Course Description

Our theme this year is myths of judging, courts, and law. These are common but not necessarily true claims about how judges make decisions and the role of courts. One set of myths sees judges as unbiased appliers of neutral law, finding law and never making it, with ideology, biography, and politics left at the courthouse door. Another set of myths sees the judiciary as the “least dangerous branch,” making law, not policy, without real power or influence. These myths are created about and by judges. They are part of our political discourse and scholarly debate.

We're nine judicial gentlemen who shun the common herd,
Nine official mental men who speak the final word,
We do not issue postage stamps or face the microphones,
Or osculate with infants, or preside at corner-stones,
But we're the court of last resort in litigation legal
(See: Case of Brooklyn Chicken vs. Washington Blue Eagle);
We never heed the demagogues, their millions and their minions,
But use this handy yard-stick when in doubt about opinions:

[Chorus]
If it's In the Constitution, it's the law
For the Constitution is without a flaw
If it's In the Constitution it's okay,
Whether yesterday, tomorrow, or today- Hooray!
If it's In the Constitution, it must stay.
Like oysters in our cloisters, we avoid the storm and strife,
Some President appoints us, and we're put away for life.
When Congress passes laws that lack historical foundation,
We hasten from a huddle and reverse the legislation.
The sainted Constitution, that great document for students,
Provides an air-tight alibi for all our jurisprudence.
So don't blame us if now and then we seem to act like bounders,
Blame Hamilton and Franklin and the patriotic founders.

A. Lippmann. “Song of the Supreme Court.”
Goals

We will judge these myths about judging and courts. We’ll evaluate the state of the American judiciary as part of our political system and American democracy.

You will also learn more about how to read and critique contemporary social science. While no particular background is required, you must be willing to think carefully and deeply about each of the arguments we read. You will learn more about evaluating research designs for causal inference and what makes for good theorizing. This focus on design and methods can seem secondary to substantive import – but the import depends on whether we believe the arguments and evidence to be sound in the first place. This can be frustrating to those wanting to jump into normative and substantive debates about findings. But we shouldn’t “put the cart before the horse”… sometimes even published research is missing the cart and all but the end of the horse.

Office Hours

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General Policies

Policies on academic integrity can be found at Faculty Statement on Academic Integrity. A guide for undergraduates at Columbia University Undergraduate Guide to Academic Integrity. Our policy on disability accommodations can be found at Faculty Statement on Disability Accommodations. Recording in class is not permitted without explicit prior consent.

Course Requirements

These are readings, participation, reaction papers, and a research project, with a proposal, presentation, and final paper. Your grade will based on:

- 30% Participation
- 30% Reaction papers (three)
- 5% Research paper proposal
- 5% Research paper presentation
- 30% Research paper (final)
Schedule

One organizational meeting (Week 0)
One lecture on foundations, with readings (Week 1)
Three units, three topics each, with readings and seminar discussion (Weeks 2-10)
Two student presentation discussion days (Weeks 11-12)

September 7  Week 0
September 14  Week 1

Myths of Law vs. Ideology
September 21  Week 2
September 28  Week 3
October 5     Week 4

Myths of “Blind Justice”
October 12    Week 5
October 19    Week 6
October 26    Week 7

Myths of Judicial Power
Nov. 2        Week 8
Nov. 9        Week 9
Nov. 16       Week 10

Myths of Doctrine
Nov. 30       Student presentations
Dec. 7        Student presentations

Participation

The class is conducted in seminar format and so attendance is, of course, required. All students should (at a minimum) complete all required readings and be prepared to discuss them. This means reading enough advance of class to leave time to formulate questions and thoughts. Occasionally, discussion questions might be given in advance and you should be prepared to address them. You should typically prepare your own discussion questions. The grade will depend primarily on the quality of informed contributions.

The first weeks will involve some lecture material, as will occasional topics later when our discussions require some teaching about research design or substantive background material.
But this is primarily a seminar for what we learn to come out of our discussions of the material, with you all dominating that discussion, not me.

I hope you will bring stories from the news or other sources about courts and judges and legal cases to class. I will do so, discussing current events or historical ones. Even without planning this out, even from what happens in any one semester, I’m positive you will see the surprising breadth and reach of judicial politics into the many aspects of our lives.

You should also feel free to post or ask questions on Courseworks, to identify concepts for which you need clarification, to get more information to prime our discussion, or to continue discussions. This is a supplemental form of participation to that in class.

Readings

All readings on the schedule are required unless listed under “recommended.” Some are straightforward “textbook-like” readings, some are works written for a more general audience, and some are works of advanced political science that will take additional time to work through and digest. Optional recommended readings are provided for those wishing more background, additional takes, or extensions on the topic. Book excerpts and more will be under files on Courseworks. Articles are available online if not there. Many recommended readings are in a miscellaneous folder on Courseworks in case you want to browse. The reading load is HEAVY in both quantity and complexity, and I take your obligation to come prepared very seriously. You should read ahead when possible, since some weeks have heavier reading loads than others. In compensation, there is no reading the last two weeks of class, when you will be working on your research papers and presentations.

You should take notes on the readings, organizing your thoughts before class. What is the argument or question of this paper? Why do we care? Why is it hard? What did they do? How strong is the research design? What is the evidence? What did we learn? What is missing?

Reaction Papers

Students will complete three short (3-5 page) reaction papers, each responding to or assessing part of that week’s readings. You must do one within Weeks 2-4, within Weeks 5-7, and within Weeks 8-10. You will sign up for specific weeks in advance. These papers will be due electronically on Courseworks Wednesdays at noon the day before class. These papers should avoid excessive summarization (they should assume the reader has themselves done the reading). Rather, they should pursue an original argument, synthesis, or extension. Successful papers usually do one or more of the following: challenge a central claim made by an author; offer an alternative interpretation of evidence; identify an important oversight and reflect upon how this
affects conclusions or substantive import; explain how and why a reading challenges or confirms previous week’s readings; connect in more than superficial detail the papers contents to specific examples of interest; argue how the readings “fail to synthesize”; etc. Those writing such papers will lead our weekly discussion, and so papers should include or end with discussion questions. If you send me such questions in advance, I’ll try to offer suggestions or edits. There will be a sign-up sheet for choosing weeks.

Research Paper

Myth? Doctrines are neutral legal tools

Due Dec. 14 (Thursday noon) on Courseworks. Each student is required to complete a long research paper on the politics of a legal “doctrine.” You will assess the myth that doctrines are neutral legal tools, of neutral origin, of neutral application. You will examine a doctrine created, used, and/or applied by the courts. You should lay out its origins and the “politics” of it – this could include: how it is used, what discretion the judges have, whether it shows signs of being used instrumentally or politically or ideologically, how it affects an area of policymaking or politics, how it has changed over time, how its construction was set by the politics of its day, etc. You should connect the course materials to your discussion, rather than simply give a brief legal history – use the paper to interrogate the “myths” we will have discussed. Your specific argument should be more explicit than “a paper on doctrine X.” Some potential examples of “doctrines” will be listed in a separate document. (You can also specify an approach that varies somewhat from the above, with explicit permission.)

Note that I use “doctrine” here in a rather broad and loose sense, including a legal test, rule, standard, balancing test, doctrinal element, approach, conceptual device, principle, or framework for dealing with some substantive issue(s). Your paper will not be on the substantive issue itself, but your interests could guide you to specific doctrinal elements related to that issue (and only that issue or others as well). The substantive issue can be contextual, but I would not, for example, want you to explore all doctrines used in abortion decisions, with abortion politics the connective tissue. Those doctrines not obviously political or non-neutral might make for the most interesting papers in which to explore judicial politics! Browse law reviews, read the news, google wildly. Surprise me and teach me, please.

Proposal

You should get started on choosing a topic as soon as possible. A short proposal is due October 20th (Friday, 5pm) on Courseworks. It is very important to turn in a proposal on time, even one consisting of multiple rough incomplete ideas. You will be allowed to revise it. Your grade on the proposal will be based on your initial submission and further developments. The proposal should include at least the following four elements, each under clearly identifiable headings:
1. A clear thesis statement or question.
2. A rough outline of the key parts of the paper or the process to develop the paper.
3. An explanation of the type of evidence or material that you intend to examine in support of your argument, with some examples.
4. A preliminary annotated bibliography of at least three potential sources in addition to others as needed. These three should be formal or academic sources, though there might be additional materials such as news articles. Each source must be followed by a 1-3 sentence summary of that work and its relevance.

Presentation
You will present your preliminary work on your topic one of the last two weeks of class, explaining to your fellow students (and me) what you have learned to date, what we should know about the politics of the doctrine you are studying, and get feedback for finishing your paper.

Paper Requirements
All papers must be 15-18 pages, double spaced in Times New Roman 12 pt. with 1-1.25 inch margins. You should “use parenthetical citations” (Lax 2008, 23) and provide a bibliography.

Readings

1. Myth? Judges just apply the law. 9/14
   Lecture on basics of the U.S. judicial and legal systems; How to read empirical papers, formal theory papers, and a judicial opinion
   a. Federalist 78 – https://avalon.law.yale.edu/18th_century/fed78.asp
   b. MPEK excerpts. Murphy, Epstein, Pritchett, and Knight. Courts, Judges, and Politics.
      ii. “Modes of Interpretation” (Murphy, Pritchett, Epstein, Knight (MPEK))
      iii. Frankfurter. Some Reflections on the Reading of Statutes (in MPEK chapter 11)
      iv. Chapter 12 excerpt.
      v. Scalia. Originalism. (excerpt MPEK Chap 12 other file)
      vi. Bork. The Tempting of America (excerpt MPEK Chap 12 other file)
      viii. Processes of Judicial Decision Making (MPEK Chap 13 excerpt)
   c. Van Geel Chapter 4
e. If time: Levi. Legal Reasoning. Sections I and II. separate file.

f. Recommended

i. William Miller. A Primer on American Courts. 2005. Chapter 1, Appx C.

ii. Merryman. The Civil Law Tradition


a. Readings


1. Chapter 1. Segal. “What’s Law Got to Do with It: Thoughts from ‘The Realm of Political Science.’”


ii. Van Geel Chapter 5


1. See if interested early responses to this line of work:


b. https://www.jstor.org/stable/pdf/793359.pdf?refreqid=excelsior%3A1ea275a0cee4456058ae015e109cd00d&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=&initiator=&acceptTC=1

c. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2422&context=lcp

c. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2882&context=facpub

iv. Spaeth Attitudinal Model chapter 13 in Epstein

v. Segal, Jeffrey, and Harold J. Spaeth. 2002. SCAMR The Supreme Court and the Attitudinal Model Revisited. Cambridge University Press: New York. Introduction (p1-12), Chapters 1, 2, 3 (skip the Separation of Powers section for now), and Chapter 8 (again skip the Separation of Powers section).


b. Discussion Questions

i. What is the role of case selection in all this? Note: endogeneity of cases in front of court. How does this affect the models and/or evidence invoked in connection with them? Why are there so many unanimous cases?

ii. Is all the law accoutrement malarkey, purposeful or not?
iii. How do judges (justices) vary from each other? as per each model.
iv. Are judicial “preferences” still different from other “political” preferences?
v. Do they admit it to themselves late at night?
vi. Does a focus on supreme court warp our understanding?

c. Other Recommended Readings

i. Symposium on The Supreme Court and the Attitudinal Model. 1994.
ii. Symposium on The Supreme Court and the Attitudinal Model Revisited. 2003.
v. Woodward and Armstrong. Excerpt from The Brethren.
vi. Van Geel Chapter 3.

vii. Epstein and Knight, chapter 2.


2. Chapter 6. Friedman and Martin. “Looking for Law in All the Wrong Places.”

3. Myths of Law vs. Ideology. Myth? Judges are constrained by precedent and law

9/28

a. Readings

i. Van Geel Chapter 6
ii. Segal & Spaeth vs. Knight & Epstein (excerpt MPEK) (week 1 folder, chap 10)
iii. Segal and Spaeth. Attitudinal Model Revisited. SCAMR Chapter 7.

b. Discussion questions

i. how do we separate ideology from precedent/law?
ii. how can we tell if precedent is used as cover?
iii. What is the evidence for precedent (effects thereof) and against?
iv. what is the research design used in each paper “testing” the causal effect of precedent? how well does it match the experimental gold standard? where does it fall short? how is it likely to matter?

v. what is the bottom line cumulatively speaking?

vi. is there other evidence out there for “law”?

vii. Why would precedent be used as an attempt at persuasion if they don’t care about it?

viii. If they do care about legitimacy and respect… collectively… does that mean they will or will not act to respect precedent? Are there any challenges to producing such a common good as “legitimacy”? IS IT a common good?

ix. How can we model precedent? [case space]

c. Recommended


iii. Segal Songer Cameron - Decision Making courts of appeals - Epstein--Chapter 10

iv. Farnsworth Rules Standards excerpt.


4. Myths of Law vs. Ideology. Myth? Justices have no party when they come to the bench. (Also see Weeks 6 and 7) 10/5

b. *Making the Supreme Court.* Book excerpts. Cameron and Kastellec. Chapters 1, 2, 4, 7 (only up to and including 7.5), 8, 12

c. Recommended:
   i. Note: growing literature on lower court appointments and material on how that has changed over time

d. Discussion Questions
   i. What is the main argument of the book?
   ii. Why do the authors see this as helpful for understanding (change in) American politics more generally?
   iii. What has changed? What has stayed the same? Which changes are the most important?
   iv. What is the bundle of characteristics approach?

5. Myths of “Blind Justice.” Myth? “Justice is blind”... to race and gender 10/12

   a. McGuire, Kevin T.-Understanding the US Supreme Court, Ch 4
   b. Unah - Race and Death Sentencing - chapter in McGuire
   g. Discussion questions:
      i. Suppose one argues the race gap in death penalty sentencing comes from bias favoring whites who “should” otherwise get the death penalty rather than from a bias “against” blacks who “should not” get the death penalty but do… is that different constitutionally? How does that affect the arguments of the justices? How can we tell the difference in these studies?
      ii. Why are statistical disparities considered relevant in employment discrimination cases but not the death penalty? Note: role of discretion?

6. Myths of “Blind Justice.” Myth? Justice has no race, gender, or party 10/19
d. Erikson, Robert. 2022. JELS. “Appellate court assignments as a natural experiment: Gender panel effects in sex discrimination cases.”

7. Myths of “Blind Justice.” Myth? “We do not have Obama judges or Trump judges...” More on race, gender, and party. 10/26
d. Hubert and Copus. 2022. Blog post. If time, read the paper. The President that Appoints Judges Matters for Civil Rights - The JOP’s Political Science Blog & “Political Appointments and Outcomes in Federal District Courts”
g. Recommended:


xvii. Michael P. Fix and Gbemende E. Johnson, Public Perceptions of Gender Bias in the Decisions of Female State Court Judges, 70 Vanderbilt Law
Review 1845 (2017) Available at:  
https://scholarship.law.vanderbilt.edu/vlr/vol70/iss6/9


8. Myth? Judges are immune to career and electoral concerns
   a. Could reread SCAMR chap 3 subsection on ambition
   f. Recommended

9. Myth? “The least dangerous branch” with “neither the purse nor the sword”
   e. Recommended
      iii. Miller, Kenneth. Direct Democracy and the Courts.

    a. Rosenberg. Hollow Hope. Chapters 1, 2 (skim or read), 13 (skim or read).
    d. Presumed guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights - Erwin Chemerinsky. Chapters 1-3, 7, 10, 11, 14, 15, 18.

11. Myth? Legal doctrines are neutral. Student presentations.

12. Myth? Legal doctrines are neutral. Student presentations.