federal agents began wiretapping suspects' phones to gather intelligence.

Without obtaining a warrant, law enforcement officials wiretapped Roy Olmstead's phone and compiled around 700 pages of conversation, none of which implicated Olmstead in illegal activity.¹ When three of his men were intercepted coming across the Canadian border into Washington, however, the police were able to combine their testimony with what was said in the recorded phone conversations and make a strong case implicating Olmstead (Hamm).

The United States Supreme Court had previously ruled, on the basis of the Fourth Amendment, that private mail could not be intercepted and submitted as evidence in court as it constituted a personal "effect" subject to privacy. The case raised the following questions: "Did the use of evidence gained from wiretaps and confiscated papers violate the Fourth Amendment protection against unreasonable searches and seizures? Were telephone conversations similar to mailed letters, which were protected by the Fourth Amendment? Furthermore, did the use of evidence gained from wiretaps and confiscated papers violate the Fifth Amendment protection against self-incrimination?" (Hamm iii).

In a 5-4 decision, the Court ruled against Olmstead. Writing for the majority, Chief Justice William Howard Taft wrote, "Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of a crime, it is not an act which comes within the letter of the prohibition of constitutional provisions . . . Evidence thus obtained is not believed to be distinguishable from evidence obtained by listening in on telephone wires" (*Olmstead v. US*, as quoted in Hamm 50).

Brandeis wrote a particularly powerful dissent, confronting the issue of rectifying the founders' intentions with new technology: "When the Fourth and Fifth Amendment were adopted, 'the form that evil had theretofore taken,' had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination . . . Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet" (*Olmstead v. US*, as quoted in Hamm 62). Brandeis acknowledges that which Taft fails to: that technology will not stop with wiretaps. The government will continue to come up with new and more intrusive instruments to peer into the lives of its citizens, searching for evidence of criminal activity. The Court's role, as Brandeis sees it, is to posit a new conception of the Fourth and Fifth Amendments that will be applicable as years pass and new technology is created.

As luck would have it, the future seemed to fall on the side of the dissenters. Olmstead's conviction did little to end illegal alcohol smuggling. In the power vacuum following his imprisonment, others merely took his place. As the *Seattle Post Intelligencer* reported, "prohibition continued to corrupt, and the solution, the paper thought, law in changing the law" (Hamm 39). Thus, the case became part of a larger debate on the scope of government power, corruption and privacy, which were pieces of the debate regarding improving or repealing Prohibition.

¹ Olmstead was suspected of running an underground alcohol smuggling ring from Seattle, Washington to Canada.

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In 1967, the Court granted certiorari to a case that would overturn the holding established in *Olmstead*. *Katz v. United States* addressed Charles Katz, a man charged on an eight-count indictment for transmitting illegal bookmaking information via a public telephone booth from Los Angeles to Boston and Miami. FBI officials obtained the information by placing a listening device on the outside of a telephone booth frequented by Katz. Despite the loose interpretation of privacy resulting from *Olmstead*, the Court found 7-1 in favor of Katz.

Writing for the majority, Justice Stewart wrote, “We conclude that the underpinnings of *Olmstead* and *Goldman* [*v. United States* (1942)] have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.” Furthermore, “the Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment” (*Katz v. US*).

With *Katz*, the Court signaled that the security from seizure guaranteed to citizens in the Fourth Amendment should be interpreted as freedom from almost any government intrusion. The distinction between public and private behavior and communication was an important principle in the case. In a concurrence in judgment, Justice Harlan established the following test for determining the scope of reasonable Fourth Amendment searches:

As the Court’s opinion states, ‘the Fourth Amendment protects people, not places.’ The question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a ‘place.’ My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’ (*ibid.*).

Thus, because he or she assumes a great degree of privacy there, behavior engaged in within the home should be protected from warrantless searches, while public behavior, such statements made in “plain view” have no expectation of privacy and are not protected from being overheard (*Katz v. US*).

More recently, FBI agents placed a GPS tracking device on Antoine Jones’ car without obtaining a warrant when they suspected him of narcotics violations. The device remained on the car for one month while the FBI watched his movements, finally arresting him in 2005 (*US v. Jones*).

Amongst public outcries that “Big Brother” was watching American citizens, the Court unanimously declared that this search violated Jones’ Fourth Amendment rights (Liptak), but split 5-4 due to the reasoning. Writing for the majority, Justice Antonin Scalia added to the conditions in *Katz*, stating the “Government’s installation of GPS device on a target’s vehicle and its use of that device to monitor the vehicle’s movements, constitutes a search” under the Fourth Amendment (Liptak).

The public expectation that Harlan described in *Katz* clearly is that government cannot constitutionally, absent a valid warrant, track a person’s car on public roads and use that data to arrest them. Currently, there are drones in American skies capable of doing that very thing. Perhaps more important in the long run, Justice Sotomayor expressed concern that the tracking device allowed continuous surveillance of Jones (Thompson 16). Is it possible that Sotomayor was as prescient in concurrence as Brandeis was in dissent?

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Concerns about domestic surveillance with drones

The FAA Reauthorization Act of 2012, passed by Congress and signed into law by President Obama in February of 2012, requires that the FAA create regulations for domestic drone use by 2015. The FAA foresees a possible 30,000 drones in use by 2020, by government and private entities. Privacy advocates, including the Federation of American Scientists' Steven Aftergood recognize that "[t]here are serious policy questions on the horizon about ... surveillance, by both government agencies and commercial entities" (Smithson). Civil libertarian organizations on both sides of the political spectrum echo these concerns, with both the ACLU and the CATO Institute adopting policy positions expressing their concerns over domestic uses of drones (ACLU; Healy).

These fears are likely to increase as the technology of drones increases. According to the NOVA television special "The Rise of the Drones," UAVs as we know them now are in the "bi-plane" stage of development. A peek into the future predicts that as drones develop, we can expect many design changes to make them more efficient at gathering data. For example, defense experts predict the number of UAVs with surveillance and strike capability to increase dramatically (Zenko, B). In June of 2011, the *New York Times* carried a story of drone development, including discussion of research seeking to create drones which mimic natural flight, minimizing the size of the drone. In development was a prototype drone that was approximately the size of a hummingbird and could land on a window sill (Bumiller and Shanker).

The imaging technology has also developed. At this point, some drones have the technical capability to track more than sixty targets at distances exceeding sixty square miles (EPIC). Moreover, surveillance cameras can detect people at distance of five to six miles (NOVA). And, the Argus drone can produce up to one million terabytes of video data a day (*ibid.*).

The issue of drone surveillance capabilities is particularly salient with the recent ruling, in a North Dakota court, that the government can introduce and use drone gathered evidence in the case of Rodney Brossart (Koebler B).

Following the Supreme Court's ruling on police use of GPS technology in *Jones* (2012), a further concern for civil libertarians is the ability of a single drone to track and surveil a suspect or target. Here, it is important to understand the Supreme Court's jurisprudence on electronic surveillance, as discussed above, and the jurisprudence guiding air surveillance.

The Global Hawk drone, for example, can stay aloft for approximately thirty-five hours; the Phantom Eye drone can fly for four days. There are reports that drones capable of flying for weeks, without cessation, have been or are being developed. This leads to potential constitutional pitfalls, based on the current guiding legal principals of the SCOTUS.

For example, John Villasenor of the Brookings Institute argues—based on two Supreme Court opinions, *California v. Ciraolo* (1986) and *Florida v. Riley* (1989)—that allow law enforcement to use "public navigable airspace, in a physically nonintrusive manner" while gathering evidence for an arrest (NPR; Koebler A).

However, a more sophisticated approach to the jurisprudence would note a disconcerting disconnect in the fact pattern. First, the evidence gathered in *Ciraolo* was done so by a single engine, manned plane—not the type of aircraft that remains aloft for days at a time. This becomes relevant because,

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secondly, Justice Samuel Alito and Justice Sonia Sotomayer penned separate opinions in the *Jones* GPS tracking case suggesting that similar, long term, continuous tracking by drones may be limited, in that law enforcement agencies and officers who track continuously, for an extended period may have access to information that is an unconstitutional breach of individual privacy (see Thompson for further discussion).

Third, there are drones which are designed to find people based on body heat, or thermal imaging. In *Kyllo v. United States* (2001), the Supreme Court, in an opinion penned by Justice Antonin Scalia, held that the privacy expectations of Danny Kyllo forbade the warrantless thermal imaging by police of Kyllo's home. The Court held that the imaging constituted a "search" under the Fourth Amendment of the United States Constitution, in part because "the Government use[d] a device that is not in general public use" (*Kyllo*). As the use of drones becomes more commonplace, the Supreme Court will likely have to revisit this ruling, and define what constitutes "general public use."

Conclusion

As is often the case, law lags behind technological advancements. We hope that this broad overview will serve three purposes. First, we hope to serve as a catalyst for legal and political scholars to pursue research outlets over this important policy space. Second, we hope to join the voices of those who urge Congress and the judiciary to be active in addressing this issue that becomes more pressing every day. Third, we hope that concerned citizens will become educated about the politics, technology and law as it relates to privacy, Fourth Amendment and domestic drone issues.

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Is Political Science Missing Out? Doctrinal Analysis and Law & Courts

Wayne Batchis
University of Delaware

In this short essay, I wish to float a simple question: Why is political science so often content to leave the doctrinal substance of constitutional politics to law professors?

I just finished reading the excellent edited volume “What’s Law Got To Do With It? What Judges Do, Why They Do It, What’s At Stake” (Geyh 2011). And I must admit, it addresses a subject close to my heart. As both a political scientist and lawyer, I find the sometimes incongruous relationship between legal and political science scholarship vexing. Court doctrine that fleshes out the meaning of the constitution has profound political implications, yet political scientists rarely explore it with the degree of depth and rigor of legal scholarship. The most obvious response to my query – why political scientists tend to avoid the doctrinal thicket – is that we are political scientists and *they* are legal scholars. We have our job and *they* have theirs. Yet, I don’t think doctrinal study should be so casually dismissed by political science. It seems to me, a qualitative doctrinal analysis of the choices judges make – one that takes the fascinating and consequential intricacies of those choices seriously – is precisely a task those in a sub-field which calls itself “Law and Politics” might embrace, and embrace unapologetically.

As a subfield, the study of law and politics unquestionably benefits from a multiplicity of methodological approaches. I believe that there would be much to be gained, and little lost, by openly embracing intensive doctrinal law-review-style scholarship, as an approach that not only co-exists with, but engages, the attitudinal model, the strategic model and historical institutionalism. Why leave close scrutiny of doctrine – particularly where its substance is intimately linked to politics in a multitude of ways – to the confines of legal academia? It is encouraging to me that our new periodical, *Law and Courts Journal*, in welcoming methodological diversity, included in its call the proviso that “conceptual analyses of the substance of law are highly appropriate subjects for *JLC* articles.” (2013)

When Justice Brandeis wrote his famous concurrence in *Whitney v. California* (1927) – joining with Justice Holmes to reject the majority’s position that Anita Whitney could be constitutionally imprisoned for associating with the Communist Party – was this famous duo acting strategically to promote their perspective? Almost certainly. Does their position against the majority approach align with their ideologically liberal ‘attitudes?’ Without a doubt. At the same time, however, Brandeis was putting flesh on the bones of the Constitution. He was crafting a doctrinal rule that would attempt, in a principled manner informed by political theory, to delineate workable constitutional boundaries. Once adopted, such doctrinal tests constrain and guide a multiplicity of political actors – not in the least, lower courts that must interpret and apply laws passed by democratically elected legislators to determine whether and in what cases such laws violate the First Amendment.

There are inherent theoretical tensions built into constitutional law; the intricacies of where a court lands, expressed in the fine-grained details of court opinions, have weighty political ramifications. Balancing the framers’ straight-forward mandate in the First Amendment with the arguably-realistic concession that no right can be “absolute” is political not merely in a dichotomous “you’re either with us or against us” sense. Political science may favor the study of raw judicial votes, but the complex and subtle choices involved in finding a doctrinal resolution, and the legal tests that ultimately result, are also

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inherently political. The fine details matter, not just for legal practitioners, but for those seeking to better understand the dynamics of constitutional politics. Conceding that under certain methodological approaches, eliminating nuance can be an effective way of modeling judicial behavior, does not make this insight any less true. It only speaks to the value of multiple methodologies.

When Brandeis unpacked his suggested doctrinal test for drawing the line between protected speech and unprotected “dangerous” speech, he proclaimed that “only an emergency can justify repression,” and reasoned that “such must be the rule if authority is to be reconciled with freedom” (*Whitney v. CA* 1927, 377). In a footnote, he cited a political scientist, Harold Laski, for support. Today I would surmise that many political scientists would dismiss a scrupulously detailed exploration of how the court defines “emergency” as an arcane matter reserved for legal scholars. However, the normative question as to how a government should ideally balance risk aversion against liberty seems to me a theoretical puzzle worthy of investigation by contemporary political science – as does an exploration of the relationship between a justice’s subtle doctrinal choices and political ideology both on and off the Court.

Brandeis’ line-drawing may be ideologically progressive, but it is also surgical. How a “liberal” justice crafts doctrinal rules tells us much about the progressive politics of the time. The fact that Holmes and Brandeis repeatedly rejected First Amendment absolutism, presumably an even more “progressive” position, suggests that the liberalism of the era was infused with a degree of moderate pragmatism. Reading the *Whitney* concurrence a bit closer, we see that Brandeis stakes out a position that would eventually be implicitly rejected by the Court’s liberal justices. On its face, the rule he articulates appears highly speech-protective: “even imminent danger cannot justify resort to prohibition of [the speech] essential to effective democracy, unless the evil apprehended is relatively serious” (*Whitney v. CA* 1927, 377). Constructing the test in this manner means that along-side a relatively objective test (is the harm “imminent” where imminence is defined as a narrow time frame?), is a relatively subjective one (what kinds of “evil” are “serious” enough to justify curtailing free speech?). This latter prong leads Brandeis – further elucidating his ideological worldview – to explore what kinds of harms, in his opinion, would *not* suffice. Illuminating the way ideology at times bleeds from one substantive area of constitutional law to another, Brandeis subtly and indirectly rebukes the dominant conservative *Lochner*-era jurisprudence, telling us that “destruction of property is not enough to justify [speech] suppression.” (*Whitney v. CA* 1927, 378).

Liberals would later come to realize that including a “gravity of harm” prong in the clear and present danger test would backfire; in *Dennis v. United States* (1951) the Court utilizes this prong to justify the conviction of the leaders of the Communist Party in the United States. The assessment that the harm from a communist overthrow was sufficiently “grave” was, of course, informed by the conservative Red Scare politics of the day. This “gravity” prong allowed the *Dennis* Court to inject ideology into its decision and balance away the reality that any such threat was deeply improbable and certainly not imminent. *Dennis* would, of course, be discredited by later decisions. The liberal Warren Court would do away with the “gravity” prong altogether in the celebrated *Brandenburg v. Ohio* (1969). This decision, protecting the speech of the most noxious and bigoted variety, would help cement the intimate association between political liberalism and ACLU-style speech protection. But it would do so at a price. The principled *Brandenburg* doctrine, although still not First Amendment absolutism, was less subject to ideological tinkering than prior doctrinal tests. In the 1980s Critical Theorists would begin to aggressively second guess whether liberalism should continue to advocate First Amendment protection for hate speech – casting doubt on the premises of the *Brandenburg* test as well as the continued assumption that, as a holding, it should be classified as politically “liberal.” An ideological fissure was born – and we might observe how

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the resulting tension within liberalism has played out in the subtleties of the Court's doctrine – for example in 2003's *Virginia v. Black*.

Similar lessons can be gleaned about the relationship between American conservatism and the First Amendment by examining recent decisions such as *Snyder v. Phelps* (2011) and *U.S. v. Stevens* (2010). Many might cynically dismiss ostensibly “speech-protective” decisions like *Citizens United v. FEC* (2010) as examples of raw political instrumentalism in which the relatively new conservative enthusiasm for a robust First Amendment is driven primarily by the partisan benefits associated with affording corporations free speech rights. Yet, a nuanced reading of other recent decisions like *Snyder* and *Stevens* reveals that something else is going on. American conservatism, like liberalism, is neither monolithic nor static. While a narrow reading of the First Amendment may have dominated conservative thought forty years ago – led by traditional, moralistic thinkers – today's conservatives seem inclined to take a fundamentally different approach, informed by anti-regulatory free market tenets and libertarianism. There is much to learn, in other words, by bridging what is typically the domain of legal scholars – doctrinal analysis – with the study of political ideology.

In their piece, “Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-Making,” Barry Friedman and Andrew D. Martin incisively identify the conundrum faced by political science. Increasingly the literature has turned attention to the important distinction between the “outcome of a case, and the *opinion* drafted by the court in that case” (Friedman and Martin 2011, 165). Revived acknowledgement that the *content* of opinions might actually matter, is in my mind a welcome development. It might suggest that some in our subfield have become increasingly uncomfortable with, as the preeminent authors describe, “political science [that] seems devoted to the proposition that the opinions themselves are disguises to cover up a decision reached in a different way” (Friedman and Martin 2011, 165). Nonetheless, the authors lament that “many studies – hampered no doubt by coding problems – continue to focus only on outcomes, as though that is all there is to law” (Friedman and Martin 2011, 165).

I count myself as extremely fortunate to have landed in a political science department that actively encourages work that crosses disciplinary boundaries. However, while it is not entirely uncommon for law and politics scholars to publish in law reviews, I cannot help but observe that doctrinal analysis, as an approach, seems to dwell in a kind of purgatory. Conducting doctrinal analysis often means publishing in venues that are not as conventional for political scientists. The nature of such scholarship can differ dramatically from what is found in political science journals. Scholarship that includes close readings of case law, by necessity, is much lengthier than what a typical social science journal allows – it is not uncommon for law review articles to exceed 30,000 words. While it is increasingly common for law faculty to be involved in the review and selection of articles published in law journals, particularly at the most prestigious law schools, the hard work of the law students who staff law journals make these long pieces feasible. They are able to devote many hours of work editing with a fine-toothed comb, ensuring that every last claim is backed by a legitimate citation. A different model than many political scientists are accustomed to no doubt, but the multitude of excellent specialized law journals, some focusing exclusively on Constitutional Law and many encouraging submissions from a range of disciplines, seem to me an untapped resource for law and politics scholars. Such journals offer not merely an occasional outlet for our work, but an opportunity for innovative and ongoing collaboration between political science and legal academia. There is currently much talk of “crisis” in legal education; increasing numbers of critics argue for a shortened law school calendar and a more practical orientation among law faculty. With growing pressure on law schools to divert resources from ‘things academic’ to ‘things pre-professional,’ now might be a perfect time for political science to step-up and take on some of the more theoretical doctrinal questions that risk being left behind.

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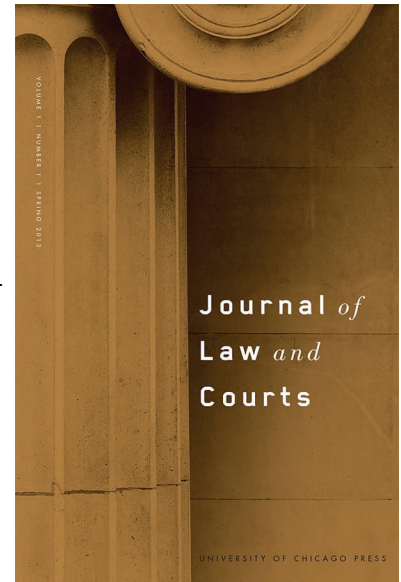
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Announcements

The New *Journal of Law and Courts*

The University of Chicago Press is pleased to announce the publication of the inaugural issue of the *Journal of Law and Courts*, edited by David E. Klein. Sponsored by the Law and Courts Organized Section of the American Political Science Association, *JLC* aims to be the premier journal for members of the law and courts intellectual community. This biannual journal is free to section members, and can be accessed from your MyAPSA account. For more information about *JLC*, please visit www.journals.uchicago.edu/JLC



Search for New Editor of the Law & Courts Newsletter

The Law & Courts Section is currently searching for a new Editor of our Newsletter. As indicated by Section Chair, Wendy Martinek, the Fall 2013 issue will mark the end of Kirk Randazzo's term. Consequently, the search is on to identify an individual who is interested and available to serve as Editor for a three-year term starting in January, 2014. All interested individuals are encouraged to contact Gordon Silverstein (gordon.silverstein@yale.edu), chair of the search committee. Additionally, individuals with questions may contact Kirk Randazzo (randazzo@mailbox.sc.edu).

BOOKS TO WATCH FOR

Drew Lanier, Editor

University of Central Florida

drew.lanier@ucf.edu

Rose Corrigan (Drexel University) has published *Up Against a Wall: Rape Reform and the Failure of Success* (New York University Press, 978-0814707937). Although rape law reform has long been hailed as one of the most successful projects of second-wave feminism, contemporary law enforcement and medical institutions continue to resist implementing feminist legal changes. Drawing on interviews with over 150 local rape care advocates in communities across the United States, Corrigan explores how and why mainstream systems continue to resist rape reform. In a series of detailed case studies exploring sexual assault nurse examiner programs, laws requiring provision of emergency contraception for victims of rape, and sex offender registration and notification statutes, the book weaves together scholarship on law and social movements, feminist theory, policy formation and implementation, and criminal justice to show how legal mobilization by anti-rape advocates actually undermined the movement's political and ideological claims about sexual violence.

James E. Fleming and **Linda C. McClain** (both of Boston University School of Law) have co-authored *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard University Press, 978-0674059108). "Many have argued in recent years that the U.S. constitutional system exalts individual rights over responsibilities, virtues, and the common good. Answering the charges against liberal theories of rights, Fleming and McClain develop and defend a civic liberalism that takes responsibilities and virtues—as well as rights—seriously. They provide an account of ordered liberty that protects basic liberties stringently, but not absolutely, and permits government to encourage responsibility and inculcate civic virtues without sacrificing personal autonomy to collective determination. The battle over same-sex marriage is one of many current controversies the authors use to defend their understanding of the relationship among rights, responsibilities, and virtues. Against accusations that same-sex marriage severs the rights of marriage from responsible sexuality, procreation, and parenthood, they argue that same-sex couples seek the same rights, responsibilities, and goods of civil marriage that opposite-sex couples pursue. Securing their right to marry respects individual autonomy while also promoting moral goods and virtues. Articulating common ground between liberalism and its critics, Fleming and McClain develop an account of responsibilities and virtues that appreciates the value of diversity in our morally pluralistic constitutional democracy."

Jill Norgren (John Jay College and The Graduate Center, City University of New York) has written *Rebels at the Bar: The Fascinating, Forgotten Stories of America's First Women Lawyers* (New York University Press, 978-0814758625). Interweaving history and biography, *Rebels at the Bar* recounts the life stories of eight women who, in the latter half of the nineteenth century, were among the first female attorneys in the United States. The lives and careers discussed include Myra Bradwell, Lavinia Goodell, Belva Lockwood, Clara Foltz, Mary Hall, Catharine Waugh McCulloch, Lelia Robinson, and Mary Greene. Although the paths of these women differed, their challenges were similar. They all breached the bar, most practiced, some succeeded, but none, because of discrimination, advanced as far as the most successful men. In a *Publishers Weekly* review, *Rebels* was described as "Intriguing and enriching....this intersection of legal and feminist history is unquestionably inspiring."

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Maria Popova (McGill University) has published *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press, 978-1107014893). Why are independent courts rarely found in new democracies? This book moves beyond familiar obstacles, such as an inhospitable legal legacy and formal institutions that expose judges to political pressure. It proposes a strategic pressure theory, which claims that, in new democracies, political competition eggs on, rather than restrains power-hungry politicians. Incumbents who are losing their grip on power try to use the courts to hang on, which leads to the politicization of justice. The analysis uses four original datasets, containing 1000 decisions by Russian and Ukrainian lower courts during 1998-2004 in two politically-salient types of cases—electoral registration disputes and defamation lawsuits against media outlets; as well as data from interviews with judges, lawyers, litigants, and judicial administrators. The main finding is that justice is politicized in both countries, but in the more competitive regime (Ukraine), incumbents leaned more forcefully on the courts and obtained more favorable rulings.

Mariah Zeisberg (University of Michigan) has published *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 978-0691157221). Armed interventions in Libya, Haiti, Iraq, Vietnam, and Korea challenged the U.S. president and Congress with a core question of constitutional interpretation: does the president, or Congress, have constitutional authority to take the country to war? *War Powers* argues that the Constitution does not offer a single legal answer to that question. But its structure and values indicate a vision of a well-functioning constitutional politics, one that enables the branches of government themselves to generate good answers to this question for the circumstances of their own times. What matters is not that the branches enact the same constitutional settlement for all conditions, but instead how well they bring their distinctive governing capacities to bear on their interpretive work in context. The book argues for a set of distinctive constitutional standards for evaluating the branches and their relationship to one another, and demonstrates how observers and officials can use those standards to evaluate the branches' constitutional politics. With cases ranging from the Mexican War and World War II to the Cold War, Cuban Missile Crisis, and Iran-Contra scandal, *War Powers* reinterprets central controversies of war powers scholarship and advances a new way of evaluating the constitutional behavior of officials outside of the judiciary.