LAW AND COURTS

Newsletter of the Law and Courts Section of the American Political Science Association

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In this Issue

From the Section Chair

Martin Shapiro, *University of California-Berkeley*

The Section will sponsor a short course on Positive Political Theory, Public Choice and Public Law taught by Edward Schwartz of Harvard and my colleague Dan Rodriguez on the Wednesday of this year's APSA meetings. As a glance at the job listings will show, many of us in the section are employed today in slots labelled "American politics. We will consider persons with specializations in Congress, parties and elections, the Presidency, or judicial politics." Public choice has become a prominent, and in some departments dominant, movement in the American politics field. In the past law and courts people have typically come very late to new methodologies that have swept other fields of political science. Now that for may of us, whether we like it or not, American politics is "our field," it behooves us to at least take a good look at a dominant method of "our field." The short course is designed to start that looking process.

What interests me about public choice is not its methodology, which I can take or leave, but its *subject matter* when it turns to law and politics. Public choice people are asking the right questions, questions that very few people in the law and courts field seem to be asking. Here are some of the questions. How does Congress use, and how successful is it at using, judicially enforced procedural rules specified in statutes to control the policy choices of administrative agencies? What kinds of models of Congressional behavior should courts use in interpreting ambiguous or incomplete statutory language? When can and/or should courts defer to agency interpretation of statutes? To what degree is a new President, presumably with a new policy mandate from the public, legally entitled to intervene in agency implementation of older statutes passed under older mandates? These are nitty gritty question about the basic grind of day-to-day, routine, legalized politics in Washington. I must confess to some degree of angry frustration that people not in the law and courts field, who in fact are now madly scrambling to learn the law we have known all along, are doing some of the most interesting work in law and politics—are asking the questions we ought to be asking and seldom do. Even if we end up rejecting the methods, study of public choice legal scholarship can help to redirect some of us from what to most American politics people is the esoterica of constitutional law to what they are interested in: the everyday politics of getting laws enacted, implemented and modified.

Public choice also bridges a gap that has opened because of a confusion which has always existed in political science about the nature of the "law and courts" field, a confusion reflected in the very title of our Section. For most of us the title might well be "Law *in* Courts." We are judicial specialists, just as other political scientists are executives or parties specialists. So logically, if we study law in courts, other political scientists ought to study law in legislatures and others yet law in administration. Yet to people outside the law and courts field, we are seen as not only the courts specialists for political science, but the law specialists for political science. For instance, as Chuck Jones notes in his APSA Presidential address, Congress specialists rarely look at statutes. Thus the people who study legislatures and administration look to us to study the law in those places, while most of us see ourselves as studying the law only in courts. The result is a serious underdevelopment of the study of law in most of the political process and a dearth of people interested in the integrated study of the whole, complex set of interacting behaviors that constitutes the law making and implementation process.

Public choice, as we all know, is grounded in economics. The central institution studied in economics is the market, the mechanism for coordinating individual private choices into collective private sector investment, production and consumption decisions. Public choice is,

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Instructions to Contributors

General Information

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

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Articles, Notes, and Commentary

Brief articles and notes describing matters of interest to the field will be published subject to review by the editor. Authors are encouraged to share research findings, teaching innovations, or commentary on developments in the field, which would interest members of the Section.

Footnote and reference style should follow that of the *American Political Science Review.* Please submit two copies of the manuscript. If possible, also enclose a diskette containing the contents of the submission. In a cover letter, provide a description of the disk's format (for example, DOS, MAC) and of the word processing package used (for example, WORD, Wordperfect).

Symposia

Collections of related articles or notes are encouraged. 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 if there is sufficient time for submission of materials to the granting or awarding body. Finally, authors of judicial books should inform **Law and Courts** of their manuscript's publication.

Data and Analysis Information

Law and Courts wishes to keep the Section informed about the availability of datasets of interest to the field. Special analysis and data problems or queries of interest to the field will also be published. Send suggestions or information to the editor.

May It Please the Court...

Editor's Note: At the 1994 meeting of the American Political Science Association John Brigham chaired a roundtable on **Oral Argument.** *John edited a symposium for this issue of* **Law and Courts,** *containing the remarks of two of the panelists, political scientist Lawrence Baum and linguistic anthropologist Bambi B. Schieffelin.*

John Brigham, *University of Massachusetts-Amherst*

A year ago, Peter Irons was on TV during our convention talking about oral argument with Bryant Gumbel. Theirs was not a very substantive conversation. Mostly it was about ethics and the battle between Peter and the Supreme Court over his publishing oral argument tapes he had copied at the National Archives. Not too long after, the Court took off all restrictions on recordings of oral argument because of the material Peter produced under the title *May It Please the Court*. With this kind of attention, there can be little doubt that oral argument is a burgeoning research site.

Yet, these arguments have rarely been considered in the institutional lore that surrounds the Court and Constitutional Law. Thus, it seems that we might profitably think about how oral argument matters and what sort of matter this oral stuff is. We might pay some attention to its status as material for research, especially in comparison with written opinion. The context of the panel was authoritative office holders being addressed. Both appellate and lower court judges have a claim on our attentions as such officeholders.

We know very little about argument and have reason to wonder about a great deal. While the biggest imponderable is how much influence argument has, the more important consideration at this point may be to put influence in the context of what we can learn from argument.

What We Know... The amount of time spent on oral argument in the U.S. Supreme Court has changed dramatically as the institution has evolved. Court lore is replete with stories of arguments that went on for days. Now there is only one hour per case yet the appearance of argument is still of a very traditional activity. There are no cameras and few visual aids. (Stern and Gressman suggest that if an attorney has a morning coat he should wear it.) And, the lore of the Court's control over the conduct of argument contributes one of the most often told anecdotes about the authority of the instituiton...the Chief's ability to stop an attorney in the midst of the word "if" for instance.

A good deal of criticism has focused on the quality of oral advocacy. 80% of the advocates never are arguing for the first time. Some even became famous for their successful arguments, like Sarah Weddington who argued *Roe v. Wade*. A few have argued on many occasions and become famous in this regard, like Daniel Webster, John W. Davis, Thurgood Marshall, Archibald Cox, Ruth Bader Ginsburg and Laurence Tribe. When justices complain about the quality of argument, such criticism may be, at least in part, a way the Court reaffirms its position as a distinguished bench.

The argument is a place of ceremony where we are reminded of a number of features of our legal system. The activity affirms that dialogue and judgment are relevant to matters of state. Rule 38.1 "The Court looks with disfavor on any oral argument that is read from a prepared text." This features a process of figuring out, of thinking in public. The argument has an important institutional place. When a Justice misses argument for illness, the case can go ahead, but the Justice cannot participate unless the argument is done again. Thus, in the mid 1980s, when the Court was evenly split, and Justice Powell—a swing vote—missed 56 cases due to illness, 11 were reargued to get his input and his vote.

The debates between the attorneys and the justices are not all that technical, perhaps not unlike the conduct of case discussion in a law school class. Arguments also display the ambition, competition, influences of brains and success that we have come to associate with the institution. This isn't Ronald Reagan reading a teleprompter. Comparison may be made with a Senate Committee, but the Court is more formal with many more traditions of an earlier time. With this formality the Court acts in public like a Court.

What We Wonder About . . . The influence of argument is seldom going to be a 180% turn around, but there is lore to inspire advocates. Stern and Gressman publish extensive commentary from justices like Charles Evans Hughes who said that his ideas about a case crystalize at oral argument: "The desirability . . . of a full exposition by oral argument in the highest court is not to be gainsaid . . . [it is] a great saving of time of the court in the examination of extended records and briefs to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff."

Since the cases are usually discussed at the Friday conference at the end of the week of argument, the initial position a justice takes may be formed around oral argument. Of course, the most likely justices to be influenced are those in the middle and the appellate bar has taken these into account and structured the rules of appellate advocacy toward the inclinations of these justices.

The issue facing us all is how best to deal with the modern demands for realism, for the words on tape and the pictures our cameras bring. In November of 1993, the Marshal, Alfred Wong, announced that the Supreme Court had eliminated restrictions on taped Court records held at the National Archives.

There seems to be a sense at the Court that oral argument somehow undercuts the other forms produced by the Court. Certainly they undercut tradition. And the pressure to have a video camera seems unlikely to vanish. Given the nature of technology, capacity to resist may just be a matter of time, but we have a better sense of the implications of such exposure the more familiar we are with oral argument.

Lawrence Baum, *Ohio State University*

Oral argument receives a great deal of attention in accounts of the Supreme Court. With the Court's deliberations largely hidden, it is in oral argument that we get our clearest view of the justices and their reactions to cases. And with the nearly continuous interplay between lawyers and justices, there is a kind of drama to oral argument.

Understandably, oral argument garners the most attention in major cases, especially when the presentations and questioning are dramatic. And accounts of those cases often give heavy weight to the oral arguments as determinants of the Court's decisions. But such accounts usually are misleading: in major cases oral argument often has little effect on the outcome for the litigants or the legal doctrines that the Court establishes. Most of us are familiar with the irony of *Gideon v. Wainwright*, in which the eloquent argument by Abe Fortas has thrilled readers of Lewis's book *Gideon's Trumpet* but in which the Court's decision was virtually certain before Fortas began his work on the case. In the same way, the weakness of the argument by Allen Bakke's counsel did not prevent Bakke from winning his case in the Court. And perhaps most striking of all, the arguments from the two sides on the obscenity issue in *Mapp v. Ohio* did not prevent the Court from turning the case into a landmark ruling on searches after argument was over.

This does not mean that oral argument is unimportant. It is a truly integral part of the Court's decision process. But its impact is more complicated and more subtle than often portrayed. Oral argument is part of two communication processes—between lawyers and justices and among the justices themselves—that shape the Court's decisions.

Those communication processes do not occur in a void. The justices approach cases with their own predilections, and they can gather relevant information to inform their choices from sources other than litigants and colleagues on the Court. Thus the impact of oral argument is interstitial rather than overwhelming, usually limited though sometimes crucial. For the same reason, there is a paradox in the impact of oral argument: because justices care more about major cases, their predilections typically are stronger and their efforts to gather information more extensive than in cases that we would call minor. As a result, oral argument is likely to have the greatest impact where it is least noticed—in cases of little general interest.

Argument as a means of communication between lawyers and justices is well understood. Perhaps more interesting is its function in communication among justices. For a variety of reasons, the justices interact with each other in the decision process less than they once did. And the Court's handling of cases in conference now involves primarily the stating of individual positions rather than real interaction among the justices. But oral argument gives justices an opportunity to raise questions and make arguments at a time when their colleagues have to listen.

Without question, the justices make use of this opportunity. This function is especially clear when they use questions to frame cases in ways intended to appeal to particular colleagues. More subtly, justices regularly seek to make their points and expose the weaknesses of positions with which they disagree in order to sway colleagues who remain open to persuasion. Liberal commentators who bemoaned the seeming dominance of oral argument by conservative justices in the early Rehnquist Court were exaggerating the effects of this dominance, but these commentators had a point: conservative positions were receiving more advocacy during oral argument, and that imbalance of advocacy potentially influenced the Court's decisions in some cases.

In considering the role of oral argument, we should not ignore functions that lie outside the decision process. Lawyers use their arguments to impress present and future clients and to influence public opinion; in that sense, the transition from formal argument to media interview on the Court's steps is smoother than it might seem. Justices use oral argument to impress the Court's audience and simply to express themselves. If the Court ever were to open argument to television coverage, these functions would become even more important. But they are hardly insignificant now, and they need to be considered in order to understand fully why oral argument takes the form it does.

Bambi B. Schieffelin, *New York University*

My own work is in linguistic anthropology and my areas of research include analyzing the relationship among genres of speaking across contexts. My long-term field site is in Papua New Guinea among the Kaluli, population 1200. As part of my research on Kaluli language and social change, I have been studying local dispute resolution. As a result of contact with Australian-style government in the late 1960s, Kaluli have been undergoing transformations in how they think about dispute settlement and what constitutes a claim and its resolution.

In addition to my far-away field site, I also carry out fieldwork in New York City. One of my favorite research settings is Lower Manhattan's small claims courts. The reason I have been investigating that setting is because the talk there includes a range of genres: conversation, narrative, and verbal-arguments, in addition to several legal routines. Talk in small claims court is relatively unplanned, interactive and focused. The theoretical perspective I take in all of my research is that talk is a particular type of activity that is constituted by a set of social practices; context not only matters, but is constructed through talk; and language is an interactive phenomenon, even when it is a written product. All speech activities and the forms of language that help constitute them are shaped by cultural and social conventions, which are reproduced, challenged and resisted through speech activities.

The methodology that I use in small claims courts in lower Manhattan is similar to what I do among the Kaluli. It includes taperecording complete cases, transcribing them in detail, and examining them on a number of discourse levels. I am inter-

ested in the rhetorical interweaving of narrative and argument, in the sense of dispute, in these courts, in addition to more cultural issues of what litigants consider as their rights, how they argue or present their cases, and themselves, and how they articulate how they have been wronged, or not.

My experience with oral arguments made before the Supreme Court comes exclusively from *May It Please the Court.* When looking at the printed page, even when it is a "transcription of what was said"—one is tempted to think of the material as a written text. However, listening to the tapes makes it very clear that oral argument is a particular type of verbal exchange, co-constructed across speakers, a speech activity that is shaped through interaction, and it is context producing.

What I would find interesting to investigate in detail are the processes that contribute to the co-construction of the oral argument. The Introduction to *May It Please the Court*, describes the process as one of narrowing, refining, practicing, trying to find the right expression, having moot courts, perfecting the answers. This suggests a great deal of planning among a range of participants, and yet, the rhetorical responses of a single speaker, the lawyer who presents a case before the Justices are critical to the legal decision. One aspect of a study on the co-construction of oral argument would be how lawyers are socialized into the particular forms of intepretation and rhetoric necessary to produce what is considered an *appropriate* oral argument. What are the reasons that a particular line of argument is rejected in the preparation of the final form? It is clearly not composed of everyday language practices, but many of them are evident in this highly specialized form of verbal exchange. One pattern that was particularly striking is the use of repetition in yes/no question sequences. In everyday conversation, when asked a question that requires a Yes/No answer, persons usually respond yes or no. In contrast, when asked a yes/no question in oral argument, lawyers repeat the propositional content of what the judges have asked, and then affirm that proposition. There seems to be an avoidance of saying no.

Sullivan describes oral argument as all Questions and Answers. As someone interested in how language creates context and frames of interpretation, I would like to examine in detail just how oral argument is also *co-constructed* through the interaction of lawyers and justices, a discourse of experts within a very particular intellectual domain. It must be a discourse that is highly planned, highly constrained by particular textual references and interpretations, yet it is deeply interactive. The answers must be relevant to the questions, yet open up new lines of thought and interpretation.

Those of us who work on language in legal settings see how the type of court room affects the organization of language at every level. For example— •The organization of turntaking (preallocated turns, turns where speakers select who speaks next), rules of interruption.

•What types of speech acts are allowed for each participant—who can ask questions, who can challenge answers.

•Types of genres that are used. There is a wide range of genres that are used in legal settings, from more narrative accounts that are relatively spontaneous (such as small claims where litigants have little experience with legal language or register, and "tell their stories") to the oral argument which is a very carefully prepared rhetorical strategy that draws on very particular legal interpretations and conventions, including what gets cited, the type of text referencing that is obligatory.

•Flow of information and who controls it. In less formal court settings, such as small claims, litigants believe that they will present their argument, tell what happened. Depending on the style of the mediator, arbitrator or judge, interruption through questioning may shape the presentation to a greater or lesser extent. This pattern is similar to the variation one sees in the flow of talk in oral argument. The contrast here is with trials where lawyers determine how the information will flow through lines of questioning and cross-examination, and what can and cannot be said, or included for evaluation. What is interesting here is who controls that organization of information, the rhetorical strategy, the framing of the argument. In small claims the litigants tend to have that control, in trial legal experts determine the flow of information and the scope of information.

•How information is shaped by what the participants already know. The forms of language selected by speakers is heavily determined by what is presupposed, what information is assumed to be shared by speakers and hearer. In small claims courts litigants share some version of the event that is being disputed, but those hearing the case do not. One of the critical tasks to be accomplished by the litigants is to present information that follows a particular cohesion and logic, a narrative that clearly states place, time, participants, claims being made, etc. Standard English speakers tend to follow a particular logic of presentation that is part of their cultural knowledge.

In my work in small claims, litigants who do not speak Standard English or are not native English speakers often do not follow the conventions expected by Standard English speakers in telling the narrative. What is foregrounded, presupposed, and how the sequence is arranged is highly variable. The cultural and linguistic differences often lead to misunderstanding and frustration on both side, a type of cross-talk that Gumperz has talked about that is not just about particular forms of language, but deeper differences about organizing the narrative.

The oral argument that I read lie at the other end of the continuum, where all speakers share a great deal of informational content before the hearing, and share many presuppositions about the interpretive frame and format of argumentation. Of course, the judges have the advantage, they can ask the questions. The questioning sequences are among the most interesting because that is where one sees the openings with regard to interpretation. In the Q/A sequences, there is a clear shift from the planned narrative of the oral argument to a more conversational type of style. There are several indicators of this.

Conversational markers such as 'well' signal that the assertion is not in agreement, and there are lots of examples of `yes, but' again affirming the preference to agree while disagreeing. Plus given the constraints of deference to the judges, lawyers take the question in a particular way so as to be able to produce a particular type of answer. I wonder to what extent lawyers presenting oral argument use the strategy of putting their meaning on the Q, using the Q to assert a point, rather than trying to interpret the intention of the Q as asked, and respond to it on its own terms. Those of us working cross-culturally have noted a great deal of variation on how issues of intentionality are responded to in various speech activities, in fact, most of classical speech act theory has now been recast as reflecting particular forms of European linguistic ideology. What I see in the responses by lawyers are complex moves to produce an answer that serves to reframe the Q.

What Public Law Scholars Should Know: More than Constitutional Law

Stephen L. Wasby, *State University of New York at Albany*

For many years, the training of most graduate students in public law has encompassed two principal subfields—constitutional law, including constitutional interpretation, and various aspects of judicial process, including judicial behavior. The scope of these subfields has generally been sufficient, as it matched rather well the types of courses that faculty were expected to teach. For those with interdisciplinary interests, topics falling within the broad rubric of law and society could be added, and the more traditional administrative law remains relevant for those interested in regulation. Yet I will argue that public law scholars must add to what they study if they are to perform their scholarship, and their teaching as well, effectively.

The substantive law in which political science public law students have received training has been pretty much limited to the domain of constitutional law, generally defined to encompass separation of powers; powers of the executive, legislative, and judicial branches; federalism; and civil liberties and rights. To be sure, students would read about statutes — when those statutes were challenged as invalid under, say, the Commerce Clause or the First Amendment. The focus, however, remained on the Commerce Clause or the First Amendment, not on the statutes.

The pull of, and emphasis on, constitutional provisions has been particularly evident in the criminal justice field, where attention focuses on the Fourth, Fifth, Sixth, and (more recently) Eighth Amendments—on issues of right to counsel, confessions, and search-and-seizure, and on procedural aspects of imposition of the death penalty. Among political scientists, what law schools have called criminal law (the definitions of rape, manslaughter, and homicide; concepts like mens rea and scienter) has continued to take a back seat to criminal procedure issues. Public law students have learned about other aspects of procedure, but this has generally been limited to basic elements of the law of standing and the components of justiciability, including the "political questions" doctrine.

As major policy concerning civil liberties and rights increasingly was embodied in statutes, expanding one's knowledge beyond constitutional provisions to include the substance of related statutes became important. One could not study employment discrimination without the substance Title VII, its 1972 amendments, Title IX, Section 504 of the Rehabilitation Act, and, most recently, the Americans with Disabilities Act, not to mention the provisions of the Civil Rights Act of 1991. Moreover, studying statutes was forced by the Supreme Court's transfer of reasoning from constitutional cases to statutory ones, so that each provided the context for the other. For example, examining only *Washington v. Davis* (1976) without attention to *Griggs v. Duke Power Co.* (1971) would be quite incomplete. And the need to learn statutory as well as constitutional law was further reinforced by the Court's use of both constitutional and statutory grounds in the same case, as when it used spoke of both the Fifteenth Amendment and the Voting Rights Act in *City of Mobile v. Bolden* (1980) or when different sets of justices emphasized the Fourteenth Amendment and Title VI in the *Bakke* case (1978). Yet even in these situations, learning statutory law was most often in aid of the study of constitutional law. If an individual were particularly interested in a substantive area of public policy, the statutes might become the central focus; certainly someone concerned about environmental policy could not survive without knowledge of Clean Air and Clean Water Acts, CERCLA, FIFRA, and the like. However, such people were, at least as academics distinguish such fields of concentration, students of public policy, not public law.

This focus on constitutional law may be sufficient for those who wish to concentrate on the constitutional law topics, which once again are receiving greater attention through the renewed interest in constitutional interpretation. Skeptics may have regularly raised questions about utility of further examinations of *Marbury v. Madison* and have suggested that exegesis of levels of Fourteenth Amendment scrutiny is sterile. Despite such skepticism, such attention can be highly rewarding to those who engage in it. And yet one wonders about the sufficiency of this attention.

One need not agree with the skeptics to feel that the focus seems limiting. There are two senses in which this is so. The first is that political science scholars with legal interests miss many topics which might stimulate them and to which they could profitably apply social science analysis, even where many law professors have explored the doctrine associated with the topic. The other sense in which the current focus is limiting is perhaps more important for a greater number of scholars. Even if they have no intention of making these "new"—or, for them, nontraditional—legal topics the focus of new projects, they may nonetheless encounter them in the course of undertaking their usual work. Without some initial basic exposure and understanding of these topics, these scientists are not likely to feel sufficiently comfortable to undertake necessary exploration of them, and without an ability to understand their elements, they must either discard the topics or handle them inadequately even when considering those topics would make their work more complete.

(continued on the next page)

This second of these two aspects recently came through to me in connection with two unrelated research projects in which I am engaged. The examples are chosen because they are recent and close together in time.

One situation involved an interview with a retired state judge in connection with work on a judicial biography (of a judge with whom my respondent had served). During the interview, the judge talked at some length about differences between him and another judge in their approaches to tort law, specifically to the role of judge and jury in determining whether defendant owed a duty of care to plaintiff. Here, to understand the interactions among judges, it was important to appreciate the legal issues involved, which bulked far larger than did constitutional questions in the state court where the judges had served. To have excluded these non-constitutional law questions would not only miss important elements of these judges' interaction but would also provide one a limited, indeed paltry, picture of the legal life of that court.

The other situation involved observation of appellate court oral argument, where my interest is in the "closeness of fit" between judges' questions and their decisions. Many of the cases I have observed in the U.S. courts of appeals are accessible to those knowing some constitutional law and criminal procedure, but many are not. For example, cases during one morning of argument at the U.S. Court of Appeals for the Fourth Circuit in Baltimore included one case involving a challenge to a National Labor Relations Board ruling, an administrative law question and thus public (if not constitutional) law, but the other cases involved anticipatory breach of a contract, the appropriate venue for a contract dispute, and the possibility of relief from a default judgment. Here one could not understand very well the lawyers' oral argument presentations, the judges' questions, or the linkage between the two, without knowledge of the underlying concepts. If one limited one's study to constitutional law cases, because of deficits in understanding issues outside of constitutional law, one would not be able to know whether the use of argument in the latter cases —a significant portion of the courts' docket—was representative or if there was variation across issue-areas.

Many more examples could be provided, but these two are useful because they indicate the importance, beyond constitutional law, of both substantive law —here, torts and contracts— and procedural law; the latter includes not only basic concepts like jurisdiction and venue but also the "abuse of discretion" standard and the Federal Rules, particularly the Rules of Civil Procedure. All right, you may say, he chose those topics; he must therefore educate himself about them. But such denial ignores our responsibility as teachers to be able to explain legal controversies for our students. Thus I would add a significant issue from the world of contemporary politics, the purported "litigation explosion," and particularly allegedly unnecessary malpractice litigation and the "liability insurance crisis" of several years ago. At the heart of campaign rhetoric about these subjects is the law of torts. Can one make informed judgments about the appropriateness or inappropriateness of malpractice litigation without some understanding of the legal standards applied? Or can one evaluate claims that lawyers supposedly caused municipalities to shut down their parks, without knowing the meaning of "joint and several liability"?

These last questions are, of course, rhetorical. The intended answers to them are reinforced by the erosion of the differences between "private law," primarily the law of torts and contracts, once the province of judge-made common law but now contain an overlay of statutory law, and "public law," not merely constitutional law but now pervasively statutory. With the growth of the specialty of law and policy, in which individuals often focus on one or more substantive areas of law such as environmental law or the law of employment discrimination, one cannot obtain a complete picture without examining not only constitutional issues but also the mix of statutory and common law bearing on the subject. In employment law, for example, not only is there long-standing statutory and administrative labor law, but there is also the common law doctrine of "at will" employment, into which both judicial decisions and statutes have made inroads.

I hope that these examples, and others that readers can supply, will demonstrate the importance of the study of law topics beyond constitutional law. I would argue that such study is important not in lieu of the study of constitutional law but to complement it. Individuals in public law who have been exposed to other aspects of law can also provide testimonials to the same effect. They include those who experienced a year of law school before shifting to political science; the few who graduated from "double-degree" (Ph.D.-J.D.) programs, particularly at Buffalo and Northwestern; and others who, after obtaining their political science Ph.D.'s, were able to spend a year at either the Carnegie-funded program at Harvard or the Russell Sage Post-Doctoral Residency Program.

At a time when many are seeking to limit the length of time consumed by completing a Ph.D. degree, it may be inappropriate and unseemly to make a suggestion which leads to the need for more, not less, study. Yet what I suggest may be achievable without extended formal course work, which may not be necessary to achieve the basic "working knowledge" that will allow sufficient understanding of materials in context and provide a basic competence to explain them to others. What is necessary is some exposure to these new subjects, under the direction or guidance of someone with reasonable familiarity with them. Law professors might not agree, but, an individual with some prior exposure to caselaw—through constitutional law—can learn how to deal with the language of these "new" subjects, and can integrate them into their more traditional public law training.

Stephen L. Wasby is Professor of Political Science at the University at Albany. SUNY. His address is: Department of Political Science, University at Albany-SUNY, 135 Western Avenue, Albany NY 12222. *Professor Wasby wishes to acknowledge the comments of his colleague, Scott Barclay, which made the presentation clearer, although he takes responsibility for remaining fuzziness and error.*

[Editor's Note: In February 1995, Michael McCann edited a special issue of the Law and Politics Book Review *containing reviews of current texts for judicial process, American courts, and law and politics courses. What follows is his introduction to the series, along with a list of reviewed texts.]*

Twenty one books have been reviewed for this project. The initial goal was to identify basic texts that are used in undergraduate classes on the general topics of law and judicial process. Given this objective, it made sense to expand our scope to include texts intended for general law and society classes, which are featured in many political science and sociology departments. Conversely, texts that address only the workings and organization of U.S. federal courts were excluded from the review series as too narrowly focused. Moreover, an informal survey of colleagues regarding classroom book choice justified adding to the lineup edited essay collections — which often are used along with, or instead of, single (or dual) author texts — that fit the general substantive categories outlined above. Finally, we decided that only books published within the last five years (*i.e.*, with the latest edition dated no earlier than 1990) would be reviewed. This last criterion excluded some classic texts and essay collections, but the editorial board agreed that availability for future classroom use warranted this qualification. In sum, while a few books that are eligible under the above criteria probably have been overlooked, this list includes most of the texts that teachers might consider for introductory classes regarding law, judicial process, or law and society.

The Law and Politics Book Review Column...

Law and Judicial Process Texts

Michael W. McCann, *University of Washington*

The volumes vary quite widely in approach and content, rather more so than the constitutional law casebooks that were reviewed in an earlier *LPBR* series (edited by Susan Gluck Mezey in late 1992). I note here four important lines of differentiation among the texts. The first and perhaps most fundamental difference concerns the general conceptual approaches that authors bring to the material. In short, the books differ regarding how "law" is defined and in what regards legal phenomena are analyzed. Three distinctive types of legal analysis can be found in these books:

- "doctrinal" approaches, which tend to focus on discrete judicial cases and/or general substantive areas of law;
- "behavioral" approaches, which emphasize official legal actors and institutions, and usually reflect the influence of a "realist" jurisprudence and more or less positivist methodological commitments; and
- "sociological" or "cultural" approaches, which tend to define law more broadly in terms of social norms, values, or ideology and often employ more interpretive modes of analysis.

While a few books combine elements of several approaches to a substantial degree, most tomes clearly privilege one of the conceptual frameworks over the others. Even the edited essay collections tend to be rather less methodologically diverse than might be expected. The important implication at stake is that the choice of a particular text usually commits the teacher to a particular, often exclusive way of understanding legal phenomena.

(continued on the next page)

A second related point of differentiation among these texts concerns where they focus their analysis of law. A useful standard here is the degree to which texts are, or are not, "court-centered." Most judicial process and legal doctrine texts by definition focus on courts, although both types of texts do vary a bit in how far they connect judicial officials, institutions, and practices to the social worlds of ordinary citizens and extra-judicial elites. By contrast, law and society texts diverge greatly in how much they direct the analysis of law narrowly to courts or, instead, extend the inquiry to other legal institutions besides courts and the workings of law "in" society.

Third, the texts differ markedly in the degree to which they devote explicit, consistent attention to normative questions. Most of the behavior-oriented books tend to mute direct assessment of how our legal institutions and conventions matter for the type of society in which we live. But there are important differences among these texts in the degree to which this is so. In particular, the more behaviorist tomes vary notably with respect to how much they address questions concerning the ways that law has both maintained and challenged systemic racial, class, gender, and other hierarchies in our society. Texts and essay collections that focus on legal doctrine or culture, by contrast, tend to be more explicitly oriented toward normative concerns. However, they too are hardly uniform with regard to their consistency, rigor, and substantive orientation in this respect.

Finally, it is worth noting that most volumes differ remarkably little in the extent to which they offer some comparative political perspective for understanding law in the United States. One text directly compares legal institutions, norms, and practices in the U.S. to those of several European nations; one theorizes broadly about law in Western industrial nations generally; and several include some random comparisons with legal relationships and experiences outside of the U.S. Generally, though, it seems that teachers must resort to books specifically designated as "comparative law" texts to provide much systematic and sophisticated comparative perspective on law in our nation.

Overall, despite the obvious differences, I am struck by just how conventional the books are in this collection. While research agendas in legal studies have developed in multiple directions over the last decade, most of our published teaching resources stick to basic approaches and concerns that are quite traditional in the discipline. Only one text (Bonsignore, et. al., eds., BEFORE THE LAW) is broadly interdisciplinary and highly eclectic in the materials it presents. Even more surprising is the fact that the pedagogical form of all these books is rather one-dimensional; very few utilize pictures, graphs, tables, and charts to any notable degree, and none are accompanied by supplementary multi-media materials or even suggested resources. Whether this reflects the preferences of public law teachers, authors of texts, or publishers is unclear. "Market" or financial factors do not seem to offer an adequate explanation, given the large numbers of students that we all teach in such classes. Whatever the reason, my point is not to condemn these books in these regards; most rightly receive very positive assessments from reviewers on intellectual grounds. But beyond aiding individual instructors in making choices each year about texts, I would hope that this review series might stimulate further discussions among ourselves concerning innovative options for teaching students about law.

In conclusion, I want to thank everyone who contributed to this review project. I have appreciated the opportunity to work with Herb Jacob, the *LPBR* editorial board, and all the great reviewers who did their part to make this happen. My job as editor was greatly aided by the diligent, intelligent, and punctual efforts of these many others. I hope that the products of our collective labors provide a useful service for many of our colleagues.

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Law and Judicial Process Texts Reviewed in the *Law and Politics Book Review*

Abraham, Henry J., *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France.* 6th ed. New York: Oxford University Press. 1993. 432 pp. Paper $19.95. Reviewed by Alec Stone.

Baum, Lawrence. *American Courts: Process and Policy.* 3rd ed. Boston: Houghton Mifflin, 1994. xii. 369 pp. Paper $29.95. Reviewed by Lynn Mather.

Bonsignore, John J., et al., eds. 6th ed. *Before the Law: An Introduction to the Legal Process.* Boston: Houghton-Mifflin, 1994. xxv 574 pp. Paper $39.95. Reviewed by John Brigham.

Calvi, James, and Susan Colemen. *American Law and Legal Systems.* 2nd ed. Englewood Cliffs, N.J.: Prentice Hall, 1992. xii 340 pp. Paper $20.00. Reviewed by John Gilliom.

Carp, Robert A., and Ronald Stidham. *Judicial Process in America.* 2nd ed. Washington, D.C.: Congressional Quarterly Press, 1992. 421 pp. Paper $27.95. Reviewed by Mark Silverstein.

Carter, Lief H. *Reason in Law.* 4th ed. Harper Collins College Publishers. 1993. Paper $20.50. Reviewed by Ronald Kahn.

Cotterrell, Roger. *The Sociology of Law: An Introduction.* 2nd ed. London: Butterworths, 1992. 398 pp. Paper $25.00. Reviewed by Mark Kessler.

Epstein, Lee, ed. *Contemplating Courts.* Washington, D.C.: Congressional Quarterly Press, 1995. 499 pp. Paper $28.95. Reviewed by Roy Flemming,

Gates, John B., and Charles A. Johnson, ed. *The American Courts: A Critical Assessment.* Washington, D.C.: Congressional Quarterly Press, 1991. 534 pp. Paper $27.95. Reviewed by Susan Olson.

Glick, Henry R., ed. *Courts in American Politics: Readings and Introductory Essays.* New York: McGraw-Hill, 1990. 405 pp. Paper $36.95. Reviewed by Donald W. Crowley.

Glick, Henry R., *Courts, Politics, and Justice.* 3rd ed. New York: McGraw Hill, 1992. xiv 465 pp. Paper $39.00. Reviewed by Phyllis Farley Rippey.

Grilliot, Harold J., and Frank H. Schubert. *Introduction to Law and the Legal System*. 5th ed. Houghton-Mifflin. 1992. 648 pp. Cloth $44.00 Reviewer: John Culver.

Jacob, Herbert. *Law and Politics in the United States.* 2nd ed. New York: Harper Collins, 1995. 311 pp. Paper $15.00. Reviewed by Susan Lawrence.

Kairys, David, ed. *The Politics of Law: A Progressive Critique.* rev. ed. New York: Pantheon, 1990. xii 481 pp. Paper $19.95. Reviewed by Howard Gillman.

Neubauer, David W. *Judicial Process: Law, Courts, and Politics in the United States.* Pacific Grove, CA: Brooks/Cole, 1991. 452 pp. Cloth $32.95. Reviewed by James C. Foster.

Schultz, David A., ed. *Law and Politics: Unanswered Questions.* New York: Peter Lang, 1994. 311 p. Paper $29.95. Reviewed by John C. Kilwein.

Slotnick, Elliot E., ed. *Judicial Politics: Readings from Judicature.* Chicago: American Judicature Society, 1992. 664 pp. Paper $27.95. Reviewed by William Haltom.

Smith, Christopher E. *Courts, Politics, and the Judicial Process.* Chicago: Nelson-Hall. 1993. 357 pp. Paper $29.95. Reviewed by Charles R. Epp.

Stumpf, Harry P. *American Judicial Politics.* New York: Harcourt, Brace, Jovanovich, 1988. 494 pp. Cloth $36.00. Reviewed by Christine Harrington.

Tarr, G. Alan. *Judicial Process and Judicial Policymaking.* St. Paul, MN: West Publishing Co., 1994. 431 pp. Paper $32.75. Reviewed by Susan R. Burgess.

Vago, Steven. *Law and Society.* 4th ed. Englewood Cliffs, N.J.:Prentice-Hall, 1994. 339 pp. Cloth 45.00. Reviewed by Helena Silverstein.

The U. S. Supreme Court Judicial Database Column....

An Expanded Version of the Database

Harold J. Spaeth, *Michigan State University*

Subject to a bit more cleaning the expanded version of the database should soon be on its way to the Consortium for distribution to member institutions. This version encompasses only the Vinson and Warren Courts (1946-1968 terms), unlike the existing one which dates from the beginning of the Warren Court (1953) through the end of the 1993 term.

Two major differences distinguish the expanded version of the database: The inclusion of the conference votes of the Vinson and Warren Courts, along with the application of the variables appearing in the existing version to the decisions of the Vinson Court.

The more important of these differences is the addition of the conference votes of the Vinson and Warren Courts to those that appear in the published Reports. The existing version contains only the vote as reported in the Court's Reports, while the expanded database includes all those cast in conference, with but a handful of exceptions noted in the documentation where the justices cast too many votes to warrant making space for them all.

In order to accommodate the votes case in conference, seven large vote fields have been created, each of which comprises a field for each justice. The first three are dedicated fields—for the preliminary, merits, and report votes, respectively. The preliminary vote pertains to the grant or denial of certiorari or, in the case of appeals, to the noting of probable jurisdiction. The merits vote is the vote on which opinions are assigned. The report vote parallels that contained in the Reports. Where the justices cast more than one such vote, the dedicated field contains the final one. The fourth through the seventh vote fields contain the nonfinal preliminary, merits, and reports vote in the order of their occurrence, as well as preliminary votes other than cert or the noting of probable jurisdiction; *e.g.,* amicus, rehearing, etc. Such votes, of course, may occur at any point during the decisional process. As such the label "preliminary" is less than accurate. For cases without a preliminary or merits vote, the relevant dedicated field is empty.

Also serving as a dedicated field is the eighth and final one. This field contains the vote, opinions, and interagreements of the justices using the format employed in the existing database. It may appear that dedicating two vote fields to the report vote is redundant. Not so; Jan Palmer compiled the report vote compatibly with his coding scheme which differs markedly from mine. His scheme also governs the preliminary and merits vote. Not to worry though. The reliability check indicates almost 100 percent accuracy in coding.

As explained more fully below, dedicated fields simplify the users' task. You may readily identify the individual justices' voting patterns across the final vote of each type. For those who wish to capture judicial voting patterns in cases with multiple votes of a given type, friendliness continues to control via a "sequence" field which, in combination with the name of the specific vote (*e.g.,* CERT, MRTS), allows one to easily order these votes chronologically and note any and all changes in a justice's vote.

Coupled with the vote fields is a set of related fields which specify—except for preliminary votes—the specific vote the field contains, the date it was cast, the direction of the vote, and whether the petitioning party won. In place of direction, which does not pertain, preliminary votes are ordered by the number of votes granting the petition in question, followed by the number denying; *i.e.,* 27, 45, 63, 90.

Concomitant with the expansion of the database is a shift in its basic unit of analysis. The existing version contains every case in which at least one justice wrote an opinion. Cases without opinions are excluded. The expanded version includes instead every case in which the Court cast a conference vote. Needless to say, the justices cast many more votes than they wrote opinions. Hence the number of Warren Court records in this version increased by more than a factor of 2 over the original one. The total for the Vinson and Warren Courts combined approaches 11,000.

The shift in the unit of analysis does not simply add new citations, however, For example, cases arising under the Court's original jurisdiction contain opinions but lack conference votes. These are excluded from the expanded database but not from the original one.

Apart from cases arising on original jurisdiction, the focus of this database—though not the unit of analysis—remains the formally decided cases; *i.e.,* those attended by oral argument. These receive full-blown treatment in the sense that data for all the variables that the database contains have been entered for these cases. Not so for the informally decided back-of-the-book summary decisions, the vast majority of which deny the petitioner's request that the Court review the case. Only a fraction of these appear. If the case was dead listed or otherwise received no conference vote, the database does not have it.

In apportioning the votes of the justices into different vote fields, ease of analysis is accorded the orally argued decisions. Accordingly, the VOTETYPE1 field for each such case contains the preliminary vote (assuming that such a vote was taken, which is not always the situation), typically the grant of certiorari or the vote noting probable jurisdiction; the VOTETYPE2 field the conference vote on the merits; and the VOTETYPE3 field the report vote. The final voting field, the eighth one, holds the reported votes, opinions, and interagreements of the individual justices as I have identified them. As mentioned, all of these are dedicated fields.

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The last of them is identified by an '8' following the abbreviation of each justice's name, *e.g.,* MAR8, DOUG8. This field is empty in informally decided cases—those in which DEC_TYPE=0 or 3—in which no justice wrote an opinion. Relatedly, if a justice's abbreviation ends with a "2," ii necessarily indicates that this is that justice's merits vote.

The alignment of a particular vote with the same vote field does not apply to the informally decided cases. These overwhelmingly concern denial of petitions for certiorari and the noting of probable jurisdiction. Thus, certiorari votes may occur in the second and third fields of these cases, as well as the first. A report vote may appear in the second, the fifth, or any other vote fields between the first and the seventh. The order is purely chronological. Only in those decided formally does the vote to grant certiorari or note probable jurisdiction always locate in the VOTETYPE1 field, the merits vote in VOTETYPE2, and the report vote in VOTETYPE3. If a case lacks one or the other of these votes, the dedicated field is empty.

I will undertake to elaborate the foregoing: If a formally decided case contains multiple preliminary, merits, or reports votes, the final one of each type will appear in its assigned field—VOTETYPE1, 2, 3, respectively. The others will appear chronologically as VOTETYPE4 through VOTETYPE7. Note, however, that preliminary or procedural votes other than those listed as CERT or JURIS will always appear subsequent to the VOTETYPE3 field, as will CERT or JURIS votes other than the final one. Note also that not every formally decided case (DEC_TYPE=1,4,5,6, or 7) necessarily has a preliminary, merits, or report vote. Lacking such a vote the relevant vote field for any such citation will be blank.

In other words, in the formally decided cases VOTETYPE1 is reserved for the justices' final vote to grant cert or note probable jurisdiction, VOTETYPE2 for their final conference vote on the merits; and VOTETYPE3 for the final report vote. Votes of any type other than these three will chronologically appear in VOTETYPE fields 4-7, along with any preliminary, merits, and report votes other than the final one. To insure that these votes have been ordered in the indicated fashion, the database contains seven parallel fields that specify the sequence of votes, SEQ1-SEQ7, which chronologically orders each discrete type of vote. Thus, in *Wade v. Mayo,* 334 U.S. 672 (1948), a case in which the justices cast two cert votes, three merits votes, and a report vote, the sequencing of the votes is as follows: VOTETYPE1=CERT, SEQ1=2; VOTETYPE2= MRTS, SEQ2=3; VOTETYPE3=REPT, SEQ3=1; VOTE TYPE4=CERT, SEQ4=1; VOTETYPE5=MRTS, SEQ5=1; VOTETYPE6=MRTS, SEQ6=2. To repeat, this pattern does not obtain in informally decided cases (DEC_TYPE=0 or 3). Votes in such cases appear strictly chronologically without regard to their VOTETYPE. Thus, in one back-of-the-book case VOTETYPE1 may be a merits vote; in another VOTETYPE3 may =CERT; while in a third VOTETYPE2 may =REPT, or a vote to dismiss the case or to consider an amicus curiae petition.

In formally decided cases, types of votes other than cert or probable jurisdiction, merits, and report always succeed VOTETYPE3 regardless of the date the vote was taken. Thus, for example, votes to rehear, to permit the participation of amici, to grant petitions for mandamus or habeas corpus, or to vacate will always locate in VOTETYPE4-VOTETYPE7 in the order of their occurrence. Such votes, by definition, can never be the final CERT, MRTS, or REPT vote. But in the informally decided cases, these votes may appear in any vote field. Which vote field will depend entirely on the overall order in which they were cast.

The expanded database provides very little information about the informally decided cases other than the votes cast by the individual participating justices, the date of such action(s), the name of the case, and at least one of the following: citation, docket and/or ID number. (The last of these is a 7-column numeric field which summarily indicates the term year, the docket on which the case locates, and the docket number.) Hence, though the expanded database contains all cases in which the justices cast a conference vote, three reasons preclude inclusion of data compiled independently of the justices' docket books. First, in many cases such data are irrelevant; second, absent opinions, these data are indeterminable without consulting briefs and lower court records; third, the relative judicial insignificance of these cases does not warrant extremely heavy cost, effort and time that systematic consultation of docket books and the collection of nonvoting data would entail. Scholars may believe contrarily in the future, but not for the nonce.

Though a case is formally decided that does not guarantee that the justices separately voted on each docket associated with the cite. If the justices cast no separate set of votes such dockets are identified with an asterisk in a newly created field: NOVOTE. Parenthetically, such no vote dockets may also display the same LITIGANTS as the docket(s) voted on. (Another new feature of the expanded database is the inclusion of the name of the case.) Thus, users interested in specific votes need not worry that they may over count multiple docket citations. Although an entry will appear in NOVOTE only if DEC_TYPE=1,2,4,5,6, or 7, note that the lead record will occasionally show NOVOTE=* instead of one or more of the ancillary docket numbers. Instead one or more of these secondary dockets will have received individualized voting. Thus, if you are interested in conference voting it will behoove you to exclude records which indicate that they are the lead docket in a citation (*i.e.,* ANALU=' ') if an asterisk appears in NOVOTE, and conversely, to include those ancillary records containing conference votes (*i.e.,* ANALU= '1') if NOVOTE is blank.

In next month's column, I will consider the occasional differences between the report vote (RVOTE), as compiled by my co-principal investigator, Jan Palmer, and my specification (VOTE).

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Section News

Nominations for Section Officers

Please send in your nominations now for next year's Law and Courts Section officers. There are four positions to be filled: Chair-Elect, and three members of the Executive Committee. According to our Section By-laws, the Nominations Committee will select a slate of officers that

> "(a) is taken from names received, particularly those persons receiving several mentions, and (b) represents the diverse interests of the section. The slate shall be listed in the summer issue of the Section Newsletter...so that the nominees are known prior to the Annual Section Meeting."

Deadline for nominations is *June 1, 1995*. Please send all names to **Michael McCann**, Chair of the Nominations Committee. His address is:

Michael McCann
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Other committee members are Gregory A. Caldeira, *Ohio State University;* Barbara Perry, *Sweet Briar College* (currently at the Supreme Court); Allison Renteln, *University of Southern California;* Louis Fisher, *Library of Congress;* Martin Edelman, *State University of New York at Albany;* D. Grier Stephenson, Jr., *Franklin and Marshall College*

From the Section Chair

(continued from p. 1)

therefore, centrally concerned with the equivalent in the public sector of the market in the private sector. That equivalent is the law making and implementation process. And just as private sector economists must constantly take account of the influence of every bit of the market on every other bit, because it is the nature of markets that every bit depends on every other bit, so public choice people tend to look at the interaction of all the bits of the law making process. Shouldn't at least some of us in "law and courts" be doing law and courts as well as law in courts, that is, looking at the whole law-making process?

Many scholars have a kind of automatic negative reaction to public choice on two fronts. As part of the law and economics movement, public choice is seen as a vehicle for propagating Chicago school laissez-faire ideology. And methodologically, public choice may be seen as a kind of scientism; naively reductionist and involving simplifying assumptions that turn it into a set of mind games totally divorced from the complex contingencies of the real world. Because of these ideological and methodological suspicions, many of the younger people including the two instructors for the short course, use the term "positive political theory" rather than public choice. This new term is a declaration that Chicago is not the only economics and that no laissez faire agenda, overt or covert, is necessarily entailed in their approach. Positive political theorists also insist that, far from being reductionist, precisely what they are interested in is how particular institutional structures, procedural rules and decision making sequences generate and constrain strategic advantages for various actors in real policy making processes and thus ultimately effect the specific outcomes of those processes. Thus positive political theorists see themselves as part of the "new institutionalism" that refuses to treat individual behavior, choice, or preference in a vacuum but instead sees such phenomena imbedded in rich, highly particularized social matrices.

End of pitch—almost. I cannot resist also saying to those of us who have already nurtured a mature aversion to public choice and its kith and kin that knowing your enemy is a good idea. At the very least the short course provides a good opportunity for reconnaissance.

More Section News...

Law and Courts Short Course:

Positive Political Theory, Public Choice and Public Law

Greetings from the rapidly thawing Northeast. I have read with interest (and no small amount of amusement) Martin Shapiro's note, appearing in this issue of **Law and Courts**, on the short course that Daniel Rodriguez and I will be teaching at the APSA meetings this year. I must admit to feeling something like a used car that Martin is trying to convince you is perfect for your needs. Plus, I've only been owned by a little old lady who only drove me to church on Sundays (temple on Saturdays for those of you who share my ethnic persuasion). The purpose of this note is to give potential participants some idea of what we will be doing, and to offer a somewhat "softer" sell.

We realize that we are likely to draw a rather diverse audience and we regard this as a good thing. If you want to learn something about how to apply game theory and other rational models to judicial questions, we'll have something for you. If you want to catch up on recent advances in the field and find out if any new results might be useful for your own research, we'll have something for you, too. Finally, if you think this approach is the Edsel of judicial politics, we will provide free test drives to confirm your hypothesis. As they say, "Come on down!"

We envision the course running pretty much all day. In the first part of the day, we will introduce participants to several topics in the study of law and courts to which the application of positive political theory (PPT) has proved a fruitful exercise. Our focus will be primarily on how one moves from an intuition about strategic interaction to writing down a model to investigate that intuition. Mathematical rigor is much less important than whether one's model asks the right questions. In the second session, we will have presentations by scholars who have recently begun to integrate these tools into their own projects. They will share their views about why they think that the rational choice paradigm can be useful for addressing topics that have traditionally been approached in other ways. In addition, we anticipate that these scholars will highlight some of the limitations of the rational choice approach for the study of law and courts. In Martin Shapiro's note, he points out with some frustration the separation of our subfield into two distinct groups: those who study courts and those who study law. In the final session of the day, we will discuss ways in which the legal models of positive political theory permit—even encourage—normative conclusions about legal practices. This is perhaps the primary contribution of the PPT approach: its focus on the structure of legal institutions allows us to make important theoretical connections between the behavior of judges and the performance of the law.

Unfortunately, we only have one day available for the course. As such, we will only be able to scratch the surface of any of these topics. We have consciously decided that the course should be inclusive, rather than exhaustive. We hope to offer something for everyone and promise everything to no-one. The good news is that the course is on Wednesday, so we will have several days together to mull (fight?) over what we learn.

One logistical note is in order. Preregistration is required, in part because we will send out a short list of recommended readings in advance of the convention. Should you have any questions about the short course, please feel free to contact Dan or myself directly. We look forward to seeing you all in Chicago.

—Edward P. Schwartz

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Conference Schedule, 1995

Western Political Science Association	Portland, Oregon	March 16-18, 1995
Southwestern Political Science Association	Dallas, Texas	March 22-25, 1995
Midwest Political Science Association	Chicago, Illinois	April 6-8, 1995
Law and Society Association	Toronto, Ontario	June 1-4, 1995
American Political Science Association	Chicago, Illinois	August 31- September 3, 1995
Southern Political Science Association	Tampa, Florida	November 1-5, 1995

Papers Presented on Law and Courts Panels

Midwest Political Science Association Annual Meeting, 1995

Section Chair: Barbara Luck Graham, *University of Missouri-St. Louis*

Multiple Perspectives on Supreme Court Decision Making

"To Reverse or Not to Reverse: Personal and Institutional Sources of Supreme Court Fluidity." Forrest Maltzman and Paul J. Wahlbeck, *George Washington University.*

"Speaking with a Different Voice: An Analysis of Opinion Writing Behavior." Lynn Rudasill, Jennifer Bailey, and Robert C. Bradley, *Illinois State University.*

"Mustering the Minority: The Dissent Assignments of Justice William J. Brennan." Sandra Wood and Gary Gansle, *University of North Texas.*

"Does the Composition of the Court Matter for Judicial Decision Making?" Paul A. Djupe, *Washington University.*

Supreme Court Decision Making: Individual Level Analysis

"Do Sincere Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices, 1937-1993." Lee Epstein and Valerie Hoekstra, *Washington University;* and Harold J. Spaeth, *Michigan State University.*

"What Motivates Supreme Court Justices?" Lawrence Baum, *Ohio State University.*

"Stability and Change in the Ideological Values in Supreme Court Decisions." James P. Wenzel, *University of California, Riverside*.

"The Impact of Freshman Justices: Criminal Justice Issues." Christopher E. Smith, *Michigan State University.*

Cross-Institutional Studies of the Judiciary

"Senators and their Ideological Evaluations of Supreme Court Nominees." James N.G. Cauthen, *University of Kentucky.*

"An Exploratory Analysis of Judicial Activism in the U.S. Supreme Court's Nullification of Congressional Statutes." Linda Camp Keith, *University of North Texas.*

"State Courts and Public School Finance: A Study of Inter-Institutional Agenda Setting." Matthew H. Bosworth, *University of Wisconsin-Madison.*

"Attention to Constitutional Issues: Agenda Formation on the U.S. Supreme Court as an Interactive Process." Roy B. Flemming, B. Dan Wood, and John Bohte, *Texas A&M University*

"Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary." John de Figueiredo, *University of California-Berkeley.*

Models of Interest Group Influence on the Supreme Court

"Onward Christian Lawyers: The Religious Right in Court." Gregg Ivers, *American University.*

"Congress and the Supreme Court: Reevaluating the Interest Group Perspective." Christopher J. Zorn, *Ohio State University.*

"Interest Groups, the Right to Die, and the U.S. Supreme Court." Suzanne U. Samuels, *Seton Hall University.*

"Group Representation and the Supreme Court." David K. Ryden, *Hope College.*

To Accept or Deny? Certiorari Decision Making in the Supreme Court

"An Information Model of the Supreme Court's Certiorari Decisions." Charles M. Cameron, *Columbia University;* Jeffrey A. Segal, *State University of New York at Stony Brook;* and Donald Songer, *University of South Carolina.*

"The Defensive Denial: Institutional Rules and Strategic Voting on the Supreme Court." Barbara Palmer, *University of Minnesota.*

"The Supreme Court Didn't Decide Today: Television Reporting of Certiorari Denials." Bradley C. Canon, *University of Kentucky.*

"Certiorari Voting on the Warren Court." Jeffrey A. Segal and Robert L. Boucher, *State University of New York at Stony Brook.*

Interpretive Theories, the Constitution, and the Supreme Court

"The Constitutive Character of the Constitution." Dennis J. Goldford, *Drake University.*

"Reality and Constitutional Interpretation: The Unlikely Alliance of Realism Jurisprudence and Deconstruction." Ed Wingenbach, *University of Notre Dame.*

"Traditional Legal Practice Versus Constitutional Theory in Supreme Court Decision Making." Robert L. Clinton, *Southern Illinois University.*

Integrative Models of Supreme Court Decision Making

"A Situational Model of Judicial Decisionmaking." Michael Esler, *Southern Illinois University* and John Stookey, *Arizona State University.*

"The Emergence and Evolution of Free Exercise Policy in the Supreme Court." Richard Pacelle and Barry Pyle, *University of Missouri-St. Louis.*

"The Impact of Amicus Curiae on Supreme Court Opinions." James F. Spriggs II, *University of California-Davis* and Paul J. Wahlbeck, *George Washington University.*

"The Impact of Legal Arguments on Supreme Court Decisions." Timothy R. Johnson, *Washington University.*

Perspectives on Law and Society

"Mediation Meets the Legal Establishment: Using ADR in Court Reform." Elizabeth D. Ellen, *University of North Carolina.*

"Only Words, Indeed." Ira L. Strauber, *Grinnell College.*

"At the Creation: New York High Court Free Speech Decisionmaking, 1791-1925." Lewis S. Ringel, *University of Maryland.*

"The Political Economy of Rights: Federal Courts and State Prison Reform." John Fliter, *Kansas State University.*

Public Opinion and the Supreme Court

"Diffuse Support for the U.S. Supreme Court: Reliable Reservoir or Fickle Foundation?" Jennifer A. Segal, *Ohio State University.*

"When the Court Hits Close to Home: The Impact of Supreme Court Decisions on Local Public Opinion." Valerie J. Hoekstra, *Washington University.*

"Public Support for the Supreme Court." Scott Peters, *University of Kentucky.*

"Public Opinion and U.S. Supreme Court Decision Making in Women's Rights Cases." Thomas R. Marshall and Joseph Ignagni, *University of Texas-Arlington.*

***Shaw v. Reno* and Race Conscious Redistricting in the 1990s**

"*Shaw v. Reno*: Lower Courts, Minority Representation and Public Policy. " Augustus J. Jones, Jr., *Miami University.*

"Rethinking Redistricting after *Shaw v. Reno.*" Jeffrey D. Schultz, White Pines College.

"*After Shaw v. Reno:* Three Generations of Jurists Confront Racial Redistricting." Jeremy D. Mayer, *Georgetown University.*

"The Right to Representation: Minority Voting Rights in the 1990s and Beyond." Edward Angelina, *Rutgers University.*

New Approaches to Gender and the Courts

"Gender and Cultural Diversity and the Effects Upon Group Cohesion in American Appellate Courts." Nancy Clayton and Dean Kahler, *Southern Illinois University.*

"The Multiple Dimensions of an Ethic of Care: An Analysis of Legal Briefs in Johnson Controls." Francis Carleton, *University of Wisconsin-Green Bay.*

"Battered Women and the Law." Donald Downs and Evan Gerstmann, *University of Wisconsin-Madison.*

"Race, Gender, and Decision Making in the Federal Courts." Susan B. Haire and Leigh Calhoun, *University of North Carolina-Greensboro.*

New Perspectives on State Judicial Research

"Trends in Contemporary Judicial Elections." Melinda Gann Hall, *University of Wisconsin-Milwaukee.*

"Organized Interests in State Courts." Donald J. Farole, Jr., *Indiana University.*

"The Intersection of Law, Politics, and Policy: Legal Services for the Poor in American Courts, 1965-1994." John C. Kilwein, *West Virginia University.*

"Explaining State Rates of Pre-Certiorari Amicus Curiae Participation." Eric N. Waltenburg, *Purdue University* and Bill Swinford, *University of Richmond.*

Comparative Studies of Judicial Behavior

"A Personal Attributes Model of Decision Making on the Supreme Court of India." Malia Reddick, *Michigan State University.*

"The Canadian Supreme Court and the Attitudinal Model." Cindy Ostberg, *University of the Pacific* and Matthew E. Wetstein, *California State University.*

"Leadership and Influence on the Canadian Supreme Court." Shannon Ishiyama Smithey, *University of Pittsburgh.*

"American Influences on the Development of Canadian Affirmative Action Law." Sandra Clancy, *University of Toronto.*

Civil Liberties, Civil Rights, and Judicial Policymaking

"The Environment in Court: The Supreme Court and Environmental Issues, 1970-1990." Bradford S. Jones, *University of Arizona.*

"Scalia, Property, and *Dolan v. Tigard:* The Emergence of a Post-*Carolene Products* Jurisprudence." David Schultz, *University of Minnesota.*

"On the Frontline and in the Trenches: An Empirical Analysis of Federal Trial Court Decision Making in Housing Discrimination and School Desegregation Cases, 1968-1989 ." Kimi Lynn King, Casi Davis, and Ewing Sikes, III, *University of North Texas*

Southern Political Science Association Annual Meeting, 1994

Section Chair: Ronald Stidham, *Appalachian State University*

Public Opinion, Politics, and Decision Making in State Courts

"We Like Courts but Hate Litigation: The Impact of Support for the Court on Litigiousness." Stephen S. Meinhold and David W. Neubauer, *University of New Orleans.*

"Criminal Justice Policy Reform as a Moving Target: The Florida Sentencing Guidelines in their Second Iteration." Roger B. Handberg and Terry L. Bledsoe, *University of Central Florida.*

"State Appellate Court Decision Making and Public Policy: An Analysis of Criminal Rape Convictions." Roger Hatley and Susette M. Talarico, *University of Georgia.*

"The Impact of Socioeconomic and Political Factors on State Supreme Court Caseloads." Craig F. Emmert and Douglas Davenport, *Texas Tech University.*

Judges and Justices: Vacancies, Expectations, Decisions

"Political and Contextual Factors in Supreme Court Vacancies." Christopher J. Zorn and Steven R. Van Winkle, *Ohio State University.*

"Supreme Court Voting and Presidential Ideological Expectations, 1916-1992." Joseph A. Devore and Stacia Haynie, *Louisiana State University.*

"Anticipating Judicial Conflict." Scott D. Gerber, *Old Dominion University* and Kee Ok Park, *University of Virginia.*

Party Identification and Judicial Decisions: An Integrated Model." C. Scott Peters, *University of Kentucky.*

Contemporary Legal and Constitutional Issues in the Courts

"Murder of an Abortion Doctor." Margaret T. Stopp, *University of West Florida.*

"The Requirement of 'Politically Correct Speech': Is There a Constitutional Basis?" Kenneth F. Mott, *Gettysburg College.*

"Conviction in the Federal Rodney King Beating Trial." Carol L. Tebben, *University of Wisconsin-Parkside.*

Influencing Court Agendas: Legal Arguments & Interest Groups

"The Role of Argument in Agenda Transformation on the Supreme Court." Katy J. Harriger, *Wake Forest University.*

"The Rise of Organized Participation in the Formation of the Supreme Court's Agenda, 1925-1990." Gregory A. Caldeira, *Ohio State University;* William K. Swinford, *University of Richmond;* and Eric Waltenburg, *Ohio State University.*

"Amicus Curiae and the Supreme Court: The Decision to Participate." Reginald Sheehan, *Michigan State University.*

"Political Disadvantage Theory and State Supreme Courts." Ashlyn K. Kuersten and Donald R. Songer, *University of South Carolina.*

Legal and Extra-Legal Influences on Supreme Court Decisions

"Clerks Come Home to Roost but Can They Crow." Karen O'Connor and John R. Hermann, *Emory University.*

"Outcome Fluidity on the Vinson Court: Is the Vote on the Merits Really the Final Vote?" Harold J. Spaeth, *Michigan State University.*

"The Jurisprudential and Behavioral Accomodationism of Justice O'Connor." Nancy Maveety, *Tulane University.*

Conflict and Consensus in Federal and State Courts

Patterns of Circuit Court Conflict." Stefanie A. Lindquist, *University of South Carolina.*

"Circuit Boundaries and Judicial Behavior in the U.S. Courts of Appeals." Susan B. Haire, *University of North Carolina-Greensboro.*

"Legal and Extra-Legal Variables as Determinants in Environmental Case Decisionmaking." Kelly A. Crews-Meyer, *University of South Carolina.*

"Court v. Court: Christmas Displays and Judicial Policy Making." William S. Mandel, *Miami University.*

Constitutional Issues in Historical Perspective

"The Intent Behind the Ninth Amendment: Implications for American Federalism as well as Individual Rights?" Staci L. Beavers, *University of Nebraska-Lincoln.*

"The American Welfare State: Moving Toward Our American Heritage." Richard Mark Geppert, *Baylor University.*

"A Cross-Institutional Analysis of the One Person, One Vote Legacy." Charles A. Kromkowski, *Catholic University of America.*

Roundtable: The Clinton Judicial Appointments

Chair:

Ronald Stidham , *Appalachian State University*

Particpants:

Eleanor Dean Acheson, *Department of Justice*
Robert A. Carp, *University of Houston*
Sheldon Goldman, *University of Massachusetts-Amherst*
Elliot E. Slotnick, *Ohio State University*

Western Political Science Association Annual Meeting, 1995

Section Chair: Michael McCann, *University of Washington*

The Politics of Judicial Selection

"Reflections on the Breyer Nomination." Mark Silverstein, *Boston University.*

"The Evolution of the Modern Supreme Court Appointment Process." John Maltese, *University of Georgia.*

"State Judicial Elections: Campaigning, Voting, Knowledge, and Canon 7." Elizabeth A. Mazzara and Charles H. Sheldon, *Washington State University.*

State Courts

"The Transformation of the California Supreme Court." John Culver, *California Polytechnic State University.*

"Party, Ideology, and the Death Verdict." Paul Brace, *Florida State University* and Melinda Gann Hall, *University of Wisconsin-Milwaukee.*

"Motivating Interest Group Participation in State Courts of Last Resort: A Study of Interest Group Strategies and State Court Openness." Richard M. Braunstein, *University of Colorado.*

The Supreme Court: Institutional Perspectives

"The Problem of Political Development for Constitutional Theory: Foundationalism and Pragmatism in Light of the Origins of the So-Called Constitutional Double Standard." Howard Gillman, *University of Southern California.*

"Polarized Interests, Political Arguments, and the Formation of Social Policy: A Content Analysis of the Amicus Briefs in *Webster v. Reproductive Health Services.*" Jack E. Rossotti, *American University.*

"The Fuzzy Logic of Supreme Court Blocs." Beverly B. Cook, *University of Wisconsin-Milwaukee.*

"Reality and Constitutional Interpretation: The Unlikely Alliance of Metaphysics and Realist Jurisprudence." Ed Wingenbach, *University of Notre Dame.*

"Mustering the Minority: The Dissent Assignments of Justice William J. Brennan." Sandra Wood, *University of North Texas.*

Law and Class

"Domination, Resistance, and the Surveillance of Welfare Clients: A Socio-Legal Analysis." John Gilliom, *Ohio University.*

"Legal Dependency: The Reassertion of Law and Politics in the British Columbia Federation of Labour Boycott of Bill 19." John Goldberg-Hiller, *University of Hawaii.*

"Cause Lawyering for the Poor in the Pittsburgh Legal Community." John Kilwein, *West Virginia University.*

"Competing Visions of Crime Control: The Case of Seattle's Drug Traffic Loitering Ordinance." Lisa Miller, *University of Washington.*

"Legal Grievances and the Politics of Workplace Disputing." Doug Baker, *University of Washington.*

Comparative Legal Institutions and Culture

"The Rights of Prisoners: The United Kingdom Confronts the European Convention on Human Rights." Donald W. Jackson, *Texas Christian University.*

"Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." Christopher M.F. Larkins, *University of Southern California.*

"Evaluating Formal and Informal Constraints on the Independence of Mexico's Federal Election Tribunal, 1988-1994." Todd Eisenstadt, *University of California-San Diego.*

Women, Gender and the Law

"Gender, Biology, and the Best Interests of the Child." Jyl J. Josephson, *Texas Tech University.*

"An Analysis of the U.S. Supreme Court's Women's Rights Cases and Public Opinion." Thomas Marshall and Joseph Ignagni, *University of Texas-Arlington.*

"Ginsburg and O'Connor: A Different Voice on the Supreme Court." Linda S. Maule, *Washington State University.*

Lawyering, Litigiousness, and Politics

"The Lure of Litigation and Other Myths about Cause Lawyers." Helena Silverstein, *Lafayette College.*

"Immigration Lawyering in Britain: Constraints and Possibilities Outside a Bill of Rights." Susan Sterett, *Denver University.*

"On the Rights Track: The Litigious Turn in Disability Policy." Tom Burke, *University of California-Berkeley.*

"Lawyering for the Commission: Law and Politics in the European Union." Andrew Appleton and Cornell W. Clayton, *Washington State University.*

Courts and Diversity

"Religious Anger and the Mobilization of Law to Protest." Kathleen M. Moore, *University of Connecticut.*

"The Popular Referendum Device and the Fourteenth Amendment." Jerry W. Clavert, *Montana State University.*

"Haphazard Jurisprudence: The Supreme Court and the Establishment Clause." Richard Glenn, *University of Tennessee-Knoxville.*

"Professor Hate Speech in University Campuses: Adopting Harassment Standards to Balance Free Speech Concerns and Equality." Linda Lopez, *University of Southern California.*

Announcement from NSF

The Law and Social Science Program of the National Science Foundation wishes to remind interested social scientists of its regular and special grant competitions, and to call special attention to a set of SPECIAL FUNDING opportunities.

Types of Proposals

In addition to standard research proposals, the Law and Social Science program welcomes planning grant proposals, travel support, requests for conferences and other activities to lay the foundation for research, and proposals for improving doctoral dissertation research. The types of proposals desired by the special competitions are indicated in the descriptions of these programs, given below.

Regular Competition

The regular grant competition supports social scientific studies of law and law-like systems of rules. These can include, but are not limited to, research designed to enhance the scientific understanding of the impact of law; human behavior and interactions as these relate to law; the dynamics of legal decision making; and the nature, sources, and consequences of variations and changes in legal institutions. The primary consideration is that the research shows promise of advancing a scientific understanding of law and legal process. Within this framework, the Program has an "open window" for diverse theoretical perspectives, methods, and contexts for study. For example, research on social control, crime causation, violence, victimization, legal, social and political change, patterns of discretion, procedural justice, compliance and deterrence, and regulatory enforcement are among the many areas that have recently received program support. The target dates for the submission of proposals in the regular competition are January 15 for proposals to be funded as early as July and August 15 for proposals to be funded in or after January.

Global Perspectives Competition

The Program is also continuing its special competition for research dealing with global perspectives on sociolegal studies. The aim of this initiative is to support research on law and law-related processes and behaviors in light of the growing interdependence and interconnectedness of the world. The competition seeks to encourage examination of both global dimensions of sociolegal phenomena (e.g., disputing, law and social change, legal pluralism, legal system development, social control, crime causation) and sociolegal dimensions of global phenomena (e.g., democratization, economic and commercial transactions, immigration and population shifts, social and ethnic conflict, regulation of the environment, public and private governance). Proposals are welcome that advance fundamental knowledge about legal interactions, processes, relations, and diffusions that extend beyond any single nation as well as about how local and national legal institutions, systems, and cultures affect or are affected by transnational or international phenomena. Thus, proposals may locate the research within a single nation or between or across legal systems or regimes as long as they illuminate or are informed by global perspectives. Proposals submitted to the global perspectives competition must be received at NSF by February 1.

Special Competitions

In addition to the two Law and Social Science Program competitions, researchers should be aware of several special competitions in the social, behavioral and economic sciences: (1) the Human Capital Initiative, (2) Democratization, and (3) Human Dimensions of Global Change, (4) Social Science Instrumentation, (5) a Center/Consortium for Violence Research and (6) a National Center for Environmental Decision Making Research. For more information about any of these competitions, contact the Law and Social Science Program.

Application Procedures

There are specially designated application and review procedures for the instrumentation competitions and the proposed HDGC, Violence, and Environmental Decision Making centers. Details on these will be given in the program announcements for the centers, once they have been approved. Their deadlines will probably fall in the period March 1 to May 1, 1995. For all the other competitions, sociolegal proposals may be submitted to the Law and Social Science program for the program target dates of January 15 and August 15. Proposals should be prepared in strict accordance with the guidelines in NSF's Grant Proposal Guide (NSF 94-2). Proposals that do not conform to these guidelines may not be considered. The review process for the Law and Social Science Program requires approximately six months. It includes appraisal of proposals by ad hoc reviewers selected for their expertise from throughout the social scientific community and by an advisory panel that meets two to three months after the target/closing date for the competition.

For further information, write, call, or e-mail: C. Neal Tate or Patricia White, Program Officers, Law and Social Science Program - Room 995, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Phone: (703) 306-1762; e-mail: CTATE@NSF.GOV or PWHITE@NSF.GOV (Internet); Fax: (703) 306-0485/6.

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Submissions to **Law and Courts** are welcome. The deadline for submissions for the next issue is July 1, 1995.

Law and Courts

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