Law & Courts

NEWSLETTER OF THE LAW & COURTS SECTION OF
THE AMERICAN POLITICAL SCIENCE ASSOCIATION

A Letter from the Section Chair

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The summer newsletter is the last chance for the section chair to provide much-anticipated advice to the Law and Courts community about what kind of research they should be doing and how they should be doing it. I've avoided proffering such advice for a year now and I suspect all of you will get along just fine if I pass on the ritual.

More importantly, during this season we begin to look back at a year of accomplishments and look forward to a new year of opportunities. As a community we will be doing this at the upcoming APSA meeting. I want to extend a special invitation for you to attend the **Lifetime Achievement Award Panel honoring J. Woodford Howard**. With the help of Mark Graber and Maeva Marcus it is sponsored this year by the Institute for Constitutional Studies, and is currently scheduled for **Friday, August 29 at 4:15pm** (location TBD).

The **Law and Courts Business Meeting** is scheduled immediately after the panel on **Friday at 6:15pm**. My special Chair's Address to the Law and Courts Community has been edited down to about 90 minutes now, and so with a little more effort we should get you to the **Law and Courts Reception** on time (**scheduled from 7:30-9**).

Actually, there is no such Address, but we will be doing some pleasant business. Our awards committees have done a wonderful job and we will be acknowledging a lot of great work by our colleagues. We will also be voting on a slate of new section officers who were recommended by our Nominations Committee (which was made up of Vanessa Baird, Leslie Goldstein, Mark Graber, Helena Silverstein, and Martin Sweet). The nominated officers are:

Section Chair (beginning Fall 2009): **Christine Harrington**
Treasurer: **Isaac Unah**
Executive Committee: **James Stoner** and **Chad Westerfeld**

The Executive Committee will also be meeting to discuss general section business. One issue that we are going to have to address involves whether to continue the recent practice

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General Information

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

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Articles, Notes, and Commentary

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

Footnote and reference style should follow that of the *American Political Science Review.* Please submit your manuscript electronically in MS Word (.doc) or Rich Text Format (.rtf). Contact the editor or assistant editor if you wish to submit in a different format. Graphics are best submitted as separate files. In addition to bibliography and notes, a listing of website addresses cited in the article with the accompanying page number should be included.

Symposia

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when possible. Finally, authors should notify ***BOOKS TO WATCH FOR EDITOR***: *Bruce Peabody,* bgpeabody@msn.com of publication of manuscripts or works soon to be completed.

(Chair's Column, continued from Page 1)

of **naming section awards after certain sponsors**. As you know, in the past we have given naming rights to certain entities in exchange for some modest annual contributions for award winners. For example, the award for "a book or journal article, 10 years or older, that has made a lasting impression on the field of law and courts" has been known as the Wadsworth Award, and in exchange for those naming rights we were supposed to receive $250 a year from the publisher.

Well, it has been some time since a section officer has been able to obtain that check from Wadsworth or its parent company. Consequently, a few months ago the Executive Committee made a decision to change the name of the prize to the "Law and Courts Lasting Contribution Award."

My own view is that we should put an end to the practice of offering naming rights for awards in exchange for small yearly sums. In my judgment, the amounts are trivial compared to the importance of the peer recognition; there has been a non-trivial administrative burden in trying to collect these small amounts; and most importantly, unless accompanied by an impactful endowment, it seems to me that there is no reason to associate the section with particular publishers or non-profit associations.

If you have views on this matter please feel free to contact me, or any member of the Executive Committee, in advance of the meeting.

Looking forward to seeing you in Boston.

Symposium: Formal Theory and Judicial Politics

Formal Theory and Judicial Politics: Contributions and Cautions

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As the Formal Theory Section Chair for the 2007 Southern Political Science Association Meeting, I assembled a roundtable of scholars to discuss and assess the contributions of formal theory to judicial politics. The contributors to this symposium (Jim Rogers, Jeff Staton, and Cornell Clayton) all participated in that roundtable; the essays here are extensions of their remarks.

It is not a stretch to state that formal approaches to studying judicial politics are both numerous and controversial. As Jeff Staton points out in his essay, just last fall the Law and Courts Listserv had a fairly spirited discussion of formal theory and whether or not we have learned anything from it. Additionally, one only has to look at recent articles in the top journals in our discipline to see that formal approaches are no longer outliers. Given this, it is appropriate now to take a step back and evaluate both the positives and negatives of formal theory in judicial politics.

In these introductory remarks, I want to highlight a few of the benefits and costs of utilizing formal theory in research—both on the courts and other topics. Many of these points will be developed in much greater detail by the subsequent essays. In Chapter 4 of *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (shameless

plug) my coauthors Tom Hammond, Reggie Sheehan, and I set forth what we believe to be the benefits (and costs) of formal modeling.[i] In terms of benefits, we identified seven. First, formal modeling forces us to be more explicit about the premises and assumptions of our theory. We must explicitly specify what actors are included or excluded, what goals they have, what the institutional rules are, etc. While this may seem to lead to increased complexity, it is only because many informal verbal models often rely on assumptions that we often do not even recognize the assumptions we are making.

Second, formal models produce rigorously derived implications. Using mathematics to derive the implications of our assumptions helps us avoid making errors. Moreover, whatever errors we do make are much more apparent. Thus, this increased transparency allows us to better correct our mistakes—a key factor in the growth of scientific knowledge.

Third, formal models must be parsimonious. If the model is too complex, we may not be able to derive any results at all. Thus, we must focus on the key elements of the phenomenon we are studying. Some criticize formal models for being overly reductionist, but formalizing a theory forces scholars to focus on the most fundamental, crucial variables. Some may disagree with the variables that are included and ignored, but this is part of the scientific process: if one disagrees with the choices made by a scholar, they are free to argue otherwise and develop an alternative model.

Fourth, occasionally we get a surprising result from a formal model. Jim Rogers and Jeff Staton will discuss this a bit more in their essays. For now, it is sufficient to say that formal models have shown "conventional wisdom" to be wrong, or correct but for the wrong reasons. A brief example of this has to do with opinion assignment on the U.S. Supreme Court: while the person who writes the Court's opinion has some control over its direction, the author is severely constrained by his/her colleagues. Thus, the opinion writer has a very narrow range of discretion with which to work. Further, formal theory has allowed us to better understand the *conditions* under which the opinion author has more (or less) discretion. Formal theory has helped move research in this area from the simple question of "Does the opinion writer matter" to the more nuanced and realistic questions of "How does the opinion writer matter" and "Under what conditions does the opinion writer matter."

Fifth, formal models allow us to better organize our findings. As example of this is Mendeleev's periodic table of elements. The periodic table played a key role in making sense of the large amount of chemical knowledge that had accumulated; further, it even allowed him to predict the existence of elements that had not yet been discovered.

Sixth, formalization can improve the quality of our empirical tests. Formal theories can suggest improvements of existing tests as well as new relationships that ought to be tested. Formalization may lead one to test a conditional hypothesis, where before a relationship was not thought to exist. Formal models may also suggest something about the functional form of the variables. Generally, the more explicit our theory, the better our empirical work will be. Formal models have us make our theories more explicit, and thus help us appropriately test hypotheses derived from those theories.

Finally, seventh, and related to the point above, formal theory helps us improve our theories. Because formal models are more explicit and transparent, they can more easily be falsified. It goes without saying that error correction is likely to be improved if we have a clearer idea of what actually needs to be corrected.

Of course, these strengths are not unique to formal models (although formal models possess them in higher degrees than other types of models). Further, there are some costs/drawbacks to formal models, which we also note in Chapter 4 of our book and Clayton discusses in his essay here. Most significant for many scholars is the amount of time that needs to be invested in developing the technical skills necessary to model politics formally. Few of us became political scientists for the math; not surprisingly, then, the number of people who possess these skills (or are interested in possessing these skills) is relatively small. This also has the effect of reducing the potential audience for such work.

Another criticism is that these models oversimplify reality and do not accurately characterize the "real world" of politics. To be sure, this is true for some formal models. But it is equally true for many nonformal models as well. To the extent that a formal model does not accurately reflect reality, then it is not a useful model. But this has to do with

the assumptions made by the scholar, not with the process of formal modeling.

A third criticism has to do with the fact that some formal models are never tested empirically. This is becoming less common, but it is true that some models are not tested. The extent to which this is a problem is unclear. For me, a model that survives empirical scrutiny is more useful then one that is not subjected to such scrutiny. But this does not make the untested model useless or wrong. Indeed, as mentioned above, the model may serve to unify seemingly contradictory pieces of empirical evidence under one umbrella. Finally, it is worth noting that the skills required to develop formal models are not the same as the skills required to rigorously test those models. Just as there as some empirical studies without a formal model, there are some formal models without any empirics. But whether the model is tested empirically, the key question we should use to evaluate any model is: does it teach us something about politics?

In the rest of this symposium, the contributors discuss different aspects of formal theory and judicial politics. Jim Rogers (Texas A&M University) argues that the distinction between formal theory and nonformal theory is overly simplistic. Rather, all models are abstractions that seek to understand some aspect of politics. He also discusses the role of rationality and information in formal models and the assumption that judges act politically. Jeff Staton (Emory University) assesses the contributions of formal theory in the study of comparative judicial politics. Staton argues that formal approaches do a good job of clarifying arguments and making them more consistent. Moreover, he examines several recent studies in comparative judicial politics that underscore the symbiotic way in which formal and nonformal scholarship interactively produce knowledge. Finally, Cornell Clayton (Washington State University) seeks (and succeeds) not to be a "turd in the punchbowl." Cornell argues that research should be question-driven, not method-driven, and scholars should use whatever method is best suited to answering their question. In some cases, formal theory will be useful; in others, it will not. Clayton goes on to discuss some fruitful future avenues of research, some of which will undoubtedly utilize formal models.

In sum, the following three essays provide a good analysis of the current state of affairs regarding the use of formal models in judicial politics. We hope you find them both educational and engaging.

(Notes)

[i] The arguments I make here in brief are fully developed in that Chapter.

The Virtue of 'Unrealism' in Formal Judicial Models, and Other Thoughts

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I appreciated Chris Bonneau's invitation to participate on a panel discussing formal models of judicial politics at the Southern Political Science Association meeting in New Orleans, and I appreciate the opportunity to continue the conversation in the pages of the *Law & Courts Newsletter*. The exchange in New Orleans was courteous in the extreme, and even downright friendly. It seemed to me that the various "sides" recognized that different intellectual puzzles could be profitably approached by different methodologies, even if we disagreed on the full value added by some of the different methods in question.

In what I trust is a continuation of the "Spirit of New Orleans," I want briefly to touch on three claims related to the use of formal models in the study of judicial politics: First, "formal" and "non-formal" models exist not as opposing duals in some sort of a Manichean scholarly world, but exist along a continuum. I want to blur the lines that some seem to want so assiduously to draw. Secondly, formal models evolve just as prosaic models evolve. Some critics of formal models of judicial politics conflate inherent limitations of mathematical models with the (logically) accidental attributes of the first generation of judicial models. Finally, I want to discuss what "rationality" means. In my

experience, critics of formal models always think that "rationality" means a whole lot more than formalists mean by "rationality."

I. The False Dualism Between "Formal" and "Non-Formal" Models

Perhaps the complaint I most often hear is that the abstraction of formal models makes them "unrealistic" and that, therefore, they're not very useful for studying social or political behavior.[i] A second is related to this: that even simple formal models can prove daunting to the reader unfamiliar with the type of reasoning they represent, and therefore only obscure rather than illuminate.

So what's the value added of the exercise if formal models are both unrealistic and off-putting?

First, I think we need to disabuse ourselves of a false dualism. A neat divide between "formal theory" and "non-formal theory" doesn't exist. All models – whether prosaic or graphical or tabular or mathematical – share an underlying purpose: they abstract from reality in order to help scholars solve intellectual puzzles that interest them. Words symbolize as do mathematical symbols. Because of human finiteness, abstraction is not a unique attribute of formal models. Abstraction, or reduction, necessarily inheres to all attempts to understand human or physical phenomena (even in the humanities). "Formal" and "non-formal" models exist along a continuum in which some of these models include more mathematical symbols and others include fewer. To be sure, mathematical models can sometimes be difficult to understand without some training, but then dense prose can often be difficult to understand as well without advanced training.

Of course, just because formal models exist along a continuum with more prosaic models, that doesn't mean that their particular type of abstractness is useful. As I mentioned above, the most common objection I hear to formal models is that they are unrealistic. But *the unrealism of models – whether formal or non-formal– is a virtue,* not a vice. As with any abstraction (whether prosaic, mathematical, graphical or some combination), the value of the abstraction hinges on whether the given abstractions of the model are useful.

Consider an every-day example: How do we explain directions to our houses? We can write out instructions in words or we can draw a map. Whether written instructions are better than a map, or vice-versa, often depends on circumstances: the complexity of getting from where a person is to our house, the difficulty of seeing street signs or landmarks, etc. Now, it is obvious that street maps are highly abstracted representations of the real topography of a city. Maps utterly distort what is really there and leave out numerous details about what a particular area looks like. But that's the point. It is precisely because maps distort reality - it is because they abstract away from a host of details of what is really there - that it becomes useful. A map that attempts to portray the full details of a particular area would be too cluttered to be useful in finding a particular location or too large to be stored in a glove compartment. So it is with formal models. They seek to abstract away from a host of details that are not relevant to the phenomenon under study. It is the very abstraction that permits us analytically to "hold everything else equal" and to focus on the most salient aspects of the phenomenon.

Of course, everything is not always equal and omitted details can matter. Just as with street maps, there can be better models and worse models for particular purposes. Maps that abstract away from too much detail won't be useful in finding a particular street or address. Models that abstract away from too much pertinent detail aren't useful for understanding the phenomenon being studied. The trick, then - which is as much matter of aesthetic taste as it is intellectual judgment - is to develop models that provide just enough detail to be useful for their intended purpose without being so complex as to confuse rather than illuminate. Further, maps can be initially off-putting abstractions from reality for those unfamiliar with them. Many maps use specialized symbols and representations that require some time and effort to learn.

Of course, simply because maps can be simplifying abstractions from reality doesn't mean that we always use them. Sometimes it's easier to write directions to your house in words, sometimes it's easier to draw a map. Again, the basis of the choice is instrumental – what best accomplishes the goal of directing someone to your house successfully.

So it is with models. There is nothing inherently wrong with a model that is written entirely in words. Sometimes, however, it's more convenient for a given purpose to use symbols and equations. Again, the choice is instrumental. To be sure, as with the stylization of maps, sometimes the abstractions may be initially off putting to a person untrained in what the symbols mean. But as with the increasing usefulness of abstract maps relative to written directions when routes become complicated, attempts to understand more complex phenomena might benefit from the convenience and parsimony of more mathematically abstract models relative to more prosaic models. And, of course, reasonable people can have different personal preferences for written directions relative to mapped-out directions. Reasonable people can also disagree over whether a particular map is detailed enough to serve its purpose (or whether the map contains superfluous and distracting details). So, too, scholars have different preferences over using more prosaic models relative to more mathematical models. Scholars can further reasonably disagree whether a specific model, whether prosaic or mathematical, is, on the one hand, sufficiently detailed to help us understand the phenomenon under investigation or, on the other hand, so detailed that the phenomenon is obscured rather than illuminated. To the extent that mathematizing concepts in a model help us effectively to express, manipulate, or reason from those concepts, to that extent it's a useful enterprise. To the extent that mathematization doesn't achieve a useful purpose, then to that extent there's no reason to mathematize an otherwise prosaic model.

II. The Evolution of Formal Judicial Models over Time & the Assumption that Judges Act Politically

A second class of criticism I often hear regarding formal models in judicial politics comes out of experience with first-generation models. Criticisms of this sort often include comments like "formal models assume that judges are political." This is largely correct, except that it is not inherent in the class of formal models, but is a criticism limited to a contestable, if popular, assumption made by the first generation of judicial models and some, but not all, second-generation judicial models.

Formal modeling came somewhat late to judicial politics, at least relative to their use by legislative scholars. As a result, it's unsurprising that the first generation of formal judicial models look a lot like models of legislatures. The earliest models typically were spatial models in which a point on the line represented a court (or a median judge or justice on a panel) rather than the median member of a committee or a legislature.

One result of this tendency is that first generation models of judicial politics almost universally make the attitudinalist assumption that judges, like other politicians, seek to achieve their political preferences through their judicial decisions. Many judicial scholars contest this assumption – from traditional legal scholars to new institutionalist scholars. I think it's an open question how far the assumption that judges seek only their political preferences can take us in explaining judicial outcomes. More important for our purpose here, however, is that while first generation judicial models almost universally make the assumption, there is nothing inherent in modeling judicial behavior formally that requires the assumption to be made. Indeed, second-generation models often move beyond the singular assumption that judges seek to achieve their political preferences, and assume that judges pursue goals in addition to political preferences or instead of their political preferences. Models do not need to assume that judges seek political goals.

A related criticism of the assumption that judges pursue their political preferences through their judicial decisions is that, if you ask judges what they pursue in their decisions, none will say they pursue their political preferences. But what judges are conscious that they're doing – or what they believe they're doing -- is almost irrelevant to the study of what they do. People are often not even vaguely aware of the incentive structures that induce our behavior. When we get on the road in the morning to drive to work, we do not consciously choose to drive on the right side of the road. We unconsciously follow the norm because the entire incentive structure – from the largely unconscious yet coordinated conjectures of other drivers, to legal sanctions – structures our behavior. Some of the most powerful incentive structures are those we're least aware of.

Judges may have added incentives to mystify their official behavior, even to themselves (so that self-reporting the goals they say they pursue may be of limited relevance to much judicial scholarship). Judges, and the legal system more generally, has a huge stake in the idea that law is an objective, neutral arbiter of human behavior separate from politics. Theories of judicial behavior, such as that suggested by Robert Cover[ii], also suggest judges mystify their official behavior to themselves and to others due to the unavoidable violence that follows from their official acts. In

any event, formal modelers need not assume that judges seek policy preference through their decisions, although I think the assumption remains a poignant and provocative starting point for judicial scholars in political science.

III. Misconceptions about "Rationality" in Formal Judicial Models

Finally, I want to discuss the idea of "rationality." Critics of formal judicial models (and of formal models more generally) often take it as a given that people do not really behave "rationally" in important aspects of their lives. A variant on this criticism is a remark I often hear that lack of perfect information means that people cannot act rationally. Truth be told, I have never heard a critic of "rationality" who actually understood how modelers understand the rationality.

Typically, critics freight the concept of rationality with a lot more substantive baggage than modelers do. For modelers, "rationality" is a very thin concept. Basically, rationality for modelers only means that a person can rank which of two outcomes she prefers (I prefer A to B, B to A, or I am indifferent between A and B), and that those preferences are transitive (if A is preferred to B, and B is preferred to C, then A is preferred to C). That's pretty much it. So, for example, a person might believe herself to be Napoleon, and yet be entirely rational by this definition of rationality. As long as this "Napoleon" can rank the outcomes she prefers relative to each other and those rankings are transitive, then she is perfectly rational for modeling purposes.

The presence or absence of information or uncertainty makes no difference either. All it means is that a person ranks lotteries over outcomes. The fact that a person may regret the choice she made *ex post* does not at all mean that the choice was irrational *ex ante*.

Dichotomies can obscure as well as illuminate. The neat divide between "formal theory" and "non-formal theory" is too tidy for my taste. The question is: what interesting insights can we generate? Because of the parsimony of formal abstractions, I believe that the approach generates insights we would not otherwise have, insights that we would not have as clearly, and insights that might have taken a lot longer to discover. That doesn't mean that this methodological hammer is singularly best for every, or even most, academic projects. It can play a significant role in solving interesting puzzles in judicial politics, and that's good enough for me.

(Notes)

[i]This section draws on material I wrote for the appendix in *Institutional Games and the Supreme Court* (Rogers, Flemming, and Bond, eds.) (Charlottsville: University of Virginia Press, 2006).

[ii]Robert Cover. 1983. "The Supreme Court Term 1982, Foreward: Nomos and Narrative," *Harvard Law Revie*w, Vol. 97, No. 4: 4-67.

Formal Theory in Comparative Judicial Politics

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Late last fall, the Law and Courts discussion list took up a pointed query concerning whether the field had learned anything unique from formal theory approaches. At first blush, the question appears eminently fair. We might reasonably ask whether a framework for model building has actually taught us something we did not know already. And I would readily agree that we do not need mathematical statements about what judges want, believe and can do in order to conclude that judicial decision-making is sometimes prudent, as formal theory skeptics commonly note. The thread died after Jeffrey Lax posted a three-page list of "things we've learned from formal theory," which seemed to suggest that, at the very least, you would have to do a good deal of reading before you could claim with much certainty that we have learned nothing. Yet, strictly speaking, the question remained open, closed perhaps only by a collective disinterest in checking the intimidating citation list against prior knowledge.

Nevertheless, I would like to suggest that whereas the question is reasonable, in so far as it seeks intellectual property than can be attributed uniquely to formal theory, it is not the right question to ask. It is not that one cannot identify unique substantive contributions from scholars that use formal methods, as Lax does, but rather that such claims and the corresponding debate over whether alleged contributions are genuinely unique mischaracterize the construction of knowledge in our field and obscure how precisely formal theory contributes to this process. If we must ask what we have learned from formal theory, we will do better to consider how formal theory, as a method of argumentation, contributes to the clarity and internal consistency of particular arguments. Instead of attempting to identify the big ideas, we should be highlighting the process by which scholars get there. Formal theory's chief contribution lies in this process. In what follows, I would like to put some flesh on these general claims. Then I will provide a few examples of how formal theory can enrich research by discussing two well-known projects in comparative judicial politics.

Formal Theory and Law and Courts Research

The search for unique substantive knowledge produced by formal theory models of law and courts is not particularly productive two core reasons. Primarily, it obscures the most likely contributions formal theory can make to the field. It is critical to stress that formal theory is a method, designed to structure and clarify the claims we make about the world and to ensure their internal consistency. It is a tool. In this sense, asking how formal theory has informed substantive debates in our field is like asking how archival methods or regression analysis have informed debates in the field. Both methods offer advantages, but to identify how precisely they have added value to a literature requires an understanding of the tool and the research context in which it is applied. A description of the many types of formal theory is well beyond the scope of this essay; however, in order to suggest the ways in which it can be useful, it is helpful to summarize the main components of one of its branches. I will focus here on non-cooperative game theory, which has come to be the dominant method of choice in judicial politics.[i]

A non-cooperative game theory model includes five components. It explicitly identifies the actors whose behavior will be analyzed and it describes from what and how these actors derive value—their preferences. In addition, a model describes what the actors can do and when they can do these things. It also specifies what the actors know about themselves, the other actors in the model and exogenous features of the world in which they live. Readers are no doubt aware that individuals in game theory models are assumed to choose actions that offer them the highest value according to their preferences; however, when the best action depends on what others choose and features of the world about which an actor might be uncertain, it is not entirely clear what the best action is. Thus, the final component of a model is a theory, referred to as a solution concept, about how actors will behave jointly in light of the information they have and their expectations about what the other actors will do. Critically, the solution concept provides explicit rules for the analyst about how to put all of the preceding information together in order to make behavioral predictions.[ii]

This, in general, is the structure of a non-cooperative game theory model. In the simplest sense, it offers rules for

constructing arguments about how people behave together in light of what they want, what they can do, what they know and their expectations of others' behavior. This strikes me as a common feature of many (though surely not all) arguments in law and courts, even when scholars do not invoke explicitly each component of a game theory model. When scholars proceed with non-formal strategic arguments, they typically identify the actors under analysis, give some rough account of their goals, suggest behavioral alternatives available to them and may even discuss their beliefs about the world. But what always goes unstated in non-formal arguments is how precisely theoretical claims are made about joint behavior in light of the other components of the model. In other words, solution concepts are left implicit. This is not to suggest that there are no solution concepts in operation in these cases. There are. Indeed, there must be, otherwise there would be no argument at all. This does not mean that scholars are drawing invalid logical inferences. It does mean that scholars are opting out of a framework this is designed to ensure the validity of these inferences.

No doubt, there are some arguments that are straightforward enough that theoretical expectations about joint behavior can be derived easily without a solution concept. But this is not always true. Indeed, some of the most interesting research questions (see Bueno de Mesquita and Stephenson 2002 below) involve strategic settings that are quite difficult to reason through without the benefit of rules for drawing deductive inferences. And some of the most interesting theoretical claims derive from models in which what "makes sense" for an actor to do is highly conditional. Identifying these conditions is a core element of good theorizing and game theory models are designed to do this. Assumptions are laid bare and we can readily identify the impact of different conceptual choices by making a change in the model and applying the solution concept again. For this reason, game theory models are particularly helpful when considering the empirical implications of small changes in key features of an argument (i.e. for developing testable hypotheses).

Certainly, not every paper in law and courts could benefit from, much less needs, a formal theory model. Arguments can be stated clearly without appealing to payoff functions and information structures. Whittington (2005) and Gillman (2002) immediately come to mind. And it is surely possible to obscure a relatively straightforward strategic argument through formalization. I merely wish to suggest that the key components of a game theory model are common to theoretical arguments generally. The advantage game theory offers lies in the rules that structure arguments about strategic interaction, rules that force scholars to provide behavioral predictions according to well-known procedures. It is the structure that formal theory places on the process of developing arguments that marks its contribution to the field.

The second reason that the search for unique formal theory-driven knowledge is unproductive is that it encourages us to view formal scholarship as constituting an entirely separate, arcane subfield. Yet, obviously scholars that use formal theory are neither all researching the same questions nor are they speaking exclusively to other scholars that use formal theory. It would be difficult to conclude that Pérez-Liñán, Ames and Seligson (2005), Vanberg (2005) and Lax (2007) are writing about the same thing, even if their models share common assumptions about human cognition; and, it would be highly unfair to suggest that key insights in these works should be, or worse can be, knowable only by a tiny set of social scientists. These scholars are writing about important questions in well-developed substantive literatures.[iii] They are engaging theoretical answers to these questions and generating new questions to ask, much like every other scholar in the field.

It would be difficult to appreciate fully Bueno de Mesquita and Stephenson's (2002) ideas about the doctrine of *stare decisis* without being familiar with the general (non-formal contributions included) debate over whether precedent does or should bind a court to its own prior decisions. Their ideas nestle comfortably within this tradition. Does the paper provide what we might think of as unique insights? In my view, it does in so far as it identifies clearly a tradeoff inherent in he choice to break a line of cases between the substance and the accuracy of doctrine communicated within a judicial hierarchy; and, it also identifies the precise conditions under which judges might opt for one side of the tradeoff over the other. But one might quarrel with whether these are unique contributions. Regardless, the key point is that these insights build on and respond to ideas in Segal and Spaeth (1996), Epstein and Knight (1996), Nelson (2001), and Kornhauser (1989), papers that display significant methodological variance yet advance the conversation. Thinking about matters in this way underscores a point that often gets lost in debates about the usefulness of formal theory in particular literatures. If we force ourselves to seek out information unique to formal theory, we set ourselves up to ignore the ways in which scholars of all methodological stripes have interactively produced knowledge.

By so doing, we risk being simultaneously unfair to formal and non-formal scholarship.

Formal Theory and Comparative Politics

Many of the core questions in comparative judicial politics involve strategic interaction. Comparative scholars have considered the choice of a state to bind itself formally to constitutional limits enforced by the judiciary (Finkel 2005; Ginsburg 2003; Hirschl 2004) and to the ability of courts to effectively constrain states to higher law obligations (Carrubba 2003; Epstein, Knight, and Shvetsova 2001; Staton 2006; Vanberg 2005). They have considered the development of judicial independence from external and internal forces (Hilbink 2007; Ramseyer and Rasmussen 1997; Rios Figueroa 2007), and, they have addressed the implications of judicial independence for economic development and human rights (Cross 1999; La Porta *et al* 2004; North and Weingast 1989). And, of course, comparative scholarship has explored well-trodden questions of judicial decision-making in institutional contexts very much different from that of the United States (Herron and Randazzo 2003; Iaryczower, Spiller, Tommasi 2002). Some of the scholars I cite here operate explicitly by way of a formal argument. Others do not. Still, the arguments in these works all contain strains of strategic interaction, whether between judges at different levels of a hierarchy, across branches of government or between elected officials considering judicial reform. What is more, key concepts in theories of institutional design or judicial independence vary considerably across states (e.g. political competition, public support, formal institutions that supposedly insulate judges, doctrinal norms of deference, access rules, etc.). Since formal theory provides precise rules for considering how changes theoretical concepts influence predicted outcomes and since a comparative research design is capable of constructing the counterfactual conditions necessary to test these claims, formal theory has been and likely will continue to be an important tool in comparative judicial politics. With this frame in mind, I would like to give two quick examples of ways in which it can enrich arguments in the field. I will focus on two recent and well-known projects.

Helmke (2002) asks why Argentine high court judges, who enjoy few *de facto* protections from political interference, have sometimes challenged the authority of the very officials who appointed them. Unsurprisingly, existing theories of judicial behavior offer no compelling explanation for such choices. Indeed, on the standard account, strategic decisions are inherently deferential, designed to minimize confrontation with current members of government. So why would a judge seemingly invite conflict with a sitting government? Helmke's intriguing theoretical claim is that where formal rules governing judicial tenure are not respected and political instability is significant, judges may begin "defecting" from their appointers in an effort to keep their positions after a government or regime failure. This simple yet important innovation links elegantly the judicial politics literature on strategic judicial decision-making with a rich tradition in comparative politics on regime transitions. The argument is clear and persuasive and the data analysis is largely supportive of its key empirical implication.

Ginsburg (2003) pursues two familiar questions in law and courts. Why would a state delegate powers of constitutional review to the judiciary and simultaneously build institutions that insulate it from political interference? Similarly, what accounts for the expansion of judicial authority over time among courts with powers of judicial review? In answering the first question, Ginsburg develops a model of political insurance, in which political coalitions construct independent judiciaries to "lock-in" preferred policies lest they lose power. With respect to the second question, Ginsburg suggests that new courts help construct a norm of compliance over time by carefully exercising their jurisdiction in their institutional infancy and only expanding their formal powers once compliance becomes expected. Like Helmke, Ginsburg provides considerable empirical support for empirical implications of these arguments.

There is a great deal to admire in these projects. That said, both arguments suggest a role for an explicit formal model. Consider Helmke. The logic of the argument depends on the expectations judges have about what will happen to them after a transition. It only makes sense to begin defecting once it appears that a transition is likely – otherwise, a judge faces the wrath of the sitting government. Waiting until something like a regime tipping point allows a judge to avoid immediate retribution and take advantage of the good graces of the new government. But here is the rub. Why would a defecting judge expect that a new government would perceive her to be loyal to the new coalition and not conclude that she had changed positions merely to keep her job? Why would a new government not want to purge such a judge and replace her with a copartisan? These expectations are not modeled in the informal account Helmke gives, yet it is precisely the kind of thing that a game theory model of the process would require. It is not that this piece of the argument could not be modeled informally, but rather that there is an entire class of game theory models designed to provide Helmke with a precise answer to the question of what beliefs must be held in order for the logic of strategic de-

fection to hold. Interestingly, Helmke clarifies this point herself in her 2005 monograph *Courts under Constraints*, where she applies a standard signaling model to the same problem addressed in Helmke (2002). By doing so, she identifies how exactly a judge can successfully exploit the uncertainty of the incoming government to avoid a purge prior to and following a regime transition. Many of the implications of that model have yet to be tested, and so not only does Helmke (2005) clarify Helmke (2002), but she expands the set of empirical implications we can test.

Like Helmke, Ginsburg tackles a difficult, normatively important question. There are a variety of reasons why we might like a judiciary to enforce constitutional limits on power yet world history is riddled with failed efforts to rein-in the state. Yet, just as Helmke struggles with the strategic implications of her argument across regimes, Ginsburg struggles with these implications across the periods of institutional design and institutional growth. There are two key questions. If courts in their institutional infancy require clever deferential strategies (say like Marshall's in *Marbury*) until a compliance norm can be established, how is it that that new courts constitute insurance for governing coalitions against the loss of power? Ginsburg recognizes this tension, and suggests that constitutional review makes attacking minority interests more costly, all things equal (p. 75); however, if the argument about the growth in institutional strength is right, then the best we can say seems to be that constitutional review makes attacking minority interests no less costly, all things equal. And, perhaps this claim itself is subject to qualification. Might it be easier to attack minority interests when you can expect a pliant constitutional court to approve of your choices? Either way, the point a formal model would render explicit the conditions under which these claims can be supported.

Regarding the second part of the Ginsburg argument, we might wonder about how precisely the norm of compliance is developed? Ginsburg suggests that losers have to be sufficiently likely to win in the future in order to comply in the present (pp. 73-74). In so far as this is true, a pattern of compliant behavior emerges. This is persuasive for sure; however, if a weak court is behaving per the Ginsburg argument, then it is not asking for compliance when it would be sufficiently costly for the government (or some other party) to comply. In so far as this is true, why might not another norm develop, say a norm in which the judiciary is expected to challenge a government only in low salience political conflicts? This was the general understanding of the Mexican Supreme Court during the period of one-party rule (Fix-Fierro 1998, 202). If it challenges government in a salient area, non-compliance is acceptable. In part, Carrubba (n.d.) addresses this second question with a non-cooperative game theory model of endogenous institutional change, which explains how an institutionally weak court can become institutionally strong. Yet, Carrubba does not deal with competing norms of compliance. Moreover, the first question is left entirely open. It is not obvious that a formal model is needed to answer how a new constitutional court can serve as insurance in light of the ensuing enforcement problem; however, it is precisely the kind of question that a formal model could be fruitfully used to answer.

Conclusion

I raise these questions about Ginsburg and Helmke not to criticize their scholarship. On the contrary, I believe that these scholars have produced some of the best recent work in our field. Yet, both projects underscore the ways in which formal and non-formal scholarship can interactively produce knowledge and they both suggest that formal theory can help pin down strategic arguments. Helmke (2002) and Ginsburg (2003) build on ideas of scholars that made use of formal and non-formal methods. And importantly, their work has been clarified and extended in key ways by formal versions of the original arguments. Carrubba answers some key questions in Ginsburg, and Helmke answers key questions of her own. A healthy research agenda produces answers to existing theoretical questions and also suggests new questions that can be modeled subsequently. Sometimes these new questions will be answered by the scholar that raises them, but it is even better when we tackle collectively our theoretical challenges. Formal theory is contributing to this process in our field, and by so doing helping to maintain its intellectual health. Formal models of law and courts ultimately will be evaluated as we evaluate all models. Do they illuminate important theoretical questions? Are they pregnant with empirical implications? Do we find support for their expectations in data? I am enough of an empiricist to welcome that analysis wholeheartedly, and I believe that formal theories can be defended on those grounds. That said, in so far as we turn to that analysis without considering the ways in which formal modeling influences the process by which arguments are developed, I believe that we miss the approach's key contribution to our field.

(Notes)

[i] For a discussion of why this has come to pass, especially in research on institutions, see Diermeyer and Krehbiel (2003).

[ii] Scholars that are sufficiently persuaded that classical rationality assumptions simply do not describe well how people think need not abandon the effort to formalize their theoretical claims. Indeed, behavioral game theory models are designed exactly to capture features of human cognition that seem to depart from classical assumptions (For a review of various modeling approaches, see Camerer 2003).

[iii] Pérez-Liñán, Ames and Seligson write about how careerism and hierarchy influence judicial choice, whereas Vanberg (2005) considers the conditions under which public support can induce judicial power and Lax (2007) investigates the possibility of constructing intelligible legal doctrine on a collegial court.

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Taking Judicial Motivation Seriously: Strategic Choice Research and the Problems/Promise of Formal Theory in Law and Courts Scholarship

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Like Admiral Stockdale during the 1992 vice presidential debates it is appropriate to ask who I am and why I am here.[i] I am not a formal theorist nor do I claim any particular expertise in this area. My assigned role is to discuss formal theoretical approaches to judicial politics from the perspective of one who works outside that tradition and perhaps has a slightly more skeptical view about its promise. I am happy to play the critic, although I hope my comments here are seen as constructive rather than (as the old Texas saying goes) simply as a "turd in the punchbowl."

Some Initial Caveats

Let me begin by expressing a general reluctance to engage in debates about the value of methodological or theoretical approaches in the abstract. As a methodological pluralist and a firm believer that the goal of social science should be to say something meaningful about problems in the social world, I tend to think it is wrong-headed to allow method or theory to drive our research agenda. In general, the choice of method should be dependent on the nature of the subject under investigation, and theory building should be an iterative process tied closely to real world experience and observation. Of course I recognize that there is no "pre-theoretical" definition of social problems worthy of our investigation and so theory is indispensable in helping us identify subjects to study. Nevertheless, there is a world of difference between what Ian Shapiro rightly labels "theory-laden" research and "theory-driven" research (Shapiro 2005). Whatever else it may be, research that seeks to validate one theory of social causation over others by ignoring alternative explanations, cherry-picking evidence to support assumptions, or defining underlying variables so broadly so as to make causal claims non-falsifiable, is bad social science.

For me the question of how useful formal theoretical approaches are for understanding judicial politics is thus a question of fit. There are many areas in the real world of law, courts, and judges where I would expect them to be useful. For example, those interested in investigating how Supreme Court justices vote while deciding to grant petitions for certiorari might find formal approaches that model strategic behavior to be quite helpful. On the other hand, if one is interested in understanding why a particular justice concludes that a statue is unconstitutional or cites a certain legal authority in a written opinion, then I am less inclined to think that a formal approach will be very illuminating. In the case of the former, experience and observation provides reasons to believe the justices act in strategic ways that can be simplified and captured by formal methods. In the case of the latter, however, there is every reason to think that judicial behavior is driven by messy normative commitments (be they ideological or legal) that are not readily open to the kind of reductionism that formal approaches require. Fit, not fad or fetish should drive the choice of theory and method.[ii]

Secondly, whatever methodological or theoretical perspective we adopt, we should assume a self-critical perspective. Our research should err on the side of making modest claims and should keep the "value added" question always front and center. I will leave it to others in this symposium better versed in the formal theory literature to address the specific contributions or "value added" by this approach to our understanding of judicial politics. But because formal theory imposes high transaction costs – given its specialized vocabulary, methodology and techniques -- those working in this tradition have a special obligation to explain clearly, and in ways that make sense to those who do not share their methodological predilections, how their work contributes to existing knowledge. All too often this is not the case.

A little more than a year or so ago I served as a discussant on a panel with a paper presented by two senior scholars in our field that applied Condercet theorem to the operation of super-majority rules in legislative decision-making. What was the starting conclusion of their paper? Under carefully specified circumstances one could predict that super-majority rules would produce better legislative outputs because they would dampen the ill-effects of partisanship

and special interest groups! The paper included pages of elegant mathematical formula but no effort to empirically test its central theoretical proposition. In 64 pages the authors cited a total of seven other works -- all formal theoretical research, and none of which included the obscure work by that little-known political scientist James Madison, who I believe had made the same point more than two centuries ago. Anyway it is hard to see what value such research adds. Of course addressing problems wholly internal to a theory is sometimes necessary to the scientific enterprise. Nor are formal theorists the only ones to loose sight of the fact that the goal of science is not to advance our careers but to add to our substantive knowledge about the world around us. Nevertheless, if we want others to take our work seriously we must convince them that our work addresses serious problems. Our research should focus on questions whose answers would be consequential for the quality of peoples' lives, and we should be more concerned with the truth value of our findings than their theoretical elegance or even coherence.

Formal Theory and Strategic Choice

With these caveats in mind, what are the promises and pitfalls of formal theoretical scholarship on law and courts? As both Jim Rogers and Jeff Staton make clear in their contributions to this symposium, formal theory embraces a broad range of research and perspectives. It is probably impossible to say anything interesting about the entire range of this research other than that its chief advantage – simplification -- is also its chief weakness. Formal approaches allow us to simplify and reduce complex variables in order to see how they interact with other complex variables. Whether such reductionism advances understanding of behavior or phenomena in the social world depends on the subject matter under investigation.

But rather than discuss formal methodology in the abstract let me focus my remarks on formal research that takes a "strategic choice" approach. While I realize there is much formal research that does not adopt a strategic choice perspective (and many strategic choice studies that do not employ formalized methods), the most prominent strand of formal theoretical work to focus on law and courts to date has been that associated strategic choice, and so it is perhaps a good place to look if we wish to understand the promise and pitfalls of formal approaches more generally.

In my view, strategic approaches—when properly conceived and applied—have offered important insights to our understanding of judicial politics. But rather than the mulish assertion that egoism is an exclusive motivation of human behavior and the goal of social science is to mathematically model how egoistic motivations interact with each other, I think of strategic choice more broadly, in the way Gary Mackie defines it: "as any argument that takes human motivation and goals as primary, then proceeds to explain how pursuit of those goals leads to systematic tendencies in observed behavior." Using this definition, what makes strategic choice exciting is that it displaces failed grand theories of social causation and places human agency at the center of analysis. In the words of Mackie, "human beings are not the puppets of subconscious demons, nor are they simply products of systemic function, or of age, income, and educational variables (Mackie 2005, 7). Human beings are motivated actors who interact with one another. Understanding the nature of individual motivation first, and then the nature of their interactions second, is thus key to understanding human behavior.

I believe much of the best work on judicial politics has adopts this sort of "strategic choice" perspective broadly defined. I have in mind such works as Lax's (2007) sophisticated treatment of how and why collegial courts construct meaningful legal rules, Ginsburg's (2003) terrific study of the emergence of judicial review in Asian democracies, or Ramseyer and Rasmusen's (1997) work on judicial independence in civil law systems, but also, as I will explain later, many works by scholars not usually associated with the strategic choice school. Some of this work utilizes formal modeling and some of it does not, but all of it shares an interest in understanding both the nature of judicial motivation and its interaction with others.

What I object to is a style of research (formal or otherwise) that fails to take the question of human motivation seriously, and that seeks to replace one failed theory of universal causation with another. Indeed, several years ago Howard Gillman and I edited two volumes of essays dedicated to institutional studies of the Supreme Court (Clayton and Gillman 1999; Gillman and Clayton 1999). Behavioralist studies and especially the "attitudinal model" dominated the field at that time. We hoped that these volumes would demonstrate how the choices that justices made were contingent on both formal in informal institutional structures, rather than autonomous and wholly driven by individual policy preferences as attitudinalists were inclined to argue. Because the justices operate within both normative and positive institutional contexts, we thought it was important to move beyond the study of individual attitudes and pref-

erences and to examine the motivational terrain within which those preferences were shaped and competed with others. Beyond this however we raised questions about how far formal strategic approaches that adopted attitudinalist assumptions about judicial motivation would lead us. This point is a critical one, so allow me to elaborate on it.

The argument that judicial decision-making is interdependent in some strategic sense is hardly new. Although they did not develop formal models, earlier scholars such as Robert Dahl (1957), Martin Shapiro (1964) and Walter Murphy (1964) all argued that judges interacted with other judges as well as with other policymakers when deciding cases. What made the new wave of strategic choice research in the 1980s and early-1990s different was the way it conceptualized judicial motivations. In the main, earlier scholars did not think judges were simply motivated by their personal ideological policy preferences. Judicial preferences certainly had ideological dimensions – in the sense that any post-realist jurisprudence rests upon political values – but judges were not assumed to be motivated to advance political policy goals in the same way that say a member of Congress or a president was motivated. Rather, this first wave of so-called "soft-strategic choice" scholarship recognized that judges cared deeply about legal doctrines and rules, professional norms and conceptions of the judicial role. What these early scholars called attention to was how these judicial preferences were structured by political forces at both cognitive and corporeal levels and were pursued within institutional contexts that allowed for strategic behavior to occur.

Beginning in the late-1980s and early 1990s, a second wave of strategic choice scholars (i.e. Marks 1988; Eskridge 1991; Ferejohn and Weingast 1992; Gely and Spiller 1990; and McNollgast 1994), began to develop more formalized models of interactive judicial decision-making. But in so doing they jettisoned the more complex conception of judicial motivation held by earlier scholars, instead positing a reductionist account of motivation that had been developed largely within the attitudinalist literature. That conception drew a sharp distinction between a judge's "legal" attitudes and their "political" (or policy) attitudes, and asserted that judicial behavior (at least on the Supreme Court) was motivated solely by the latter. While most of this early strategic choice research on courts and law was published in law reviews or economic journals, it eventually became mainstreamed in the political science (e.g. Songer et. al. 1994; Rogers 2001; Cameron et. al. 2000; Hammond et al. 2005). Much of this work cites attitudinal scholarship such as Segal and Spaeth (1993) as proving that the justices are motivated to advance their "liberal" or "conservative" policy preferences. Indeed, Spiller and Gely go as far as to suggest that the goal of the strategic approach is to "generalize the attitudinal model" and argue for full integration of the two approaches (Spiller and Gely 2008).

I will not rehearse the familiar reasons why so many scholars now believe the attitudinalist model to be deeply flawed with respect to how it conceptualizes judicial motivation (but see Symposium 1994; Symposium 2003; Gillman 2001). Unquestionably attitudinal scholarship has demonstrated that, within certain areas of law, Supreme Court voting patterns display a "unidimensional structure," or, in other words, vote patterns remain stable over time. What they have not shown is that this structure is the result of simple policy preferences. To be sure, attitudinalists have successfully attacked a straw man – a version of the "legal model" that conceptualizes the law as black letter interpretation and mechanistic adherence to precedent (Segal and Spaeth 1999). But no legal practitioner in the post-realist world views the law or the operation of legal-professional norms in such a way. In the post-realist legal world, law is neither mechanistic nor apolitical. In theory and practice the law is conceptualized as a commitment to apply a set of *a priori* interpretive principles and values (some of which are substantively political). The correct distinction is thus between "principled" and "result oriented" decision-making processes, rather than between political and apolitical models (Gillman 2001). Indeed, scholars who tend to adopt an historical-institutional perspective such as Gillman (2001) or Keck (2007), as well as those who work in more traditional behaviorialist frameworks such as Baum (2006) or Kritzer and Richards (2002), and even strategic choice scholars such as Lax (2007) or Maltzman, Spriggs and Wahlbeck (2000), all have demonstrated that judicial preferences or motivations are far more complex and multi-faceted than the attitudinalist model permits.

My point here is not to reopen the debate over the attitudinal model, but to emphasize that questions of preference formation or motivation must be treated theoretically prior to studying how preferences interact. By uncritically adopting attitudinalist accounts or other highly reductionist versions of judicial motivation, much of the strategic choice research in this "second wave" went in misguided directions. So-called "Marksian" accounts that treated the preferences of judges and elected politicians as interchangeable, particularly failed to garner much support when subjected to honest empirical testing. Segal's (1997) award-winning article in the *American Political Science Review*

testing such models demonstrated what common sense should have told us – judges do not sit around calculating the median member of Congress when deciding whether to strike-down a statute. Moreover, by implicitly adopting such a thoroughly un-realistic conception of how law and politics interact in the judicial mind, many of these second wave studies lost the ability to speak to how law and judging is experienced or understood by its practitioners. Like the attitudinalist research that it increasingly displaced, these strategic choice studies had a reified quality to them. Even when empirical data was cherry-picked to make their theoretical propositions plausible, they remain unconvincing because they lacked resonance in the world of experience. Indeed many of these studies remind me of Shapiro's (2005) satirical study of lampposts, in which empirical evidence of dogs peeing on lampposts is marshaled to conclude that lampposts are placed strategically for dogs to have places to pee.

Moving Forward?

If this vein of strategic choice research on judicial decision-making demonstrates the problems associated with highly reductionist accounts of human motivation, a more promising development is the emergence of a new wave of research that uses the strategic framework to actually explore how different kinds of motivations are constructed and interact in law and courts. Rather than assuming an unrealistically sharp dichotomy between law and politics, these studies explore how law and politics mix in complex ways to generate and constrain the preferences of legal actors. I have already mentioned Lax's (2007) wonderful article examining the construction of legal rules on appellate courts, Ginsburg's (2003) insightful study of the establishment of judicial review in new democracies, and Ramseyer and Rasmusen's (1997) examination of judicial independence in civil law systems as just a few examples. Some of these studies utilize formal models, some do not.

What makes them promising is the degree to which they place the question of motivation, not just interaction, at the heart of the analysis. In doing this, it is also likely that such research will draw new linkages between formal theory and normative-historical research. Lax's research, for example, draws heavily on Lewis Kornhauser's normative work about legal rules, just as the work of Ginsburg and Ramseyer and Rasmusen is embedded in normative research about judicial independence. Similarly, from the other direction, recent research by historical-institutional scholars such Graber (1993), Gillman (2002), McMahon (2004), Pickerill and Clayton (2004) and Whittington (2007), who are interested in understanding how "political regimes" shape judicial preferences have all used strategic frameworks (loosely defined) to explain how elected elites structure judicial values and preferences. The convergence of these approaches will no doubt continue.

While some will want to continue down the road of integrating formal models of interaction with stale versions of judicial motivation derived from attitudinal research, I think the most exciting work in the future will focus on unbundling the idea of judicial motivation in order to understand how formal structures create spaces for preference *formation* as well as preference *interaction*. Whether this research utilizes formal methods and models, and whether it is labeled strategic choice or something else, is ultimately less important than the insights it yields about questions of significance in the real world.

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(Notes)

[i]James Stockdale was one of the most highly decorated officers in U.S. Navy history but not well known outside of military circles. When he ran as a vice presidential candidate on Ross Perot's Independent ticket in 1992, he infamously opened one vice presidential debate with the rhetorical questions "Who Am I? Why am I here?"

[ii]A similar point about the applicability of strategic choice models to judicial behavior is made by Jeff Segal (2007), although for different reasons.

The Justice Department and American Politics: Functions, Process, and Questions about Current Politics

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Introduction:
The purpose of this paper is self aware intellectual missionizing. It is intended to emphasize the vast opportunity, and the social need, for new work on what otherwise I call "the politics of prosecution." The missionary plea is for new work- -all the way from high class undergraduate papers to doctoral dissertations, finished books, scholarly and popular, and high class journalism- - all of this directed to the executive-bureaucratic process in law. The deficit of knowledge is very great. There really is a need and the knowledge really is not being developed. This is related to, but separable from, the well developed subject of judicial politics, in particular, the plea invites attention to the United States Department of Justice. The Department of Justice is a crucial institution of power. William French Smith, Reagan's first Attorney General, referred to the Department as "one of the most powerful [institutions] in Washington and one of the least understood." (Smith, 1991, xvii.)

MELODRAMA ABOUT THE DEPARTMENT
There have been, during the Administration of President Bush II, some very melodramatic situations that many people know.

1. The Washington Post, the intra-office memorandum of the political information class, has reported in some detail on the legal theory of the Department that there is virtually no legal restraint on a wartime President's power to authorize torture.

2. Within this year, John Ashcroft has published his autobiographical account, primarily emphasizing his time as Attorney General of the United States. He confirms the trip to his hospital room by White House Chief of Staff Andrew Card and White House Counsel Alberto Gonzales to secure his approval of a legal instrument that the Acting Attorney General would not sign.

3. The prolonged hearings and reports in 2007 on the removal of certain United States Attorneys led principally to the deterioration of Attorney General Alberto Gonzales and his reputation. These cases involve a great deal of melodrama and they are mixed in with very mundane events.

In the combination of the melodramatic and the mundane, it is plausible to identify four functions of the Department of Justice, to suggest some considerations about Department of Justice functions, to make some exploratory suggestions about its process and to leave with a question about current politics.

THREE PRINCIPLES: Moley, Wallace, and Frank Miller

As a preface, consider three points that may be called "principles." They are empirical findings from work by Raymond Moley, Schuyler Colfax Wallace, and a lawyer named Frank W. Miller. In 1927 Moley, later one of Franklin Delano Roosevelt's prime advisors, wrote a book entitled Politics and Criminal Prosecution.

The Moley Principle emphasized the broad reach and essentially unreviewable discretion of the prosecutor.

In 1930, Wallace conducted the first mail survey in political science that I know to have been addressed to executives. The Wallace Principle emphasized that prosecutors not only have wide discretion (which is what the Moley Principle says), but exercise their own value judgments in making their decisions.

The Frank Miller Principle specifies four considerations that prosecutors say they take into account in making these value judgments. It is plausible to say "take into account," but it would be too much to say "measure" and too much to say "define clearly." What is the "strength of the evidence"? What is the character of the accused? What is the attitude of the community? What are the costs and benefits of carrying something to prosecution?

The Frank Miller Principle gets some assent from some practicing (and thinking) lawyers on these criteria, and but it gets scorn from others whom one also regards with respect. (The difference seems to depend on the degree of precision that critics think these principles call for.) Beyond such differences, this Frank Miller Principle extends beyond criminal action. It also runs through the civil and the advisory processes in government as well. For present thinking, one adopts these principles not only for local and state actions but as applying to the United States Department of Justice.

THE FOUR FUNCTIONS

There are recurring problems in government, and they are dealt with somehow. Political scientists may make progress by identifying four functions of the Department of Justice. These four functions are (1) the institutional monitor of loyalty, patriotism, and system security; (2) the policing of election practices; (3) the policing of officials' ethics; and (4) the litigation of, or controlling advice on, more or less "ordinary," but very important, substantive policy. In thinking through these functions we also must give some attention to Justice Department process, Justice Department structure, and the Department as a working system.

Function 1. **We should all pay some attention to the actual functioning of the Department of Justice as the police of loyalty and patriotism**. That is not a pleasant subject to discuss, especially from a civil libertarian point of view. But almost any review of the Department's history will take us back to some consideration of the Palmer Raids during World War I. It will take us to some consideration of struggles between the legendary J. Edgar Hoover and one or more Attorneys General, and of the cooperation that he received from Presidents Franklin Delano Roosevelt and Lyndon B. Johnson.

This paper is not grounded on the large literature that has emerged, within the years since 2003, on the subject of "torture." But in the context of the agenda it is necessary to point out that it is within the Office of Legal Counsel that the intellectual work was done to validate the power of the President, under claims of "the Executive Power," to decide what practices shall and shall not be permitted, and to shield those claims against challenge in either the courts or the legislative process. What is most worthy of note is that the legal work itself is, to an extent that we cannot know, done in secret. Even Jack L. Goldsmith, who signed on with the intent to support the authority of the President, found it too much to take. Most importantly, Goldsmith said, "Much of what I learned must remain hidden behind thick walls of classified information, and cannot be written about for years, if ever" (Goldsmith, 2007, 12).

In this era, when all of politics is influenced by the concept of terror, students and faculty of political science need to study more deeply the advisory process. Students of government are told a great deal about the importance of the Solicitor General's office. This office controls the
Government's approach to the Supreme Court. Much more should be learned about the Office of Legal Counsel. This office tells the Executive Branch what "the law" is and that is what the Government acts on. In this present Administration, where the term "signing statements" has taken on great emotive power, the Office of Legal Counsel tells the agencies what the President wants them to do with the laws confided to them. The small Office of Legal Counsel, with about twenty-some people, is the interpreter, and broadly the advocate, of the most extensive powers that can be claimed by a President.

Function 2. **The Justice Department is increasingly important in the policing of election practices.** One of the things that we should all recognize is how deeply involved the Department of Justice is, and how much more likely it is to be, in the regulation of election practices. There are many dimensions of this, but in this paper one emphasizes a special situation under the Voting Rights Act, as variously interpreted and amended since 1965.
The case illustrates the importance of trying to learn the pathways by which social issues become departmental decisional issues. It also illustrates how fundamental can be the policy decisions that may come from internal departmental changes.

This was a Federal case that the Government brought and won that concerns Noxubee County, Mississippi. The Government prevailed in this case as of a decision issued on June 29, 2007. [(U. S. v. Ike Brown, U. S. District Court, Southern District of Mississippi, Eastern Division, Civil Action No. 4:05 CV 33TSL-LRA, Document 214, Filed 06/29/07.) Memorandum Opinion and Order, page 103.)]

The case was brought, by the Civil Rights Division, under the Voting Rights Act, Section 2, alleging racial discrimination by black officials against white voters in Noxubee County. (There is a portrait of Noxubee County as of some years ago, when there was a big local dispute about a proposed commercial waste site in Crawford (Uproar at Dancing Rabbit Creek [1996]).

This case comes under the Voting Rights Act, Section 2. Some of the Voting Rights specialists commented informally on an announcement of the Department's interest in the case. They seemed shocked, as if this DOJ action was a departure from normal practice on Voting Rights Act issues.[i]

In formal terms, here is how the Department of Justice summarized its complaint:

> In this complaint, the United States alleges that the practices of local election and party officials discriminate against whites in violation of Section 2 of the Voting Rights Act. This is the first case filed by the Department of Justice in which it alleges that whites are being subjected to discrimination in voting on the basis of their race. Further, it is alleged that officials have coerced, threatened, and intimidated voters in violation of Section 11(b) of the Act.

There was a consent decree with certain local officials prohibiting a wide range of practices said to be illegal and discriminatory. The present author deemed the consent decree a shadow. If the Government had a case where the "strength of the evidence" justified the benefits of bringing it to trial, the Government would have done so. The local officials had no incentive, since their pockets were by no means as deep as those of the Department, to say "oh no, just try me in court."

The remaining defendants were the Noxubee County Election Commission and the local Democratic Executive Committee and its chairman, Ike Brown, who were the real targets in any case. The case could only come with initiative from the Department of Justice. What did they say (or think) were the costs and benefits? The Government spent two years of effort on this case. The financial costs had to have been considerable. The matter could have come into the Division and ascended to the Assistant Attorney General (AAG) level because someone, committed to the Division's normal practices, deemed it to be a compelling injustice worthy of prosecution.

The present author does not find the compelling injustice hypothesis persuasive. The best interpretation is that this was a case where the political appointees in the Department exercised their authority to override career line lawyers who denied the legitimacy of the case.

This particular county has never escaped its Black Belt plantation heritage. Even the judge, who ruled for the Government, says "The court does not doubt that similar discrimination against blacks continues to occur throughout this state, *perhaps routinely*. (Italics added. MH) And it may be true, though the court makes no judgment about this, that the Justice Department has not been responsive, or fully responsive, to complaints by black voters."

Indeed, the judge says "the *politics* (italics added, but it is his word) of the decision to prosecute this case . . . cannot be a factor in the court's decision." The case's being brought was an abuse of prosecutorial discretion in a Department of Justice under severe pressure from outside.

How did it come to command the attention of the Department's leadership? Persons and groups who are defeated in one political arena call upon those to whom they have access in some other arena. This probability is likely to be high where exclusion and inclusion (Holden, 2006, 177-180) is a significant issue.

As an explanatory principle, one should also find ways to estimate the probability of counter-attack (Holden, 2006). Hypothesis: If it were possible to have unedited and unexpurgated logs from the White House, or from other external communications, we should find that the Noxubee County Republicans, white people, were able to get their matter into the Division through its political participants rather than its career participants.

The best explanation is that the Noxubee County Republicans were able to get their case into the Department as a matter for attention at the level of the Attorney General or those with whom the Attorney General daily consults. The interpretation is that it subsequently was transmitted from the top level to become an intra-Civil Rights Division matter.

The evidence, after two years of preparation, was not compelling. (I personally sat through about half of the two week trial and read reports on the rest.) Some matters, publicly reported, would surely have activated such a referral if it were correct. For instance, it was reported that the Democratic Chairman (Brown) had published a list of white persons who would not be permitted to vote. The testimony in court showed that this report was not true.

What was true? There were persons, *believed to be Republicans*, whom it was said *might be challenged* if they attempted to vote *in the Democratic primary*. The public reports have not dealt with the question of how people might overcome any such challenge. When the election came, according to the testimony that I heard in court, no one was actually challenged.

Lawyers like to lead with strong witnesses. Specifically, the Department of Justice led off with testimony by an incumbent, and white, Prosecuting Attorney. This Prosecuting Attorney claimed that a black attorney was recruited to run against him. He challenged this candidate's eligibility on residency grounds. There were no black attorneys in the county, the man had come in from the Jackson metropolitan area some two hours drive away. He said the Noxubee Democratic Executive Committee never acted on his challenge. The Prosecuting Attorney did what would have been forecast as second nature to a lawyer. He went to court and got the other person disqualified on the ground that the residency requirement had not been met. He was reelected without anyone running against him. He has in any event been in office 23 years and is in office today. *He exercised his procedural rights, remained on the ballot, and was re-elected with no challenge*.

The Government's expert witness was a political scientist long active in Republican politics in North Carolina. He testified that there is black discrimination against whites that such discrimination is a mirror image of past discrimination against blacks by whites. This "mirror image" language indicates a claim that black officials in Noxubee have used their powers to do the very same things to white voter as once were done to blacks.

In a hearing on recommendations to implement the June 29 decision, the Government further proposed that "Ike Brown and his associates" be barred from participating in the electoral process for the next four years. (The Government has prevailed, at least to the extent that the administration of elections for the next four years has been placed in the hands of a referee-administrator appointed by the U. S. District Judge. One law professor, who says he worked in the Civil Rights Division for more than twenty years, said on an election law list serv that he had never known so drastic a remedy.)

There is virtually nothing in the case that deserves to be called "intimidation," and most of what the judge finds "discrimination" is trivial or explainable in other terms. The case should never have been brought, though a gratuitous report by the New York Times disguises that reality from the reader beyond Mississippi, and misleads the outside reader into believing that the blacks were doing to the whites what the whites used to do to them.

The political significance of the case is that in many, many Southern counties local politics is a racial political struggle. When black majorities finally prevail at the county level, they will then be faced with the weaponry of the Department of Justice, if the opposite party controls the national government. The Civil Rights Division, under new political leadership,

political leadership, is now being redefined under a new conception that the original race relations and civil rights purpose is no longer so necessary. In effect, this is the retrenchment that one could forecast for agencies seeking to minimize constituency dispute (Holden, 1966).

Function 3. **We should also expect the Justice Department to play an increasingly large role in the policing of officials' ethics** because the teletronic era feeds on drama. Anything identified as "bad" also requires correction by "whatever means." The Department has, from time to time even in the more remote past, brought various criminal cases against state and local officials. We should expect this to become intensified due to the theatrical effect of teletronic coverage. This subject is wide open to new study. Since March, when Governor Eliot Spitzer's misadventures, potential Federal indictment, and resignation came into public view, one discussion on the listserv involved the idea of "selective prosecution." Basically, selective means that Republicans running the Department of Justice selected Democrats whose official and political careers could be embarrassed, and sometimes destroyed, by being prosecuted.

Some people explained that they thought Spitzer just got caught because the new anti-terrorism laws, plus advanced electronic technology, make it extremely easy for anybody's bank account transactions to be identified, reported to Federal authorities, and made the basis for some more specific investigation and possible indictment. Others thought Spitzer had, as Attorney General of New York, had "done it to others" and deserved no sympathy. Others thought he was stupid and had it coming. One person (call her Commentator 1) brought onto the listserv information that soon was also in print (New York Times): that an active Republican had said he had informed on Spitzer. This comment was taken by another commentator as implying some sympathy or belief Spitzer had been unfairly targeted.

Commentator 2:

> But don't we often rely on base political motives to supply the oversight of our leaders? The grim reality is that Spitzer, for whatever psychological reasons, knew he was playing with fire with regard to violating a number of laws, and left the evidence all around him. The lead story in tomorrow's Times suggests that he was far more involved in trying to get Joe Bruno (a New York state senator with whom the Governor had been in some controversy) than he has admitted to. What would we be saying, incidentally, if (the informant) had made his disclosures to NY legal authorities (most of them Democrats)? Would we expect them to wave the charges aside, even if there is evidence that Spitzer broke variety of (rarely enforced) laws?

This produced an immediate response from Commentator 1.

> My argument is not that Spitzer wasn't stupid or that he didn't do it. Or even that he should not have been caught. . . My concern here is that once criminal investigation becomes a site for political payback in some cases, it's hard to believe that justice can be even-handed in others. . . To legitimately wield the power they do, they must rely on trust from a public that believes they have a dispassionate commitment to truth and even-handedness. And that's what has been badly shattered in the current Justice Department.

It is not necessary discuss whether Governor Spitzer was behaving stupidly or not. Nor is it necessary to jump into the fray over whether selective prosecution explained his situation. Instead, the question that has not been asked in social science is: "how does the investigation as a unit of action come to be?" The action that puts one under the cloud is not so much an overt action such a prosecution, though that is bad enough, but the covert stuff that you may never be able to correct or rebut in the course of an investigation.

Thus, to the listserv one did, in fact, pose the generic question:

> .. Who, on this list, has developed a methodology for studying "investigations" and for studying the process of turning "investigations" into indictments, etc.? This is not taught in political science. Is it taught in law school? I doubt it but I wait to be instructed.

No one offered an answer. It will be methodologically difficult to deal with the problem. The function of methodology is to exclude outright fraud and minimize logical error.

The trouble is that methodology also serves to suppress or minimize deep study of important questions, forcing people to seek the safe haven of the more obvious and manageable questions. But that is not where the most significant problems of politics and society are to be met.

Without spending more time, one should notice that Donald Cragan and John Shields appear to be much more definitive. They have written an extensive study of Federal prosecutions during the Bush II Administration in which they will leave no doubt as to their conclusion. Their claim will be that the Bush II Administration's Department of Justice has targeted Democrats and has prosecuted seven times as many Democrats as Republicans.

These problems of prosecuting people who may well be convictable, but of choosing those who are politically inconvenient are not new.

Function 4. **Departmental discretion is also exercised to sustain value judgments in ordinary policy, although these value judgments may not be compelled by "the law."** There is also accordingly a need for study of Department of Justice discretion where issues of policy are more ordinary. If we have any Federal law that is enforceable by Federal penalties, then the Department of Justice is the agency ultimately interprets what Federal law means. Other Federal agencies may be more immediately involved, but for them Federal law is what the Department says it until some Federal court says otherwise.

This work is largely the function of "the litigating divisions." These units are headed by Assistant Attorneys General, roughly parallel to the assistant secretaries in other departments and to commissioners in the independent regulatory agencies. They are presidential appointees. At present, there are seven litigating divisions. The question is what degree of substantial stabilization exists in the environment. From that viewpoint, the issue also is how stable or unstable the constituency interest may be. The divisions can probably best be ordered as followed: National Security Division, a product of the Patriot Act under circumstances that need no further exploration. The Civil Division, which (from its origins in the handling of claims against the Government) is an outgrowth of the basis of protecting the Treasury against extravagant demands. But Civil Division litigation about such things as medical benefits reaches far beyond simple ideas of "the law." So does the Criminal Division, in which negotiated settlements with major automobile companies may involve great intrusion in the historic right of the right to express an opinion that has not been precleared by the Department.

The most significant factor about the litigating divisions is whether its constituency structure (Holden, 1966, 843-851?) involve conflictual matters that the Attorney General has to be particularly concerned about or whether they can be left to run by themselves.

The Anti-Trust Division once had an anti-monopoly conception. The victory of Chicago School Economics not makes unnecessary the conception of anti-monopoly as central to anti-trust policy.

The Environmental and Natural Resources Division, with the especially turbulent problem of the Environmental Crimes Unit (Lochner) and a Congressionally mandated rewriting of the pertinent parts of the DOJ Manual, is built on the history of the Land Division.

Robert Duran pointed to the administrative politics that could influence this Division. He said "... for instance, appointees (meaning 'political appointees') effectively diminished the status, organizational independence and enforcement zeal of hazardous waste personnel by merging this unit with the Division's environmental enforcement section ." (Durant, 1992, 34.)

Finally, in trying to think through the working system, some students could undertake a mapping of Congress and the Department of Justice. Legislation, appropriations, and oversight are all part of what has to be studied more closely. This means, incidentally, that someone should pay extremely close attention to everything that can be

learned about the Assistant Attorney General for Legislative Affairs.

Congress does act in a decision-making and authoritative capacity. The oversight function has increased in importance due to the presence of television, and the amplication of other electronic modes that allow visual images to be sent from one person to another and to the whole world. Oversight means hearings and hearings become theatrical displays.

Some refinement of the term "oversight" is needed. There is intermediation, where representatives or Senators seek something good for (or protection against something bad for) a client, a constituent, or other favored interest. There is "true" oversight where the intent is more or less objectively to improve some aspect of the administrative process or policy. There is legislation where the intent—often hard to achieve—is to make a substantive change in the content of legislation. Finally, there is the intent to inflict punishment, which was the process being visited upon Attorney General Gonzales.

One question is how does the oversight process get started. The oversight process regarding the removal of the United States Attorneys seems to have begun with complaints out "in the field" that members felt they had to take seriously. It may well have been intermediation. Senator Pete Domenici's active interest in the case of David Iglesias was one example.

Very soon the oversight process shifted to harassment and something akin to punishment, although punishment is a double edged sword. (In some political conditions, the members of Congress seen to inflict punishment may suffer damage to their own reputations and need to protect themselves.) The intervention, in late November 2004, by Ed Cassidy, chief of staff for Representative Doc Hastings (RWA) was related to punishment. (http://www.tpmmuckraker.com/archives/002689.php.)

The demand for punishment came from prominent Washington businessman Tom McCabe, disappointed with McKay's handling of voter fraud allegations. He demanded that Hastings "ask the White House to replace Mr. McKay," for not adequately pursuing the voter fraud allegations. Hastings said, "I flat out refused to do so, which Ed Cassidy told him in the bluntest of terms."

There were similar interventions in California, distinguished only the fact that the U. S. Attorney Carol Lam was assailed by a coalition of eighteen Republican lawmakers, led by Representative Darrell Issa (R-CA) sign a letter criticizing Carol Lam's "lax" handling of immigration cases, and defended by Democratic Senator Dianne Feinstein. In the end the much cited oversight capacity (McGeary, 1929), is far less potent that teletronic drama may suggest.

Congress sometimes acts in an advisory capacity, as do some other representative assemblies. And it acts expressively, offering of praise, pledges or promises to those in highest authority, presenting petitions for assistance or relief, and sometimes protesting the action of the executive's servants or, ultimately, the executive's policies and actions.) Only when Congress acts authoritatively does it impose significant limitations upon the Department of Justice, and only then in extraordinary situations. Most members of Congress, most of the time, do not have jurisdictional access to influence the Department. Moreover, members of the President's party will tend, unless they have compelling reasons, act expressively to support DOJ, if only to shield the President. This means that most of the time, controversial matters within the scope of DOJ will be determined by the working system of the DOJ.

CONCLUSION

The task of the Political Scientist is to explore and explain how and when the Department will decide for itself, and how and when its decision will be influenced, or even controlled, by some other source. The political scientist's task is also to understand how such knowledge can be taken into account in political reasoning.

Thus, to reiterate virtually the same language used in beginning, there is a serious need for new work—all the way from undergraduate papers to doctoral dissertations; finished books, scholarly and popular; and high class journalism.

In dealing with these matters, political scientists should be very alert to the imperative loyalties that are present. Officials have wide official latitude, but they are constrained by imperative loyalties that are active pressures or political demand that other people will enforce or attempt to enforce, whether the person upon whom they seek to act likes it or not. They can be reduced to four: (1) party, faction or clique, or ideological linkage—despite constant professions that nothing "political" should be taken into account; (2) public opinion and culture; (3) the legal profession itself; and (4) cooperation and coordination with other agencies, especially in the world of "law enforcement." We should also expect to find as internal beliefs and emotional commitments about how judgments should be made stand as latent pressures.

In dealing with such questions, there are two other matters of process that we need to understand better. One is the simultaneity of **bargaining and command**. Bargaining and command will be revealed as we discover the paths by which praises, reassurances, demands, complaints, and threats enter from the world outside, and as we discover how Departmental personnel enter into their own relationships with the rest of the world.

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(Notes)

[i] The case caught the present author's attention because he was familiar with the history of the Mississippi Constitutional Convention of 1890. The 1890 Constitution was the legal vehicle by which disfranchisement of black votes was accomplished. The chairman of the Franchise Committee had been one R. C. Patty, Chancery Clerk of Noxubee County. It seemed profoundly ironic that Noxubee County should produce a Justice Department law suit based on the claim of black discrimination against white people.)

The Judicial Research Initiative at the University of South Carolina

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The Department of Political Science at the University of South Carolina is pleased to announce the creation of the Judicial Research Initiative (JuRI). This collaborative effort is designed to replace the services formerly provided by the S. Sidney Ulmer Project at the University of Kentucky (which will no longer operate given the departure of Kirk Randazzo to the University of South Carolina). Initially, the JuRI will archive and distribute several versions of popular judicial datasets, including the various U.S. Supreme Court Databases (compiled by Harold Spaeth), the U.S. Courts of Appeals Database (originally compiled by Donald Songer and updated by Ashlyn Kuersten and Susan Haire), and the Attributes of U.S. Judges Database (compiled by Gary Zuk and Gerard Gryski). These data are archived at the JuRI website (www.cas.sc.edu/poli/juri) and links are available to additional datasets archived at other institutions.

During the summer 2008 transition period the JuRI website will continually provide updates to these datasets as they become available, ensuring that all users have access to the most recent data. Then, starting in the fall semester the JuRI will seek to expand its services to the academic and professional community by providing a working papers archive and a distribution point for empirical measures of law and judicial phenomena. Additional services will 'come online' as resources permit. The goal of this endeavor is to offer the JuRI as the primary location for data and research pertaining to all aspects of law and judicial politics.

In addition to the offerings provided by the Judicial Research Initiative, the Department of Political Science at the University of South Carolina has established a Ph.D. major in public law beginning in the 2008 academic year. Doctoral students who major in public law can choose between two primary focuses – the American Judiciary and Comparative Judicial Politics. Individuals who specialize in the American Judiciary will focus on how federal and state judicial institutions integrate with other branches of government and impact the policies of the United States. Students who specialize in Comparative Judicial Politics will focus on how judicial institutions operate in a variety of environments, including established democracies, developing countries, and countries transitioning to democracy.

The University of South Carolina is in a unique position to offer a doctoral major in public law due to the prominence of three faculty members whose research focuses on various aspects of judicial politics. Donald Songer, Professor of Political Science, conducts research on judicial politics within the United States (most notably the U.S. Courts of Appeals) and comparative judicial institutions (most notably the Canadian Supreme Court). Kirk Randazzo, Assistant Professor of Political Science, focuses on judicial politics and empirical methodology. His research examines strategic behavior within the U.S. federal judiciary, legal constraint among judges, and comparative judicial institutions (primarily in Eastern Europe and the former Soviet Union). Lee Walker, Assistant Professor of Political Science, focuses on comparative politics and empirical methodology. His research examines judicial behavior and public attitudes toward the judiciaries of Latin America. In addition to these three judicial scholars, the University of South Carolina has numerous other faculty members who specialize in aspects of American Politics, International Relations, Comparative Politics, Public Policy and Administration, and Political Theory. Doctoral students who attend the University of South Carolina and major in public law will have opportunities to conduct research on cutting-edge judicial politics and learn about all aspects of public law.

In conclusion, the University of South Carolina is extremely excited about these two developments. The doctoral major in public law will begin training students to conduct sophisticated and systematic research on all aspects of judicial politics. And, the Judicial Research Initiative (JuRI) will ensure that the academic and professional community continues to have access to the latest data and research on law and judicial politics.

Actively Learning Public Law

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Introduction

Typical public law courses in an undergraduate curriculum include Constitutional Law, Civil Rights and/or Civil Liberties, Law & Society, Judicial Process, criminal justice offerings, and perhaps options that focus more specifically on sex, gender, sexual orientation, race, or class. Whatever the course, syllabi generally direct students to read academic or popular press books or articles, to view videos, and to digest court rulings; and expectations usually include some form or degree of "class participation"—that often elusive (and perhaps ill-defined), but still essential element of any successful classroom experience. Such participation can take a variety of forms, of course, from the "What do you think about Justice X's line of reasoning in this case?", to the "Johnny, can you detect where you and Susie are missing each other on this question?", to exercises such as mock trials or moot courts, but one thing seems to clear: the more engaged, the more excited, and the more challenged the students are, the more they will get out of the course and the more they will carry with them throughout their lives. In short, I suggest, the more "active" students are—i.e. the more actively they are learning the material—the better.

This is not to disparage the lecture-oriented approach. In certain instances and institutions, this is the most efficient means for presenting information to large numbers of students. But where there is the possibility for a less passive approach to education—where students take on an independent project, where they actually talk to one another (as opposed to talking past each other or communicating with the person next to them via the professor/moderator), and where they literally get the blood flowing during the period by moving around in groups or as emissaries—students of all learning styles will benefit and instructors of all dispositions will find more rewarding teaching assignments. What's more, integrating active learning approaches into public law courses is an especially manageable prospect, due to the fact that our course material is so inherently engaging and because it affords vast and varied opportunities for creative applications to the "real world." That is, rather than dealing with the abstractions of differential equations or reactions in organic chemistry, for example, our courses appeal to broad and compelling themes (e.g. justice, equality, freedom) and invite students to weigh in on the most heated issues of the day (e.g. reproductive rights, gun control, the death penalty).

At the same time, as the initiated are well aware, it can still be difficult to effect meaningful, substantive, and consistent participation in class (beyond students merely announcing their opinions on various matters) unless students' interests are captured and unless their energies are focused—unless, in other words, students see that there is something at stake, that their contributions really can inform the collective inquiry, and that pushing the intellectual envelope will pay off in the end. To be sure, such efforts can be complicated by the general human tendency to cling to the known and don the well-worn, an inclination that I suggest we, as teachers, have a responsibility to confront and contest at every turn—drawing students into a space where they take risks and engage the material on unfamiliar ground. In this spirit, as Kelly-Woessner and Woessner (2006) put it, college "is not Club Med," meaning that rather than merely seeking to make a class "comfortable," there are times when students "must confront new and controversial ideas in order to help them think critically or broaden their perspective of the world, even if they find these new ideas to be unsettling [emphasis added]" (499).

In order to create such an environment and ethos, I have for the last several years devised and implemented a variety of "active learning" exercises[1] that are usable in a variety of public law courses. The underlying assumption here, following Cronin (1991), is that students will tend to "like and learn more from doing things than just sitting and listening" (487) and that "collaborative learning" (Bruffee (1993, 113), which makes the "Kuhnian assumption that knowledge is a consensus," is something fostered best when people are involved in interdependent exercises. Research has, in fact, demonstrated that students are more likely to be engaged in classes that make use of various active learning methods (Hamm and Adams, 1992, 2); and, even more to the point, Caruson (2005) writes, "[s]ince *politics* is essentially about group work and communication, active learning strategies are especially well suited" to courses dealing with political content [emphasis added] (309).

What follows then is a discussion of two categories of active learning. The first, involving "simulations," reflects on a more common variety, though the example I provide represents the first of its kind I have seen and can be employed in a range of different public law courses. The second, focusing on "structured interviewing," outlines a method I have devised and executed in multiple courses and with multiple themes, each time with great success. Following the general explication of both approaches, I offer at the end (in Appendices 1-3), examples from my classes and I encourage the reader to freely borrow or draw upon these exercises for use in their own courses.

Active Learning Techniques

Simulations

Simulations can take a variety of forms (van Ments 1983; Endersby and Webber 1995), but in general as Bonwell and Eison (1991) explain, simulations and games "include guiding principles, specific rules, and structured relationships" and often contain a role playing component which can be particularly effective at "forcing students to examine their attitudes toward other people and circumstances" (47).[2] Affording a "more direct experience with course material" (Endersby and Webber 1995, 523), role-playing scenarios can take a variety of forms, though the common elements found in most approaches "involve placing participants 'in roles which require that they overcome obstacles in pursuit of goals' and 'in situations whose opportunities, constraints, and incentives resemble those found in real politics'" (Hensley 1993, 64 [quoting Walcott 1980, 1]). In fact, he continues, role-playing activities are particularly appropriate for courses in judicial politics because "the roles of major participants in courtroom situations are both familiar and relatively unambiguous: plaintiffs, defendants, attorneys, jurors, and judges" (64).

Moreover, such exercises serve to facilitate the expression of a range of opinions by students without immediate coordination by the instructor and thus avoid the problem of "preaching by the authority figure" (Brown, 1994, 105). In the end then, students have seen something new—an "other"—without finding such perspectives pushed upon them by the instructor, or even other students. More to the point of this essay though, Brown (1994) explains that role play opportunities are valuable in that they allow participants to "to take nothing for granted, to question all of the statements and their implications of all of the actors." Indeed, the author continues,

> The freedom afforded by playing a stranger, and attributing extreme positions to that individual, allows the players tremendous scope of exploration into the nuances and conflicts inherent in any complex situation, without exposing the players' own beliefs. However extreme or absurd the development of the scenario, each individual is allowed to evaluate and question all positions within themselves. The culmination of the role play is not intended to be a public confession of wrongly held views that have been enlightened, but rather a private refection on the issues raised that will go beyond the particular class and degree program. (106)

And thus, as Ambrosio (2004, 285) has argued, the incorporation of such methods of inquiry can afford a deeper and more personal assessment of the subject area than would be possible through more conventional pedagogical approaches.

On another level though, assuming the role of an actor in the legal arena encourages deeper reflection on one's values and assumptions—especially when the role assignment requires acting *against* one's inclinations or comfortable tendencies. It is true, of course, that students may simply play their assigned role with an eye to achieving

the best grade possible, but whatever the motive may be, their enthusiasm in *doing* does encourage them to take the game quite seriously (see, e.g. Grummel 2002) and they find themselves vigorously stressing policies, making decisions, and advocating solutions that often run contrary to their predispositions—because, at least in some sense, the assignment has imparted to them a sense of ownership over a set of perspectives that they now feel obliged to communicate in a genuine and sincere fashion.

In such instances, students must, at least temporarily, step outside their zone of comfort and see the other side of controversial questions. As such, they are able to "play their role," advocating in ways and in an environment that not only accepts such experimentation in thought and value but which actually *rewards* it.[3] And thus such exercises facilitate exploration because students take on non-traditional assignments; reflection is encouraged, as well, in an empathic sense (i.e. "walking in another's shoes"); and, finally, risk-taking is supported by the institutional cover of the exercise itself. In other words, it is "okay" to think, speak, and argue in this new way because that is the *assignment*.

But we should stress here as well that such exercises also invite the *instructor* to assume some amount of risk in experimenting with non-traditional (and by no means guaranteed) methods for encouraging students to learn. On this note, as Bonwell and Eison (1991) explain, the "greatest barrier" to the adoption of methods beyond the traditional lecture is "the fact that faculty members' efforts to employ active learning involve risk—the risks that students will not participate, use higher-order thinking, or learn sufficient content, that faculty members will feel a loss of control, lack necessary skills, or be criticized for teaching in unorthodox ways" (2). Still, as Caruson (2005) is correct to stress, while the incorporation of such methods promises some uncomfortable uncertainty, the "benefits outweigh the risks as students engage with the material in a way that would be difficult to achieve in an alternate format, and the quality of their work consistently exceeds expectations" (305).

State v. Calvin

In the simulation, *State of Pennsylvania v. John Calvin*, students are assigned various responsibilities in a *voir dire* proceeding, or the process by which prospective jurors are questioned and (de-)selected by counsel from the initial panel(s) called to report for jury duty. Students are asked to assume roles including those of defense and prosecution attorneys, a common assignment in exercises such as moot courts, for example, but including as well a judge, occasional jury consultants (depending on the size of the class), and, critically, would-be *jurors*—that is, ordinary citizens who, as Larson (2004) notes, "tend to be left out of the political process" (303) in favor of games that revolve around the decisions and influences of political elites.

This hypothetical case was written to draw upon the students' reading assignments to this point in the course (various cases and controversies pertaining to legal representation, fair trials, the media, and so on) and it has to do with an individual accused of murdering a priest as revenge for previous abuses. (See Appendix 1). As the students are quick to realize, religion, views on capital punishment, histories of abuse, and theories on human nature, among other things, play an important role in the consideration of the composition of the jury.[4] Students are given their role assignments about two weeks before the in-class component of the exercise, in order to do some research, prepare or respond to juror questionnaires, discuss strategy, and generally get "into" their roles.

The role assignments in such a simulation are critical to the success of the project and can take one of two basic approaches, each of which pushes the students to proceed down new and unfamiliar avenues. First, where possible, students are assigned to a role *counter* to their normal inclinations and perhaps ideology. For example, students who tend to be more statist in their political disposition—prepared, in other words, to generally accept assertions of governmental authority or restrictions on individual freedom—are ripe for placement *not* as prosecutors (where they would be most comfortable), but rather as defense attorneys with the responsibility to populate a jury box filled with those most likely to resist the state's construction of the case and most inclined to side with the accused, especially given that the crime was a capital offense, or one for which the death penalty is an option. Second, because a juror's obligations are not as institutionally defined as those of the respective attorneys, a different approach to role assignments is necessary. Here, jurors are required to devise a brief biography of someone other than themselves or family members, including the educational background, occupation, age, race, and gender of their character. Students tend to have great fun with this—constructing identities with sophistication, savvy, and oftentimes humor; but what this also does is to accomplish a "cross-section" of the community and underscore the significance of the unknown elements of the profile of each student-created character.

As Appendix 1 indicates, both sets of counsel prepare surveys to be completed by the would-be jurors. Once these have been completed and analyzed, the attorneys take to evaluating the jury pool. Desiring to "win," of course, attorneys make calculations about the various jurors—though they realize, at the same time, that tact and discretion are required because this individual may end up on the jury and may be less receptive to their case on account of the screening process. The dynamics between the parties at this stage (attorney-consultant, juror-attorney, attorney-judge) are especially instructive, as students engage in the process of either proceeding against their normal political preferences or adopting as much as possible (with many eyes and ears keeping them in line and "true" to character) the persona, concerns, experiences, and responses of the role they devised.

Questions during the *voir dire* tend toward themes one would expect ("As a regular churchgoer, could you fairly judge this case?", "Do you believe that capital punishment is always wrong?", "Do you watch televisions shows like 'COPS' or 'America's Most Wanted'?"), but they also delve into deeper, more nuanced, and sometimes delicate domains ("Have you known anyone who has been a victim of abuse?") and even strategic word association queries ("What is your reaction when you hear the following names: "Father John Geoghan," "Cardinal Bernard Law," and so on) in order to gauge how closely the jurors have followed recent high profile cases. Responses are just as illuminating, particularly for those students who have added to their profile that they are actively religious, that they have children, and that they have known an abuse survivor, among other things.

Following the exercise, attorneys (perhaps in conjunction with their consultants) meet outside of class and return the next period with a list of jurors to strike. In reality the process for challenges varies by state, but for this exercise I have students begin with alternating cause challenges, providing specific reasons why each individual cannot fairly consider the case—after which the judge rules on each claim. Once cause challenges have been exhausted, the two sides are granted two peremptory challenges, which do not require justification, but which are, in "real life," susceptible to Equal Protection challenges. Following this, the class then discusses the experience, with stricken jurors having the opportunity to defend themselves, with counselors explaining their suspicions, reticence, or support, with the judge comparing notes with the consultants, and with everyone viewing up close and personal the politics at the heart of this commonplace legal exercise.

Structured Interviewing

What I refer to as "structured interviewing" is a device that, as the name would suggest, involves the act of "interviewing" (student-to-student) in a "structured" (that is, not open-ended) format, whereby: (a) the substantive theme of the dialogue between participants is coordinated in such a way that students proceed through the exercise with distinct markers and along defined avenues; (b) the participants themselves undergo and facilitate the process of "data" collection in their assigned roles as investigator and recorder; and, (c) where both parties are ultimately responsible for *explaining*, not merely "reporting," their partner's answers to the entire class. The potential for structured interviewing as a pedagogical tool builds on recent research on the processes of group deliberations and individual opinion formation and evolution in other contexts—for example, jury deliberations (Jonakait 2003), focus group gatherings (Heumann, Pinaire, and Clark 2005), deliberative polling projects (Fishkin 1991), and intensive one-on-one semi-structured interviewing (Gaubatz 1995). Done right, what this method facilitates is an efficient and focused opportunity to draw perhaps disinclined participants into a discussion under the cover—and hence protection—of a conversation "assigned" by the instructor.

One element that distinguishes this technique from other sorts of "conversation-starters" is the relative intimacy of the situation—a one-on-one setting that affords those generally reticent students the opportunity to be more vocal than usual, both in the conversation with their partner and later on, when asked to report to the class on the fruits of their interview. As is often the case with such students, having something written in advance puts them at ease and provides some confidence in public address. Second, this process enables—indeed, it requires—*deliberation* (as opposed to announcements, sermons, or rhetorical ships passing in the night) in the sense that students *must* both talk and listen; they *must* articulate themselves to the best of their abilities to their partners; and they *must* expose themselves to at least thirty minutes of dialogue with, in some cases, those who are diametrically opposed to their political views and values. Moreover, they must use that time effectively in order to explain (and even defend) their partner's views once the class reconvenes as a whole.

It is here that the interview component adds an interesting twist to the exercise because rather than a student sitting on the "hot seat" in front of a class waiting for their response to some Socratic posture, it is instead one of their *peers* who is pushing them to clarify their positions and justification. Student "A," in other words, has the incentive to press "Student B" to explain herself because "A" has been assigned to figure out "B" (and vice versa), an arrangement not without some discomfort and even frustration, but one which in an intriguing way reconfigures the class dynamic. To be sure then, the assignment also implicates some degree of risk in that students are nudged out of their comfort zone (where they may be content to raise their hand and speak—or not), and are perhaps literally displaced from their preferred seating arrangements, which means they are no longer surrounded by their cohort of friends or affirming associates.

Third, structured interviewing requires careful *listening*, to both sort out the reasoning of one's partner *and* to contemplate how his/her responses do or do not bear on one's own responses and reasoning, whether already conveyed (and hence open to amendment) or awaiting expression when the interviewing tables are turned. Indeed, many students find themselves persuaded by their colleagues' explanations—whether through their reasoning or their insightful questioning of the questions *themselves*[5]—and actually ask permission to revise their initial responses. Finally, because students must take what they have learned and then distill it into a two paragraph synopsis, they are thus required to take the reasoning they have drawn out of their partner, analyze it, and draft a report for the class discussing what they have learned of their subject(s). This portion of the activity is especially enlightening as students listen to their peers explain what they took from the interrogatory component of the exercise and then take the opportunity to comment on the other's assessment, affording something like an instantaneous "fact-check" that substantially improves the overall collective inquiry because each student now has an interest in ensuring that his/her responses are accurately reflected in the record.

"Talking with Strangers"

In this exercise students first complete a survey with ten questions. The survey questions (see Appendix 2) are relatively straightforward but carefully written to allow for coding of the responses. In organizational terms, the ten questions are all presented in the course of one sentence; each question affords five distinct options; and each asks the students to do one of the following: (a) reflect on a specific reading assignment for that day, (b) (re)consider an argument previously discussed, (c) situate their responses within the context of larger course themes, (d) weigh in on a salient public policy debate, or (e) engage in analogical reasoning when presented with an equally contestable issue implicating questions of harm, responsibility, and individual freedom.

Upon answering the questions to the best of their ability, students award themselves a "0" for an "A"-response, a "1" for a "B," and so on up to a "4" for "E," with the questions written in such a way that what is generally the politically "left" approach would be an "A," while the one most to the political "right" would be represented by option "E." The objective here is to offer the students a seemingly banal survey with no obvious indication of how they are "supposed" to respond; rather, they are asked to choose the options that most closely represent their views on or impressions of the matter—thus providing critical "data," as it were, to be analyzed and interpreted by their partner. Students then tally their scores, with quantitative values associated with their responses, and report their number aloud, which (at least the first time) provides some amusement as each person tries to figure out where this is going ("What is our number *supposed* to be?" they wonder).

The student with the highest score is then paired with the individual with the lowest score; the students with the second highest and second lowest scores are then paired together; the third highest and lowest work together; and so on—all the way down to a tie, or close grouping of students who are paired together as ostensibly "similar" respondents (though they may only have similar totals as opposed to similar responses). Each group then spends about a half hour engaged in a structured interview of their partner, with specific instructions on how to proceed and what to bring back to the larger group in the way of a written report of their experience. And thus the survey really only sets the stage for the more significant pedagogical value of this exercise: the experience of *interviewing* a peer in an organized albeit relaxed setting, in order to tease out one's assumptions and biases about self and society in a degree to which traditional techniques of measuring public attitudes do not avail themselves (see Heumann, Pinaire, and Clark 2005). But while "talking" with "strangers" of this sort encourages the desired engagement with an "other," an even greater effect occurs when each respondent must then *explain* his or her subject's views to the class—a requirement that privileges listening and attention to those specific frames, values, biases, and assumptions that either implicitly or

explicitly inspired their partner's survey responses.

To some extent the success of the interview between students depends on the personalities involved. Some students will perhaps not like one another; others will lack the inter-personal skills to hold even a one-on-one conversation. This is an unavoidable element of any classroom endeavor. Still, in my experience, most students take quite well to this task and set out to truly *understand* the opinions of their partner, an assignment which is more difficult than one might think at first blush, because the interview instructions call for each member of the group to first review their partner's surveys and to then take the opportunity to discuss each other's responses, carefully attending to *why* various options were chosen. In this regard, any political issue that sustains such variance on the "why"-axis (pun intended) could be the thematic focus of an exercise like this. Reproductive rights, drug policy in America, and capital punishment are some obvious examples where one finds divergent views, but virtually any policy debate that can be organized in less-to-more (for purposes of organization) terms seems eligible for an activity of this sort.

Conclusion

Having used techniques such as those described above and included as Appendices for several years now, I can speak to their consistent success—in the form of dozens of students now in or through law school, working on campaigns, on congressional staffs, and in various other fields who found that active learning approaches helped them better understand the legal problems and political implications we covered in various courses. While such evidence is admittedly anecdotal, for me it affirms the notion that, where possible, we as teachers are obliged to seek out methods and exercises that make students more active participants in their own education. Asking undergraduates to set aside notebook and pen (and perhaps to take the iPod buds out of their ears) is daunting to be sure, perhaps as much for the instructor, but the rewards are often immediate, profound, and long lasting—for everyone.

Appendices

Appendix 1: *State v. Calvin*

OBJECTIVES

This exercise brings to life the complexity of what is known as the *voir dire*, or the process of assembling a petit jury (the jury that hears the trial, as opposed to the grand jury which brings indictments) from the initial pool of those called for possible service. Multiple members of the community have been called by the state to potentially sit for this capital murder trial.

The objective here is **not** to try the case; rather, the objective for both sets of attorneys is to secure the most receptive jury possible, given the constraints of the pool. As you will see, this is more accurately a process of jury *de*-selection, whereby you must strategically pursue the panel most hospitable to the argument your side would likely make in such a case.

To wit, both the prosecution and the defense are permitted unlimited challenges for "cause" and two "peremptory" challenges, or challenges which do not require explanation. The readings assigned for March 18th and March 20th will flesh out these concepts and demonstrate their significance—as will our in-class video materials.

THE CASE: *State of Pennsylvania v. John Calvin*

John Calvin, an 18-year old high school senior, has been charged with first degree murder in the demise of Father John Paul, a 42-year old Roman Catholic priest serving a generic diocese in northeastern Pennsylvania. Calvin, who has been charged as an adult and who is eligible for the death penalty if convicted, was for several years an alter boy in the parish of St. Mary's and has alleged that he was—from ages 11-14—sexually molested by Father Paul. Following this, Calvin ceased involvement with the Church; he has cycled through various bouts of depression and drug addiction; and he has accumulated three misdemeanor convictions (petty theft, possession of marijuana, and assault).

Father Paul was found murdered in the parish residence on January 1, 2008. Before he was apparently beaten to

death, Paul penned a letter of contrition—the prose and presentation of which suggest that the document was prepared under extreme duress. In his final statement to the world, Paul seemed to engage in a public confession, pleading for forgiveness from those he had harmed. Several years before, and shortly after he renounced his faith, Calvin confronted Father Paul about the alleged sexual abuse. Encountering Paul in the parish parking lot, Calvin was seen shouting at the priest and was overheard promising that he would receive "justice" someday.

The County Attorney's office (the prosecutors) feels it has sufficient evidence to charge Calvin with First Degree Murder in the death of Father John Paul. Because of the pre-trial publicity surrounding this case, the defense's motion for a change of venue has been granted and the case will now be tried in Bethlehem—the community from which the would-be jurors will be drawn.

ROLE ASSIGNMENTS

Judge _____
Prosecutor 1 _____
Prosecutor 2 _____
Defense Counsel 1 _____
Defense Counsel 2 _____
Jurors _____

RESPONSIBILITIES

Prosecution & Defense Counsel

1. *Questionnaires*: Each legal team will put together a juror questionnaire consisting of no more than 10 questions. These questions may involve whatever issues and information you think are relevant to assembling a favorable jury, but do note that the jurors will already be completing their biographies, so your queries should avoid such mundane, descriptive matters as "How many children do you have?" and should, instead, be oriented toward divining the potential significance and implications of the experiential composites of each individual. Questions should require no more than 2-3 sentence responses and the questionnaire must be prepared and sent to me as a Word document, so that I can send it along to the members of the *venire*, or the panel of would-be jurors.

2. *Voir dire*: Prior to the *voir dire* your team will need to review the responses and develop a strategy for the in-class session. What do you need to know from each potential juror? How will you tease out that information without badgering the individual and perhaps inviting a prejudicial disposition toward your case? What will you do if you do not ascertain what you had hoped from the respondent?

    a. In class, the prosecution will begin with juror #1, for 3-4 minutes, followed by the defense; after which the prosecution will move to juror #2, followed by the defense; and so on until each juror has been interviewed. I will keep the time on each cumulative set of exchanges. If the prosecution does not use its full time with a particular juror, we will move to the defense; if the defense does not use its full time, we will move on to the next juror. If there is time remaining *after* each juror has been interviewed, the balance will be divided evenly between the two sides, for self-directed follow-up inquiries—beginning with the prosecution.

3. *Challenges*: In the class following the *voir dire*, you will need to present arguments for both cause and peremptory challenges. For *cause* challenges, you will need to provide a convincing explanation (to the judge); for *peremptory* challenges, you will not. More details to come.

Jurors

1. *Biography*: Your first responsibility is to take on another identity and draft a short biography of your made-up self. You will need to be currently residing in Bethlehem, PA, but beyond this, you can be whoever or whatever you would like. Of course, you will need to be able to act and respond in this character during the in-class exercise. In your short (2-3 paragraphs) bio, include at least your character name, education, up-bringing, profession, marital / family status, race, gender, and political disposition. Whatever else you would like to include is up to you.

2. *Questionnaires*: You will receive two separate Word document questionnaires by email, one provided by the prosecutors and one provided by defense counsel. Answer the questions as your character would—or would not, as the case may be.

3. *Voir dire*: During the *voir dire*, you will play the role you have scripted and answer accordingly.

4. *Challenges*: You will have an additional role to play on the day following the *voir dire* (March 27th). More details to come.

Judge

1. *Questionnaires*: You will review the completed biographies and questionnaires of all the jurors.

2. *Voir dire*: During the simulation exercise you will listen intently to the responses and construe them in light of the questionnaires. You must approve all cause challenges, so you will need to defend your decisions.

3. *Challenges*: On March 27th the attorneys will present their arguments for cause challenges and will invoke peremptory challenges where necessary. More details to come.

SEQUENCE

Wed., March 19th	Questionnaires are due to me from both sets of attorneys—by email and as a Word document. Jurors will receive their composite questionnaire templates from me on Wednesday night or Thursday morning.
Fri., March 21st	*Completed* questionnaires *and* biographies are both due to me from jurors—by email and as Word documents.
Sat., March 22nd	Juror materials distributed to attorneys and judge by email.
Tues., March 25th	*Voir dire*
Thurs., March 27th	Challenges and discussion

Appendix 2: Talking with Strangers

Part I: Survey

1. In general, I believe the state should be able to set restrictions on an individual's right to own firearms.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree

e. Strongly disagree

2. The shootings at Columbine High School could probably have been prevented with more stringent regulation of firearms in our society.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

3. Author and social critic Daniel Lazare for the most part gets the issues right in his article assigned for today, "Your Constitution is Killing You."
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

4. When laser guns are more prevalent, the government should be able to prohibit individuals from owning them.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

5. The only way that "arms" (as in "the right of the people to keep and bear arms") could mean anything *other* than muskets and cannons would be if the Constitution was in fact a "living" document.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

6. Safety locks should be required on all handguns purchased in the United States.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

7. The "people" (as in "the right of the people to keep and bear arms") refers to the citizenry of the United States as a collective unit and *not* to each and every individual American.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

8. Cities and states should be able to sue gun manufacturers to recoup the money spent addressing the public health epidemic wrought by gun violence in their communities.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree

e. Strongly disagree

9. The logic for banning smoking because of its second hand effects should mean that firearms, too, should be restricted because of their similarly negative influences on society at large.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

10. The premise of law professor John Lott's book, *More Guns, Less Crime*—that arming citizens will actually *decrease* the overall amount of crime in our society because citizens will be able to protect themselves and thereby *deter* criminal activities—strikes me as dead wrong.
a. Strongly agree
b. Somewhat agree
c. Neutral
d. Somewhat disagree
e. Strongly disagree

Appendix 3: Talking with Strangers

Part II: Interview

Interviewer: _____ Interviewee: _____

INSTRUCTIONS:

1. Review the survey answers of your partner.

2. Discuss each other's answers #1-10 to the extent that you feel you understand both *what* the person thinks about each question or issue and *why* they think it. You are interviewing this individual and thus your job is to probe and prod until you *understand* what they think and why they think it.

3. Use this process of inquiry and the responses to these *specific* survey questions and public policy issues to devise a *general* statement (approximately two paragraphs in the space below) that explains your partner's impressions of the Second Amendment and the various public policies that pertain to it in today's society. You will be required to communicate these views to the class and your written report should be turned in to me at the end of the period.

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Burnstein, E. & Sentis, K. (1981). Attitude polarization in groups. In R. Petty (Ed.), *Cognitive responses in persuasion*. Hillsdale, NJ: Lawrence Erlbaum Associates.

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leaving the classroom. *PS*, 305-9.

Ciliotta-Rubery, A. & Levy, D. (2000). Congressional committee simulation: an active learning experiment. *PS*, 847-51.
Conover, P., Crewe, I. & Searing, D. (1991). The nature of citizenship in the united states and great britain: empirical comments on theoretical themes. *Journal of Politics*, *53*, 800-
Cronin, T. (1991). On celebrating college teaching. *PS*, 482-91.
Edmundson, M. (1997). On the uses of a liberal education. *Harper's*, 43-.
Endersby, J. and Webber, D. (1995). Iron triangle simulation: a role-playing game for undergraduates in congress, interest groups, and public policy classes. *PS*, 520-23.
Fishkin, J. (1991). *Democracy and deliberation*. New Haven: Yale University Press.
Fishkin, J. & Ackerman, B. (2004) *Deliberation day.* New Haven: Yale University Press.
Gaubatz, K. T. (1995). *Crime in the public mind*. Princeton: Princeton University Press.
Grummel, J. (2002). Using simulation to teach decision-making within the policy process. *PS*, 789-.
Hamm, M. and Adams, D. (1992). *The collaborative dimensions of learning.* Norwood, NJ: Ablex Publishing Corp.
Haney, C., Banks, C., & Zimbardo, P. (1973). Interpersonal dynamics in a simulated prison. *International Journal of Criminology and Penology*, 69-97.
Hensley, T. (1993). Come to the edge: role playing activities in a constitutional law class. *PS,* 64-68.
Heumann, M., Pinaire, B., & Clark, T. (2005). Beyond the sentence: public perceptions of collateral consequences for felony offenders. *Criminal Law Bulletin, 41*, 24-46.
Johnson, A. (1996). "'It's good to talk': the focus group and the sociological imagination. *Sociology Review, 44*, 516-.
Jonakait, R. (2003). *The american jury system*. New Haven: Yale University Press.
Kelly-Woessner, A. and Woessner, M. (2006). My professor is a partisan hack: how perceptions of a professor's political views affect student course evaluations. *PS*, 495-501.
Larson, S. G. (2004). 'We the people:' diversifying role playing in undergraduate american politics courses. *PS*, 303-06.
Lazare, D. 1999). Your constitution is killing you. *Harper's*, 57-66.
Lott, J. (2000). *More guns, less crime*, 2nd ed. Chicago: University of Chicago Press.
Moscovici, S. & Zavalloni, M. (1969). The group as a polarizer of attitudes. *Journal of Personality and Social Psychology, 12,* 125-135.
Myers, D.G., & Lamm, H. (1976). The group polarization phenomenon. *Psychological Bulletin*, *83*, 602-627.
Petty, R. (ed.). (1981). *Cognitive responses in persuasion*. Hillsdale, NJ: Lawrence Erlbaum.
Sunstein, C. (2002). *Republic.com*. Princeton: Princeton University Press.
_____. (2000). Deliberative trouble? why groups go to extremes. *The Yale Law Journal, 110,* 71-119.
van Ments, M. (1983). *The effective use of role play: a handbook for teachers and trainers*. London: Kogan Page.
Walcott, C. (1980). *Simple Simulations, 2.* Washington, D.C.: American Political Science Association.

(Notes)

[1] One basic definition of this somewhat ambiguous pedagogical classification is provided by Charles Bonwell and James Eison (1991), who define active learning as anything that "involves students in doing things and thinking about the things they are doing" (2). To this they add some of the "general characteristics" of active learning: (A) Students are involved in more than listening; (B) Less emphasis is placed on transmitting information and more on developing students' skills; (C) Students are involved in higher-order thinking (analysis, synthesis, evaluation); (D) Students are engaged in activities; and (E) Greater emphasis is placed on students' exploration fo their own attituteds and values (2).

[2] van Ments (1983, 14) distinguishes between the two, referring to "gaming" as the collection of methods which are meant to provide students with "either a highly simplified reproduction of part of a real or imaginary world (a simulation) or a structured system of competitive play that incorporates the material meant to be learnt (a game)."

[3] Obviously role-playing can go too far (see e.g. Haney, Banks, and Zimbardo 1973), but the potential for similar problems in a political science course is much diminished as compared to what one might encounter in disciplines

such as psychology and medicine. The Zimbardo study, of course, famously involved an experiment where a group of volunteers was randomly assigned to be either prisoners or guards with the intention of studying the nature and development of the relationship between the two groups, though leading the investigators to terminate the study after the sixth day because the participants were, in effect, *too* affected by their role assignments.

[4] Religion is critical for at least three reasons here: (1) The Catholic Church has been consistently in the news for its handling of various allegations of past abuse; (2) Many students who attend the private, northeastern university where I teach are at least nominally Catholic; and, (3) Religion, as opposed to race and gender, has *not* been deemed by the U.S. Supreme Court to be on the same level (regarding peremptory challenges) as race or gender.

[5]Responses to Question #8, for example, may not necessarily translate easily in left-right terms. A few students who advocated greater regulation of the firearms industry thought that such supervision should come in the form of *legislation*, as opposed to social policy crafted by courts. As such, they may "disagree" to some extent with the premise of the question as stated, thus giving them a "higher" score than they would otherwise achieve. Issues of this sort are, of course, part and parcel of the survey method, generally, but I was delighted to have the students so carefully scrutinizing the wording of the exercise.

Rational Choice Theory and the Judiciary

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Two years ago, I organized a readings seminar in the Jurisprudence and Social Policy Program (a social science PhD program housed in the School of Law at UC Berkeley). It was in response to a request by five graduate students in our program: Michael Gilbert, Dave Carniglia, Pamela Coukos, Tim Meyer, and Pablo Rueda. They wanted the opportunity to join together and systematically review the burgeoning literature on rational choice analysis of the judicial process. I was intrigued by the request, agreed to it, and set about assembling a body of readings. I pulled together my own modest collection of articles. They contributed what they had. I contacted Bob Cooter, Eric Talley, Daniel Rubinfeld, and Pablo Spiller and other of my law and economics colleagues here at Berkeley, for their suggestions. And I sent out a call on the Law and Courts ListServe. I was overwhelmed by helpful responses to this call. I received a host of suggestions from a great many colleagues, too many to acknowledge here. However, I do want to single out Lee Epstein, Ran Hirschl, Tom Ginsburg, and especially Roy Flemming for their helpful suggestions (Sometime earlier, Roy had organized a similar reading group for some of his graduate students and graciously shared his reading list with me.)

On the basis of this initial request, I assembled over 200 articles (the number kept growing during the term), and presented them to members of the reading group at our first meeting. They did some quick reading, sifting and ordering, and proposed a reading plan for the term. We began to work through the articles with the purpose of revising the list. Our purpose: to develop an annotated syllabus by the *end* of the semester. The result is what you see below.

This result is impressive. Without doubt, there is now a substantial enough literature to warrant a separate and substantial course. With modification and updating, the syllabus is suitable for use in an advanced upper division public law seminar for undergraduates, a graduate seminar, or a law school seminar. As the compilers of the syllabus indicate in their introduction to the syllabus, this is a work-in-progress since the field continues to develop rapidly. Still, they have identified major issues and topics, and have developed a useful *framework* that is likely to endure even as the literature continues to expand. Furthermore, what the attentive reader will see, indeed as is evident in the very first set of readings, rational choice analysis of the judiciary does not involve esoteric new concerns, but deals with important issues that have long been staples of concern in both normative and descriptive public law and political

science scholarship. Finally, note that the syllabus ends with an assessment of the value of rational choice analysis. In fact in our reading group, we began with these and other related readings and often made mention of them throughout the semester. Some who use the syllabus might want to use these readings at the outset rather than at the end, or perhaps use them in both places.

Our hope in distributing this syllabus through the *Newsletter* is that it will be of value to members of the Law & Courts Section. Note that it is not copyrighted. Anyone is free to use it or parts of it as they see fit. We do hope that it will be helpful to a number of our colleagues. No doubt this is not the only such list of readings on the topic; we urge others to share their own list with colleagues on the ListServe.

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July 2008

Rational Choice Theory and the Judiciary
Annotated Syllabus
(Revised July 2008)

In recent years, rational choice models of judicial institutions and processes have proliferated, offering insights that are novel, counterintuitive, and sometimes dubious. This syllabus provides a framework for examining, synthesizing, and critiquing these efforts. Although students with background in rational choice will find the material more accessible, the syllabus could be used in any law school, graduate school, or advanced undergraduate seminar.

Since developing this syllabus, there have been several more publications that deal with the topic. Indeed the rate of publication has developed so fast that it is difficult to keep up with the literature in this burgeoning field. More recent publications include:

"Positive Political Theory and the Law" (2006) Special issue of *The Journal of Contemporary Legal Issues*, 15: 1-242 (David Law, General Editor).

Papers presented at the "Law and Positive Political Theory Conference: Legal Doctrine and Political Control" (2007) *The Journal of Law, Economics and Organization*, 23: 275-518.

In addition, several books have been published that embrace some form of strategic analysis of behavior of judges and/or the institutional design of courts.

All this suggests that the syllabus below should be viewed, like all other syllabi, as a work in progress, subject to refinement, subtraction, and addition. Nevertheless, we do feel that the framework embedded in the syllabus captures enduring issues and covers an area broad and rich enough to warrant a separate course and indeed perhaps a separate subfield within the public law area.

I. Are Judges Independent?

This central question frames the first part of the syllabus. Intuition and legal pedagogy suggest that the answer is unequivocally "yes," at least in the United States and some other Western countries. Rational choice scholarship often concludes otherwise.

A. Traditional Views and Expressions of Judicial Independence

Federalist Papers. Federalist Paper #78.
Anti-Federalist Papers. Herbert J. Storing, ed., *The Anti-Federalist Writings of the Opponents to the Constitution*, Brutus #XI, XII, XIII, XIV, XV, XVI.
Marbury v. Madison, 5 U.S. 137 (1803)

B. Defining Independence through a Rational Choice Lens

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press). [Chapter 1]
Ferejohn, John. 1999. "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," California Law Review 72:353-384.

These selections illustrate the conceptual difficulties inherent in the notion of judicial independence. While judges may be independent of the parties appearing before them, they may not be independent of the state. Acting independently may further the regime's interests; the state can curtail judicial independence through jurisdictional and other regulations; and when the state itself is on the line, self-interested judges who wish to retain their positions will side with it.

Optional readings

Clinton, Robert Lowery. 1994. "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison." American Journal of Political Science 38:285-302.
Shipan, Charles R. 1997. *Designing Judicial Review: Interest Groups, Congress, and Communications Policy* (Ann Arbor: University of Michigan Press).
Shipan, Charles. 2000. "The Legislative Design of Judicial Review: A Formal Analysis," Journal of Theoretical Politics 12(3):269-304.

C. The Virtues of Independence

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press). [Introduction, Pages 1-64]
Landes, William A., and Richard A. Posner. 1975. "The Independent Judiciary in an Interest Group Perspective," Journal of Law, Economics, & Organizations 18:875.
North, Douglass, and Barry Weingast. 1989. "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in 17th Century England," Journal of Economic History 49(4):803.
Ginsburg, Thomas. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press). [chapter 1]

Judicial independence enhances the fairness of the legal process. While that helps to explain why independence enjoys widespread support, it does not necessarily explain why independence originally developed. Why would self-interested legislators and executives voluntarily reduce their authority over the judiciary? Rational choice scholars have several theories. Independent judges are more likely to have their decisions respected, reducing social unrest and the demands on the state to settle disputes by force. Independent judges may also increase the resiliency of legislative bargains. More generally, legislators and executives can use an independent judiciary to enhance their credibility. Finally, legislators and executives can use an independent judiciary as insurance against tyranny by rival politicians.

D. Under what Conditions will Judicial Independence Blossom?
Ramseyer, Mark, and Eric B. Rasmusen. 2003. *Measuring Judicial*

Independence: The Political Economy of Judging in Japan (Chicago: University of Chicago Press). [chapters ???]Selected chapters

Ginsburg, Thomas. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press). [chapters 2-4]

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press). Selected chapters [chapters ???]

Notwithstanding its theoretical benefits, the actual desirability of judicial independence varies with the prevailing political structure. These selections draw out this point in different ways, but their underlying message is the same: robust political competition tends to correspond to greater judicial independence and empowerment. The opposite also holds.

Optional readings

Knight, Jack, and Lee Epstein. 1996. "On the Struggle for Judicial Supremacy." Law and Society Review 30:87-120.

Stephenson, Matthew. 2003. "When the Devil Turns: Political Foundations of Independent Judicial Review," Journal of Legal Studies 32:59.

II. Are Judges Constrained by the Rule of Law?

This broad inquiry frames the second part of the syllabus. Again, intuition and legal pedagogy suggest that the answer is "yes"; although judges have some interpretive flexibility, particularly in constitutional cases, they are ultimately bound by the laws on the books. Most rational choice scholars are skeptical of this. Their models ignore law completely or, to the limited extent they address it, claim that law is not a meaningful constraint.

A. Law is Irrelevant: The Attitudinal Model and its Weaknesses

Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press). [chapters 3, 8]

Easterbrook, Frank H. 1982. "Ways of Criticizing the Court." Harvard Law Review 95:802.

Epstein, Lee, Jack Knight, and Andrew Martin. 2001. "The Supreme Court as a Strategic National Policy-Maker." Emory Law Journal. 50:583-611.

Posner, Richard A. 1993. "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," Supreme Court Economic Review 3:1.

The attitudinal model posits that judges, particularly those on the U.S. Supreme Court, base their decisions only on their sincere, desired substantive outcomes. In other words, judges ignore the law and simply vote their preferences. Easterbrook uses social choice theory to show that sincere voting on multimember courts can lead to intransitive outcomes. Epstein et al. make the oft-noted point that if judges are so concerned with achieving their desired substantive outcomes, they should act strategically—sincere voting may spark a Congressional override and a new law that is even further from the judges' ideal points. (This idea is explored in depth below.) In this sense, law may be a constraint insofar as it signals the sitting Congress's preferences. Posner makes the easily-forgotten point that judges do not have preferences on every legal-political issue and that they have interests beyond public policy. They may follow established law simply because it is easier to do that than to innovate.

Optional readings

Brace, Paul, Laura Langer, and Melinda Gann Hall. 2000. "Measuring the

Preferences of State Supreme Court Judges." Journal of Politics, 52(2):387-413.
Dahl, Robert. 1957, repr. 2001. "Decision-making in a Democracy: The Supreme Court as a National Policymaker" Emory Law Journal 50:563-582.
Epstein, Lee et al. 1998. "Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices." Journal of Politics 60:801-18.
Lim, Youngsik. "2000. An Empirical Analysis of Supreme Court Justices' Decision Making." Journal of Legal Studies 29:721-752.

B. Institutional Practices and Judicial Behavior

Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press). [Introduction and chapter 1]
Easterbrook, Frank H. 1982. "Ways of Criticizing the Court." Harvard Law Review 95:802.
Epstein, Lee and Jack Knight. 1998. *The Choices Judges Make* (Washington, D.C.: Congressional Quarterly Press). [chapters 1, 3]
Kornhauser, Lewis A. 1992. "Modeling Collegial Courts II: Legal Doctrine." Journal of Law, Economics, and Organization 8:441-70.

Maltzman et al. and Epstein and Knight challenge the attitudinal model by claiming that judges within multi-member court act strategically vis-à-vis one another. They pursue substantive ends, but they do not vote sincerely on every issue to achieve them—they bargain, compromise, and cajole to generate votes. Easterbrook uses social choice theory to show that even if judges vote sincerely, they can reach intransitive outcomes. Kornhauser makes a distinct, relevant point. The outcome of a given case may vary depending on whether separate votes are cast on each legal issue or whether one vote is cast to decide the case as a whole. All of these selections suggest that judicial outcomes are not a straightforward function of judges' aggregated, sincere preferences. Note that none of these selections treats law as a meaningful constraint.

Optional readings

Murphy, Walter F. 1964. Elements of Judicial Strategy (Chicago: University of Chicago Press).
Caminker, Evan H. 1999. "Sincere and Strategic Voting Norms on Multimember Courts," Michigan Law Review 97:2297-2380.

C. Judicial Hierarchy and Judicial Behavior

Segal, Jeffrey A. and Charles M. Cameron, and Donald R. Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions," American Political Science Review 94.
Spitzer, Matt and Eric Talley. 2000. "Judicial Auditing," Journal of Legal Studies 29:649-683.
Cross, Frank B. and Emerson H. Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal," Yale Law Journal.

While the last set of readings examined strategic behavior within multi-member courts, these selections consider interactions between courts. Supreme courts have the power to review and reverse lower court rulings, and thus the capacity of lower courts to pursue their preferred substantive ends may be limited—unless, of course, their preferences match those of the reviewing court. As the optional readings suggest, this topic has generated a wealth of research. Again, almost none of it treats law itself as an important constraint on judicial behavior.

Optional readings

Boucher, Robert L., Jr., and Jeffrey A. Segal. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials." Journal of Politics 57 (August 1995):824-37.

Caldeira, Gregory A., John R. Wright, and Christopher J.W. Zorn. "Sophisticated Voting and Gate-keeping in the Supreme Court." Journal of Law, Economics, and Organization Vol. 15, No. 3, October 1999, 549-572.

Cameron, Charles M., Jeffrey A. Segal, and Donald Songer. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." American Journal of Political Science 38:673-696.

Krislov, Samuel. "Powers and Coalations in a Nine-Person Group: Applying the Shapley-Shubik Index," Behavioral Science 3 (1964) 32-51.

Schubert, Glendon. "The Certiorari Game" in Quantitative Analysis of Judicial Behavior. (Glencoe, IL: The Free Press, 1959): 211-254.

Schubert, Glendon, "Policy Without Law: An Extension of the Certiorari Game," Stanford Law Review 14(1962):284-327.

Segal, Jeffrey A., Robert Boucher, and Charles M. Cameron. "A Policy-Based Model of Certiorari Voting on the U.S. Supreme Court." Journal of Politics 57(1995).

Shavell, Steven. 1995. "The Appeals Process and a Means of Error Correction." Journal of Legal Studies 24:379.

Spiller, Pablo T. and Matthew L. Spitzer. 1992. "Judicial Choice of Legal Doctrines." Journal of Law, Economics, and Organization. 8:8-46.

Stearns, Maxwell L. Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making. Ann Arbor: University of Michigan Press, 2000.

Ulmer, S. Sidney. "The Decision to Grant Certiorari as an Indicator to Decision 'On the Merits'". Polity 4(Summer 1972):429-447).

D. Separation of Powers and Judicial Behavior

Gely, Rafael and Pablo T. Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases," Journal of Law, Economics, and Organizations 6:263.

Epstein, Lee, Jack Knight, and Shvetsova. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," Law & Society Review 35:1.

Ferejohn, John A. and Barry R. Weingast. "A Positive Theory of Statutory Interpretation." International Review of Law and Economics 12(1992):263-279.

Barnes, Jeb. 2004. *Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Interactions* (Stanford University Press). [chapters 1-4]

These selections consider judicial behavior against the backdrop of the coordinate branches of government. The underlying theme is that self-interested judges will consider the preferences of the other branches of government when issuing decisions—otherwise they may be overturned through the enactment of fresh legislation. Gely and Spiller present the basic model. Epstein et al. develop a dynamic model illustrating the interactions between the branches over time. Ferejohn and Weingast complicate the model by considering not just Congress and the President but also committees, rules of procedure, and administrative agencies. Barnes presents empirical analysis of these issues. This topic has attracted attention from many scholars, so once again the optional readings list is long. Note too that the constraint on judges developed in these selections is institutional, not legal.

Optional readings

Cooter, Robert and Tom Ginsburg. "Comparative Judicial Discretion: An Empirical Test of Economic Models." International Review of Law and Economics 16(1996):295
Eskridge, William N., Jr. "Post-Enactment Legislative Signals." Law and Contemporary Problems 57(Winter 1994):75-90.
Eskridge, Willaim N., Jr. "Overriding Supreme Court Statutory Interpretation Decisions." Yale Law Journal. 101(1991):331-455.
Eskridge, William N., Jr. "Reneging on History? Playing the Court/Congress/President Civil Rights Game." California Law Review. 79(1991):613-684.
Eskridge, William N., Jr. and John Ferejohn. "The Article I, Section 7 Game." Georgetown Law Journal. 80(1992):523-564.
Ferejohn, John and Barry Weingast. "Limitations of Statutes: Strategic Statutory Interpretation." Georgetown Law Journal 80(1992):565-582.
McNollgast. "Legislative Intent: the Use of Positive Political Theory in Statutory Interpretation." Law and Contemporary Problems 57(Winter 1994):1-37.
McNollgast. "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation." Georgetown Law Journal 80(1992):705-742.
Murphy, Walter F. *Congress and the Court*. (Chicago: University of Chicago Press, 1962).
Pritchett, C. Herman. *Congress vs the Court, 1957-1960*. (Minneapolis: University of Minnesota Press, 1961).
Riker, William H. and Barry R. Weingast. "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures." Virginia Law Review 74(1988):373-401.
Rogers, James R. "Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction." American Journal of Political Science 45(January 2001):84-99.
Schmidhauser, John R. and Larry L. Berg. The Supreme Court and Congress: Conflict and Interaction, 1945-1968. (New York: The Free Press, 1972)
Segal, Jeffrey A. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." American Political Science Review. 91(March 1997):28-44.
Spiller, Pablo T. and Emerson H. Tiller. "Invitations to Override: Congressional Reversals of Supreme Court Decisions." International Review of Law and Economics (1996).
Vanberg, Georg S. "Abstract Judicial Review, Legislative Bargaining, and Policy Compromise." Journal of Theoretical Politics 10(1998):299-326
Vanberg, Georg. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." American Journal of Political Science 45 (April 2001):346-361.

E. Judicial-Administrative Interactions

Spiller, Pablo T. and Matthew L. Spitzer. "Judicial Choice of Legal Doctrines." Journal of Law, Economics, and Organization. 8(1992):8-46.
Tiller, Emerson. 1998. "Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making." Journal of Law, Economics, and Organization 14:114-35.
Tiller, Emerson H. and Pablo T. Spiller. "Strategic Instruments: Legal Structure and Political Games in Administrative Law." Journal of Law, Economics, and Organization 15 (July 1999): 349-377.

These papers consider judicial behavior against the backdrop of the "fourth branch" of government: administrative agencies. Whereas judges tend to be subservient to those branches that can overturn them, they may be more aggressive with respect to agencies, which cannot. Judges may manipulate the legal process that governs agencies to achieve their preferred substantive ends. Agencies can respond in ways that insulate

their actions from the courts, providing another check on judicial behavior.

Optional readings

Cohen, Linda R. and Matthew L. Spitzer. "Solving the Chevron Puzzle." Law and Contemporary Problems 57(Spring 1994):65-110.

Hanssen, F. Andrew. "Independent Courts and Administrative Agencies: An Empirical Analysis of the States." Journal of Law, Economics, and Organization 16 (October 2000): 534-571.

Spiller, Pablo T. and Emerson H. Tiller. "Decision Costs and the Strategic Design of Administrative Process and Judicial Review." Journal of Legal Studies. 26(June 1997): 347-370).

F. Does Law Have a Place?

Gillman, Howard. 2001. "What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision-Making." Law and Social Inquiry. 26:465.

Kornhauser, Lewis A. 1989. "An Economic Perspective on Stare Decisis." Chicago-Kent Law Review. 65(1989):63.

Kornhauser, Lewis A. 1992. "Modeling Collegial Courts I: Path Dependence." International Review of Law and Economics 12:169-85.

O'Hara, Erin. "Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis." Seton Hall Law Review. 24(1993):736

Spaeth, Harold J. and Jeffrey A. Segal. *Majority Rule or Minority Will* (Cambridge: Cambridge University Press).

Based on the preceding readings, the answer to the overarching question in this part of the syllabus—are judges constrained by the rule of law?—would appear to be "no." While judges face a number of constraints in their decision-making, legal doctrine is not one of them. But commonsense and casual observations run contrary to this finding. Judges often seem to apply the law on the books, even when that law is at odds with their personal preferences and there is no pressure from within the court, the judicial hierarchy, or other branches of government to conform to it. In the selected readings, rational choice scholars grapple with this issue. Gillman's article is particularly noteworthy for summarizing efforts to—and deep problems with—integrating law into quantitative studies of judicial behavior.

Optional readings

Landes, William A., and Richard A. Posner. 1975. "The Independent Judiciary in an Interest Group Perspective," Journal of Law, Economics, & Organizations 18:875.

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law." Southern California Law Review 68 (1995): 1631-1683.

Rasmusen, Eric. "Judicial Legitimacy: An Interpretation as a Repeated Game." Journal of Law, Economics, and Organization. 10(April 1994):63-83.

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press).

Talley, Eric. Precedential Cascades: An Appraisal." 73 Southern California Law Review 87 (1999).

III. Do Rational Choice Scholars Have it Right?

The syllabus concludes by asking whether the application of rational choice models to the judiciary is a fruitful enterprise. While the models yield new and interesting insights, they also suffer from weaknesses. Epstein and Knight review the pros and cons of the strategic account. They are optimistic that rational choice models can illuminate the judicial process. Green and Shapiro challenge the rational choice model generally and are pessimistic about its potential. They emphasize that rational choice scholars have produced very little empirical research. This is true in the judicial realm; most of the readings in this syllabus are characterized by rich theory and minimal observation.

Epstein, Lee and Jack Knight. 2000. "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," Political Research Quarterly 53(3):625-661.

Green, Donald P. and Ian Shapiro. 1994. *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (New Haven: Yale University Press). [chapter 1-3]

BOOKS TO WATCH FOR

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What role do interest groups play in shaping the choices of the justices of the Supreme Court? In **Friends of the Supreme Court: Interest Groups and Judicial Decision Making** (Oxford University Press), **Paul M. Collins, Jr.** (University of North Texas) depicts the Court as a public policy battleground in which organized interests influence the decision making of our nation's most powerful jurists. As part of his analysis, the author considers theories of judicial choice and behavior derived from diverse disciplines including law, marketing, political science, and social psychology. He argues that interest groups influence how the justices vote and whether they choose to author concurrences and dissents.

Malcolm M. Feeley (University of California at Berkeley) and **Edward L. Rubin** (Vanderbilt University) have just published **Federalism: Political Identity and Tragic Compromise** (University of Michigan Press). After analyzing various traditions of federalism studies within political science, history, and American constitutional law, the authors conclude that federalism is at best an unstable "tragic choice," rather than a central concept for political organization. The authors further contend that the United States is no longer a federalism system. What appear to be accounts of federalism in the U.S. are either policy prescriptions for decentralization, nostalgic appeals to an earlier era, or "smoke screens" for a conservative political agenda.

When Courts & Congress Collide: The Struggle for Control of America's Judicial System (University of Michigan Press) by **Charlie Geyh** (Indiana University) has been reissued in paperback, with a new preface, and a foreword by Sandra Day O'Connor. The author argues that the independence of the federal judiciary is attributable less to constitutional structure than the emergence and entrenchment of institutional norms. The book addresses the role that courts have played in preserving their independence and fostering a dynamic equilibrium between the judiciary and the legislative branch.

The fifteenth edition of **American Constitutional Law: Introductory Essays and Selected Cases** (Prentice Hall) written by **Alpheus Thomas Mason** (Princeton University) and **Donald Grier Stephenson, Jr.** (Franklin & Marshall) has recently been published. This casebook explores the role of the U.S. Supreme Court as a legal as well as a

political institution and as a major player in American government. The volume uses Court cases to examine issues such as the jurisdiction and organization of the federal courts, judicial review, Congress and the president, federalism, the electoral process, the commerce clause, national taxing and spending power, property rights and the development of due process, nationalization of the bill of rights, criminal justice, freedom of expression, protest and symbolic speech, freedom of association, freedom of press, religious liberty, privacy, equal protection of the laws, and security and freedom in wartime.

As **Ugo Mattei** (University of California, Hastings) and **Laura Nader** (University of California, Berkeley) point out, the "rule of law" has been widely cherished and celebrated in the U.S., even as it remains a generally elusive and ill-defined concept. In **Plunder: When the Rule of Law is Illegal** (Blackwell), the authors engage in a systematic critique of the rule of law, exposing what they believe is its neglected "dark side." Specifically, they point to the close relationship between the rule of law and "plunder," which they understand as the practice of violent extraction of weaker political actors in the service of Western cultural and economic domination. The authors examine their plunder concept by considering diverse examples including the appropriation of Native American lands, use oil in Iraq, and the development of Western patents and intellectual property rights.

William J. Quirk's (University of South Carolina) new book **Courts & Congress: America's Unwritten Constitution** (Transaction Publishers) contends that the power to make decisions in our democracy has shifted from Congress to the courts. The author argues that our original constitutional design has been subverted by what he calls the "Happy Convention," an informal and unwritten rearrangement of our governing powers. While politically beneficial to politicians and judges, this arrangement undermines the vision of constitutionalism held by the nation's founders, and imperils our democracy.

Karl Llewellyn's **The Bramble Bush** (Oxford University Press) is both a classic introduction to legal education and an enduring example of legal realism. A new edition of the book has just been published, with an introduction and notes provided by **Steve Sheppard** (University of Arkansas). Llewellyn's original text is retained in this edition, as well as notes from his two intermediate editions, with a new biographical and critical introduction, and notes for contemporary scholars and students.

In recent years, the Supreme Court has protected states from lawsuits arising out of federal legislation in such diverse areas as disabilities law, age discrimination, patent and trademark law, and labor standards. But does the Court's seemingly robust doctrine of "state sovereign immunity" actually increase state authority and undermine federal anti-discrimination efforts? Are the Court's efforts shifting the balance of power toward states and away from the federal government, and if so, what are broader implications? In **Rights, Remedies, and the Impact of State Sovereign Immunity** (SUNY Press), **Christopher Shortell** (Portland State University) explores these questions through historical case studies, and traces the impact of state sovereign immunity on both plaintiffs and states. The author concludes that the doctrine's primary effect is felt most keenly by the weakest and most politically unpopular individuals.

In **The Madison Constitution** (Johns Hopkins) **George Thomas** (Claremont McKenna College) argues that our contemporary adherence to judicial supremacy runs counter to the Constitution established at the nation's founding. According to the author, the Constitution encourages an antagonistic approach to settling disputes between the branches, thereby preserving itself as the nation's fundamental law. Through four historical case studies, the book shows that American constitutionalism is primarily about countervailing power asserted through competing conceptions of constitutional authority and meaning, rather than legal limits enforced by courts.

The Oxford Handbook of Law and Politics (Oxford University Press), edited by **Keith E. Whittington** (Princeton University), **R. Daniel Kelemen** (Rutgers University) and **Gregory A. Caldeira** (Ohio State University), is part of the multi-volume Oxford Handbooks of Political Science. The Law and Politics Handbook provides a survey of the diverse field, ranging from such traditional subjects as theories of jurisprudence, constitutionalism, judicial politics and law and society to such (re)emerging subjects as comparative judicial politics, international law, and democratization. The book, featuring 50 scholars and 45 chapters, brings together law and courts scholars who provide critical appraisals of the key issues shaping the discipline.

Upcoming Conferences

Conferences

2008 APSA Annual Meeting
http://www.apsanet.org/section_222.cfm
Dates: August 28 -31, 2008
Location: Boston, Massachusetts

Third Annual Conference on Empirical Legal Studies
http://www.lawschool.cornell.edu/cels2008/
Dates: September 12-13, 2008
Location: Cornell Law School in Ithaca, New York
Paper submissions deadline: April 15, 2008.

Great Plains Political Science Association Conference
http://www.apsanet.org/content_53870.cfm
Dates: September 27, 2008
Location: University of Northern Iowa, Cedar Falls, IA
Call for Papers Deadline: August 15, 2008

Illinois Political Science Association Fall 2008 Annual Conference
http://www.apsanet.org/content_53871.cfm
Date: Saturday, November 8, 2008
Location: Eastern Illinois University, Charleston Illinois
Call for Submissions Deadline: September 20, 2008

Georgia Political Science Association Conference
www.gpsanet.org
Dates: November 13, 14, 15, 2008
Location: Savannah, Georgia, USA
Call Deadline: July 1, 2008

Southern Political Science Association 80th Annual Meeting
www.spsa.net/joomla/index.php?option=com_content&task=view&id=29&Itemid=31
Dates: January 8-10, 2009
Location: New Orleans, Louisiana
Call For Proposals Deadline: July 25, 2008

2009 APSA Teaching and Learning Conference
http://www.apsa.com/section_236.cfm
Dates: February 6-8, 2009
Location: Baltimore, MD

Western Political Science Association 2009 Annual Meeting
http://www.csus.edu/ORG/WPSA/mtgs.stm
Dates: March 18 – 20, 2009
Location: Vancouver, BC, Canada