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A Letter from the Section Chair

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As we usher in a New Year I want to begin by thanking everyone who devotes their time and good judgment to the well-being of our section.

In 2007 we welcomed Gretchen Helmke, Kevin Quinn, and Gerald Rosenberg as members of our Executive Committee, joining Timothy Johnson and Doris Marie Provine.

Wendy Martinek is doing a terrific job as our new Secretary, and Gordon Silverstein continues to do yeoman's work as our Treasurer. Christine Harrington sees to it that the Law and Courts website remains up to date with useful information and resources.

Stef Linquist and Julie Novkov are – at this very moment – toiling away at putting together the panels for the 2008 annual meeting.

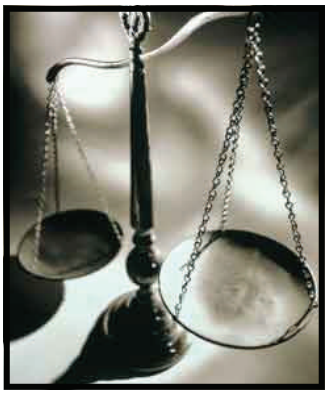
Wayne McIntosh may deserve the title of Hardest Working Member of Law and Courts as the editor of the amazing Law and Politics Book Review.

Nancy Maveety has taken over the reigns of "lawcourts-l", the Law and Courts Discussion List – successfully overseeing a transfer of the list database to Tulane (new address lawcourt-l@tulane.edu). Art Ward is the new editor of this newsletter and he has assembled a great issue.

Dozens of you – too many to mention here – responded to my invitation that you serve on one of our many section committees, and we're all grateful for your service.

As of the end of 2007 our section can boast of exactly 800 members, making us the 6th largest section (of 35) behind Comparative Politics (1586), Political Methodology (1047), Qualitative and Multi-method Research (1042), Public Policy (980), and Elections, Public Opinion, and Voting Behavior (903). We do better than Federalism, Legislative Studies, Public Administration, and the Presidency Research Group, which means, I suppose, that we get the gold medal in the separation-of-powers membership derby.

continued on page 4



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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)

In the enclosed newsletter Paul Collins and Vanessa Baird provide some helpful advice on using the Court of Appeals and Supreme Court Databases and Larry Baum and Eileen Braman revisit Saul Brenner and Marc Stier's exploration of precedent, which just goes to show that – despite the best efforts of the best minds over decades of research – there are still stubborn disagreements over a question as basic, and seemingly straightforward, as the influence of law on judging.

Symposium: The Influence of Precedent

Does Precedent Influence the Justices' Voting On the U.S. Supreme Court? A Theoretical Argument

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Abstract

We argue that it is reasonable to believe that precedent often influences the voting of the justices on the U.S. Supreme Court. We offer three reasons for this conclusion: (1) Precedent is important in our legal culture and the justices are able to achieve important goals when they follow precedent; (2) Following precedent reduces the burden of calculation of the justices; and (3) There are numerous firmly based precedents that the justices believe that they are compelled to follow.

Does Precedent Influence the Justices' Voting on the U.S. Supreme Court? A Theoretical Argument

Rumble[1] tells us that the legal realists of the 1920s and the 1930s were both rule skeptics and opinion skeptics[2]. As rule skeptics, they were skeptical concerning the importance of rules as a key explanation for the judges' decisions. Karl Llewellyn, for example, believed that "judges at every level are able to select or disregard precedent to suit the conclusion already arrived at."[3] As opinion skeptics, the legal realists were skeptical regarding whether the judges' opinions reflected how the judges decide the cases. Llewellyn tells us that the legal realists adopted the concept of rationalization from psychology and applied it to the judges' opinions. They no longer viewed these opinions "as mirroring the process of deciding cases, but rather as trained lawyers' arguments made by the judges (after the decision has been reached), intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable…"[4]

Segal and Spaeth echo the position of the legal realists:

> If judges necessarily create law, how do they come to their decisions? To the legal realists, the answer clearly is not found in 'legal rules and concepts…' Judicial opinions

> containing such rules merely rationalize decisions; they are not the causes of them.[5]

Segal and Spaeth further argue that rules and other legal materials are particularly unimportant for determining the decisions of the U.S. Supreme Court justices because the justices decide "hard" cases, i.e., cases in which there are plausible legal arguments on both sides, and have the freedom to decide these cases any way they choose.[6] And what the justices choose to do with their freedom is to decide these cases based on their attitudes toward the public policy issues in the cases.[7] Thus, Segal and Spaeth uphold "the attitudinal model" and reject "the legal model."[8]

In this article we will not be evaluating the influence of all the possible legal sources as determinants of Supreme Court decision making. We will be concerned only with the influence of Supreme Court precedent.

We will contend that it is plausible to believe that precedent often influences the decisions of the justices even in hard cases. We will further argue that the precedent that is influential can usually be found in the justices' opinions. In advancing our argument, we are not denying that the public policy attitudes of the justices are influential. Rather, we are affirming that it is reasonable to believe that precedent is often influential as well.

Whether precedent is influential on the U.S. Supreme Court is an empirical question, which is currently being explored by a number of Supreme Court scholars using quantitative tools.[9] We hope to contribute to this debate, not by presenting another quantitative study, but by advancing an empirically based, theoretical argument. We believe that both approaches are useful in investigating this and other empirical questions.

Viewing Precedent Through the Eyes of the Justices

Our first argument is that the culture of law shapes the decision making of Supreme Court justices. This culture emphasizes the role of legal reasoning and precedent.

Most political scientists accept the Weberian notion that we must, at least in the first instance, understand human action from the perspective of the actors involved.[10] We must take the self-understanding of political actors seriously and interpret it in light of their political culture. We discover the self-understandings of political actors by examining what they say and what they do. Of course, sometimes there is a gap between what actors do and what they say they do. Some actors lack insight into their own actions or the culture that shapes their actions. Or they may deceive others or themselves. But, given the importance of our self-understandings in determining what we do, in the absence of evidence of such deception or self-deception, we can expect that what actors say they do will be systematically related to what they do.

When we think about the political culture that shapes the actions of the Supreme Court justices, it is implausible to think that precedent does not influence their decisions. Law school students are trained to reason based on the study of past legal decisions. Attorneys use these tools to predict how judges will decide the cases they handle and how to frame the arguments they make to influence these decisions.

The study of precedent is so important that it is not clear that it always makes sense to distinguish between a justice's attitudes towards some issue and his understanding of the meaning of past legal decisions. For most lawyers—and many non-lawyers as well—adopt policy positions regarding many issues in the course of learning about important Supreme Court decisions of the past. Can we, for example, specify the nature of a justice's commitment to a certain conception of the proper range of freedom of speech independently of her understanding and reaction to Supreme Court decisions regarding freedom of speech?

The justices on the Court are, of course, immersed in the culture of precedent. All the participants in the cases assume that the analysis of precedent influences the justices' decision making and they act accordingly. The justices read or hear this analysis of precedent at various stages in the decision making process: (1) in the cert petitions; (2) in the cert memos written by their law clerks; (3) in the written briefs on the merits submitted by the attorneys for both sides; (4) in the bench memos prepared by the justices' law clerks prior to oral argument; (5) at oral argument; and (6) when they are writing their opinions. These opinions are replete with an analysis of precedent. Phelps and Gates, for example, inspected the opinions of Justices Rehnquist and Brennan in the constitutional cases in the 1973-1992 era

and discovered that 34% of the paragraphs in Rehnquist's opinions and 38% of the paragraphs in Brennan's were devoted to a discussion of precedent.[11] This data suggests that it is plausible to believe that precedent influences their decisions. It makes no sense for the justices to go to so much trouble of analyzing precedent unless they believed that such analysis would make a difference in their decision making. Baum makes this point regarding the law in general in the following way:

> And there is an excellent reason to think that justices do care about making good law. They have been trained in a tradition that emphasizes the law as a basis for judicial decisions. They are evaluated informally by a peer group of judges and legal scholars who care about their ability to reach well-founded interpretations of the law. Perhaps most important, they work in the language of the law. The arguments they receive in written briefs and oral arguments are primarily about the law. The same is true of arguments they make to each other in draft opinions and memoranda.[12]

That precedent is important to Supreme Court justices should not surprise us. For the emphasis on following precedent in our legal culture serves a number of important goals for our legal system. This is not the place to present the essentially jurisprudential arguments for following precedent. But we do note that adherence to precedent serves the following goals: (1) continuity in the law, a goal appreciated by those people who rely on the law in the conduct of their affairs; (2) fairness, because by following precedent the Court treats like cases alike; (3) legitimacy, because adherence to precedent dramatizes the view that the justices do not decide cases capriciously, and (4) enhancement of the Court's decision, because by following precedent, the current justices encourage future justices to do likewise and, thereby, increase the weight of the current justices' decisions.[13]

These goals are impressive, but they should be not be overemphasized. Despite these goals, at times the justices have reasons to overrule, distinguish, limit or ignore a particular precedent. Perhaps, Cardozo's advice about what justices should do also gives the best account of what they actually do. He stated: "Somewhere between worship of the past and exaltation of the present the path of safety will be found."[14]

It might be argued, however, that the fact that the justices talk about specific precedents in their opinions does not necessarily indicate that these precedents influence their decision. For we can distinguish, at least in principle, between the reasoning used to arrive at a decision and the reasoning used to justify that decision. Thus, it can be argued that the justices spend so much time with case analysis not because they believe that this activity is useful in deciding which litigant ought to win, but because case analysis is useful in justifying that decision. But before we accept this claim, we ought to ask why the justices might care about justifying their decisions. Perhaps, the justices are concerned with justifying their decisions to give other people a reason to respect or follow it. This is, the justice's are primarily concerned with the third and fourth goal we mentioned above (i.e. legitimacy and the enhancement of the Court's decisions). For if the justices are only pretending to follow precedent, as opposed to really doing so, the first and second reasons (i.e. continuity in the law and fairness) would not carry any weight with them.

But does it make sense to think that the justices ignore precedent and decide on the basis of their own attitudes and yet also believe that they must justify their decisions in terms of precedent to maintain the legitimacy of the Court or to influence future justices? Now, if many justices believed this, it is hard to understand how they could have kept it quiet all these years.[15] To have cynically deceived the public in this way would qualify as one of the greatest confidence games of all time. Imagine a secret of this sort not slipping out in Washington, a town where secrets of all sorts are leaked in a matter of hours. How could Bob Woodward have missed this one? Moreover, if most of the justices were not concerned with following precedent in making their decisions and knew that other justices acted in the same way, then the fourth reason for following precedent (i.e. enhancement of the Court's decisions) would disappear. For if a justice thinks that his fellow justices, now and in the future, will not follow precedent, there is no point to trying to influence these justices by pretending to be following precedent. Thus, the only possible rationale for the pretense of following precedent would be to seek legitimacy for the Court's decision (i.e. the third reason presented above). The general public, however, knows and cares about few Supreme Court decisions. And we suspect that its reaction to these decisions rarely depends on whether the Court follows, overturns, distinguishes, or ignores precedent.

Rather, the public's reaction is heavily influenced by whether it likes the outcome or not. At any rate, it is hard to understand why an effort to persuade the public that Supreme Court justices follow precedent has to be as elaborate as it appears to be. Does it really take such detailed and lengthy opinions to convince an uneducated and uninterested public that Supreme Court justices follow precedent?

But even if the general public does not care much about whether Supreme Court justices follow precedent, the Court watchers – the journalists who cover the Court for the major media, the lower court judges, most of the law professors and many members of the political elite – do care. Or to be more precise, most Court watchers want the justices: (1) to follow precedent most of the time and (2) to advance good arguments whether they are doing so or not. But the best way, indeed the only way, for the Supreme Court justices to persuade the Court watchers that they are pursuing these two goals is to actually pursue them. But it is very difficult for most of us to persuade anyone of anything unless we believe it ourselves. And there is no reason to believe that Supreme Court justices are different from most people in this respect.

It might be argued, however, that because all precedents are ambiguous, the justices cannot follow precedent even if they want to. We admit that Supreme Court precedents are often ambiguous. But there is a difference between holding that these precedents are ambiguous and assuming that any interpretation of precedent is equally plausible. We would argue that in a number of cases decided by the Court (including in some nonunanimous ones) only one outcome can be justified by good legal arguments. Walter Murphy tells us that because the "rules are not infinitely malleable" some possible decisions "cannot write," i.e., cannot be justified by good legal arguments.[16] And Karl Llewellyn made the same point:

> For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, there are not so many that can be built defensibly.[17]

Almost any decision can be supported by bad legal arguments, but most justices on the Court will try to avoid making such arguments. Thus, despite the ambiguity of legal materials, it is credible to believe that Supreme Court decision making will be constrained by the legal materials available to the justices, including the available precedents.

We have taken seriously the possibility that Supreme Court justices are, singularly or together, engaged in a conspiracy in which they hide their disdain for precedent beneath a veneer of attention to it. But this is an extremely dubious claim. For it is very hard to believe that most Supreme Court justices are so cynical. Nor is it likely that they would be so dedicated to justifying their decisions in terms of precedent if they did not believe that this is what they should do in deciding cases.

A more plausible claim is that the justices write long opinions justifying their decisions in terms of precedent because they believe that they do and should follow precedent in many cases. And presumably they do so because they are trying to attain all four goals we mentioned a moment ago. Thus, if those who say that the justices do not follow precedent are right, the justices are deceiving themselves about how they decide cases.

Is this claim plausible? In our view it is not. Any justice who believes that his or her decisions should be determined by precedent will try to conform to precedent at least some of the time. To believe that we should follow a rule is to try to conform to it except under unusual circumstances. Someone who says he believes in a rule (e.g. that he ought to follow precedent) but does not act on it either does not really believe in the rule or is suffering from a weakness of will or a lack of self-control. There is no reason to believe that Supreme Court justices believe that they should follow precedent but are unable to act on this belief. Unless the critics are right to say that precedent can *never* determine the decisions of a justice – a position we have rejected – then the determination of the justices to follow precedent will lead them to do so.

The above analysis suggests that we do not quite believe in the rationalization thesis relied upon by the legal realists. Because this thesis is derived from Freudian psychology, it is useful to hear the views of another Freudian psychologist. Edward Robinson tells us that:

> '…that fact that the judge mentioned certain factors in his opinion endows them with psychological importance…

> 'When men rationalize their actions they are nearly striving to do more than hide their real motives. They are expressing their ideals of what the motives of such actions ought to be.' If such expressions are 'not motives when they first arise; their mere repetition is likely to establish them as such.' Finally, the stated reason for decisions may be 'to a degree at least indicative of the impulses that actually play a part in reaching that decision.'[18]

Thus, it does not make sense to characterize the justices' opinions as either as mere rationalizations or as complete descriptions of how the decisions are reached. Rather, it is reasonable to conclude that the opinions serve both as rationalizations and as descriptions and do so imperfectly.

Indeed, the above quotation reminds us of Goffman.[19] If any of the Supreme Court justices was originally self-conscious about playing his role of advancing legal arguments based on precedent, it is likely that eventually it will become second nature to him, and he will become the part he is playing.

Following Precedent and the Costs of Calculation

Our first argument, then, holds that it is credible to believe that the justice defend their decisions in terms of precedent because they believe that precedent ought to and does influence their decisions. We would like to supplement this argument with a second, related one. Those scholars who say that judicial opinions are a mere fig leaf thrown over the attitudes of the justices must hold that the justices keep two sets of books in their minds. First, they keep track of their attitudes towards the public policy issues in the cases which actually lead them to decide one way or another. Second, they keep track of the legal arguments they can use to justify their decisions to others. Moreover, each time they come to a new case, they must bring the arguments found in both sets of books to bear on their decision. They have to decide the case on the basis of their policy attitudes. Then they have to think about how to justify the decision in terms of precedent.

Most of us who have thought about the kinds of issues that come before the Supreme Court have a hard enough time keeping one set of books. And when we have to render our opinion about some new or different issue, we look for precedents in our own decisions or those of others to help us make up our minds. We frequently invoke analogies to past situations and decisions to help us decide what to do or think in a new case. Supreme Court justices are not super human. It is hard to believe that every time they address a new case, they go through all the calculations needed to come to a decision and then determine whether it could be justified in terms of legal precedent. It would be difficult enough for them to work through each one of these processes of thought when a new case came before them. The more plausible route for them is to first view the case in terms of the possible relevant precedents, if any, and seek a de novo solution to the problem posed by the case only if the precedents do not work for them. Different justices, of course, might make different decisions regarding the relevance and the wisdom of a given precedent. But all of them will confront the claimed relevant precedents in deciding the case. As Cardozo stated, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the course laid by others who have gone before him."[20] And Llewelyn tells us:

> …what is precedent?...precedent consists in an official doing over again under similar circumstances substantially what has been done by him or his predecessor before…It takes time and effort to solve problems. Once you have solved one it seems foolish to reopen it…Both inertia and convenience speaks for building further on what you have already built, for incorporating the decision once made, the solution once worked out, into your operating technique without reexamination of what earlier went into reaching your solution.[21]

Llewelyn, of course, also argues that, at times, the judge should not follow precedent. But his comments above are

useful regarding the advantages of following precedent.

Firmly Based Precedents

We have argued that precedent is important in our legal culture and that the justices are able to achieve certain important goals when they follow precedent. We have also argued that following precedent reduces the burden of calculation on the justices. A third argument in favor of the influence of precedent concerns firmly based precedents. There are a number of decisions of the Supreme Court that have so changed American society or have so altered our understanding of the Constitution that any justice, or at least any new justice, no matter what his or her policy preferences, would feel compelled to follow them. We call these decisions "firmly based precedents."

A good example of a firmly based precedent is *Brown v. Board of Education* (1954). When Chief Justice Rehnquist was a law clerk to Justice Jackson he wrote a memo to his boss in favor of *Plessy v. Ferguson* (1896), which upheld the constitutionality of a Louisiana statute that required trains to provide "separate but equal" cars for black and white passengers. Although Rehnquist later denied that this memo represented his views, there is no evidence, aside from his statement, that this is true.[22] But Chief Justice Rehnquist, no matter what his views then or since, never voted to overrule *Brown.* Even former Judge Bork supports *Brown,* though he believes in original intent and argues that the framers of the Fourteenth Amendment did not intend that this amendment should be interpreted to prohibit racial segregation in the public schools.[23] For *Brown* cannot be changed without drastically changing American society.

Brown is not the only example of a firmly based precedent. Monaghan tells us that the *Second Legal Tender Case*, (1871) which upheld the constitutionality of Congress' power to make paper money legal tender for the payment of debts, and the series of cases that upheld Congress' power to enact the New Deal legislation and to create the administrative state, are unlikely to be overruled.[24] Regarding the *Second legal Tender Case*, for example, Robert Bork states that "if a judge today were to decide that paper money is unconstitutional, I would think he ought to be accompanied not by a law clerk but by a guardian." This is true even though Bork notes that this decision is contrary to original intent.[25]

One might easily add to the list *Marbury v. Madison* (1803), *Martin v. Hunter's Lessee* (1816), the interpretation of the necessary and proper clause in *M'Culloch v. Maryland* (1819), the interpretation of the commerce clause in *Gibbons v. Ogden* (1824), *Barron v. Baltimore* (1833), *Cooley v. Board of Warden's* (1852), the scope of the privileges and immunities clause of the Fourteenth Amendment in *The Slaughterhouse Cases* (1873), *Santa Clara County v Southern Pacific Railroad Co.* (1886), the series of decisions that incorporated most of the provisions of the Bill of Rights into the due process clause of the Fourteenth Amendment, *Bolling v. Sharpe* (1954), *Baker v. Carr* (1962), *Gideon v. Wainwright* (1963), *Reynolds v. Sims* (1964), *Wesberry v. Sanders* (1964), *Heart of Atlanta Motel v. United States* (1964), *Katzenbach v. McClung* (1964) and *Katzenback v. Morgan* (1966). Yet, almost all these decisions were highly controversial when they were first decided and some remained so in the decade after they were handed down.

It might be argued that the issue in *Brown* (and in these other cases) will never be raised again before the Court and, therefore, will not influence their decision making. But this is not true. In at least four decisions after *Brown,* the Court followed *Brown* and rejected the segregated practice. These are: *Mayor of Baltimore v Dawson* (1955), (legally segregated beaches), *Holmes v. Atlanta* (1955), (golf courses), *New Orleans v. Detiege* (1958), (parks) and *Johnson v. Virginia* (1963), (courtroom). Whether *Brown* will be followed in this way in the future is difficult to determine. Any justice, if he or she so wished was free to argue in any case that may be relevant to the issue, that *Brown* was wrongly decided. That it is unthinkable that any justice would have advanced this argument suggests that *Brown* structures decision making on the Court, by imposing outer limits which the Court will not violate. The other firmly based precedents do the same.

Which cases fall into the category of "firmly based precedents" and which do not is often a matter of interpretation. Indeed, it may be more realistic to think of the Courts' decisions in terms of a continuum rather than in dichotomous terms. And whether a case ought to be placed at one point of the continuum or at another may change over time. *Plessy,* after all, might once have been classified as a "firmly based precedent." Nevertheless, it is difficult to deny that at any time in Supreme Court history, except for the very earliest period, there were firmly based precedents that the justices believed that they were compelled to follow.

Conclusion

We have advanced three arguments for believing that adherence to precedent often influences the votes of the justices. We believe that these arguments offer a challenge to those scholars who insist that the Supreme Court decision making in hard cases is rarely influenced by precedent.

(Notes)

1. Wilfred E. Rumble, Jr., American Legal Realism (Ithaca, NY: Cornell University Press, 1968), 48, 79-80.
2. Some of the legal realists were also fact-skeptics.
3. Mark Tebbit, Philosophy of Law: An Introduction (London and New York: Routledge, 2000) 31.
4. Karl N. Llewelyn, Jurisprudence: Realism in Theory and Practice (Chicago, IL: University of Chicago Press, 1962) 58.
5. Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (New York: Cambridge University Press, 2002) 88.
6. Segal and Spaeth, 88.
7. Segal and Spaeth, 93.
8. These terms are used by Segal and Spaeth throughout their book.
9. See e.g., Mark J. Richards and Herbert M. Kritzer "Jurisprudential Regimes in Supreme Court Decision Making" American Political Science Review 96 (June 2002): 305-320.
10. Dennis Wrong, Max Weber (Englewood Cliffs, NJ: Prentice-Hall, 1970) 17.
11. Glen A. Phelps and John B. Gates, "The Myth of Jurisprudence" Santa Clara Law Review 31 (1991): 567-96.
12. Lawrence Baum, The Supreme Court 8th ed. (Washington, D.C: Congressional Quarterly, 2004), 120.
13. For a fuller discussion of these goals see, Saul Brenner and Harold J. Spaeth, Stare Indecisis (New York: Cambridge University Press, 1995) Chapter 1.
14. Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven, CT: Yale University Press 1921), 160.
15. It is possible that each justice is a closet legal realist but does not tell the other justices this. So each justice thinks that he or she is the only legal realist. This would be a colossal case of what the sociologists call pluralistic ignorance. It is no more likely than the conspiracy theory we discuss in the text.
16. Walter Murphy, The Elements of Judicial Strategy (Chicago, IL: The University of Chicago Press, 1964), 31.
17. K. N. Llewelyn, The Bramble Bush (New York: Oceana, 1960), 81.
18. Our source is Rumble, 94. His source is Edward Stevens Robinson, Law and the Lawyers (New York: Macmillan, 1935), various pages.
19. Erving Goffman, The Presentation of Self in Everyday Life (NewYork: Anchor, 1959).
20. Cardozo, 149.
21. K.N. Llewelyn, 70.
22. Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (New York: Alfred A. Knoff, 1976), 605-610.
23. Robert Bork, The Tempting of America: The Political Seduction of Law (New York: The Free Press, 1990), 74-84.
24. Henry Paul Monaghan, "Stare Decisis and Constitutional Adjudication, "Columbia Law Review 88 (May, 1988) 723-73.
25. Bork, 155.

Ways of Thinking About Precedent

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In 1994 Jeff Segal and Harold Spaeth presented an APSA conference paper in which they offered an innovative test of the relative strength of Supreme Court justices' preferences and their adherence to precedent. That paper led to an article in the *American Journal of Political Science* (Segal and Spaeth 1996) and to their book *Majority Rule or Minority Will?* (Spaeth and Segal 1999). The paper and its successors tested whether justices who opposed a legal doctrine at its inception maintained that opposition after the doctrine had achieved the status of a precedent. Segal and Spaeth concluded from their evidence that such justices indeed maintain their opposition to a precedent the great majority of the time.

The paper attracted responses from several scholars, including a 1995 APSA paper by Saul Brenner and Marc Stier. Brenner and Stier differed with Segal and Spaeth on two grounds. First, they offered a set of logical arguments against the view that the justices give little weight to precedent. Second, they conducted an empirical analysis of their own, based on a modification of the Segal-Spaeth procedures, to reach a different conclusion about the relative weights of preferences and precedent.

A revised version of the Brenner-Stier paper was published in the *AJPS* as part of the forum that accompanied the Segal-Spaeth article (Brenner and Stier 1996). But that publication included only the empirical analysis, not the logical arguments. I thought that omission was unfortunate, that the arguments presented in the paper would benefit scholars in the field. Thus I am glad that a revised version of this portion of the 1994 paper is now being published in the Newsletter (as Stier and Brenner). In this essay I will discuss what I see as the value of what Stier and Brenner have done, while recognizing that they may not agree with all my interpretations of their arguments.

A great deal has been written about precedent as an element in judicial decision making, and the general thrust of what Stier and Brenner say is not a sharp departure from prior scholarship. What I found (and find) so interesting about their arguments, however, is the care with which they draw out the implications of the legal framework within which the justices work. If the justices constantly think about cases in relation to precedents, they argue, the precedents relevant to their decisions inevitably affect their reactions to those cases.

In taking this position, of course, Stier and Brenner differ with those scholars who see precedent as merely a gloss on the justices' decisions. They also differ with scholars who think that precedent does influence the justices, but only because the justices need to maintain their legitimacy with audiences that care about adherence to precedent. Thus they disagree fundamentally with prominent positions in both the attitudinal and strategic camps. But they are also distant from traditional legalistic interpretations of judicial decision making. They certainly do not argue that relevant precedents fully determine Supreme Court decisions.

Although they speak primarily in common-sense terms, a portion of Stier and Brenner's arguments falls in the realm of cognitive psychology. In effect, they are saying, the legal reasoning that pervades arguments to the Court and within the Court structures the justices' cognitive processes. Further, they argue, the idea that justices "keep two sets of books in their minds"--policy considerations on which they base their decisions and legal arguments with which they try to justify those decisions to other people--is an unreasonably demanding conception of judicial cognition. Indeed, they suggest, the decision process that is least demanding cognitively (and thus likely to be attractive to the justices) works within the framework of existing precedents.

Of course, this judgment can be contested. Segal and Spaeth (2002, 433) have cited the theory of motivated reasoning that was developed by Ziva Kunda (1990) and other psychologists. This theory, which analyzes the impact of "directional" and "accuracy" goals on judgment, has a clear relevance to judicial decision making: policy goals can be understood as directional, the goal of interpreting the law correctly as accuracy. The theory can readily be understood

to support the view that in the legally ambiguous cases heard by the Supreme Court, justices are free to pursue their directional goals. Indeed, that is Segal and Spaeth's interpretation. And even if one does not fully accept that interpretation of the motivated reasoning framework, clearly the institutional characteristics of the Supreme Court are unusually favorable to the elevation of directional goals over accuracy goals (see Braman and Nelson 2007, 940-942).

But as Stier and Brenner point out, legal ambiguity does not mean that legal considerations weigh equally on the two sides. And if the justices reason within a legal framework, unequal weights may influence their choices. The situation that Segal and Spaeth analyzed, in which a justice has a pre-existing and public commitment that conflicts with a relevant precedent, gives special weight to directional goals. When that situation does not exist, as it generally does not, the justices are more open to the influence of accuracy goals that may conflict with their policy preferences. Among other things, existing legal doctrines can channel their choices (Richards and Kritzer 2002).

Stier and Brenner's arguments will not necessarily change readers' minds about the role of precedent in Supreme Court decision making. Those who see precedent as unimportant to the Court's decisions have good reasons to maintain their position. For that matter, those who think that the justices take precedent into account only because of concern with certain audiences can continue to interpret evidence of the impact of precedent in those terms.

Still, the Stier-Brenner argument should encourage us to think more about the cognitive processes by which justices make their choices. It is wildly unrealistic to think that the justices respond to precedents without regard to their policy preferences. But it also seems unrealistic to think that the precedents with which the justices work affect only the justifications offered for decisions and not the decisions themselves. Through the way they argue for their position, Stier and Brenner make an important contribution to the continuing debate over the roles of legal and policy considerations in judicial decision making.

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Catching up to Move Ahead: Identifying and Filling Theoretical Gaps on Precedential Constraint and the Supreme Court

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Those of us who study legal decision making have what can only be characterized as a fascination with precedent. Legal academics study lines of authority noting where judges distinguish and follow it; empirical scholars crunch case votes operationalizing adherence to prior pronouncements in a dizzying variety of ways (Landes and Posner 1976; Merryman 1977; Songer, Cameron and Segal 1994; Brenner and Spaeth 1995; Knight and Epstein 1996; Segal and Spaeth 1996; Landes, Lessing and Solimine 1998; Spaeth and Segal 1999). Love it or hate it – see it as a meaningful constraint on judges or not – law and courts scholars are deeply concerned with discovering the "essence" of its role in legal decision processes.

Why are we, as a subfield, so taken with studying the influence of precedent? First, understanding case-based reasoning is an inherently interesting endeavor. The norm of stare decisis requires judges follow the rules and logic in prior decisions when considering current disputes to the extent those cases involve similar facts, parties and/or legal issues. Cases, however, are complex; they can be similar and different across aspects. This can lead distinct decision makers to "see" the applicability of specific precedent to pending litigation quite differently (Braman and Nelson 2007). Thus, there is a good deal of plasticity built into the application of one of our most important constraints on legal decision makers (Sunstien 1996; Sherwin 1999). This has important implications for the legitimacy of judicial outputs. Judges explain when they feel compelled to follow (and not follow) precedent by citing and distinguishing cases in written opinions. As legal experts, we generally trust them to make these determinations sincerely and accurately based on their legal training. Where these decisions are made by judges on lower courts, they can be appealed, providing an additional check on what are, essentially, self-made determinations about the extent to which proffered case law appropriately confines the reasoning of decision makers in particular instances.

A second reason law and courts scholars are so interested in precedent is, of course, its centrality in legal notions of decision making. Those trained in the legal tradition come not only to accept, but to internalize, rules of appropriate argumentative and decision making behavior. Via strong socialization processes, starting in law school and continuing thorough one's legal career, practitioners and judges come to define themselves by adherence to professional norms. These norms, in turn, become the standard to which judges hold themselves and each other accountable (See, Braman 2004, pp. 30-45 for a more detailed account of this process). One of the most important decisional norms is stare decisis. To question the constraining influence of precedent is to strike at the heart of the legal model; to demonstrate its influence is to vindicate traditional conceptions of legal reasoning. Either way, the pay-off can be substantial for law and courts scholars. Whether your approach to legal models of decision making is critical, traditional or some hybrid of the two, you have to "deal with" precedent in some respect. Its role in how judges think of their own decision processes is, simply, too integral to ignore.

Add the Supreme Court to the mix and what was already interesting becomes really interesting. Leaving aside the fact that the Court sits atop our judicial hierarchy and decides cases involving important policy issues, what makes the study of precedent so intriguing at this level is that the justices are not technically required to follow it. Of course, they are subject to strong normative pressure to do so unless they have compelling reasons to overturn prior rulings. But the fact that there are no formal checks on the justices' decisions to invoke, ignore, or distinguish prior case law, adds an additional layer of self-imposed discretion on what is already an extremely pliant mechanism of constraint.

Scholars who are skeptical about the constraining force of precedent are quick to point out that the Court handles a high proportion of "hard" cases, with compelling arguments (and precedent) on both sides, providing ample "cover" for attitudinal behavior (Segal and Spaeth 1993; 2002). But even those who believe that precedent can meaningfully influence judges have a special difficulty explaining its power on this court. Individual justices do not have to follow cases they see as "wrongly decided." Moreover, some justices see themselves as high-profile champions of particular decision making approaches (Baum 2006) which, they often argue, have been underutilized on previous Courts.

There is little reason to expect them to cite those cases as authoritative in their reasoning -- and nothing technically demanding that they do so. All considered, it becomes apparent that, we as a subfield, should concern ourselves not only with the empirical (i.e. are the justices constrained by precedent), but the theoretical as well (i.e. why would they be constrained by precedent?). Enter Stier and Brenner to identify and begin to address this significant gap in our thinking.

I think it speaks to the success and pervasiveness of Segal and Spaeth's attitudinal model that we are much more familiar (and perhaps more comfortable) with arguments about why Supreme Court justices are not meaningfully constrained by precedent, than thinking about why they should be. In some ways it seems odd to just now be building theory for assumptions about judicial behavior that Segal and Spaeth were clearly reacting against in writing their original book. It is in identifying the fact that traditional understandings of constraint on the Court are theoretically underspecified, however, that Stier and Brenner make, what may be, their essay's greatest contribution. Sometimes just asking a question no one else has asked -- regarding long held assumptions that others have implicitly taken for granted -- can be a great leap forward. I believe this is one of those moments. At the very least their essay demonstrates how the ebb and flow of competing paradigms can compel us to reconsider and refine our most basic understandings of democratic behavior.

Moreover, the content of the argument they put forth is compelling. For too long the answer to the question, "why would the justices on the Court be constrained by precedent?," has been: "because they are judges." Well, yeah. That's an important part of the answer. As judges, they are subject to the same strong socialization processes as other practitioners, making adherence to precedent a key factor in how they view the appropriate exercise of their own authority. But, members of our highest court are more than judges. They are also people with strong views who have been vetted though a highly political process. Stier and Brenner take on this reality; implicit in their argument is the idea that we need to start looking beyond the "legitimizing" function precedent serves for judges on the court. Their essay posits that there are other reasons a smart Supreme Court justice might choose to cite prior opinions. In doing so they craft a much more sophisticated argument than simply assuming the justices cite precedent because they are "supposed to" – one that satisfactorily addresses the fact that they are not "compelled to" – and at the same time generalizes to judges on lower courts in important respects.

Without restating their argument, I will take this opportunity to critically analyze some of its main points. Stier and Brenner suggest decision makers on the Court cite precedent for three reasons. First, citing precedent helps the justices achieve important "goals"; second, it saves time and resources; third justices use precedent because there are "firmly based" decisions that all justices feel compelled to follow due to the extent to which these decisions have "changed American society" and/or "altered our understanding of the Constitution."

Three of the four "goals" Stier and Brenner discuss in the first prong of their argument are similar to what other scholars refer to when talking about the legitimizing value of precedent. Viewed in this light, the constraining force of precedent is important because it provides flexible continuity and fairness in the administration of justice. Via application of cased-based decision making similarly situated litigants are treated equally; existing doctrine encompassing important democratic values can be applied to new situations as they arise. Adherence to precedent also enhances legitimacy by constraining (or at least appearing to constrain) judicial discretion.

Slightly apart from this, they argue citation to precedent can be an important tool for the justices in enhancing the importance of their own decisions. By citing prior case law the justices encourage future Supreme Court decision makers to do the same – presumably encouraging future Courts to defer to the current Court at some later date in time. Stated another way, the authors argue, justices cite precedent to increase their own power and/or influence over time. I think this argument has the potential to appeal to those who see the justices as single minded pursuers of policy in complex ways. I look forward to seeing how this particular goal is incorporated into our understandings of precedent on the court.

The second prong of their argument about justices using precedent to conserve time and effort is important in light of the Court's limited resources. Precedents themselves may serve as heuristics for established and/or contested legal standards (consider the Lemon test in establishment cases), as well as arguments individual justices admire and abhor. Also, and especially, relevant here is the authors' point that the justices' attitudes about particular legal issues and un-

derstandings of precedent are largely intertwined. This is a point that is not adequately appreciated by most law and courts scholars; it has great import for how the justices think about precedents they will cite and distinguish, acknowledge or ignore.

Particular opinions may loom large in the minds of the justices as eloquent statements of democratic truths [Marbury v. Madison (1803)] or great accommodations of competing interests [ex., Jackson's concurrence in Youngstown Sheet and Tube Co. v. Sawyer (1952)]. Alternatively, they may also be seen as horrible examples of the Court elevating politics over principle [Korematsu v. United States (1944); Barenblatt v. United States (1959); Bush v. Gore (2000)]. Just hearing the names of those cases can cause visceral reactions in decision makers demonstrating their heuristic and symbolic value. Significantly, this is true not only for high-profile cases – like the ones mentioned above (and in the third prong of Stier and Brenner's argument) – but it is likely the case for less visible decisions where the justices were personally involved in crafting majority opinions or particularly vitriolic dissents. Viewed in this light, citations to particular decisions or opinions within cases can become "short hand" for arguments and legal issues the justices have previously "worked through" or for principled divisions on a particular Court [consider, for instance, how various justices used United States v. Lopez (1995) in subsequent commerce clause opinions on the Rehnquist Court]. It makes great sense to bear this in mind when thinking about how the justices cite and use precedent.

The final prong of Stier and Brenner's argument concerns the fact that important Supreme Court decisions often become imbued with constitutional connotation and "democratic meaning." This provides an important legitimizing tool for justices at the same time it acts a meaningful constraint on their decisions. The authors argue that citing particular cases like Brown v. Board of Education (1954) can improve public acceptance of their decision making. But these cases that have worked their way into our democratic psyche also provide a sort of "outer limit" for legal justifications that the justices can not and will not cross. The authors suggest the justices can not significantly alter these holdings because the public ramification would be significant. But they go further, suggesting that Supreme Court justices would not significantly alter these decisions because the holdings, themselves, become part of the way they understand our constitutional system. Of course, one could point to prior understandings that were once viewed as "super-precedents" that have since been overturned [i.e. Lochner v. New York (1905), Plessy v. Ferguson (1896)] to diminish the strength of their argument here – but summary dismissal of this sort is too easy. Moreover, to dismiss this argument so simply seems to "miss the point" in some important respect. Perhaps the constraining force of "firmly based" precedent is limited to particular Court "eras," akin to what Richards and Kritzer (2002) have described as "jurisprudential regimes," but within those eras that force is quite real. As such, we need to address this in our theorizing.

As much as I like this essay, there remains significant work to be done here. I think the authors would agree that this represents the beginning of an important discussion, rather than its culmination. For instance, although the authors never explicitly say so, the group nature of Supreme Court decision making is, itself, a constraint on the justices requiring that they seriously think through decisions using appropriate tools of legal analysis, including precedent. Stier and Brenner do a nice job of citing various statistics demonstrating a "culture of precedent" on the Court. Not all of this evidence, however, provides equally compelling evidence of constraint. A skeptic, for instance, could characterize citations to precedent in opinions and oral argument as "posturing," in that, the justices want to appear to be deciding cases via appropriate criteria without actually doing so. In my view, some of the most compelling evidence of precedential constraint on the Supreme Court has been provided by Knight and Epstein (1996, pp.1024-28) and other researchers who analyze the justices' conference notes.

Specifically, law and courts scholars commonly find, in private conferences the justices spend a good deal of time talking about precedent. This behavior, occurring privately and exclusively among the justices, cannot be characterized as mere posturing for the benefit of public audiences. Instead, it suggests that the justices are talking to each other in legal terms because that is how they believe they should decide cases (Braman 2004, pp. 18-22). As such, individual justices are constrained in their reasoning to arguments their colleagues deem appropriate; they need to utilize precedent to the extent they want to convince others on the court of the merits of their opinions. These conversations and internal memoranda circulated among the justices (which also cite precedent) are important in shaping majority opinions. The justices cannot use any argument to convince their colleagues – they need to use legally appropriate arguments. In essence, it is the group nature of decision making by commonly socialized actors that assures

adherence to accepted legal norms, including stare decisis, on our highest court.

This brings to mind another important consideration in our theorizing. The decision to cite, distinguish or ignore precedent is made at two distinct levels of analysis: the micro level, where individual justices choose how to deal with specific cases cited as authoritative, and the macro level where the entire court acts with regard to prior case law. Indeed, it is only at the macro level that precedent can be formally overturned, though particular justices often suggest that the logic and rulings in specific cases should be abandoned. Moreover, individual justices may be more concerned about maintaining consistency in the way they treat particular doctrine. There is less protection of this sort for the court, as a whole, because majority opinions are authored by different justices who may have distinct views of how particular cases apply in similar instances.

We need to build this complexity into our theorizing; different considerations may be relevant for each level of analysis. For example, we should be asking: What purpose does precedent serve for individual justices? What role does it play for the Court as collective decision making body? Are these individual and collective functions the same or different? If they are different, are there circumstances where one may "interfere" with the other? If so, what would we expect to result from that conflict? What are the empirical implications of our theorizing? I am sure other aspects of this essay will raise interesting questions in the minds of different law and courts scholars. The larger point is, this is how our knowledge progresses. Sometimes we need to take a step back and critically evaluate our assumptions in order to move ahead. Often, the result is finding gaps we are surprised no one has previously acknowledged. Stier and Brenner have done us a great service in puzzling through this one. Their essay suggests many intriguing paths ahead in understanding the precise role of precedent on the Supreme Court.

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Research Spotlight

Merging Phase I and Phase II of the United States Supreme Court Judicial Database

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Merging Phase I (Harold Spaeth) and Phase II (James L. Gibson) of the United States Supreme Court Judicial Database has proved challenging. There are great advantages to having these databases merged, as Phase II has detailed information about all versions of opinions, values incurred in the opinions, amici participants, and parties.

One of the problems is deciding on the units of analysis. In Phase I, there are multiple units of analysis that you can choose – case citations, docket number, multiple issues and laws. In Phase II, the units of analysis are the case citations, but there are different variables for each opinion. In the data that I am making available, only the case citations match with Phase II data.

After merging the data, I created an aggregate database, using policy area*year as the unit of analysis. There are data on eleven policy areas and most data are available from 1953-2000, but some of the data have limited years. The policy areas are: Discrimination, First Amendment, Privacy, Criminal rights, Labor, Environment, Economic regulation, Taxation, Due process and government liability, Judicial power and Federalism. These categories match Spaeth's designation of "Value" from his database fairly closely, with the exception of the separation of environmental cases into their own category, the inclusion of personal injury and government liability with non-criminal due process cases and the inclusion of state and federal taxation into the same category. Furthermore, miscellaneous and attorney law issues are excluded from the database.

I included all orally argued cases, whether they resulted in signed or unsigned opinions, including per curium decisions and judgments. I excluded memoranda, decrees and any case that resulted in a split vote. Multiple docket numbers that the justices include into a single case citation are counted only once. At times, some case citations represent multiple issues. Since I was particularly interested in the issue areas, I included cases with multiple issue areas as separate units, but only when the case's issue spans across more than one policy area.

With the new aggregated data, I matched information from Baumgartner and Jones Policy Agendas Database, Songer's Courts of Appeals Databases, various measures of landmark decisions Biskupic and Witt (1997) and Epstein, et al. (1996) and politically salient decisions (Epstein and Segal 2000), and Martin and Quinn ideal points scores.

The data, all the syntax that I used with explanations for what I was doing, as well as all the analysis syntx can be downloaded from my website:

http://sobek.colorado.edu/~bairdv/research.html

(Data References)
The version of the United States Supreme Court Judicial Database used in this compilation can be downloaded at the University of Kentucky's website for the S. Sidney Ulmer Project.
United States Supreme Court Judicial Database, Phase II: 1953-1993 can be downloaded at ICPSR. Study 6987.

Songer, Donald R. United States Courts Of Appeals Database Phase 1, 1925-1988 [Computer file]. ICPSR number 2086. Columbia, SC: Donald R. Songer [producer], 1990. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1998. A random sample of cases from each circuit for each year between 1925 and 1988 was coded for the nature of the issues presented, the statutory, constitutional, and procedural bases of the decision, the votes of the judges, and the nature of the litigants. The variables are divided into four sections: basic case characteristics, participation, issues, and judges and votes. The cases of the Appeals Courts do not actually represent all cases handed down by Appeals Courts (as they do in Phase I and Phase II of the Supreme Court), but rather represent a random sample of each circuit and year.

The Policy Agendas Database is distributed through the Center for American Politics and Public Policy at the University of Washington and the Department of Political Science at Penn State University, with the support of National Science Foundation grant number SBR 9320922.

Martin and Quinn's Supreme Court justice ideal point measures are similar in spirit to Poole and Rosenthal's D-NOMINATE scores (1997). These scores are different from Poole and Rosenthal's D-NOMINATE scores in that they use Markov chain Monte Carlo methods to fit a Bayesian measurement model to designate ideal points of each Supreme Court justice that are allowed to vary in any pattern imaginable over time without restricting the movements to be linear.

For more information about Martin and Quinn's Supreme Court's Ideal Points, visit their website: Ideal Points for the U.S. Supreme Court, or their article: Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." Political Analysis 10 (Spring): 134-53.

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Research Spotlight

Transforming the United States Courts of Appeals Databases in Stata*

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In the Winter 2006 issue of *Law and Courts,* I presented Stata code allowing researchers to reliably transform the unit of analysis in Spaeth's (2005) Original U.S. Supreme Court Judicial Database from the case to the justice-vote (Collins 2006). The purpose of making this transformation is to enable scholars to tackle questions at the level of the individual justice (Giles and Zorn 2000). Since the publication of that code, I have developed comparable code allowing researchers to transform the unit of analysis in Songer's (2007) United States Courts of Appeals Data Base from the case to the judge-vote.[1]

Like the Original U.S. Supreme Court Database, the United States Courts of Appeals Data Base is structured such that the unit of analysis is the case, which makes some research questions more easily investigated than others. By transforming the unit of analysis from the case to the judge-vote, students of law and courts are enabled to address a multitude of new inquiries at the level of the individual judge. For example, using the judge-vote as the unit of analysis allows researchers to examine acclimation effects, factors related to the decision to dissent or concur, the influence of Chief Judges on their fellow panel members, in addition to a host of other topics.

Graphically, the code transforms the Courts of Appeals Data Base from this format:

case	j1vote1	j2vote1	j3vote1	j1maj1	j2maj1	j3maj1
1	1	3	1	1	2	1
2	1	3	1	1	2	1

To this format:

case	judgeid	jvote1	jmaj1
1	1	1	1
1	2	3	2
1	3	1	1
2	1	1	1
2	2	3	2
2	3	1	1

The transformation of the Courts of Appeals Data Base is accomplished in the following steps[2]:

. set mem 75m
. use "cta96_stata.dta"

The database that is about to be created will be substantially larger in size than the Courts of Appeals Data Base in its original form. As such, users must allocate sufficient memory. Employing a number of alternatives, I found that at least 75m must be allocated (though allocating more memory will speed up the process). Memory must be allocated prior to opening the Data Base.

. gen j1vote1=direct1
. gen j1vote2=direct2
. gen j1maj1=1
. gen j1maj2=1 if direct2~=.

This series of commands creates four new variables that contain information on judge 1's voting behavior. In its original form, the Data Base does not contain these variables as judge 1 is by definition a part of the majority and, therefore, judge 1's behavior corresponds exactly to the ideological direction of the majority's decision. Because Stata will transform the data based on characters contained in the judge-specific variables, new variables for judge 1 must be created. **j1vote1** and **j2vote2** contain information on the ideological direction of judge 1's votes. **j1maj1** and **j1maj2** indicate that judge 1 was a member of the majority. Note that **j1maj2** will only contain values if the ideological direction of the second case type is specified in the data.

. gen caseid = _n

This creates a unique identification number for each case in the database.[3]

. reshape long codej@ j@vote1 j@vote2 j@maj1 j@maj2, i (caseid) j (judgeid)

This command reshapes the data from wide format (unit of analysis = case) to long format (unit of analysis = judge-vote).[4] Using the **@** character, Stata locates the judge-numbers (1-16) and recognizes that these variables vary within cases. Note that there is no need to tell Stata which variables are constant within each case; Stata will recognize these variables on its own. **i (caseid**) tells Stata that each individual case is uniquely identified by the **caseid** variable. **j (judgeid)** tells Stata to create a new variable, **judgeid**, that corresponds to each judge's number (1-16).

. drop if codej==. & jvote1==. & jvote2==. & jmaj1==. & jmaj2==.

The final step is to clean-up the data. The previous code transforms the data such that there are 16 judge-number observations for each case, increasing the number of observations in the data from 18,195 to 291,120. This code purges the data of these missing observations, leaving the researcher with a final dataset of 55,575 observations.

The availability of publicly accessible databases has marked a dramatic change with regard to the ability of scholars to conduct empirically-oriented research on law and courts. Yet, the structure of many of these databases makes certain lines of inquiry more easily broached than others. The purpose of this note is to provide an easily implemented and reliable code for transforming the unit of analysis in the original and updated United States Courts of Appeals Data Bases. While the code is targeted toward these specific datasets, its basic logic can be extended to a variety of similarly organized databases. As such, I encourage researchers to share extensions to this code and welcome other innovations in data transformation, which can save us all some frustration from time to time (e.g., Benesh and Zorn 1998:12).

Appendix

The following code can be implemented to transform the updated Courts of Appeals Data Base (Kuersten and Haire 2007). Since the intuition behind the code is identical to that discussed above, I will forgo a discussion of each step in the process.

```
. set mem 75m
. use "KH_update_stata.dta"

.gen j1_vote1=direct_1
.gen j1_vote2=direct_2
.gen j1_maj1=1
.gen j1_maj2=1 if direct_2~=.

.rename j2vote2 j2_vote2
.rename j2maj1 j2_maj1
.rename j3_maj_1 j3_maj1
.rename j4_vote_1 j4_vote1
.rename j4_vote_2 j4_vote2
.rename j4maj1 j4_maj1
.rename j5_vote_1 j5_vote1
.rename j5_vote_2 j5_vote2
.rename j5_maj_2 j5_maj2
.rename j6_vote_1 j6_vote1
.rename j7_vote_1 j7_vote1
.rename j7_vote_2 j7_vote2
.rename j8_vote_1 j8_vote1
.rename j8_vote_2 j8_vote2
.rename j9_vote_1 j9_vote1
.rename j10_vote_1 j10_vote1
.rename j10_vote_2 j10_vote2
.rename j13_vote_1 j13_vote1
.rename j13_vote_2 j13_vote2

.gen id = _n

.reshape long j@ j@_vote1 j@_vote2 j@_maj1 j@_maj2 , i (id) j (judgeid)

.drop if j==. & j_vote1==. & j_vote2==. & j_maj1==. & j_maj2==.
```

(Notes)

* I thank Stefanie Lindquist, Wendy Martinek, and Lisa Solowiej for their comments and encouragement; Susan Haire, Ashlyn Kuersten, and Donald Songer for their work on the Courts of Appeals Data Bases; and Sara Benesh and Chris Zorn, who provided an inaugural treatment of data transformation on which this code is based (Benesh and Zorn 1998). A Stata do-file containing the code appearing herein is available on my webpage at http://www.psci.unt.edu/~pmcollins/.

1. The United States Courts of Appeals Data Base (1925-1996) is available on-line at The S. Sidney Ulmer Project for Research in Law and Judicial Politics, which is graciously maintained by Kirk Randazzo. Note also that the Ulmer Project contains an updated version of the Courts of Appeals Data Base (1996-2002), based on the efforts of Ashlyn Kuersten and Susan Haire. The code contained here is designed for use with the "original" Courts of Appeals Data Base. The Appendix reports the code for transforming the updated Data Base.

2. The code appearing below performs equally well in Stata 9.0 and Stata 10.0.
3. Prior to this step, users may wish to weight the cases. However, weights can be assigned after the transformation is complete.
4. After running this line of code, Stata will return a message indicating that codej16, j16vote2, and j16maj2 were not found. This is not an error message, but rather reflects the fact that entries for those variables, corresponding to judge 16, are missing from the Data Base.

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Stata release 10.0. 2005. College Station, TX: Stata Corporation.

BOOKS TO WATCH FOR

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Courts and Judicial Policymaking (Prentice Hall) by **Christopher P. Banks** (Kent State University) and **David M. O'Brien** (University of Virginia) offers a broad examination of the contemporary politics of law, courts, the legal profession, and judicial policymaking – often informed by a comparative perspective. The book covers four main substantive areas: What is law? How are courts organized and how do they work procedurally? What influences court access and, ultimately, judicial decision making? And finally: how do courts make policy, and how is their authority constrained? The book is designed for use by undergraduates as well as graduate students, draws on perspectives from the legal academy as well as political science, and incorporates multiple analytic approaches, such as the attitudinal model and new institutionalism.

Who's Your Daddy: Popular Culture, the Founding Fathers, and Judicial Review (Ashgate Publishing) by **Susan Burgess** (Ohio University) applies interpretive techniques drawn from cultural studies to a perennial question of law and politics: what role do the founding fathers play in legitimizing contemporary judicial review? Rather than offering another theory defending either judicial activism or judicial restraint, this book employs narrative analysis, popular culture, queer theory, and parody to better understand and to reconstitute the traditional relationship between fatherhood and judicial review. To this end, the author uses soap operas, romance novels, science fiction, reality television, and coming out narratives to provide alternative ways to understand the relationship between paternal power and law from the bottom-up.

In **Jeffrey R. Dudas's** (University of Connecticut) new book **The Cultivation of Resentment*:* Treaty Rights and the New Right** (Stanford University Press), the author offers one of the first book-length examinations of how grassroots conservative activists use rights discourse to pursue their political goals. This work argues that conservative activists engage in frequent and sincere mobilizations of rights talk, and that such discourse is central both to the identities of conservative activists and to the broad appeal of modern New Right politics. By tracing the interplay of rights and resentment, Dudas provides new insights into the prevailing scholarship on law and politics, which typically overlooks the importance of rights discourse for conservative politics.

Douglas Edlin (Dickinson College) is the editor and a contributor to **Common Law Theory** (Cambridge University Press). In this book, legal scholars, political scientists, philosophers and historians from Australia, Canada, New Zealand, the United Kingdom, and the United States analyze the common law through three of its classic themes: rules, reasoning, and constitutionalism. Their essays, specially commissioned for this volume, provide an opportunity for thinkers from different jurisdictions and disciplines to talk to one another and to their wider audience within and beyond the common law world. The authors include Larry Alexander, T.R.S. Allan, David Dyzenhaus, Melvin A. Eisenberg, John Gardner, Jeffrey Goldsworthy, Gerald J. Postema, Emily Sherwin, James R. Stoner Jr., Michael Taggart, and Douglas E. Edlin.

Paul Frymer (University of California, Santa Cruz) has recently published **Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party** (Princeton University Press). As the author notes, in the 1930s, fewer than one in one hundred U.S. labor union members were African American. By 1980, the figure was more than one in five. *Black and Blue* explores the politics and history that led to this dramatic integration of organized labor. In the process, the book tells a broader story about how the Democratic Party unintentionally sowed the seeds of labor's decline. This work also examines the role of courts in becoming the leading enforcers of workplace civil rights, and, in the process, threatening unions with bankruptcy if they resisted integration. In diversifying unions, judges and lawyers enfeebled them financially, thus, as the author explains, democratizing through destruction.

Many legal scholars and commentators have a vague sense that the law has not kept pace with recent, dramatic changes in how news is gathered and disseminated. But in the newly released **We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age** (Free Press), constitutional scholar **Scott Gant** (Boies, Schiller & Flexner) offers a sustained argument about the purposes and meaning of the First Amendment's Press Clause, and a new paradigm for assessing the rights that should be extended to non-traditional

and citizen journalists. Drawing upon historical and legal analyses, the author makes the case that everyone in the U.S. who disseminates information and opinion to the public should be granted the same legal protections now given to the mainstream media, such as the so called "reporter's privilege" which allows traditional journalists to protect their confidential sources.

Scott Gerber (Ohio Northern University) has just authored his second novel, **The Law Clerk** (Kent State University Press) which draws upon his own experience as a former clerk to a federal judge. The book follows the exploits of protagonist Sam Grimes who accepts a prestigious clerkship and finds himself working on "the case of the decade," the trial of the son of a Mafia boss. Among other themes, *The Law Clerk* explores the pornography industry, the judicial system, and legal issues arising from the First Amendment.

In December 2006, a number of U.S. Attorneys were unilaterally removed by the Bush administration, purportedly because they refused to pursue partisan investigations and indictments. **David Iglesias** was one of those attorneys, and he, along with **David Seay,** have written In Justice: An Insider's Account of the War on Law and Truth in the Executive Branch (Wiley). The book recounts Mr. Iglesias's interactions with President Bush, former White House advisor Karl Rove, and former Attorney General Alberto Gonzales, along with other important Washington players. The authors reveal what top Republican officials said and did, and argue that these officials subverted justice in an attempt to influence the 2006 congressional midterm elections.

Over the last decade, there has been an explosion of concern in the U.S. about obesity and weight. Plaintiffs are now filing lawsuits arguing that discrimination against fat people should be illegal. In **Fat Rights: Dilemmas of Difference and Personhood** (NYU Press), **Anna Kirkland** (University of Michigan) explores the issue of whether weight should be added to lists of currently protected traits like race, gender, and disability. Kirkland draws on little-known legal cases brought by fat citizens as well as significant lawsuits over other forms of bodily difference (such as transgenderism). Among other questions, she asks why the boundaries of our antidiscrimination laws rest where they do. Fatness, the author argues, is both similar to and provocatively different from other protected traits, raising longstanding dilemmas in antidiscrimination law into stark relief.

As **Tamir Moustafa** (Simon Fraser University) makes clear in **The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt** (Cambridge University Press, 2007), scholars and policymakers have long emphasized judicial reform as a panacea for the political and economic turmoil plaguing developing countries. Courts in these nations have been charged with spurring economic development, safeguarding human rights, and even facilitating transitions to democracy. But how realistic are these expectations, and in what political contexts can judicial reforms deliver their expected benefits? In this work, the author addresses these and other questions by examining the politics of the Egyptian Supreme Constitutional Court, arguably the most important experiment in constitutionalism in the Arab World.

In **Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954** (University of Michigan Press) **Julie Novkov** (University at Albany, SUNY) considers Alabama's legal efforts to suppress interracial sexual intimacy from the end of the Civil War to the dawn of the Civil Rights era. Examining appellate records from prosecutions for miscegenation, she reveals the intertwining of white elites' fears of interracial families and the process of state building. Through controlling and defining the dangers of interracial romance, legal actors structured a state that they hoped would fulfill the dual principles of legitimacy and white supremacy. This book's story of the struggle over miscegenation also uncovers the relationship among full citizenship, exclusivity in marriage rights, and state-building, with implications for the contemporary cultural fights over legally enforcing heterosexual exclusivity in marriage.

Senator Hillary Clinton is currently the most well known woman to run for president, but she is hardly the first. In **Belva Lockwood: The Woman Who Would be President** (NYU Press), **Jill Norgren** (John Jay College and the Graduate Center of the City University of New York) recounts the life story of one of the nineteenth century's most surprising and accomplished advocates for women's rights. Lockwood was the first woman to run a full campaign for the presidency (in both 1884 and 1888), and the first woman attorney admitted to the U.S. Supreme Court bar (in 1879). The author discusses Lockwood's various challenges to the male political establishment, and her capacity to command the attention of presidents, members of Congress, influential writers, and everyday Americans. A young adult version of this biography will be released in the fall 2008 (Lerner Books).

In **The Constitution of Electoral Speech Law: The Supreme Court and Freedom of Expression in Campaigns and Elections** (Stanford University Press), **Brian K. Pinaire** (Lehigh University) trains his attention on freedom of speech within the political process, or what he refers to as "electoral speech law." Specifically, the author examines the Court's evolving conceptions of free speech within the electoral process and then traces the consequences of various debates and decisions from the post-World War II era to the present. This book presents competing visions of electoral expression in the marketplace of ideas, various methods for analyzing speech dilemmas, the multiple influ-

ences that shape the justices' notions of both the potential for and privileged status of electoral communication, and the ultimate implications of these Court rulings for American democracy.

The relationship between race, law, and drugs recently took center stage in the Supreme Court cases of Kimbrough v. U.S. and Gall v. U.S., which examined sentencing disparities in criminal laws involving crack and powder cocaine. In **Unequal Under Law: Race and the War on Drugs** (University of Chicago Press), **Doris Marie Provine (**Arizona State University) offers a more comprehensive, scholarly exploration of the intersection of these issues. Her book asks how a nation committed to legal equality justifies laws of dubious effectiveness which most severely impact a historically disadvantaged racial minority. The author uses the case of punitive drug laws to explore the sometimes elusive role of racism in law. The book traces the history of efforts to control drug abuse through criminal punishment before moving on to a more institutionally focused analysis of the nation's response to crack cocaine, and an examination and evaluation of the Supreme Court's treatment of drug laws.

Fifteen years ago, **Gerald Rosenberg** (University of Chicago) set off widespread debate in political science and the legal academy about the extent to which courts can spur political and social reform. In his forthcoming second edition of **The Hollow Hope: Can Courts Bring About Social Change** (University of Chicago Press), the author once again engages this scholarly discussion. The book contains two new chapters on the use of litigation to further the right to same-sex marriage and a link to a website where Rosenberg responds to his critics. Throughout the new edition, the author reaffirms his contention that it's nearly impossible to generate significant reforms through litigation. American courts, Rosenberg argues, are ineffective and relatively weak-, far from the uniquely powerful sources for change they're often portrayed as.

Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning (Cambridge University Press) is a sweeping indictment by **Robert Spitzer** (State University of New York Cortland) of the legal profession's approach to constitutional interpretation. The author contends that the adversarial, advocacy-based American legal system is well suited to American justice, in which one-sided arguments collide to produce a just outcome. But when applied to constitutional theorizing, the result is selective analysis, overheated rhetoric, distorted facts, and overstated conclusions. The consequences of this system are examined through three cases of current interest: the presidential veto, the "unitary theory" of the president's commander-in-chief power, and the Second Amendment's "right to bear arms." In each case, Spitzer contends, law reviews were the breeding ground for defective theories that won false legitimacy and political currency.

In **The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court** (Rowman & Littlefield), **Jim Staab** (University of Central Missouri) contends that Justice Scalia's jurisprudence is influenced by Hamiltonian political principles. The book begins with a discussion of six schools of conservative thought in the legal community today: Burkean traditionalism, conservative pragmatism, Legal Process, libertarianism, natural law, and originalism. The author then examines and compares Hamilton's and Scalia's views in the areas of separation of powers, executive power, administrative law, judicial power, constitutional interpretation, and federalism. The author not only finds a number of commonalities between the two views, but also argues that the two men have very similar temperaments.

Matthew Streb (Northern Illinois University) is the editor and a contributor to **Running for Judge** (NYU Press), which examines the changing nature of races for judgeships in the U.S., and the resulting political and policy implications. The book ties together the current state of the judicial elections literature, and presents new evidence on a wide range of topics of interest to law and courts scholars, including the history of judicial elections, an understanding of different types of judicial elections, electoral competitiveness during races, and the increasing importance of campaign financing in judicial contests. This work also analyzes voting in judicial elections, the role interest groups and parties play in supporting candidates, judicial accountability, media coverage of campaigns, and judicial reform of elections.

Conferences & Events

2008 APSA Conference for Chairs
http://www.apsanet.org/section_712.cfm
Dates: February 21-22, 2008 Location: San Jose, California

2008 APSA Teaching and Learning Conference
http://www.apsanet.org/section_236.cfm
Dates: February 22-24, 2008 Location: San Jose, California

Southwestern Political Science Association Annual Meeting
http://www.swpsa.org
Dates: March 12-15, 2008
Location: Las Vegas, Nevada

Western Political Science Association Annual Conference
http://www.csus.edu/org/wpsa/mtgs.stm
Dates: March 20-22, 2008
Location: San Diego, California

Midwest Political Science Association National Conference
http://www.indiana.edu/~mpsa/index.html
Dates: April 3-6, 2008
Location: Chicago, Illinois

New England Political Science Association
http://www.neu.edu/nepsa/
Dates: April 25-26, 2008
Location: Providence, Rhode Island

Joint Annual Meetings of the Law and Society Association and Canadian Law and Society Association
http://www.lawandsociety.org/ann_mtg/am08/call.htm
Dates: May 29-June 1, 2008
Location: Montreal, Quebec, Canada

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.