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

A Letter from the Section Chair

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I am delighted to report that the Law and Courts Section is flourishing and is in the process of launching some exciting new initiatives. This success is due to the many scholars who generously donate their ideas, time, and energy to the Section's endeavors, including our new President-Elect Christopher Zorn, Treasurer Lisa Holmes, and Executive Council members David Law and Julie Novkov. These exceptional scholars just elected as Section officers join Secretary Robert Howard and Executive Council members Pamela Corley, Kevin McGuire, and Kirk Randazzo in providing vital leadership and in attending to the Section's business.

Since my term as Chair began, we have initiated three important searches, which now are in various stages of completion. First, in September we began a search for the next editor of the *Law and Courts Newsletter*, and as this issue illustrates, Kirk Randazzo has accepted the position. Joining Kirk as part of the new editorial team is Drew Lanier, the new "Books to Watch For" Editor. I thank Kirk and Drew for their willingness to take on these demanding tasks and for a seamless transition.

As previous *Newsletter* Editor, Artemus Ward did a truly outstanding job, and I know that you will join me in thanking him for his contributions, which include not only the editorship but also chairing the search committee for his replacement. The other members of the search committee were Pamela Corley and David Law, and I appreciate their excellent work as well.

The second search currently underway is for the first editor of the Section's journal, which we are in the process of establishing. I am pleased to announce that the search committee consists of Christopher Zorn (Chair), Lawrence Baum, Cornell Clayton, Joel Grossman, Valerie Hoekstra, Robert Howard, and Keith Whittington. Quite obviously, this committee is a distinguished group of scholars who will work hard to get the journal up and running. We are quite fortunate that all have agreed to serve. There will be much more to say about their work in later editions of the *Newsletter* as matters progress.

The third search is for the next editor of the *Law and Politics Book Review*. This search is still open but will close shortly. If you have any interest in this position or would like to nominate worthy candidates, please contact Wayne McIntosh (Chair), Kevin McGuire, Julie Novkov, James Stoner, and Chad Westerland.

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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: February 1 (Winter), May 1 (Spring), and October 1 (Fall). 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***:

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

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In addition to recruitment, the Section is launching an important project to provide an empirical description of the diverse array of scholars who compose the Law and Courts community. As you know, the Section recently transformed the ad hoc Committee on the Law and Courts Profession into a standing committee, relabeled as the Law and Courts Professionals Committee. This committee has the task of providing information to the Section about the nature of our members. This first project will describe who we are and what we do, which will lay the groundwork for more nuanced inquiries into the organization and the various intellectual fields represented. The members of the Professionals Committee are Wendy Martinek (Chair), Brent Boyea, Tom Clark, Malcolm Feeley, Mark Graber, and Paul Wahlbeck. The committee is aiming for the Summer edition of the *Newsletter* to present their initial findings. I have no doubt that they will produce a first-rate product that will be of interest to us all.

Also launching this year are the Section's service awards, which were just approved at the 2010 Business Meeting. For this first round of awards, the Section's Executive Council will serve as the selection committee.

Concerning awards, we already have identified the 2011 recipient of the Lifetime Achievement Award, which honors a distinguished career of scholarly achievement and service to the law and courts field. I have the distinct honor and pleasure to announce that this year's winner is James L. Gibson. As we all know, Jim is the epitome of scholarly excellence, professionalism, and collegiality. In celebration of his exceptional career, the Section will sponsor a roundtable at the upcoming APSA Meeting. Please join me in congratulating Jim and be sure to make plans to attend what is sure to be a terrific panel.

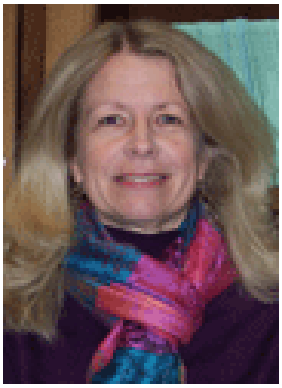
This year's selection committee for the Lifetime Achievement Award included Jeffrey Segal (chair), Paul Brace, Herbert Kritzer, Isaac Unah, and Teena Wilhelm. I extend thanks to Jeff, Paul, Bert, Isaac, and Teena for a job well done.

Of course, the Section's numerous other award committees presently are working to identify the latest winners. These committees and their memberships are listed on the Section's page on the APSA website at http://www.apsanet.org/content_4818.cfm . I very much appreciate the service of such a talented group of scholars, a sizable proportion of whom are serving in the Section for the first time and represent some of the Section's rising stars.

Finally, the Nominations Committee is seeking recommendations for the next round of Section officers: the Chair-Elect, Secretary, and three members of the Executive Council. The committee consists of Chris Bonneau (Chair), Lisa Hilbink, Mark Hurwitz, Ryan Owens, and Jeffrey Yates. Consistent with APSA and Section Bylaws, Section officers must be members of the APSA and the Law and Courts Section. Please contact the committee to nominate candidates for the various positions.

Best wishes to everyone for a happy and productive winter.

Professor Susan B. Haire, Recipient of the 2011 Erika Fairchild Award



At the 2011 annual meeting of the Southern Political Science Association, Professor Susan B. Haire of the University of Georgia received the Erika Fairchild Award. This award honors the late Erika Fairchild, an early President of the Women's Caucus for Political Science South. It is presented every two years by the Women's Caucus to an individual with a strong record of scholarship, a strong commitment to students and teaching, and a strong record of service to the professor and a collegial spirit.

The following description is taken from the SPSA official program: Dr. Haire received her Ph.D. in 1993 from the University of South Carolina, and is currently a faculty member in the Department of Political Science at the University of Georgia, and an affiliated faculty with the Institute for Women's Studies at UGA. Her research examines decision-making in the United States Courts of Appeals. With Donald Songer and Reginald Sheehan, she is the author of *Continuity and Change on the United States Courts of Appeals* (University of Michigan Press, 2000), and has authored or co-authored works in a variety of academic journals, including the *American Journal of Political Science*, the *Journal of Politics*, and the *Law & Society Review*.

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She has an extensive record of service on a wide variety of Department and University committees, and has served on the Executive Council for the Law and Courts Section of the American Political Science Association, and as a section chair for the annual meetings of both the American Political Science Association and the Southern Political Science Association. She has also served as Program Officer for the National Science Foundation. Perhaps most notably, Dr. Haire's extensive collaboration with graduate students and junior faculty both at Georgia and at other institutions reflects her commitment to mentoring in the discipline. She has directed eight dissertations; her students have gone on to faculty positions at the University of Vermont, the University of Utah, Catawba College, Kennesaw State, Western Carolina, and Louisiana State University.

Congratulations to Professor Haire!

The "Case Salience Index" — A potential new measure of political salience

Todd Collins and Chris Cooper
Western Carolina University

While scholars have explored the role of a case's importance on individual behaviors and the judicial process, research examining case salience has flourished in the past decade. While many scholars and commentators have recognized the importance of salience, judicial scholars have disagreed over the operationalization of the concept. Epstein and Segal (2000) convincingly cite the flaws of many prior approaches to determine salient Supreme Court cases and derive their own measure–whether the case is discussed on the front page of the *New York Times*. They make compelling arguments for their media-based measure and it has been widely accepted and used in numerous subsequent studies.

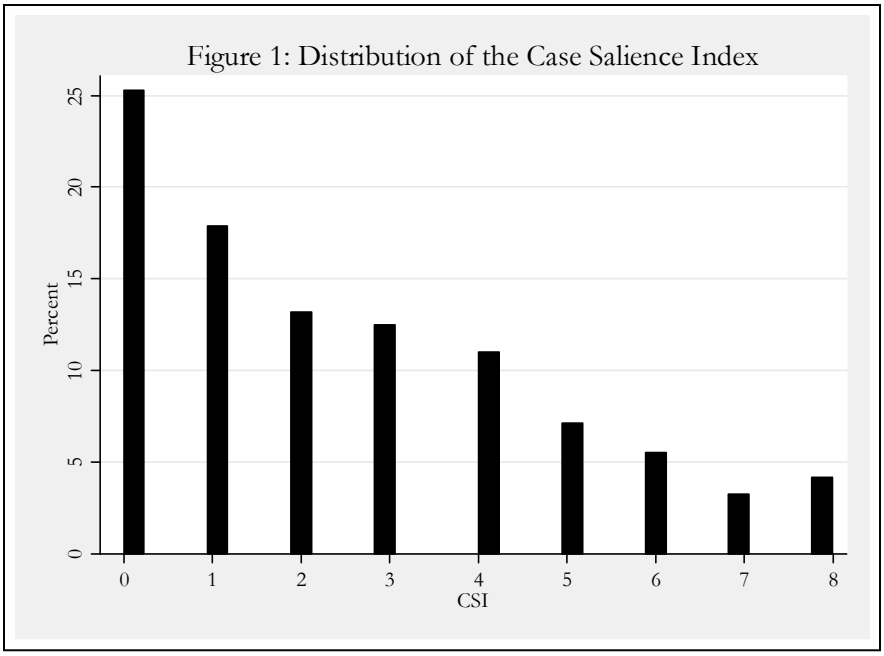
Despite its common usage, however, some have pointed to potential systematic flaws in using the *New York Times* as a proxy for salience. Critics have noted that using a single media source as a measure of national salience could create measurement problems. For example, there is some evidence that the *Times* leans farther left than many other papers (Groseclose and Milyo 2005). Also, given the localized nature of advertisers and readership, a single media outlet may be more likely to report stories originating from its home area and giving less coverage to important cases from other parts of the nation. Both of these trends have been supported by previous research (Maltzman and Wahlbeck 2003; Unah and Hancock 2006). Others also suggest that front-page coverage may exclude too many cases as salience, as cases must compete with other news stories for front-page coverage (Brenner and Arrington 2002). Despite these and other concerns, many have continued to use the front-page of the *Times* as a proxy for salience, concluding that "its advantages over other measures lie in its immediacy, which makes it facially the most valid measure, and in its content neutrality, which makes it transportable to virtually any policy area of interest" (Unah and Hancock 2006, 306).

To lessen the negative aspects of the *Times* measure while building on its positive aspects, we are developing a new option for scholars hoping to examine case salience. As we describe in an upcoming *Political Research Quarterly* article, this measure, labeled the Case Salience Index (CSI), combines the positive aspects of media measurements while potentially reducing the limitations of the *NY Times'* measure. Because of the problems with using any single media outlet, we combine the *Times* with three other major newspapers: the *Washington Post, Los Angeles Times*, and *Chicago Tribune.* We followed the practice of Segal and Cover (1989) in utilizing these four papers that represent both geographic and ideological diversity.

In addition to adding multiple papers, we believe it is important to recognize that although stories covered on the front page of a paper are more salient than those covered elsewhere, coverage anywhere in a newspaper represents some level of salience. As a result, we develop an index in which each occurrence of coverage on the front page of each paper receives a score of "2," coverage anywhere else in each paper (but not on page one) receives a score of "1," and no coverage at all receives a "0." We then sum these scores across all papers, meaning

that each case receives a CSI score varying between 0 (meaning that it was not covered anywhere in any paper) and 8 (indicating that it was covered on the front page of all four papers). This new index creates a replicable, contemporaneous, and non-dichotomous measure that is less subject to biases than a measure of salience based on a single media outlet.

In our initial analysis concerning cases from the Rehnquist and Burger Courts, we find significant variation across the papers and across time. Just under 75 percent of the Supreme Court's decisions are covered somewhere by at least one of our four papers. In most years, the *New York Time*s consistently covers more cases that the other three papers. The *Washington Post* and *LA Time*s have similar coverage most years and the *Chicago Tribune* consistently devotes the smallest amount of ink to Supreme Court cases. As expected, coverage also varies by issue area, with some matters such as Civil Rights, Civil Liberties, and privacy cases receiving more coverage than economic, tax, and labor cases. Figure 1 displays the overall distribution based on data collected so far, including all if the Rehnquist Court and most of the Burger Court.



As for our new measure of salience, approximately 25 percent of cases receive a score of 0 (indicating no coverage in any paper) and 80% of the cases receive a score of 4 or lower. Just over 4% receive a score of 8, indicating coverage on the front page of all four papers. Further investigation suggests that the CSI identifies many potentially important cases that are considered not salient if we examine just one particular newspaper source. For example, we find that 2,459 out of 3,039 cases (81%) were not covered on the front page of the *New York Times*. Out of these cases that would be deemed "not salient" by the *Time*s measure, 1676 were covered somewhere in at least one paper. Over 16% (396) of the cases deemed not salience by the *NY Times* measure appeared on the front page of at least one other paper, with 99 cases appearing on the front page of at least two papers, but not the *NY Time*s. Twenty cases in this data appeared on page one of the *LA Times, Washington Post,* and the *Chicago Tribune* without appearing on page one of the *NY Times.*

In addition to adding ideological and geographic balance, the CSI recognizes that salience is best measured as a continuous variable. Examining coverage anywhere in these papers, as opposed to just page one, allows for a more nuanced measure of case salience. This also corrects for the "big-news-day bias" that could lead to the improper categorization of an otherwise salient case (Brenner and Arrington 2002). Thus, an important case will still have some level of salience in our measure even if it is bumped from the front page by catastrophic events or other newsworthy stories.

In our initial models examining individual judicial behavior, we are finding differences using the CSI and other measures of salience. While we are still finalizing data collection and cleaning, we hope to make the CSI information publically available for other scholars in the near future. We are close to finalizing the CSI for the Rehnquist Court, have made progress on the Burger Court, and have started examining coverage for the Warren Court. This new measure will provide an alternative to researchers and perhaps allow us to better understand the intricacies that salience plays in the judicial process.

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Reevaluating Our Conceptualization of Upperdogs and Underdogs

Michael P. Fix
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With over 760 citations in peer-reviewed journal articles, the impact of Galanter's (1974) party capability theory is far-reaching in law and courts scholarship. At its most basic level, Galanter's argument focuses on the advantages possessed by repeat players, the "haves" (e.g. the ability to "play for the rules," developing advanced litigation strategies such as forum shopping, added expertise and legal services, and institutional facilities) in the legal process, and how those advantages consistently lead them to "come out ahead" when facing one-shotters, the "have-nots." He noted repeat players are successful more often than not, but that the haves do not always prevail in litigation.

Early research using Galanter's approach conceptualized one-shotters and repeat player as a dichotomy with governments and large corporations falling into the latter category and individuals and small businesses in the former. Building on Galanter, a vast array of scholars have expanded upon this basic theoretical argument by clarifying key concepts, examining the underlying mechanisms, and considering other relevant factors not discussed by Galanter. One important expansion involved breaking down the simple dichotomy between the two litigant categories into a more nuanced typology (Songer and Sheehan 1992, Wheeler 1987). Using the typology originally developed by Wheeler (1987), Songer and Sheehan (1992) separate litigants into a typology of individuals, businesses, state and local governments, and other which included nonprofit organizations, private/nonprofit schools, organizations, political parties, or otherwise unclassifiable litigants.

In a second analysis, they focus on specific business types and create a category of "underdogs" of poor and racial minorities. Underdogs were the least successful litigants in this analysis and upperdogs ("haves" in Galanter's terms) won more than any other litigant type even after controlling for ideology, region, and case characteristics.

Scholars building on Galanter's basic framework also show the variation across courts matters. Depending on the position in the court hierarchy, advantages enjoyed by the haves varied. Wheeler et al. (1987) tested the

typology at state supreme courts and found the "haves" to be more successful and a useful framework for understanding litigant success. At the U.S. Courts of Appeals, Songer and Sheehan (1992) find that the biggest upperdog, the federal government, continued to be the most successful. The federal government has all of the advantages Galanter identified for repeat players, particularly added legal expertise because of their frequent appearance before the court. Moreover, research in a variety of cross-national contexts largely supports the basic premise that the upperdogs come out ahead over time (e.g. Atkins 1991 [England], Dotan 1999 [Israel], Haynie 1994 [Philippines], McCormick 1993 [Canada], Smyth 2000 [Australia]). However, support for this framework has not been universal or unconditional. Examining the U.S. Supreme Court, Sheehan, Mishler, and Songer (1992) find little evidence of either being a repeat player or more of an upperdog with resources impacting litigant success when controlling for judicial ideology.[1] At this position in the hierarchy, judicial ideology was more important than litigant resources in explaining outcomes.

While this typological classification of party types has enabled scholars to test the empirical predictions of party capability theory in a variety of institutional contexts, it also imposes an implicit hierarchical ordering of these litigant types. In some issue areas, this implicit hierarchy provides an accurate depiction of reality, yet in others this might be less true. One distinction to note is that not all litigants are created equal and the actual match-up of the case may explain the outcome more than simply relying on classifications of upperdog or underdog. For example, in a Clean Water Act case, the Natural Resource Defense Council (NRDC) may be challenging the implementation of an Environmental Protection Agency (EPA) regulation by a business. The NRDC, a non-profit environmental organization, would be considered an underdog based on the hierarchy, but be the more experienced litigant because of substantive expertise and litigation experience before the court in this issue area. The NRDC's success in court may be better explained by resources than by position in the hierarchy. While this could appear like an isolated incident, there may be numerous situations in which the ranking of litigants can lead to inaccurate assumptions regarding litigant success and overlook explanations that lie within the particular match-up, specific litigants, and the issue area.

A second factor making the hierarchy less useful for understanding court outcomes is the role of equalizing factors that serve to potentially level the playing field. As existing research demonstrates amicus curae briefs provide one such mechanism by mitigating some of the advantages enjoyed by upperdog litigants. McGuire (1990) and Wolpert (1991) find a positive correlation and greater probability of winning based on the number of amicus briefs filed in support of the litigant. Additionally, Songer, Kuersten, and Kaheney (2000) find that amicus briefs can level the playing field and that upperdogs have little advantage when the underdog is supported by an amicus brief. At the Supreme Court level, Collins (2007) finds that the briefs are particularly successful influencing the outcome of policy in cases decided by the court. He also observed a threshold effect where after a large number of briefs in favor of a particular position, there are diminishing returns for the litigant. Underdog litigants may be winning or losing in cases because of the submission of amicus briefs rather than the presumed resources and advantages inherent in their status as a repeat or one-shot player. Similar to the role of amici, the quality of the attorney make a substantial difference on success rates independent of the status of the litigants (McGuire 1995).

It is accurately recognized that all litigants are not created equal, but context may often determine who is more equal than whom. Thus, greater flexibility in understanding the impact of litigant types on judicial outcomes lies in allowing greater flexibility in the hierarchy of litigant types. As such we recommend two refinements of litigant classifications that recognize and build upon existing research. The first in more theoretical and accounts for potential systematic variation between litigant classes due to institutional and contextual variation. The ordinal typology most commonly utilized in applications of party capability theory is intuitively appealing. Most of the time we would expect the federal government to be the strongest litigant, individuals the weakest, and lower levels of government and businesses in the middle. Yet, this expectation does not always make sense. For example, the environmental litigation literature shows that the specific type of agency action under litigation can influence a judge's likelihood of overruling an agency action. Therefore, a litigant's success may depend more on the agency action rather than on litigant type. Additionally, the stage at which an agency action is at can influence a judge's likelihood of overruling the action. Judges are more likely to uphold agency actions where larger amounts of time and resources have already been invested (Malmsheimer and Floyd 2004). For cases where an agency is not a

party, contextual factors such as the agency action and institutional factors including the type of agency can have an impact on the case outcome, yet are often overlooked under most applications of party capability theory.

To account for this variation, we recommend simply dropping the assumption of ordinality.[2] Rather, the litigant typology should be conceptualize as a set of nominal categories defining differences in kind, but lacking any presumption about their ordering. For most empirical analyses of the impact of litigant type on outcomes, this reconceptualization will require no major methodological or operational adjustments. Rather, it provides a theoretical recognition of the (often ignored) role of institutional, contextual, and issue variation on the relationship between variables of theoretical interest and outcomes. Not only with this shift in theoretical perspective avoid the reliance upon assumptions of litigant strength that may not always hold, but we hope it will also lead to increased attention to how the comparative advantage of various litigant classes varies across a range of issues areas, institutions, and other spatial and temporal groupings that might possess systematic variation.

The second refinement we suggest recognizes that within these broad categories individual litigants can be quite different in terms of resources. While the commonly used categories of litigant types feels quite intuitive, it ignores potentially significant variation within each of the categories. For example, individual litigants may be more like each other than they are like the federal government on average, but the differences in resources possessed by wealthy individuals and indigent ones is not insignificant. Even within the most uniform of the commonly used litigant categories – the federal government – a wide range of variation in the success rates of individual administrative agencies exists, as Table 1 illustrates. Moreover, this approach is consistent with previous findings that external resources such as amici participation can "level the playing field" (Songer, Kuersten, and Kaheney 2000).

Table 1: Agency Success Rates

Agency	*Success*	*Total*	*Percentage*
Interstate Commerce Commission	8	8	100.00
Securities & Exchange Commission	12	14	85.71
Occupational Safety and Health Review Commission	10	12	83.33
Civil Aeronautics Board	14	17	82.35
Board of Immigration Appeals	61	84	72.62
Federal Communications Commission	30	43	69.77
Environmental Protection Agency	16	24	66.67
Federal Maritime Commission	2	3	66.67
National Transportation Safety Board	2	3	66.67
Federal Energy Regulatory Commission	29	44	65.91
Federal Labor Relations Authority	5	8	62.50
Federal Power Commission	25	41	60.98
Benefits Review Board	30	51	58.82
National Labor Relations Board	253	462	54.76
Railroad Retirement Board	5	10	50.00
Department of Health and Human Services[a]	2	4	50.00
Federal Reserve Board	2	4	50.00
Department of Labor[a]	3	7	42.86
Federal Trade Commission	11	28	39.29
Total	520	867	59.98

This table is taken from Fix (2011). The data represent all cases in the Songer Court of Appeals Database involving an administrative agency between 1961-2002, excluding agencies that appear in two or fewer total cases in the database.

[a] These represent decisions made for the office of the secretary of the department rather than a specific agency within that department.

While this approach moves away from the traditional classification of parties by category, it offers greater

flexibility and imposes fewer assumptions regarding the strength of an individual litigant. Specifically, we propose two ways of focusing on the characteristics that make a litigant an upperdog or underdog rather than traditional approach of utilizing predetermined categories. One approach would be to replace the categorical variables with a set of covariates that capture the resources that give upperdogs their comparative advantage. This approach represents an expansion of work done by McGuire (1995), Songer, Kuersten, and Kaheney (2000), and others. This set of covariates could include measures of amici support, presence/quality of attorney, type of agency, and specific agency action litigated, among others. This approach also offers the flexibility to adapt the measures of litigant advantage to account for factors that may give one party an upper hand in certain institutions, contexts, or issue areas.

The second approach takes a step backwards and involves a reevaluation of what makes a party an upperdog or an underdog. Classifying litigants into this dichotomous typology – or one of the more nuanced variations – essentially produces proxies for an unknown mechanism that gives certain parties which possess certain features an increased likelihood of victory over other parties lacking those features. Rather than continuing to use these categories as a representation of some unknown mechanism, we suggest that future research explore new techniques for classifying litigants. Instead of using assumptions to group litigants, we could instead allow the data itself to inform our classification decisions by creating groups defined by the presence over absence of a set of variables representing those features we would expect upperdogs to have but which underdogs would lack.[3]

Both of our approaches build on Galanter's dichotomous typology and move towards a contextualized application and understanding of litigant resources. By reconceptualizing litigant typology as a set of nominal categories and carefully examining institutional, contextual, and issue variation, a deeper understanding of the factors driving litigant success and judicial behavior can be gained. Additionally, taking a closer look at variation within each of the litigant categories will provide a more precise understanding of how resources can have differing effects for the same litigant type and potentially illustrate meaningful differences missed by aggregating litigant types. These approaches continue to value the upperdog/underdog categories, but move beyond them to more detailed conceptualization of relationships between different types of litigants and levels of resources.

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[1] The South African Appellate Division provides another institutional context in which the comparative advantage of traditional upperdog litigants fails to conform to expectations (Haynie 2003).

[2] Of course, if the litigant typologies were to serve as the dependent variable in an analysis the shift from an ordinal to a nominal measure would require a change in the method of estimation.

[3] If a more data driven approach to this problem is desired, classification analysis offers a potential solution. While classification analysis techniques are rarely used in applied political science research, they are quite common in the data mining industry and may be ideal for this application.

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JUDICIAL RESEARCH IN RISKY POLITICAL ENVIRONMENTS

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Judicial research in comparative perspective is no longer an extravagant enterprise. Countless works, employing multiple and often innovative methodological approaches, have been conducted beyond U.S. boundaries in recent years. The range of research questions and theories discussed includes a variety of topics, such as the variation of the courts' ability to check the government and emerge as prominent political actors (over time, and across different political systems and contexts); the roles, ideas and self-conceptions of the different actors involved in the judicial process (especially, but not only, judges); the role of the law in structuring their actions; a plethora of issues related to the access, efficiency and performance of judicial systems; judicial appointments; the roles of courts across regime types, and other important issues (*See*; Kapiszewski and Taylor, 2008; Whittington et al, 2008, part III).

However, the study of law & courts in comparative perspective is still hindered by a variety of theoretic and practical factors. Ideal or, at least, basic preconditions for judicial inquiry are not necessarily met everywhere in the world. One of these preconditions is the ability to carry out our research about the topics, phenomena or actors of our choice without facing major personal and professional disadvantages or *risks*. Judicial politics researchers do not usually jeopardize their personal safety, professional goals and overall well-being while carrying out research projects. Yet, in some countries, troubling conditions can hamper the researcher's ability to carry out the

study at all, or negatively affect one or more of its stages, especially the often needed data collection enterprise. The existence of these risks can often discourage work precisely with regards to those countries that are least understood, and where our work is most necessary for academic and practical reasons. This is the case for our colleagues who are addressing meaningful, challenging topics around the world – in Malawi, The Philippines, Pakistan, Egypt, Venezuela, Central America, China, Russia and other post-soviet polities, especially those marred by authoritarian regimes.

In these and other countries, academics interested in law & courts issues may not enjoy the ability to carry out their studies without fearing potential repercussions from different actors. The underdevelopment of our discipline outside of established democracies is not only the result of lack of attention or neglect vis-à-vis our topics of interest but, instead, it is often the result of our colleagues' tacit avoidance of questions (and hypotheses) that are unwelcomed by political officers, judges, lawyers and even fellow academic colleagues. Though this is evident in the case of overtly authoritarian regimes, it could also be the case in systems where questioning judicial authority is less accepted, or where even suggesting that judges decide on the basis of extra-legal considerations can get a researcher in trouble – moreover, risks can also emerge in stable, democratic societies for students of thorny topics, such as terrorism, drug-trafficking, and criminal justice reform.

Just as these problems affect scholars living and working in such countries, they also have the potential to thwart the research goals of foreign researchers. Some countries even place important restrictions on overseas academics to carry out work in a variety of sensitive issue areas, or establish bureaucratic procedures or permits prior to conducting the investigation. Others might place certain restrictions concerning the release of information. Not being aware of these conditions and limitations can create risks vis-à-vis the authorities of the country in question. In addition to facing inquiries from governmental or judicial officials regarding the nature of one's work, the potential consequences of not complying with these requirements may include not being able to access the required information, through interviews and other modalities of qualitative inquiry. Not only meeting with judges, magistrates and other public officials can be difficult, but also making some questions in this context can create additional problems. Research in risky environments should take into account potential problems for the interviewees or participants in the research project. Even if the interviews can take place, they can result in skewed data, subsequently affecting our inferences.

Researchers can also face problems coding information about judicial decisions that are only available in official records. On-line access for judicial research is growing worldwide, thanks to judicial reform efforts, but it is far from being available everywhere. Quite often, obtaining necessary data can only be available *in situ*. Hiring local research assistants as data coders can help to solve accessibility problems (especially if they are better aware of how the actors or institutions under study work, so potential problems can be avoided or minimized in advance). However, this should not mean that principal investigators should not take heed of the problems their research assistants can face – particularly if they live in the country in question and could also face problems of their own, in the legal professional or academic worlds.

To deal with these problems, judicial researchers should become familiar with basic strategies to deal with problematic environments. Although we do not really count with a volume that explicitly addresses risk in judicial research in comparative perspective, we can rely on works addressing political science fieldwork more broadly, and other relevant sister disciplines where risky research is essential (see for example Berg 2008; Perecman and Curran 2006; Sriram et al 2009). It goes without saying that judicial researchers and their assistants should engage in low profile data collection. The problem is how to abide by traditional data collection requirements while still compiling data and subsequently making it available according to our customary protocols and traditions. Methodology, in any case, should not be conceived 'as a rigid or fixed framework for the research but, rather, as an elastic, incorporative, integrative, and malleable practice,' an advice given for contexts even harsher than the ones we might face, but still applicable to judicial research in risky settings (Kovats-Bernat 2002). However, this will not insulate us against potential dilemmas in the long run: Shall (I) be less transparent in order to secure access to the data? Shall (I) engage in deception to know more about my issue of interest? If the strict research protocols cannot be followed, shall (I) abandon the research enterprise at all? There are no perfect answers for these and a myriad of other questions likely to arise in problematic scenarios, but they should anyway be addressed.

There are risks that can be anticipated, and others that are harder to assess and that can emerge at later phase of the research process. In any case, it is critical to take into account and properly address such potential risks from the start. Yet, potential troubles should not automatically rule out the study. Caution, and pondering all the options, is the best strategy. Also, do not hesitate sharing your concerns with colleagues prior to designing and carrying out any 'risky' research. In addition to consulting judicial scholars, other colleagues with experience in problematic settings can be a very useful source to deal with any problem. It is also be important to incorporate this discussion to our current training in judicial research. These are problems that matter greatly to scholars doing either or both quantitative and qualitative work. For this purpose, we could find useful resources at the Consortium on Qualitative Research Methods and the APSA Section on Qualitative and Multi-Method Research, who count among their members scholars doing research in risky environments, including judicial politics.

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STUCK IN-BETWEEN: INTERVIEWING JUDGES AND OTHER LEGAL ELITES IN AFRICA

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Questions of objectivity/subjectivity, the application of positivist methods, and the universal applicability of our research findings have been the subject of rich debate across the social sciences, including the field of law and courts.[1] Within political science, discussion has historically occurred at the margins.[2] In her 2004 APSA Presidential address Susanne Hoeber Rudolph highlighted the assumptive practices of Western scholars traveling to the developing world by reminding us to free ourselves from our intellectual straightjackets and to recognize that our research is shaped by the subject's response to *us*, the researcher, and these responses are frequently conditioned by *our* identity and behavior. Researchers from the global north simultaneously operate in multiple spheres of power; power is important here because "power [. . .] produces meanings, subject identities, their interrelationships and a range of imaginable conduct" (Doty 1996:4). Focus on the researcher-researched relations of power tends to highlight the exploitation inherent in the act of interviewing and collecting data. However, power dynamics can be more complex, more fluid, and multidirectional, particularly when we consider the relative power position of a young, female graduate student to an older male Supreme Court Justice.

Here I reflect on my dissertation fieldwork experiences in sub-Saharan Africa and attempt to understand

the ways in which my identity shaped the nature and trajectory of my research. From August 2006 to July 2007 I carried out interviews with legal elites – judges, lawyers and academics - in Uganda, Tanzania and Malawi.[3] My research sought to discover how changing political dynamics shape judicial decision-making over time.[4] I was determined not to rely simply on judgments, newspapers, and official documents. Rather, I wanted to trace the connections between variables through first-hand accounts of individuals who witnessed or actually shaped events. In addition, given the challenges of gathering documentary evidence from dilapidated university libraries and the incomplete court archives, interviews were critical to bridging gaps in my account. I entered the field armed with a positivist social scientific understanding of what it meant to be an interviewer; a neutral body through which I would gather and interpret data. Almost immediately I discovered that my assumptions about the research process were flawed and unhelpful. I was forced to reflect upon the ways in which the researcher embodies the actual interview. I fully expected to assess the style, manner, experience, and social/professional position of the interviewee and the comprehensibility, plausibility, and consistency of the testimony.[5] But what about *my* style, manner, experience and social position as researcher? I begin by aligning myself with the following assumption, articulated here by Austin Sarat (1990:164): "[T]he procedures I use to make observations are neither neutral nor universal and are not so powerful as to be able to produce consistency in spite of differences in the race, class, gender, and history of observers."

ACCESS

I realized that preparing in advance a specific list of individuals to interview in Tanzania, Uganda and Malawi was unlikely to succeed. So I chose a non-probability sampling approach and adopted semi-structured interview techniques. My identity played a role in securing access even before I began to talk to my informants.[6] On one hand, as a young woman I was potentially less threatening which was useful in the sense that it dislodged the notion of the interviewer as "knower." On the other hand, as a woman I might not be taken as seriously, and this could threaten the validity of the information I obtained (see Gurney 1991: 56). The key was to identify and respond to situations in which I was seen as the "knower" (by virtue of my location as a white, westerner/foreigner), and then to situations where (by virtue of my age, gender and professional status) I was classified as non-threatening and of a lower status. This affected the measures I took to secure access to my interview subjects.

To overcome the potential problem of being "taken seriously" I dressed as formally as possible. One way in which the fieldworker signals status and place is through dress and bodily adornment. This feature of appearance is the most amenable to modification, and modification is often important in the negotiation of roles and relationships (Warren and Hackney 2000: 22). In any society, dress and appearance take on both political and moral significance, but in a society caught between Western cultural trends and local tradition the significance becomes heightened. Dress can be a signaler of formality and status, but it can also be a marker of Westernness. While in Malawi I attended the Second National Constitution Redrafting Conference. There I witnessed how highly politicized the issues of gender, clothes, and identity can be. A male MP, in response to submissions on potential constitutional amendments by the Parliamentary Women's Caucus, confidently (though irrelevantly) proclaimed that, "The Bible says that women must not wear men's clothes." As my neighbor, a female MP, stood up loudly and referred to the Right Honorable Gentleman as a Right Honorable "dinosaur," I remained in my chair shifting uncomfortably in my trousers. Although the male MP was shouted down by a strong cohort of female MP's, I became more conscious of my own position. Could I assume that I was an honorary male by virtue of my nationality (and race) and therefore exempt from these cultural norms? Or was I simply a discredited female not to be taken seriously?

In addition to dressing formally, I always carried business cards and folders that prominently identified my university. Various papers - government research clearance, letter of introduction from my advisor, and letters of local affiliation - were always at hand, though rarely requested. Professional affiliation was effective as a means to securing interviews, but personal referrals appeared to result in longer, more substantive and frankly useful interviews. The use of an informal local sponsor can be a way of establishing legitimacy and securing interviews. The sponsor both validates and verifies you as a scholar.

In Tanzania, I fortunately developed a relationship with a local law professor who was well known and respected within the legal community. His help in setting up interviews resulted in access to individuals I knew were going to be difficult to reach, particularly the more highly ranked members of the judiciary.

"STUDYING-UP"

The term "studying or researching-up" has been coined by anthropologists to capture the problem with researching a group that has more economic, social, and professional capital than the researcher.[7] The call for anthropologists to study up to powerful elites located at the state level is a response to the orthodoxy within the profession of "studying down" to individuals at the village level. Race and class are seen as the primary signifiers of relational power here (although gender, sexuality and age are certainly important). I found myself positioned in a liminal space, stuck in-between: synchronically inside and outside webs of privilege and power. I was simultaneously imbued with privilege by virtue of my race and status as a Westerner; yet I was located below by virtue of my profession (graduate student), age, and gender. Unraveling the potential openings and limitations my position offered was complex and challenging. This unraveling can only be achieved, to borrow from Patricia Hill Collins (2004), through the mapping of "privilege and penalty."

On one occasion I traveled eight hours by bus into an isolated part of the country to interview a retired judge at his home. His wife picked me up at the station and asked "How old are you?" When I told her she announced that I was young enough to be her daughter and should consider myself to be part of their family. Even at thirty, I was still considered to be a child in Tanzania. Being viewed as a "child" often proved to be more useful than might be expected. I perceived the interviewees to be more at ease (what's your basis for comparison?) and they would often go beyond just answering the question to offer additional advice and guidance. As Hackney (1998) found, these interview scenarios are often characterized by a sense of trust and openness – sincere helpfulness such as the type offered to children in our society.[8] Here it is important to acknowledge that age powerfully intersected with gender, and childlessness intersected with Westernness. Historically women have been seen as weak and child-like beings that need to be protected. This is another layer of meaning if we consider the treatment/role of white women during colonial rule in Africa. Further, the choice to delay or put-off altogether childbearing automatically marked me as Western.

On another occasion a Supreme Court judge took on a professorial role, repeatedly stopping the interview to give me things to read, including a copy of his rather extensive, two-volume PhD dissertation. It is worth noting here, however, that "researching-up" creates the possibility of co-option; co-option of the interviewer by the interviewee. It is possible that interviewees would want to build a relationship to portray themselves or their institution in a positive light and this may occur through paternalistic forms of ingratiation. In sum, a single situation can be read in multiple ways. Perceived moments of advantage can alternatively be read as the interviewer representing a threat (Desmond 2004:266).

Because my interviews were semi-structured and based on a small number of broad or open questions, I rarely challenged the judges with specific questions about their personal record on controversial issues. Sensitivity to the temporality of the research process is critical. Discussion about events ten or more years old is far easier than more recent events. Research in the legal field acutely highlights this issue, for even when a case is no longer *sub judice*, judges are reluctant to offer public commentary on their decision making. On the few occasions that I did attempt to directly question or confront respondents on their personal decision making record, I felt that my non-threatening social location was beneficial. Although the judges were frequently taken aback, they were not afraid to tell me that I was completely wrong and why that was. In other words, they felt free to respond because they were not threatened by me.

Whiteness and Westernness, as well as a more advanced age, may permit women fieldworkers more cross-gender behavior than that allowed to native women (Warren and Hackney 2000: 15). Moreover, it may also automatically position the researcher as an expert. In an African context I was immediately rendered "Western" by virtue of my skin color. Sometimes I was cast as an "honorary" expert, placed in an "honorary" male role or simply

granted male access. In these situations interviews were more difficult because the informants would be more rigid in their responses, seemingly concerned with providing the "correct" response.

VALUES AND ASSUMPTIONS; ETHICS VERSUS RAPPORT

Concomitant with the assumption of neutral researcher identity is the expectation that the interviewer should hide his or her political preferences, attitudes, and biases. On occasion interviewees attempted to draw out my personal opinions. One day a Malawian Supreme Court judge invited me to have morning tea with him. The first dilemma of our interaction arose when his secretary brought in the tea. Laid out separately on the tray were tea bags, milk, sugar and hot water. We paused for what felt like an uncomfortably long period of time staring at the tray. It suddenly occurred to me that perhaps he was waiting for me to serve him. So, setting aside my Western, feminist sensibilities, I offered to serve him tea. To my relief he declined and insisted that I should serve myself first, and we fell into a discussion on the comparative merits of Tanzanian versus Malawian tea. This relief was short lived. Before I knew it an academic discussion on the merits of borrowing foreign case law had turned into a debate on the recent South African Constitutional Court decision on gay marriage (*Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005). Using words like 'unnatural,' 'not right for Malawi,' and 'not in the Bible,' he first tried to extract my opinion. When that failed, he attempted to ascertain my religious beliefs. I said nothing fearing that if I revealed my support of gay rights he would end this meeting abruptly and would cancel the appointment we had for a more formal interview the following week. In the end he did not cancel, and the interview turned out to be one of the most candid and informative interviews I conducted. Both male and female researchers must make concessions in certain situations to get as much from informants as possible. Female researchers in patriarchal social settings can face challenging compromises in an attempt to maintain rapport and a desire not to appear ungrateful for the time and hospitality granted by the interviewee. Thus there is a delicate balance to be achieved between personal ethics and maintaining a rapport or sense of solidarity with the interview subject.

Reflection on the reaction of my interviewees to my identity made me think harder about the assumptions underpinning my research. I entered into this research working under normative assumption that western style rule of law, horizontal accountability, and judicial independence were all good things. These are political assumptions about the role(s) of my interview subjects: judges and lawyers. Upon reflection I have wondered whether I needed to be more up-front with my interview subjects about my research assumptions. How might that have changed the dynamics of the interview?

CONCLUDING REFLECTIONS

This series of personal reflections highlights the ultimate privilege of the researcher: mobility across categories. Structures of power are not rigid and static; instead they are fluid and dynamic. Just as we position our subjects, so, too, are we positioned by our subjects. Different settings, institutions, and individuals will attribute varying degrees of salience to our multiple locations of identity and power. I make the case that self-reflexivity, although it complicates the research process, also introduces an element of rigor into our work. In their recent edited volume, *Conducting Law and Society Research*, Simon Halliday and Patrick Schmidt (2009:4) argue that "research methods need to be demystified and understood as social practices." It is not only our research subjects who are embedded in structures of power and imperialism. We too, as researchers, are situated in myriad ways across multiple locations. This affects the kind of research questions we ask, the type of research methods we employ, and it shapes the way we engage in fieldwork. I have shown here how we enter the field with a set of privileges, but are concomitantly constrained by the norms and structures of our host societies. We enter with both "privilege and penalty" (Hill Collins 2004). Ultimately, the research enterprise is shaped by our ability to negotiate a series of dilemmas; these dilemmas range from the practical and ethical to the epistemological. Embracing the "messiness of research" (Kritzer 2009) is a strength and not a weakness.

[1] This is particularly evident in law and society research, see for example, Trubek & Esser (1989), Sarat (1990) and more recently the edited volume "Conducting Law and Society Research" (Eds. Halliday and Schmidt) (2009).

[2] Exceptions here include constructivist approaches to the study of international relations and those adopting critical/feminist methodologies in their research. A recent symposium in *PS, "*Fieldwork, Identities, and Intersectionality: Negotiating Gender, Race, Class, Religion, Nationality, and Age in the Research Field Abroad", was a welcome remedy to this lack of reflection within our discipline.

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[4] Manuscript, *African Courts and the Emergence of Judicial Power*, forthcoming.

[5] For further discussion on this see Dexter, Lewis Anthony. 1970. *Elite and Specialized Interviewing*. Evanston, IL: Northwestern University Press, p.7, and, Tansey, Oisín. 2007. "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling" *PS: Political Science and Politics*, Vol. 40, No. 4 (Oct., 2007), pp. 765-772

[6] At the time of this research, I identify as a female, white American graduate student, in my early thirties. My nationality is British and I am married. My partner did not accompany me to my research sites.

[7] See for example, Nader (1972), Desmond (2004) and Anderson-Levy (2010).

[8] This idea of presenting yourself as slightly naïve or ignorant has been proffered as a useful interviewing strategy across numerous disciplines. Lofland and Lofland (1984: 38), cited in Warren and Hackney (2000), suggest taking on the persona of "socially acceptable incompetent – someone who is friendly and likable yet who needs help in understanding the basics of things."

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A TEXTBOOK CASE OF UNIMPORTANCE

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"Who is the greatest Supreme Court Justice of all time?"

This common question is a fun parlor game for court-watchers, and is sometimes a jumping-off point for serious historical scholarship. Invariably, though, it ends with the same answers: John Marshall, Oliver Wendell Holmes, Louis Brandeis.

"Who is the worst Supreme Court Justice of all time?"

This is also a fun parlor game, maybe even more fun than the "best of all time" question, if only because it speaks to our inner snark. It's also a trickier question than "best of all time," because there are different ways to define "worst." Did the "worst" Justice author a notorious opinion, a la Roger Taney, *Dred Scott*-ing his way into infamy? Perhaps the "worst" Justice quit the job quickly like James Byrnes, or was forced off the Court like Abe Fortas. Or maybe the "worst" Justice, like the "best" Justice, is simply a matter of scholarly opinion; poor Charles Whittaker, condemned to the dustbin of history by academic tastemakers.

While fun to ponder, both questions are clichés. We live in an age of ranking and listmaking, a time in which it is impossible to turn on our televisions for even ten minutes without stumbling onto some channel running a "Top Ten" or "Best Ever" show. (Imagine the cross-platform synergy possibilities here, though. "The Top Ten Justices, Presented by the NFL Network" … #1: Byron White. Perhaps a Food Network spinoff show, "The Best Justices I Ever Ate," featuring Warren Burger and Felix Frankfurter.)

If we're going to traffic in the common currency of ranking and listmaking, then, we might as well ask an unconventional question.

"Who is the most nondescript Supreme Court Justice of all time?"

There's a question that doesn't get asked every day. Better still, the answer to this question might well be reliably measurable.

There have been several renowned "Greatest Ever Justice" studies, all structured around surveys asking

academics and/or other commentators to rank the Justices along some defined continuum.[1]

While such polling does produce measureable data, the data is still at its core subjective.[2] This is especially true when pollsters invite respondents to formulate their own criteria for defining greatness.[3]

Determining the biggest nonentity in Supreme Court history could be done via similar survey instruments, but there is a way to do it in a more objective fashion. "Greatness" can be imputed in a number of contexts. Some of these contexts are institutional, such as the growth of the Court in the American political system (Marshall, Taney), or the imposition of needed internal reforms (William Rehnquist). The most common context of greatness, of course, is jurisprudential. In this case, we may start with the unremarkable premise that a "great" Justice has had influence on the development of the law.

Conversely, we can posit that a nondescript Justice lacks such influence. The task now is to assess judicial influence. One surefire indicator of influence on the law is whether a Justice's work is being taught in constitutional law classes, either at the undergraduate or law school level. To that end, we can measure a Justice's influence by asking a simple question – **how often are a given Justice's opinions being excerpted as "major cases" in constitutional law textbooks?**[4]

The following analysis stems from a study of eighteen leading constitutional law textbooks, all with current editions dated no earlier than 2006 (a full list of the textbooks appears in the Appendix).[6] Twelve of these eighteen textbooks are geared for law schools; the other six are designed for undergraduate courses in constitutional law.

Let us first consider the Justices whose work is excerpted most often. There are two ways to define "most-excerpted." One is to tabulate the number of a Justice's individual opinions which are excerpted in the textbooks. In other words, the majority opinion in *Lawrence v. Texas* counts as one opinion for Anthony Kennedy, and the dissent in *Lawrence* counts as one opinion for Antonin Scalia.[6]

Using this definition, the most-excerpted Justices are as follows:

LIST #1: INDIVIDUAL OPINIONS EXCERPTED
(MAIN OPINIONS, CONCURRING OPINIONS, AND DISSENTING OPINIONS)

JUSTICE	# OF OPINIONS	YEARS OF SERVICE
1. John Paul Stevens	185	1975-2010
2. William Rehnquist	153	1972-2005
3. William Brennan	131	1956-1990
4. Antonin Scalia	118	1986-current
5. Byron White	109	1962-1993
6. Sandra Day O'Connor	101	1981-2006
7. Harry Blackmun	94	1970-1994
8. Anthony Kennedy	88	1988-current
9. William O. Douglas	77	1939-1975
Thurgood Marshall (*tie*)	77	1967-1991
Potter Stewart (*tie*)	77	1958-1981

Alternatively, we could define "most-excerpted" as the number of **times** a Justice's opinions are excerpted. Here, since Kennedy's *Lawrence* opinion appears in each of the eighteen books in this study, that counts as eighteen excerpts for Kennedy (the same is true for Scalia's *Lawrence* dissent, which also appears in each of the eight-

een books). In this instance, the list changes, but only slightly:

LIST #2: TOTAL NUMBER OF EXCERPTS

JUSTICE	# OF EXCERPTS	YEARS OF SERVICE
1. John Paul Stevens	634	1975-2010
2. William Rehnquist	600	1972-2005
3. Antonin Scalia	482	1986-current
4. William Brennan	463	1956-1990
5. Sandra Day O'Connor	414	1981-2006
6. Byron White	375	1962-1993
7. Anthony Kennedy	349	1988-current
8. Harry Blackmun	298	1970-1994
9. David Souter	294	1990-2009
10. Clarence Thomas	280	1991-current

Naturally, neither of these lists "proves" that John Paul Stevens is the greatest Justice of all time. The prevalence of excerpts of a given Justice's opinions is not necessarily a sign of judicial greatness, because these numbers are distorted both by a Justice's sheer longevity on the Court, and also by an unavoidable presentist bias.

As is seen in List #1 (Justices ranked by the number of different cases in which they wrote either the Opinion of the Court, a concurrence, or a dissent), each of the top eight most-excerpted Justices served on the Court at least into the 1990's, and five of them served into the 2000's. List #2 (Justices ranked by the total number of excerpts) is even more presentist: every Justice on this list served into the 1990's; seven served into the 2000's, and three are still on the Court today.

The explanation for this presentist bias is uncomplicated. Law school classes are not really historical enterprises. Fundamentally, they are exercises devoted to the dissemination of current legal principles (although these exercises can be part of a larger project designed to inculcate the habits and techniques of legal reasoning). Even undergraduate constitutional law classes – which can afford to spend more time on jurisprudential development – must focus predominantly on contemporary law.

While this presentist bias means that lists of "most-excerpted" Justices are not necessarily indicia of greatness, a list of the "least-excerpted" Justices is almost certainly an indicator of mediocrity. At the very least, it is an indicator of a comprehensive failure to produce work that had any seminal impact or enduring value.[7]

As it turns out, we can not only compile a list of Justices who are having a minimal impact on constitutional law curricula, but we can also compile a list of Justices whose impact is wholly nonexistent. Of the 111 Justices of the United States Supreme Court who served during the period covered by the textbooks in this study,[8] 22 of them are completely shut out of the constitutional law textbooks in this study – **they do not have any of their opinions excerpted even once**:

LIST #3: UNEXCERPTED JUSTICES

JUSTICE	YEARS OF SERVICE	TOTAL YEARS
Samuel Blatchford	1882-1893	11
John Campbell	1853-1861	8
John Catron	1837-1865	28
Nathan Clifford	1858-1881	23
Gabriel Duvall	1811-1835	24
Oliver Ellsworth	1796-1800	4
Ward Hunt	1873-1882	9
Howell Jackson	1893-1895	2
Thomas Johnson	1791-1793	2
Joseph Lamar	1911-1916	5
Henry Livingston	1807-1823	16
Joseph McKenna	1898-1925	27
John McKinley	1837-1852	15
Alfred Moore	1799-1804	5
John Rutledge	1789-1791	2
George Shiras	1892-1903	11
Thomas Todd	1807-1826	19
Robert Trimble	1826-1828	2
Bushrod Washington	1798-1829	31
James Wayne	1835-1867	32
Charles Whittaker	1957-1962	5
Levi Woodbury	1845-1851	6

In one respect, the "shut-outs" list contradicts the durational assumption derived from the most-excerpted list. Six of the shut-out Justices served on the Court for at least twenty years, two served for over thirty years, and James Wayne's 32-year tenure places him among the top ten longest-serving Justices in history. If one explanation for the surfeit of excerpts by John Paul Stevens and William Rehnquist is that they each spent over thirty years on the Court, then one would logically expect that at least some of James Wayne's three-decades-long body of work would appear in the textbooks.

However, this durational expectation is trumped by the expectation that contemporary Justices will feature more often than long-departed ones (and having left this earth during Andrew Johnson's presidency, Justice Wayne is assuredly long-departed). Here, the "shut-outs" list is the unsurprising inverse of the most-excerpted lists. With only four exceptions, none of the shut-out Justices served in the 20th century. Of the four who did serve in the 20th century, two of them – Joseph Lamar and Charles Whittaker – only served on the Court for five years. A third, George Shiras, served for eleven years, but his 20th century service on the Court is brief; he retired in 1903.

This brings us to Joseph McKenna.

At 27 full years of service (1898-1925), McKenna is the 21st-longest-serving Justice in Supreme Court history, and is in the top 20% all time. He is also one of the longest-serving Justices of his particular era. Only three of the Justices with whom McKenna served – John Harlan "the elder", Oliver Wendell Holmes, and Edward White – spent a longer time on the Court than McKenna did.

On a purely statistical level, it's not quite fair to burden McKenna with the designation of Most Nondescript

Justice of All Time. John Catron, Bushrod Washington, and James Wayne each share McKenna's dubious distinction of not having any of their work reproduced in constitutional law textbooks, but all of them sat on the Court for a longer period than McKenna did.

Yet there is one key fact which distinguishes McKenna from Catron, Washington, and Wayne. Indeed, this key fact distinguishes McKenna from almost all of the shut-out Justices, including every one of the shut-outs who served for longer than five years on the Court. Joseph McKenna is the lone shut-out Justice who served for an extended time on the Supreme Court during the 20th century.

The other shut-out Justices all served on the Court during a time which is generally under-represented in the textbooks in this study. Altogether, these textbooks include excerpts from 837 different cases, but only 71 of those 837 cases occurred before 1900. Although one major reason that Bushrod Washington's work is completely missing from the textbooks is that Washington produced little work of any real significance,[9] an equally-salient reason is that hardly any opinions from Washington's era are excerpted.[10] What is true of Washington is true of almost all of the long-serving shut-out Justices: they all served in a period of time which is just not covered very much (at least in terms of reproduction of actual opinions) by these textbooks.

The lone exception here is McKenna. While McKenna's service period of 1898-1925 is not nearly as well-represented in this study as the latter years of the 20th century, it is nevertheless a period of time which is substantially documented in the textbooks. There are 34 cases between 1898 and 1925 which appear in the textbooks. Importantly, those 34 cases feature nearly comprehensive coverage of the Court's personnel in that era.

Counting the Justices who were already on the Court when he arrived in 1898, Joseph McKenna served with 23 other Justices during his tenure on the Court. Fifteen of those 23 Justices wrote at least one main Opinion of the Court while serving with McKenna which is excerpted in at least one textbook in this study: (see page 20)

That leaves eight other Justices who served with McKenna, but who did not write a main opinion during McKenna's tenure on the Court which is excepted in these textbooks: Louis Brandeis, Henry Brown, Pierce Butler, Melville Fuller, Horace Gray, Joseph Lamar, George Shiras, and Willis Van Devanter.

However, six of these eight Justices are accounted for in the books in this study anyway. These six did produce excerpted main opinions, but did so outside of McKenna's tenure: Brown, Fuller, and Gray each wrote at least one main opinion prior to McKenna's 1898 arrival which is excerpted in these textbooks; Brandeis, Butler, and Van Devanter each wrote main opinions after McKenna's 1925 departure which are excerpted.[11] Furthermore, Brandeis, Butler, and Fuller also wrote concurrences and/or dissents during McKenna's tenure which are excerpted in at least one textbook.

Of the 23 Justices who served on the Supreme Court with Joseph McKenna, then, only Joseph Lamar and George Shiras are completely absent from the textbooks in this study. However, neither Lamar nor Shiras approached the length of McKenna's tenure; Lamar served for only five years on the Court, and Shiras served for only eleven years. McKenna's 27 years on the Court far outstrips even their combined 16 years of service.

Even some of McKenna's contemporaries whose Supreme Court service was a comparative eye-blink nevertheless appear in these textbooks. Horace Lurton, who was on the Court for less than five years before dying in office in 1914, has a cameo appearance; so does John Clarke, who served for a shade over six years before resigning in 1922 out of fear that the job would push him to an early grave (smart move; he lived another 23 years). Even in his own era, when almost every other Justice had at least a minimal impact on the future teaching of constitutional law, McKenna had no impact whatsoever.

No Justice, then, served so long while saying nothing of consequence quite like Joseph McKenna. Charles Whittaker, you're off the hook.

LIST #4: EXCERPTED MAIN OPINIONS WRITTEN BY McKENNA'S CONTEMPORARIES DURING McKENNA'S SERVICE ON THE SUPREME COURT (1898-1925)

JUSTICE	# OF OPINIONS
David Brewer	2
John Clarke	1
William Day	4
John Harlan "the elder"	3
Oliver Wendell Holmes	6
Charles Evans Hughes	2
Horace Lurton	1
James McReynolds	2
William Moody	1
Rufus Peckham	2
Mahlon Pitney	1
Edward Sanford	1
George Sutherland	2
William Howard Taft	3
Edward White	3

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[1] Albert Blaustein and Roy Mersky distributed a survey instrument to law professors asking them to categorize Justices on a scale ranging from "great" to "failure," see "Rating Supreme Court Justices," 58 AMERICAN BAR ASSOCIATION JOURNAL 1183 (1972), see also William G. Ross, "The Ratings Game: Ranking Supreme Court Justices," 79 MARQUETTE LAW REVIEW 401 (1996) (provides 1993 update to Blaustein-Merksy data). In a 1993 study, William Pederson and Norman Provizer went to the trouble of designing separate polls for academics, judges, practitioners, and students, see *Great Justices of the Supreme Court: Ratings and Case Studies* (Peter Lang, 1993), see also Pederson and Provizer, *Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices* (Peter Lang, 2003). Michael Comiskey designed a two-level survey that asked for both retrospective overall rankings of the Justices and also for assessments of how well-qualified they were for the Court at the time of a Justice's nomination, see *Seeking Justices: The Judging of Supreme Court Nominees* (Univ. Press of Kansas, 2004) , 87-89.

[2] Scholars are developing empirical methods of evaluating federal judges, see Stephen J. Choi and G. Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance," 78 SOUTHERN CALIFORNIA LAW REVIEW 23 (2004); see also Frank B. Cross and Stefanie Lindquist, "Judging the Judges," 58 DUKE LAW JOURNAL 427 (2009). However, these studies are focused on vetting the fitness of federal judges for possible nomination to the Supreme Court, and it is a question whether these empirical techniques can be translated into a means of evaluating the performance of Supreme Court Justices themselves. See W.E.R.L., "On Tournaments for Appointing Great Justices ot the U.S. Supreme Court," 78 SOUTHERN CALIFORNIA LAW REVIEW 157 (2004). ("W.E.R.L." is a reference to the Workshop on Empirical Research in the Law that is held regularly at Washington University in St. Louis.) Even here, the question of whether the "merit" of a potential Supreme Court nominee can be objectively determined at all is highly debatable. See Michael J. Gerhardt, "Judicial Selection By the Numbers," 32 FLORIDA STATE LAW REVIEW 1197, 1199 (Summer 2005) ("[T]here has never been some objective, or neutral, criterion of merit. Instead, the governing elite has made judicial appointments to further its own interests. Consequently, merit is defined so as to allow for, if not to maximize, the appointments of relatives, friends, and especially political allies.").

[3] See Blaustein and Mersky, supra n.2 See also Robert C. Bradley, "Selecting and Ranking Great Justices: Poll Results," in Pederson and Provizer, *Leaders of the Pack*, supra. n. 2, at 7 ("To avoid author perceptions or feelings from introducing bias into development of the list, the survey was constructed to give no indication of the criteria to be used.")

[4] I define a "major case" as a case that is set off with its name and citation (as opposed to other cases which are identified and discussed in the text of the casebook as "lesser" cases). While many textbooks reproduce some verbatim sections of "lesser" cases, this study takes into account the editorial decision that is made to designate cases as major. In other words, if the authors of the casebooks are "telling" their readers that certain cases are more significant than other ones, that is prima facie evidence of a case's importance and influence

[5] This study was also the basis for an article identifying the leading cases in American constitutional law which recently appeared in these

pages. See Lichtman, "The Canon of Constitutional Law in 2010," *American Political Science Association Law and Politics Section Newsletter*, vol. 20, no. 3 (Summer 2010).

[6] Note that this definition makes no distinction between main opinions and concurrences/dissents. If anything, it could be argued that excerpted concurrences and dissents are an even larger signal of a Justice's influence than excerpted main opinions, since concurrences and dissents are generally opinions that are not needed to teach the holding of a given case. Their inclusion is an editorial decision made by the textbook's author(s) that something in this ancillary opinion (or the mere fact that a given Justice contributed such an opinion) is as important a teaching tool as the main opinion itself.

[7] This is not to say that the existence of an excerpted opinion in the textbooks bears any relationship to the "quality" of a Justice. Nobody would ever suggest that Rufus Peckham was a great Justice (the original Blaustein-Mersky survey, for example, somewhat charitably, rated him as "average"), nor would anyone ever suggest that his constitutional claim to fame, *Lochner v. New York*, has any positive enduring value. Via *Lochner*, though, there is little question that Peckham's work has had an impact on the study of constitutional law, albeit a negative one. Notorious though it is, the *Lochner* decision – and by extension, its author – is a presence in the field.

[8] The 112th Justice, Elena Kagan, had not issued any opinions prior to the publication of any of the textbooks used in this study; her first opinion was published on January 11, 2011, in which she wrote for the Court in an unremarkable bankruptcy case, *Ransom v. FIA Card Services, Inc.* As of the writing of this article, Justice Kagan has not contributed any concurrences or dissents.

[9] As Richard E. Ellis writes in the invaluable *Oxford Companion to the Supreme Court of the United States, 2nd ed.* (Oxford, 2005), "Although he served on the Court for thirty-one years, Washington is not really know for handing down any important decisions" (at 1072).

[10] Even the lions of the early 19th century, John Marshall and Joseph Story, combine to have only seventeen opinions excerpted; eleven by Marshall (all main opinions), and six by Story (three main opinions, one concurrence, and two dissents).

[11] Brown's lone contribution to the books in this study is one of the most reviled cases of all time: *Plessy v. Ferguson*.

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O'Brien, David M. *Constitutional Law and Politics,* 7th ed. (Norton, 2008)

Paulsen, Michael Stokes; Steven G. Calabresi; Michael W. McConnell; and Samuel L. Bray, *The Constitution of the United States* (Foundation Press, 2010)

Rossum, Ralph A.; and G. Tarr, *American Constitutional Law,* 8th ed. (Westview Press, 2009)

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Schultz, David; John R. Vile; and Michelle D. Deardorff, *Constitutional Law in Contemporary America,* (Oxford University Press, 2010)

Stone, Geoffrey R; Louis Michael Seidman; Cass R. Sunstein; Mark V. Tushnet; and Pamela S. Karlan, *Constitutional Law,* 6th ed. (Aspen 2009)

Sullivan, Kathleen M.; and Gerald Gunther, *Constitutional Law,* 17th ed. (Foundation Press, 2010)

Varat, Jonathan D; William Cohen; and Vikram D. Amar, *Constitutional Law,* 13th ed. (Foundation Press, 2009)

Six of these texts are designed for undergraduate constitutional law courses: Epstein/Walker, Fisher/Harriger, Mason/Stephenson, O'Brien, Rossum/Tarr, and Schultz/Vile/Deardorff. Five of these six texts are two-volume sets, geared towards the typical collegiate constitutional law regimen of separate semester classes in civil liberties and governmental powers/structure. Only the Mason/Stephenson text is a single volume designed for undergraduate courses.

The other twelve texts are law school casebooks.

ADVENTURES AND LEARNINGS OF A FIELD RESEARCH ENTHUSIAST

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Field research may be the one opportunity we academics have to feel a little bit like Indiana Jones—well, without the paranormal artifacts, the damsel in distress, and in all probability without danger lurking behind every corner. Granted, Indiana Jones may be a bit of a stretch, but field research can feel like a real (albeit benign) adventure. Though discovering that something is crawling down my back during an interview with a Supreme Court judge in El Salvador ('don't panic—it's probably an ant and not a spider') has become part of my particular experiences, the adventure I refer to is of the less unnerving kind and lies in the often unpredictable discoveries made in interviews, the hunt for documents, or simply in talking to people. And before you know it, it has happened: You have fallen in love with your project all over again.

I certainly did—which is a good thing in the long process of writing a dissertation. Mine led me to London, where I interviewed Queen's Council barristers on the trade-offs between security and rights protection by the Supreme Court.[1] My first stop, of course, was the home of the newly created Supreme Court. The beautifully renovated Middlesex Guildhall stands on the western side of Parliament Square, facing the Palace of Westminster and the Big Ben.

I met with the Head of Communications to the UK Supreme Court, who talked about the different measures the Court had taken to become more approachable to the general public (including televised proceedings, still unimaginable in their US counterpart). The Court is open to the public, and when it is not in session, visitors are welcome to try out the very chairs occupied by the judges. One of the security guards and I chatted about his aspirations on becoming a lawyer while I swiveled around in Baroness Hale's seat.[2]

While that was the closest I got to the judges on this first visit to London, I had the opportunity to participate in interviewing supreme court judges in Nicaragua and El Salvador (in addition to journalists, human rights activists, and legal scholars) as a graduate assistant to Don Songer's and Lee Walker's NSF sponsored field research.[3]

I came back from each trip knowing more about what worked and what did not. While my learnings are not revolutionary, certainly not exhaustive, and may not be applicable to all situations, they helped me and I offer them in the hopes others will find them useful.

As several people have told me and I happily repeat here: in procuring interviews, one has to be persistent, and follow up on unanswered requests. Naturally, the behavior should stop miles short before it can be considered pestering. If the direct route to an interview is not available, seek detours. When it comes to interviews, it may be a little bit about who you are (ABD v. Full Professor), but it is much more about whom you know. It is not unusual, for example, for repeat players on the UK Supreme Court to have ties to legal advocates to the Parliament or to the Law Lords themselves. The last question in every interview should therefore be a request for potential contacts

who might be willing to give an interview.

A very different sort of learning effect developed over the course of my interviews. I found that starting each interview by talking a bit about the background to the research we were conducting worked well for me. Knowing your audience is key at this point—there is a fine line between giving them background to the interview and boring them with technical detail and jargon (and I can tell you from experience that you will know where the line is once you cross it and see the eyes across of you grow dim).

The background offered should be deep enough to provide a number of benefits: establish you as a serious and knowledgeable scholar, give the interviewees enough information to categorize you (spy, administrator, or scholar?) as well as your work (how will the information be used? government report? historical book? legal/social analysis?), while allowing their thoughts some time to percolate.

It will probably not come as a surprise to anyone: as soon as our true motives are understood, we are perceived as a very unthreatening species. Most of the people I talked to were happy to provide knowledge for knowledge's sake (particularly under the cloak of anonymity).

In order to get a conversation going, it is helpful to start with relatively broad questions—which can be natural extensions of the background just presented. In the interviews in which I assisted Lee Walker in Nicaragua and El Salvador, we often started the interview by presenting the three basic theories of rights revolutions (institutional features conducive to rights litigation, attitudinal predispositions on the court, vibrant support structures), and asking the interviewees for their opinion concerning these competing theories in the Nicaraguan or Salvadoran framework. This might work well with legal scholars, while a broad question on the role of courts and society in protecting rights may be a better approach with journalists. The important thing is not to lead the interviewees towards a particular opinion, giving them ample room to express their views.

That being said, I should add that every interview will be tainted by a certain bias. When we visited the Nicaraguan Supreme Court for the first time, we arrived shortly after the "Día de la Madre" (Mother's Day). A group of women assembled in front of the Supreme Court on this popular holiday to protest the recent elimination of health of the mother exceptions in Nicaragua's laws prohibiting abortion. The topic was on everybody's mind; in our interviews in the next weeks with journalists, Supreme Court judges, and human rights activists, we invariably touched upon it. The first group would fault the judges for not moving on the more than 50 petitions brought to the Supreme Court;[4] the second group, the judges, would proclaim that these things take time, but that they were working on the petitions; while the third group speculated that the petitions would remain unanswered because they were used as leverage against the church—lest the church advocate against the political establishment and accuse them of conducting unfair elections (as they had done in the past). In this as in other cases, the different interviews form pieces of a mosaic.

In order to keep the conversation as unconstrained as possible, we decided not to use a recorder; so this point is crucial (and common sense): The notes should be transcribed immediately after the interview. It is amazing how the hand scribbled notes, which now seem more like hieroglyphics to me, were perfectly clear to me shortly after I wrote them down.

Lastly, all of the experiences in the field feed into the knowledge built about the country, its people, and institutions. Trying the food, seeing the historic sites, and particularly talking to the people, may not all be relevant to the project at hand, but every incident provides a background picture to the analysis. When I think about our project in Nicaragua, for example, I remember a statement made by Camilo, a student in Nicaragua who helped us set up interviews and collect data, which summed up the feelings of many people we talked to: "Every person in Nicaragua has a political opinion, because everything in this country is stained by politics". I remember El Salvador's complicated relationship with its civil war through the spray painted murals of Che Guevara on the walls of the University of San Salvador. When reading opinions issued by the UK Supreme Court, I remember what the view from the judges' bench is like.

The people I interviewed are without exception passionate about their country and many have thought long and hard about the traits of their judicial systems. Talking to them provided a rich source of knowledge; apart from

that it also brought the work I do to life—gave it depth, color, and meaning. Going into the field is an adventure—even if the object of our pursuit is not the Holy Grail—and it can be a big motivator. We pick our research according to what tickles our fancy, but actually rolling up our sleeves and immersing ourselves into the lives and stories behind the academic question can increase the fascination and rekindle the interest in our research and trigger new, interesting questions while advancing our knowledge in the current inquiry.

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[1] The interviews in the UK were conducted with grateful acknowledgment of financial assistance by the British Politics Group.

[2] The seats are not actually assigned, since the court hears cases in panels; but it *could* have been her favorite seat …

[3] Their project examines the causes and development of rights protection by the supreme court in four Latin American countries and includes the creation of a database of judicial decisions spanning more than 20 years.

[4] The petitions brought to the Court were "Acciónes de Inconstitucionalidad"—petitions to declare the law unconstitutional.

ANNOUNCEMENTS

The *International Journal of the Legal Profession* invites manuscripts for a planned symposium issue on Government Legal Practice and Government Lawyers. We are particularly interested in papers dealing with lawyers occupying career positions in government service dealing with matters other than criminal prosecution or criminal defense. We welcome studies dealing with a wide range of issues including (but not limited to) the nature of the lawyers' work, their career patterns, the ethical issues they confront, and/or how they balance professional norms in a political environment. Questions about the suitability of manuscripts can be directed either to the general editor, Professor Avrom Sherr (Avrom.Sherr@sas.ac.uk) at the Institute for Advanced Legal Studies, or the symposium editor, Professor Herbert Kritzer (kritzer@umn.edu) at the University of Minnesota Law School. Submissions should be sent electronically, either as Word documents or as PDF documents (with all identifying information removed) to Professor Sherr. All manuscripts will be subject to the journal's normal peer review process. The deadline for submission to insure consideration for the symposium is September 15, 2011; it is anticipated that the symposium will be published in the second issue of 2012.

BOOKS TO WATCH FOR

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Joyce Baugh (Central Michigan University) has published *The Detroit School Busing Case: Milliken v. Bradley and the Controversy Over Desegregation* (Kansas University Press, 978-0-7006-1766-1). This book focuses on the U.S. Supreme Court's decision in *Milliken v. Bradley* (1974), which undercut efforts to desegregate metropolitan school systems outside of the southern United States, and the negative effects of this case on public education have been long lasting. While considerable attention has been paid to *Brown v. Board of Education* and school desegregation issues in general, there has been insufficient focus on Milliken, even though this crucial decision effectively undermined the promise of equal educational opportunities embodied in Brown

Gary Jacobsohn's (University of Texas) book *Constitutional Identity* (Harvard University Press, 978-0674047662) argues that a constitution acquires an identity through experience—from a mix of the political aspi-

rations and commitments that express a nation's past and the desire to transcend that past. It is changeable but resistant to its own destruction, and manifests itself in various ways, as Jacobsohn shows in examples as far flung as India, Ireland, Israel, and the United States.

Daniel Okrent (former public editor, *The New York Times*) has published *Last Call: The Rise and Fall of Prohibition* (Scribner, 978-0743277020). This book deals with two constitutional amendments and legislative, judicial, and executive actions to promote and revoke the Eighteenth Amendment to the U.S. Constitution.

Alpheus Thomas Mason (Late, Princeton University) **and Donald Grier Stephenson, Jr.** (Franklin & Marshall College) have updated their longstanding text *American Constitutional Law: Introductory Essays and Selected Cases* (Person/Longman, 978-0205108992). The 16th edition is to be printed in February 2011.

Martin J. Sweet (Northwestern University) examines in *Merely Judgment: Ignoring, Evading, and Trumping the Supreme Court* (University of Virginia Press, 978-0-8139-3058-9) the mismatch between the Court's declaration of "unconstitutional" and the elected branches creation and maintenance of "unconstitutional" laws and actions. Using the cases of affirmative action, school prayer, legislative vetoes, hate speech, and flag burning, Sweet deduces how the litigation nexus can be derailed by the elected branch. Capitalizing on the legal, political, and social barriers to litigation, the elected branches can radically alter the ability of prospective litigants to challenge these unconstitutional programs and thus the elected branches have learned how to successfully evade, ignore, and even trump the Supreme Court.

Justin J. Wert's (University of Oklahoma, ISBN 978-0-7006-1763-0) first book *Habeas Corpus in America: The Politics of Individual Rights* (University Press of Kansas) is the first study of habeas corpus in an American political context. Wert reexamines this essential individual right and shows that habeas corpus is not necessarily the check that we've assumed--it's as much a tool of politics as it is of law.