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# LAW AND COURTS

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

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## FROM THE SECTION CHAIR

THOMAS G. WALKER,  
EMORY UNIVERSITY

Although it seems not so long ago that we met in San Francisco, preparations for the 1997 APSA meeting in Washington already are well underway. The Law and Courts Section, of course, will sponsor a full set of research and discussion panels, organized this year by Lee Epstein. And the Section will have its annual business meeting and cocktail party on the Friday night of the convention.

One of the more important events of the business meeting will be the election of new Section officers. This year we will need to choose a new Chair-Elect to replace Joel Grossman who moves up to Chair. We will also fill three positions on the Section Execu-

I have appointed a to recommend a slate of fices. On page 22 of **Courts** you will find a members who have committee. The Nomi- encourages members of individuals who would This is an essential part So please take a minute Tate, the chair of the tee, asking consideration for those individuals you think are deserving of nomination to Section offices.



tive Committee. nominating committee candidates for these of- this issue of **Law and** list of the seven Section agreed to serve on that nating Committee en- the Section to suggest make good officers. of the election process. to send a note to Neal Nominating Commit-

tee, Also at the annual business meeting, we will be honoring those members of the Section who have produced outstanding research efforts. The committees to select the best paper presented at the San Francisco meetings and the best book on Law and Courts published in 1996 are already in the process of evaluating the papers and books nominated for these awards. The committee to select the winner of the Lifetime Achievement Award is about to begin its deliberations as well. The competition for one award, however, remains open. The deadline for nominating papers for the CQ Press Award for the best paper on law and courts written by a graduate student is not until June 1. Finally, If you are a faculty member who receives an outstanding paper written by a graduate student this spring term, please consider nominating that paper for the CQ Press Award. Award rules and nomination instructions are found on page 22 of this issue of **Law and Courts**.

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## General Information

*Law and Courts* publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. *Law and Courts* is published three times a year in Winter, Spring, and Summer 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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## *Instructions to Contributors*

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### Articles, Notes, and Commentary

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

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

### 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 *Law and Courts* of publication of manuscripts.

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## THE LAW AND POLITICS BOOK REVIEW

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# THE NEW INSTITUTIONALISM, PART II

LEE EPSTEIN AND JACK KNIGHT, *WASHINGTON UNIVERSITY IN ST. LOUIS*

For the last issue of *Law and Courts*, Howard Gillman penned an intelligent essay on the new institutionalism.<sup>1</sup> His primary purpose was, as he put it, “to draw attention to two approaches—rational choice, a.k.a. ‘the strategic approach,’ and interpretive-historical institutionalism—and then say some nice things on behalf of the latter.”<sup>2</sup>

These constitute our general aims, as well—though, of course, we plan to say something nice about the former, strategic rationality. We also hope to delimit our points of disagreement and, yes, agreement with some of the notions in Gillman’s essay.

Before joining the issue, we begin with a brief review of strategic rationality. We think this step is necessary because confusion seems to exist over just what the account is all about. This is particularly evident from Gillman’s charge that the strategic approach “risks” the problem of over-inclusiveness (that is, it “conflates any context of strategic decisionmaking with the presence of ‘institutional’ constraints and opportunities”<sup>3</sup>). We believe this charge is mistaken, and hope to demonstrate as much in our review.

In the second section we emphasize our general agreement with another of Gillman’s concerns, namely, the strategic approach is under-inclusive in the sense that

it fails to account for important features of institutional politics - such as the possibility that institutional norms may shape or constitute the preferences and interests of officeholders (thus making preference-formation endogenous to the analysis rather than exogenous) and that this may include instilling in them the motivation of duty and professional responsibility (which may combat or supplant the impulse to maximize personal preferences).<sup>4</sup>

At the same time, we seek to broaden the scope of the critique. For under-inclusiveness is a potential problem not only in the strategic approach to judicial politics but in others (including his favorite, the interpretive-historical), as well.

## THE STRATEGIC ACCOUNT OF JUDICIAL DECISIONS

The strategic account of judicial decisions rests on a few simple propositions: Justices may be primarily seekers of legal policy, but they are not unsophisticated actors who make decisions based merely on their ideological attitudes.<sup>5</sup> Instead, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, of the choices they expect others to make, and of the institutional context in which they act. We, and others, call this a strategic account because the key ideas it contains are drawn from the rational choice paradigm,<sup>6</sup> an

approach that has been advanced by economists and political scientists working in other fields.<sup>7</sup> We can, thus, state our primary argument as follows: We can best explain the choices of justices as strategic behavior, and not merely as responses to ideological values.

Shortly we detail the benefits and limitations of this approach. For now, we simply want to be clear about its key components: justices’ actions are directed toward the attainment of goals, justices are strategic, and institutions structure justices’ interactions.

## JUSTICES AS GOAL-ORIENTED ACTORS

A key assumption of rational choice explanations is that actors make decisions consistent with their goals and interests. Indeed, we say that a “rational” decision occurs when an actor takes a course of action (makes a decision) that satisfies her desires most efficiently. All this means is that when a political actor selects, say, between two alternative courses of action, she will choose the one that she thinks most likely to help her attain her goals; all we need to assume is that she acts “intentionally and optimally” toward some specific objective.<sup>8</sup>

Rational choice accounts further suppose that an actor can rank the alternative courses of action available to her in terms of her preferences over the outcomes that she expects the actions to produce. Once the actor establishes the relationship between actions and outcomes, she can compare the relative benefits of the alternative actions, and choose the alternative that produces the highest-ranked outcome.

To see this point, consider the simple example depicted in Figure 1 (see page 8). It shows the possible choices—ordered from left to right—confronting U.S. Supreme Court justices in a case involving this question: For how many hours can the federal government detain a criminal suspect between a warrantless arrest and a determination of probable cause? We have labeled three of the possibilities: 24, 36, and 48 hours.

Suppose justice X was to select among the three possible alternatives; further suppose that she genuinely prefers 24 hours to 36 hours to 48 hours. If that were the case, we would say justice X acted rationally if she made those individual choices that led to a decision by the full Court which established a standard closest to 24 hours.

To give meaning to this assumption, namely that people maximize their preferences, however, we must specify the content of actors’ goals.<sup>9</sup> And that is where the notion of justices as “seekers of legal policy” comes in. On most strategic accounts, a major goal of Supreme Court justices is to see the

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law—over the long term—reflect their preferred policy positions, and that they will take actions to advance this objective.<sup>10</sup>

In so writing, we—as do most scholars who adopt this account—recognize that policy is not the only goal justices pursue; there are others, with the establishment and retention of the legitimacy of the Court being an important one. For, as so many scholars have written, before the Court can make authoritative policy, that is, policy that other institutions, the public, and states will view as binding on them, it must possess some level of respect.

Still, we should not lose sight of the fact that legitimacy, like most other goals scholars ascribe to justices, is a means to an end—and that end is the substantive content of the law. We do not think of this as a particularly controversial claim. Justices may have goals other than policy, but no serious scholar of the Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things over which most social scientists agree.

#### **STRATEGIC JUSTICES**

The second part of the strategic account ties back to the first: For justices to maximize their preferences, they must act strategically in making their choices. By “strategic,” we mean that judicial decision making is interdependent. That is, a justice acts strategically when she realizes that her fate depends on the preferences of other actors and the actions she expects them to take (not just on her own preferences and actions).<sup>11</sup>

Occasionally, strategic calculations will lead justices to vote their sincere preferences or sign opinions that reflect them. Suppose, in the example above, that all nine Supreme Court justices agreed to 24 hours and that justice X was to write the opinion of the Court. If that was so, then justice X would be free to craft an opinion that reflected her sincere preferences since they are the same as the Court’s. In other instances, strategic calculations lead justices to act in a sophisticated fashion (that is, in a way that does not reflect their sincere or true preferences) so as to avoid the possibility of seeing their most preferred policy rejected by their colleagues in favor of their least preferred one. Suppose that justice X believed that only three other justices supported her preferred policy of 24 hours. Since X knows that she needs the signatures of at least four others if her opinion is to become the law of the land,<sup>12</sup> X might choose to write an opinion that adopted a 36-, rather than 24-, hour rule. Why? Because, based on her knowledge of the preferences of the other justices and the choices she expected them to make, 36 hours would allow her to avoid her least preferred position (48 hours)—and not because it was her first choice.

But strategic considerations do not simply involve calculations over what colleagues will do. Justices must also consider the preferences of other key political actors, including members of the elected branches of government and the Ameri-

can people. The logic here is as follows.<sup>13</sup> As all students of U.S. politics know, two key concepts undergird our constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second is the notion of checks and balances: each branch of government imposes limits on the primary function of the others. For example, the judiciary may interpret laws and even strike them down as being in violation of the Constitution. But congressional committees can introduce legislation to override the Court’s decision; if they do, Congress must act by adopting the committee’s recommendation, adopting a different version of it, or rejecting it. If Congress takes action, then the president has the option of vetoing the law. In this sequence, the last “move” rests again with Congress, which must decide whether to override the president’s veto.<sup>14</sup>

It is just these kinds of checks that lead policy-oriented justices to concern themselves with the positions of Congress, the president, and even the public. For if their objective is to see their favored policies become the ultimate law of the land, then they must take into account the preferences of the key actors and the actions they expect them to take. Or else they run the risk of seeing Congress replace their most preferred position with their least. Or of massive non-compliance with their rulings in which case their policy fails to take on the force of law.<sup>15</sup>

To see these points, let us revisit the example depicted in Figure 1, and assume that at the time the Court was deciding the dispute a majority of justices favored fewer hours than the other branches of government. What standard would a strategic policy-maximizing Court advance? Under these circumstances, the Court may be unwise to vote its sincere preferences: If the Court articulates a 24-hour standard, Congress may try to override its decision by writing 48 into law. As a result, the Court would have strong incentive to compromise its preferences and adopt 36 hours—or, at least, some number that Congress believed was the best it could do under the circumstances and, accordingly, would leave undisturbed.

Of course, by acting in this sort of sophisticated fashion the Court’s majority will neither see its most preferred position (24 hours) nor its least preferred position (48 hours) written into law. Yet, this course of action—the rational course of action under the circumstances—may lead to the best possible outcome for the majority, 36 hours.

#### **INSTITUTIONS**

Even from our simple example over the choice of hours, we can see that policy-oriented justices face a complex strategic decision in their efforts to affect the nature of the law. In attempting to create policies that reflect their own preferences, our approach suggests that they must take account of two sets of rules governing two different strategic relationships: (1) the internal relations among the justices and (2) the relations

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between the Court and relevant external actors, such as members of the other branches of government and the American people. Their success in creating particular laws depends on their ability to anticipate the reactions of those other actors in these relationships to their own decisions. That is, the effectiveness of a particular justice is in part a function of how well she is able to develop reliable expectations of the actions of others. It is in this important task of expectation formation that social and political institutions—sets of rules that structure social interactions in particular ways—play a crucial role in the strategic account.

Many internal Court rules assist the justices in this way. The requirement of a majority for precedent is certainly one. Under this norm, justices know that they must attain the signatures of at least four justices for their decisions to become precedent. This rule, as we noted above, can induce sophisticated behavior on the part of justices who, based on their beliefs about the preferences and likely actions of their colleagues, do not think that four others share their preferences. The “Rule of Four” is another institution that provides information to assist the justices in making choices. Most obvious is that justices know that they generally must attract at least four votes to hear a case. If they do not, they will need to bargain with their colleagues to attain the requisite number.<sup>16</sup>

There are also rules that govern the relationship between the Court and external actors—with an especially important one being an institution underlying the U.S. Constitution, the separation of powers system. As we have already noted, that system, along with informal rules that have evolved over time (such as the power of judicial review), endows each branch of government with significant powers and authority over its sphere. At the same time, it provides explicit checks on the exercise of those powers such that each branch can impose limits on the others.

To understand why this system is so important to the choices justices make, reconsider the task facing justice X who must decide whether to write an opinion that adopts a 24- or 36- or 48-hour rule. On the one hand, X must be attentive to internal norms of the Court; for example, only those rules to which at least five members of the Court subscribe will be established. Thus, she may have to modify her most preferred policy choice in order to accommodate the preferences of the other members of the Court. On the other hand, she must be attentive to the strategic dimensions of judicial decision making outside of the Court: Because she serves on one of three branches of government, her decisions are subject to the checks and balances inherent in the separation of powers system instantiated in the Constitution. Hence to create efficacious law justice X must take into account the preferences and expected actions of these other political actors.

Seen in this way, the rule of checks and balances provides justices (and all other governmental actors) with important information: Policy in the United States emanates not from

the separate actions of the branches of government but from the interaction among them. Thus, it follows that for any set of actors to make authoritative policy—be they justices, legislators, or executives—they must take account of this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices.

Of course, there are many other institutions that structure the relations between justices and external communities, including legitimacy norms (e.g., the norm favoring respect for precedent and the norm disfavoring the creation of new issues).<sup>17</sup> But the general point applies with equal force to all of these: On the strategic account, we cannot fully understand the courses of action justices take unless we consider the institutional context under which they operate.

#### **THE PROBLEM OF UNDER-INCLUSIVENESS**

Having now clarified the basic logic of the strategic account, we want to acknowledge that it is under-inclusive, in the sense that it cannot explain everything. But how does this distinguish it from the other prevailing approaches to judicial politics? None of these has exclusive purchase on understanding law and courts, despite occasional claims to the contrary by their proponents; indeed, each fails to some extent to account adequately “for important features of institutional politics.”<sup>18</sup> The relevant question, then, is: what are the implications of this failure?

In what follows, we consider two: (1) the interpretive-historical approach explains everything that the strategic approach does and more and (2) the interpretive-historical approach captures features necessary to explaining judicial behavior that no other approach does, while no other approach captures necessary features that the interpretive-historical approach fails to capture.

We selected these to respond to an error we believe Gillman committed in his essay, and one that scholars commonly commit in similar methodological debates over under-inclusiveness: Drawing the conclusion that approach Y is clearly inferior to alternative Z (the one preferred by the critic) because Y cannot explain something or answer some important question. This seems to reflect a belief that it is sufficient to show the weaknesses of one approach as a way of satisfying a claim of the superiority of another. To be fair, it is not clear whether Gillman believes that his criticisms of the strategic approach establish the superiority of the interpretive-historical alternative; but some passages in his essay suggest that he does. Whether Gillman does or not, many critics of the strategic approach apparently do. So it is instructive to think about what would have to be the case to support this view.

*Does the Interpretive-Historical Approach Explain Everything that the Strategic Approach Does and More?*

One implication that might follow from the under-inclusiveness of the strategic approach is that the interpretive-historical approach explains everything that the

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strategic approach does and more. We can find possible support for this claim in Gillman's assertion that the contributions of the strategic approach are generally redundant since interpretivists are already attentive to strategic behavior. To back up this claim, Gillman offers two arguments. The first is implicit in his conclusion that the strategic behavior of justices is "always a kind of strategic behavior that is sanctioned by prevailing institutional norms."<sup>19</sup> The logic here is that strategic behavior is really a function of normative constraints, which are best explained by the organizational logic of the judicial system. But, if Gillman is correct (which we accept only for the sake of argument), this does not count against the strategic approach, for—as we explained above—strategic behavior should always take account of institutional sanctions and constraints. So, even on Gillman's own characterization of strategic behavior, the primary explanation of that behavior will rest on the answer to the question of what explains the relevant institutional norm. On this question we place our bets on an explanation that highlights the political elements of institutional development rather than on an account that rests on organizational logic and is often grounded on an unspecified functionalism.<sup>20</sup> More generally, the question of institutional development is a researchable question to which we believe the strategic approach has important things to contribute.

The second source of evidence of the redundancy of the strategic approach offered by Gillman relates to some of our previous work.<sup>21</sup> He asserts that our demonstration of the strategic interaction between Jefferson and Marshall in *Marbury v. Madison*<sup>22</sup> is consistent with the view of the case advocated by "interpretive scholars for as long as we can remember."<sup>23</sup> We disagree, believing instead that our study demonstrates the importance of detailed and systematic analyses of the strategic interactions in which justices engage. In fact, in the essay, we argue that most prior studies misunderstood the strategic problem facing Marshall. He was not, as many maintain, a shrewd strategist who outwitted Jefferson; rather, he was merely a strategic political actor who accommodated a political environment that was strongly weighted against him.

Without close attention to the strategic implications of the beliefs that both Marshall and Jefferson held about the possible consequences of their actions, we would not have been able to demonstrate the strength of that conclusion. In other words, at least in part because we could not have adequately undertaken this analysis by invoking the interpretive-historical account alone, we cannot conclude—nor can we agree with Gillman—that his favored approach encompasses strategic behavior and more.

*Does the Interpretive-Historical Approach Capture Features Necessary to Explaining Judicial Behavior that No Other Approach Does, While No Other Approach Captures Necessary Features that the Interpretive-Historical Approach Fails to Capture?*

A second possible implication of the under-inclusiveness of the strategic approach goes something like this: The interpretive-historical approach captures features necessary to explaining judicial behavior that no other approach does, while no other approach captures necessary features that the interpretive-historical approach fails to capture. The most compelling issue that might support this position—and one that Gillman emphasizes (rightly so)—is the endogeneity of preferences.

To be sure, formal rational choice models do not generally address preference formation. We would go so far as to say that this is a significant weakness of the account and a potential source of strength among others, including the interpretive approach. But two points should be noted. First, scholars who employ the interpretive-historical approach tend not to tackle the endogeneity of preferences as a general research question; they usually limit their analysis to showing, as is evident in Gillman's own argument, that judicial actors are motivated by non-instrumental factors. (Hence, Gillman's concern with "why 'instrumentalism' has such a hypnotic hold on the imagination of our field."<sup>24</sup>) This preoccupation with emphasizing that political actors are not merely motivated by narrow self-interest weakens the contribution that the interpretive-historical approach could make to the general question of preference-formation: While the stress on non-instrumental motivations is a salutary antidote to an exclusive focus on self-interest (or policy preferences as it is usually formulated in this literature), it prevents advocates of the interpretive-historical approach from developing a comprehensive approach to the important issue of judicial motivation.

Second, we cannot necessarily conclude that strategic behavior may not play an important role in such a process simply because formal models of strategic decision making fail to take adequate account of preference formation. To the extent that preferences affect choice and, thus, judicial outcomes, good reasons exist to believe that political actors will attempt strategically to influence preferences. Of course, there is much we need to learn about these processes, and this is an area on which the strategic and interpretive-historical approaches could work together to further our understanding. But—and this is the more general and important point—the case has not been made that the interpretive-historical approach has some exclusive purchase on this essential feature of judicial politics.

#### DISCUSSION

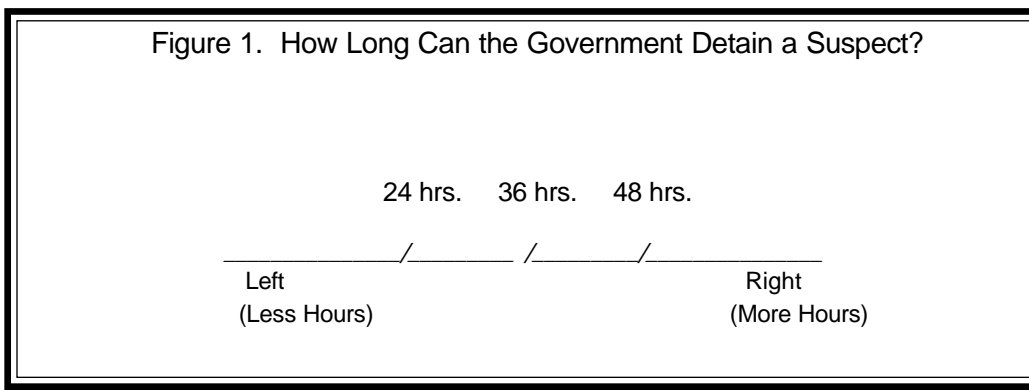
The major lesson we draw from the fact of under-inclusiveness is that it is unwise to take a position about the *a priori* superiority of a particular approach. We think, instead, that the present state of the discipline recommends a sympathetic division of labor. For those of us who seek to ground our explanations at the micro-level of intentional action, a comprehensive approach would require a general theory

of motivations such as the one offered by Weber in his analysis of social action in *Economy and Society*. With such an approach we could presumably accommodate both instrumental rationality (central to the strategic approach) and value rationality (which we take to be a central feature of the interpretive-historical approach) in our understanding of judicial decision making.<sup>25</sup> At present, however, no such comprehensive framework exists.

Thus, we agree with Gillman when he argues that the appropriateness of a particular approach is a function of the specific question being asked. Some questions are better approached with different methods. And our understanding of law and courts should be the product of the interaction of these different approaches.

Melinda Gann Hall, e.g., "Constituent Influence in State Supreme Courts," 49 *Journal of Politics* (1987): 1117-1124 and "Electoral Politics and Strategic Voting in State Supreme Courts," 54 *Journal of Politics* (1992): 427-446; and Melinda Gann Hall and Paul Brace, e.g., "Order in the Courts: A Neo-Institutional Approach to Judicial Consensus," 42 *Western Political Quarterly* (1989):391-407 and "The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts," 75 *Social Science Quarterly* (1994): 136-151.

<sup>6</sup> We refer to non-parametric or strategic choice accounts. Under these, individuals make rational decisions but the rational course of action is contingent upon their expectations about what other players will do unless they have a dominant strategy (a particular strategic choice that will produce the best outcome



We also agree with Gillman's endorsement of Smith's astute observation that, in assessing the relative merits of different methods, the relevant question is which approach "is doing the most work."<sup>26</sup> Where we differ from Gillman (and perhaps with Smith) is on how we would draw the line among the different approaches.<sup>27</sup> For, to the extent that many socio-legal phenomena contain a political dimension, we would insist that the strategic account has a fundamental role to play in our efforts to develop a comprehensive understanding of those phenomena.

regardless of what the others do). See Peter C. Ordeshook, *A Political Theory Primer* (New York: Routledge, 1992).

<sup>7</sup> It also has been applied to the Court. In *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), Walter F. Murphy paints a portrait of shrewd justices, who anticipate or know the responses of their colleagues and of other relevant actors, and take them into account in their decision making; of a group that would rather hand down a ruling that comes close to, but may not exactly reflect, its preferences than, in the long run, see another political institution (e.g., Congress) completely reverse its decisions or move policy well away from its ideal points. Elements, in other words, elucidates the strategic nature of judicial decision making.

More recently a group of (mainly) law and business school professors have adopted rational choice theory to study the role of the Court in the governmental system. See, for example, William N. Eskridge, Jr., "Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale Law Journal* (1991):331-417; Daniel A. Farber, and Philip P. Frickey, *Law and Public Choice* (Chicago: University of Chicago Press, 1991); John Ferejohn, and Barry Weingast, "A Positive Theory of Statutory Interpretation," 6 *International Review of Law and Economics* (1992):263-279; Daniel B. Rodriguez, "The Positive Political Dimensions of Regulatory Reform," 72 *Washing-*

### Notes

<sup>1</sup> Howard Gillman, "The New Institutionalism, Part I: More and Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics," 7 *Law and Courts* (1996-97): 6-11.

<sup>2</sup> *Ibid.*, 7.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Idid.*

<sup>5</sup> We adopt the material in this section from our forthcoming book, *The Choices Justices Make* (Washington, D.C.: CQ Press). In this article, as in *Choices*, we limit our discussion to the decision making of U.S. Supreme Court justices. For strategic analyses of other kinds of jurists, see work by



ton University Law Quarterly (1994):1-150; and Pablo T. Spiller and Rafael Gely, "Congressional Control of Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988," 23 *RAND Journal of Economics* (1992):463-492.

<sup>8</sup> Jack Knight, *Institutions and Social Conflict* (Cambridge: Cambridge University Press 1992), 17.

<sup>9</sup> If we do not, then our resulting explanations take on a tautological quality, "since we can always assert that person's goal is to do precisely what we observe him or her to be doing" (Ordeshook, *A Political Theory Primer*, 10-11).

<sup>10</sup> By emphasizing "over the long term," we mean that justices wish to create efficacious policy, that is, policy that other actors will respect and with which they will comply.

We also hasten to add that while strategic accounts typically assume that justices are policy seekers, this need not be the case. It is up to the researcher to specify the content of actors goals so as to give meaning to the assumption that people are preference maximizers. And, in fact, there are strategic accounts that attribute other goals to justices. See, for example, John A. Ferejohn and Barry Weingast. "A Positive Theory of Statutory Interpretation."

<sup>11</sup> See Charles M. Cameron, "Decision-Making and Positive Political Theory (Or, Using Game Theory to Study Judicial Politics)," paper presented at the 1994 Columbus Conference, Columbus OH.

<sup>12</sup> Opinions that fail to obtain the signatures of a majority become "judgments of the Court," which lack precedential value. This majority requirement for precedent is one of the Court's many norms, a subject we take up shortly.

<sup>13</sup> We adopt this paragraph from Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints* (Washington, D.C.: CQ Press, 1995), 45-47.

<sup>14</sup> Here we describe a sequence in which the Court makes the first "move" and Congress, the last. Of course, it is possible to lay out other sequences and to include other (or different) actors (see Christopher Zorn, "Congress and the Supreme Court: Reevaluating the 'Interest Group Perspective'," paper presented at the 1995 annual meeting of the Midwest Political Science Association, Chicago). For example, we could construct a scenario in which the Court moves first; congressional committees and Congress again go next but, this time, they propose a constitutional amendment (rather than a law); and the states (not the president) have the last turn by deciding whether or not to ratify the amendment.

<sup>15</sup> They also open themselves up for other forms of retaliation on the part of Congress and the President: legislation removing their ability to hear certain kinds of cases and impeachment, to name just two. See Murphy, *Elements of Judicial Strategy*.

<sup>16</sup> Such bargaining typically takes the form of a threat to publish a dissent from a certiorari denial. For more, see Epstein

and Knight, *The Choices Justices Make* and H.W. Perry, *Deciding to Decide* (Cambridge: Harvard University Press, 1991).

<sup>17</sup> For more details, see Jack Knight and Lee Epstein, "The Norm of Stare Decisis," 40 *American Journal of Political Science* (1996): 1018-1035; and Lee Epstein, Jeffrey A. Segal, and Timothy Johnson, "The Claim of Issue Creation on the U.S. Supreme Court," 90 *American Political Science Review* (1996): 845-852.

<sup>18</sup> Gillman, 7.

<sup>19</sup> *Ibid.*, 9.

<sup>20</sup> See Knight, *Institutions and Social Conflict*.

<sup>21</sup> Here we should give proper credit where it is due. Gillman cites Knight as co-authoring (with Epstein) a 1995 paper on *Ex parte McCardle*, 7 Wall. 506 (1869). That paper was in fact written by Epstein and Walker ("The Role of the Supreme Court in American Society: Playing the Reconstruction Game," in *Contemplating Courts*, ed. Lee Epstein [Washington, D.C.: CQ Press, 1995]). Knight and Epstein did write the 1996 article on *Marbury v. Madison*, 1 Cr. 137 (1803) ("On the Struggle for Judicial Supremacy," 30 *Law & Society Review* [1996]: 87-120).

<sup>22</sup> 1 Cr. 137 (1803).

<sup>23</sup> Gillman, 9.

<sup>24</sup> *Ibid.*

<sup>25</sup> See Jack Knight, "Interpretation as Social Interaction," (Unpublished Manuscript, Washington University in St. Louis), for a general discussion of what such an approach might look like for explanations of legal interpretation.

<sup>26</sup> Rogers Smith, "Ideas, Institutions, and Strategic Choice," 28 *Polity* (1995): 135.

<sup>27</sup> Given space limitations, we note only briefly an additional point of disagreement with Gillman—that the strategic approach fails to contribute to our understanding of important normative questions. This is an oft-stated criticism of rational choice theory. But we fail to see the merit of this sweeping claim. Many normative questions rest primarily on an understanding of the consequences of institutional arrangements, public policies, or particular judicial decisions. One of the benefits of the strategic approach is that it allows us to trace clearly the aggregate consequences of the interaction of individual social action.

For examples of philosophical arguments that employ the implications of strategic analysis in constructing their normative justifications, see Jack Knight and James Johnson, "Public Choice and the Rule of Law: Rational Choice Theories of Statutory Interpretation," in *Nomos: The Rule of Law*, ed. Ian Shapiro (New York University Press, 1994); and Jack Knight and James Johnson, "The Political Consequences of Pragmatism," 24 *Political Theory* (1996): 68-96. As in our earlier discussion, our claim here is not that strategic analysis is sufficient to answer important normative questions; rather we claim that it will often be central to understanding the social phenomena that is at the core of our normative claims.

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# PLACING JUDICIAL MOTIVES IN CONTEXT: A Response to Lee Epstein and Jack Knight

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Let me begin with those points of agreement that make our remaining disagreements purely academic (and thus, for us, still worth discussing). We agree that there are advantages to exploring the ways in which judicial decisionmaking is influenced, constrained, or constituted by institutional contexts. We also agree (contrary to what Epstein and Knight suggest) that our accounts should emphasize “the political elements institutional development” and not merely “organizational logic” or functionalism. We agree that we will develop a better understanding of the Court as an institution if we move away from methodological orthodoxy and toward an appreciation of the ways in which different methods can shed light on different dimensions of institutional politics. No single method can illuminate everything we might be interested in knowing, and this means that we should evaluate the strengths and weaknesses of various approaches by asking whether they give us satisfying answers to particular questions. And so the benefits of rational choice institutionalism should not be discounted on the grounds that it does not explain everything about institutional politics and the new historical institutionalism should not be discounted on the grounds that it uses data that is not machine readable and feels no need to translate explanations into models.

In my original essay I indicated that I was not making “an argument about the inherent problems” with rational choice or positive political theory. I pointed out that because “most powerholders are in the habit of thinking strategically at least some of the time” there are good reasons to believe that rational choice accounts “can be quite illuminating.” In other words, if we are evaluating the strengths of particular approaches in light of how well they answer particular questions, it seems to me that the strategic approach holds great promise in helping us understand what would lead judges to vote in ways that did not appear to reflect their sincere preferences (if that’s what “strategic decisionmaking” means; see below). Game theory has always been pretty good at illuminating why people do not always do what seems to be in their best interest, such as avoiding arms races or confessing to crimes.

I did claim (in what I thought was a rather modest, self-evident point) that the strategic approach may be less use-

ful if we are interested in examining aspects of institutional politics that are not usefully described as strategic. I have in mind the possibility that institutions encourage affiliated members to pursue particular substantive political missions or functions (including institutional maintenance) that are not best characterized in the language of self interest or that they generate some decisionmaking routines that are less than fully deliberative. Epstein and Knight address the former when they acknowledge that the emphasis among interpretivists “on non-instrumental motivations is a salutary antidote to an exclusive focus on self-interest (or policy preferences as it is usually formulated in this literature),” but they are also worry that this emphasis “prevents advocates of the interpretive-historical approach from developing a comprehensive approach to the important issue of judicial motivation.” If this is meant to suggest that interpretivists exclude from their analysis the motivation of strategic rationality and focus instead on non-instrumental motivations, then we have an example of an easily corrected misunderstanding, since (as I suggested in my earlier essay) interpretivists have been discussing strategic behavior on the Court for some time. In fact, our preference is to treat the issue of motivation (judicial values, purposes, agendas, interests, institutional perspectives) as a central object of inquiry, and this is one of the reasons why we think (perhaps mistakenly) that we have a conceptual advantage over approaches that simply assume that judges act on the basis of only one overarching motivation (such as the pursuit of policy preferences).

Whether the ascription of a single motivation limits the range of behavior that can be usefully explored by the strategic approach depends, of course, on how the concept of “strategic decisionmaking” is defined. Epstein and Knight suggest that a decisionmaker is being strategic when she “realizes that her fate depends on the preferences of others’ actions and the actions that she expects them to take (not just on her own preferences and actions)”; in other words, one thinks strategically when one attempts to promote the efficient accomplishment of one’s long-term interests in a way that anticipates the likely behavior of others. The examples offered by Epstein and Knight convey an image of justices as (a) focused exclusively on short-term goals (e.g.,

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announcing a rule that requires suspects arrested without a warrant to come before a magistrate within 24 hours), (b) willing to decide a case on the basis of their sincerely-held positions on the merits only when there are no discernible intracourt or inter-institutional challenges to that position, (c) inclined to decide a case on the basis of something less than their most preferred positions if concessions seem necessary to secure a majority or to evade an unwanted response from powerholders in other institutions, and (d) prepared to make a decision on the basis of positions with which they fundamentally disagree in order to avoid the threat of a consequence they consider even worse than losing a particular case.

I will suggest in a moment that strategic behavior need not be limited to decisions to bargain or retreat. But assuming for the moment that this is the feature of institutional politics that advocates of the strategic approach want to highlight (mostly as an addendum to the attitudinal model), it should be noted that there is little reason to think that Supreme Court justices are frequently forced to back away from their position on the substantive merits of a case, particularly at a time in the Court's history when justices seem less enamored with the norms against individual opinion writing. More importantly, if there is a disagreement about this, interpretivists think that the best way to determine whether a justice acted sincerely or strategically (if these are to be considered two different things) is through a careful (interpretive) examination of whether the justices believed that circumstances forced them off their preferred positions. We need this information about the justices' actual perceptions and interpretations of events because the mere fact that a justice may have changed her mind during the opinion-writing stage, or that the Court appears to have avoided a conflict with a coordinate branch of government, is not sufficient evidence of a strategic bargain or retreat. One of the first points made by Murphy in *Elements of Judicial Strategy* about intracourt dynamics is that justices often attempt to influence each other by making arguments on the merits, and "collections of judicial papers show that time and again positions first taken at conference are changed as other Justices bring up new arguments" (Murphy 1964:44). The influence of professional training and legal argument can even lead a justice who was originally assigned a majority opinion to conclude that "additional study had convinced him that he and the rest of the majority had been in error" (*ibid.*), which I assume is not considered a strategic shift under any definition of "strategic." The way that Murphy determined whether a shift in position should be characterized as a strategic retreat or a principled change of heart was to use "traditional legal-his-

torical" methods (e.g., reviewing conference notes, draft opinions, memos, and memoirs) in order to better understand the justices' jurisprudence and deliberations (*ibid.*,:3).

The same kind of interpretive analysis is necessary in order to determine whether justices are attempting to evade conflicts with powerholders in other institutions. I think the evidence suggests that Marshall acted strategically when he refused to order the Virginia Supreme Court to release the Cohen brothers in *Cohens v. Virginia*, but I also think that when the Court refused to issue an injunction against President Andrew Johnson in *Mississippi v. Johnson* it was applying well-established constitutional principles. Advocates of the strategic approach want to claim that judges are sometimes forced to back down when challenged by other institutions, and interpretivists agree; but we also wonder how we are to know whether we are witnessing the performance of what some strategic scholars refer to as a "separation of powers game," or a more straightforward application of separation of powers principles, except through an interpretive reconstruction of prevailing legal interpretations and political contexts?

While the strategic approach is often sold as a more sophisticated version of the attitudinal model (in that it sheds light on those circumstances when judges are forced to back off their preferred positions), it is important to note that there is nothing about the definition of strategic behavior offered by Epstein and Knight that requires a strategic decisionmaker to adjust her preferences when faced with pressure or uncertainty. In fact, for an institution that is expected to remain independent of political pressure, it would seem that the least strategic course of action would be to develop a reputation for bargaining, retreating, and evading. Indeed, the course of action that might best maximize the interests of the justices in the long run would be to act in away that appeared principled rather than strategic (see Murphy 1964:174-175). Thus, just as the game of Chicken generates the paradox that acting irrationally may be a rational way of forcing one's opponent to swerve, so too might it be that, for the Supreme Court, non-strategic decisionmaking might be viewed as a paradoxical form of strategic decisionmaking. However, if this is so, then the idea of a "strategic decisionmaker" suddenly expands beyond those decisional tendencies highlighted in the examples offered by advocates of the strategic approach to encompass almost any imaginable course of action.

Advocates of the strategic approach may view this as evidence of how their approach is capable of capturing a more full range of judicial behavior. But those who are inclined toward interpretive-historical institutionalism think that this paradox exposes a possible weakness in the con-

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cept of “strategic decisionmaking,” or at least exposes the dependency of the concept on interpretive analysis. A justice such as Scalia, who fancies himself an ideological spokesperson—or perhaps Brennan and Marshall with respect to death penalty cases, or any justice with clear and consistent views on an issue—may often find himself in a position where he would need to make a concession in order to secure a majority, but after considering the alternatives he may conclude that his preferred position is best promoted by its more pure articulation in a plurality or concurring opinion than by elaborating a watered-down version in an opinion of the Court (Murphy 1964:197). It would be difficult to understand the sense in which this calculation should be characterized as non-strategic rather than just differently-strategic than a decision to bargain. Moreover, some justices, when faced with intransigent competitors, may think that both their short-term and long-term interests are best served by standing firmly behind an unpopular but principled judgment rather than by retreating or evading a conflict, as with (perhaps) the four conservatives who held firm during the New Deal battles, the majority in the second flag-burning case (*U.S. v. Eichman* [1990], decided after Congress attempted to overturn *Texas v. Johnson* [1989] with the passage of the Flag Protection Act of 1989), and the Court as a whole in the famous joint opinion in *Cooper v. Aaron* (1958).

In general, if one is being strategic whenever one considers the consequences of one’s behavior in light of the behavior of others, and not simply when one bargains or retreats, then all of these examples, plus virtually all decisions handed down in the history of the Court, are properly labeled strategic. (The only example of non-strategic voting that comes to mind is the aging Justice Grier’s wandering votes during the conference on the *Legal Tender Cases*. That behavior earned him an invitation to retire.) In *Dred Scott*, for example, would the strategic decision have been to avoid the slavery issue entirely by invoking the precedent of *Strader v. Graham* in order to establish the point that the Missouri high court had the final say on matters of state law (as Justice Nelson was initially prepared to write), or would it have been to address the constitutional issues that were previously sidestepped (as Justice Wayne proposed)? If the latter, was it more strategic to uphold the power of Congress to address the issue of slavery in the territories through the political process (as Justices Curtis and McLean suggested) or to write an opinion that might have had the effect of keeping the issue of slavery from dividing the Union by ruling that neither Congress nor the federal judiciary have any authority to determine the status of slaves (as Chief Justice Taney indicated in his majority

opinion)?

Raising these questions makes clear that what distinguishes these alternative courses of action is not the degree to which the justices exhibited a concern about the interactive effects triggered by the behavior of others but rather the influence of different sets of preferences and concerns on the justices’ calculations. (See also Murphy’s [1964:202-207] discussion of the different approaches taken by Black and Stone toward economic substantive due process.) If this is true, then what needs to be illuminated is not the abstract question of whether the justices engage in strategic decisionmaking but the more specific question of what sorts of considerations led a particular judge to conclude that a particular course of action—whether bargaining or not bargaining, retreating or standing firm, evading or confronting, acting sincerely or insincerely—was the best course to adopt under the circumstances. Once these motives and contexts have been illuminated, the question then becomes, how much do we gain by way of explanation when we add the extra concept of “strategic decisionmaking”?

(One might think about this in light of the Prisoner’s Dilemma. It is tempting to assume that the “strategic environment” forces the prisoner to confess. But the question of what is the “strategic” course of action depends entirely on the prisoner’s preferences and concerns. Once you know that he is the kind of person who would turn in his friend in order to save his hide, then you know all you need to know about how he will cope with his environment. If instead you found out that he was the sort of person who would rather rot in prison than get a reputation as a snitch, then you also know that he is in the sort of environment that will lead him to choose jail. In both cases, what enables us to understand why the prisoner acted as he did is not the concept of strategic decisionmaking but rather our familiarity with what the prisoner cared about.)

And so there are still a number of issues that deserve more attention. If strategic decisionmaking means moving off one’s preferred position, then rational choice can illuminate how this happens but it may apply only to a small range of judicial decisions, and even then, the question of whether a justice actually engaged in a strategic retreat seems to be an appropriate object of interpretive verification. If strategic decisionmaking can include almost any purposeful course of action, then the concept only helps us understand judicial behavior after we know the actual motives and concerns of judges. Maybe this means that our division of labor will consist of interpretive scholars identifying a range of judicial motivations and concerns—the pursuit of personal policy preferences, the maintenance of ju-

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risprudential traditions, the commitment to consolidate national power, the desire to protect the independence of the Court, the interest in avoiding impeachment, the promotion of the political agenda of a dominant coalition or class, perhaps even the ambition to run for president—and advocates of the strategic approach will see which of these is productively translated into rational choice models and which put too much strain on that conceptual apparatus. (This means keeping in mind Murphy's [1964:xi] warning that "the formal theory of games" often leads to "distortions of reality" when applied to judicial decision-making.) It may also be useful to talk more about which aspects of Supreme Court politics are not properly considered "strategic" and thus (by definition?) not usefully examined through the methods of rational choice institutionalism, as well as whether there might be certain institutional effects that cannot be effectively explored through the use of historical-interpretive analysis.

Let me end as Murphy ended *The Elements of Judicial Strategy* (1964:207-9), with a comment about the role of a judge that, while painfully romantic, still gets at some of the issues we have been discussing. He wrote that, "as rulers, judges who wish to see their policy choices become operative cannot always escape the necessity of negotiation or resort to devious stratagems." At the same time, "No combination of strategy and tactics can substitute for the other qualities which go to make a good judge"—or, as

I would put it, those institutional characteristics which may shape the self-image and motivations of Supreme Court justices. "In reflecting on the cardinal virtues of a judge, Lord Justice Denning has enumerated 'Patience to hear what each side has to say; Ability to understand the real worth of the argument; Wisdom to discern where truth and justice lie; Decision to pronounce the result.' To this list one might add: Prudence to know how much truth and justice and wise policy can be achieved at any one time and how they may be most surely and effectively attained; Courage to pursue such a course even when it means risking some political dangers and enduring bitter criticism from contemporaries.... Strategy, of course, is concerned only with prudence. "There is no question that, with the help of interpretivist reconstructions of judicial motivations and political contexts, rational choice scholars can provide insights into those times when the justices engage in Bickelian shifts from principle to prudence. But scholars interested in the question of whether the Court's mission, history, constituency, and structure shapes the justices' understanding of what it means to be a "good judge"—or for that matter a "ruler"—should be encouraged to explore the advantages of the sort of "new institutionalism" that Rogers Smith imagined might be the future of public law (see "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 [1988]:89-108).

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## A POSTSCRIPT FROM EPSTEIN AND KNIGHT

When we learned that Howard Gillman planned to respond to our essay, we were delighted. We hoped that Gillman would end the discussion on a high intellectual plane.

We were somewhat disappointed. Rather than respond to our comments about his favored approach, he continues to attack the strategic account. And he continues to get it wrong.

Gillman suggests that he is still unsure as to the exact definition of strategic decision making, but we were quite precise in our essay. It is not appropriately characterized as merely retreat, bargaining, misrepresentation, or lack of sincerity—all definitions that can be found in Gillman's response. Strategic decision making is about interdependent choice: an individual's action is, in part, a function of her expectations about the actions of others.

The definition is as simple and as broad as that. We find it odd that Gillman apparently considers such a broad conception as a negative point against the value of the approach. We, on the other hand, see this as the very fact underlying its importance. For it is merely an acknowledgment of the breadth of the phenomena that might be explained. If Gillman believes that the pervasiveness of strategic decision making undermines or trivializes the importance of the approach, then

how does he defend the value of the interpretive-historical approach with its emphasis on treating "the issue of motivation...as a central object of inquiry" in the face of the obvious fact that motivations are fundamental to all intentional action? Surely, the ubiquity of motivation does not undermine the importance of the interpretive-historical approach. But, as we said in our essay, an understanding of motivations alone will not suffice as an explanation of judicial politics. Judicial politics is about the interactions of individual actors with their various motivations. It is in understanding the implications of this interaction that the value of the strategic approach rests.

We could go on. But, rather than prolong the debate in the pages of *Law and Courts*, let us simply direct attention toward our new book, *The Choices Justices Make*. There, we lay out the strategic account in some detail; assess its explanatory power against information mined from the Court's public records and from the private papers of Justices Brennan, Douglas, Marshall, and Powell; and, ultimately, hope to make a compelling case for the importance of injecting strategic analysis into future studies of the Supreme Court, whether those studies focus on the choices justices make or the doctrine that they produce.

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# A FIFTY-STATE SUPREME COURT DATA BASE\*

\*A Multi-User Data Base to be Created  
by a Grant from the National Science  
Foundation

MELINDA GANN HALL, *MICHIGAN STATE UNIVERSITY*,  
CO-PRINCIPAL INVESTIGATOR

Paul Brace and I are very pleased to announce the National Science Foundation's (NSF) support of our proposal to construct a state supreme court data base for the academic community. The project, to begin in June, will be conducted jointly at Rice University and Michigan State University. Designed to be a multi-user data base appropriate for scientific inquiry proceeding from a variety of theoretical and methodological perspectives, the project will be the first to assemble comprehensive data on the high courts of all fifty states.

The impetus to create a state supreme court data base emerged from our own scholarly interests in comparative judicial studies and the politics of institutions, and from the absolute frustration of having to invest an extraordinary amount of time in routine data collection in order to address even the simplest research questions. Also, we were astonished at the difficulty, and in some instances the impossibility, of locating sources for many of the states. For instance, such basic information as the types of internal operating rules utilized by courts or the partisan affiliations of the justices, are not uniformly reported.

With the goal of facilitating state judicial politics (and comparative) scholarship, and inspired by the United States Supreme Court and Courts of Appeals projects, we submitted an initial proposal to NSF in August 1995. Early in 1996, we received a project development grant to design a data base that would serve the wide range of interests represented in the political science community. To provide guidance, NSF appointed a Board of Overseers, composed of Robert Carp (University of Houston), Eugene Flango (National Center for State Courts), Lawrence Friedman (Stanford University), Donald Songer (University of South Carolina), and Harold Spaeth (Michigan State



University). With the advice of this distinguished group of scholars, Paul and I designed the actual project that will begin in June.

As stated, Paul and I started with the premise that the lack of a single reliable and systematic data base has impeded, and continues to hamper, the development of state judicial scholarship. Anyone interested in studying state courts, including graduate students writing dissertations, has been forced to construct unique data sets to explore their scholarly interests. And, as I just mentioned, evaluation of even seemingly simple and straightforward hypotheses requires extensive hours of reading and coding. This tedious and time-consuming activity may have some rewards but it also detracts from the time available for thinking, analysis, and writing. Too often, time that could be spent thinking about these diverse courts instead is expended on the mundane task of collecting data.

The consequences of the lack of a standardized data base on state courts are severe. Given the daunting data collection burdens involved with state judicial politics research, scholars typically have resorted to intensive examinations of single states or fifty-state studies at very high levels of aggregation. As a result, the literature reflects a compartmentalization of findings and a disjunction between microlevel and macrolevel explanations of judicial politics. While important strides have been made in understanding the politics of state courts, debate and cumulative progress in the subfield have been hampered because studies often are based on data from different states, time periods, or levels of analysis. Specifically in terms of theory, we have yet to achieve a very complete understanding of the role of institutions and context on judicial politics, nor do we understand the interaction of microlevel and macrolevel forces,

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leaving our theories incomplete. And, most fundamentally, we simply do not have anything approaching a comprehensive picture of how the state courts actually operate.

Without a systematic data base, many findings in the state judicial politics literature will remain anecdotal and descriptive, and more general theories of judicial processes and behavior will continue to be elusive. This is particularly unsettling because, as Paul and I have argued, American state courts stand as diverse comparative laboratories that offer analytical leverage for addressing many important contextual and institutional hypotheses about judges, courts, and law. Systematic analyses of multiple state courts will enhance our understanding of state adjudication and also will promote the development of theories capable of unifying the contextual and individual forces affecting the operations of courts. In other words, we will have the capability of building models that are not institution-specific, or not limited by time and place.

With these thoughts in mind, our objective is to create a state supreme court data base that will provide a wealth of information about state supreme courts, which then can be used as the point of departure for theoretically driven empirical studies across the broad spectrum of issues critical to scholars of judicial politics. As discussed below, the data base will combine information about justices' votes, court decisions, and case characteristics with the justices' personal attributes, institutional rules and structures, and state contextual variables. By bringing together data from multiple contexts, years, and levels of analysis, this survey of state high courts will support research of theoretical importance across a range of analytical approaches and will hasten the development of theory that connects judges with their institutional, political, and social contexts. Moreover, the confluence of the diverse efforts that are likely from the various intellectual "corners" of the judicial politics and state politics fields will promote competing explanations for judicial politics, lively theoretical discussions, and rigorous methodological debate. Indeed, the stimulation of vigorous dialogue and the means to evaluate alternative perspectives empirically, is exactly the point of this endeavor.

#### **DESIGN ISSUES**

The pivotal concern with constructing a multi-user data base is collecting the data in a practical amount of time and with the expenditure of a reasonable amount of resources, while simultaneously producing a resource that justifies both time and cost. After discussions with our advisory board, we explored the primary elements that

would be entailed in the assembly of such a data base. Four major issues emerged with regard to the design: 1) whether to code a sample of states or all fifty states, 2) whether to code samples of supreme court decisions within states or the universe of all decisions, 3) whether to code a single year or multiple years, and 4) whether to code data collected from different decades or from consecutive years. While no design is perfect, we decided to collect information from all fifty states, to use sampling when necessitated by a court's caseload, and to code three consecutive years of data starting with 1995 (the most recent complete year available in the published reporters) and working back.

The decision to collect data from all fifty states rather than from selected states was an easy one. Universally, the scholars on our advisory board and others who have offered their advice agreed that assembling data from all fifty states is crucial. Such a strategy will give us comprehensive information about the nature of these courts' dockets, who wins and loses the cases, and a host of other important data essential to an understanding of these courts.

The other issues were more difficult, particularly the decision about whether to sample cases within states or to code the universe of published decisions. Overall, the number of court decisions issued by state supreme courts each year is formidable. In 1994, state supreme courts decided between 66 (Delaware) and 1,543 (Oklahoma) cases with formal, signed opinions, or an average of 228 cases per state.

At a meeting with our advisory board last April, we agreed that a practical approach to coding the opinions in the states was to collect and code all cases in states issuing 200 opinions or less per year, and to draw a random sample of 200 opinions from states where more than 200 opinions per year were delivered. Employing this sampling procedure, and noting the actual average computed for 1994, we expect to code an average of 200 cases per court per year. In other words, we anticipate coding about 10,000 court cases for each year for all states. Needless to say, this will be the most important and labor-intensive aspect of the project.

Based on the number of hours research assistants (RAs) work per academic year, and committing one-half of our work-week to the project, Paul and I estimate that with four RAs working with us, we can code three years of data in three calendar years, in addition to the other information to be included in the data base. This strikes us as imminently reasonable.

Finally, we decided to code consecutive years of data rather than single years selected from different decades (a

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strategy suggested and considered). Given the importance of establishing an complete picture of the operations of these courts, along with such empirical issues as being able to measure justices' predispositions across a series of cases, we opted for consecutive years. Overall then, Paul and I will collect and archive three years of data (1993 through 1995) for all fifty states, with the target completion date of June 2000.

#### **MAJOR VARIABLES**

As mentioned, we will be coding a great deal of information about the cases decided in state supreme courts from 1993 through 1995. While Paul and I have made every effort to use as examples the coding schemes for the United States Supreme Court and Courts of Appeals data bases, we will have to modify these codebooks substantially to accommodate the considerable differences in dockets between federal and state courts. Based on a pilot study we conducted for the initial grant proposal, we have developed a preliminary coding scheme appropriate for state supreme courts. However, we wish to emphasize that our current scheme is a draft. Paul and I will devote this summer to refining the coding scheme, before the actual coding begins in Fall. We plan to code a sample of cases from all fifty states, and to use this information to tighten the scheme already developed so that it may be applied consistently and accurately across all fifty states. As scholars of state politics, we are keenly aware of the complexities of litigation before state supreme courts and the diverse nature of these institutions, and recognize that it will be a challenge to devise a plan to capture these complexities.

Generally, the major variables we expect to code include basic identification variables (e.g., state where the case is litigated, docket number, citation), chronological variables (e.g., date of oral argument, decision date), background variables (e.g., date of first formal decision, whether administrative action preceded the litigation, the forum being reviewed, identity of the petitioner or appellant, identity of the respondent or appellee, whether amicus curiae briefs were filed, disposition of the lower court's decision), substantive variables (e.g., authority for the decision, primary issues), outcome variables (e.g., winning party, direction of supreme court's ruling), votes variables (e.g., number of votes in majority, number of concurrences, number of dissents, individual justices' votes), and other miscellaneous information necessary for using the data base (e.g., whether the cases collected in each state represent a sample or universe).

In addition to the case data just described, we will be collecting information about the justices staffing the bench

in the states' highest courts. As mentioned earlier, some of this information is surprisingly difficult to obtain. While there are many biographical directories for judges, the fact remains that many state supreme court justices do not list their partisan affiliations, especially in states where judges are chosen in nonpartisan or retention elections. Further, there are tremendous inconsistencies in reporting across justices and states on all variables. Paul and I will start with published sources, but we also will be contacting state court administrators and clerks of court, and ultimately sending out questionnaires to the justices themselves, to complete these data. The specific background variables we will collect include each justice's religion, partisan affiliation, education, date of birth, age at the time of appointment, previous positions and experience, gender, race, and ethnicity.

Finally, we will include in the data base various institutional features and state contextual variables. Institutional variables include selection procedures for judges, terms of office, retirement rules, selection procedures for chief justices, conference rules, and opinion assignment methods. Contextual measures include inter-party competition, elite and institutional ideology, income and economic performance, population and population change, and the partisan composition of legislatures. Fortunately, for many of these variables, there are excellent published sources. Otherwise, for data not reported, Paul and I will contact court administrators, clerks of court, or other state officials.

#### **CONCLUSIONS**

Paul and I wish to emphasize that our role in this project is not merely supervisory. We will be fully immersed in the actual coding of all data and will be working closely with our RAs on a day-to-day basis throughout the project. Further, we will utilize constant reliability monitoring in order to guarantee accuracy and consistency in coding. Paul and I will make every effort to produce a resource that is accessible and useful to the scholarly community.

With the release of the data base, we hope to generate interest in the politics of state courts and to promote efforts to move our theories forward by providing a laboratory through which the extraordinarily complex relationships that affect the politics of the judiciary can be unraveled. We expect the data base to be attractive not only to scholars just entering the field but also to more established scholars who wish to expand their scholarly interests. We are convinced that studies of the states, while intrinsically important in their own right, offer outstanding opportunities for transcending current theoretical bounds, and we hope to see many other scholars engaging in these pursuits.



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# THERE'S NO PLACE LIKE HOME ON THE WORLD WIDE WEB

Lee Epstein, *Washington University* and Jerry Goldman, *Northwestern University*

We devote this column to some simple instructions for web novices. For the Rip Van Winkles who have just awakened to the digital age, much of what we describe below will appear as old mainframe text-processing instructions from the good old days of RUNOFF. In many respects, this is exactly what you shall be creating. We lay out our model, show you what it will look like, and then add a postscript with some counsel for those who want to jump quickly into web authoring tools.

Before starting on the basics of writing World Wide Web (aka WWW) pages, it is important to understand a few terms used in conjunction with the Internet.

## DEFINING TERMS

**Server** - A computer connected to the Internet that stores files for users to access. All servers on the Internet have an address, such as merle.acns.nwu.edu.

**Browser** - A program used to look at World Wide Web pages. The two most common browsers are Netscape Navigator and Microsoft Internet Explorer.

**Web Page** - A "page" is one file of information available on the WWW. Web pages are designed using Hypertext Markup Language, described below. Every WWW file (or page) must end with .html or .htm.

**URL** - Uniform Resource Locator. This is the Internet address of the web page. A URL has the form: `http://oyez.at.nwu.edu/cases/index.html`

This is a breakdown of the different parts of the URL:

`http://` - This tells the computer to use the HyperText Transfer Protocol, which is the method of transmitting WWW pages.

`oyez.at.nwu.edu` - This is the address of the server (computer) where the information is stored.

`cases` - The word "cases" bracketed by two slashes signifies a folder or directory containing one or more files. There may be several folders or subdirectories within a single URL

`index.html` - This is the specific document that the browser is looking for.

So, in plain terms, this sample URL is telling the browser to look on the server named "oyez.at.nwu.edu" for a folder named "cases". Inside that folder is the file "index.html".

**Hyperlink** - "Active" areas of a web page. This may be a picture or text anywhere on the page that responds to clicking on it with the mouse. Standard hyperlinks are written in blue text, as described below.

## WRITING A WEB PAGE

Web pages should be created using a plain text editor, not a

word processor like Microsoft Word (Writing pages in Word or similar software may imbed formatting or other strange characters to gum up your web page). BBEdit is a widely available program for writing web pages on Macintoshes. HTML Assistant or Homesite does the same for Windows.

The HTML Language is based on a tag system. A tag is an instruction that appears within a less than "<" and greater than ">" symbol. Web browsers do not print whatever is inside these tags. Instead, the browser uses the tags to format the information on the page.

The instructions that can be used within a tag are a pre-defined set of directions. Most tags need to be closed with a slash when the tag no longer applies. For example, the HTML `<bold>Hello There!</bold>` would result in Hello There! in bold viewed through a web browser. Since the tag is closed, anything that appears after that tag would appear as plain text.

Some HTML tags are mandatory and thus required on every web page. The following chart describes these tags. Unless specified, the tags must appear in this order as well. (HTML is not case-dependent.)

`<HTML>` This tells the browser that the information on the page is written in HTML. It should be the first tag of the file, and the `</html>` tag should be the last tag of the file.

`<HEAD>` This signifies the header of the page, such as the title.

`<TITLE>` This is what appears in the Title Bar of the browser when it is reading that page.

`<BODY>` This is used to denote the start of the information to be displayed on the page itself, as opposed to in the header.

This is all you need to create a web page. More whistles and bells will follow, but this will surely allow you to start accelerating onto the information highway. Consider the following example of Edward Corwin's homepage, if he'd been around to create one:

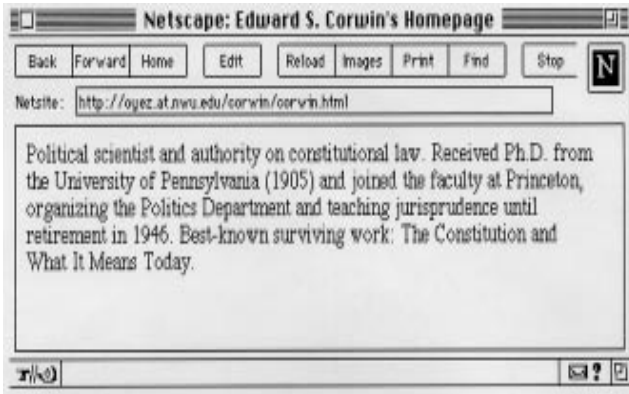
```
<html>
<head>
<title> Edward S. Corwin's Homepage</title>
</head>
<body>
```

Political scientist and authority on constitutional law. Received Ph.D. from the University of Pennsylvania (1905) and joined the faculty at Princeton, organizing the Politics Department and taught jurisprudence until retirement in 1946. Best known surviving work: *The Constitution and What It*

Means Today.

```
</body>
</html>
```

When viewed through a web browser, the text above would look something like this:



This simple document does not harness the hyperlinking capabilities of HTML, however. Moreover, the page would lose appeal as the mountain of information on Corwin's cv were cast into a single document. Thankfully, there are other, optional tags available to help organize and format the page. There are three main groups of tags.

### SOME COMMON TAGS AND TYPES

#### LAYOUT TAGS

**<P>** This is a paragraph tag. It creates a blank line and then starts whatever text follows it on a blank line.

**<BR>** This is a break tag. Similar to a paragraph tag, it moves whatever text follows it to the start of the next line. It does not, however, add a blank line.

**<HR>** Horizontal Rule. This tag inserts a horizontal rule line into the file, which may be useful for organizing a file into sections.

**<H1 >** through **<H6>** These tags consist of H and then a number from 1 to 6. It represents a header, and places the text inside the tag in a larger size. The size is determined by the number; 1 being the largest and 6 the smallest.

#### FORMATTING TAGS

**<B>** This puts the text following the tag in bold type.

**<I>** This *italicizes* the text following the tag.

**<U>** This underlines the text following the tag.

**<Center>** This centers the information within the tag.

#### HYPERTEXT EFFECTS TAGS

These tags make web pages interactive and add a multimedia component to them. Because they are more powerful, they require more detailed descriptions.

##### A HREF

"A HREF" stands for A Hypertext REFERENCE. It is the start of the tag that tells the browser to make some text active and connect it to another URL. The full formation of the tag is the A HREF followed by an equal sign, and then the URL of the

page to connect to. The hypertext ends with a **</A>** tag.

If a page has HTML like this:

Please visit the **<a href="http://www.nwu.edu">**Northwestern Home Page**</a>**

Then the words "Northwestern University" will appear in blue text when viewed through a web browser. Clicking on the blue text will connect to the server (www.nwu.edu) and display its contents in the browser window.

##### IMG SRC

"IMG SRC" stands for Image Source. This tag is used to display an image in the browser window. Web browsers can read images in two formats: JPEG or GIF. The IMG SRC tag is also followed by an equals sign and then the URL to the image or picture file.

For example, HTML like this:

```

```

Looks for an image file named "corwin.gif" in the images folder ("images") on the server "myserver.home.edu".

##### LISTS

HTML can automatically create lists of items. There are two major types of lists:

###### UNORDERED LIST

This creates a buffeted list of items. This type of list is created with the **<UL>** tag.

Each item in the list should be preceded with a **<LI>** tag, which does not need to be closed. So the HTML for an unordered list for the days of the week would be:

```
<UL>
  <LI>Sunday
  <LI>Monday
  <LI>Tuesday
  <LI>Wednesday
  <LI>Thursday
  <LI>Friday
  <LI>Saturday
</UL>
```

###### ORDERED LIST

An ordered list creates a numbered list of items. The first item is preceded by a number, starting at one and increasing to the end of the list. This list is created with an **<OL>** tag, again with **<LI>** denoting each list item.

```
<OL>
  <LI>Fall Quarter
  <LI>Winter Quarter
  <LI>Spring Quarter
</OL>
```

What follows is the HTML for a basic web page which uses many of the tags described above. On the following page is a screen shot of what that HTML looks like in a browser window.

```
<html>
<head>
<title>Edward S. Corwin's Homepage</title>
```

```

</head>
<center>
<H1>Edward S. Corwin's Homepage.</H1>
<p>

</center>
<p>
<body>

```

Political scientist and authority on constitutional law. Received Ph.D. from the [University of Pennsylvania](http://www.upenn.edu) (1905) and joined the faculty at Princeton, organizing the [Politics Department](http://www.princeton.edu/~politics/) and taught jurisprudence until retirement in 1946. Best-known surviving work: *The Constitution and What It Means Today*.

```

</body>
<br>
<hr>
<br>
<H3>Memorable Courses.</H3>
<ol>
<li>Politics 101: Jurisprudence
<li>Politics 305: Proseminar on The Relevance of Judicial
Review
<li>Politics 400: Directed Graduate Study
</ol>
<br>
<hr>

```

```

<br>
<h6>Last revised: April 29, 1967</h6>
</body>
</html>

```

See the "Screen" below.

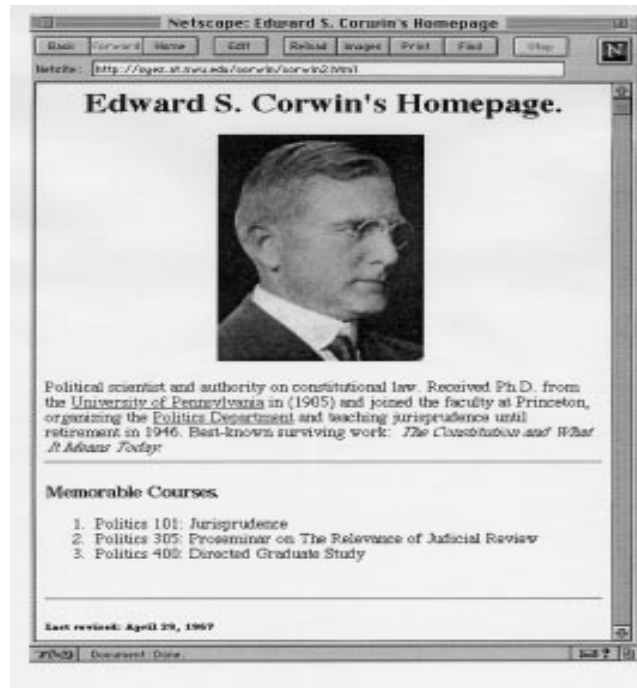
#### POSTSCRIPT

Adding tags to text to create HTML documents is tedious and prone to error. Thankfully, there are several software products on the market that automatically imbed tags to your documents the way word processors do routinely today.

HTML authoring software enables WYSIWYG ("what you see is what you get") results. What you type on the screen (holding, paragraphing, number lists) will be translated into HTML. Netscape Navigator 3.0 Gold is free for educators. It contains both a web browser and an editor so you can create your HTML document and then view it in Netscape. Claris Home Page 2.0 and Adobe Page Mill 2.0 are well-executed editing programs that offer additional features and ease-of-use. Both programs run on multiple platforms.

Getting started will require a visit to your computing center to learn how: to log on to your faculty or institutional web server, to upload and download your documents, and to know whom to contact when things don't go according to plan.

Don't let all this intimidate you. The journey through a thousand web pages begins with the first click!



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# BOOKS TO WATCH FOR

**Wayne McIntosh** and **Cynthia Cates** in *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas* (Greenwood Press, forthcoming, 1997) argue that much of what judges do is an intellectual project in which history (sometimes ancient history) has relevance. To other decision-makers the long-ago past relevant only as convenient props, window dressing to be invoked for symbolic effect. To judges, the past is a serious reference. Hence, judges have every reason to believe that what they do now will not only be consequential to the parties involved in a conflict and others similarly situated, but will have considered relevance to lawyers and judges in the distant future. This sets the stage for individual judges to pursue their individual intellectual interests, to develop their ideas. This means that there is more than one way of looking at what judges do. They do produce outcomes, which are important in and of themselves, and this makes the process by which those outcomes are arrived at important. But distinct from the outcomes they produce and the preferences they express, judges can, if they choose to devote the energy to it, engage in the process of developing their ideas as intellectual entrepreneurs.

In this book, **McIntosh** and **Cates** develop the notion of judicial entrepreneurship as a useful concept for understanding the intellectual contests involved in legal reasoning. The evidence we bring to bear on the question is based upon the writings of four judges, Jerome Frank, Sandra Day O'Connor, Hans Linde, and Louis Brandeis. Although all are prominent jurists, the outward similarities end there. Frank, who sat on the Second Circuit, was a flamboyant liberal philosopher, a major New Deal player, and one of the key figures in the mid-century legal realism movement. By contrast, O'Connor is a more modest judge, a conservative republican, who thus far is primarily renowned not for her jurisprudence, but for the fact that, in 1981, she became the first woman to sit on the nation's highest tribunal. Yet another portrait is painted by Hans Linde, recently of the Oregon Supreme court, and little known outside the insular world of appellate law. And then there is Louis Brandeis, a true star in the pantheon of jurisprudence, whose influence on law and politics is almost unparalleled. As we demonstrate, however, the four share one crucial commonality. They may all be said to have assumed the intellectual risks of aggressively pursuing ideas of particular interest to them in the legal marketplace--in this book's terminology, they are judicial entrepreneurs.

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In *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (University Press of Kansas, 1997) **Paul Kens** examines the ways in which Field's experiences in early California influenced his jurisprudence and produced a theory of liberty that reflected both the ideals of his Jacksonian youth and teachings of Laissez-faire economics. **Kens** sheds new light on Field's role in helping the Supreme Court define the nature of liberty and determine the extent of constitutional protection of property. By focusing on the political, economic, and social struggles of his time, Kens explains Field's jurisprudence in terms of conflicting views of liberty and individualism. The book firmly establishes Field as a persuasive spokesman for one side of the conflict and as a prototype for the modern activist judge, while it also provides an important new view of capitalist expansion and social change in Gilded Age America.

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**Roy B. Flemming** plans to complete a new book in 1998. He has returned to Texas A&M University after nearly seven months this past year in Ottawa, Canada collecting data on the leave to appeal process in Canada's Supreme Court. Leave applications are analogous to petitions for certiorari in the U.S. Supreme Court.

**Flemming's** research, supported by a two year grant from the National Science Foundation, is aimed at determining the extent to which explanations of agenda setting by the U.S. Supreme Court can be supported and extended to other high courts, in this instance, Canada, that have significant public policy responsibilities and wide discretion over the cases they chose to hear.

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**Steven A. Light** and **Kathryn R.L. Rand** are coauthors of two recent publications: "Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives," 2 *Michigan Journal of Race and Law* 1 (1996) and "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming," Sovereignty, and Identity, 4 *Virginia Journal of Social Policy and the Law* (March, 1997).

**Are you writing a book or have you  
recently had one published?  
If so, please contact the Editor.  
Suedavis@udel.edu**

The Second Edition of **Harry Stumpf's** *American Judicial Politics* (Prentice-Hall) is expected to appear on the shelves in July, in time for adoption for the fall term, 1997.

The book is considerably expanded over the first edition, with more complete and detailed coverage of the jurisprudential movements affecting the political study of courts. The basic structure of the book remains the same, but each chapter is updated, using the considerable body of research published in the last ten years. The book is an attempt at a comprehensive coverage of the subfield and is aimed at upper division and graduate level courses.

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**Daniel Hoffman's**, *Our Elusive Constitution*, is scheduled to be published by SUNY Press in August. It will be the first volume of a new American Constitutionalism Series, edited by **David Spitzer**.

**ACCESS BOOK REVIEWS AT THE WEBSITE FOR  
THE LAW AND POLITICS BOOK REVIEW**

[HTTP://WWW.PSCI.UNT.EDU/LPBR/](http://www.psci.unt.edu/lpbr/)

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# SECTION NEWS AND ANNOUNCEMENTS

## Calls for Nominations

### SECTION NOMINATIONS

At the business meeting at the 1997 ASPA convention in Washington the Law and Courts Section will elect four new officers: a Chair-Elect and three members of the Executive Committee. A Nominating Committee has been appointed to present a slate of candidates at that meeting. The Nominating Committee solicits suggestions from the membership for individuals to fill these positions.

If there are particular Section members you would like to have considered for these offices, please send your suggestions to Professor C. Neal Tate, Chair of the Nominating Committee, by mail or e-mail. All suggestions must be received by June 1. The Nominating Committee's recommended slate of candidates will be published in the Summer issue of the Newsletter.

#### **Nominating Committee Members:**

C. Neal Tate (Chair)  
Department of Political Science  
University of North Texas  
Denton, TX 76203-0338  
e-mail: Neal\_Tate@unt.edu

Mark A. Graber  
University of Maryland/College Park

Lynn Mather  
Dartmouth College

Susan Mezey  
Loyola University/Chicago

James Spriggs  
University of California, Davis

Joseph Stewart, Jr.  
University of New Mexico

Isaac Unah  
University of North Carolina/Chapel Hill

### CQ PRESS AWARD

The CQ Press Award is given annually for the best paper on law and courts written by a graduate student. To be eligible the nominated paper must have been written by a full time graduate student. Single and coauthored papers are eligible. In the case of coauthored papers, each author must have been a full time graduate student at the time the paper was written. Papers may have been written for any purpose (e.g., seminars, scholarly meetings, potential publication in scholarly journals, etc.). This is not a thesis or dissertation competition.

Papers may be nominated by faculty members or by the students themselves. The papers must have been written during the twelve months previous to the nomination deadline. This year's nomination deadline is June 1, 1997. The award carries a cash prize of \$200. To be considered for this year's competition, a copy of the nominated paper should be submitted to each of the award committee members:

Stacia Haynie (chair)	William McLauchlan
Louisiana State University	Purdue University
Baton Rouge, Louisiana 70816	

John Winkle  
University of Mississippi

### THE LIFETIME ACHIEVEMENT AWARD

The Lifetime Achievement Award is given every two years to honor a distinguished career of scholarly achievement and service in the field of law and courts. Any political scientist who has been active in the field for at least 25 years or has reached the age of 65 years is eligible. Nominations may be made by any member of the Section and should consist of a statement outlining the contributions of the nominee and, if possible, the nominee's vita. The deadline for nominations for this year's award is April 20, 1997. Nomination materials should be sent to each of the award committee members:

Gregory A. Caldeira (Chair)	Roy B. Flemming
Ohio State University	Texas A&M University
Columbus, Ohio 43210	Nancy Maveety
	Tulane University

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# MORE ANNOUNCEMENTS

## THE PUBLIC LAW GROUP IN THE JURISPRUDENCE AND SOCIAL POLICY PROGRAM, UNIVERSITY OF CALIFORNIA, BERKELEY

Some time ago, I bumped into Nelson Polsby on campus and he asked, "How are things going in Berkeley's other Political Science Department." This appellation is apt. And it has stuck. This "other department" is the Law School's Ph.D. Program in Jurisprudence and Social Policy (JSP). Founded by Law Professor Sanford Kadish and Sociologist Philip Selznick in the mid 1970s, JSP offers strong training to graduate students interested in law and the humanities and social sciences. But it is especially strong in law and politics.

The Program has a core faculty of twelve, three political scientists, two historians, two economists, two sociologists, two philosophers, and one criminal justice scholar. It also depends heavily on other law school faculty, and a group of affiliated faculty in political science, history, sociology, philosophy, business, psychology, and public policy.

Perhaps the Program's greatest strength is in public law/political science. The three political scientists in the Program, Malcolm Feeley, Robert Kagan, and Martin Shapiro, are all well known public law scholars and are active in the APSA. Several other faculty in the Program and in the Law School have close ties with political science.

JSP students interested in public law obtain training in research areas such as judicial process and behavior, law and politics, as well as constitutional law, theory and history, and administrative law. The Program is also strong in comparative law and comparative judicial process (The American Journal of Comparative Law is published at the Law School.) Students interested in careers in public law in political science supplement the Program's offerings in public law with courses in rational choice theory (as applied to law and the legal process) offered by the two economists in the program, as well as courses in sociolegal research methods, the sociology of law, legal history, and a variety of courses in jurisprudence and political theory.

The JSP Program also has strong ties with Berkeley's political science department, and JSP's "political science" students regularly take graduate seminars in American politics and institutions, international relations, and political theory offered by the Department of Political Science, serve as teaching and research assistants to faculty in that department, and participate in informal seminars with political science graduate students at faculty members' homes and at the Center for the Study of Law and Society. Members of the political science department also regularly sit on JSP student qualifying exams and thesis committees. JSP students can develop especially strong programs in the following combination of fields: judicial process and American politics and constitutional history; public law and constitutional and political theory; public law and public policy; public law and rational choice; public law and comparative politics; and public law and criminal justice.

The JSP student body is varied. Roughly one third of the students come to the program already with a JD degree, about a third obtain a Ph.D. only, and about one third obtain both a JD and Ph.D. while affiliated with the Program.

JSP students interested in careers in political science make ample ties in political science and have broad-enough training to fit easily into teaching positions in leading political science departments. Indeed, apart from law school placements, JSP's most frequent placements have been in political science departments, programs closely aligned with political science, and sociolegal research institutions. Recent JSP graduates with political science interests have gone on to hold post doc and teaching positions at the following institutions: Amherst, Brigham Young, UC Santa Cruz, Chiba University, Colorado, Denver, Harvard, Hebrew University, Michigan, New York University, North Carolina, Ramapo College, Rutgers, University of Southern California, SUNY Binghamton, Virginia Polytechnic, Wayne State, and Yale, as well as the U.S. Environmental Protection Agency, the Police Foundation, the American Medical Association, and the American Bar Foundation.

**Malcolm M. Feeley and Claire Sanders Clements**

**Rutgers University-Camden** announces the formation of its **Council for State Constitutional Studies**. The Council will sponsor research, publications, and educational programs relating to sub-national constitutionalism both in the United States and abroad. It will also act as a clearing-house for information about sub-national constitutions. The Council will sponsor an annual lecture in state constitutional law; this year's speaker, appearing at Rutgers Law School on April 10, will be Harry Scheiber of the University of California, Berkeley. During Fall, 1997, the Council will sponsor various activities associated with the fiftieth anniversary of the New Jersey Constitution, including an hour-long documentary with New Jersey Network on the New Jersey Constitution and a Continuing Legal Education conference. Publications of the Council include an annual issue on state constitutional law in Rutgers Law Journal and a reference series on state constitutions published by Greenwood Press. For further information about the Council, please contact either the Council's Director, **Alan Tarr** (tarr@crab.rutgers.edu) or its Associate Director, **Robert Williams** (rfw@crab.rutgers.edu).

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# CONFERENCES AND CALLS FOR PAPERS

IN THE WAKE OF THE LAW...  
CRITICAL LEGAL CONFERENCE 97  
4-7 September 1997  
University College Dublin

## SECTIONS AND ORGANISERS:

### HISTORY AND POSTCOLONIALISM

Peter Fitzpatrick, Faculty of Laws, Queen Mary and Westfield College, Mile End Road, London E1 4NS, United Kingdom, phone 44-171-975-5555, fax 44-181-981-8733.

Barry Collins, School of Law, University of East London, Longbridge Road, Dagenham, Essex RM8 2AS United Kingdom, phone 44-181-849-3467, e-mail: b.collins@uel.ac.uk

### SACRED FRAGMENTS IN THE TEXTS OF LAW: PLAYING WITH RIDDLES

Sharon Hanson, Department of Law, Birkbeck College, University of London, Malet Street, London WC1E 7HX, United Kingdom, phone 44-171-631-6619, fax 44-171-631-6688, e-mail: s.hanson@cems.bbk.ac.uk

Kathleen Moore, Department of Political Science, University of Connecticut, Box U-24, 341 Mansfield Road, Storrs CT, USA, phone 1-860-486-3747, fax 1-860-486-3347, e-mail: kmoore@uconnvm.uconn.edu

### DROWNING IN THE TURBULENCE? CITIZENSHIP, MINORITY RIGHTS, NATIONALISM AND LAW IN THE NEW WORLD DISORDER Bill

Bowring, Department of Law, University of Essex, Wivenhoe Park, Colchester, Essex CO4 3SQ, United Kingdom, phone 44-1206-873-723, fax 44-1206-873-

428, e-mail: bowring@essex.ac.uk

### SEXUALITY, LAW AND DIFFERENCE

Maria Drakopoulou, Kent Law School, Eliot College, University of Kent, Canterbury CT2 7N5, United Kingdom, fax 44-1227-827-831, e-mail:

m.drakopoulou@ukc.ac.uk Ivana Bacik, Law School, House 39, Trinity College, Dublin 2, Ireland, phone 353-1-608-2299, fax 353-1-677-0449, e-mail: icbacik@tcd.ie

### EUROPEAN COMMUNITY LAW AND THE CHALLENGE OF ETHICS

Sionaidh Douglas-Scott, School of Law, King's College London, Strand, London WC2R 2LS, United Kingdom, phone 44-171-873-2316

### LAW, LITERATURE AND AESTHETICS

Adam Gearey, Kent Law School, Eliot College, University of Kent, Canterbury CT2 7N5, United Kingdom, phone 44-1227-823-012, e-mail: a.d.gearey@ukc.ac.uk

### GENERAL INFORMATION:

The Critical Legal Conference brings together academics, lawyers and students from the UK, Ireland, North America, Europe and beyond. It has established itself as a major forum for critical and interdisciplinary thinking about law.

The conference will be held in Dublin, on the Belfield Campus of University College. UCD is located two miles from the historic centre of Dublin. Accommodation is available at the UCD Residence Halls which are immediately adjacent to the conference buildings.

### SECTIONS, PANELS and PAPERS

Papers are invited on the theme of the conference under

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## *CONFERENCE SCHEDULE, 1997-98*

International Political Science Association	Seoul, South Korea	August 17-21
APSA	Washington, DC	August 28-31
Law and Society Association	St. Louis, MO	May 29-June 1
Southern Political Science Association	Norfolk, VA	November 5-8
Northeastern Political Science Association	Philadelphia, PA	November 13-15
Western Political Science Association	Los Angeles, CA	Mar 20-22, 1998



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the sections listed above. The Section Organisers are coordinating panel contributions, offers of papers and workshops. If you wish to organise a section or contribute a paper unrelated to the Sections listed, please contact the Conference Organiser. Offers of papers are welcome until 31st July 1997, but we may not be able to accept very late proposals through lack of space in the conference timetable.

Full conference details and booking information will be available in April. If you are interested in receiving further information and registration forms, please contact the Conference Organiser:

Jim Bergeron, Conference Organiser CLC97  
Faculty of Law, University College Dublin  
Belfield, Dublin 4 Ireland  
phone 353-1-706-8743, fax 353-1-269-2655  
email [bergeron@acadamh.ucd.ie](mailto:bergeron@acadamh.ucd.ie)

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### LAW AND RELIGION: OBLIGATIONS OF DEMOCRATIC CITIZENSHIP AND DEMANDS OF FAITH

A conference on "Law and Religion: Obligations of Democratic Citizenship and Demands of Faith" will be held at Brown University on Friday and Saturday, April 11 and 12, 1997. Participants include David Estlund, Kent Greenawalt, Amy Gutmann, Michael McConnell, Martha Nussbaum, John Reeder, Nancy Rosenblum, Yael Tamir, Ronald Thiemann, John Tomasi, Graham Walker, Carol Weisbord, Melissa Williams, and Alan Wolfe. Registration is not required.

For further information contact Nancy L. Rosenblum at Brown University. Phone: (401) 863-2827 or Fax: (401) 863-7018.

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### AMERICAN SOCIETY FOR LEGAL HISTORY

The American Society for Legal History will hold its 1997 Annual Meeting October 16-18 in Minneapolis, MN. The conference will feature papers and panels on all aspects of legal history. Robert J. Kaczorowski, Fordham University School of Law will serve as Program Chair. Interested individuals should contact Kaczorowski at the Fordham School of Law, 140 West 62nd Street, New York, NY 10023; Phone: (212) 636-6826; Fax: (212) 636-6899; e-mail: [rkaczorowski@mail.lawnet.fordham.edu](mailto:rkaczorowski@mail.lawnet.fordham.edu)

### LEGAL STUDIES FORUM

Judith Grant is editing a special issue of *LEGAL STUDIES FORUM* on law and popular culture. She is especially interested in manuscripts with an emphasis on crime. Analyses of the depiction of law enforcement, criminal defense or prosecution, punishment, or any television, novels, film or music. The *LEGAL STUDIES FORUM* is an eclectic, interdisciplinary journal which prides itself in the exploration of new and exciting intellectual currents.

Please send manuscripts to:

Professor Judith Grant  
Gender Studies Program, SSM 116,  
University of Southern California  
Los Angeles, CA 90089-0022  
email: [judithg@mizar.usc.edu](mailto:judithg@mizar.usc.edu)  
Deadline for submission is April 1, 1997.

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### THE JUDGES' JOURNAL INVITES MANUSCRIPTS

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